DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-219235 DATE: April 29, 1986

MATTER OF: Bureau of Indian Affairs Questions on Payments to Indians

DIGEST:

1. Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accrued interest on overpayment, were withdrawn by the Indian in good faith but were subsequently recovered by the Interior Department from monies deposited in the Indian's Individual Indian Money account from an unrelated proceeding, may be returned to Indian overpaid.

2. Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accrued interest on the overpayment, the Interior Department subsequently recovered from monies in the Indian's Individual Indian money account attributable to the same proceeding, may not be returned to Indian overpaid.

3. Consistent with general rule that Government cannot be charged interest without a specific waiver of sovereign immunity either in a statute, treaty, or contract, and decisions of this Office and the United States Claims Court strictly applying the rule, Government cannot be charged interest on monies it pays to Indian notwithstanding Government breached its trust responsibilities to Indian.

4. Monies returned to Indian, which earlier were improperly recovered, should be repaid from the current lump-sum appropriation to the Bureau of Indian Affairs for "Operation of Indian Programs." Since such repayment would not be improper or incorrect, there is no need for the disbursing officer to request relief under section 3527(c) of title 31 of the United States Code or for this Office to grant relief.

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Under the authority of section 3529 of title 31 of the United States Code, the Indian Service Special Disbursing Agent (ISSDA), Interior Department Bureau of Indian Affairs (BIA), asks numerous questions about his duties and responsibilities in rectifying erroneous disbursements of funds from Individual Indian Money (IIM) accounts. The key issue provoking these questions is whether he should overdraft his account and refund $19,457.26 to Linda Slockish and $2,238.62 to Carmen Johnson, plus interest accruing from May 1981 to the present, and whether he would be granted relief for these payments under section 3527(c) of title 31 of the United States Code. Since this issue is pressing, as agreed with the ISSDA, we will respond to it in this opinion. If necessary we will answer the other questions raised in a later decision.

For the reasons given below, we conclude that the ISSDA may refund $19,457.26 to Ms. Slockish, representing both an overpayment to her of $13,374.21 and imputed interest of $6,083.05, both of which were recovered from her in May 1981. On the other hand, Interior may not refund to Ms. Johnson the $2,238.62, representing an overpayment of $1,538.79 and accrued interest, that was recovered from monies in her IIM account. Consistent with the general prohibition on the Federal Government's payment of interest, the ISSDA may not pay accrued interest from May 1981 to the present to Ms. Slockish. Furthermore, since the refund to Ms. Slockish is a proper payment, there is no reason for BIA to request relief for the ISSDA making the payment or for us to grant relief. The refund to Ms. Slockish should be paid from the lump-sum appropriation currently available to the BIA for "Operation of Indian Programs."

## Background

Section 372 of title 25 of the United States Code authorizes the Secretary of the Interior to ascertain the legal heirs of intestate decedents holding allotments of lands held in trust by the United States. This authority has been delegated to the Interior Department Office of Hearings and Appeals. See 43 C.F.R. § 4.1.

On December 5, 1975, in a proceeding before the Office of Hearings and Appeals involving the Estate of Harvey Kaiser Phillips, an administrative law judge rendered an Order Determining Heirs. Estate of Harvey K. Phillips, IP PO 008L 76-9 (Off. Hearings App. Dec. 5, 1975). The

Order made several mistakes[1]/ resulting in larger distributions of property to Ms. Slockish and Ms. Johnson than were warranted, and underdistributions to other heirs. As neither Ms. Slockish nor Ms. Johnson were enrolled members of the Yakima Tribes, under section 607 of title 25, the Tribes properly exercised their right to buy the distributed trust lands at the fair market value. By Order of December 28, 1976, the same administrative law judge ordered distributed the trust funds arising from sale of the lands. The monies awarded to Ms. Slockish and Ms. Johnson, including the overpayments of $13,374.21 and $1,538.79 respectively, were placed in their IIM accounts. The monies in these accounts are held in trust by the United States. On March 8, 1977, payment was made directly to Ms. Slockish by Treasury check from her IIM account. As she was a minor, Ms. Johnson's money was left on deposit in her IIM account.

On July 19, 1978, the same administrative law judge issued a Modification Order correcting the heirship interest erroneously described in the Order of December 5, 1975. Estate of Harvey K. Phillips, IP PO 008L 76-9 (Off. Hearings App. July 19, 1978). This procedure was consistent with regulations which allowed administrative law judges to reopen probate cases within 3 years from the date of the final decision, on their own motion or at the request of the BIA to prevent "manifest error." 43 C.F.R. § 4.242(d). Interior Department administrative precedent[2]/ also required redistribution to proper heirs where there existed a reasonable possibility for correction of interests. Estate of Tennyson B. Saupitly, 6 IBIA 140, 143 (1977). At the time of the Modification Order Ms. Slockish had no funds on deposit in her IIM account. The distribution to Ms. Johnson was still in her account.

Subsequently, in October 1978, the BIA Superintendent, Yakima Agency, requested the comments of the Portland Area Office staff concerning recovery of the overpayments. The request suggested it would be necessary to debit the accounts of Ms. Slockish and Ms. Johnson. Since Ms. Slockish had withdrawn her funds and was not known to possess any

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1/ The judge reversed two categories of heirs, and the probate clerk misinterpreted ancestral distribution.

2/ BIA policy also mandated immediate adjustment action when credit to an individual account was found to be in error, and stated that erroneous payments should not delay payment of funds to rightful owners.

assets, the request suggested that any funds later inherited could be used to defray the overpayment.

Between the date of the Superintendent's request and May 1, 1981, the day the overpayments were recovered, there transpired considerable correspondence between the BIA Portland Area Office and the Department of the Interior Office of the Solicitor. The correspondence focused on the policy set forth in a memorandum of January 6, 1960, from the BIA Commissioner. In effect, the policy stated that any private distribution made under a legal order should stand, and that no collection action would be initiated against those receiving erroneous payments, at least to the extent that erroneously distributed funds did not remain in trust accounts.

Apparently in disregard of the January 6, 1960 memorandum, the Yakima Agency recovered the overpayment to Ms. Slockish of $13,374.21 by offset against her inheritance from the estate of her father, Edward E. Johnson. The agency also withheld $6,083.05 of her inheritance to cover lost interest on the overpayment, from the time of distribution in March 1977 to recovery in May 1981.[3/] An amount of $1,538.79 plus interest of $699.83 was recovered from the IIM account of Ms. Johnson for the overpayment to her. The submission states that neither Ms. Slockish nor Ms. Johnson was notified of the offsets nor were provided opportunity to challenge them. The recovered funds were paid to the heirs of the Harvey K. Phillips estate who originally had been underpaid.

On September 11, 1981, the BIA Associate Solicitor issued an opinion affirming the policy expressed in the January 6, 1960 memorandum. The opinion said that orders for redistribution would only apply to undistributed funds or funds subsequently credited to an estate but not to funds distributed pursuant to a valid though erroneous order. Under this interpretation only funds in an IIM account attributable to an erroneous probate order could be recovered.

Several years later, in March 1985, Ms. Slockish requested the BIA Portland Area Office to review the propriety of the recovery of the overpayment and the interest

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[3/] The interest was computed on the amount that would have been earned over the 4.2-year period if the monies had been placed in an IIM account and held for the other heirs. The Department informs us that IIM funds are invested and interest rates are determined every 6 months.

assessment. Ms. Slockish contended she should not have had to repay the funds since the Government was at fault in making the error in distribution.

Based on various internal memoranda, the Department now suggests that recovery of the overpayment to Ms. Slockish was improper, and that she should be repaid the entire amount recovered from her. Although the Department was less conclusive about the recovery from Ms. Johnson, at least the BIA Yakima Agency Superintendent recommends that she also be repaid the entire amount recovered.

## Legal Discussion

It is a fundamental rule that persons who receive monies 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 good conscience to make restitution. For example, in DiSilvestro v. United States, 405 F.2d 150, 155 (2d Cir. 1968), cert. denied, 396 U.S. 964 (1969), the court said:

> "It is, of course, well established that parties receiving monies from the Government under a mistake of fact or law are liable ex aequo et bono to refund them, and that no specific statutory authorization upon which to base a claimed right of set-off or an affirmative action for the recovery of these monies is necessary."

Accord, United States v. Bentley, 107 F.2d 382, 384 (2d Cir. 1939) (payments made through mistakes of United States officials are recoverable and hardship of refunding what the defendant may have spent cannot stand against injustice of keeping what never rightfully was his). See also B-176867, Oct. 12, 1972. This principle is embodied in the general requirement of the Federal Claims Collection Act, codified at 31 U.S.C. §§ 3711-19, as amended by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, 1754-56, that Federal agencies try to collect debts for money or property arising from their activities.

It is also well-settled that the Federal Government has the same right belonging to every creditor to apply undisbursed monies owed to a debtor to fully or partially extinguish debts owed to the Government. United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); Gratiot v. United States, 40 U.S. (15 Pet.) 336, 370 (1841). Consistent with

this principle, on several occasions we have held that the United States could set off monies it was holding in trust for Indians for debts the Indians otherwise owed the United States though the funds involved were not held in IIM accounts. 34 Comp. Gen. 152, 154 (1954) (nothing in Act of June 17, 1954, Public Law 83-399, authorizing $1,500 per capita payments to members of Menominee Indian Tribe precludes Government from exercising its right of setoff to liquidate indebtedness of tribe members to United States); B-121910, Nov. 29, 1954 (Osage headright payment to Indians may be setoff against debt Indians owed for fines and penalties levied by Court).

General trust principles are in accord. If a trustee makes an overpayment to a trust beneficiary, the beneficiary would be unjustly enriched if permitted to retain the amount overpaid. III Scott, Law of Trusts § 254 (3d ed. 1967); Restatement (Second) of Trusts § 254 (1959). Thus, in most circumstances, a trustee should be able to set off against the sums due a beneficiary a debt of the beneficiary to the trustee in the trustee's representative capacity. Bogert, Law of Trusts and Trustees § 814 (Rev. 2d ed. 1981).

Notwithstanding these considerations, consistent with the United States' general and particular trust responsibilities to American Indians, we think improper Interior's recovery of the overpayment from Ms. Slockish as well as the interest assessed on the overpayment.

In its management of Indian trust funds the United States has charged itself with "moral obligations of the highest responsibility and trust," and its conduct in dealing with Indians should be judged by the "most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Where the Federal Government has control or supervision over tribal monies or properties, the Government's fiduciary relationship normally exists even though nothing is expressly said in the authorizing statute about a trust fund, a trust or fiduciary relationship. Navajo Tribe v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980). There is no dispute that the Federal Government through the Interior Department was trustee of the monies in the IIM accounts of Ms. Slockish and Ms. Johnson.

Consistent with these general trust responsibilities, by statute, regulation, and precedent of the Interior Board of Indian Appeals, the Secretary of the Interior is authorized to waive use of IIM account monies to satisfy indebtedness of Indians to the United States. Section 410 of title 25 of the United States Code states:

> "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 contracted or arising during such trust period * * * except with the approval and consent of the Secretary of the Interior."

Moreover, section 115.9 of title 25 of the Code of Federal Regulations authorizes but does not require the Secretary of the Interior to apply IIM account monies against indebtedness to the United States. Funds accruing from the sales of lands held in trust by the United States often are placed in IIM accounts as occurred in this case.

The Interior Department Board of Indian Appeals has characterized the statute and the regulation[4]/ together as requiring the Secretary's approval before funds derived from trust property may be applied against debts owed by an Indian. United States v. Mossette, 9 IBIA 151, 153-54 (Bd. Ind. App. Jan 8, 1982). As described earlier, the Interior Department policy[5]/ in effect at the time the overpayments to Ms. Slockish and Ms. Johnson were recovered 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.

We think the authorities described prevail over the Federal Government's general debt collection responsibilities. In United States v. Mossette, 9 IBIA 151, 153-54

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4/ When the case was decided the proper citation of the section was 25 C.F.R. § 104.9 (1980).

5/ Interior's policy has some analogous support in statute. For example, section 5584 of title 5 of the United States Code permits waiver of an overpayment to a Federal Government employee when collection would violate equity and good conscience and would not be in the best interests of the United States. Furthermore, both the Federal Claims Collection Act and the general principles of private trust law allow for waiver of collection when a debtor does not have the present or prospective ability to pay. 31 U.S.C. § 3711(a)(3); III Scott, Law of Trusts § 254.1 (3rd ed. 1967); Restatement (Second) of Trusts § 254 (1959).

Appeals held that neither the Federal Claims Collection Act nor its implementing regulations repealed or overrode the Secretary's trust duties to American Indians, or affected the Secretary's authority to approve or disapprove use of IIM funds including approval of payment of debts. Furthermore, while the GAO decisions cited above permitted setoff of Indian debts to the Federal Government, neither involved setoffs from IIM accounts nor the same compendium of statute, regulation, and policy that imposed particular trust responsibilities on the Secretary of the Interior. Accordingly, we have no objection to Interior paying to Ms. Slockish the $19,457.26 which Interior agrees was erroneously recovered from her; that is, both the principal amount of the overpayment and the assessed interest.

On the other hand, refund to Ms. Johnson of the $2,238.62 recovered from her is not warranted. Although it is arguable from a strict reading of the January 6, 1960 BIA memorandum that the overpayment and the accrued interest attributable to the overpayment should not have been recovered, we think the better view is the memorandum contemplated that collection would take place if there still remained monies in an IIM account from the original distribution. This was the interpretation reached by the BIA Associate Solicitor in the September 11, 1981 opinion. Moreover, this view accords with the general requirement that overpayments should be recovered if possible. Thus, since the overpayment and the accrued interest still were in her IIM account, recovery from her was proper.6/

We next consider the ISSDA's question about whether Ms. Slockish should be awarded interest from May 1981 to date on the $19,457.26 that was improperly recovered. It is well recognized that a private trustee who breaches a fiduciary relationship to a beneficiary would be liable for interest. Restatement (Second) of Trusts § 207 (1959); III Scott, Law of Trusts § 207 (1967). In this instance, Interior did breach its trust responsibilities to Ms. Slockish.7/ Interior did not provide her with an

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6/ As suggested by the ISSDA, there may be some inequity in this since the reason the monies still were in her account probably was because she was a minor and thus her ability to withdraw the funds was restricted.

7/ This was also true of Ms. Johnson.

opportunity to contest recovery of the overpayment and assessment of interest, nor with notice of the recovery by setoff. This violated her procedural due process rights guaranteed by the Fifth Amendment to the United States Constitution. Matthews v. Eldridge, 424 U.S. 319, 332 (1976); Kennerly v. United States, 721 F.2d 1252, 1257 (9th Cir. 1983).

Nevertheless, it is well settled that absent a treaty, statute, or specific provision therefor in a contract, interest as interest or as an element of damages may not be awarded against the United States or its agencies. United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951); United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1315-16 (Ct. Cl. 1975), cert. denied 425 U.S. 911 (1976). The rule, which is based on the doctrine of sovereign immunity, 518 F.2d at 1315, does not permit payment of interest on equitable grounds and applies even where the Government unreasonably has delayed payment. E.g., Grey v. Dukedom Bank, 216 F.2d 108, 110 (6th Cir. 1954); Muenich v. United States, 410 F. Supp. 944, 947 (N.D. Ind. 1976). Furthermore, it has been held that the character of interest cannot be changed by calling it damages, loss, earned increment, just compensation, discount, offset, penalty or any other term. Mescalero Apache, 518 F.2d at 1322. The interest prohibition has been applied frequently and consistently by this Office as well as the courts. E.g., 59 Comp. Gen. 380, 382 (1980).

In two major cases the Indian Claims Commission and the United States Court of Claims were in conflict about awards of interest to Indian claimants when the United States was a trustee for the Indian monies in question. In both instances the Court of Claims reversed Indian Claims Commission rulings that interest should be assessed. United States v. Gila River Pima-Maricopa Indian Community, 586 F.2d 209 (Ct. Cl. 1978) rev'g 33 Ind. Cl. Comm. 1 (1976); United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975) rev'g 31 Ind. Cl. Comm. 417 (1973).

The Court differentiated between interest that was required to be paid by statute and that assessed by the Commission where there was no statute. Thus, it sustained the award of interest on monies erroneously paid from "Indian Moneys, Proceeds of Labor" funds, as section 161(b) of title 25 of the United States Code requires interest to be paid on those funds; but reversed the award for interest on monies erroneously paid from IIM accounts, there not being any statute that required interest to be paid on those monies.

586 F.2d at 216-17; accord, American Indians Residing on Maricopa-AK Chin Reservation v. United States, 667 F.2d 980, 1003 (Ct. Cl. 1981).

This Office is not bound to follow precedents set by the United States Court of Claims; however, we do give them careful consideration and generally will follow those that are consistent with longstanding administrative interpretations of law.

In view of the longstanding practice of both the courts and this Office not to award interest unless it is clearly authorized by treaty, statute or contract, we will follow the rulings of the United States Claims Court. In this regard, we deem it crucial that the United States is not specifically required to pay interest on IIM accounts.

A question remains about how payment to Ms. Slockish should be made. The ISSDA suggests that he overdraft his account and request relief for this action under section 3527(c) of title 31 of the United States Code, the provision dealing with relief of accountable officers for improper payments. If relief were granted, the overdrafted accounts would be replenished from the lump-sum appropriation for "Operation of Indian Programs," the appropriation used for the accountable officer function covering Indian programs.

Initially, we would point out that since the refund to Ms. Slockish would not be an improper or incorrect payment, there would be no reason for Interior to request relief for the disbursing officer from liability for making the payment or for us to grant it. The payment can be made from appropriations currently available for the activity involved. We understand this would be the yearly appropriation for "Operation of Indian Programs." E.g., Pub. L. No. 98-473, 98 Stat. 1837, 1847. In this regard, we have held that where the United States is not obligated to pay a claim until a final determination of the Government's liability is made, the appropriation current when such final action is taken is the appropriation properly chargeable with payment. B-174762, Jan. 24, 1972; 38 Comp. Gen. 338, 340 (1958). This is how we handle both payments of tort claims, 38 Comp. Gen. 338, 340 (1958), and adjustments of accounts of accountable officers granted relief either for

physical losses of funds or illegal, improper or incorrect payments when no appropriation is specifically available for the charge. 31 U.S.C. § 3527(d)(1)(B). Although the payment to be made here is not technically a claim award, we think it sufficiently similar to warrant application of the same principle.

for Shelton J. Dorsey
Comptroller General
of the United States