



INTERIOR BOARD OF INDIAN APPEALS

Estate of John Joseph Kipp

8 IBIA 30 (03/14/1980)

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Reconsideration denied:
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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF JOHN JOSEPH KIPP

IBIA 79-32

Decided March 14, 1980

Appeal from order by Administrative Law Judge David J. McKee denying petition for rehearing.

Above order affirmed; order determining heirs reversed in part and remanded.

1. Indian Probate: Claim Against Estate: Generally

The Board is not limited in its scope of review of an Administrative Law Judge's disposition of claims and may exercise the inherent authority of the Secretary to correct a manifest injustice or clear error where appropriate.

2. Indian Probate: Claim Against Estate: Proof of Claim

It would defeat the intent of Congress, which has formulated strict rules for the Secretary to follow in the management of trust property, for claims arising from alleged agreements affecting trust realty to be allowed on the basis of mere parol evidence. The potential for fraud would otherwise be too great.

3. Indian Probate: Claim Against Estate: Generally

The amount of a claim which must be paid from trust assets is as crucial a decision as whether such claim should be paid at all. It would therefore be improper for the Administrative Law Judge to allow the agency superintendent to determine the amount of an approved claim which must be paid a general creditor based on future documentation of the creditor's exhaustion of an Indian decedent's non-trust assets.

4. Indian Probate: Claim Against Estate: Source of Funds for Payment

While the Department's regulations do not explicitly recite that trust assets may be utilized for the payment of general creditors' claims only after all other sources of compensation have been exhausted, this limitation is implicit in both the Department's regulatory plan for the payment of claims and in the nature of the trust relationship between the Secretary and Indian heirs of allotted lands. Any trustee, let alone the Secretary, would be derelict who generally commits trust funds to pay debts legally compensable from other sources.

5. Indian Probate: Claim Against Estate: Timely Filing: Generally

In accordance with 43 CFR 4.250, all claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under 43 CFR 4.211(c) shall be filed prior to the conclusion of the first probate hearing and if they are not so filed, they shall be forever barred.

APPEARANCES: William B. Sherman, Esq., for appellants Aurice Kipp Show and Max Lee Kipp; James C. Nelson, Esq., for creditor Glacier County Bank.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On October 26, 1977, John Joseph Kipp died intestate at the age of 52 at Great Falls, Montana. He is survived by his widow, Betty Joy Kipp, and an adopted son, Martin James Kipp. Decedent was the beneficial owner of real property on the Blackfeet reservation in Montana held in trust by the United States under the provisions of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-358 (1976). The value of the trust real property for purposes of probate was estimated at \$80,451.12 (including buildings on the land valued at \$10,000). At the time of decedent's death, there were apparently no cash assets in his Individual Indian Money Account at the Blackfeet Agency. However, in addition to his trust property, decedent possessed extensive assets in non-trust realty and personalty. Seven claims totaling more than \$186,000 were presented against the trust estate in the proceedings below.

Two hearings were conducted in this probate, the second of which was a supplemental hearing on the sole issue of the estate's liability for claims of indebtedness previously filed. On March 30, 1979, Administrative Law Judge David J. McKee entered an order determining heirs. Included in this order were separate rulings allowing or disallowing the various claims at issue.

Aurice Kipp Show, decedent's surviving sister, and Max Lee Kipp, a surviving brother, filed a petition for rehearing from the above

order on May 4, 1979. The petitioners alleged that Judge McKee had erroneously denied their claims for unpaid rental allegedly due them by the deceased for the use of land. This petition was denied by Judge McKee by order dated June 6, 1979.

A notice of appeal from the order denying petition for rehearing was filed with the Board of Indian Appeals on August 6, 1979, by William B. Sherman as counsel for Aurice Kipp Show and Max Lee Kipp. Appellants' opening brief was filed in this matter on October 23, 1979. The only other brief received by the Board is a statement filed by James C. Nelson, counsel for the Bank of Glacier County, which received conditional approval from Judge McKee for its claim filed against the estate in the amount of \$99,096.18. ^{1/}

Scope of Review

[1] In the course of evaluating the Administrative Law Judge's disposition of appellants' claims, the Board has examined the basis on which other claims were either allowed or disallowed in this case. As a result of this review, it is considered necessary in this decision to reverse the Judge's allowance of one of these claims and to qualify

^{1/} Decedent's widow, Betty Joy Kipp, has submitted several statements urging expedited resolution of this appeal without addressing the merits of appellants' claims. Counsel James W. Zion, Helena, Montana, submitted a certificate of representation to the Board on behalf of Mildred Kipp, decedent's former spouse, but no brief or other statement was subsequently filed.

the extent to which other claims approved by the Administrative Law Judge and from which no appeal was taken are, under law, actually payable. This expanded consideration of the decision appealed from is authorized by 43 CFR 4.290 which states in part: "The Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

Discussion, Findings and Conclusions

In his order determining heirs, the Administrative Law Judge ruled on seven separate claims against decedent's estate as follows:

1. Denied claim of Aurice Kipp Show (appellant herein) in the amount of \$14,953.50, allegedly due on an oral promise to compensate for use of trust land.
2. Denied claim of Max Lee Kipp (appellant herein) in the amount of \$7,226.75, allegedly due on an oral promise to compensate for use of trust land.
3. Denied claim of Woodrow Kipp, a brother of decedent, in the amount of \$2,500, allegedly due on an oral promise to compensate for trust land acquired by gift deed.

4. Approved claim of the Blackfeet Tribe in the amount of \$4,517.30 for unpaid balance on a loan which was secured by a Departmentally approved Assignment of Trust Property and Power to Lease dated October 26, 1959.

5. Approved claim of Bank of Glacier County in the amount of \$99,096.18, secured in part by liens on non-trust property and assets to the extent such unpaid indebtedness is not satisfied by "the total liquidation of all non-trust security held by the Bank."

6. Approved claim of Good-Tabaracci, Inc., in the amount of \$1,875 (plus interest) for unpaid balance on crop hail insurance.

7. Approved claim of Mildred Kipp, former spouse of decedent, in the amount of \$55,000 based on State court divorce decree and subject to limitation that deductions be made for "amounts already paid thereon from whatever source."

For the reasons set forth below, the Board affirms the Administrative Law Judge's disposition of Claim Nos. 1 through 4 as enumerated above; remands for further proceedings the disposition of Claim Nos. 5 and 6; and reverses the ruling on Claim No. 7.

[2] The claims of Aurice Kipp Show, Max Lee Kipp, and Woodrow Kipp are not allowable for the simple reason that insufficient proof

was offered by these claimants to establish a legal indebtedness of the decedent to them. By law, it was incumbent on those either leasing or deeding any interest in trust lands to the decedent during his lifetime to obtain Departmental approval. See 25 CFR 121.17-121.23 and 25 CFR Part 131. 2/ Yet, no records were produced by these claimants in support of their claims that the decedent either acquired trust land or the use of trust land from them through a compensation agreement.

In short, it would defeat the intent of Congress, which has formulated strict rules for the Secretary to follow in the management of trust property, for claims arising from alleged agreements affecting trust realty to be allowed on the basis of mere parol evidence. The potential for fraud would otherwise be too great.

In contrast to Claim Nos. 1 through 3 above, the Blackfeet Tribe produced competent evidence of a valid claim against decedent's estate. The indebtedness was proven by documentary evidence and, in accordance with statute, the encumbrance on decedent's trust property had received Departmental approval. See 25 U.S.C. § 483a (1976). 3/

2/ The statutory authority for these regulatory requirements appears in scattered sections of volume 25 of the United States Code. For complete listings, see "Authority" preface to the rules cited.

3/ The tribe's claim is allowable in this case as a preferred claim notwithstanding the fact it could obtain redress by means of foreclosure or other methods prescribed in its lending agreement with decedent. Since there was no objection to the tribe's claim, it is

The claim by the Bank of Glacier County was also supported by documentary evidence. Unlike the claim of the Blackfeet Tribe, however, it is not secured by any liens against decedent's trust property. Under the circumstances, it was correct for the Administrative Law Judge to allow this claim as one established by any other general creditor, pursuant to the provisions of 43 CFR 4.250-4.251.

[3] However, it appears from the order approving the bank's claim that the specific amount of compensation to be given this creditor was left to the agency superintendent to decide, based on future documentation of the bank's exhaustion of decedent's non-trust assets. ^{4/} Such a procedure is improper.

The amount of a claim which must be paid from trust assets is as crucial a decision as whether such claim should be paid at all. This fact is patently clear where, as here, the amount claimed exceeds the estimated value of the trust estate as a whole. The Department's regulatory scheme for the payment of claims, found in 43 CFR 4.250-4.252, clearly envisions that the Administrative Law Judge presented a claim will decide the amount of payment, if any, to which a claimant is

fn. 3/ (continued)

presumed the heirs at law preferred settlement of the estate's indebtedness to the tribe through the probate claims procedure rather than possibly losing certain lands by foreclosure. See and compare Estate of Lawrence Ecoffey, 5 IBIA 85 (1976); Acting Associate Solicitor's Memorandum (Indian Affairs) to Examiner Montgomery, A-58-1104.9A (April 14, 1958).

^{4/} See Order Determining Heirs dated March 30, 1979, at pp. 5-7.

entitled. See also 43 CFR 4.240(a)(3). This decision often bears on mixed questions of fact and law, as cited in the foregoing regulations, and, where even on fact alone, it remains a matter which is best decided in a quasi-judicial setting. Simply stated, what the Superintendent should hear from the Administrative Law Judge is how much to pay a creditor on a proven claim. 5/

There is a similar problem with respect to the claim of Good-Tabaracci, Inc. That is, the record is devoid of any evidence that this general creditor's claim cannot be satisfied from non-trust assets of the decedent.

[4] While the Department's regulations do not explicitly recite that trust assets may be utilized for the payment of general creditors' claims only after all other sources of compensation have been exhausted, this limitation is implicit in both the Department's regulatory plan for the payment of claims 6/ and in the nature of the trust relationship between the Secretary and Indian heirs of allotted

5/ In some cases, this will require retention of jurisdiction over a case by the Administrative Law Judge until a creditor can prove that non-trust assets or other securities have been exhausted and that a sum certain from the trust estate is therefore owing.

By regulation, there is one exception to the principle that only the Administrative Law Judge may determine and award claims. At 43 CFR 4.271 it is provided that agency superintendents may determine and award creditors' claims when the value of a deceased Indian's trust personal property and cash is less than \$1,000.

6/ Note, for example, 43 CFR 4.250(b) which states in part: "[C]laims shall show the names and addresses of all parties in addition to the decedent from whom payment might be sought."

land. 7/ For that matter, any trustee, let alone the Secretary, would be derelict who generally commits trust funds to pay debts legally compensable from other sources. 8/

The Board sees no recourse but to remand this matter to the Administrative Law Judge 9/ for the receipt of evidence and entry of a

7/ Consistent with the Secretary's trust responsibility to Indian heirs of allotted land, it has long been recognized by the Department that claims against an estate may not be enforced through the sale of trust lands. Estate of John J. Akers, 1 IBIA 246, 259 (1972).

8/ In a dissenting opinion in this case, it is submitted that because allotted lands are not subject to liens of indebtedness incurred while title is held in trust (25 U.S.C. § 354 (1976)), the Secretary lacks authority to administratively allow claims against trust estates.

During the 70 years in which the Department has been allowing claims against trust estates, only one Federal district court has used the above argument to disallow a claim. Running Horse v. Udall, 211 F. Supp. 586 (D.D.C. 1962). There, the court held that the Secretary could not compensate a state for old-age assistance payments rendered a deceased Indian from trust assets of the deceased. Departmental regulations were subsequently changed to accommodate the court's holding. See 43 CFR 4.250(g). Notwithstanding the possible merits of the dissenting opinion, it remains beyond the authority of this Board to declare invalid the various regulations of the Department allowing the payment of claims.

For the proposition that the Secretary possesses implied legal authority to allow claims in Indian probate proceedings held in accordance with 25 U.S.C. §§ 372-373 (1976), see Felix Cohen's Handbook of Federal Indian Law at 231 (U.N.M. ed. 1971); Solicitor's Opinion, 61 I.D. 37 (1952); 25 U.S.C. § 373a (1976) (an Act adopted in 1942 relating to escheat wherein Congress expressly authorizes the Secretary to pay creditors' claims); and Estate of Martin Spotted Horse, Sr., 2 IBIA 265, 81 I.D. 227 (1974). In addition to the foregoing, we merely note the following: To the extent that Indians exist daily on lines of credit furnished them by grocers, doctors, and other life-blood creditors, it is difficult to perceive the good of a rule which would either deny them this lifestyle or seriously impair it through some form of "Departmental approval" requirement.

9/ Administrative Law Judge McKee has retired. Remand will therefore be made to his successor, Administrative Law Judge Alexander H. Wilson.

specific order allowing the claims of the Bank of Glacier County and Good Tabaracci, Inc., in specific amounts authorized by law and Departmental regulations.

[5] Finally, the claim of Mildred Kipp should have been disallowed by the Administrative Law Judge as untimely filed. At 43 CFR 4.250(a), it is provided:

(a) All claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under § 4.211(c) shall be filed with either the Superintendent or the Administrative Law Judge prior to the conclusion of the first hearing and if they are not so filed, they shall be forever barred. [Emphasis supplied.]

Mildred Kipp filed her claim with the Administrative Law Judge on August 28, 1978, one day before the second hearing held in the probate of decedent's estate. The first hearing was held May 9, 1978, and it was prior to the conclusion of such hearing when Mildred Kipp was required to file her claim. 10/

Therefore, by virtue of the authority delegated the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge David J. McKee, dated June 6, 1979,

10/ It is noted that Mildred Kipp has a remedy at law for satisfaction of her claim by virtue of the decree of divorce entered in Probate No. 2972, District Court of the Ninth Judicial District, State of Montana, County of Glacier, on Jan. 2, 1975. The foregoing judgment does not purport to affect decedent's trust property. If it does, it is to such extent voidable. See Mullen v. Simmons, 234 U.S. 192 (1914).

denying appellants' petition for rehearing, is affirmed. However, the Order Determining Heirs dated March 30, 1979, is reversed as to that part of the decision allowing the claim of Mildred Kipp. Further, this estate is remanded to the Administrative Law Judge with jurisdiction over the matter to receive evidence and make specific findings, conclusions and orders as to the amount of compensation, if any, the Bank of Glacier County and Good-Tabaracci, Inc., are entitled to receive from the Department consistent with this opinion and the regulatory requirements of 43 CFR 4.250-4.252.

//original signed
Wm. Philip Horton
Chief Administrative Judge

I concur:

//original signed
Mitchell J. Sabagh
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

Presentation of creditors' claims to the Administrative Law Judge during probate against decedent's interests in allotted trust lands raises issues in this probate which require construction of provisions of the General Allotment Act, the Act of February 8, 1887, 24 Stat. 390, 388 (25 U.S.C. §§ 331, 349 (1976)). The Allotment Act is characterized thus by the Court of Appeals for a circuit where a large amount of allotted land is situated: "The paternalism that characterizes the Allotment Act undoubtedly now offends many Indians and non-Indians, but we are free neither to rewrite history nor to redraft the Act to conform to our notions of contemporary social attitudes" (Akers v. Morton, 499 F.2d 44, 48, n.3 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975)).

The main purpose of the General Allotment Act is to end the tribal and nomadic ways of life among the Indians, to encourage family farming among them, to protect the allottees' interest in their trust lands and provide their families with permanent homes (Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969)). Section 1 of the Act, 25 U.S.C. § 331 (1976), provides for allotments to individuals for agricultural purposes. After 25 years the United States is to "convey * * * [a patent] to said Indian, or his heirs * * * in fee, discharged of said trust and free of all charge or incumbrance" (25 U.S.C. § 348 (1976)). When the fee patent is given, the lands shall then become

subject to state law, but until then, "[S]aid land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent" (25 U.S.C. § 349 (1976)). The President extended the trust period (to the lands here in issue) until the period of trust responsibility was extended indefinitely by the Indian Reorganization Act of 1934 (Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. § 462 (1976))). The 1887 Act contains no exception to the provision prohibiting encumbrance of the land allotted prior to discharge of the trust: If such exceptions exist, they must appear in later enactments.

The development of an elaborate scheme of probate administration by the Secretary was probably not in contemplation of Congress in 1887 when the General Allotment Act became law. Pursuant to the Act the Secretary divided the reservations affected into allotments which were distributed to individual Indians subject to restrictions against alienation. 1/ The continued extension of the trust period, however, made some sort of probate procedure appear necessary. The current probate practices derive from the Act of June 25, 1910, 2/ which made

1/ The Blackfeet reservation is one of the reservations directly affected by the Act; it was created by the Act of April 15, 1874, 18 Stat. 28.

2/ 36 Stat. 856, 25 U.S.C. § 373 (1976), as amended. The evolution of Departmental probate practice is traced in the introduction to Digest of Federal Indian Probate Law, Office of Hearings and Appeals (1972). Currently, the probate of Indian trust estates is administered by Indian probate Administrative Law Judges under the provisions of Departmental regulation 43 CFR Part 4, Subpart D, whose administration of probate matters is reviewable by this Board in the Office of Hearings and Appeals, Department of the Interior. 36 FR 7186 (Apr. 15, 1971); 36 FR 24813 (Dec. 23, 1971).

the administration of the estates of individual Indians the exclusive province of the Secretary, subject to infrequent judicial review of decisions. ^{3/}

The practice of allowing claims began immediately following the 1910 statutory probate enactments and was formalized in Departmental regulations. ^{4/} The regulations promulgated in 1935 reflect the policies applied in earlier Departmental orders in probate cases decided in the course of the Secretary's administration of Indian estates, and present the same general scheme as regulations currently in effect published at 43 CFR Part 4, Subpart D. ^{5/} The early creditors' claims appear to have been for relatively insignificant amounts which were small in relation to the trust estate; the payment to the creditors was often made in a reduced amount or denied altogether if the estate was small or the condition of the heirs seemed to warrant reduced payment or denial of payment. ^{6/}

^{3/} See Tooahnippah v. Hickel, 397 U.S. 598 (1970), for a discussion of judicial review of Departmental probate proceedings. Early cases established that the power of the Secretary to handle these matters was virtually exclusive. McKay v. Kalyton, 204 U.S. 458 (1907); Hy-yu-tse-mil-kin v. Smith, 194 U.S. 401 (1904); Bond v. United States, 181 F. 613 (C.C. Or. 1910).

^{4/} Following the June 25, 1910, Act, regulations were issued in 1910 by the Secretary; regulations were again published in 1915, and revised in 1923 and 1935. Determination of Heirs and Approval of Wills of Indians Except Members of the Five Civilized Tribes and the Osages, Regulations. May 31, 1935, 55 I.D. 263.

^{5/} Specifically 43 CFR 4.250 through 4.252. Previously appearing at 25 CFR Part 15, the probate regulations were republished at 43 CFR Part 4 in 1971, concurrent with the establishment of the Office of Hearings and Appeals. 43 CFR 4.252, the section of the regulation construed by this opinion, appears for the first time in that publication of the Rules. 36 FR 24813 (Dec. 23, 1971).

^{6/} See, for example, Estate of Samuel John Eagle Horse, Probate 165.1 (September 6, 1911), where claims totaling \$392.30 were disallowed

However, except as provided by Congress, the Secretary is not authorized to allow debts incurred by an Indian decedent to be a charge or encumbrance against the decedent's trust property in the hands of his Indian heirs (25 U.S.C. § 349 (1976); Squire v. Capoeman, 351 U.S. 1 (1956); House v. United States, 144 F.2d 555, cert. denied, 323 U.S. 781 (1944); Running Horse v. Udall, 211 F. Supp. 586 (D.D.C. 1962); Estate of Phillip Tooisgah, 4 IBIA 189, 82 I.D. 541 (1975), aff'd, Tooisgah v. Kleppe, 418 F. Supp. 913 (W.D. Okla. 1976); Solicitor's Opinion M-36066 (February 3, 1959)). Not only does the Act of June 25, 1910, not provide for the allowance of creditors'

fn. 6/ (continued)

against an estate composed of \$30.80 in cash and trust land valued at \$665.81.

Most reported instances involving Departmental approval of creditors' claims appear after 1910. Representative claims, usually for less than \$100, include claims for groceries and auto repairs (Estate of Phillip American Bear, Probate 1818-33 (December 2, 1933)); repayment of prior approved loans (Estate of Noah Bad Wound, Probate 78151-38 (May 9, 1939)); support of decedent by maternal grandmother (Estate of Mary Bear Looks Behind, Probate 102279-21 (December 20, 1921)); casket (Estate of Black Eagle, Probate 36381-34 (April 18, 1935)); nursing care (Estate of Black Hawk, Probate 63211.30 (January 28, 1935)); clothing (Estate of Blue Eyes, Probate 36659-26 (June 21, 1933)); abstractor's fee (Estate of William Carpenter, Probate 55428-34 (March 29, 1935)); alimony and child support (Estate of Eleanora Devine, Probate 33411.29 (July 23, 1929)); State old age assistance (Estate of Lucy Little Tail, Probate 25973-38 (July 20, 1943)); surgeons fees and hospital bills (Estate of Fred Loudner, Probate 14035 (April 3, 1935)); "luxury items" (Estate of William Palmier, Probate 17609-35 (June 21, 1935)); gasoline, oil, tires, chains, car battery, and coal (Estate of Charles Roubideaux, Sr., Probate 86116 (May 24, 1937)); hauling wood and water (Estate of Sharp Pointed, Probate 11948.36 (September 30, 1936)); tribal court judgment (Estate of Lucy Spotted Crow, Probate 20370-32 (August 8, 1932)); car repair and restaurant bill (Estate of Foster Thunderhawk, Probate 31837-26 (February 27, 1940)); and a loan secured by a note (Estate of Benjamin Quapaw, Probate 28998-20 (March 14, 1927)).

claims against such estates, the Act of February 8, 1887, specifically forbids the practice. ^{7/} Congress has, however, created several statutory exceptions to the general rule established by the 1887 Act. Thus, provision is made for payment of creditors' claims from estates which escheat (Act of November 24, 1942, 56 Stat. 1021, 25 U.S.C. § 373a and b (1976)). Encumbrance is permitted also, where the Secretary previously has approved a mortgage of the trust property during the decedent's lifetime (25 U.S.C. § 483a (1976)) or the creation of a security interest in cash trust assets for purposes consistent with the exercise of the trust responsibility (25 U.S.C. § 410 (1976)). The Departmental creditors claims regulation, 43 CFR 4.252, recognizes the limited scope within which payment of claims may be made, providing they may be allowed only to the extent not "prohibited by law." There appears to be no reason why a procedure for obtaining prior approval of commercial claims could not be devised within the statutory framework. (Mortgages under 25 U.S.C. § 483a are currently administered pursuant to 25 CFR 121.34.)

^{7/} Questions concerning the availability of assets to satisfy unpaid claims usually focus on income derived from the land rather than the land itself, since the prime reason for holding the land in trust is to keep it unencumbered. It now appears settled that income derived directly from the land is also trust property and cannot be encumbered. (This has not always been clearly the rule, however. See Jones v. Taunah, 186 F.2d 445 (10th Cir. 1951), rev'd, in Squire v. Capoeman, above.) What constitutes income derived directly from the land may be difficult to ascertain in some cases but farm land being farmed by the beneficial owner produces income that retains the trust character. Critzer v. United States, ___ Ct. Cl. ___ (April 18, 1979), 47 U.S.L.W. 2684).

A 1952 Solicitor's opinion takes official notice that sections 1 and 2 of the Act of June 25, 1910, contain no provision for the allowance of creditors' claims (Solicitor's Opinion, 61 I.D. 37 (1952)). 8/ Despite the absence of statutory authority for the payment of such claims, however, the opinion finds an implied authority in the Secretary to approve creditors' claims, based upon reasoning that accepts analogy to state probate proceedings as a necessary part of the distribution of Indian estates. The position expressed by the 1952 opinion apparently represented the position of the Department until 1962, when the opinion in Running Horse v. Udall, above, held the Departmental position as stated by the Solicitor to be erroneous while holding a creditor's claim invalid based upon analysis of the 1887 Allotment Act and the Act of June 25, 1910.

In Running Horse an order determining heirs had allowed payment from trust assets to be made to the creditor State of South Dakota, a practice the court found to be beyond the authority of the Secretary where there were living heirs who were denied the benefit of the trust property which was subject to the Secretary's administration pursuant

8/ The opinion indicates concern about the continuing Departmental practice of allowing claims against trust estates, in light of enactment of an escheat statute expressly providing for allowance of creditors' claims against trust estates, apparently as an express exception to the general rule that claims against such property are unenforceable. The opinion concludes that the claims practice based upon custom should continue, but that some regulatory reform is required in order to provide a basis for such payments.

to the General Allotment Act. ^{9/} The interaction of the 1887 Act and the 1910 Act was considered by the opinion, which concluded that no implied authority to allow creditors' claims could be derived from a statutory scheme which expressly forbids any encumbrance of the land which is the subject of the legislation. The reasoning of the court in Running Horse thus disapproves the logic of the 1952 Solicitor's opinion. The rationale for allowing creditors' claims stated in the 1952 opinion, however, later became the basis for the opinion in the Estate of Martin Spotted Horse, 2 IBIA 265, 81 I.D. 227 (1974), relied upon by the majority opinion.

The opinion in Spotted Horse allowed three creditors' claims, two of which had not been given prior Secretarial approval, and which, therefore, lacked a specific statutory basis. Spotted Horse repeats

^{9/} 211 F. Supp. at 588. The court first found at page 587, in a fact situation nearly identical to that in this probate, that:

“ 4. The land referred to above originally was allotted by trust patent No. 276674 dated June 18, 1912, from the United States to Abraham Running Horse, Rosebud Sioux Allottee No. 6095, and inherited by James Running Horse from the trust patentee. The trust patent was issued under the Sioux Allotment Act of March 2, 1889, 25 Stat. 888, which by reference incorporates the provisions of Section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 390, 25 U.S.C. § 349, as amended. Under the terms of the Sioux Allotment Act, the United States agreed to hold the land, "in trust for the sole use and benefit" of Abraham Running Horse or, in the case of his death, of his heirs; and further agreed, upon the expiration of the trust period, to convey the land to Abraham Running Horse or, in case of his death, to his heirs, 'in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *'; and further agreed that such trust lands 'shall not be liable to the satisfaction of any debt contracted prior to the issuing of such [fee] patent: * * *.' The trust period is now and has been in effect at all times material to this case.”

the rationale of the 1952 Solicitor's opinion struck down by the district court. No attempt is made to distinguish the holding in the Running Horse decision, although there is an inference in Spotted Horse that Running Horse is limited to its facts. (The amendment of Departmental regulations to provide that state old age assistance claims are not payable from trust assets seems to confirm that this became the Departmental position.) Such an interpretation recognizes a claims practice that has been followed since 1910, but ignores the Running Horse holding that "[t]he Secretary is not authorized by law to allow debts incurred by an Indian decedent as a charge or encumbrance against the decedent's trust property in the hands of his Indian heirs." ^{10/} Running Horse and Spotted Horse simply cannot be reconciled.

It is a general rule of construction in statutes involving Indian affairs that doubtful statutory language must be interpreted in favor of the Indians. Worcester v. Georgia, 31 U.S. (6 Pet.) 214 (1832); Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976). In the case where creditors seek to encumber trust property established by the General Allotment Act, however, there is no ambiguity. The 1887 Allotment Act forbids allowance of encumbrances prior to termination of the trust status of allotted lands. Restrictions on lands imposed by the General Allotment Act run with the land: not being personal to

^{10/} Id. at p. 588. More importantly, the position taken ignores the Running Horse reasoning and the legal basis for the holding, which is unassailable.

the individual allottee, the restrictions continue until the time set for their expiration by Congress. Bowling v. United States, 233 U.S. 528 (1914); United States v. Noble, 237 U.S. 74 (1915); Couch v. Udall, 404 F.2d 97 (1968). The restriction is not affected by the death of the original allottee, nor by changes in the personal status of the allotment holder. Oklahoma Gas & Electrical Co. v. United States, 609 F.2d 1365 (10th Cir. 1979). Whatever the situations of the original allottees and their families may have been in the first half of the twentieth century, which may perhaps have led the Department to pay creditors' claims from trust assets, the conditions of the second half of the century exemplified by the estate here in probate indicate that creditors' claims presented against the trust estate of a small farmer are considerable, and are capable of effectively eliminating existing allotments.

The trust estate here in probate is only a part of the total estate of the decedent: The record indicates the greater part of his estate is in probate in the state district court, while certain personal effects are subject to the jurisdiction of a tribal court established pursuant to 25 CFR Subchapter B, Part 11. Three different tribunals--State, Departmental, and tribal are now administering parts of decedent's estate. This situation exposes the fallacy in the thesis that the Departmental practice must afford to commercial and other creditors the same rights they would enjoy if the trust estate were unrestricted: to afford the benefits of the Allotment Act to

decendent's heirs does not deprive his creditors of a forum for presentation of their claims.

The majority opinion expresses concern that a holding which exempts trust property from all creditors' claims will result in a denial of credit to allottees and their heirs by the general commercial community. It overlooks the statutory exceptions permitting certain mortgages and encumbrances of personalty. And it assumes that the allottees have no other assets-- an assumption which is demonstrably false in this instance. The majority position shows a willingness to "redraft the act to conform to our notions of contemporary social attitudes." 11/

Congress exercises plenary power in the area of Indian affairs. United States v. Kagama, 118 U.S. 375 (1886). In the case of the restriction against encumbrance it imposed upon trust lands with the passage of the 1887 Allotment Act, it has created several exceptions. Trust lands can be encumbered by the beneficial owner with the prior approval of the Secretary, for approved purposes, as was done in the case of the mortgage given by decedent to the Blackfeet Tribe (25 CFR 121.34, implementing 25 U.S.C. §§ 483a, 410 (1976)). The very existence of the statutory exceptions indicates that, in the case of the

11/ Allowance of the exemption for this class of property from the claims of creditors merely recognizes a class of property to be exempt from such claims in addition to the exemptions permitted by State laws. The record of this case indicates that, except for the tribe, none of the creditors placed any reliance upon the trust property when they extended credit to decedent.

General Allotment Act, as with Indian legislation in general, it is not proper to graft interpretations unfavorable to Indians onto the Act without express authority for such a position. (Bryan v. Itasca County, above.) If exceptions are intended to the general rule that there shall be no encumbrance of trust lands in the hands of allottees or their living heirs, Congress must enact those exceptions in specific legislation. 12/

Of the seven claims presented against the estate, only one was presented for prior approval by the Secretary during decedent's lifetime pursuant to provisions of 25 U.S.C. § 483a (1976). The claim of the Blackfeet Tribe is entitled to approval for payment subject to the limitations stated at 43 CFR 4.251 (d). The remaining claims are barred by the provisions of 25 U.S.C. § 349 (1976). The estate should therefore be remanded to the Administrative Law Judge with instructions to disapprove all creditors' claims except the claim by the Blackfeet Tribe.

//original signed

Franklin Arness
Administrative Judge

12/ While the rule urged by this opinion would change Departmental practices, the continued adherence to an erroneous practice cannot be justified merely to avoid disruption of customary usage. This Board has the authority to announce such a change in Departmental practice. United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974), rev'd on other grounds sub nom. Shell Oil Co. v. Kleppe, 426 F. Supp. 894 (D. Colo. 1977). See Solicitor's Opinion, 84 I.D. 54, 62 (1976); Solicitor's Opinion, 84 I.D. 443, 453 (1977); Solicitor's Opinion, 86 I.D. 307, 318 (1979).