



INTERIOR BOARD OF INDIAN APPEALS

Yakama Nation v. Northwest Regional Director, Bureau of Indian Affairs

51 IBIA 175 (03/31/2010)

Related Board case:

51 IBIA 187



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

YAKAMA NATION,)
Appellant,) Order Affirming Decision in Part and
) Vacating Decision in Part
)
v.)
) Docket No. IBIA 07-54-A
NORTHWEST REGIONAL DIRECTOR,)
BUREAU OF INDIAN AFFAIRS,)
Appellee.) March 31, 2010

The Yakama Nation (Nation) seeks review of a November 2, 2006, decision (November 2 Decision) of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), in which the Regional Director determined that construction costs assessed against the Nation's fee lands within the Wapato Irrigation Project (WIP) were not subject to deferral under the Leavitt Act, 25 U.S.C. § 386a. In addition, the Regional Director sua sponte considered whether to adjust or eliminate the assessed construction costs, and declined to do so. The Nation contends that, pursuant to section 386a, assessments for the costs of construction of an irrigation system on the Yakama Reservation (Reservation) must be deferred for lands that are "Indian-owned" without regard to the status of the Nation's title, i.e., whether the lands are held in fee or in trust. Additionally, the Nation requests that we vacate that portion of the Regional Director's decision that declines to adjust or eliminate the assessed costs because the Nation did not request that the costs be adjusted or eliminated, and because the Regional Director's decision not to adjust or eliminate the costs is arbitrary and unsupported by the record.

We affirm the Regional Director's decision to assess construction costs on the Nation's fee lands because the applicable regulation, 25 C.F.R. § 152.32, explicitly states that the deferral of construction costs applies "only where such land is owned by Indians either in trust or restricted status." In addition, Deputy Solicitor's Opinion M-36708, issued on July 18, 1967, declares that Leavitt Act deferrals are limited to lands owned by Indians in trust or restricted status. Finally, we vacate that portion of the Regional Director's decision declining to adjust or eliminate the charges under section 386a because the Regional Director's sua sponte analysis failed to consider a statutory prerequisite and because his factual findings and assumptions are not supported by the current record.

Facts

Construction of WIP began in or about 1896 to supply water to landowners on the Yakama Indian Reservation. *See* Exhibit to Nation’s Reply re Order for Supplemental Briefing (“Recommended Cancellation of Delinquent Operation and Maintenance Assessments Wapato Irrigation Project Summary,” July 20, 1995), at 2. WIP consists of three districts or “units”: The Wapato-Satus, Ahtanum, and Toppenish-Simcoe. The Wapato-Satus unit comprises 95% of WIP, and apparently consists of Satus Nos. I, II, and III. GAO Report to Congress (GAO Report),¹ May 1997, “BIA’s Management of the Wapato Irrigation Project” at 2, 16 (Appendix I).² Congress funded the construction of WIP’s infrastructure, *id.* at 1, and called for the costs of WIP’s construction to be borne by purchasers of irrigable fee lands within its boundaries. *See* Pub. L. No. 58-3, 33 Stat. 596, 598 (Dec. 21, 1904); *see also* Pub. L. No. 61-114, 36 Stat. 269, 286 (Apr. 4, 1910) (additional funds appropriated for further construction are to be repaid in accordance with the Act of December 21, 1904). Instructions have been in existence since 1927 for the collection of the construction costs for Indian irrigation projects. *See* Department of the Interior (Department) Circular No. 1624a (July 25, 1927) (cited at 25 C.F.R. § 141.1 note † (1940)); *see also* 25 C.F.R. Parts 141 (1940), 134, 138, and 139 (2004).

In 1932, Congress enacted 25 U.S.C. § 386a, commonly known as the Leavitt Act, which lies at the heart of the Nation’s appeal.³ In pertinent part, section 386a provides:

The Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made: *Provided*, That the collection of all construction costs against any Indian-owned lands within any Government

¹ GAO is now known as the Government Accountability Office but was, at the time of the cited report, known as the General Accounting Office.

² The Board takes official notice of the GAO Report, which was submitted by the Nation in support of its appeals in *Yakama Nation v. Northwest Regional Director*, Nos. IBIA 07-132-A and 08-008-A. *See* Exhibit D to Declaration of Jeffrey S. Schuster, Dec. 7, 2007. A copy of the GAO Report has been placed in the record for this appeal.

³ Throughout this decision, we will use “Leavitt Act” and “section 386a” interchangeably to refer to 25 U.S.C. § 386a.

irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished

Sometime between 1985 and 2002, the Nation acquired *fee* title to 11 parcels of land within WIP's service area. November 2 Decision at unnumbered 2-4. These parcels originally were individual allotments that passed out of trust into unrestricted fee status at some point prior to the Nation's acquisition of them.⁴ The parties agree that 6 of the 11 parcels are located within the Wapato-Satus Unit of WIP, but apparently disagree as to the location of 5 of the parcels. *Comp. id.* at 3-4 (one parcel is located within the Satus II unit,⁵ and four parcels are located "outside the Satus II and Wapato-Satus units"⁶) *with* Nation's Reply Brief at 2 (all parcels for which assessed construction costs are challenged are located within the Wapato-Satus Unit). In 2004, WIP sent the Nation 3 invoices to collect construction assessments against the 11 fee parcels.⁷ The Nation appealed each of these

⁴ According to both the November 2 Decision as well as the invoices for the construction costs, the last four digits of each parcel number are the original Indian allotment number for the parcel. Therefore, each of the subject parcels, at one time, was an allotment held in trust or restricted fee status and, prior to the Nation's acquisition, each passed into unrestricted fee status.

⁵ The Satus II unit appears to be — or at one time was — a subunit of the Wapato-Satus Unit. *See* GAO Report at 16 (Appendix I).

⁶ Neither the Regional Director nor the record provided to the Board informs us of the unit within which these four parcels are located.

⁷ Bill No. 2004000002172, dated March 24, 2004, assessed a total of \$352.99 in construction costs against parcel nos. 001 1240 1294, 001 1922 1336, 001 3284 3584, and 012 2833 2833. According to the record, the invoice for parcel no. 012 2833 2833 "was canceled and reissued" to another entity. Administrative Record (AR) 5 (email dated Oct. 18, 2006, from Linda Queahpama, Yakama Agency, BIA, to Jeff Harlan, Northwest Regional Office, BIA). This bill apparently was adjusted because the Regional Director states that the "bills in question . . . amount to \$810.03," November 2 Decision at unnumbered 7, which is less than the \$893.97 aggregate sum of the bills in the record before the Board.

Bill No. 2004000002171, dated March 24, 2004, assessed a total of \$328.49 in construction costs against parcel nos. 001 3569 3631, 001 3619 1040, 012 2827A 2827, 110 5011 2947, 110 5017 2150, and 110 5018 2150. Bill No. 2004000002169, dated

(continued...)

construction assessments to the Regional Director, asserting that the Leavitt Act requires the deferral of construction costs against Indian-owned lands regardless of whether title is held in trust, restricted fee, or unrestricted fee. Nation's Statement of Reasons, July 19, 2004, at 1-2.

On November 2, 2006, the Regional Director issued his decision upholding the construction assessments levied against the Nation. He explained how each assessment was calculated, then addressed his authority for assessing construction costs against the Nation's fee lands. He then reviewed the express terms of 25 U.S.C. § 386a, noting that construction costs "against any Indian-owned lands within any Government irrigation project" are deferred until such time as "Indian title thereto shall have been extinguished." November 2 Decision at unnumbered 5 (quoting 25 U.S.C. § 386a). He pointed out that the Department of the Interior, through 25 C.F.R. § 152.32, has interpreted the deferral of construction costs under section 386a "to apply only where such land is owned by Indians either in trust or restricted status." *Id.* (quoting section 152.32). He also noted that section 152.32(a) provides *inter alia* that whenever a non-Indian or an Indian acquires land located within an Indian irrigation project in fee simple status, the new owner must agree to pay the pro rata construction costs chargeable to the land. *Id.*

The Regional Director also reviewed the history of the Department's interpretation of section 386a, identifying a 1967 Deputy Solicitor's legal opinion for the Commissioner of Indian Affairs in which the Deputy Solicitor determined that Indian-owned fee lands within the Wind River irrigation project were not eligible for deferred construction costs. *Id.* at unnumbered 6 (discussing Deputy Solicitor's Opinion M-36708, July 18, 1967, II *Opinions of the Solicitor* 1963 (DOI 1974)). After reviewing these authorities, the Regional Director concluded that the construction charges appropriately were assessed against the Nation's fee lands.⁸

⁷(...continued)

March 24, 2004, assessed a total of \$212.49 in construction costs against parcel nos. 001 3615 T1636T5244 and 110 5101 0566.

⁸ The Nation also argued that the deferral of construction costs against Indian-owned lands "was reinforced" by Pub. L. No. 87-316, 75 Stat. 680 (September 26, 1961) (1961 Act). The Regional Director concluded that the 1961 Act does not dictate a contrary result because the 1961 Act expressly authorizes the deferment of construction costs in accordance with section 386a. The Nation did not renew this argument before the Board.

In addition to concluding that the Nation's fee lands are ineligible for a deferment of construction costs, the Regional Director also sua sponte declined to adjust or eliminate the costs under the first clause of section 386a. In declining to adjust or eliminate the charges, the Regional Director stated,

[N]on-Indian water users are routinely assessed maintenance and construction charges. [The Nation] is the single largest owner of land on the Yakama Reservation and owns entirely or has a fractionated ownership interest in more than 53,700 acres within [WIP]. The bills in question are for 508.46 acres and amount to \$810.03. As the largest single landowner with holdings of over 38 percent of [WIP's] land base . . . , the [Nation] is in a unique position to greatly influence the viability of [WIP]. Discharging this debt, though small, could be seen as setting a precedent that would negatively impact [WIP's] overall ability to deliver water. This in turn would negatively impact the [Nation], individual Indian landowners, and non-Indian landowners who depend on water delivered by [WIP] for irrigation and non-irrigation purposes.

November 2 Decision at unnumbered 7. He also reviewed the legislative history concerning the first clause of section 386a, and concluded that "an adjustment or cancellation of the [assessed construction charges] would be outside the spirit of the act." *Id.* at unnumbered 8.

This appeal followed. The Nation filed an opening brief, to which the Regional Director responded. The Nation then filed a reply brief. The Board sought supplemental briefing from the parties on BIA's discretion to adjust or eliminate (or not to adjust or eliminate) charges assessed against lands for Indian irrigation projects and on whether the Board has jurisdiction to review BIA's exercise of discretion not to adjust or eliminate the construction charges at issue in this appeal. Both parties responded to the Board's request for briefing.

Discussion

We affirm the Regional Director's decision not to defer, pursuant to 25 U.S.C. § 386a, construction costs assessed against the Nation's fee lands. Section 152.32 of 25 C.F.R. states in clear terms that *fee* lands within the boundaries of an Indian irrigation district are subject to pro rata construction costs regardless of who owns the lands. Our decision also comports with Deputy Solicitor's Opinion M-36708 (July 18, 1967), in which the Deputy Solicitor interpreted the first proviso of section 386a as limiting the deferral of construction costs to lands held in trust for or restricted fee by Indians. The regulations

confirm and, in effect, codify the Deputy Solicitor's interpretation of the statute. As these authorities instruct, the first proviso of section 386a concerning the deferral of construction costs does not apply to lands held in fee regardless of whether the owner is Indian.

We vacate that portion of the Regional Director's decision in which he declines sua sponte to adjust or eliminate the assessed construction charges because we conclude that the Regional Director has not considered the circumstances under which the charges were incurred, as required by the first clause of section 386a. Therefore, the Regional Director's decision fails to comport with a statutory prerequisite. Moreover, we conclude that the record fails to support the Regional Director's limited factual findings or the assumptions that he drew from his limited findings.

I. Deferral of Construction Costs

The Yakama Nation argues that, as a matter of law, all lands that it owns inside the boundaries of WIP are "Indian-owned" within the meaning of the Leavitt Act, regardless of whether the lands are held in fee or in trust. Therefore, the Nation contends that any construction costs must be deferred by operation of law.

We review de novo any legal determinations made by the Regional Director. *Estes v. Acting Great Plains Regional Director*, 50 IBIA 110, 115 (2009). The Nation, as the appellant, bears the burden of establishing error in the Regional Director's decision. *Id.* In the absence of manifest injustice or manifest error, the scope of the Board's review is limited to those issues raised before the Regional Director. 43 C.F.R. § 4.318; *see Wallowing Bull-C'Hair v. Rocky Mountain Regional Director*, 49 IBIA 120, 124 (2009), and cases cited therein; *see also Rosebud Indian Land and Grazing Ass'n v. Acting Great Plains Regional Director*, 50 IBIA 46, 56 n.10 (2009) (the Board ordinarily will not consider arguments raised for the first time in a reply brief). We conclude that the Nation has not met its burden.

Under the Leavitt Act, "the collection of all construction costs against any Indian-owned lands within any government irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands *until the Indian title thereto shall have been extinguished . . .*" 25 U.S.C. § 386a (emphasis added); *see also* 25 C.F.R. §§ 134.4a(b), 138.5, and 139.5 (construction costs shall be assessed after "Indian title is extinguished"). "Indian title" is a term of art that refers to title that cannot be extinguished without the consent of the United States, and typically subsumes two types of title unique to Indian lands: (1) restricted title, where title is held by a tribe or an individual Indian, but with a restriction against alienation that requires the consent of

Congress (or the Secretary of the Interior pursuant to statute) before title may be transferred or a fee patent issued, and (2) trust status, where the United States holds title to the land in trust for a tribe or individual Indian(s). *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (“Indian title is a matter of federal law and can be extinguished only with federal consent”).⁹ Thus, under the statute, the deferral of charges is permitted only until such time as the land passes from trust or restricted fee title, i.e., Indian title is extinguished; the Nation has not cited any authority in which “Indian title” is deemed to include lands held in unrestricted fee simple status by a tribe.¹⁰

Consistent with this meaning of “Indian title,” the Department, through its published regulation, has interpreted “Indian-owned lands,” as used in the Leavitt Act, to mean those lands held in trust or restricted status on behalf of Indians:

Collection of all construction costs against any Indian-owned lands within Indian irrigation projects is deferred as long as Indian title has not been extinguished. (Act of July 1, 1932 (47 Stat. 564; 25 U.S.C. 386a)). *This statute is interpreted to apply only where such land is owned by Indians either in trust or restricted status.*

25 C.F.R. § 152.32 (emphasis added). This regulation has the force and effect of law, and is binding both on BIA and on this Board. *Gallegos v. Anadarko Area Director*, 20 IBIA 36, 37 (1991). This Board cannot disregard a duly promulgated regulation that interprets and implements a statute, nor may it authorize BIA to disregard such a regulation. *Louriero v. Acting Pacific Regional Director*, 37 IBIA 158, 159 (2002). Moreover, Deputy Solicitor’s Opinion M-36708 explains that “[t]he phrase ‘Indian owned lands’ in [the] context [of the first proviso of section 386a] means trust and restricted lands, the Indian title to which has not been extinguished by conveyance after June 30, 1932, to a non-Indian” AR 7 at 3.¹¹ Because each of the 11 parcels at issue herein originally was an Indian allotment,

⁹ There is also original Indian title or aboriginal title, which refers to the historical possession of lands by Indians prior to the arrival of non-Indians. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

¹⁰ There is no dispute that unrestricted fee simple title does not require the consent of the United States to transfer title to lands owned by Indians or tribes.

¹¹ The Solicitor’s “M-Opinions” are binding on the Board. 212 Departmental Manual (DM) 13.8(c) (limitation on delegation of authority to Office of Hearings and Appeals); (continued...)

because the fee simple status of the Nation's ownership interests undisputedly means that Indian title was extinguished to each parcel, and because it is undisputed that each parcel was owned in fee by the Nation in 2004 when construction costs were levied against the parcels, the Nation is not eligible to have said costs deferred under 25 U.S.C. § 386a, as interpreted by 25 C.F.R. § 152.32.

The Nation also argues that nothing in section 152.32 authorizes the Regional Director to impose construction charges against the Nation, and asserts that the Leavitt Act as well as 25 C.F.R. Parts 134, 138, and 139 each direct that no assessment of construction costs shall be made against "Indian-owned land." The Nation contends that Part 152 applies to "patents in fee, not the imposition of construction charges." Opening Brief at 10; *see also* Reply Brief at 8 ("Part 152 deals with conveyances").

The Nation is correct that section 152.32 is not the source of the Regional Director's authority to levy construction charges. *Cf.* 25 U.S.C. § 386 ("The Secretary of the Interior is . . . directed to require the owners of irrigable land under any irrigation system constructed for the benefit of Indians . . . to begin partial reimbursement of the construction charges"); *see also* 25 C.F.R. §§ 134.1, 134.4a, 138.2, and 139.2. The Regional Director specifically cites to 25 C.F.R. Parts 134, 138, and 139 as the sources of authority to issue annual construction assessments. *See* Nov. 2 Decision at 2. Section 152.32 provides notice to purchasers of lands within an Indian irrigation project that (1) the manner in which title to the lands is held will determine whether construction costs will be deferred; (2) a purchaser, either Indian or non-Indian, of fee lands within an Indian irrigation project must execute an agreement to pay such charges; and (3) a lien is to be included in any fee conveyance of such lands. Such notice is consistent with the purposes of Part 152, which are to address "Issuance of Patents in Fee, . . . Removal of Restrictions, and Sale of Certain Indian Lands." *See* Title, 25 C.F.R. Part 152. And, in giving such notice, section 152.32 interprets the statutory language of section 386a. Moreover, section 152.32 is not inconsistent with Parts 138 and 139, both of which state that "[i]n conformity with [section § 386a] no assessment shall be made on behalf of construction costs against Indian-owned land within the project until the Indian title thereto has been extinguished." 25 C.F.R. §§ 138.4, 139.4; *see also id.* §§ 134.4a(b), 134.1. Thus, the

¹¹(...continued)

209 DM 3.2A(11), 3.3 (delegation of authority to the Solicitor); *see also* Solicitor's Opinion M-37003 (Jan. 18, 2001) (Sec. Bruce Babbitt, concurring). Because the Deputy Solicitor's opinion is fully consistent with the regulation, we need not decide whether the 1967 Deputy Solicitor's opinion is binding on the Board.

deferment ceases when “*Indian title* thereto has been extinguished.” 25 C.F.R. §§ 138.4, 139.4 (emphasis added).

With respect to the Nation’s argument that 25 C.F.R. §§ 138.5 and 139.5 explicitly refer to lands being assessable when “Indian-owned lands pass[] to non-Indian ownership,” we note that nothing in either regulation defines “Indian-owned.” *Cf.* Deputy Solicitor’s Opinion M-36708 (“Indian owned lands” means lands held in trust or restricted fee). Section 152.32 fills this void by stating in unambiguous terms that collection of construction costs is deferred “as long as Indian title has not been extinguished,” and by stating explicitly that section 386a “is interpreted to apply only where such land is owned by Indians either in trust or restricted status.”

The Nation raises two additional arguments for the first time on appeal to the Board, for which reason we decline to consider them. The Nation contended in its notice of appeal that there is “no record that WIP required the Nation to enter into a new agreement [to pay construction costs] beyond whatever was entered into by the non-Indian predecessor.” Notice of Appeal at 5. The Nation did not renew this argument in its opening or reply briefs, and it is not entirely clear what the Nation intends by this statement. Because the issue was not raised before the Regional Director, we do not discuss it further. *See* 43 C.F.R. § 4.318 (“An appeal [to the Board] will be limited to those issues that were on appeal before . . . the BIA official”); *Delorme v. Acting Great Plains Regional Director*, 46 IBIA 107, 110 n.5 (2007) (the Board will not consider issues raised for the first time in a notice of appeal to the Board where the appellant had the opportunity to raise the argument first to the Regional Director).

In addition, the Nation contends in its reply brief, that it had no notice of “the Regional Director’s incorrect interpretation of the Leavitt Act [through application of 25 C.F.R. § 152.32]; nor does the record show any such notice.” Reply Brief at 8. Again, we need not respond to this argument because it is raised for the first time in the Nation’s reply brief and without the opportunity for response from the Regional Director. *See* 43 C.F.R. § 4.318; *Gardner v. Acting Western Regional Director*, 46 IBIA 79, 83 (2007). The Nation provides no explanation for its failure to raise this argument earlier, especially since the Regional Director specifically cites section 152.32 in his decision. *See* November 2 Decision at unnumbered 5. Nevertheless, we note that section 152.32 was published for notice and comment as section 121.32 in the Federal Register in 1972, 37 Fed. Reg. 8,384 (Apr. 26, 1972), and that the final regulation was published the following year, 38 Fed. Reg. 10,080 (April 24, 1973). Section 152.32, formerly

section 121.32, has been published in the Code of Federal Regulations since 1973. *See* 25 C.F.R. §§ 121.32 (1973-1982), 152.32 (1983-present).¹²

Because 25 C.F.R. § 152.32 and Deputy Solicitor's Opinion M-36708 specifically interpret the first proviso of 25 U.S.C. § 386a concerning the deferral of construction costs to apply only to lands held in trust or restricted status, we affirm the Regional Director's November 2 Decision not to defer the construction costs billed to the Nation for the land interests owned by the Nation in fee.

II. Adjustment or Elimination of Construction Costs

In addition to rejecting the Nation's challenge to the assessment of construction charges for the Nation's fee lands, the Regional Director also determined *sua sponte* that he would not adjust or eliminate the charges under the first clause of 25 U.S.C. § 386a. The Nation asks us to vacate this portion of the Regional Director's decision on the grounds that the Nation did not seek an adjustment of the construction charges or their elimination; the Nation only contended in its appeal to the Regional Director that it was entitled by operation of law to have the charges deferred. Alternatively, the Nation contends that this portion of the Regional Director's decision is arbitrary and capricious, and that the facts on which he relies are unsupported by the record.

We conclude that the Regional Director was not required to await a request from the Nation before considering whether to adjust or eliminate the charges under section 386a. But, we agree with the Nation that the Regional Director's decision must be vacated and remanded because the Regional Director failed to consider a statutory legal prerequisite for adjusting or eliminating the construction charges, and because his factual findings are not supported by the record.

We review a Regional Director's exercise of discretion to determine whether an appellant has shown (1) that the administrative record fails to support the Regional Director's factual findings, *Washinawatok v. Midwest Regional Director*, 48 IBIA 214, 231 (2009); (2) that the Regional Director failed to consider a legal prerequisite in the exercise of his discretion, *see Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 46 (2009), *Cloud v. Alaska Regional Director*, 50 IBIA 262, 269 (2009); or (3) that the Regional Director committed a procedural error, *Ponca Tribe of Oklahoma v. Acting Anadarko Area Director*, 22 IBIA 199, 203-04 (1992).

¹² Section 121.32 was redesignated as section 152.32 in 1982. *See* 47 Fed. Reg. 13,327 (Mar. 30, 1982).

The Nation first argues that, in the absence of a request from the Nation, the Regional Director erred in considering whether to adjust or eliminate the construction charges under the first clause of section 386a. We disagree. The Nation cites no authority in support of its position, and we find nothing in the statute to prohibit the Regional Director from sua sponte considering whether to adjust or waive the charges.¹³

We agree with the Nation's second argument that the Regional Director failed to consider the statutory criteria, i.e., the circumstances under which the construction charges were incurred. In addition, we agree that the Regional Director's limited factual findings, and the assumptions he drew from those findings, are not supported by the record. Thus, we vacate that portion of the Regional Director's decision in which he declines to adjust or eliminate the construction charges assessed against the Nation.

As we previously explained, section 386a directs BIA to adjust or eliminate "reimbursable charges of the Government of the United States existing as debts against . . . tribes of Indians in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made." 25 U.S.C. § 386a. In response to the Board's request for supplemental briefing, the parties have informed the Board that there are no rules, regulations, or guidelines that implement this provision. Therefore, we apply the language of the statute and, while we assume that the Regional Director considered whether it would be just and equitable to adjust or eliminate the construction charges, we cannot say that he did so in light of "the circumstances under which the charges were made." The Regional Director does not mention the circumstances under which the charges were made, much less does he explain how his findings and his consideration of those findings relate to the circumstances giving rise to the charges. Instead, the Regional Director focuses on the Nation's alleged status as the "single largest owner of land" on the Reservation and the Nation's ability "to greatly influence the viability of [WIP]." November 2 Decision at unnumbered 7. The Regional Director also comments on the possible negative effects that could occur if the Nation's construction charges were adjusted or eliminated. These considerations may well relate to whether a reduction or elimination of charges would be just and equitable, but constitute an incomplete evaluation in the absence of any identification and connection of such equities to the circumstances under which the charges were incurred.

¹³ While BIA is not required to refrain from deciding whether to adjust or eliminate debts under the first clause of section 386a until a request is received, it is unclear why the Regional Director would not solicit and consider the position of the Nation in determining whether to adjust or eliminate the construction costs assessed against the Nation's fee lands, especially where his inclination is not to adjust or eliminate the debt.

Moreover, the record is devoid of support for the Regional Director’s factual findings that the Nation is the single largest landowner on the Reservation, that the Nation owns interests in more than 53,700 acres within WIP’s boundaries, and that the Nation owns interests in 38% of the lands served by WIP. In the absence of further explanation, we also find that these particular findings do not support the assumptions that the Regional Director drew from them, i.e., that the Nation can influence the viability of WIP and, ultimately, that eliminating the \$810.03 assessed against the Nation would negatively affect WIP’s ability to deliver water to both Indian and non-Indian WIP customers. Nor have we found any independent support for these assumptions in the record. For these reasons, we vacate this portion of the Regional Director’s decision.

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 in part the Regional Director’s November 2, 2006, decision.¹⁴

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Sara B. Greenberg
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.

¹⁴ In its brief in response to the Board’s order for supplemental briefing, the Nation argues for the first time that it should be permitted to raise a new defense to the imposition of construction costs. The Nation argues that, in connection with appeals it has pending before the Board to contest operation and maintenance (O&M) charges assessed against its lands, *see Yakama Nation v. Northwest Regional Director*, Nos. IBIA 07-132-A, IBIA 08-08-A, and IBIA 08-149-A, the Regional Director has taken the position that the “adequate funds” defense asserted therein by the Nation applies only to construction costs and not to O&M charges. The Nation argues that it should now be permitted to assert this defense, found in 25 U.S.C. § 385, against the assessed construction charges challenged in the instant appeal.

The Nation is too late. The time for raising this defense was in the Nation’s appeal to the Regional Director, and not in supplemental briefing requested by the Board on a different issue and after the time had passed for the parties to submit their briefs on the merits. *See* 43 C.F.R. § 4.318. Notwithstanding our procedural rejection of this argument, the Nation is not precluded from raising this defense in a future challenge to construction costs.