



INTERIOR BOARD OF INDIAN APPEALS

U&I Redevelopment LLC and Lantana Real Estate v. Acting Northwest Regional
Director, Bureau of Indian Affairs

49 IBIA 256 (06/17/2009)

Related Board cases:

44 IBIA 240

51 IBIA 284



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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| U&I REDEVELOPMENT LLC and |) | Order Affirming in Part and Vacating and |
| LANTANA REAL ESTATE, |) | Remanding in Part |
| Appellants |) | |
| |) | |
| v. |) | Docket No. IBIA 07-116-A |
| |) | |
| ACTING NORTHWEST REGIONAL |) | |
| DIRECTOR, BUREAU OF |) | |
| INDIAN AFFAIRS, |) | |
| Appellee |) | June 17, 2009 |

U&I Redevelopment LLC (U&I) and Lantana Real Estate (Lantana) (collectively Appellants) have appealed the June 6, 2007, decision of the Acting Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he (1) upheld the revised 2006 and 2007 operation and maintenance (O&M) assessments for non-trust land owned by Appellants within the Wapato Irrigation Project (WIP or Project) on the Yakama Reservation in the State of Washington and (2) dismissed as untimely the appeal of bills issued in May 2006 for the 2002-2005 O&M assessments. The Regional Director issued the latter portion of the decision in response to the Board's remand order in *U&I Redevelopment LLC and Lantana Real Estate v. Acting Northwest Regional Director*, 44 IBIA 240 (2007) (*U&I Redevelopment I*).

On appeal, Appellants argue that (1) they should not be assessed any O&M fees because their land is non-irrigable and (2) their appeal of the bills issued in 2006 was not untimely because they never received those bills. While the record is insufficient to establish that the bills issued in 2006 for the 2002-2005 O&M assessments were actually *mailed to and received by* Appellants more than 30 days before they filed their appeal to the Regional Director, we nevertheless affirm those assessments, as well as the revised assessment for 2006, because, even if the Regional Director erred in finding the appeal of the bills issued in 2006 to be untimely, Appellants have not shown error in the Regional Director's conclusion that, because the affected land was included in the WIP by contract in 1919 and remains within the WIP, Appellants were therefore required by both 25 U.S.C. § 385 and 25 C.F.R. § 171.19(a) (2007) to pay their proportionate per-acre share of the O&M fees

for the Project for 2002-2006. We conclude, however, that the Regional Director erred in failing to address Appellants' August 2006 and subsequent submissions as a request under 25 U.S.C. § 389b to have their land redesignated as permanently nonirrigable and removed from the Project and from the concomitant obligation to pay O&M fees. We therefore vacate the Regional Director's affirmance of the modified 2007 O&M assessment and remand the matter to him for review of the redesignation and removal request. Since the 2006 O&M assessment accrued and was initially billed *before* the request for redesignation was submitted, it is not affected by the request and, as noted above, we affirm the 2006 O&M assessment as recalculated in the Regional Director's decision.

Statutory and Regulatory Background

BIA has the authority to assess O&M charges pursuant to 25 U.S.C. § 385 and the regulations at 25 C.F.R. Part 171 (2007).¹ See *Edwards v. Portland Area Director*, 34 IBIA 215, 216 (2000). Section 385 of 25 U.S.C. provides in relevant part: "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" In accordance with 25 C.F.R. § 171.19(a), O&M 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

The Secretary also has the authority to eliminate land from an irrigation project if he determines that the land is permanently nonirrigable, provided that the landowner consents. 25 U.S.C. § 389b. Removal of the land would also extinguish the landowners' obligation

¹ The regulations in 25 C.F.R. Part 171 were extensively revised in 2008. Citations in this order are to the regulations in effect prior to the 2008 revisions unless otherwise noted.

² The Project is composed of three units — the Ahtanum Unit, the Toppenish-Simcoe Unit, and the Wapato-Satus Unit. An exception to the general provision affecting only the Toppenish-Simcoe Unit limits the levying of O&M assessments to "all lands which can be irrigated from the constructed works for which application for water is made annually and approved by the Project Engineer." 25 C.F.R. § 171.19(a)(2). The Regional Director asserts that Appellants' lands are subject to the general rule, rather than the exception for the Toppenish-Simcoe Unit, and Appellants do not contend that their land is within the Toppenish-Simcoe Unit. The record is not clear as to which unit the land is located in.

to pay O&M assessments. *See* 25 C.F.R. § 171.700 (2008).³ Additionally, Congress has specifically granted the Secretary the authority to redesignate the lands within the Wapato-Satus Unit of the WIP capable of being served by the Project's irrigation waters and to remove non-serviceable land from the Project if the removal is based on a redesignation for a higher use, subject to the requirement that the O&M assessments levied on the removed land must be paid up to the date of the removal. *See* sec. 5, Pub. L. No. 87-316, 75 Stat. 680 (Sept. 26, 1961).

Factual and Procedural Background

The WIP was established in 1906 to serve landowners on the Yakama Indian Reservation and is one of the oldest and largest irrigation projects operated by BIA. *See* Decision at 2; *see also* "BIA's Management of the Wapato Irrigation Project," No. B-276157, GAO/RCED-97-124, May 28, 1997 (GAO Report), at 3.⁴ Landowners seeking to participate in the WIP and benefit from the provision of water were required to execute an "Application for Water Right Wapato Unit Yakima Reservation, Washington."⁵ The land now owned by Appellants was included in the WIP pursuant to Application No. 335 (AR 9), dated March 27, 1919, which their predecessor-in-interest submitted to acquire irrigation water for a total of 395.16 acres. Section 7 of the Application states that the land is subject to annual O&M charges on a per acre basis, and section 8 of the

³ Although the pre-2008 regulations do not mention the removal of land from an irrigation project or the concomitant elimination of the duty to pay O&M assessments, the 2008 version of 25 C.F.R. Part 171 does, albeit obliquely. Specifically, 25 C.F.R. § 171.100 defines "[p]ermanently non-assessable acres" as "lands that the Secretary of the Interior has determined to be permanently non-irrigable pursuant to the standards set out in 25 U.S.C. 385b," and 25 C.F.R. § 171.700(c) provides that a landowner or lessee does not have to pay annual O&M assessments if the land "is re-designated as permanently non-assessable." But neither the pre-2008 regulations nor the 2008 regulations establish any procedures by which a landowner or lessee can request that a parcel be redesignated as permanently non-irrigable or permanently non-assessable.

⁴ Although the 142,000 acres included in the Project were originally owned by the Yakama Nation, portions of the land were subsequently allotted to individual Indians or sold to non-Indians. *Id.* at 3 n.3.

⁵ The spelling of the "Yakima Nation" was changed back to the original spelling of "Yakama" in 1994; the spelling of Yakima County was not altered. *See* GAO Report at 1 n.1, citing Sec. 1204(g), Title XII, Pub. L. No. 103-434 (Oct. 31, 1994).

Application binds the landowner and its heirs and assigns to pay those charges whenever due under the rules and regulations prescribed by the Secretary. *See also* Decision at 3. The Application executed by Appellants' predecessor-in-interest was recorded in the Yakima County records. *Id.*

Appellants acquired 43.74 acres⁶ of the land included in Application No. 335 by Trustee's Deed dated November 25, 2002. AR 3, Appellee's Response on Threshold Issues, Declaration of Lance Boone (Boone Declaration), Attachment B-1.⁷ Appellants apparently were unaware that the land was included in the WIP and did not notify BIA that they were the new owners of the land. BIA, in turn, apparently was unaware of the change of ownership of the land and did not send O&M assessments to Appellants.

Appellants state that they first learned that the parcel had been incorporated into the WIP on May 15, 2006, when they received a settlement statement from the title company hired to insure the sale of a portion of their property that placed \$12,500 in an escrow account pending payment of O&M assessments for the property. *See* AR 6, Attachment to Appellants' Response to Pre-Docketing Notice and Order, Seller's Estimated Settlement Statement.⁸ By letter dated August 10, 2006 (AR 13), Appellants contacted the Regional Director requesting that he lift the "unjustified \$12,000 water lien" placed on the property.

⁶ Although Appellants claim that the land they acquired — which is legally described in various documents as "Lot 1 of Short Plat No. 85-46, recorded under Auditor's File Number 27030199, records of Yakima County, Washington, situated in Yakima County, Washington" — encompasses only 41.12 acres, BIA explains that the discrepancy derives from the fact that Yakima County's calculation of the size of the parcel as 41.12 acres for tax assessment purposes reflects the County's elimination of land encumbered by road, railroad, or other easements, while BIA's computation of the parcel's acreage for O&M purposes is based on the full size of the parcel. *See* Decision at 2.

⁷ The Trustee's Deed identifies the grantees as Lantana (undivided 50% interest) and Holly Associates, L.L.C. (Holly) (undivided 50% interest). By Quit Claim deed dated June 11, 2003, Holly conveyed its interest to U&I. Since the principals of Holly were the same as those of U&I, the deed acknowledged that the conveyance effectuated a mere change in identify and no change in beneficial ownership. *See* Boone Declaration, Attachment C-1.

⁸ The title company apparently uncovered the unpaid assessments when, as part of its investigation into possible liens against the property, it contacted BIA and was advised of the unpaid assessments. And it was from that contact by the title insurance company that BIA learned of Appellants' ownership of the parcel. *See* Boone Declaration at 1-3, ¶¶ 2-5.

They stated that they had owned the property for over 10 years,⁹ and that the property was within the city limits of Toppenish, Washington, had never been served by the WIP, and was, in fact, incapable of being served by the WIP. They further averred that they had never received any billing for water-related services until they received a bill for \$200, which they paid. Appellants also complained that, consistent with statements in the GAO Report, they had never been provided opportunities to participate in Project decision-making, and asserted that, while they might have a reserved Federal water right, they nevertheless were not stakeholders because they had not in the past, nor would they ever in the future, put the river water to productive irrigation uses. Appellants concluded by asking the Regional Director for advice as to where they should go from there.

In an August 26, 2006, letter to the Superintendent, Appellants stated that the property was located in an industrial zone within the city limits, had never been irrigated, and was not capable of being irrigated. Letter from Dawson to Superintendent, Aug. 26, 2006, attached to AR 6.

The Regional Director responded by letter dated October 27, 2006 (AR 9, Attachment 1), stating that the property had been part of the WIP since 1919, that BIA's records indicated that U&I had become one of the property owners in 2003, and that landowners had the responsibility to notify BIA of changes in ownership. The Regional Director noted that on May 16, 2006, WIP had issued O&M bills, totaling \$11,566.24, for prior years (2002-2006) for the property, and that those bills had to be paid to finalize changes in ownership. He also indicated that the "\$200 bill" referred to in Appellants' letter was most likely a bill for \$211.04, which had been sent to them by mistake and the payment for which had been credited to the bill for Appellants' property. The Regional Director further explained that the O&M obligation is not based on the use of irrigation water but arises out of the land's location within the WIP boundaries. He closed by recommending that Appellants contact the WIP billing staff to get a current accounting of the amount owed.

Appellants appealed the Regional Director's October 27, 2006, letter to the Board in *U&I Redevelopment I*.¹⁰ In their Notice of Appeal, Appellants contended, among other things, that their property is in "an industrial zone and is comprised of old buildings," and thus the lands "are not and to our knowledge never have been irrigable lands."

⁹ Appellants' assertion that they have owned the land for over 10 years appears to rest on the fact that they were named as the beneficiaries of a Deed of Trust executed on June 17, 1996. See Boone Declaration, Attachment B-1, Trustee's Deed Recital 1.

¹⁰ Appellants addressed their appeal to the (former) Interior Board of Contract Appeals, which transmitted it to this Board.

On receipt of the appeal, the Board requested additional information and briefing from the parties. After receiving and reviewing that information, the Board determined that the matter was not ripe for Board review because it was “neither an appeal from one or more specific O&M bills, nor an appeal from a decision of the Regional Director purporting to deny [Appellants’] request for the Regional Director to lift the ‘lien’ on [their] property.” *U&I Redevelopment I*, 44 IBIA at 244. We remanded the matter to the Regional Director for further consideration and action in response to Appellants’ August 10, 2006, letter, as supplemented by the pleadings before the Board. *Id.*

On March 14, 2007, while the original appeal was still pending before the Board, BIA issued a bill to Appellants for \$2,533.90 for the 2007 O&M assessment for the entire 43.75-acre parcel, with a due date of April 15, 2007. Appellants appealed the assessment to the “Wapato Irrigation - Agency Superintendent” on March 21, 2007, advising the Superintendent that they no longer owned the entire parcel because they had sold all but 6.7 acres to another party. They also requested that the Superintendent not only correct the WIP records to reflect the partial sale of property, but also that he remove their retained 6.7 acres from further billing because it was “for services never needed because the property is not irrigation property.” When no response from the Superintendent was forthcoming, on April 20, 2007, Appellants wrote to the Regional Director, enclosing a copy of both the appeal to the Superintendent and the 2007 O&M bill. *See* AR 12, “APPEAL II.” Appellants reiterated that they retained only 6.7 acres of the original parcel, requested that the Regional Director notify the Superintendent that the bill was not applicable to the land sold, and asked that he explain to the Superintendent that no billing should have been issued at all since the land was “not capable” of receiving water services or “of being farmed.” *Id.*

In response to the Board’s remand order, Appellants submitted a document to the Regional Director, also dated April 20, 2007, referenced “APPEAL,” in which they summarized and expanded on the arguments raised in the original appeal to the Board. AR 11. Appellants again averred that the land they owned was in an industrial zone where no water delivery point exists, and that the property therefore was incapable of being irrigated by the WIP. They also contended that, “[w]ith buildings and structures located on the property, there are no plans to convert the property to farming.” APPEAL at 1.

Appellants also asserted that their property was not an irrigation subsistence unit or garden, but an industrial zone, and therefore fell outside the parameters of 25 C.F.R.

§ 171.1(b).¹¹ Additionally, Appellants complained that BIA had never consulted them or sought their advice about water matters as required by 25 C.F.R. § 171.1(c); that 25 C.F.R. §§ 171.1(f) and 171.5 explicitly tie the allowable fees to the delivery of irrigation water to a designated delivery point; that no water had been delivered to the land during their ownership; that there was no delivery point on their property; and that despite the impossibility of delivering or distributing water to the property, BIA nevertheless persisted in assessing Appellants O&M charges for the property. They further maintained that, since they had no need for WIP's services, they had no obligation to notify BIA of their acquisition of the property, and that 25 C.F.R. § 171.19 was inapplicable because it applied only to acreage designated assessable and to which irrigation water can be delivered. Appellants added that, when Lantana contacted the U.S. Treasury Department about the invoice it received for its portion of the \$211.04 bill previously sent to Appellants, the Treasury Department advised Lantana that it could opt out of the Project, but that when it contacted WIP personnel, it was "told opting out was not possible." APPEAL at 2. Appellants requested that the Regional Director direct WIP personnel to contact the title company and explain that the billing had been voided so that the title company's lien could be lifted, and asked that he ensure that the \$211.04 previously paid be refunded to them.

In a short supplement to the APPEAL (AR 10), Appellants cited the GAO Report's recommendation on page 12 that lands "physically incapable" of producing crops be removed from the Project's assessable acreage and that the unpaid assessments associated with those lands be cancelled as had been done seven times before.¹² Appellants asserted that, because their property was in an industrial zone and no irrigation waters were provided to it, the property was physically incapable of producing crops with infrastructure provided by the WIP.

In his decision, the Regional Director addressed both the appeal of the 2007 O&M assessment and the issues remanded to him in *U&I Redevelopment I*. AR 1. As to the bill

¹¹ Subsection 171.1(b) authorized BIA "to apply to irrigation subsistence units or garden tracts only those regulations in this part which in [its] judgment would be applicable in view of the size of the units and the circumstances under which they are operated."

¹² According to the GAO Report, four of the seven previous cancellations were for Indian landowners under a 1932 act, and three were for non-Indian landowners under a 1936 act. GAO Report at 11. These cancellations were based on the fact that (1) the quality of the soil was poor; (2) drainage of the land was inadequate; or (3) the older assessments were uncollectible. *Id.* According to the GAO Report, almost \$360,000 in past due assessments have been cancelled since 1942. *Id.*

for the 2007 O&M assessment, the Regional Director first acknowledged that part of the property had been sold and informed Appellants that, as a result of the sale, WIP staff had segregated the property retained by Appellants from the land sold, had withdrawn the bills for both the 2007 and 2006 O&M assessments, and had prepared new bills for the 2006 and 2007 O&M assessments based on the 7.36 acres of land remaining in Appellants' ownership.¹³ According to the Regional Director, the new bills levy \$468.68 for the 2006 O&M assessment and \$483.40 for the 2007 O&M assessment. Decision at 2.

The Regional Director then proceeded to respond to the issues raised by Appellants in both their March 21, 2007, letter to the Superintendent and their April 20, 2007, letters to him. The Regional Director discounted as unsupported Appellants' claim that the total pre-sale acreage identified in the 2007 bill — 43.74 acres — was incorrect, explaining that the difference between the acreage of the parcel for tax purposes and the acreage utilized for O&M assessments was due to the County's elimination of land encumbered by various easements from the acreage subject to taxation and BIA's use of the full size of the parcel for O&M assessment purposes. Decision at 2. The Regional Director also rejected their assertion that they had no legal obligation to pay O&M assessments because they did not use the water, noting that Appellants' predecessor-in-interest had executed the Application requesting the right to receive water from the WIP and thereby bound itself, its heirs, and its assigns to pay the levied O&M charges. The Regional Director added that the Application had been recorded in the County records, and that Appellants therefore could easily have discovered the O&M obligation when they purchased the land. Citing 25 C.F.R. § 171.19(a), the Regional Director determined that the obligation to pay O&M charges does not depend on any particular need for or use of the water in any given year, but, rather, that it is the land's location within the Project not the need for or use of the water, that triggers the landowner's duty to pay those charges. Appellants' reference to State law was irrelevant, the Regional Director stated, because Federal, not State, law governs Federal irrigation projects. Decision at 2-3.

The Regional Director similarly found no merit in Appellants' reliance on the lack of a water delivery point on their property and the consequent incapability of the land to be irrigated, as negating their obligation to pay O&M assessments. The Regional Director pointed out that, in accordance with 25 C.F.R. §§ 171.4(d) and 171.5(b), the WIP was only required to provide water to a single location on an 80-acre farm unit, and that, when

¹³ The discrepancy between the 6.7 acres Appellants assert they retain and the 7.36 acres that BIA has calculated remain in their ownership stems from the fact that the 6.7 acres excludes land encumbered by various easements, while the 7.36 acres is based on the full size of the parcel. See Decision at 2; see also n.6, *supra*.

a parcel of more than 80 acres was subdivided and the portion sold contained less than 80 acres, the new owner was responsible for ensuring that the parcel had a delivery point. The Regional Director further rejected Appellants' claim that, because their parcel was not a subsistence unit or garden tract falling within 25 C.F.R. § 171.1(b), the O&M regulations did not apply to them. In that regard, the Regional Director noted that subsection 171.1(a) directed BIA to apply the O&M regulations to all BIA-administered irrigation projects, and, consequently, the fact that the parcel was not subject to the permissive application of the regulations described in subsection 171.1(b) did not negate the applicability of the O&M regulations to their parcel. The Regional Director also disputed Appellants' contention that the WIP had never consulted landowners as required by 25 C.F.R. § 171(c), pointing out that the WIP had consistently consulted with water users through notifications in the *Federal Register* and through periodic water user meetings, including a meeting held on March 6, 2007. The Regional Director added that, in any event, the regulations did not require consultation prior to the levying of O&M assessments. Decision at 3. The Regional Director acknowledged in a footnote Appellants' reference to the GAO Study, stating that it did not support Appellants' position because it did not express any conclusions about the validity of bills for property in industrial zones or on which irrigation water was not used. The Regional Director did not address Appellants' contention that their property has never consisted of "irrigable lands" and that it was "physically incapable" of producing crops. The Regional Director concluded that, with the exception of the need to recalculate the assessments to reflect the sale of part of the land, Appellants had failed to identify any reason for invalidating the assessments. *Id.* at 2-3.

The Regional Director next turned to the issues remanded by the Board, specifically the issues raised in Appellants' August 10, 2006, letter, as supplemented by the pleadings filed with the Board. The Regional Director first responded to Appellants' complaint that WIP had improperly placed a "lien" on the property, explaining that the "lien" was actually an escrow account proposed to be retained by the title company to cover the unpaid O&M assessments due for the property. While acknowledging that, in response to the title company's inquiry, BIA had provided the Irrigation Account Status Report upon which the "lien" was based, the Regional Director pointed out that no lien had been imposed by the WIP, and that, since the Regional Director had no authority to require a private title company to take any action, the Regional Director was incapable of lifting the lien as Appellants had requested in their August 10, 2006, letter. Decision at 4.

The Regional Director also considered Appellants' August 10, 2006, letter to be a challenge to the 2002-2006 bills underlying the Status Report provided to the title insurance company. Citing the Boone Declaration and the declaration of Linda Queahpama (Queahpama Declaration) and their attachments, the Regional Director explained that the amounts identified in the Status Report were based on corrected billings

issued to Appellants on May 10 and 16, 2006, copies of which were included as Attachments A-E to the Queahpama Declaration.¹⁴ The Regional Director noted that the bills contained appeal information advising the recipients that any appeal of the bills had to be mailed no later than 30 days after the due date, and that the latest due date for the bills in question was June 15, 2006. Since Appellants' August 10, 2006, letter could not have been mailed any earlier than August 10, 2006, the Regional Director determined that, in accordance with 25 C.F.R. § 2.9(a), the letter could not be considered to be a timely filed appeal of the bills. The Regional Director therefore concluded that, with the exception of the reissued 2006 bill reflecting the sale of a portion of the property, the bills could not now be appealed or challenged. Accordingly, the Regional Director affirmed the corrected bills for the 2006 and 2007 O&M assessments for the land still owned by Appellants, confirmed his lack of authority to affect the escrow account established by the title company, and dismissed as untimely the appeal of the bills issued in 2006 to the extent Appellants intended their August 10, 2006, letter as an appeal of those bills. Decision at 5.

Appellants timely appealed the Regional Director's decision. The appeal has been fully briefed by both Appellants and the Regional Director and is ripe for review.

Discussion

On appeal, Appellants first deny that they received any of the bills allegedly sent in May 2006 for the 2002-2006 O&M assessments, although they acknowledge that they learned of the amount due from the title insurance company on May 15, 2006, when they closed on the sale of a portion of the property. They assert that the only bill they received from BIA was the erroneous bill for \$211.04, which they claim did not contain any appeal

¹⁴ The Regional Director admitted that one owner named on the bills, Holly, was incorrect but concluded that notice of the bills nevertheless most likely reached the correct owners since the principals of Holly were the same as those of the current co-owner, U&I, and because the bills were addressed to Lantana, the correctly named owner. The Regional Director also acknowledged that the legal description on the bills was partially incorrect but found that the acreage upon which the assessments were based was limited to the number of acres within Lot 1 of Short Plat 85-45, which was the correct legal description of Appellants' property. Decision at 5.

information.¹⁵ Accordingly, they deny that their appeal of the 2002-2006 bills was untimely.

The main focus of Appellants' appeal, however, centers on their contention that they should be allowed to "opt out" of the obligation to pay O&M assessments. They assert that their property is zoned for industrial use, contains railroad tracks and various types of buildings, and lacks a water delivery point, all of which, Appellants submit, render the land unsuitable for irrigation. They distinguish their situation from one in which a landowner has no need for water in a given year, which they admit would not be reason to eliminate the obligation to pay O&M assessments, on the ground that they will *never* need irrigation waters for their parcel. Accordingly, they maintain that they should be allowed to "opt out" of the assessment requirement. In support of this argument, they contend that nothing in the Application or the regulations prevents a landowner from opting out for lands that become physically incapable of producing crops, and they insist that it is illogical and unlawful to expect people to pay for something they are incapable of receiving and using. They further aver that the Federal government does not have exclusive jurisdiction over non-Indian lands and that, therefore, more restrictive State laws should be applied. Appellants also reiterate their disagreement with the amount of acreage listed in the new 2006 and 2007 bills, their belief that section 171.1(b) relating to subsistence units and gardens is relevant to their appeal, and their contention that the lack of consultation renders the O&M assessments invalid.

Appellants seek three remedies from the Board. First, they ask that the Board (or the WIP) issue a statement that they can take to the title company, which explains that funds being held in escrow can be released to them. Second, they request that the \$211.04 previously paid be refunded to them. And third, they seek a decision allowing their property to be "opted out" of the O&M assessment requirement.

An appellant has the burden of proving error in the Regional Director's decision. *Gardner v. Acting Western Regional Director*, 46 IBIA 79, 85 (2007); *Strom v. Northwest Regional Director*, 44 IBLA 153, 162 (2007). Unsupported allegations are insufficient to sustain this burden of proof. *See Gardner*, 46 IBIA at 85. We find that Appellants have failed to meet their burden of showing that the Regional Director erroneously affirmed the 2002-2005 and the revised 2006 O&M assessments and affirm that portion of the Regional

¹⁵ The bills consist of three pages. The second page includes a reference to a right of appeal, but the actual appeal instructions are on the third page. Appellants include a copy of pages one and two of their bill for \$211.04, and thus apparently contend that page three was missing.

Director's decision. However, we conclude that the Regional Director erred in failing to consider Appellants' August 10, 2006, letter and subsequent submissions as a request to redesignate their property as permanently nonirrigable pursuant to 25 U.S.C. § 389b, and we therefore vacate the Regional Director's decision affirming the revised 2007 assessment and remand the request to him for initial consideration.

2002-2005 and Revised 2006 O&M Assessments

The Regional Director did not address the merits of Appellants' arguments relating to the validity of the 2002-2006 assessments; rather, she determined that the August 10, 2006, appeal of those bills was untimely because it was not filed within 30 days of the bills' due dates. The Regional Director based her timeliness conclusion on the fact that the copies of the bills appended to the Queahpama Declaration indicated that the bills had been issued at the latest on May 16, 2006, with the last due date identified as June 15, 2006. *See* Queahpama Declaration Attachments A-E.¹⁶ Under the particular circumstances of this case, we find Queahpama's use of the term "issued" to be ambiguous. Given the overall context of Queahpama's declaration, it is evident that the bills were issued or "generated" on May 10 and 16, 2006; it is not clear that "issued" also means that the bills were mailed on that date. Nor does she explain the process for issuing O&M bills, provide documentary evidence that the specific bill was mailed to the proper party on a certain date, attest that the bill was not returned to BIA, or show when (or if) Appellants received them. We therefore find that, given the unique situation presented here, the evidence in the record is insufficient for the Regional Director to have determined a date of receipt by Appellants, for purposes of triggering the appeal period. *Cf. Corpuz v. Acting Northwest Regional Director*, 35 IBIA 149, 150 (2000) (the Board vacated and remanded a Regional Director's decision, which had dismissed an appeal from an O&M bill on the ground that the appeal had been filed 31 days after the date of the bill, because there was no showing by BIA that the bill had been received by the appellant on the billing date). However, while we find the record insufficient to support the Regional Director's untimeliness finding, we nevertheless conclude that, even if the appeal were timely, Appellants have failed to meet their burden of showing that BIA erred in assessing O&M charges for 2002-2006.

¹⁶ Four of the bills (Attachments A-D) have issue dates of May 16, 2006, and due dates of June 15, 2006; the remaining bill (Attachment E) has an issue date of May 10, 2006, and a due date of June 9, 2006. The record also contains a "Final Notice" issued on August 8, 2006, which added an administrative fee of \$62.50 to the \$11,441.09 total principal and \$63.50 interest charges, for a total amount due of \$11,566.24, because the May bills had not been paid. *See* Queahpama Declaration Attachment F.

As noted earlier, 25 U.S.C. § 385 authorizes the Secretary to assess O&M charges for lands within a BIA irrigation project, and 25 C.F.R. § 171.19(a)(1) specifies that O&M assessments will be levied on lands within a Project regardless of whether water is requested.¹⁷ The land owned by Appellants was committed to the WIP in 1919 by their predecessor-in-interest's execution of an application that, once accepted, contractually bound the landowner and its successors-in-interest to pay O&M assessments for the land. Appellants do not deny that the land falls within the boundaries of the WIP; rather, they assert that the land is incapable of receiving and using irrigation and thus should be "opted out" of the assessment charges. This argument, which they first made in August 2006, comes too late to affect the validity of the assessments due and owing before that date, which were issued when the land was indisputably included in the Project and BIA was unaware of any potential request that the lands be eliminated from the WIP. Appellants have offered no support for their implicit contention that BIA can and should retroactively rescind the O&M assessments, and we note that, while non-serviceable land may be removed from the WIP, any such removal is subject to the requirement that the O&M assessments levied on the removed land must be paid up to the date of the removal. *See* sec. 5, Pub. L. No. 87-316, 75 Stat. 680 (Sept. 26, 1961); *see also* 25 U.S.C. § 389b. We therefore find that Appellants have not shown that BIA erred in levying the 2002-2005 and revised 2006 O&M assessments.

None of Appellants' other arguments undermines this conclusion. The Regional Director reasonably explained the discrepancies in the acreage used by BIA and that used by the County for taxation purposes, and Appellants have offered nothing to contradict that explanation. Similarly, Appellants have not shown error in the Regional Director's conclusion that the provisions of 25 C.F.R. § 171.1(a), which authorize BIA to apply the O&M assessment regulations, among others, to lands within irrigation projects, governs the assessment of those charges for Appellants' land within the boundaries of the WIP, regardless of whether Appellants' property falls outside the permissive provisions of subsection 171.1(b) relating to subsistence units and garden tracts. Appellants' complaint that they were never consulted as purportedly required by 25 C.F.R. § 171.1(c) also fails because that subsection, which grants BIA the authority to take necessary action for the proper operation, maintenance, and administration of an irrigation project, simply states that BIA will seek advice from water users on matters of program priorities and operational policies. That subsection does not require consultation before O&M charges are assessed.

¹⁷ Since the O&M assessments apply regardless of whether water is requested, the lack of a delivery point on the land does not eliminate the landowner's duty to pay the assessment, especially since it is the landowner's responsibility to arrange for delivery when a subdivided parcel contains less than 80 acres. *See* 25 C.F.R. § 171.5; *see also* 25 C.F.R. § 171.4(d).

Appellants have not disputed the Regional Director's assertion that BIA fulfilled the consultation directive by issuing *Federal Register* notices and holding public meetings or shown that those notices and meetings were insufficient to meet the directive of section 171.1(c). Accordingly, Appellants have failed to meet their burden of showing error in the 2002-2005 and revised 2006 O&M assessments, and we affirm the Regional Director's decision to the extent it did not set aside those assessments.

Revised 2007 O&M Assessment

As discussed previously, 25 U.S.C. § 389b authorizes the Secretary to eliminate land determined to be permanently nonirrigable from an irrigation project, and section 5, Pub. L. No. 87-316, 75 Stat. 680 (Sept. 26, 1961), specifically grants the Secretary the authority to redesignate the lands within the Wapato-Satus Unit of the WIP capable of being served by the irrigation waters and to remove non-serviceable land from the Project, subject to the requirement that the land bear its proportionate share of construction costs and its commensurate share of O&M costs to the date of the removal. Neither the statutes nor the pre-2008 (or post-2008) regulations, however, establish any procedures that a landowner must follow to request that the irrigability of a parcel of land, or its inclusion in the WIP, be re-evaluated.

We have carefully reviewed Appellants' August 10, 2006, letter, as supplemented by their additional submissions, and have determined that the Regional Director erred in failing to consider these documents as a request under 25 U.S.C. § 389b that the land they own be redesignated as permanently nonirrigable and removed from the Project and from the concomitant obligation to pay O&M fees. We reject the Regional Director's argument that Appellants' letters were simply "[g]eneralized complaints about water rights [and unfair treatment]." Answer Brief at 8. To the contrary, Appellants repeatedly asserted that their land was "not capable of being irrigated," had "never been irrigable lands," and were "physically incapable" of growing crops. And, although the Regional Director asserts that even if Appellants' letters could be construed as a request for redesignation, "any action that may be taken by the Project will not be applied retroactively," the Regional Director cites no authority *mandating* that result and provides no reasoned explanation for summarily excluding consideration of making a redesignation (if granted) retroactive to the date of submission or of granting an annual waiver. *See* 73 Fed. Reg. 11028, 11,034 (Feb. 29, 2008) (annual assessment waiver may provide relief during the time it takes for lands to be redesignated). We therefore vacate the Regional Director's affirmance of the modified

2007 O&M assessment and remand the matter to him for review of the request.¹⁸ In so doing, we express no opinion on the merits of Appellants' request for redesignation, or on the appropriateness of retroactive application, if the land is redesignated.

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 affirms in part and vacates and remands in part the Regional Director's June 6, 2007, decision.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.

¹⁸ Although the Regional Director revised the 2006 O&M assessment after the August 2006 request was submitted, that assessment accrued and was initially billed *before* the request for redesignation was submitted. Therefore, it is not affected by the request and, as noted above, we affirm the 2006 O&M assessment as recalculated in the Regional Director's decision.