ARMSTRONG

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Liability of Bureau of Indian Affairs for Interest on Individual Indian Monies

File: B-243029

Date: March 25, 1991

DIGEST

Because the law regarding the investment of Individual Indian Monies (IIM) does not require the payment of interest on IIM accounts, the Bureau of Indian Affairs (Bureau) is not liable to IIM account owners for loss of interest, even that resulting from the Bureau's failure to manage IIM investments properly. The Bureau and tribal representatives should seek legislative settlement of any such claims.

DECISION

The Acting Deputy Commissioner of Indian Affairs has requested an advance decision on the propriety of paying Individual Indian Monies (IIM) account owners interest income that would have accrued to their accounts but did not because of the Bureau's management of those accounts. In 1938, the Bureau, acting under authority of 25 U.S.C. § 162a (section 162a),1/ initiated its practice of investing IIM funds. Bureau management and accounting practices, however, may have resulted on occasion in IIM account owners losing interest income. Nevertheless, judicial precedent is unequivocal that because section 162a does not require the payment of interest on IIM accounts, the government is not liable to account owners for any loss of interest.

1/ Section 162a authorizes the Secretary of the Interior to deposit funds held in trust for the benefit of individual Indians, as well as tribal funds, in banks that will pay a reasonable rate of interest on the deposit, and, if he deems it to be in the best interest of the Indians, to invest such funds in any public-debt obligations of the United States and in bonds, notes or other obligations that are unconditionally guaranteed by the United States.

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BACKGROUND

In 1989, the Bureau, trustee of Indian funds held by the United States,2/ determined that it could manage the funds more efficiently and at less cost to the government by procuring certain financial services from the private sector. See B-236146, Mar. 13, 1990. The Congress has instructed the Bureau to reconcile all Indian accounts before transferring any funds to a private bank. Pub. L. No. 101-512, 104 Stat. 1915, 1929-30 (1990); Pub. L. No. 101-121, 103 Stat. 701, 714 (1989). See also B-236146, Mar. 20, 1990. Representatives of a number of Indian tribes have suggested that the Bureau, as part of the reconciliation effort, should calculate and identify on financial statements for each IIM account the interest that IIM account owners may have lost over the years as a result of the Bureau's management and accounting practices.

According to the Bureau's Office of Trust Funds Management, the Bureau, at the end of fiscal year 1990, maintained approximately 288,000 IIM accounts. Office of Trust Funds Management, "Investment of Indian Trust Funds, Fiscal Year 1990" 3. IIM accounts were originally intended for legally incompetent adults and minors without guardians. Department of Interior, Office of Inspector General Report No. 89-117, "Selected Aspects of Indian Trust Fund Activities, Bureau of Indian Affairs" 21 (Sept. 29, 1989). Today, the Bureau also maintains IIM accounts for adults receiving income from a trust resource, such as oil and gas royalties. (For example, the Minerals Management Service, after collecting oil and gas royalties, pays the Bureau, who deposits the amount in the appropriate IIM account.) Office of Trust Funds Management report at 4. The Inspector General has described the Bureau's IIM operation as a "large quasi-banking system." Inspector General report at 7.

According to Bureau officials, the Bureau, in 1938, decided that all IIM funds would be invested and directed its Agency Offices to do so in a manner consistent with section 162a. Since 1966, the Bureau's Branch of Investment in Albuquerque has pooled all IIM accounts for investment purposes. The Bureau allocates interest earned on the investment pool to individual accounts. See generally, Office of Trust Funds

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2/ The Secretary of the Interior, responsible for the management of Indian affairs (see 43 U.S.C. § 1457; 25 U.S.C. §§ 1a, 2), has delegated authority for management of Indian trust funds to the Assistant Secretary for Indian Affairs, who carries out this responsibility through the Bureau.

Management report, supra; Inspector General report, supra. Tribal representatives suggest that there are many instances where the Bureau has failed, either because of neglect or by decision, to invest some IIM funds, and has deprived account owners of the possibility of cumulative earnings on interest income by failing to record interest income properly or to credit an account owner with interest earned. For example, the Bureau has not calculated interest on oil and gas royalties since November 1985, although such funds are invested as part of the IIM pool of funds; the Bureau awaits the development and implementation of a system that will allow accurate calculation and distribution of such interest. Meanwhile, account owners lose the opportunity to invest this interest.

The Inspector General recently concluded that because of inaccurate financial records, poor accounting processes, and inadequate management and controls, the Bureau's investment decisions are not credible, and criticized the Bureau for failure to recognize investment losses, among other things. The Inspector General discussed one instance where the Bureau lost at least $3.9 million in IIM principal as a result of investing in financial institutions that failed. Inspector General report at 12. The Inspector General computed interest of $3.8 million that would have been earned on the unrecovered funds as of April 30, 1989. Id. The Inspector General mentioned other instances of losses of funds and unearned interest income as well. He pointed out that "sometimes the Bureau was responsible for the losses . . ., and other times the losses were beyond the Bureau's control." Id. at 14. The Inspector General noted that in situations such as this, the Department's Solicitor has determined that the Bureau is not liable for lost interest; the Inspector General, citing the Bureau's fiduciary responsibility, concluded that "decisions must be made regarding the Bureau's liability." Id.

Arthur Andersen and Company, in its May 1990 report of its audit of Indian trust funds, noted instances of misposting of receipts and untimely interest distributions, and found, also, that the Bureau has not identified the ultimate account owners of some IIM balances. Arthur Andersen & Co., "Tribal and Individual Indian Monies Trust Funds; Financial Statements as of September 30, 1989 and 1988" 8, 15 (May 11, 1990).

Neither the Bureau, tribal representatives nor IIM account owners are in a position at this time to calculate with any degree of certainty estimated loss of interest, or even to identify, for example, those accounts or parts of accounts that were not invested, over what period of time the Bureau may have failed to invest particular IIM funds, or when interest income may not have been posted properly. Nevertheless, in response to the tribes' queries, the Bureau

has agreed to instruct the accountants undertaking the reconciliation to calculate possible lost interest, see the Bureau's Request for Proposals, part I, para. 8, Dec. 20, 1990; the success of this effort will depend, of course, on the existence and availability of account records and other historical evidence.

The Bureau's Acting Deputy Commissioner, in the meantime, asks whether the Bureau, as a general matter, is liable to IIM account owners for lost interest, and, if so, how the Bureau should properly record such liability. He notes that in a 1986 decision, we concluded that the United States is not liable for interest on IIM accounts. 65 Comp. Gen. 533, 540 (1986).

DISCUSSION

Liability for Loss of Interest

Federal courts have long held that the United States is not liable for interest unless it has consented to the payment of interest. In a 1986 decision, the Supreme Court explained the derivation of the rule. Library of Congress v. Shaw, 478 U.S. 310, 314-17 (1986). English common-law courts viewed interest as a penalty separate from damages on the substantive claim, and thus created a separate cause of action for the recovery of interest. Because under United States law, the federal government, as sovereign, is immune from suit in the absence of its consent, American courts, adopting the English common law view concerning the recovery of interest, concluded that a claimant against the government cannot recover interest unless the government has waived its immunity from suit in this regard. Id. "[A]bsent a statute expressly providing for the payment of interest, separate from a general waiver of immunity to suit, the United States is immune from an award of interest as damages." White Mountain Apache Tribe of Arizona v. United States, 20 Cl. Ct. 371, 379 (1990). Courts construe waivers of sovereign immunity strictly in favor of the United States:

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit the recovery of interest suffice where the intent is not translated into affirmative statutory . . . terms."

United States v. New York Rayon Importing Co., 329 U.S. 654, 659 (1947).

Judicial precedent is unrelenting in its application of this rule to IIM funds. Courts have consistently held that section 162a does not constitute a waiver of sovereign

immunity because, quite simply, it does not require the payment of interest. See, e.g., Rogers v. United States, 877 F.2d 1550, 1556 (Fed. Cir. 1989) ("There is no contract, treaty or Act of Congress . . . that expressly, or even by implication, provides for the payment of interest. . . ."); United States v. Gila River Pima - Maricopa Indian Community, 586 F.2d 209, 216 (Ct. Cl. 1978) ("no statute exists requiring interest to be paid on 'Individual Indian Money' (IIM) accounts. . . ."); White Mountain Apache Tribe of Arizona, 20 Cl. Ct. at 384 ("The statute does not expressly mandate . . . payment of interest . . .").

With regard to IIM accounts, section 162a states:

> "the Secretary is . . . authorized . . . to deposit in banks . . . the funds held in trust for the benefit of individual Indians: Provided, that no individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate . . .: Provided further, that the Secretary . . ., if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any . . . individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed . . . by the United States." (Emphasis added.)

Compare with 25 U.S.C. § 161a, as originally enacted, which constituted a waiver of immunity with regard to tribal funds: "All funds . . . held in trust by the United States . . . to the credit of Indian tribes . . . shall bear interest at the rate of 4 per centum per annum." (Emphasis added.)3/ See, e.g., Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States, 512 F.2d 1390 (Ct. Cl. 1975); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238, 1243-48 (N.D. Ca. 1973).

In White Mountain Apache Tribe of Arizona, the Claims Court examined judicial precedent and found no way around the rule against payment of interest. Ten years earlier, the court noted, the Court of Claims had suggested that the Bureau's obligation under section 162a, if any, to invest IIM funds in a productive manner had not been addressed fully, and thus deserved further consideration. Navajo Tribe of Indians v.

3/ Section 161a was revised in 1984 to require the Secretary of the Treasury, at the request of the Secretary of the Interior, to invest tribal funds in public debt securities bearing interest at rates determined by the Treasury Secretary.

United States, 624 F.2d 981, 994-95 (Ct. Cl. 1980). After reviewing decisions following Navajo Tribe, the court in White Mountain Apache Tribe concluded that while section 162a does not direct the payment of interest, it does "waive the government's immunity to suit." White Mountain Apache Tribe of Arizona at 382-83, citing Mitchell v. United States, 664 F.2d 265, 274 (Ct. Cl. 1981). The court said that section 162a "establishes and circumscribes the Secretary of the Interior's authority to invest funds," and that "[e]xercise of that authority within the parameters established by [section 162a] calls for the production of money;" nevertheless, the court found, the case law interpreting section 162a "fails to come to grips with the impediment to recovery," i.e., that "[t]he statute does not expressly mandate [the] payment of interest." White Mountain Apache Tribe of Arizona at 384. The court concluded, "[g]iven the substantial jurisprudence from the Supreme Court and the Court of Claims insisting that the proponent of interest as damages demonstrate the sovereign's express waiver of immunity . . ., . . . [section 162a] cannot be construed as an express waiver." Id. Regardless of whatever duty might be imposed by section 162a on the Bureau, interest, as lost investment yield, is the measure of any breach of that duty, and the case law is unequivocal that a "waiver of immunity to pay interest must be separate from the waiver of immunity enabling a suit for damages." Id.

We addressed this issue in our decision at 65 Comp. Gen. 533. In that case, the Bureau had improperly withdrawn funds from the IIM account of Ms. Linda Slockish. Ms. Slockish asked that the Bureau, in addition to refunding the amount withdrawn, pay her interest that would have accrued from the date of withdrawal to the date of refund had the monies remained in her account and been invested. Although we concluded that the Bureau, in withdrawing the money from the account, had breached its trust responsibilities to Ms. Slockish, we held, nonetheless, that the Bureau did not owe her interest. Id. at 539. We stated:

> "In view of the longstanding practice of both the courts and this Office not to award interest unless it is clearly authorized by treaty, statutes or contracts, 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."

Id. at 540. We noted that it makes no difference whether interest is characterized as "damages, loss, earned increment, just compensation, discount, offset, penalty or any other term." Id. at 539-40.

After a thorough and considered analysis of section 162a and case law interpreting it, we find no basis upon which to modify our 1986 conclusion. Federal courts have made clear that the failure of Indians' claims for interest on IIM funds lies in the wording of section 162a, i.e., section 162a does not require the payment of interest. As the Court of Claims explained in a 1975 decision, an award of interest against the government cannot be made, "[n]o matter how high the purpose or how benevolent the motive, . . . unless the requirements of the no-interest rule have been met." United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1323 (Ct. Cl. 1975). Thus, in the absence of a judicial remedy, the Bureau and tribal representatives should seek legislative settlement of any claims arising from the reconciliation effort. The statutory impediment can be redressed only by the Congress through the legislative process.

Recording Interest Liability

The Bureau should not record as an obligation of the United States any interest liability until the Congress has agreed to accept such liability. We have no objection however, to the Bureau requiring the accountants undertaking the reconciliation to calculate possible lost interest and to identify it, for informational purposes, on the financial statements they prepare to report their findings to the Bureau and the account owners.

Milton J. Socolar

Acting Comptroller General
of the United States