



INTERIOR BOARD OF INDIAN APPEALS

Marjorie L. Miller v. Anadarko Area Director, Bureau of Indian Affairs

26 IBIA 97 (07/06/1994)



United States Department of the Interior

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

MARJORIE L. MILLER

v.

ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-126-A

Decided July 6, 1994

Appeal from a decision declining to release funds in a Special Deposit account.

Vacated and remanded.

1. Indians: Financial Matters: Individual Indian Money Accounts--
Indians: Trust Responsibility

The Secretary of the Interior must exercise his authority under 25 U.S.C. § 410 (1988) in accordance with the trust responsibility of the United States for funds held in Individual Indian Money accounts.

2. Constitutional Law: Due Process--Indians: Financial Matters:
Individual Indian Money Accounts

Due process requires that the owner of an Individual Indian Money account be afforded a prompt hearing when a hold is placed on funds in the account.

APPEARANCES: Amos E. Black III, Esq., Anadarko, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Marjorie L. Miller seeks review of a July 26, 1993, decision of the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to release funds in a Special Deposit account to her. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further proceedings.

Background

Appellant is the beneficial owner of a 20-acre tract of trust land which is part of the allotment of Yeag-taupt, Kiowa Allottee 118. 1/ On

1/ Appellant also holds interests in two other tracts which were originally part of Kiowa Allotment 118.

The 20-acre tract at issue here is described as the S¹/₂, NW¹/₄, NE¹/₄, sec. 32, T. 6 N., R. 10 W., Indian Meridian, Caddo County, Oklahoma.

October 14, 1980, the tract was leased to Energy Fuel Corporation of America (Energy Fuel) for oil and gas mining purposes. Energy Fuel paid a bonus of \$11,000 for the lease, which was approved by the Superintendent, Anadarko Agency, BIA, on January 6, 1981. 2/

By error, the tract was included in a March 26, 1981, lease sale. Energy Fuel was the successful bidder at that sale and entered into a second lease of the tract, upon payment of a bonus of \$128,000. The second lease to Energy Fuel was approved by the Superintendent on June 4, 1981. The second bonus, which had been deposited into appellant's Individual Indian Money (IIM) account, was withdrawn by her on June 5, 1981.

In September 1982, Energy Fuel discovered that it had two leases of the same tract. It wrote to the Agency on September 17, 1982, seeking a reimbursement of the bonus and fees it had paid in connection with the second lease. On October 7, 1982, it again wrote to the Agency concerning the duplication, stating in part: "We realize that it is an inconvenience for you to issue a refund anytime soon, however, it is a drastic inconvenience to our co-owner, PCX Corporation [(PCX)]."

On November 18, 1982, the Superintendent wrote to PCX, stating: "You are advised that we have been able to recover \$96,000.00 from the landowner. * * * We have placed a 'hold' on [appellant's] Individual Indian Monies account, effectively holding all future income [appellant] may receive. When [appellant's] IIM account reaches a balance of what we owe your company, a refund will be made." 3/ A journal voucher entry dated November 19, 1982, shows a transfer of \$96,000 to PCX.

In 1987, appellant began making inquiries about the matter. In a letter dated December 29, 1987, the Superintendent responded:

Prior to the recent approval of the new oil and gas leases on your trust property, it was found that the total owed to the overdraft was \$32,025.00. As of October 1, 1987, your overdraft account showed a credit of \$10,607.50, and the subsequent approval of the three new leases increased the credit to \$25,817.49. This amount will be applied to PCX Corporation's account, leaving a balance owed to said company in the amount of \$6,207.51.

2/ The term of the lease was 5 years from approval "and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." According to a note in the administrative record, the lease expired on Jan. 6, 1986.

In late 1987, new leases were issued for all three of the tracts in which appellant holds an interest.

3/ BIA placed the hold on appellant's IIM account on May 21, 1982, four months before Energy Fuel wrote to it about the duplication.

BIA also established a Special Deposit account, into which funds from appellant's IIM account were transferred from time to time. The first transfer was made on June 2, 1983, in the amount of \$1,759.15. Subsequent transfers were made on Mar. 28, 1988, in the amount of \$26,529.09, and Nov. 3, 1988, in the amount of \$90.

In view of the foregoing, it is regretted that we cannot release any funds from your account until such time that the total amount of overdraft has been liquidated. Consequently, we are mandated to apply all future funds that you receive from your trust property towards payment of remaining balance of the debt.

On March 25, 1992, appellant wrote to the Superintendent requesting an accounting. She also requested that the funds in the Special Deposit account be transferred to her because attempts to locate Energy Fuel had proved unsuccessful. In response to appellant's request, BIA staff looked into the matter and found that the Special Deposit account then contained \$36,858.21. and appellant's IIM account contained \$698.22. The hold on appellant's IIM account was released on April 27, 1992.

Also in April 1992, Agency staff began a concerted effort to locate Energy Fuel and PCX. On November 27, 1992, in response to one of its inquiries, the Agency received a letter from Humphrey Oil Corporation, stating: "Energy Fuel Corporation of America is no longer in existence. The corporation filed Chapter 7 Bankruptcy in 1985, and was 'abandoned' through the Bankruptcy Court in early 1987." The Humphrey letter enclosed a copy of an order from the Bankruptcy Court for the Northern District of Texas, dated February 2, 1987. ^{4/}

The Agency also received information from Humphrey and other sources that PCX had changed its name to X Corporation. One response, which is signed "Robert L. Harmon, Former Trustee for X Corp.," stated that X Corporation had been dissolved on December 31, 1991, and no longer existed.

Appellant continued to request that the funds in the Special Deposit account be released to her. On April 27, 1993, the Superintendent formally rejected her request. In his decision of that date, the Superintendent first summarized the history of the matter, as discussed above. He then noted that a total of \$28,378.24, including interest, had been transferred from appellant's IIM account into the Special Deposit account. He continued:

The actual principal paid by you was \$24,200.95, leaving a balance owed of \$7,824.05. As with any repayment of a debt owed the interest accrued cannot be included as repayment in the amount owed.

* * * * *

The decisions of the Comptroller General of the United States, file B-219235, dated April 29, 1986, in a similar case

^{4/} The order, titled "Order on Adequacy of Notice," found that the notice of abandonment and destruction of business documents proposed by Energy Fuel's trustee was "sufficient and adequate." In re Energy Fuel Corp., debtor, No. 385-32860-M-7 (Bankr. N.D. Tex. Feb. 2, 1987).

states, "It is a fundamental rule that persons who receive moneys erroneously paid by a Government Agency or official, acquire no right to such money and the courts consistently have held that such persons are bound in equity and in good conscience to make restitution."

Funds accrued in the Special Deposit account were found to be more than the \$32,025 which you owed, only because interest has been accruing on the \$24,200.95 in special deposit. The "Hold" was released on April 27, 1992, even though you have not repaid the full amount of the overpayment. All funds accrued after the last transfer on November 3, 1988, were then distributed to you.

The decision to require repayment of any debt is a discretionary one (25 USC 410). In light of the fact that the administrative hold on your account has been released, it is my decision not to require you to repay the outstanding \$7,824.05.

It is also my decision that based on the above you have no claim to the proceeds held in special deposit, you received the bonus money for the lease approved January 6, 1981, and any bonus monies paid to you thereafter were in error.

(Superintendent's Apr. 27, 1993, Decision at 1-2).

Appellant appealed this decision to the Area Director, who sought the views of the Field Solicitor, Tulsa. The Field Solicitor responded by memorandum dated July 7, 1993, stating:

You have advised us that the corporate existence of [Energy Fuel *] was terminated in a 1987 bankruptcy action in Dallas, Texas. See In re Energy Fuel Corporation, debtor, No. 385-32860-M-7 (Bkrcty. N.D. Tex). [Appellant] argues that, inasmuch as the corporation which is owed the funds no longer exists, those funds should be returned to her. The question presented is whether the termination of the bankrupt corporation relieves debtors of the corporation from liability.

Our research indicates that the debtor, Energy Fuel or its bankruptcy trustee, has the power to reopen the bankruptcy proceedings for the purpose of administering undiscovered assets. See 11 U.S.C. § 350, and In re John Horace Atkinson, et al., 62 B.R. 678 (Bkrcty. D. Nev. 1986). In this case, there is no indication that the court ever made any disposition of this asset, or that the court was advised of the existence of this asset. Therefore, it would be appropriate for the court to reopen this estate and administer this asset.

[*] There is some confusion regarding the precise identity of the company owed the money. We understood Energy Fuel was entitled to

all of the funds; however, your memorandum questions whether [PCX] is entitled to some of the money. There is no indication that the existence of [PCX] has terminated or that the entirety of the funds was owed only to Energy Fuel. This memorandum addresses only the liability of appellant, and does not purport to identify any party other than Energy Fuel as her creditor. Should your records indicate that some of all of the funds are owed to [PCX], then appellant's grounds for this appeal are without merit.

(Field Solicitor's July 7, 1993, Memorandum at 1-2).

By letter dated July 26, 1993, the Area Director affirmed the Superintendent's decision, basing his conclusions in part upon the Field Solicitor's memorandum.

Appellant appealed to the Board. Her notice of appeal was received by the Board on August 31, 1993. ^{5/} Only appellant filed a brief.

Discussion and Conclusions

Appellant's principal argument on appeal is that the right of Energy Fuel and/or PCX to the funds in the Special Deposit account is subject to an Oklahoma statute of limitations. Appellant contends that, because the companies were aware of the overpayment to appellant on September 17, 1982, the date Energy Fuel first wrote to BIA about it, any cause of action accrued on that date and is now barred under the state statute. Appellant further contends that "the continued denial of her lease bonus and rental monies constitutes a breach of fiduciary duty" by BIA, "[i]n view of the fact that no justiciable claim exists against Appellant or [BIA]" (Appellant's Brief at 8 (unnumbered)).

In the Board's view, the pivotal statute here is not the Oklahoma statute of limitations but, rather, the Federal statute concerning payment of debts or claims from the proceeds of trust property. 25 U.S.C. § 410 (1988) provides:

No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian

^{5/} In a certificate attached to her notice of appeal, appellant's counsel stated that "the existence or whereabouts of [Energy Fuel] and [PCX] were] unknown to Appellant" despite the efforts of BIA to locate them.

The Board ordered counsel to contact the Bankruptcy Court in Dallas to obtain an address for Energy Fuel, its successor in interest, or its trustee in bankruptcy. It also ordered counsel to make a diligent effort to locate PCX. Counsel thereafter furnished the name and address of Energy Fuel's trustee. He also furnished an address for PCX, but it turned out to be an outdated one. The Board's notice of docketing sent to that address was returned by the Post Office.

contracted or arising during such trust period, or, in the case of a minor, during his minority, except with the approval and consent of the secretary of the Interior.

[1] This provision vests the Secretary with discretion to approve or disapprove payment of a debt or claim from the proceeds of trust property. *See, e.g., United States v. Acting Aberdeen Area Director*, 9 IBIA 151, 89 I.D. 49 (1982); *Robinson v. Acting Billings Area Director*, 20 IBIA 168 (1991). However, the Secretary's discretion is not unfettered. He is bound by the trust responsibility of the United States toward the Indians for whom the funds are held. *E.g., Acting Aberdeen Area Director*, 9 IBIA at 153-54, 89 I.D. at 51; Comptroller General's Decision B-219235, 65 Comp. Gen. 533, 537-39 (1986). Further, although he must give careful consideration to a debt or claim presented to him for payment, the Secretary must also respect the due process rights of the IIM account owner.

In *Acting Aberdeen Area Director*, the Board affirmed BIA's declination of a request by the United States for setoffs against the IIM accounts of two individuals. The Board stated that "any disapproval of a request for setoff against IIM funds should be well-considered and not arbitrary." It found that the BIA decision not to approve the setoff request in that case was "well-reasoned" and "based on an examination of the funds potentially available for setoff, the basic necessities of the individuals involved, and the interest of the United States in collecting quite substantial judgment amounts." 9 IBIA at 156, 89 I.D. at 52-53.

[2] The due process requirements applicable to BIA's payment of debts and claims from IIM accounts were first addressed in *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983). In that case, the United States Court of Appeals for the Ninth Circuit held that BIA violated the due process rights of an IIM account owner by transferring money from his account to his tribe without affording him a hearing. ^{6/} In *Robinson*, the Board considered a case in which BIA had placed a hold on an IIM account for the purpose of accumulating funds with which to repay an erroneous probate distribution. The Board found that Robinson's right to a hearing arose in May 1983, when the hold was placed on her account. Although BIA offered Robinson a hearing three years later, the Board held that she had suffered a due process violation in 1983 when BIA failed to provide her a hearing at that time. ^{7/}

^{6/} As a result of the *Kennerly* decision, BIA amended its regulations governing IIM accounts to require that a hearing be offered whenever it is proposed to limit an individual's access to his account or to pay creditors. 25 CFR 115.10. *See* 51 FR 2874 (Jan. 22, 1986).

^{7/} On the merits in *Robinson*, the Board concluded that BIA should not recover the overpayment at issue. The Board took into account, "not only the trust responsibility, but also equitable considerations, including the initial and continued violation of [Robinson's] due process rights, the extensive length of time her account had been subject to the hold, and the financial hardships the hold caused [Robinson] and her family." 20 IBIA at 174-75.

Here, there is no evidence that appellant was offered a hearing when the hold was placed on her account in 1982 or at any time thereafter. Thus the Board finds that appellant's right to due process has been violated. However, as it did in Robinson, the Board finds here that "the fact that appellant has suffered a due process violation does not mean that she is entitled, as a matter of law, to retain the overpayment." 20 IBIA at 171.

The claim against appellant's IIM account in this case differs from those in Acting Aberdeen Area Director and Robinson in that it is not made by the United States on its own behalf or by the Secretary in his capacity as trustee for other Indian beneficiaries. Instead, the claim is made on behalf of an outside entity or entities, *i.e.*, Energy Fuel and/or PCX. Undoubtedly, BIA felt some need to assist these companies recover the over-payment, because of its own error. 8/ Even under these circumstances, however, it is not clear that the Superintendent had authority to place a hold on appellant's account for the benefit of Energy Fuel and/or PCX.

25 U.S.C. § 410 (1988) imposes no restrictions on the categories of creditors who may be paid from the proceeds of trust property. However, BIA appears to have imposed such restrictions through promulgation of the regulations in 25 CFR Part 115. 25 CFR 115.9 provides in part: "Funds of individuals may be applied by the Secretary or his authorized representative against delinquent claims of indebtedness to the United States or to any of its agencies or to the tribe of which the individual is a member, unless such payments are prohibited by acts of Congress, and against money judgments rendered by courts of Indian offenses or under any tribal law and order code." 9/ The claim of Energy Fuel and/or PCX does not fall within any of these categories.

8/ Arguably, Energy Fuel also bore some responsibility for the overpayment by failing to notice that the tract it bid on in the Mar. 26, 1981, lease sale was one it had already leased. Appellant might be faulted for failing to notice that she had signed two leases for the same property. Nevertheless, it was BIA which was responsible for maintaining lease records and which erroneously advertised the tract for lease, setting the stage for the errors made by the other parties. BIA also approved both leases without noticing the duplication.

9/ In its entirety, 25 CFR 115.9 provides:

"Funds of individuals may be applied by the Secretary or his authorized representative against delinquent claims of indebtedness to the United States or to any of its agencies or to the tribe of which the individual is a member, unless such payments are prohibited by acts of Congress, and against money judgments rendered by courts of Indian offenses or under any tribal law and order code. Funds derived from the sale of capital assets which by agreement approved prior to such sale by the Secretary or his authorized representative are to be expended for specific purposes, and funds obligated under contractual arrangements approved in advance by the Secretary or his authorized representative or subject to deductions specifically authorized or directed by acts of Congress, shall be disbursed only in accordance with the agreements (including any subsequently approved modifications thereof) or acts of Congress. The funds of an adult whom the

The parties have not addressed the issue of the Superintendent's authority to impose a hold on appellant's IIM account. Yet, the validity of the original hold clearly appears relevant to the question at issue in this appeal. Recognizing that a decision on this point may well have consequences extending beyond this decision, the Board is hesitant to address the matter without briefs from the parties. While it could order briefs on this issue, the Board has concluded, in light of the other unresolved matters discussed below, that requiring such briefs at this point would not result in an efficient use of the parties' or the Board's time and resources.

Even if the Superintendent had the authority to impose the hold on appellant's account, there would still be a question concerning whether the hold was consistent with BIA policy. Appellant withdrew the original overpayment from her IIM account long before the hold was placed on the account. The funds which have accumulated in the account since then are proceeds from her trust property and are not attributable in any way to the overpayment. In another context, *i.e.*, one involving erroneous probate distributions, both this Department and the Comptroller General have drawn a distinction between an attempt to recover an overpayment where the overpayment remains in an IIM account and an attempt to recover an overpayment from other funds in an IIM account, after the original overpayment has been withdrawn by the account owner. See Robinson, 20 IBIA at 173-75 & n.8; Comptroller General's Decision B-219235. The Comptroller General's decision was grounded upon a BIA policy announced in 1960, which, in the Comptroller General's words, "was that distribution under a legal probate order should stand, and recoveries of overpayments could only be effected through transfers of funds remaining in IIM accounts from the original distributions." 65 Comp. Gen. at 538. 10/

The Board is not aware of any BIA policy statement, analogous to the 1960 statement concerning erroneous probates, that would cover the situation here. If a policy similar to the 1960 policy were applied here, however, recovery from appellant's IIM account would not be deemed appropriate

fn. 9 (continued)

Secretary or his authorized representative finds to be in need of assistance in managing his affairs, even though such adult is not non compos mentis or under other legal disability, may be disbursed to the adult, within his best interest, under approved plans. Such finding and the basis for such finding shall be recorded and filed with the records of the account."

10/ See also Memorandum of Acting Associate Solicitor, Indian Affairs, Sept. 11, 1981, at 2:

"[W]e regard the 1960 memorandum as construing any order for redistribution as applicable only to undistributed funds or funds subsequently credited to the estate, while refraining from attempts to collect funds distributed pursuant to a valid, but erroneous, order. Thus under this interpretation, at most, only funds in an IIM account attributable to an erroneous probate order would be subject to recovery under the modified order."

because none of the funds now in the account are derived from the overpayment.

As noted above, BIA's approval or disapproval of a claim against an IIM account involves the exercise of discretion. Further, as evident from the discussion immediately preceding, BIA's decisions in this area may be grounded in broad policy considerations. The Board's authority to review discretionary and policy-based decisions of BIA officials is limited. 11/ Earlier Board cases involving issues similar to the one in this appeal were specially referred to the Board by the Assistant Secretary - Indian Affairs or the Commissioner of Indian Affairs, and the Board was authorized to review the exercise of discretion. Robinson, 20 IBIA at 170-71; Acting Aberdeen Area Director, 9 IBIA at 153, 89 I.D. at 51. No such authorization has been granted to the Board in this case.

Other problems with the present posture of this appeal are that (1) it is not possible to tell from the record which, if either, of Energy Fuel and PCX, is the true creditor here, and (2) PCX's trustee has not received notice of this appeal.

The record does not show how PCX was related to the erroneous lease. Energy Fuel was the lessee of record, and there is no lease assignment to PCX in the record, or any document evidencing a legal relationship between Energy Fuel and PCX. However, Energy Fuel's October 7, 1982, letter describes PCX as its co-owner, and BIA sent a payment of \$96,000 to PCX, after the funds had been returned to BIA by appellant. Apparently, BIA recognized PCX as having a valid interest in this matter, but there is little in the present record to support such a recognition.

Further, although Energy Fuel's trustee has presumably received appellant's filings in this appeal, PCX's trustee has not, because appellant was not able to locate him. However, the record shows that BIA received a response from this trustee in 1992, and it therefore appears possible that he could now be located.

Although there are both legal and policy issues which remain unresolved at this point, it appears that the most efficient way of proceeding is to vacate the Area Director's decision and remand the matter to him with instructions to take a series of actions, as outlined below.

First, the Area Director should require the trustees of Energy Fuel and PCX to notify BIA, within a specified period of time, whether they intend to claim the funds in the Special Deposit account. 12/ If neither

11/ 43 CFR 4.330(b) provides: "Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

12/ The addresses of the trustees should first be verified, and the trustees fully informed about the matter. As a first step, the Board will mail

trustee notifies BIA of an intent to claim the funds, then the funds may be released to appellant without further ado. 13/ If either trustee notifies BIA that he does intend to claim the funds, then the Area Director must determine whether the entity that trustee represents, vis-a-vis the other, is entitled to make the claim. If he determines that a claim has been made by an entity entitled to do so, the Area Director must then address the legal and policy issues left unresolved above to determine whether the funds should be released to the claimant or to appellant. Any decision made by the Area Director may be appealed to the Board. 14/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's July 26, 1993, decision is vacated, and this matter is remanded to him for further proceedings, as discussed in the opinion.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

fn. 12 (continued)
copies of this decision to both trustees, using the best addresses it has for them.

The Board suggests that BIA seek the assistance of the Solicitor's Office throughout the proceedings discussed here.

13/ There is a suggestion in the record that BIA intended to deposit the funds in the U.S. Treasury if Energy Fuel and PCX could not be located. Clearly the funds belong either to appellant or to Energy Fuel/PCX. The Board sees no basis for depositing them in the U.S. Treasury.

14/ With respect to any Area Director's decision based on discretion and/ or policy, the Board would be limited in its review, as discussed above, unless the Assistant Secretary - Indian Affairs were to grant the Board expanded review authority under 43 CFR 4.330(b).

Lacking such a grant of authority, the Board could, if necessary and appropriate, refer the appeal to the Assistant Secretary pursuant to 43 CFR 4.337(b) for exercise of discretion.