



INTERIOR BOARD OF INDIAN APPEALS

Thomas E. Edwards v. Portland Area Director, Bureau of Indian Affairs

34 IBIA 215 (01/25/2000)

Related Board case:
36 IBIA 235



United States Department of the Interior

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

THOMAS E. EDWARDS

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 99-7-A

Decided January 25, 2000

Appeal from a decision concerning irrigation operation and maintenance charges.

Dismissed in part; vacated and remanded.

1. Indians: Water and Power Resources: Irrigation Projects--Indians:
Water and Power Resources: Operation and Maintenance

When the Bureau of Indian Affairs alters a longstanding practice and, for the first time, sends bills for irrigation operation and maintenance charges to the Indian owners of unleased trust lands, it must explain the bills and the procedures concerning them, and advise the landowners of any opportunities available to them for postponing payment of the charges without incurring penalties.

APPEARANCES: Thomas E. Edwards, pro se; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Thomas E. Edwards seeks review of a July 7, 1998, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the assessment of irrigation operation and maintenance charges (O&M charges) against Yakama Allotment 2850. For the reasons discussed below, the Board dismisses this appeal in part, vacates the Area Director's decision, and remands this matter to him for further action.

Background

Appellant is the owner of an undivided 1/7 interest in Allotment 2850, an 80-acre allotment located on the Yakama Reservation and within the Wapato Irrigation Project (the Project). The allotment is considered to be irrigable but is not currently under lease.

O&M charges are assessed under authority of 25 U.S.C. § 385 1/ and 25 C.F.R. Part 171. 25 C.F.R. § 171.19(a) provides:

Operation and maintenance assessments will be levied against the acreage within each allotment, farm unit or tribal unit that is designated as assessable and to which irrigation water can be delivered by the project operators from the constructed works whether water is requested or not, unless specified otherwise in this section.

* * * * *

(2) Wapato Irrigation Project-Toppenish-Simcoe Unit, Washington.

Operation and maintenance assessments will be levied against all lands which can be irrigated from the constructed works for which application for water is made annually and approved by the Project Engineer.

The Project is composed of three units)) the Ahtanum Unit, the Toppenish-Simcoe Unit, and the Wapato-Satus Unit. From documents in the record, it appears that Allotment 2850 is located within the Wapato-Satus Unit and thus is subject to the general provisions of subsec. 171.19(a), under which assessments are made regardless of whether or not water is requested.

Prior to 1998, the Project did not bill the Indian owners of unleased, so-called "idle," trust lands for O&M charges. In a 1997 General Accounting Office (GAO) report, 2/ BIA's then-current practice was described thus: "BIA prepares assessment bills for the idle trust

1/ 25 U.S.C. § 385 provides:

"For lands irrigable under any irrigation system or reclamation project the Secretary of the Interior may fix maintenance charges which shall be paid as he may direct, such payments to be available for use in maintaining the project or system for which collected: Provided further, That all moneys expended under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe: Provided further, That the Secretary of the Interior is authorized and directed to apportion the cost of any irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe."

2/ "BIA's Management of the Wapato Irrigation Project," No. B-276157, GAO/RCED-97-124, May 28, 1997 (GAO Report).

land but does not mail them to the Indian landowners. Past due assessments become a lien against the Indian trust land, and their collection is deferred until the land is sold." GAO Report at 7.

Two years before GAO issued its report, the Department's Inspector General (IG) issued a report on the Project. ^{3/} Among other things, the IG found that BIA's practice concerning idle trust lands was in conflict with the Department's debt collection procedures, which "require that debts owed to the Bureau be promptly billed and recorded to ensure that these amounts remain legally enforceable debts due the Project." IG Report at 8. The IG recommended to the Assistant Secretary - Indian Affairs that the Project be required to bill "all owners or water users of project lands [for] annual operation and maintenance charges" and that it also be required "to enforce debt collection procedures." IG Report at 12. In a September 25, 1995, memorandum commenting on the draft report, the Assistant Secretary agreed with the IG's recommendations and described BIA's plans for implementing them.

In March 1998, for the first time, the Project sent bills to Indian owners of idle lands. Appellant and five of his six co-owners were each billed in the amount of \$503.57. The seventh co-owner, Ethel Morrow, was billed in the amount of \$581.93. ^{4/} Appellant appealed his bill to the Superintendent, Yakama Agency, BIA. Two of his co-owners, Simon P. Edwards, Jr., and Frank Edgar Edwards, also appealed their bills to the Superintendent. ^{5/}

The Superintendent issued a decision on May 5, 1998. He stated:

The Congress, up until 1984, provided annual supplemental appropriations for unleased trust lands within the Project. [^{6/}] Subsequently, since

^{3/} "Final Audit Report on the Wapato Irrigation Project, Bureau of Indian Affairs (No. 95-I-1402)," Sept. 29, 1995 (IG Report).

^{4/} Morrow's bill included penalties, interest, and fees. No explanation concerning the origin of these additional charges is given in the bill.

^{5/} The record includes a copy of a notice of appeal to the Superintendent signed by these two co-owners, but no copy of a notice of appeal signed by Appellant. Even so, it is clear from other documents in the record that Appellant filed a notice of appeal with the Superintendent.

It does not appear that the two co-owners pursued their appeal beyond the Superintendent.

^{6/} Concerning these appropriations, the GAO Report states:

"[T]hrough 1984, the project received annual appropriations from the Congress to cover the uncollected assessments. Since fiscal year 1984, when the Congress authorized the establishment of an interest-bearing account for collections, the project has earned \$3.6 million in

1985, you and the other land owners of Allotment No. 2850, are responsible for the annual irrigation assessments of Allotment No. 2850. * * * A recent [IG] audit faulted [the Project] for not billing the allottees of unleased lands. [BIA] up until this year, lacked the capability of sending billings to fractionated interest trust landowners. The 1998 billing is the first sent to fractionated interest trust landowners within the Project. [BIA] prepared a debt write-off proposal which, if approved, would result in the write-off of 1997 and prior idle trust land debt within the Project.

Absent special legislation from Congress, to exempt Indian lands from irrigation assessments, or restoration of annual appropriations for unleased trust lands, [BIA] is, by regulation, required to bill assessable lands within its irrigation projects.

Superintendent's Decision at 1-2.

Appellant appealed this decision to the Area Director. On July 7, 1998, the Area Director affirmed the Superintendent's decision and informed Appellant that he had the right to appeal to the Board. Appellant did so. Appellant and the Area Director filed briefs.

Discussion and Conclusions

Appellant's notice of appeal identifies only himself as an appellant. However, in the text of the notice, he indicates that he intended his appeal to be "a class action appeal on behalf of all unemancipated enrolled Indian land owners of unleased trust lands including the Edwards' clan of enrolled Colvilles (Thomas E. Edwards, Dolly A. Edwards, Simon P. Edwards, Frank Edgar Edwards, Ethel M. Hunt, and Jewell Martin)." Notice of Appeal at 1. Nothing in the notice of appeal shows that any of the named individuals, or anyone else, has authorized Appellant to represent them in this proceeding. Therefore, the Board considers Appellant to be the sole appellant here.

fn. 6 (continued)

interest from its operation and maintenance collections to partially offset the uncollected assessments. However, neither the appropriations nor the interest earnings canceled the past due assessments."

GAO Report at 7.

Most of Appellant's arguments are directed to the decision to send bills to the owners of unleased allotments, including Allotment 2850. Appellant alleges, inter alia, that the decision constitutes a breach of the trust responsibility.

The Area Director contends that the Board lacks jurisdiction over this entire appeal because the decision to bill the landowners was made by the Assistant Secretary - Indian Affairs. The Board agrees in part with the Area Director, finding that it lacks jurisdiction over some, although not all, of the issues raised in this appeal.

It is clear that the decision to bill the Indian owners of unleased trust land was a decision made in 1995 by the then Assistant Secretary. The Board lacks authority to review decisions made by the Assistant Secretary, except where they are specially referred to the Board by the Secretary or the Assistant Secretary or where a right of review is established by regulation. E.g., Kawerak, Inc. v. Assistant Secretary - Indian Affairs, 28 IBIA 66 (1995), and cases cited therein. No such referral or regulation applies in this case.

The Board lacks jurisdiction over this appeal to the extent that it challenges the Assistant Secretary's decision to send bills for O&M charges to the Indian owners of unleased trust lands. As discussed below, however, some of Appellant's arguments challenge the manner in which BIA implemented the Assistant Secretary's decision. Most of those arguments are subject to the Board's review authority.

In addition to challenging his O&M bill, Appellant raises a number of other issues which are not directly related to his bill. For instance, he attempts to challenge BIA's former practice concerning O&M charges, under which BIA did not bill the landowners but allowed the charges to become liens on the land. In addition, he alleges that BIA failed to act on a 1995 request for a supervised sale of Allotment 2850; that BIA failed to act on a request to issue an Indian Reorganization Act charter to the Edwards Clan; that BIA failed to properly credit lease payments for Allotment 2850 between 1984 and 1989; and that BIA has mismanaged Allotment 2850.

The Board does not have general supervisory authority over BIA. Rather, it has authority to review BIA actions only with respect to specific decisions made or specific actions taken. See 25 C.F.R. Part 2, 43 C.F.R. Part 4, Subpart D. ^{7/} The action giving rise to this appeal

^{7/} In certain narrowly defined circumstances, the Board may hear appeals from the inaction of a BIA official. See 25 C.F.R. § 2.8.

was BIA's billing of Appellant for O&M charges. Only issues related to Appellant's bill are properly part of this appeal. Therefore, the Board does not address the issues listed in the preceding paragraph.

Of the numerous arguments made by Appellant, the Board has identified seven which arguably relate to the manner in which BIA implemented the Assistant Secretary's decision. In the first of these, Appellant objects to the timing of his bill, contending that it should not have been sent prior to the irrigation season.

25 C.F.R. § 171.17(a) provides: "Irrigation water will not be delivered until the annual operation and maintenance assessments are paid in accordance with the established annual rate schedule as set forth in the public notice issued by the Area Director." In light of this provision, the Area Director argues, bills must be sent prior to the irrigation season.

The relevant "public notice issued by the Area Director" is a March 6, 1996, Federal Register notice concerning O&M charges for the Project. The notice states that the charges "become[] due on April 1 of each year and are payable on or before that date." The notice also repeats the regulatory mandate: "No water shall be delivered to any of these lands until all irrigation charges have been paid." 61 Fed. Reg. 8969, 8970.

In light of the provisions of 25 C.F.R. § 171.17(a) and the March 6, 1996, Federal Register notice, the Board finds that BIA did not err in sending Appellant's bill prior to the irrigation season.

Appellant next contends that he should not have been assessed O&M charges because he does not have "first water rights." He alleges that he was advised by the Superintendent in March 1996 that he has "a right to water only if there is any water left after the upstream users take what they want to use." Opening Brief at 9.

The Area Director contends that Appellant's description of his water rights is incorrect. He argues:

Water use and withdrawals from the Yakima River are subject to the priority dates and quantities established in the adjudication of the waters of the Yakima Basin. Department of Ecology v. Acquavella, et al., Civil No. 77-2-01484-5 (Superior Court, Yakima County, Washington). * * * [Irrigation water available to the Yakama Reservation under this adjudication is] delivered through [the Project]. Water from [the Project] is apportioned on a fair and equitable

basis between all Project water users entitled to the receipt of irrigation water.
(25 C.F.R. § 171.6). [8/]

Area Director's Answer Brief at 9.

Appellant produces no support for his allegation that the Superintendent advised him concerning his water rights. Even if the Superintendent made the statement Appellant attributes to him, it would not matter here. The Superintendent's view as to Appellant's water rights is relevant only to the extent that it might affect the actual delivery of water to Allotment 2850. Appellant does not allege that the Superintendent erred with respect to the delivery of water to Allotment 2850.

In any event, 25 C.F.R. § 171.19(a) does not distinguish among land units based upon the quality of their water rights. Rather it requires that O&M assessments be made against all lands "designated as assessable and to which irrigation water can be delivered."

Appellant has failed to show that he should not have been billed for O&M charges because of the quality of his water rights.

Next, Appellant contends that BIA has continued to pursue collection efforts despite the pendency of this appeal. Appellant does not submit any evidence in support of this contention.

The Area Director explicitly states that all collection efforts against the owners of Allotment 2850 have been stayed pending final decision in this appeal. In light of Appellant's failure to submit any evidence to the contrary, the Board accepts the Area Director's statement and finds that Appellant has failed to show that BIA has pursued collection efforts against him while this appeal has been pending.

Next, Appellant contends that BIA erred in assessing O&M charges against him because he has never signed a promissory note authorizing either the assessments or any enforcement actions.

8/ 25 C.F.R. § 171.6(a) provides that the Officer-in-Charge "will endeavor to apportion the water at all times on a fair and equitable basis between all project water users entitled to the receipt of irrigation water."

See also 25 U.S.C. § 381, which provides:

"In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

The Project evidently allows lessees of Indian lands (and perhaps other water users) to sign promissory notes in order to postpone payment of O&M charges beyond April 1 of the year. See Felitz v. Portland Area Director, 34 IBIA 191, 192 (1999), for an example of such a promissory note. The signing of a promissory note, however, does not create the obligation to pay an O&M assessment. Rather, it simply permits a water user to delay payment of the assessment. The assessment per se is authorized by 25 C.F.R. § 171.19(a).

Appellant has not shown that BIA was precluded from assessing O&M charges against him because he did not sign a promissory note.

Next, Appellant contends that BIA erred in assessing O&M charges against him because he owns only an undivided fractional interest in Allotment 2850 and therefore cannot exclude the other co-owners from any portion of the allotment. Appellant's theory appears to be that, because he cannot prevent his co-owners from using his share of any water delivered to the allotment, he cannot be compelled to pay O&M charges.

Nothing in law or regulation exempts trust land from O&M assessments simply because it is in fractionated ownership. Further, nothing in the Assistant Secretary's September 25, 1995, memorandum evidenced an intent to exempt the owners of fractionated land from her decision to bill the owners of idle trust land for O&M charges. Given the large amount of trust land presently in fractionated ownership, the Assistant Secretary surely would have mentioned such an exemption in her decision had she intended to include one.

Appellant has not shown that BIA was precluded from assessing O&M charges against him because he owns only a fractional interest in Allotment 2850.

Next, Appellant contends that BIA erred in sending bills to only three of the seven co-owners of Allotment 2850. He alleges that some of his co-owners did not receive bills and appears to be contending that, under such circumstances, he should not be required to pay the amount assessed against him.

The Area Director contends that bills were sent to all co-owners of Allotment 2850 except for Rose Cunningham, who is deceased and whose estate was in probate at the time of billing. ^{9/} He attaches copies of bills for all seven co-owners (including one for Rose Cunningham, although hers lacks an address).

^{9/} It appears from a Feb. 2, 1999, title status report submitted by the Area Director that Rose Cunningham's share in Allotment 2850 has now passed to a non-Indian, Darrell E. Kinney.

There is no way of knowing for sure whether all the bills for Allotment 2850 were actually mailed. However, in light of the fact that Appellant's filings show different addresses for some of the co-owners than are shown on the BIA bills, it appears likely that the reason some co-owners did not receive bills is that BIA had incorrect addresses for them.

If BIA erred in this regard, it erred with respect to the co-owners who did not receive bills, rather than with respect to Appellant. In any event, the fact that some co-owners did not receive bills is insufficient to establish that BIA failed to bill those co-owners. Accordingly, Appellant's allegations are insufficient to show that BIA erred in this regard.

Next, Appellant challenges the amount of his O&M assessment, contending that it "should be limited to the reduction of [his] income generated by the benefits of [the Project]." Opening Brief at 12. The Board understands Appellant to mean by this argument that he should not be required to pay any more in O&M assessments than he receives in irrigation-generated income from the property.

As noted above, the O&M rates for the Project were established by notice published in the Federal Register. As is clear from the notice, charges are made on a per-acre basis, not on a percentage of income basis. The Federal Register notice is equivalent to a regulation. See Joint Board of Control v. Portland Area Director, 17 IBIA 65 (1989). Accordingly, the Board does not have authority to change the rates established in the notice or to declare them invalid as to Appellant.

The Board concludes that it lacks jurisdiction over Appellant's challenge to the amount of his O&M assessment.

In his appeal to the Area Director, Appellant complained of the lack of information provided to the landowners concerning their 1998 O&M bills, which were the first they had ever received. Although it is not clear that Appellant intended to pursue this complaint before the Board, the Board gives him the benefit of the doubt and assumes that he intended to do so. See 43 C.F.R. § 4.318.

The bills are computer printouts titled "BILL [-] DEPARTMENT OF THE INTERIOR - BIA OPERATION AND MAINTENANCE." They show the allotment number, the number of acres, the rate per acre, and the amount due. They state that payment is due on April 1, 1998, and specify how and where payment is to be made. At the bottom of the bill, the following statement appears:

NO WATER DELIVERED UNTIL BILL IS PAID. 5.000% INTEREST
ASSESSED 30 DAYS AFTER DUE DATE. 6.000% PENALTY ASSESSED
90 DAYS AFTER DUE DATE. ADMINISTRATIVE CHARGES OF \$12.50

WILL BE ASSESSED FOR EACH 30, 60, 90 DAY DEMAND LETTER.
BILL(S) WILL BE FORWARDED TO U.S. TREASURY FOR COLLECTION
ACTION AFTER 90 DAYS FROM THE DUE DATE AT THE RATE OF
18%.

No further explanation is included in the bill. No statement is made concerning where the recipient might obtain an explanation of the bill. In fact, no telephone number is provided for any BIA office.

The bill does not show the date it was prepared. However, Appellant states that he received his bill on March 16, 1998, and the Area Director accepts his statement.

As far as can be determined from the record, no cover letter was included with the bill, and no advance notification was sent. Thus it appears that Appellant received, out of the blue, a cryptic bill in the amount of \$503.57) a bill which allowed only two weeks for payment 10/ and threatened substantial penalties for failure to pay on time, but which included no meaningful explanation and no information as to how to obtain one. Further, Appellant was apparently not given any information as to whether or not opportunities were available to him to postpone payment without incurring penalties.

25 C.F.R. § 171.17(a) provides:

Irrigation water will not be delivered until the annual operation and maintenance assessments are paid in accordance with the established annual rate schedule as set forth in the public notice issued by the Area Director. Under the following special circumstances, this rule may be waived and water delivered to:

(1) Trust and restricted lands farmed by the Indian owner when the Superintendent has certified that the operator is financially unable to pay the assessment and he has made arrangements to pay such assessments from the proceeds received from the sale of crops or from any other source of income. In such cases the unpaid charges will stand as a first lien against the land until paid but without penalty on account of delinquency.

It does not appear that Appellant or any of his co-owners is farming Allotment 2850. However, as far as can be determined from the record, BIA was not aware that this was the case when it sent the O&M bills for Allotment 2850. Thus, it appears that BIA failed to

10/ The bill also specified that payment could be made only by money order, certified check, or cashier's check.

advise Appellant and his co-owners about the provisions of subsec. 171.17(a)(1) even though, as far as BIA knew, those provisions might have applied to them.

There is no regulatory provision equivalent to subsec. 171.17(a)(1) which is specifically applicable to the owners of unleased trust land who are not farming the land. However, as discussed above, BIA allows lessees of Indian lands to delay payment of O&M charges through the signing of promissory notes, although there is apparently no specific authorization for this practice in 25 C.F.R. Part 171. BIA's actions in this regard demonstrate that it allows persons other than those referred to in subsec. 171.17(a)(1) to postpone payment of their O&M charges without incurring penalties.

Whether or not BIA has developed such a practice with respect to owners of idle trust lands cannot be deduced from the record. 11/ If it has done so, however, it has apparently not informed those landowners.

[1] Under the circumstances of this case, where BIA had not previously billed the Indian owners of idle trust lands for O&M charges, the Board finds that it was error for BIA to bill Appellant without explaining the charges, without providing the name and telephone number of a contact person or office where Appellant could obtain further information, and without explaining how, and on what terms, if any, Appellant might make arrangements to postpone payment if he is unable to pay the charges at the time they are due.

Because Appellant is the only landowner who is a party here, this decision is directly applicable only to him. However, under 25 C.F.R. § 2.7(b), bills sent to other landowners remain appealable if no appeal information was given to them. 12/

11/ It seems likely that some of the owners of idle trust lands will be even less able to pay their O&M assessments on time than the Indian farmers referred to in subsec. 171.17(a)(1) and the lessees of Indian lands who are allowed to sign promissory notes.

12/ There is no issue in this appeal concerning the relation between appeals from O&M bills under 25 C.F.R. Part 2 and possible debt collection proceedings under 4 C.F.R. Chapter II. The situation of the other landowners, however, illustrates the potential for conflict between these two procedures if BIA were to institute debt collection proceedings against landowners (or others) who have not paid their bills but who, under 25 C.F.R. § 2.7, still have a right to appeal their bills under 25 C.F.R. Part 2.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is dismissed in part, the Area Director's decision is vacated, and this matter is returned to him for further action. Such further action shall include the issuance of a new bill to Appellant, which shall incorporate or be accompanied by the information discussed above.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge