



PRAIRIE COUNTY, MONTANA

178 IBLA 20

Decided July 8, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

PRAIRIE COUNTY, MONTANA

IBLA 2009-44

Decided July 8, 2009

Appeal from a decision of the Director, Office of Budget, denying a challenge to the manner in which disbursements under the Federal Payments In Lieu Of Taxes Act are formulated.

Appeal dismissed.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice: Protests

A protest filed under 43 C.F.R. Part 44 pertaining to payments in lieu of taxes made to local governments with entitlement lands must be filed “by the first business day of the calendar year following the end of the fiscal year for which the Department made the payments.” 43 C.F.R. § 44.56(b). Where the right to appeal under 43 C.F.R. § 44.57 is limited to rejected protests, the Board has no review authority for challenges to payments based on possible errors in computation or data for fiscal years not timely protested.

APPEARANCES: Todd Devlin, Chairman, Prairie Board of County Commissioners, and Rebecca A. Convery, Esq., Prairie County Attorney, Terry, Montana; Rachel Spector, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The present appeal was filed by Todd Devlin, Prairie County (Montana) Commissioner, on behalf of Prairie County,¹ under the Payments in Lieu of Taxes (PILT) Act, 31 U.S.C. §§ 6901-6907 (2006), and implementing regulations, 43 C.F.R.

¹ The right to protest and appeal matters governed under 43 C.F.R. Part 44, however, is not granted to individuals but given specifically to “[a]ny affected local government.” 43 C.F.R. §§ 44.55, 44.57. Accordingly, we recognize Prairie County as the proper appellant and Devlin as the County’s representative, in his capacity as a County Commissioner.

Part 44. This is the Board's first appeal from a decision of the Office of Budget, Department of the Interior, under 43 C.F.R. § 44.57.² It emanates from a filing, styled as a "protest," submitted by Prairie County, on July 1, 2008, charging error in how PILT disbursements were calculated when funded below Congressionally authorized amounts "from 1995 to present."³ The Director, Office of Budget, responded on October 6, 2008, explicating and advocating the correctness of its PILT disbursements, and finding that the challenged calculations accord with the PILT Act and implementing regulations.

Background

The PILT Act was enacted to "compensate[] local governments for the loss of tax revenues resulting from the tax-immune status of federal lands located in their jurisdictions, and for the cost of providing services related to these lands." *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258 (1985) (state plan for PILT distribution invalidated under supremacy clause); *Greenlee County, Arizona v. U.S.*, 487 F.3d. 871, 873-74 (Fed. Cir. 2007) (liability for PILT limited to Congressional appropriation). Under the PILT program, "the Secretary of the Interior is required to make annual payments 'to each unit of general local government in which entitlement land is located.'" *Id.*; see also 31 U.S.C. § 6902 (2006). The amount of the payment to which a unit of local government is entitled under § 6902 is calculated based on the number of acres of entitlement land within its jurisdiction. Under 31 U.S.C. § 6903(b)(1) (2006), the payment is the greater of two amounts determined by acreage-based formulas. One formula, identified generally as Alternative A, pays a higher per-acreage rate (subject to limits based on population), reduced by amounts the local unit received in the prior fiscal year under one of the payment laws identified in 31 U.S.C. § 6903(a)(1) (2006) (prior year payments). The other, Alternative B, pays a significantly lower per-acreage rate (also subject to population-based limits), but has no reduction provision. See 31 U.S.C. § 6903(c) (2006).

² Management of the PILT program was vested in the Bureau of Land Management (BLM) until late 2004, when authority for the program was transferred to the Office of Budget, Office of the Secretary. See 69 Fed. Reg. 70557 (Dec. 7, 2004) (promulgation of the 43 C.F.R. Part 44 regulations). The current Departmental regulations pertaining to the management of the PILT program vary little from the regulations that governed BLM, which were set forth at 43 C.F.R. Subpart 1881 (2004).

³ We note that the PILT payment to Prairie County was fully funded in fiscal year (FY) 2008.

Congress established the per-acre-payment amounts for the years leading up to 1999. See 31 U.S.C. § 6903(b)(1) (2006) (e.g., Alternative A: 93 cents for FY 1995, \$1.11 for FY 1996, \$1.29 for FY 1997, \$1.47 for FY 1998, and \$1.65 for FY 1999; Alternative B: 12 cents for FY 1995, 15 cents for FY 1996, 17 cents for FY 1997, 20 cents for FY 1998, and 22 cents for FY 1999). Congress also specified the initial amounts to be applied under the population limitation in § 6903(c) (e.g., for FY 1995, \$110 per person for populations up to 5,000, \$103 per person for populations from 5,001 and 6,000, and so forth to \$44 per person for populations exceeding 50,000). However, Congress intended that the amounts it established would be adjusted: “On October 1 of each year after the date of enactment of the [PILT] Act, the Secretary of the Interior shall adjust each dollar amount specified in subsections (b) and (c) to reflect changes in the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor, for the 12 months ending the preceding June 30.” 31 U.S.C. § 6903(d) (2006). Congress further provided that funding for the PILT program may be limited from time to time: “Necessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter. Amounts are available only as provided in appropriation laws.” 31 U.S.C. § 6906 (2006); See *Greenlee County, Arizona v. U.S.*, 68 Fed. Cl. 482, 486 (Ct. Cl. 2005) (PILT is not an entitlement), *affd Greenlee County, Arizona v. U.S.*, 487 F.3d at 878-80, 881 (Federal liability for PILT is limited to Congressional appropriation). Thus Congress retained discretion to set the amount of spending for PILT through the appropriations process. *Greenlee County, Arizona v. U.S.*, 487 F.3d at 878-80; *Greenlee County, Arizona v. U.S.*, 68 Fed. Cl. at 491. Under the current regulation, “[i]f Congress appropriates insufficient monies to provide full payment to each local government during any fiscal year, the Department will reduce proportionally all payments in that fiscal year.” 43 C.F.R. § 44.51(b).

For FY 2007, Prairie County received a PILT payment of \$86,149. Department of the Interior, *Fiscal Year 2007 Payments in Lieu of Taxes National Summary* (National Summary) at 71. This payment represented an amount prorated at 64.700528 percent of the eligible amount of \$133,141 formulated under § 6903.⁴ *Id.* The PILT formula for determining the amount paid Prairie County for FY 2007 was

⁴ The PILT payment to Prairie County did not involve § 6904 or § 6905 authorization payments.

The 64.700528 percent by which each PILT payment was prorated for FY 2007 was based upon the amount of \$232,133,759 appropriated by Congress divided by the amount of \$358,293,428 authorized by Congress (as calculated by the Office of Budget in accordance with the number of acres nationwide to which PILT payments apply). National Summary FY 2007 at 8. By comparison, for FY 2008 Congress appropriated \$228,506,803 for PILT payments, having authorized \$367,226,525 for the same period. See National Summary FY 2008 at 8; <http://www.doi.gov/pilt/index.html>.

based upon the 429,486 acres of entitlement lands, a prior year payment of \$120,754, and a population-based ceiling of \$165,319. *Id.* at 165, 259. Since the calculated Alternative A amount of \$44,565,⁵ was less than the Alternative B calculation of \$133,141,⁶ Alternative B represented the amount authorized for payment under the PILT program, which was then prorated because FY 2007 was not fully funded. *Id.* at 165.

Inquiry and “Protest”

The record in this matter begins with a March 13, 2008, inquiry submitted to the Secretary, Department of the Interior by Devlin, seeking “clarification and a detailed explanation on how and why the Department of [the] Interior calculates the formula at the *prorate* stage used in the calculation [of PILT].” Letter to the Secretary, dated Mar. 6, 2008. Noting that he sought more than a simple answer to “frequently asked questions,” Devlin requested a precise and detailed response that would include “the justification on where (meaning the stage and not level) you *prorate* the formula.” *Id.* At the direction of the Secretary, Pamela K. Haze, Director of Budget, provided the Department’s response. In a March 25, 2008, letter to Devlin, Director Haze explained the PILT program by outlining the several sections of the Act relevant to the calculation of payments—sections 6903, 6904, and 6905. She concluded:

Funding for the annual PILT payments to counties and other local jurisdictions is appropriated in the Interior, Environment, and Related Agencies Appropriations Act. If Congress appropriates insufficient funds to provide the fully authorized payment to each county in any given fiscal year[, 43 C.F.R.] part 44.51(b) directs the Department to reduce “proportionally” all payments in that fiscal year. The appropriated level for the PILT program is then prorated to counties and other jurisdictions based on the authorized level, which is calculated in accordance with the procedures in section 6903, 6904, and 6905 of the PILT Act.

⁵ The Office of Budget computed Alternative A by first multiplying 429,486 acres by \$2.23 per acre. *See* National Summary FY 2007 at 8, 165. Since the determined amount of \$957,754 could not exceed the population-based ceiling of \$165,319 (1,105 people multiplied by \$149.61 per person based upon a population less than 5,000), that ceiling was offset by the prior year payment of \$120,754 to reach an authorization of \$44,565 under Alternative A. *Id.* at 15.

⁶ The Alternative B calculation was achieved by multiplying 429,486 acres by 31 cents per acre. *See* National Summary FY 2007 at 8, 165.

Director's Letter, dated Mar. 25, 2008, at 2.

On July 1, 2008,⁷ Devlin filed with the Director, Office of Budget, a “protest” on behalf of Prairie County, “concerning the prorate on PILT payments calculated to units of local government from 1995 to present.” In light of the disposition of the appeal, we provide only a limited discussion of the issues and analyses presented by Prairie County in its July 1, 2008, filing and in its appeal before this Board, and by the Office of Budget in its responses. Devlin focused on the ratio between the Alternative A and the Alternative B per acre values. Fundamental to his argument was the assertion that Congress intended to perpetuate the same ratio between the two values from year to year. He claimed that, since 1995, the Department had failed to maintain that ratio, in violation of Congressional intent under the PILT Act.⁸ Devlin further disputed the timing of the Department's prorated calculation under Alternative A.

The Director responded on October 6, 2008, rejecting the “protest” on the ground that Devlin presented “insufficient evidence to indicate the possibility of errors in the computations or the data on which the Department bases its annual PILT payments.” Director's Response, dated Oct. 6, 2008 at 1. In the analysis, the Director examined Devlin's arguments, in the context of a detailed review of the statute and legislative history, and determined that to maintain the ratio as proposed by the County, “the Department would have to adjust the variables that are set out in the statute—something the Department is not authorized to do.” *Id.* at 1-2.

The Director did not purport to base the Department's authority for its response on the regulations regarding protests in 43 C.F.R. Part 44, nor did the response provide notification of any applicable appeal process. Rather, the Director

⁷ The protest was dated June 25, 2008. The record includes an email message to others on the various committees with which Devlin is involved and certain congressional offices. The message explains that he had not originally intended to file anything with the Department because the various committees were actively pursuing the legislative adoption of a “new, more equitable formula” for PILT payments.

⁸ As noted, the Department and not Congress has established the values since 1999 in accordance with section 6906. When PILT is not fully funded, Devlin claims BLM errs in applying proration by computing authorized amounts based on inflation adjusted statutory variables (*i.e.*, per capita and per acres), selecting the Alternative most favorable to the recipient, then prorating its payment. According to Devlin, since BLM is required to maintain a ratio of 7.5:1, it should more properly and fairly prorate the inflation adjusted statutory factors and then select the most favorable Alternative.

invited Devlin to contact her or another official in the Office of Budget directly, if he had “further questions concerning this matter.” Director’s Response, dated Oct. 6, 2008 at 6. Nevertheless, by letter dated October 31, 2008, Devlin submitted a “formal appeal to your denial of my protest of the incorrect prorated and ratio concerning the PILT formula notice of appeal, and attached reasons, with the Director.”⁹ By letter dated November 26, 2008, Devlin and the Prairie County Attorney submitted a supplemental filing with additional information and arguments. The Office of Budget has responded.

Authority to Review

We must first consider the threshold issue of our jurisdiction to review the appeal under the provisions of 43 C.F.R. Part 44.¹⁰

[1] As an administrative appellate body of the U.S. Department of the Interior, the jurisdiction of this Board is limited to the authority delegated by the Secretary of the Interior, as set forth in the regulations regarding appeals. See 43 C.F.R. § 4.1 (generally). The specific regulation governing the Board’s jurisdiction to review Departmental disbursement of PILT payments is set forth in 43 C.F.R. § 44.57: “Can a local government appeal a rejection of a protest? Any affected local government may appeal the Department’s decision to reject a protest to the Interior Board of Land Appeals under 43 CFR part 4.” An appeal to the Board regarding PILT activities is explicitly limited to (1) an affected local government and (2) decisions rejecting PILT protests.

The regulation at 43 C.F.R. § 44.55 provides that “[a]ny affected local government may file a protest with the Department.” The regulation at 43 C.F.R. § 44.56 provides clear guidance regarding the requirements for filing a protest.

How does a local government file a protest? The protesting local government must: (a) Submit evidence to indicate the possibility of errors in the computations or the data on which the Department bases the computations; and (b) File the protest by the first business day of

⁹ The notice is dated Oct. 31, 2008, but neither the original and the envelope in which it was received, nor copies in the record indicate when the notice was officially filed (although one note attached to the original suggests that it was received on Nov. 12, 2008).

¹⁰ We note that, in the only other PILT appeal reviewed by this Board, *County of Imperial*, 40 IBLA 257 (1979), our jurisdiction to hear the appeal under 43 C.F.R. § 44.56 was not at issue.

the calendar year following the end of the fiscal year for which the Department made the payments.¹¹]

The regulations at 43 C.F.R. Parts 4 and 44 provide no authority for the Board to entertain an appeal directly from a PILT payment determination, and limits our authority to the consideration of a rejected protest timely submitted.

Prairie County challenges the Department's PILT payments "from 1995 to present" in its July 1, 2008, filing styled as a protest. We cannot reach the merits of the County's challenge, however, because we do not find that the Department's response is a decision rejecting a timely protest, as provided for in 43 C.F.R. §§ 44.55 and 44.56, which is appealable to this Board under 43 C.F.R. § 44.57.

Payments for each fiscal year from 1995 to 2007 were made during their respective fiscal years. The fiscal year for the Federal Government ends on September 30. 2 U.S.C. § 631 (2006). Since a local government protest must be filed no later than the first day the Office of Budget is open for business in the first week of January following the PILT payment (*likely* January 2, 3, or 4, depending on when the New Year Holiday falls or unless other circumstances prevail), 43 C.F.R. § 44.56, Prairie County's July 1, 2008, protest was untimely for payments made for FYs 1995-2007. Accordingly, under 43 C.F.R. § 44.57, this Board has no jurisdiction to review an appeal from the Director's response dated October 6, 2008.

¹¹ This filing deadline for protests has remained unchanged since the outset of the PILT program. When the PILT regulations (pertaining to BLM management of the program) were initially proposed, 42 Fed. Reg. 40,000 (Aug. 8, 1977), and promulgated, 42 Fed. Reg. 51,580 (Sept. 29, 1977), the source and reason for implementing this time period were not disclosed. When changes to 43 C.F.R. Subpart 1881 were proposed in order to implement the statutory changes to the PILT program in 2000, the preamble provided the following with respect to § 1881.56, the predecessor to § 44.56: "This proposed section would explain the process of filing a protest *including the time within which the unit of general local government **must** file.*" 65 Fed. Reg. 21,688, 21,690 (Apr. 24, 2000) (emphasis added). No further comment was provided then or later when the regulations were amended to reflect the transfer of responsibility for the PILT program. 69 Fed. Reg. 70,557 (Dec. 7, 2004).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is dismissed.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge