



INTERIOR BOARD OF INDIAN APPEALS

San Carlos Apache Tribe v. Western Regional Director, Bureau of Indian Affairs

41 IBIA 210 (09/19/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

SAN CARLOS APACHE TRIBE,
Appellant,

v.

WESTERN REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee.

: Order Reversing Decisions in Part and
: Dismissing Appeals in Part
:
:
: Docket Nos. IBIA 03-110-A
: IBIA 04-123-A
: IBIA 05-59-A
:
: September 19, 2005

This matter involves three consolidated appeals from decisions by the Western Regional Director of the Bureau of Indian Affairs (Regional Director; BIA) denying the San Carlos Apache Tribe (Tribe) the use of principal from the San Carlos Apache Tribe Development Trust Fund (Trust Fund) for annual purchases of water from the Central Arizona Project (CAP), a federal reclamation project.

For each of the years 2003, 2004, and 2005, the Tribe applied to use the Trust Fund to purchase CAP water. In each year, the Regional Director denied those applications to the extent that they sought to use principal rather than income from the Fund. ^{1/} In addition, in the 2003 decision, the Regional Director refused to approve the Tribe's application for funds to purchase a portion of the CAP water it requested until the Tribe obtained certain federal court approval. Finally, in the 2005 decision, the Regional Director specified that BIA would distribute Trust Fund income for the CAP water purchase to the Bureau of Reclamation, which manages the CAP, rather than to the Tribe.

The Tribe appeals each of these decisions. For the reasons set forth below, the Board of Indian Appeals (Board) reverses the Regional Director's denial of the use of Trust Fund

^{1/} The specific decisions at issue are the Acting Regional Director's decision of April 24, 2003; the Regional Director's decision of June 4, 2004; and the Acting Regional Director's decision of February 11, 2005.

principal for the Tribe's purchase of CAP water and dismisses the remainder of the Tribe's appeals. 2/

Statutory and Regulatory Background

The Tribe resides on a reservation, established in 1871, encompassing more than 1.8 million acres in east central Arizona. The Gila River flows through the southern portion of the reservation, and most of the reservation lies within its drainage area. As Arizona became settled, however, the waters of the upper Gila became depleted, threatening the Tribe's crops. Early efforts to irrigate the reservation failed and efforts instead began to focus on ways to make the Tribe self-sufficient through a diversified approach to economic development. S. Rep. No. 102-133, at 3-4 (1991).

In 1924, Congress authorized development of the BIA-managed San Carlos Project, which included the construction of Coolidge Dam on the Gila River. The principal purpose of the dam was to provide water for the benefit of the Gila River Indian Community (GRIC) and adjacent non-Indian lands downstream from the San Carlos Reservation. The reservoir behind the dam, commonly called San Carlos Lake, is located entirely within the boundaries of the reservation and flooded the Tribe's best irrigated lands, but the Tribe received no water supply or rights to store any water behind the dam. Tribal members were forced to move to areas without existing irrigation, thereby creating an increasing burden on federal and tribal officials to provide an adequate supply of water. Id. at 5.

In 1935, a federal district court approved a decree embodying a stipulated settlement providing water rights of the Gila River to certain entities. Generally known as the Globe Equity No. 59 Decree (Globe Equity Decree), the decree provided the Tribe 6,000 acre-feet of water but no storage rights in San Carlos Lake. 3/ Moreover, upstream use of the Gila River

2/ The Tribe also seeks an award of attorney fees and other expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Departmental regulations implementing EAJA limit its application to "adversary adjudications required by statute to be conducted [on the record] by the Secretary under 5 U.S.C. 554." 43 C.F.R. § 4.603(a) (2004); see also Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, 17 IBIA 141 (1989). This is not such a proceeding. Accordingly, the request for an award of attorney fees is denied.

3/ The government gave little attention to the rights of the Tribe in the adjudication, and the amount of water provided to the Tribe under the stipulated decree was reduced from 36,000 acre-feet to 6,000 acre-feet just before the decree was submitted to the court for approval. S. Rep. No. 102-133, at 5.

often depletes the River before it reaches the Lake, so that the Tribe historically has not been able to divert even the 6,000 acre-feet to which it is entitled. Id. at 5-6.

In 1978, the State of Arizona initiated a general stream adjudication in state court to determine rights to the Gila River and its tributaries, which includes the Gila River above the San Carlos Project. In the face of extensive and costly demands on time and resources presented by the adjudication and related litigation, the Tribe and its non-Indian neighbors began negotiations to settle their water-related disputes. The parties produced an agreement that provided for the resolution of various disputes and provided water to the Tribe from a variety of sources. The San Carlos Apache Tribe Water Rights Settlement Act of 1992 (Settlement Act), Pub. L. No. 102-575, 106 Stat. 4740, was enacted to implement the agreement. Id. at 7.

The Settlement Act gave the Tribe the rights to approximately 153,000 acre-feet of water. The Act also makes provision for the Tribe to store water in San Carlos Lake by requiring the Secretary to designate an active conservation capacity in the Lake for the Tribe's benefit in maintaining a minimum pool of stored water for fish, wildlife, and recreation purposes. Id. at 8; Settlement Act § 3704(e). Much of the water to which the Tribe is entitled under the Settlement Act is from the CAP. The Settlement Act requires the Tribe to pay operation, maintenance, and replacement (OM&R) costs associated with the CAP water rights granted to it under the Act. See, e.g., Settlement Act §§ 3704(c) & (d). The Tribe also has a contract for the delivery of CAP water with the United States (through the Bureau of Reclamation), which requires the Tribe to pay OM&R costs in order to receive CAP water. See Tribe's CAP Water Delivery Contract, December 11, 1980, ¶ 6. Thus, in order to make use of its CAP water, the Tribe must "purchase" the CAP water by paying the OM&R costs to the Bureau of Reclamation.

The mechanism by which the Tribe uses its CAP water is somewhat complex and factors into the issues in this case. The CAP diverts water from the Colorado River. The closest part of the CAP aqueduct is more than 60 miles west of the Tribe's Reservation and at a much lower elevation. Thus, the Tribe currently cannot receive its CAP water entitlement directly from the CAP aqueduct. Rather, the Tribe "exchanges" its CAP water for Gila River water held in San Carlos Lake for potential release and use by GRIC and the San Carlos Irrigation and Drainage District (SCIDD), who are in a location that allows them to use water delivered directly by the CAP aqueduct. In an exchange, therefore, GRIC and/or SCIDD substitute CAP water delivered via the CAP aqueduct for the Gila River water that would normally be delivered to them by releases from San Carlos Lake. However, the rights for storage of GRIC and SCIDD water in San Carlos Lake are governed by the Globe Equity Decree, and an exchange that results in the retention of GRIC or SCIDD water in the Lake, rather than its release to the Gila River, effectively requires the approval of the Globe Equity court. See Tribe's Opening Brief (2003) at 7; BIA's Answer Brief (2003) at 9-10. Thus, so long as the

Tribe relies on exchanges to use its CAP water right, it cannot use its CAP water without the approval of the Globe Equity court. ^{4/}

The Settlement Act also created a Trust Fund, funded by a 1994 congressional appropriation of \$38.4 million and a \$3 million contribution from the State of Arizona. Settlement Act § 3707(b). The use of the Trust Fund is governed by section 3707(d), which provides:

When the authorizations in section 3708(b) [regarding execution of waivers and releases] of this title are effective, the principal of the Fund and any interest or income accruing thereon may be used by the Tribe to put to beneficial use the Tribe's water entitlement, to defray the cost to the Tribe of CAP operation, maintenance and replacement charges as appropriate, and for other economic and community development purposes. The income from the Fund shall be distributed by the Secretary to the San Carlos Apache Tribe only upon presentation to the Secretary of a certified copy of a duly enacted Resolution of the Tribal Council requesting distribution and a written budget approved by the Tribal Council. Such income may thereafter be expended only in accordance with such budget. Income not distributed shall be added to principal. The principal from the Fund may be distributed by the Secretary to the San Carlos Apache Tribe only upon presentation to the Secretary of a certified copy of a duly enacted Resolution of the Tribal Council requesting distribution and a written budget approved by the Tribal Council and the Secretary. Such principal may thereafter be expended only in accordance with such budget: *Provided, however,* That the principal may only be utilized for long-term economic development projects.

Settlement Act § 3707(d) (emphasis in original). The Settlement Act required the Secretary to promulgate regulations necessary to carry out the purposes of subsection 3707(d). *Id.* § 3707(e).

BIA published regulations governing the use and distribution of the Trust Fund on April 27, 2001. *See* 66 Fed. Reg. 21,086 (2001), codified at 25 C.F.R. Part 183. The regulations describe how the Tribe may use the principal and income from the Trust Fund. Specifically, the regulations state:

The Tribe may use the principal and income from the Trust Fund in the following ways:

^{4/} While the parties' briefing provides differing descriptions as to exactly why the approval of the Globe Equity court is required, the Tribe concedes that it cannot protect the retention and storage of the exchange water in San Carlos Lake without the court's approval.

(a) To put to beneficial use the water entitlement provided to the Tribe in the Settlement Act;

(b) To defray the cost to the Tribe of CAP operation, maintenance, and replacement charges;

(c) For economic development purposes; provided, however, that principal may only be used for long-term economic development projects and income may be used for other economic and community development purposes; and

(d) For Administrative Costs reasonably related to the above uses.

25 C.F.R. § 183.4 (2005). ^{5/} The regulations also provide that the written budget submitted by the Tribe must identify the amounts to come from principal and the amounts to come from income. *Id.* § 183.5(b). The regulations provide that a request for the distribution of Trust Fund principal or income will be disapproved only if the Tribe fails to provide certain documents in its request, fails to submit certain follow-up reports, or if the request includes a use that does not comply with the Settlement Act or the regulations. *Id.* § 183.7.

Procedural Background

The first of these consolidated appeals, No. 03-110-A, arises from the Tribe's first request to use Trust Fund monies to purchase CAP water. The Tribe made the request to the Regional Director by letter of March 17, 2003. The Tribe requested \$3,947,130.00 in Trust Fund principal to purchase 45,000 acre-feet of CAP water, including funds to reimburse the Tribe for 5,950 acre-feet of water it had already purchased. The Tribe explained that it needed the water to maintain 75,000 acre-feet of water in the San Carlos Lake, which supports fishery resources on which many of the Tribe's economic activities depend. The Tribe noted that the Lake's water levels had been lower each year due to drought and that maintaining lake levels would provide revenue in the form of fishing, camping, and recreation fees and would encourage visitation at the Tribe's casino and other businesses on the reservation. The "pro forma" portion of the Tribe's application explained:

Financial Return is viewed as long term, and must be assessed as the cost of establishment of the fishery population, costs of clean up, and loss of revenue from license fees, camping fees, boat tag fees, recreation fees, Lake Store sales, RV Park rentals, which are estimated to approach \$5 million dollars in a three year period following a die off of the fish population in San Carlos Lake.

By letter of April 24, 2003, the Regional Director approved the request for funds to reimburse the Tribe for the 5,950 acre-feet of CAP water that had already been delivered but

^{5/} These regulations have remained unchanged throughout the period encompassed by the Tribe's appeals.

stated that the release of funds for the purchase of the remaining 39,050 acre-feet would not be approved “until an exchange of water is available and approved by the Federal court.” The Regional Director also decided that the purchase of the 5,950 acre-feet of water could be made using only income from the Trust Fund, not principal. Specifically, the Regional Director stated:

I am considering the approved portion of the Tribe’s request as a short-term economic development project. Any amount of water purchased cannot be considered permanent since a significant amount is lost to evaporation and seepage. Therefore, funds are to be drawn from the Trust Income and not the Principal account.

As a result of the Regional Director’s approval of a portion of the Tribe’s application, \$421,898.30 was distributed from the Trust Fund’s income account. See BIA Answer Brief (2003) at 2. The Globe Equity court never finalized an order approving an exchange for the remaining water requested by the Tribe.

The Tribe filed with the Board a timely Notice of Appeal of the Regional Director’s April 24, 2003, decision. On March 8, 2004, after briefing was completed, the Tribe filed a motion for expedited ruling, which the Board denied on June 23, 2004. 6/

The second appeal, No. 04-123-A, arises from a request made by the Tribe to the Regional Director by letter of May 11, 2004. The Tribe made an “emergency request” for distribution of \$290,000 in Trust Fund monies to purchase 20,000 acre-feet of CAP water. The Tribe requested disbursement from the principal of the Trust Fund, or in the alternative, given the Regional Director’s prior denial of principal, from income. The Tribe declared that, absent the purchase of additional water, the Lake would be reduced to 12,000 to 15,000 acre- feet of water by June 2004, threatening a catastrophic fish kill. The Tribe asked BIA to immediately approve disbursement of the Trust Funds “upon the condition that the Globe Equity No. 59 Court authorizes the proposed exchange of CAP water for storage in the San Carlos Lake during calendar year 2004.”

By letter of June 4, 2004, the Regional Director approved the Tribe’s request to the extent that Trust Fund income was available and contingent on approval of an exchange by the

6/ In an order of March 12, 2004, allowing briefing on the motion to expedite, the Board noted that it was apparent from the Tribe’s motion that the specific factual context of the Regional Director’s decision — a request to use Trust Fund monies to purchase water in 2003 — no longer existed but that the legal issues raised appeared to be capable of repetition yet evading review.

Globe Equity court. The Regional Director denied the request to use Trust Fund principal, citing to his April 24, 2003, decision. ^{7/}

In the meantime, on May 24, 2004, the Tribe applied to the Globe Equity court for approval of the exchange of up to 20,000 acre-feet of CAP water. On June 30, 2004, the Globe Equity court issued an order denying the Tribe's motion. Thus, no Trust Fund monies were distributed for the purchase of CAP water in 2004.

The Tribe filed a timely appeal of the Regional Director's June 4, 2004, decision. On August 3, 2004, the Board consolidated this appeal with the Tribe's 2003 appeal.

The third appeal, No. 05-59-A, arises from a request made by the Tribe by letter of January 7, 2005. The Tribe requested \$626,697.50, including: (1) \$602,037.00 for the purchase of 9,000 acre feet of CAP water; and (2) \$24,660.50 to pay fees of the Gila Water Commissioner related to the Tribe's prior purchases of CAP water. The Tribe again requested the Secretary to immediately approve disbursement of the Trust Funds, conditioned upon the approval of the Globe Equity court.

By letter dated February 11, 2005, the Regional Director again decided that the purchase of CAP water is a short-term economic development project with funding to be derived only from Trust Fund income, not principal. The letter did not specifically condition disbursement of the funds on the Tribe's obtaining approval of the Globe Equity court for the exchange. For the first time, however, the letter provided that disbursement of Trust Fund income would be made in increments, as income became available, to the Bureau of Reclamation. The letter further noted that certain monies were available from a separate drought fund to help subsidize the Tribe's CAP purchase for 2005. Given this offset, the Regional Director approved a distribution from Trust Fund income of \$570,879.50, subject to the availability of funds. However, the Tribe was unable to reach an agreement with the Bureau of Reclamation to purchase CAP water in 2005.

The Tribe filed a timely appeal of the Regional Director's February 11, 2005, decision. On April 26, 2005, the Board consolidated the Tribe's 2005 appeal with its two prior appeals.

With respect to each of the appeals, the Tribe filed opening and reply briefs, and BIA filed answer briefs. Both parties incorporate the arguments of their earlier briefs in the later briefs and the Board considers all of the arguments presented in all of the briefs in ruling on these appeals.

^{7/} The Regional Director mistakenly identified "May 23, 2003," as the date of his 2003 decision.

Discussion

The Tribe raises three issues in these consolidated appeals. First, the Tribe argues that, in all three decisions, the Regional Director incorrectly designated the purchase of CAP water as a “short-term economic development project” and improperly denied the Tribe’s application of Trust Fund principal for such purchases. Second, the Tribe argues that the Regional Director’s 2003 decision incorrectly denied the distribution of Trust Funds due to the lack of approval by the Globe Equity court. Third, with respect to the Regional Director’s 2005 decision, the Tribe additionally argues that the Regional Director wrongly provided for the distribution of Trust Fund monies for CAP water purchases to the Bureau of Reclamation rather than the Tribe. 8/

Before addressing the merits of the Tribe’s appeal, the Board must examine its jurisdiction to decide the questions raised by the Tribe. Although the Board is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board generally limits its jurisdiction to cases in which the appellant can show standing and where claims have not become moot. See Citizens for Safety and Environment v. Acting Northwest Regional Director, 40 IBIA 87, 92 (2004) (standing); Pueblo of Tesuque v. Acting Southwest Regional Director, 40 IBIA 273, 274 (2005) (mootness).

The Board relies on the analysis provided in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), to evaluate standing. The burden is on the appellant to show: (1) an injury that is concrete and particularized, as well as actual or imminent; (2) that the injury is causally connected with or fairly traceable to the actions of the appellee and not caused by the independent action of a third party; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-561, cited in Citizens for Safety and Environment, 40 IBIA at 93. As to mootness, it may occur when nothing turns on the outcome of an appeal, such that the appeal no longer presents a case or controversy. Pueblo of Tesuque, 40 IBIA at 274.

We first note that all of the Tribe’s claims in each of the three appeals are technically moot because the time for delivery of the CAP water that the Tribe sought to purchase has elapsed in each case. In that sense, nothing turns on these appeals. However, it is plain from the fact that the Board has three nearly identical appeals before it, none of which the Board has been able to decide in time to allow for the purchase, exchange, and delivery of the CAP water at issue in those appeals, that the issues presented are capable of repetition yet evading review and thus fall under an exception to mootness. It is well-established that the Board will consider

8/ The Tribe also contests various statements contained in the April 24, 2003, decision. See Tribe’s Opening Brief (2003) at 9-11. These statements are irrelevant to the Regional Director’s decision and thus are not properly raised in this appeal.

an appeal of a short-term order that is capable of repetition yet evading review. See Lower Brule Sioux Tribal Council v. Great Plains Regional Director, 40 IBIA 211, 211 n.1 (2005).

However, the Board still must determine if the Tribe had standing to bring the appeals in the first place. In addition, if a matter has become moot for reasons other than the Board's failure to complete review in time to provide relief, then the "capable of repetition yet evading review" exception to mootness does not apply.

The Board concludes that the Tribe's claim that the Regional Director erred in denying Trust Fund principal for CAP water purchases is justiciable. The Tribe has suffered a concrete and particularized injury from the Regional Director's denial of the use of principal. The Tribe argues that the Trust Fund income is inadequate to fund all of the projects for which the Tribe seeks Trust Fund money if the CAP water purchases must be paid out of income rather than principal. For example, the Tribe notes, with documentary support, that it had nearly arranged in early 2004 to purchase 20,000 acre-feet of CAP water but that, due to BIA's denial of the use of Trust Fund principal for CAP water purchase, it could not afford to purchase that water given its high cost at that time. The Tribe explained, "Without the use of the Trust Fund principal, the Tribe will be unable to make this payment without impacting the budgets of other Tribal programs which the Tribe cannot afford to jeopardize." Tribe's Motion to Expedite (2004) at 3.

The Regional Director likewise recognized the limitations his decision placed on the Tribe's funding. The Regional Director's June 4, 2004, decision advised the Tribe that, "[b]ased on your request for funds and the fact that I have determined funds must be taken from the Income Account, you may want to review the current project budgets where funds are coming from the Income Account and prioritize the projects to ensure there [are] sufficient funds available."

With respect to the Tribe's challenge to the Regional Director's denial of Trust Fund monies in the 2003 decision based on the lack of court approval necessary to effectuate the CAP water exchange, the Board concludes that this question is moot.^{9/} In its 2004 and 2005 requests, the Tribe asked BIA to approve the request for disbursement of Trust Fund monies for the purchase of CAP water contingent on the Tribe's obtaining the court approval that would allow it to effectuate an exchange of the CAP water. In 2004, the Regional Director's decision applied this approach requested by the Tribe, and in 2005, the Regional Director's

^{9/} We also note that it is doubtful whether the Tribe has standing to challenge this decision because, as the Tribe itself recognizes, it cannot effectively exchange and store CAP water in San Carlos Lake without court approval. Thus, it is unclear that the Tribe suffered any injury by the Regional Director's 2003 denial of Trust Fund monies to purchase CAP water for which the Tribe lacked court approval. In any event, even if the Tribe did have standing to raise this issue, as discussed above, the issue has clearly become moot.

decision was simply silent on the question. Thus, there is no dispute between the parties on this point in the 2004 and 2005 decisions, and there is no indication that the Regional Director will revert to the 2003 approach of denying the Tribe's request for Trust Fund monies based on lack of court approval. Indeed, even the Regional Director's 2003 decision may be read to take exactly the approach requested by the Tribe in its 2004 and 2005 requests. Thus, the Board dismisses as moot the portion of the Tribe's appeals challenging the Regional Director's determination in the 2003 decision to deny the Tribe's request for certain Trust Fund monies.

The Board concludes that the Tribe's claim that the Regional Director's 2005 decision erroneously determined to distribute Trust Fund monies to the Bureau of Reclamation rather than the Tribe also is moot. At the time of filing its appeal, the Tribe had standing to raise this issue because the Tribe identifies a concrete injury that would result if the decision were implemented. Specifically, the Tribe declares that it was developing a plan for payment to the Bureau of Reclamation that would ensure that the water was delivered prior to payment and that would be advantageous to the Tribe. However, because no Trust Fund monies were distributed for CAP water purchase in 2005, for reasons unrelated to these appeals, the Regional Director's distribution mechanism was not implemented and had no effect on the Tribe. Thus, the Board dismisses this portion of the Tribe's appeals as moot. The Board cautions, however, that before issuing a similar decision in the future, the Regional Director should carefully examine and justify the legal and practical bases for such a limitation, which is not specifically authorized by the statute or regulations.

The Board now turns to the question whether the Regional Director erred in denying the use of principal for the purchase of CAP water by the Tribe. The Board concludes that the Regional Director's decision is contrary to BIA regulations. The Regional Director is incorrect that the regulations permit the use of principal only for long-term development projects. Rather, the regulations specify that the Tribe "may use the principal and income from the Trust Fund in the following ways," and then lists four independent categories of uses, described in subsections (a) through (d). 25 C.F.R. § 183.4 (emphasis added). By its plain language, the regulations permit the use of Trust Fund principal for each of these four categories. Only one category, subsection 183.4(c), limits the use of principal to long-term economic development projects. That limitation, contained in only one of four subsections, cannot be imputed to apply to the categories of uses identified in the other three subsections. Thus, the regulations allow the use of principal for all four categories of uses listed in subsection 183.4.

The Regional Director argues that his reading of the regulation, as limiting use of principal to long-term development projects, is consistent with the statutory language. BIA Answer Brief (2003) at 11. The Regional Director maintains that the statutory language makes a general, introductory statement about the uses of principal and interest that is then limited by the subsequent language specifying that "principal may only be utilized for long-term economic development projects." Whether the statutory language is subject to the interpretation given it by the Regional Director is not before the Board. By their plain language, BIA's regulations

provide a different interpretation of the statute's language, and the Board and the Regional Director must follow and apply those regulations. See Ballard v. Acting Eastern Oklahoma Regional Director, 35 IBIA 216, 217 (2000) (the Board is bound by promulgated regulations); Jones v. Acting Sacramento Area Director, 13 IBIA 124, 125 (1985) (the Board lacks authority to change or invalidate regulations).

The Tribe maintains that the purchase of CAP water qualifies for Trust Fund monies under subsections 183.4(a) and (b). The Regional Director responds to this argument, for the first time in BIA's 2005 brief, with the unsupported and conclusory statement that "the purchase of CAP water does not fall under § 183.4(a) or 183.4(b)," and that "the only provision of the regulations under which it could arguably fall is § 183.4(c)." BIA Answer Brief (2005) at 3. The Regional Director provides no explanation as to why these other subsections do not apply. 10/

The Board concludes that the purchase of CAP water qualifies for Trust Fund principal and income under both subsection 183.4(a) and subsection 183.4(b). Section 183.4(a) allows the use of Trust Fund monies "[t]o put to beneficial use the water entitlement provided to the Tribe in the Settlement Act." 25 C.F.R. § 183.4(a). The CAP water the Tribe seeks to purchase is a water entitlement provided to the Tribe in the Settlement Act, and the purchase of that water is necessary for the Tribe to put that entitlement to beneficial use via an exchange that permits the Tribe to retain and store water in San Carlos Lake. The water in the Lake is beneficially used by its storage for fishing and recreation, and is also available for beneficial use on the Tribe's farm. Perhaps the Regional Director views the statutory and regulatory phrase "put to beneficial use" to refer to actions such as the construction of irrigation works on the reservation or the building of infrastructure to allow the direct delivery of CAP water to the Tribe. However, this language is not so limited. By its plain language, subsection 183.4(a) encompasses the Tribe's purchase of CAP water that, through its exchange, will allow the Tribe to store and beneficially use water in San Carlos Lake. 11/

10/ In its 2003 request, the Tribe characterized the proposed purchase as "economic development," so it may be understandable why the Regional Director only addressed that category in his 2003 decision. But in 2004 and 2005, the Tribe did not characterize the request as falling under any particular provision of section 183.4, and by then the Regional Director was well aware of the Tribe's argument that subsections 183.4(a) and (b) applied as well.

11/ Congress recognized that the Tribe's fish, wildlife, and recreation concessions are a major source of income to the Tribe and that prior droughts combined with drawdowns of San Carlos Lake had repeatedly caused or threatened massive fish kills that had or could have had substantial adverse economic, environmental, and psychological impacts on the Tribe. See S. Rep. No. 102-133, at 25-26. Congress clearly understood that water stored in San Carlos Lake is beneficially used by the Tribe.

The analysis with respect to subsection 183.4(b) is similarly straightforward. Subsection 183.4(b) allows the use of Trust Fund monies “to defray the cost to the Tribe of CAP operation, maintenance, and replacement charges.” The Tribe’s purchase of CAP water constitutes payment of OM&R charges, and the use of Trust Fund monies to make the purchase defrays the cost of those charges. Thus, the Tribe may obtain Trust Fund principal to purchase CAP water pursuant to subsection 183.4(b).

Even if the Regional Director were correct that Trust Fund principal may be used only for long-term economic development projects, the Regional Director supplied no reasonable basis for his determination that the purchase of CAP water is only a short-term economic development project. The only rationale provided by the Regional Director for categorizing the purchase of CAP water as a short-term economic development project is that the water will not be permanently retained in the Lake but will seep and evaporate away. The fact that water is not permanently retained in the Lake, however, does not mean that it cannot yield a long-term economic benefit to the Tribe. The Tribe argues that the water is needed in serious drought years to prevent a catastrophic fish kill that would cause long-term harm to its fishing and recreation revenues and related businesses. The Regional Director provides no reason for ignoring or rejecting this argument. By considering only the permanence of the water and not the economic significance of the Tribe’s intended use of that water, the Regional Director fails to provide a reasoned basis for concluding that the use of Trust Fund monies to purchase CAP water by the Tribe does not use those monies for long-term economic development.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board (1) reverses the Regional Director’s determination that principal from the Trust Fund cannot be used to purchase CAP water for the purpose of enabling the Tribe to retain and store water in San Carlos Lake; (2) dismisses as moot the Tribe’s challenges to the Regional Director’s 2003 denial of Trust Fund monies based on the lack of court approval of the CAP water exchange; and (3) dismisses as moot the Tribe’s challenge to the Regional Director’s 2005 determination to distribute Trust Fund monies for the purchase of CAP water to the Bureau of Reclamation rather than the Tribe.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge