



## INTERIOR BOARD OF INDIAN APPEALS

Leo M. Kennerly, Sr. v. Billings Area Director, Bureau of Indian Affairs

8 IBIA 106 (07/08/1980)

Judicial review of this case:

Dismissed, *Kennerly v. United States*, 534 F. Supp. 269 (D. Mont. 1982)

Affirmed in part; reversed and remanded in part, 721 F.2d 1252 (9th Cir. 1983)



# United States Department of the Interior

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

ADMINISTRATIVE APPEAL OF LEO M. KENNERLY, SR.  
v.  
BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 80-2-A

Decided July 8, 1980

Appeal from decision of Area Director permitting payments from individual trust account of tribal member pursuant to assignment of income executed by member in favor of tribe to secure loans.

Affirmed in part and modified in part; remanded with instructions.

1. Indian Tribes: Credit Activities--Indian Tribes: Department Regulations

Where notice of decision by Area Director approving tribal debt collection through use of assignments of income is not shown to have been received by appellant, failure to make timely appeal from the decision will not be inferred.

2. Indian Tribes: Credit Activities--Indian Tribes: Department Regulations

Where Departmental regulation at 25 CFR 104.9 permits payment from individual trust accounts following Departmental approval, payments from the account of appellant are not barred by Montana or tribal laws establishing limitations against enforcement of stale claims.

3. Indian Tribes: Credit Activities--Indian Tribes: Department Regulations

Where only one of a series of assignments of income executed by appellant in favor of the Blackfeet Tribe in 1944, 1947, 1949, and 1950 shows Departmental approval of the loan transaction described, the remaining assignments are subject to examination

for compliance with the regulatory requirements. The assignment documents upon which the tribe relies to collect the claimed delinquent account must be shown to conform to the requirements of 25 CFR 104.9.

APPEARANCES: Steven L. Bunch, Esq., for appellant; E. L. Meredith, Esq., Field Solicitor, Billings, Montana, for appellee Area Director.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Findings of Fact

From February 13, 1943, until September 28, 1953, appellant made a series of unsecured loans totaling \$3,518.68 from the Blackfeet Tribe at Browning, Montana, of which \$126.26 was repaid. 1/ A \$3,000

1/ The tribal ledger account shows unsecured loans were made:

February 13, 1943	in amount of	\$	200.00
October 2, 1943		\$	175.00
February 1, 1944		\$	200.00
January 14, 1945		\$	150.00
February 15, 1946		\$	150.00
May 23, 1947		\$	501.19
July 7, 1947		\$	105.50
November 10, 1948		\$	25.00
March 11, 1950		\$	100.00
April 18, 1952		\$	90.00
April 18, 1952		\$	10.00
May 1, 1953		\$	1,365.92
August 27, 1952		\$	45.28
August 27, 1952		\$	5.00
August 27, 1952		\$	5.00
September 28, 1953		\$	30.00
undated entry (1953)		\$	<u>360.79</u>
	Total		\$3,518.68

Payments on the account from 1943 to 1953 were made:

January 1, 1946	in amount of	\$	.09
April 24, 1946		\$	10.61
December 1, 1946		\$	10.00
June 24, 1947		\$	80.56
December 1948		\$	<u>25.00</u>
	Total	\$	126.26

loan secured by a note and chattel mortgage was made to appellant on July 20, 1945, and an unsecured note for \$3,500 was given by appellant to the tribe on December 30, 1949. On February 1, 1944, appellant executed an assignment of income and power of attorney from his account at the Blackfeet Agency to the tribe, in the amount of \$200. 2/ On July 7, 1947, appellant executed an assignment of income to the tribe in the amount of \$105.50; on September 22, 1949, a \$3,300 assignment was made by him; and on March 13, 1950, a \$100 assignment was executed. 3/

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2/ The assignment recites:

"ASSIGNMENT OF INCOME

"As security for the performance of any loan agreement resulting from its application date February 1, 1944, the undersigned hereby assigns to the Blackfeet Tribe of the Blackfeet Indian Reservation of Browning, Montana, all income from any source in which it now has or may in the future acquire an interest, including lease and oil payments.

"I or we, the undersigned, agree and authorize the Superintendent of the Blackfeet Indian Reservation to draw to the Treasurer of the Blackfeet Tribe all income which is now or may in the future be accrued to my Individual Indian Account.

"This agreement shall apply to all cases of delinquencies."

The Power of attorney recites:

"POWER OF ATTORNEY

"I, Leo M. Kennerly do hereby by these presents make, constitute and appoint the duly authorized Treasurer of the Blackfeet Tribe of the Blackfeet Indian Reservation in Montana my true and lawful attorney in fact, for me in my name, place and stead to receive and receipt for any and all moneys or checks which may be due or may become due to me from the United States Indian Agency or the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, and to endorse the same with my name, writing on such check under my name so endorsed his name and official designation and to cash such checks and convert the same into money or credit, and I do hereby ratify and confirm all that he, my said attorney may do in this respect as fully and completely as though done by myself."

3/ These three assignments used the identical form which provided for approval of the transaction by the Agency; thus, the July 7, 1947, assignment provides:

"ASSIGNMENT OF INCOME DEPOSITED TO  
INDIVIDUAL INDIAN ACCOUNT AT  
BLACKFEET INDIAN AGENCY, BROWNING, MONT.

"In consideration of the granting of a Tribal loan to the undersigned, for Refund on U.S. Tr. check 13821 in the amount of \$105.50 dated July 7th, 1947 the undersigned, pledges as security, all income deposited to (his)(her)(our) individual Indian Account at the Blackfeet Agency Office, and when notified in writing by the Treasurer of the Blackfeet Tribe, that under the terms of the above loan, the said

From September 28, 1953, until May 26, 1977, there was no activity in the account between appellant and the Blackfeet Tribe. On

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fn. 3 (continued)

loan, or payments of the reunder [sic], are due and payable, I (we) hereby authorize the Superintendent of the Blackfeet Agency, Browning, Montana, to draw check or checks from my (our) Individual Indian Account in payment of such amounts as are due and payable, as reported in writing to the Superintendent by the Treasurer of the Blackfeet Tribe, to me (us) acknowledging receipt of such payment or payments shall be issued a tribal receipt. This assignment of income to cover payment or payments of the above tribal loan, is made with the understanding that it does not take priority over any claims of amounts (I) (we) may owe under the Revolving Credit loans, leases, permits, etc. on tribal land, approved by the Superintendent, or claims of the United States to apply on Reimbursable or other debts payable to the United States, whether past, present, or future, in nature, and such payments thereof are not in conflict with any Department of the Interior regulations, in force at the present time or issued in the future, and further that this assignment is approved by the Sup't. under such rules as he may require.

Leo M. Kennerly"

"Subscribed and sworn to before me this 7th day of July 1947

Ponsy Cavanagh

Notary Public"

"This assignment is approved by me with the understanding that all the terms of the assignment are complied with, and with the further stipulation that once we are notified in writing by the Treasurer of the Blackfeet Tribe that the amount is due and payable under the terms of the above tribal loan, and Treasury check is drawn from the above individual account, the proceeds of such check must be applied on the above loan."

"It is further stipulated that, I, as Superintendent, of the Blackfeet Agency, relinquish no authority, in expenditure of trust funds, under Departmental Regulations. It is further stipulated that a completed, signed, copy of this assignment, must be given to the Blackfeet Agency."

"It is further stipulated that it is the responsibility of the Treasurer of the Blackfeet Tribe to notify the Blackfeet Agency Office, in writing, relative to drawing check in payment of this loan, in sufficient time to draw such check to it, and the drawing of such check to the above Indian before notification by the Treasurer will in no way affect the delivery of such check so drawn, to the Indian Payee."

"It is further stipulated that the Blackfeet Agency Office shall currently be notified of payment or payments due on the above loan at least twice a year, such notice to be in writing and signed by the Treasurer of the Blackfeet Tribe. The approval of this assignment is

May 26, 1977, however, a credit was applied to appellant's account by the tribe <sup>4/</sup> which, acting pursuant to an amended tribal ordinance had presented the assignments of income executed by appellant from 1944 through 1950 to the agency for payment of income accruing to appellant's account. <sup>5/</sup> Appellant protested the taking, and entered into negotiations with the tribe and the agency Superintendent to seek a release of his account. Appellant disputed the amount claimed to be due by the tribe, and contended the account was interest free and was wholly or partly forgiven. Collection of credits from appellant's account were stopped pending negotiations between appellant and the tribe. In January 1979, however, the agency Superintendent determined that 25 CFR 104.9 permitted transfer of part of appellant's account to the tribe; on January 23, 1979, payments amounting to 20 percent of credits on hand for appellant were authorized by the Superintendent to be paid by the agency to the tribe. On April 12, 1979, appellant sought relief from the Superintendent's action by appeal to the Billings Area Director. On May 24, 1979, the Area Director upheld the decision of the Superintendent. Appeal was thereafter taken to the Commissioner who referred the appeal to this Board, pursuant to provisions of 25 CFR 2.19(a) (2).

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fn. 3 (continued)

null and void at the option of the Superintendent of the Blackfeet Agency.

Warin L. O'Hara  
Superintendent,  
Blackfeet Indian Agency."

<sup>4/</sup> The ledger account for appellant maintained by the tribe shows credits on

May 26, 1977	in the amount of	\$303.82
July 7, 1977		\$116.36
July 19, 1977		\$177.06
August 23, 1977		\$221.19
October 6, 1977		\$163.29
November 29, 1977		\$116.36
January 25, 1979		\$546.33
March 22, 1979		\$ 79.87

<sup>5/</sup> Tribal Ordinance 51, as amended by Ordinance 55 on September 6, 1976, provides in pertinent part:

"[A]ll actions \* \* \* brought on behalf of the tribe to recover a debt owing to the tribe shall have no prescribed period of limitations."

### Issues on Appeal

Appellant contends that agency action which permitted payment to the tribe in 1977, 1979, and, presumably, 1980, based upon the assignments of income he executed in 1944, 1947, 1949, and 1950, violates his Fifth and Fourteenth amendment rights to notice and hearing prior to a taking of his property. He contends the action taken partakes of the nature of an unlawful eminent domain proceeding, also in violation of the Fifth amendment to the United States Constitution, and that it violates the fiduciary duty owed him under the trust relationship between appellant and the United States. Appellant seeks reimbursement of all monies taken from his account since May 26, 1977, or, alternatively, an evidentiary hearing to determine disputed questions of fact sought to be raised by him.

The Billings Area Director contends this Board lacks the power to consider the matter because notice of appeal was given late by appellant, contrary to provisions of 25 CFR 2.10(b); that the account between appellant and the tribe is due in the full amount claimed by the tribe and is not barred by any time limitation upon the debt's collection; and that the tribal court is the only proper forum for relief.

The transaction which forms the basis of this dispute took place on the Blackfeet Reservation and, but for the trust interest of the United States, concerns only the tribe and tribal members. Kennerly v. District Court, 400 U.S. 423 (1971), establishes that in such transactions the State of Montana lacks jurisdiction to impose its law upon the parties. Since the State courts are not available to the parties to this dispute, the issues on appeal, as framed by the arguments of the parties, raise the question whether this Board or the Blackfeet Tribal Court is the proper forum for resolution of this dispute between the tribe and a tribal member arising from the attempted collection of a debt of individually owned trust funds which the tribal member claims is barred by laches or by a limitation prescribed either by tribal ordinance or State law. The Board determines that the matter is properly before it for decision.

### Discussion and Conclusion

[1] In choosing to pursue his remedies under 25 CFR Part 2, appellant sought review by the Area Director of the payments allowed to be paid out of his account by the Superintendent. On April 12, 1979, notice of appeal was given simultaneously with the making of the appeal. Decision on this appeal was delayed, however, when the appeal was referred by the Area Director to the Commissioner. The appeal was referred back to the Director for decision which was supplied on May 24, 1979. The record is silent concerning the date when notice of the

decision was received by appellant; the Board is unable to infer a failure to reasonably pursue administrative remedies from the record supplied. The provisions of 25 CFR 2.4 require that where written notice of a decision affecting a party is not given to the party, his appeal rights continue until the notice is supplied. The notice is to be given to the "Indian or Indian tribe affected." Under the circumstances, the notice of appeal given on July 9, 1979, by appellant was sufficient. The matter is now properly before this Board having been directly referred to the Board by the Commissioner for decision pursuant to 25 CFR 2.19(a)(2), which permits such accelerated procedure.

[2] Although the facts are disputed (in the sense that appellant does not agree the tribal ledger is an accurate statement of his account) the situation of the parties is clear. The tribe obtained assignments of income from appellant which it is using to collect money from appellant's individual Indian money account (IIM account). The IIM account is made up of income from trust lands which would otherwise be paid to appellant.

Since the laws of Montana respecting limitations on actions are not available to appellant, he seeks an order from the Secretary to prevent agency application of 25 CFR 104.9 so that no more payments from his account will be taken, and seeks to have money already taken restored to him. 6/

[3] Under 25 CFR 104.9 it is provided that

[f]unds of individuals may be applied \* \* \* against delinquent claims of indebtedness \* \* \* to the tribe of which the individual is a member, unless such payments are prohibited by acts of Congress \* \* \*. \* \* \* [F]unds obligated under contractual arrangements approved in advance by the Secretary \* \* \* shall be disbursed only in accordance with the agreements \* \* \*.

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6/ See R.C.M. 1947, § 93-2603, which provides an 8-year limitation upon "any \* \* \* obligation \* \* \* founded upon an instrument in writing." The former tribal ordinance, Ordinance 51, provided that debts to the tribe over \$5,000 in amount were not subject to limitations of actions; prior to the enactment of Ordinance 51, a 2-year limitation was apparently effective against all civil actions for debt. It is axiomatic that, barring the existence of a time limitation on debt, the maker of an instrument is not released from liability by a delay in presentation which does not cause him any loss, nor by failure of the holder to make a proper presentment. 10 C.J.S. Bills & Notes § 557, p. 872 (1938).

The assignment of income executed by appellant on July 7, 1947, shows prior Secretarial approval to have been obtained; the agreements dated February 1, 1944, September 22, 1949, and March 13, 1950, do not, however, appear to have been approved, nor does the tribal ledger account of the loans not evidenced by notes indicate whether Departmental approval was sought and obtained for those loans.

The practice of allowing the encumbrance or assignment of trust assets under certain conditions controlled by Departmental regulation has been approved, and is of long standing. <sup>7/</sup> Payment pursuant to assignments of income is permissible, therefore, under Departmental regulations, since not barred by any Federal Act prohibiting payment of such claims. <sup>8/</sup> The regulations implementing the statutory consent to encumbrancing do not provide for the exercise of tribal authority to control the administration of individual trust accounts. Further, the very reasons which underlie the Departmental practice of approving or disapproving individual trust fund transfers to the tribe also indicate why resolution of this appeal is properly a matter for this forum to decide, in lieu of adjudication by the tribal court. The issue here decided by the Board concerns the administration by the BIA of an IIM account. The tribal court is not in a position to control that administration, which concerns the execution of statutory duties by the Secretary in the exercise of his trust responsibility.

It is not clear from the record whether more than the single assignment for \$105.50 is payable under 25 CFR 104.9, for the record does not indicate whether the remainder of the claimed debt was approved by the agency, nor does it show the basis for approval of the assignments, except for the recitation that the claim is based upon transactions completed in 1953. On the record presented, therefore, only the \$105.50 item can be approved.

#### Decision

The assignment of income dated July 7, 1947, in the amount of \$105.50 is approved; consideration of the remaining assignments is referred to the Billings Area Director for determination whether the assignments of income and the balance of the account claimed by the tribe were approved as required by regulation and whether, under all

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<sup>7/</sup> 25 U.S.C. § 410 (1976); For a discussion concerning claims against trust assets held by the Department, see Estate of John Joseph Kipp, 8 IBIA 30, 87 I.D. 98 (1980).

<sup>8/</sup> Administration of allotted trust lands and the resulting trust estates is within the province of the Secretary, subject to review only for abuses of discretion in the execution of his duties concerning the exercise of his power. McKay v. Kalyton, 204 U.S. 458 (1907).

the circumstances outlined by the administrative record, the assignments as made were effective to allow payment from appellant's agency account in the amounts shown. 9/

As so modified, the decision of the Area Director that payment of the assignments was not barred by State law or the tribal ordinance is affirmed. The appeal is returned to the Billings Area Director for appropriate action consistent with this decision.

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//original signed

Franklin Arness  
Administrative Judge

We concur:

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//original signed

Wm. Philip Horton  
Chief Administrative Judge

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//original signed

Mitchell J. Sabagh  
Administrative Judge

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9/ In this connection, although the language of the February 1, 1944, assignment is very general, it, like the other assignments, recites a definite amount (\$200). The intent of the parties to the transaction must be determined; it appears however, to be doubtful there was ever any intention to assign more than the face amount appearing on each assignment, since the later assignments clearly are limited to their face value. The course of dealing between the parties must be considered when deciding this issue. Under the circumstances, unless there is a contrary showing, it may well be considered that the parties did not intend to create a line of credit, but rather intended each transaction for which an income assignment was executed to be a single transaction. If that is the case, the total amount collectible under the assignments (if they all can be approved consistent with Departmental guidelines for such transactions) is \$3,705.50. The records of the tribe indicate that \$1,724.28 has been collected since May 1977-- see n.4, above.