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Indian Monies and Welfare Eligibility

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resolution, and take far fewer resources than litigation. A complaint can also be the vehicle for a political effort to ensure parent involvement in a given migrant education program or project.

Although problems will vary from state to state and LEA to LEA, and only migrant parents and their representatives can determine the greatest need and the best strategies for a particular locale, we offer this as a suggested general strategy: The first complaints filed should concern state PACs. Hopefully, with a *comparatively* small amount of effort we can soon obtain vigorous and effective state PACs in each state which can affect the migrant education program throughout the entire state.

The next effort should be complaints directed at achieving knowledgeable and aggressive PACs in key local school districts.

The third stage of complaints should involve the more difficult issues of program content: What is taught, who teaches, how are subjects taught, what supportive services are necessary to ensure learning, and so on.

Migrant advocates, especially legal services workers, should view MLAP as a clearinghouse for this parent involvement strategy. Our collective experience with these complaints will enable MLAP to push OE to establish a responsive complaint resolution procedure and to resolve individual complaints to our clients' satisfaction. We must utilize the complaint system on a wide level and push it to evaluate its potential. Only then will we bring about the kind of parent participation we need to improve the education of migrant children.

INDIAN LAW SUPPORT CENTER

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Indian Monies and Welfare Eligibility

Introduction

The receipt by Indians — who are receiving federal or state welfare assistance — of claims judgment monies, lease or royalty payments from trust lands, and damage awards in actions brought by the United States on their behalf raises important issues for legal services attorneys.

Types of Welfare

1. Aid to Families with Dependent Children. The Federal Public Assistance Act, 42 U.S.C. §§301 *et seq.*, authorizes federal financial aid to states that submit a plan conforming to the requirements of the Act and that receive approval of their plans by federal authorities. Federal financial assistance to a state electing to participate in the AFDC program is conditioned on the state's adherence to the recipient eligibility standards set forth in the Act and regulations. The penalty imposed on a state for failure to adhere to the federal criteria is the withdrawal of federal assistance.[1]

The right of American Indians to receive state welfare benefits has been settled only recently,[2] but the establishment of this right has raised another problem: May the state include Indian monies as "countable income or resources" in the determination of the amount of the AFDC grant an Indian recipient shall receive?

2. Supplemental Security Income (SSI). Aged, disabled and blind Indians may also qualify for federal welfare and state supplemental assistance, if any, under the relatively new SSI program. Pub. L. No. 92-603, 42 U.S.C. §§1381 *et seq.*

3. County Poor Relief. County poor relief or medical assistance may be available to Indians who do not fit within the "categories of assistance" set forth by SSI and AFDC. State- or county-administered poor relief must be consistent with constitutional standards.[3] However, there appears to be no reason why the county must exempt any form of Indian monies or resources in considering an Indian's eligibility for such aid. Such assistance is not governed by the Social Security Act, and the state has wide discretion to set standards that are not discriminatory and are rationally related to its goals.[4]

Indian Monies

The term "Indian monies" embraces income to Indians from several sources.[5] It includes, among other items, per

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1. The legal effect of a state's participation in the federal program with respect to so-called "need related standards" is clear, i.e., states are bound by the federal criteria with respect to the definition of income and its inclusion in the computation of AFDC grants due to the supremacy clause of the Constitution. *See* Lewis v. Martin, 397 U.S. 552 (1970); Tiry v. Smith, 392 U.S. 309 (1968). However, the states have much more flexibility under federal law in devising and implementing "non-need related standards" as the means of decreasing their welfare recipient rolls. New York State Department of Social Welfare v. Dublino, 412 U.S. 405 (1973).
2. *Acosta v. San Diego County*, 126 Cal. App.2d 455, 272 P.2d 92 (1954), held that since Indians living on a reservation in California are citizens of the state, the county is required by the privileges and immunities clause of the fourteenth amendment to include them in its welfare program.

   F. S. Cohen agrees that all Indians, as citizens, are entitled to both state and federal welfare benefits under the fourteenth and fifth amendments. F. S. COHEN, FEDERAL INDIAN LAW, p. 244 (N.M. reprint 1971).
3. In *Hawk v. Fenner*, 396 F. Supp. 1 (D. S.D. 1975), the court held that the state may not apply a durational residency test to an Indian who was otherwise qualified for such assistance.
4. *See generally Welfare Laws*, 79 Am.Jur.2d §§49-74 (1975). Additionally, states and counties may argue that they are "jurisdictionally disabled" to assist Indians (and presumably non-Indians) who are residents of Indian reservations within the state and county. White v. Califano, 581 F.2d 697 (8th Cir. 1978).
5. Whiskers v. United States, No. 77-1620 (10th Cir., June 14, 1979). The court, in rejecting the Indian plaintiffs' claim that

capita distributions of judgment monies awarded by the Indian Claims Commission, proceeds from the sale of trust lands and other assets, lease payments from trust lands, and damage awards in actions brought by the United States on behalf of its wards against third parties. All these monies typically are held by the United States as trustee for its Indian beneficiaries in identified, individual accounts. 25 C.F.R. §§104 *et seq.*

The regulations defining the duties of the Secretary of the Interior in the management and disbursement of these accounts treat adult Indians differently from minor Indians. Adult Indians, regardless of their status as restricted Indians, may withdraw funds from their accounts upon proper demand. 25 C.F.R. §104.3. A minor's funds, however, can be disbursed only in such amounts deemed necessary for the minor's support, health, education or welfare under a plan approved by the Secretary. Such a request for a release of funds may be made by the minor's legal guardian or the person having a right to control and custody of the minor.

There is no general statutory exemption of Individual Indian Monies (IIM) from inclusion as income in determining the grant amount an Indian is to receive under AFDC or SSI. Indeed, the general law is to the contrary. 42 U.S.C. §602(a)(8) (Supp. 1979) provides that "the state agency *shall* take into consideration any other income and resources of any child or relative claiming aid to families with dependent children in determining the need of the child or relative claiming such aid." (Emphasis added.) This rule of general income inclusion, subject to specific exceptions, governs SSI as well. Consequently, Indian recipients must argue for either an express or implied exception of Indian monies that they receive from inclusion as income or resources in the welfare agency's determination of their eligibility for assistance.

The Governing Rules

Generally, under both the SSI and AFDC programs, all monies and resources of the recipient are to be considered unless expressly exempted from such consideration by statute. *See* 42 U.S.C. §1382(a), 20 C.F.R. Part 416, subparts K and L (SSI); and 42 U.S.C. §602, 45 C.F.R. 233.20 (AFDC).

Specific exemptions in favor of Indians do exist, however:

(1) Claims Judgment Funds. 25 U.S.C. §1407 exempts congressional awards of funds to Indians in satisfaction of judgments of the Indian Claims Commission or the Court of Claims from consideration as income or resources when welfare agencies determine the extent of eligibility or assistance under the Social Security Act.[6]

(2) Submarginal Land Act, 25 U.S.C. §459e. This Act exempts all property, and the receipts therefrom, conveyed pursuant to §459e to tribes from being considered as income; 45 C.F.R. 233.20(a)(4)(m) (1979). This is true even if the tribal members receive a distribution of per capita shares of the receipts.

(3) Educational Grants. Any grant or loan administered by the Commission of Education to any undergraduate student for educational purposes is *totally exempt* for purposes of determining eligibility for AFDC, 45 C.F.R. §233.20(a)(d) (1979). However, loans or grants from the Bureau of Indian Affairs, as well as loans or scholarships from any other sources, are only *partially exempt* to the extent that their conditions of use preclude their application to current living expenses. 45 C.F.R. §233.20(a)(3) (1979).[7]

(4) Other IIM Monies. IIM monies are subject to the administration of the Secretary of the Interior. Sharp limitations are placed on these monies so entrusted to his care. He may not make gifts or donations on behalf of an Indian from an Indian's funds. He may not create private trusts and transfer an Indian's money to that trust. He is authorized to pay only necessary medical and funeral expenses and other expenses where specific authority has been granted by the Congress. Generally, debts may not be paid by the Secretary out of an Indian's funds.[8]

Consequently, if IIM monies were considered simply as a species of federal benefits such as Social Security benefits, unemployment compensation or Veterans Administration benefits, all of which do, or may, constitute income and available resources for the purpose of computing the amount of a grant under the states' AFDC programs, then Indian monies could be treated as income or resources. 45 C.F.R. §233.20(4)(i) (1979).[9]

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the United States breached its trust obligations under the Southern Paiute Judgment Distribution Act (82 Stat. 147), discussed whether funds appropriated by Congress to pay the land claims settlement constituted "Indian monies" under 31 U.S.C. §725S(a),(20) (1976). It found that they did not.

6. The Oregon Court of Appeals accepted the Indian plaintiffs' argument in *Burke v. Adult Family Services Division*, 590 P.2d 250 (1979), that 25 U.S.C. §1407 impliedly exempted per capita shares of the Umatilla Reservation Tribal Judgment Fund even though that judgment fund had been established prior to the effective date of the Act, October 19, 1973. The court viewed section 1407 as having the substantive purpose of exempting the class of monies donated as "judgment funds" regardless of when the judgment fund was established by Congress or whether the distribution plan governing the disbursement of those funds was developed pursuant to the Act or not.

   Unfortunately, judgment funds distributed per capita to terminated Indians are not exempt. 20 C.F.R. §416.1146(c). This provision may affect the Klamath Indians' receipt of judgment funds in light of the imminent per capita distribution of those funds pursuant to enabling legislation enacted prior to October 19, 1973.

7. Constitutional challenges to the classification of OE-administered grants and loans as totally exempt as distinct from other governmental loans and grants have been rejected.

8. *See* F. S. COHEN, FEDERAL INDIAN LAW, p. 201 (N.M. reprint 1971); *See also* 25 C.F.R. §11.26 (Payment of Judgments from Individual Indian Monies) (the Secretary has discretion to pay money judgment awards entered against an Indian by the Court of Indian Offenses from an Indian's IIM account).

9. SSI obviously regards Indian recipients' per capita payments (that are not specifically exempted) from trust resources countable either as income or resources, depending on the treatment that is appropriate. Randall v. Califano, No. 77-0626-WWS (Memorandum Order, Feb. 9, 1978). Whether this is a questionable practice is examined below.

   Unfortunately, IIM funds are regarded by the Bureau of Indian Affairs (BIA) as "countable resources" for the purpose of determining eligibility under General Assistance (GA) guidelines. The BIA regards the GA program as supplementary to state welfare programs; that is, an Indian must seek state welfare assistance and be denied prior to being considered by BIA-GA. Further, receipt of state AFDC assistance disqualifies Indians for BIA-GA even if the BIA payments exceed state AFDC payments because of a state's election of a "percentage of

However, absent specific congressional authority, it is debatable whether a state welfare agency can force an Indian to "utilize" his or his children's monies for current living expenses. *See Chase v. McMasters*, 573 F.2d 1011 (8th Cir. 1978), *cert. denied*, 493 U.S. 965 (1979). There appears to be no explicit statutory authorization, or an administrative mechanism, for a state to force an Indian to "utilize" those monies. It would seem that these funds are just not available and for that reason could not be considered by the AFDC authorities. *Greene v. Barnes*, 485 F.2d 242 (10th Cir. 1973), *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974).

(5) Alaskan Native Claims Settlement Act (ANCSA), 43 U.S.C. §§1601-1626 (Supp. 1979). Funds received by native enrollees under the Act may not be deemed to be a substitute "for any governmental programs otherwise available" to them as citizens of the United States and Alaska. Section 1626 also specifies that any compensation, revenue, remuneration or other benefit received by a member of the household shall be disregarded when determining eligibility for the Food Stamp Program, 7 U.S.C. §§2014 *et seq.*

(6) Exclusion of Indian Lands. 20 C.F.R. §416.1234 excludes, for purposes of SSI, Indian lands from the determination of resources of an individual (and spouse, if any) who is of Indian descent from a federally recognized tribe. This exclusion includes such restricted, allotted lands as the person holds if he cannot sell, transfer or otherwise dispose of such lands without the permission of other individuals, his tribe or an agency of the federal government.

There appears to be no comparable exclusion for Indians' lands under the AFDC regulations. However, a state's effort to require an Indian to sell his trust land and "utilize" the proceeds therefrom for the maintenance of his minor children who are otherwise eligible for AFDC would likely violate the Indian's federal right to have his land maintained in trust. *Chase v. McMasters*, 573 F.2d 1011 (8th Cir. 1978), *cert. denied*, 493 U.S. 965 (1979).

Implied Exemptions

Assuming that the Indian recipient of welfare also receives Indian monies that are nonexempt, the welfare authorities may seek to recover the amount of the overpayment, if any, that occurred.[10]

Generally speaking, there can be no implied exemption of welfare recipient's income or resources. 3 SUTHERLAND STATUTORY CONSTRUCTION 71.08. However, courts have recognized implied exemptions in the tax area in favor of Indian trust property. *Squire v. Capoeman*, 351 U.S. 1 (1956). As the basis for such an implied exemption argument in favor of Indians in the welfare area, 25 U.S.C. §410 provides that:

> 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, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior. June 21, 1906, c.3504, 34 Stat. 327. (Emphasis added.)

This section seems to preclude, *prima facie*, a claim against an Indian welfare recipient that seeks to recover an overpayment against monies from trust lands. In interpreting this section, one court held that it barred a real estate broker from recovering against an Indian's rental profits from leased trust lands without the Secretary of the Interior's approval. *In re Guardianship of Prieto's Estate*, 52 Cal. Rptr. 80 (1966).

But further argument is needed to make this argument effective against recovery by SSI and the state from trust monies. First, it appears that as a matter of due process, it is necessary even for the Social Security Administration to obtain the Interior Secretary's review and consent before asserting any claim *against* the Indian's monies that originated from a trust source. This obligation is similar to that imposed on the Federal Power Commission to determine that the granting of a federal water power license on an Indian reservation will not interfere, or be inconsistent with, the purpose for which the reservation was created. *LacCourte Oreilles Band of Indians v. Federal Power Commission*, 510 F.2d 198 (D. D.C. 1975). In *LacCourte Oreilles Band of Indians* the Tribe sought review of an order of the FPC issuing an interim license to the original licensee of a project on the reservation despite the Tribe's refusal to consent to the use of its land for the project. The Tribe argued that a federal treaty prevented such use and that the grant of the license necessarily interfered with the reservation's purposes. While the court upheld the FPC's power to issue an interim license under section 15 of the Federal Water Power Act, 16 U.S.C. §1808(b), it also said that the Act conditioned the FPC's authority to grant such a license initially on its ability to find "that the license will not interfere with or be inconsistent with the purposes of the reservation." 510 F.2d at 211. The court emphasized that the Tribe's right under statute and relevant treaties must be assessed in order to comply with section 4(e) of the Act. 510 F.2d at 212.

The Social Security Administration in its regulations acknowledges its duty to exclude payments or other benefits provided under a federal statute (other than Title XVI of the Social Security Act) where exclusion is required by such statute. 20 C.F.R. §416.1218. The argument here is that due process requires the Social Security Administration to make findings regarding the effect of 25 U.S.C. §410 on any overpayment claims arising due to an Indian's receipts of lease monies from trust lands. Further, if the funds involved are within the protection of 25 U.S.C. §410, then SSA must procure the approval and consent of the Secretary of the Interior before proceeding with the claim.

Secondly, it could be argued that the Secretary of the

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need" plan (*i.e.*, an award of 90 percent of established need rather than 100 percent of established need).

10. The fact of overpayment gives rise to a claim in favor of the United States or the state involved. If the overpayment cannot be recovered by adjustment during the recipient's life, it can be presented in the appropriate proceedings as a claim against the estate of the deceased recipient. 20 C.F.R. §416.537 and 20 C.F.R. 416.570. But a state may not recover on a claim against an Indian's estate based on welfare assistance extended during the decedent's life. Running Horse v. Udall, 211 F. Supp. 586 (D. D.C. 1962); 43 C.F.R. §4.250(g).

    AFDC regulations allow for the recoupment of overpayments, primarily based on fraud or misrepresentation, against the recipient's available income and resources (including disregarded or set aside or reserved items) 45 C.F.R. §233.20(f).

Interior is without authority to allow these claims because it would interfere with his obligation to deliver the trust allotment (if that is the source of the income) free and clear of encumbrance. 25 U.S.C. §348. *See United States v. Rickert*, 188 U.S. 432 (1903), and *Running Horse v. Udall*, 211 F. Supp. 586 (D. D.C. 1962).

However, can SSI and the state merely *base* the fact of overpayment on the receipt of Indian monies from an enduring trust source? This case arises when the claimed overpayment would be recovered by the welfare authorities by way of adjustment during the recipient's life. *See* 25 C.F.R. §§416.537 and 416.570. The welfare authority would argue that although the overpayment may be based on the receipt of the Indian monies, no claim is being made *against* those monies. The overpayment would be recouped against the recipient's future welfare payments. In *Swasey v. Shalen*, 526 F.2d 831 (1st Cir. 1977), the court allowed the state to recoup AFDC overpayments to recipients by reducing the recipient's earned-income disregard by 50 percent. The court reasoned that this practice was not precluded by congressional policy or otherwise:

> But recoupment generally requires no authorization. One might hesitate to identify the state's right as recoupment rather than equitable setoff, but there is no ground for denying the existence of the power as a starting point for the occasions on which there is a right to exercise it. The state in any other context could as a matter of course withhold payment until the debt owed to it was paid. 526 F.2d at 836.

Consequently, the fiscal concerns which allow the state to claim part of the federally disregarded earned income as a recoupment of an overpayment may allow the state to "offset" or adjust the Indian welfare recipient's AFDC payments based on his contemporaneous receipt of Indian monies derived from trust land.[11]

Conclusion

Conflict between the rights that an Indian has due to his Indian status and the rights that he has as a citizen are unavoidable. Indian lawyers must seek to reconcile those benefits and burdens — as well as they can.

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11. The Court of Claims decision in *Critzer v. United States*, No. 134-75 (Ct. Cl., Apr. 18, 1979), an Indian tax case, also suggests that a court, if presented with this issue, would not find a direct conflict with 25 U.S.C. §410 if the state sought to adjust the overpayment by way of a setoff.

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Recent Legislative Activity

As the 96th Congress moves into its last few months of activity, the Access to Justice Project is pleased to report several recent legislative successes in guaranteeing the access of legal services clients to the federal courts. Of course, a great deal more remains to be done.

Civil Rights of the Institutionalized

On May 6, 1980, the Senate approved final passage of the conference report to H.R.10, the Civil Rights of the Institutionalized bill, by a vote of 56-37. The House approved the report by a voice vote on May 12. This bill, which gives the United States Attorney General standing to assert the federal rights of persons in state institutions, stands as one of the few civil rights initiatives of this Congress.

Although both Houses of Congress had previously passed somewhat differing versions of the bill, the Senate's final approval was far from certain. Calling it "one of the most dangerous bills that has come before Congress in the 26 years I have been a member," Senator Thurmond (R-SC) joined Senators Danforth (R-MO), Boren (D-OK) and Exon (D-NE) in a week-long filibuster reminiscent of the civil rights battles of the 1960s. It took the bill's proponents, led by Senators Bayh (D-IN) and Hatch (R-UT), four attempts before they were able to obtain the support of the 60 senators necessary to achieve cloture and cut off debate by the very tight vote of 60-34. *(See Late-breaking news* under the Mental Health Law Project's column in this issue.)

Social Security Judicial Review

The House-Senate Conference Committee considering H.R.3236, the Social Security Disability Amendments, rejected an attempt by the Senate to change the standard for judicial review in Social Security cases from "substantial evidence" to "arbitrary and capricious." The current section 405(g) standard was left intact.

The Social Security Administration had urged that factual review of Social Security decisions be eliminated in response to the federal court reversal-remand rate in favor of claimants of approximately 50 percent. Senator Long (D-LA), Chairman of the Finance Committee which had jurisdiction over the legislation, actively supported the Social Security Administration's position. He used the rather curious argument that review should be limited to legal questions because overly sympathetic juries were too freely second-guessing the factual determinations of administrative law judges. In reality, review is limited to the record and there are no trials of any sort. However, based on considerable pressure from the Chairman, the Committee and subsequently the Senate, adopted the "arbitrary and capricious" language which was proposed as a compromise by Senator Ribicoff (D-CT).

In Conference, the House conferees, led by Rep. Pickle (D-TX), stood firmly by their chamber's position that the standard not be changed. After it became clear that the Senate Conferees were split on the issue, the Senate yielded to the House version.