



INTERIOR BOARD OF INDIAN APPEALS

Shoshone-Bannock Tribal Credit Program v. Portland Area Director,
Bureau of Indian Affairs

35 IBIA 110 (07/14/2000)

Reconsideration denied:
35 IBIA 159



United States Department of the Interior

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

SHOSHONE-BANNOCK TRIBAL CREDIT PROGRAM
v.
PORTLAND AREA DIRECTOR

IBIA 00-1-A

Decided July 14, 2000

Appeal from a decision removing a hold on an Individual Indian Money account.

Affirmed as modified. Remanded.

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

The Bureau of Indian Affairs' trust responsibility for funds in an Individual Indian Money account is solely toward the account holder.

2. Indians: Financial Matters: Individual Indian Money Accounts--
Indians: Tribal Government: Judicial System

When the Bureau of Indian Affairs is presented with a request to pay a claim from an Individual Indian Money account under 25 C.F.R. § 115.10, and litigation concerning the claim is pending in tribal court, the Bureau should await completion of the tribal court proceeding before considering payment of the claim.

3. Indians: Financial Matters: Individual Indian Money Accounts--
Indians: Tribal Government: Judicial System

Although 25 C.F.R. § 115.10 does not require that a claimant exhaust tribal remedies before presenting a claim to the Bureau of Indian Affairs for payment from an Individual Indian Money account, a claimant which has already filed suit in tribal court should be required to complete that litigation before presenting the claim to the Bureau.

APPEARANCES: Kent A. Higgins, Esq., Fort Hall, Idaho, for Appellant; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director; John F. O'Connor, Esq., Phoenix, Arizona, for Leo T. Cerino.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Shoshone-Bannock Tribal Credit Program (Appellant) appeals from an August 13, 1999, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), which removed a hold on the Individual Indian Money (IIM) account of Leo T. Cerino, a member of the Shoshone-Bannock Tribes (Tribes). For the reasons discussed below, the Board affirms the Area Director's decision as modified herein but remands the matter to him for further action.

Background

In December 1981, Appellant made a loan to Cerino in the amount of \$5,000. Cerino signed a promissory note on December 7, 1981. On the same day, he signed a BIA document titled "Assignment of Trust Property and Power to Lease," which stated in part:

In consideration of a loan from the lender, I hereby assign to the lender as security for repayment of such loan, the following: (a) All property, except land, which is now or may in the future be held in trust for me by the United States; (b) all income from trust land in which I now have or may in the future acquire an interest; (c) any income from any source and any funds from any source accruing to my [IIM] account.

This document was approved by the Superintendent, Fort Hall Agency, BIA, on December 7, 1981.

On February 23, 1983, the loan was modified to include an additional advance of \$5,000. Cerino signed another promissory note, this time joined by his wife Joyce. Cerino and his wife signed a second Assignment of Trust Property and Power to Lease, containing language identical to that quoted above. This document was approved by the Superintendent on February 23, 1983.

On August 25, 1986, Appellant filed a complaint in tribal court, alleging that Cerino and Joyce Ballard were in default on their loan. Shoshone-Bannock Tribes Credit Dep't v. Joyce Ballard and Leo Cerino, Case No. C-86-88 (Shoshone-Bannock Tribal Court). Appellant sought to recover \$9,322.53, plus interest. Further, it sought to liquidate the loan security through

the possession and sale of four Quarter Horses * * * ; the possession and sale of any and all Alfalfa crops the Defendants may possess; [t]he transfer of title or sale of Allotment #623; containing 20.0 acres more or less; [t]he transfer of title or sale of Allotment #624; containing 10.0 acres more or less; [and] enforcement of the Assignment of Trust Property and Power to Lease signed by both Defendants on October 31, 1984. [1/]

Appellant's Aug. 25, 1986, Civil Complaint in Case No. C-86-88, para. VIII.

In December 1986, Cerino filed a petition under Chapter 7 of the Bankruptcy Code (Title 11, U.S.C.). He listed Appellant as a secured creditor holding a claim in the amount of \$9,692.53. On May 15, 1987, the Bankruptcy Court issued a discharge releasing Cerino from personal liability for debts existing at the time the case was commenced. In re Leo Thomas Cerino, Case No. 86-06163-BKC-GBN (Bankr.D.Ariz. May 15, 1987).

It appears that, for over six years following Cerino's discharge in bankruptcy, Appellant took no steps to pursue its tribal court suit against Cerino. This was presumably because of advice given by the Tribes' attorney in a November 25, 1987, memorandum, which stated: "In my opinion, based upon my review and research, the Cerino debt has been fully discharged and the Credit Office is prohibited from attempting to collect upon the debt. This includes any further withholding of lease income."

On August 2, 1993, Appellant asked the tribal court to schedule Case No. C-86-88 for trial. It requested relief similar to that described in its 1986 complaint, including "a first lien on any Trust Property & Power to Lease or any and all trust income accruing to Defendant's IIM Account." No further information appears in the record concerning this tribal court proceeding.

Sometime prior to February 14, 1995, Appellant notified the Superintendent that Cerino's loan was in default and requested that a hold be placed on Cerino's IIM account. On February 14, 1995, the Superintendent wrote to Cerino, informing him that a hold had been placed on his account and that he had a right to a hearing. The Superintendent conducted a hearing, apparently on March 29, 1995. 2/ By letters dated April 21, 1995, the Superintendent sought further information from both Appellant and Cerino.

1/ No Assignment of Trust Property and Power to Lease dated Oct. 31, 1984, is included in the record.

2/ There are conflicting statements in the record as to the date of the hearing. Because the precise date is not critical here, the Board accepts Mar. 29, 1995, as the hearing date for purposes of this decision.

On June 10, 1996, the Superintendent issued a decision stating:

After lengthy consideration of your testimony regarding the status of your tribal loan in view of your bankruptcy decision it is my ruling that you are still liable for your debt to the [Tribes], based on the following.

This decision is based on the fact that the tribes did not waive sovereign immunity nor participate in your bankruptcy proceedings. Unless the tribes expressly waived their sovereign immunity they cannot have an adverse decision rendered against them without participation in the proceedings.

Therefore, the decision of the Bankruptcy Court could not include the debt owing to the tribes unless they expressly agreed. Because they did not attend the proceedings leads me to believe that their action to not participate was an expression not to waive their sovereign immunity. If the court ruled against the tribes because of their lack of attendance then it was an erroneous assumption that their lack of presence implied consent. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (Santa Clara [Pueblo v.] Martinez, 436 U.S. 49, 58 [(1978)]).

In summary, it is my decision to approve the tribes request to forward funds from your [IIM] account from time to time as funds accrue to it to satisfy your debt to them.

Superintendent's June 10, 1996, Decision.

Cerino appealed this decision to the Area Director. Although Cerino served his notice of appeal and his statement of reasons on Appellant and Appellant's attorney, Appellant did not participate in the proceedings before the Area Director.

On August 13, 1999, the Area Director issued a decision in Cerino's appeal. He stated:

After reviewing the records regarding this matter, it is my decision to reverse the Superintendent's June 10, 1996 decision. It is accordingly directed that the hold placed upon your IIM Account is hereby removed and that the tribe's debt which was discharged by the Bankruptcy Court on May 15, 1987 may not be satisfied by any funds entering into your IIM Account after the date of discharge.

Area Director's Aug. 13, 1999, Decision at 2.

Appellant then appealed to the Board. Appellant, Cerino, and the Area Director filed briefs.

Request to Supplement Record

After filing its notice of appeal but before the Area Director submitted the administrative record, Appellant filed a request to supplement the record. Attached to its request were three documents: (1) a copy of the Area Director's August 13, 1999, decision; (2) a copy of the Board's decision in Runs After v. Aberdeen Area Director, 8 IBIA 170, 87 I.D. 501 (1980); and (3) a 10-page list titled "Chronological Events of Leo Cerino and Joyce Ballard Cerino."

The Area Director's decision is properly a part of the record for this case. The Board therefore accepts Appellant's copy of the Area Director's decision for inclusion in the record before the Board.

The Board may take official notice of its own decisions. It therefore accepts the copy of its Runs After decision for inclusion in the record before the Board.

Appellant's 10-page list is more problematical. It is not actually a list of events, as its title implies, but a list of documents. Only a few of the listed documents are included in the administrative record submitted by the Area Director. Appellant does not submit copies of any of the listed documents to the Board.

The Area Director objects to inclusion of Appellant's list of documents in the record for this appeal. He contends:

[The list] does not reflect the administrative record before any Department decision makers at any stage of this appeal. Appellant is impermissibly attempting to correct the record by belatedly offering the evidence it was required to submit four years ago when seeking to prove its claim before the Ft. Hall Superintendent.

Area Director's Objections to Supplementation of Record at 1-2. At the same time, the Area Director argues that Appellant's list demonstrates the inadequacy of the administrative record that was before both the Superintendent and the Area Director.

Appellant apparently offers the list as evidence that it had perfected a security interest in the funds in Cerino's IIM account prior to Cerino's bankruptcy filing. See Appellant's Opening Brief at 2. To the extent documents on the list are relevant to Appellant's claim against Cerino, they should have been presented to the Superintendent at the March 1995 hearing. It is now

too late for Appellant to offer previously unsubmitted evidence in support of its claim. E.g., Mosay v. Minneapolis Area Director, 27 IBIA 126, 132 (1995), and cases cited therein.

Even so, the list serves a purpose in that it reveals the existence of a large number of documents which appear to be relevant to the issue here but which were evidently not before the Superintendent or the Area Director when they issued their decisions. The Board accepts the list for this limited purpose.

Discussion and Conclusions

Appellant makes two arguments before the Board. First, it contends that it was entitled to recover from Cerino's IIM account because it had a perfected security interest which was not affected by Cerino's discharge in bankruptcy. For this argument, it cites Runs After, supra. Second, Appellant contends that the Tribes' sovereign immunity barred the discharge of Cerino's debt to the Tribes. For this argument, it cites In re Greene (Richardson v. Mt. Adams Furniture), 980 F.2d 590 (9th Cir. 1992), cert. denied, 510 U.S. 1039 (1994).

Cerino argues that Runs After is inapposite here because it construed Federal bankruptcy law as it existed prior to the Bankruptcy Reform Act of 1978. He further contends that under present law, specifically 11 U.S.C. § 552, funds entering Cerino's IIM account after he filed his bankruptcy petition are not subject to Appellant's security interest. Finally, Cerino argues that Appellant raises its "perfected security interest" contention for the first time on appeal.

Because of the poor state of the record, see further discussion below, it is not possible to tell whether Appellant made this argument before the Superintendent. Given the fact that Appellant did not participate in the proceedings before the Area Director, it is clear that Appellant did not make the argument before the Area Director. Neither the Superintendent nor the Area Director addressed the issue in their decisions.

Although advised of its right to do so, Appellant did not file a reply brief in this appeal. Therefore it has not refuted Cerino's contention that it failed to make this argument before BIA. Because Appellant had an opportunity to dispute Cerino's assertion and did not do so, the Board accepts Cerino's assertion as accurately stating the facts. The Board therefore finds that Appellant failed to make the argument before either the Superintendent or the Area Director.

Just as it declines to consider evidence presented for the first time on appeal, the Board ordinarily declines to consider arguments made for the first time on appeal. E.g., Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996), and cases cited therein. Because so many of the documents related to Cerino's loan and bankruptcy proceedings are

missing from the record, it would be particularly unwise for the Board to abandon its usual practice here. The Board therefore declines to consider Appellant's "perfected security interest" argument.

With respect to the sovereign immunity question, both Cerino and the Area Director argue that Greene is not controlling here because it concerned a suit brought against a tribe and did not decide the question of whether a debt to a tribe is property subject to a bankruptcy court's jurisdiction. The Area Director notes that the Ninth Circuit in Greene, 980 F.2d at 598, appears to make a distinction between the two situations. Cerino cites two bankruptcy court decisions which explicitly rejected tribal sovereign immunity arguments (In re Shape, 25 B.R. 356 (Bankr. D. Mont. 1982); In re Sandmar Corp., 12 B.R. 190 (Bankr. D.N.M. 1981)), and argues that, at the appellate level, there has been no decision precisely on point.

Although both the Superintendent and the Area Director based their decisions exclusively upon the sovereign immunity issue, there are, as the Area Director argues in this appeal, other issues which should have been addressed by both BIA officials. Further, as discussed below, it is those other issues which ultimately control the outcome of this case. The Board therefore finds it unnecessary to address the sovereign immunity issue here. 3/

Cerino and the Area Director raise a number of due process issues in their answer briefs. The Area Director acknowledges that the issues were present when the matter was pending before him and confesses error in having limited his decision to the sovereign immunity issue.

As noted above, Appellant did not file a reply brief. Thus it has left unrefuted the due process arguments made by Cerino and the Area Director.

The Area Director argues that the Superintendent denied Cerino due process of law by failing to comply with the requirements in 25 C.F.R. § 115.10(c) concerning the conduct of hearings. He contends that the Superintendent violated subsec. 115.10(c)(5) by failing to make and preserve a record of the hearing. He further contends that the Superintendent violated subsecs. 115.10(c)(2) and (4) by accepting evidence outside the hearing and basing his decision on the extra-hearing evidence. 4/

3/ It is conceivable that both bankruptcy issues will need to be revisited at a later time. If so, there may be, by the time the need arises, a definitive answer from the Federal courts on the question of whether tribal sovereign immunity shields a debt to a tribe from the jurisdiction of a bankruptcy court.

4/ 25 C.F.R. § 115.10(c) provides in relevant part:

"The Secretary, or an authorized representative, shall conduct a hearing, if no [sic] requested as specified above, to determine whether to continue to restrict the Individual Indian Money Account, and/or allow payment of delinquent claims and judgments of tribal courts and

The record includes a February 7, 1997, Superintendent's memorandum which states: "A video machine was used to record the hearing. The machine did fail and no tape was produced. No written notes were taken during the hearing by the BIA Staff. Therefore, no formal documentation of the hearing is now available." 5/

The record also includes a February 20, 1997, memorandum signed by an Agency secretary who was present at the hearing. She states that the summary is based on her recollection of the hearing, which had taken place nearly two years earlier. The Area Director argues that this summary does not satisfy the regulatory requirement for recording the hearing. The Board agrees.

The Board finds that the Superintendent violated 25 C.F.R. § 115.10(c)(5) by failing to make and preserve a record of the hearing.

With respect to 25 C.F.R. § 115.10(c)(2) and (4), the Area Director contends:

[T]he Superintendent did not base his June 10, 1996 decision on the hearing record. Instead, by letter dated April 21, 1995, the Superintendent solicited further documents from Cerino and [Appellant]. The Superintendent's April 21,

fn. 4 (continued)

courts of Indian offenses from such accounts. The following are requirements for such a fair hearing:

* * * * *

"(2) The individual must be given the opportunity to be heard. This includes the right to hear the case against the individual; to present testimony, to present witnesses, and to question and rebut opposing witnesses. This includes the right to orally present arguments and evidence. The account holder may be heard on why a judgment of a tribal court or court of Indian offenses should not be paid from his or her Individual Indian Money account, but he or she may not relitigate the facts established by that court.

* * * * *

"(4) The decision to uphold or overturn the proposed action, must be made by the Secretary, or an authorized representative, and must be based on information presented or referred to at the hearing. The decision of an authorized representative of the Secretary may be appealed as provided in Sec. 115.14.

"(5) The Secretary, or an authorized representative, shall make provisions for recording the hearing and shall preserve the record for the duration of the appeal period. Tape recording the hearing is sufficient."

5/ The Superintendent who prepared this memorandum was a successor to the Superintendent who conducted the hearing. It appears likely that the successor Superintendent had no personal knowledge of the case.

1995 letter would indicate that documents comprising Cerino's official loan file were not even presented, or in the possession of the Superintendent at the March 29, 1995 hearing.

Area Director's Answer Brief at 7.

The Superintendent's April 21, 1995, letter to Appellant required that Appellant "provide the complete file of the subject loan." Appellant's May 3, 1995, response described the loan documents being transmitted as follows: "Loan Application, Two documents of the Attachment A, Two documents of the Promissory Note, Wage Authorization, Two documents of the Assignment of Trust Property & Power to Lease, Two documents of the Disclosure, Modification Agreement, and Computer document of loan balance & interest accruing."

At least some of the documents described in Appellant's May 3, 1995, letter were critical to Appellant's claim. Yet, as the Area Director argues and Appellant's May 3, 1995, letter seems to confirm, these documents were apparently not available at the hearing. Further, there is no evidence in the record that the loan documents were ever made available to Cerino for response.

In the absence of a tribal court judgment on the claim against him, Cerino was entitled to raise any and all relevant legal or factual defenses in the proceedings before the Superintendent. Cerino was not given that opportunity in this case.

Based upon the record presently before the Board, the Board finds that the Superintendent violated 25 C.F.R. § 115.10(c)(2) and (4) by considering evidence not made available at the hearing and not made available to Cerino at any time.

The Board further finds that Cerino's right to due process was violated by the Superintendent's failure to comply with the hearing and evidence requirements of 25 C.F.R. § 115.10(c) and by his failure to give Cerino an opportunity to respond to all documents submitted by Appellant in support of its claim.

The Area Director further contends that Cerino's due process rights were violated because the Superintendent did not have an adequate factual basis for his decision. He argues that Appellant "presented no evidence or documentary support [at the hearing] to prove the actual amount owed, interest accrued, any monies paid toward reducing the debt, nor any partial satisfaction through foreclosure on other collateral securing the debt" and "offered no evidence as to the payment history of Cerino's co-debtor, Joyce Ballard." Area Director's Answer Brief at 12.

As just discussed, it is apparent that critical information concerning Cerino's loan was missing at the time of the hearing. Further, there is no indication that adequate information

was ever submitted, even belatedly. The record as presently constituted contains no documentation at all to support the amount of Appellant's claim against Cerino. ^{6/} Thus, it clearly appears that the Superintendent made his decision without adequate evidence.

Further, apart from his determination concerning tribal sovereignty immunity, the Superintendent never made a determination as to the validity of Appellant's claim or the amount of the claim that was valid. Instead, he appears to have simply assumed that the claim asserted by Appellant was valid in its entirety.

The Board finds that the Superintendent violated Cerino's right to due process by authorizing payment of an unliquidated claim from Cerino's IIM account without making a determination as to the validity of the claim and without having an adequate factual basis for making such a determination.

Cerino argued before the Area Director that Appellant's claim was time-barred under tribal law. As he concedes in this appeal, the Area Director did not address this argument in his decision. Before the Board, the Area Director contends:

[T]he administrative record in this appeal seems to support that [Appellant] failed to pursue its claim in 1987 in tribal court on advice of counsel. Only in 1993, with new counsel and new case law (Greene was decided in 1992) did [Appellant] seek to rejuvenate its stale claim. [Appellant's] claim may have been time barred when filed in tribal court in 1986, and may have been otherwise barred when presented to the Superintendent for collection in 1995. The record on these crucial issues is absent.

Area Director's Answer Brief at 14.

The Area Director also contends that it is the Tribes which must determine whether, as a matter of tribal law, Appellant's claim is time-barred. Thus, he argues, "[t]he Superintendent should have stayed his decision, or ruled against [Appellant's] claim, until the tribal courts had finally determined the validity of [Appellant's] claim in light of tribal delay in pursuing it to collection." Id. at 15.

The Board agrees. It is not clear that Cerino made his time-bar argument before the Superintendent. However, the Superintendent must have been aware of the tribal court case

^{6/} Although Appellant's May 3, 1995, letter listed a "Computer document of loan balance & interest accruing," no such document is included in the record. The Area Director concedes that the record is incomplete and states that "[i]t is unclear still whether the Superintendent was not provided all of [Appellant's] May 3, 1995 attachments, or whether he simply failed to provide them to the Area Director." Area Director's Answer Brief at 4 n.5.

because Appellant's original complaint and a April 20, 1987, tribal court order were among the documents the Agency transmitted to the Area Director. The information available to the Superintendent about the tribal court proceedings, although evidently incomplete, 7/ was enough to alert him that he should inquire about the status of those proceedings.

[1] BIA has a trust responsibility for the funds in an IIM account. Its duty in this regard is owed solely to the account holder. This is true even where the claimant seeking payment from an IIM account is an Indian tribe. Cf. Candelaria v. Sacramento Area Director, 27 IBIA 137, 139-40 (1995) (BIA's trust duty with regard to trust land is owed to the landowner, not to Indians doing business with the landowner).

[2] The trust responsibility requires that BIA officials ensure, to the extent possible, that the claims they authorize for payment from IIM accounts are valid. Where there is a question as to the validity of a claim under tribal law, the best evidence on that question is a decision from the tribal court. Thus, when a case concerning the claim is pending in tribal court, the trust responsibility requires that BIA refrain from authorizing payment of the claim until the tribal court proceedings have been concluded. 8/

[3] In this case, there is another reason why the Superintendent should have awaited conclusion of the tribal court proceedings. It was Appellant who filed suit in tribal court and Appellant who, prior to concluding its suit in tribal court, applied to the Superintendent for payment from Cerino's IIM account. Although 25 C.F.R. § 115.10 does not require that a claimant exhaust tribal remedies before presenting a claim to BIA, it is reasonable to expect a claimant which has already filed suit on its claim in tribal court to pursue its lawsuit to conclusion before presenting the claim to BIA. Such a claimant has, in essence, made a choice of remedies and should not complain if it is required to follow through with its choice.

7/ The Superintendent may not have been aware of Appellant's Aug. 2, 1993, Request to Set [Case] for Civil Hearing, as no copy was included in the documents transmitted to the Area Director. Although the list of documents submitted by Appellant in this appeal, see discussion supra, indicates that further proceedings have taken place in tribal court, there is no evidence that any information concerning these proceedings was submitted to the Superintendent or the Area Director.

8/ In this case, of course, the validity of the claim under tribal law is not the only factor which BIA must consider. If the tribal court finds the claim valid under tribal law, BIA must still consider the bankruptcy issues. Cerino is entitled to raise other issues as well. See 25 C.F.R. § 115.10(c)(2). In an appropriate case, BIA may decline to authorize payment of a claim, even when the claim is valid. United States v. Acting Aberdeen Area Director, 9 IBIA 151, 89 I.D. 49 (1982).

For the reasons discussed, the Board concludes that the Area Director was correct to disapprove the Superintendent's decision. However, it also concludes that the Area Director's decision must be modified because it failed to address critical issues.

In addition, the Board finds that some further investigation must be undertaken in this case. A statement made in Cerino's brief suggests that funds may have been removed from his IIM account and transferred to Appellant. Cerino's Answer Brief at 16. Because the Superintendent's decision authorizing this action was appealed and thus never became effective, see 25 C.F.R. § 2.7, no transfer of funds should have taken place. Therefore, the Board remands this matter to the Area Director for an investigation of this allegation. If the allegation proves accurate, the Area Director shall take appropriate corrective action.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's August 13, 1999, decision is affirmed as modified to state that the hold on Cerino's IIM account is removed to allow for completion of tribal court proceedings and because the proceedings before the Superintendent were tainted by violations of Cerino's right to due process of law. The matter is remanded to the Area Director for action in accordance with the preceding paragraph.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge