



INTERIOR BOARD OF INDIAN APPEALS

Jim and Pam Buline v. Billings Area Director, Bureau of Indian Affairs

32 IBIA 121 (04/06/1998)

We believe the BIA should make available all the construction and the charges that have been assessed and paid in the past by the irrigators in the various locations of the project.

The Area Director responded to Appellants' appeal on February 20, 1997:

[The Superintendent's] decision was to assess construction charges on fee patent lands of the Wind River Irrigation Project at the rate of \$1 per acre for the 1996 billing. Your appeal concerns the 1996 construction charges on tracts 759.20, 759.30, 787.10, 787.20, 787.30, 787.40, 886.10, 886.20, 886.30 and 886.40.

Irrigation construction charges are charged to the irrigable lands on the Wind River Irrigation Project (Project), as provided for under 25 USC 385, which states "the Secretary of the Interior is authorized and directed to apportion the cost of any irrigation project...in accordance with the benefits received by each individual Indian." Statute 25 USC 386 further provides that "The Secretary of the Interior is authorized and directed to require the owners of irrigable land...to begin partial reimbursement of the construction charges...at such times and in such amounts as he may deem best."

Wind River Irrigation construction accounts were last reviewed in 1976. At that time repayment rates were set, based on repaying the existing construction debt over the next 40 years. However, since 1976, an additional \$1,545,807 of construction money has been spent on the project. Repayment rates are being increased to reflect these additional expenditures.

As of 1976, tract 759.20 (38.1 acres) owed \$2,741.12. Your 1976 through 1994 bills were for \$68.63 per year, based on repaying this debt over a period of about 40 years. Since 1976, \$1,545,807 of additional reimbursable construction money has been spent on the Project, which amounts to \$39.19 per acre. Tract 759.20's share of this cost is therefore, \$1,493.14. Also since 1976, \$1,098.08 of construction charges have been paid on this tract. Therefore, tract 759.20 presently owes $\$2,741.12 + \$1,493.14 - \$1,098.08$, for a net balance of \$3,136.18. Your 1996 bill was for \$38.10. It would take over 80 years to repay the construction debt on your land at this rate.

[The Area Director then provided the same calculation in table form for each of the other tracts listed above.]

Your appeal mentioned a NIIMS review. There is no NIIMS review anticipated. There will be an update of the project financial records, presently scheduled to start this summer. This is not expected to have any effect on the 1996 construction billing.

The [BIA] is required by law to make assessments for repayment of the construction costs on the Project. The amounts

of your assessments are not excessive. Therefore I am denying your appeal.

Appellants appealed to the Board. Their Notice of Appeal states at page 1:

We have concerns with the construction charges regarding our property. Enclosed is a bill we received, 105872 for \$700.34 for [tract 886.10]. That amount was paid for several years prior to this date. In the letter we received, which we are appealing, this is not even accounted for. Also included is the letter we wrote trying to resolve the discrepancy. We have never received a response on that matter. This is why we are questioning the accuracy of these figures. This is one of the many reasons why [we] are questioning the assessment.

The BIA has indicated there has been \$1,545,807 of construction money that has been spent on the project. We've made attempts to obtain specific information from BIA at [the Wind River Agency] and the Billings Area Office to see where the money was spent. We don't believe anyone knows where this money was spent or if this is an accurate figure. Possibly this money isn't being spent on construction, but on operations.

Our biggest concern about the construction charges is 1-accountability 2-authority of expenditures of the money 3-we as irrigators have no input, but are expected to pay. How do we know what construction, improvements and etc., have benefitted the irrigators. We are being asked to pay for construction improvements when BIA can't tell us where the improvements have taken place. The indebtedness of our land increases without any accountability to the landowners.

Appellants filed an additional statement with the Board. They contended:

We appeal to you based on our previous correspondence with regard to the construction charges on the project. We are very concerned that [BIA] cannot tell the water users where the construction has taken place over the years. We have been told money has been spent for purposes of construction on the project, but we are given no specifics of what they improved with these dollars in the Crowheart area where we are affected. We also feel that if the money has been spent for the purposes of construction, we (the water users) have not had any input what so ever in the process.

In addition, we pay our water fee every year which is [operation and maintenance], and this year we had to spend our own money (as did many other water users) to clean the BIA project ditches. This is one of many reasons why we are questioning the use of the construction dollars on the project in the past as well as at the present time.

The Area Director filed an Answer Brief in which he responded to each issue he could identify in Appellants' Notice of Appeal and statement. 1/

The issues which Appellants raise in this appeal were not the subject of the Superintendent's November 19, 1996, decision; of their December 17, 1996, appeal to the Area Director; or of the Area Director's February 20, 1997, decision. The Superintendent assessed a \$1 per acre construction repayment charge on each acre of Appellants' fee patent land served by the Project. Appellants appealed this decision on the grounds that it was arbitrary until the NIIMS review was completed and until there was a full explanation of the past and present construction charges. The Area Director's decision set out the past and present construction charges for each tract owned by Appellants, and informed Appellants that no NIIMS review was anticipated. He concluded that the Superintendent's assessment of \$1 per acre was not excessive. These are the only issues that are properly before the Board in this appeal.

Instead of addressing the Area Director's decision, Appellants raise several specific matters which were not part of their Notice of Appeal to the Area Director, and other general complaints about the management of the Project. With the benefit of their statements on appeal, Appellants' notice of appeal to the Area Director can be read as seeking an accounting of all construction charges and expenditures, not just the charges assessed against their fee patent lands. However, the Board finds that the Area Director's interpretation of the notice of appeal to him was reasonable and that he provided full information in accordance with that interpretation.

Appellants bear the burden of proving error in the Area Director's decision. The Board has frequently held that an appellant who fails to make an allegation of error, let alone present support for that allegation, fails to carry his or her burden of proof. See, e.g., McCarty v. Muskogee Area Director, 30 IBIA 152 (1996); L.W. Yarberry Estate v. Acting Muskogee Area Director, 29 IBIA 81 (1996), and cases cited therein. Appellants do not allege any error in the Area Director's February 20, 1997, decision. The Board concludes that Appellants have failed to carry their burden of proving error in the Area Director's decision. 2/

1/ On Jan. 2, 1998, the Board received another filing from Appellants in which they repeat some matters previously raised in their filings on appeal and raise several new issues. The Area Director argues that the filing is untimely and that Appellants and other individuals raised the new issues with the Superintendent at the same time as they made the filing with the Board. The Area Director states that the Superintendent has not yet ruled on those new issues.

The Board agrees with the Area Director that the filing received on Jan. 2, 1998, is untimely and that the new issues are not properly before it. Therefore, that filing has not been considered.

2/ It is clear that Appellants are frustrated with what they consider to be BIA's failure to respond to their requests for information concerning construction expenditures and to include the irrigators in decisions concerning the Project. The Area Director has not disputed Appellants' right

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 Billings Area Director's February 20, 1997, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

fn. 2 (continued)

to receive such information, and the Board finds no evidence in the materials before it that BIA has failed to provide information when it has understood what Appellants were requesting.

In regard to Appellants' general questions concerning construction expenditures on the Project, the Area Director stated at pages 3-4 of his Answer Brief:

"[B]ecause Indian irrigation project statutes provide generous discretion to Superintendents in areas of concern, such as those mentioned by [Appellants], the BIA has improved its record keeping system. In the fall of 1995, BIA migrated its accounting records from the Billings Area Irrigation Accounting System * * * to the current [NIIMS]. In addition, BIA has established a national **Power and Irrigation Reconciliation Team** to audit the financial records of each irrigation project. * * *

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"* * * The Wind River Irrigation Project occasionally holds general meetings with the irrigators. * * * However what is really needed is a water user's association on the Project, similar to the associations that exist on the Blackfeet Irrigation Project and the Fort Peck Irrigation Project. Efforts to form an association of this type at Wind River have been made at least since the 1960's, and BIA continues to support the formation of such an association. A water user's association can represent the irrigators, could contract with BIA for some Project operations, or could even take over management of the Project from BIA."

Appellants should raise their general concerns directly with BIA, perhaps in the context of the matter presently pending before the Superintendent.