



INTERIOR BOARD OF INDIAN APPEALS

Joint Board of Control for the Flathead, Mission & Jocko Irrigation Districts v.  
Portland Area Director, Bureau of Indian Affairs

17 IBIA 65 (02/15/1989)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

## JOINT BOARD OF CONTROL FOR THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS

v.

AREA DIRECTOR, PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-41-A

Decided February 15, 1989

Appeal from a decision of the Portland Area Director, Bureau of Indian Affairs, concerning the 1988 operation and maintenance rate for the Flathead Irrigation District.

Dismissed and remanded.

1. Indians: Water and Power Resources: Irrigation Projects--Indians: Water and Power Resources: Operation and Maintenance--Regulations: Generally

The setting of an operation and maintenance rate for an Indian irrigation project, pursuant to 25 U.S.C. § 385 (1982), is rulemaking within the meaning of 5 U.S.C. § 551(4) and (5) (1982).

2. Board of Indian Appeals: Jurisdiction--Regulations: Validity

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

3. Regulations: Generally

When it appears that the Bureau of Indian Affairs has not concluded a rulemaking proceeding, the matter will be remanded for completion.

APPEARANCES: Stanley T. Kaleczyc, Esq., Helena, Montana, for appellant; Vernon Peterson, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for appellee.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On September 16, 1988, the Board of Indian Appeals (Board) received the above case on referral under 25 CFR 2.19(a)(2) 1/ from the Acting

1/ Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or Bureau of

Assistant Secretary--Indian Affairs. Appellant Joint Board of Control for the Flathead, Mission and Jocko Irrigation Districts seeks review of a decision issued by the Portland Area Director, Bureau of Indian Affairs (BIA; appellee), concerning the 1988 operation and maintenance rate for the Flathead Irrigation District. For the reasons discussed below, the Board dismisses this appeal and remands the case to appellee for further consideration in accordance with this opinion.

### Background

Pursuant to regulations in 25 CFR Part 171, on June 11, 1987, BIA published a proposed 1988 operation and maintenance rate for the Flathead Irrigation Project in the Federal Register. See 52 FR 22391 (June 11, 1987). The proposed rate, which was based upon a budget prepared under the direction of the Superintendent, Flathead Agency, BIA (Superintendent), was \$14.67 per acre. The notice, which lacked a description of the nature of the action involved, stated: "The public is welcome to participate in the rule making process of the Department of the Interior." 52 FR at 22392. Interested persons were given 30 days from the date of publication to submit comments.

After receiving several objections to the proposed rate, appellee established a Maintenance Rates Review Committee, composed of BIA and Bureau of Reclamation officials familiar with the operation and maintenance of irrigation projects, to review the proposed rate. The committee submitted its report to appellee on July 13, 1987. By memorandum dated July 27, 1987, appellee adopted the recommendations of the committee and set the operation and maintenance rate at \$13.60 per acre. By letter dated July 31, 1987, the Superintendent notified appellant that the 1988 operation and maintenance rate would be \$13.60. The Superintendent's letter stated that appellant could appeal the decision to the Assistant Secretary--Indian Affairs. The final rate has not been published in the Federal Register.

Appellant timely appealed this decision to the Assistant Secretary, by letter dated August 25, 1987. The case was referred to the Board by memorandum dated September 16, 1988. The Board received the administrative record from appellee on October 11, 1988. By order dated October 12, 1988, the Board established a briefing schedule.

On October 21, 1988, before the submission of appellant's opening brief, appellee filed a motion to dismiss on the grounds that the Board lacked jurisdiction to hear the appeal. Briefing on the merits was stayed pending resolution of the motion to dismiss. Appellee filed a supplemental brief in support of his motion; appellant opposed dismissal.

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fn. 1 (continued)

Indian Affairs official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision."

Discussion and Conclusions

Appellee raises several alternative grounds for dismissal: (1) the Portland Area Office's use of notice and comment procedures precludes Board review; (2) the determination of rates through publication of a "general notice document" is not subject to Board review because the determination is a discretionary decision; and (3) the 1988 rate is not ripe for decision because it has not been published in the Federal Register. 2/

Appellee explained in detail the background and procedures utilized in setting the operation and maintenance rates for the Flathead Irrigation Project. BIA's authority to set operation and maintenance rates derives from 25 U.S.C. § 385 (1982), 3/ which states:

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: Provided further, That all moneys expended under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe: Provided further, That the Secretary of the Interior is authorized and directed to apportion the cost of any irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe. [4/]

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2/ In its brief opposing dismissal, appellant stated that it received notice of the final rate determination through the Superintendent's July 31, 1987, letter to its Executive Director. Appellant noted that this letter stated it was final unless appealed pursuant to 25 CFR Part 2.

In response to this statement, appellee noted at page 8 of his reply brief:

“We have raised the publication question because of a concern that [appellant] might argue that the final rate - with or without right of appeal - is not effective unless and until technical publication in the Federal Register occurs. If [appellant], as the duly constituted representative of the irrigators, is in effect stipulating to receipt of notice and waiving the technical publication requirement, there is no need to dismiss this case solely on the grounds that technical publication of the final notice has not occurred.”

3/ All further references to the United States Code are to the 1982 edition.

4/ The first proviso of section 385 was repealed by the Act of Oct. 12, 1982, P.L. 97-293, § 224(f), 96 Stat. 1273.

Prior to 1977, the Flathead Irrigation Project was addressed in regulations in 25 CFR Parts 194 and 195. Section 194.17 (1977) provided for assessments "payable in accordance with the annual public notice issued each year." The present 25 CFR Part 171 <sup>5/</sup> was promulgated in 1977. At that time section 171.1(e) provided: "The Area Director, or his delegated representative is authorized to fix as well as to announce, by proposed and final public notice published in the Federal Register, the annual operation and maintenance assessment rates for the irrigation projects or units within his area of responsibility." 42 FR 30362 (June 14, 1977). (Emphasis added.) The section was amended in 1978 to read: "The Area Director, or his delegated representative, is authorized to fix as well as to announce, by notice published in the Federal Register, the annual operation and maintenance assessment rates for the irrigation projects or units within his area of responsibility." (Emphasis added.) The comments on the change state: "The language of proposed and final notice has been misinterpreted as meaning a proposed and final rule. Notices are not published as proposed and final public notice, but only as a notice." 43 FR 8799 (Mar. 3, 1978).

Appellee alleges that the Portland Area Office has consistently published proposed operation and maintenance rates in the Federal Register and has allowed an opportunity for comment on the proposed rates. Specifically, he states that this procedure has been used at Flathead since 1985, after the project was transferred to the jurisdiction of the Portland Area Office.

With this background, appellee first argues that Board review of the operation and maintenance rate is precluded by his use of notice and comment procedures. Appellee asserts that the use of notice and comment procedures is not prohibited by 25 CFR 171.1(e), and, therefore, was available for use in setting the operation and maintenance rate. He contends that the setting of the rate through notice and comment procedures, pursuant to regulatory authorization, gives the rate the same force and effect of law as the regulation. Noting that the Board has held it lacks authority to change or invalidate duly promulgated Departmental regulations, appellee concludes that the Board also lacks jurisdiction to review this operation and maintenance rate.

Appellee attempts to argue that his setting of the operation and maintenance rate is not a rule because 25 CFR 171.1(e) does not require the use of notice and comment procedures, but is nevertheless entitled to the immunity of a rule from Board review. The Board cannot accept this position. The rate setting either is or is not a rule; it cannot be a rule and not be a rule at the same time.

[1] Whether or not an agency proclamation is a rule depends on whether it falls within the definition set forth in the Administrative Procedure Act, 5 U.S.C. § 551(4). Under section 551(4) a "rule" is

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<sup>5/</sup> Part 171 was originally promulgated as Part 191. The part was redesignated without substantive change by notice published in 47 FR 13327 (Mar. 30, 1982).

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. [Emphasis added.]

In determining whether or not an agency proclamation is a rule, the actual effect of the proclamation is dispositive regardless of how the agency may have characterized its action. See, e.g., Western Coal Traffic League v. United States, 694 F.2d 378, 392 n.61 (5th Cir. 1983); Brown Express, Inc. v. United States, 607 F.2d 695 (5th Cir. 1979); Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque, 14 IBIA 46, 93 I.D. 79 (1986).

"Rulemaking" is defined in section 551(5) as the "agency process for formulating, amending, or repealing a rule." The Department of the Interior is an "agency" within the meaning of section 551(1).

While no attempt precisely to define rulemaking can be wholly successful, the essence of its meaning is generally understood. Rulemaking by an agency characteristically involves the promulgation of concrete proposals, declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it. \* \* \* Furthermore, rules ordinarily look to the future and are applied prospectively only, whereas orders are directed retrospectively, typically applying law and policy to past facts.

PBW Stock Exchange, Inc. v. Securities & Exchange Commission, 485 F.2d 718, 732 (3rd Cir. 1973), cert. denied, 416 U.S. 969 (1974). As the Supreme Court stated in Morton v. Ruiz, 415 U.S. 199, 231 (1974), rulemaking involves the power of an administrative agency to "formulat[e] policy and mak[e] rules to fill any gap left [in a congressionally created program], implicitly or explicitly, by Congress."

The Department of the Interior is not essentially a rate-setting agency.<sup>6/</sup> However, 25 U.S.C. § 385 authorizes the Department to set operation and maintenance rates for Indian irrigation projects under its jurisdiction. In setting those rates, the Department is engaged in filling an explicit gap left by Congress in the irrigation project program. Such action constitutes rulemaking within the meaning of 5 U.S.C. § 551(4).

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<sup>6/</sup> For examples of rate-setting as rulemaking, see Associated Electric Cooperative, Inc. v. Morton, 507 F.2d 1167 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975); Phillips Petroleum Co. v. FPC, 475 F.2d 842 (10th Cir. 1973), cert. denied, 414 U.S. 1146 (1974); Automobile Club of New York, Inc. v. Cox, 592 F.2d 658 (2nd Cir. 1979).

Consequently, those rates must be set through the rulemaking procedures set forth in 5 U.S.C. § 553, which, with exceptions not applicable here, require notice and comment, either through publication in the Federal Register or personal service on all persons subject to the rulemaking. 7/

It is clear that appellee did not believe the setting of the operation and maintenance rate for the Flathead Irrigation Project constituted rulemaking and did not intend to follow the rulemaking procedures of 5 U.S.C. § 553. However, the proposed 1988 operation and maintenance rate was published in the Federal Register and public comments on the proposed rate were invited. Appellee considered the comments received, altered the rate based on his reassessment, and intended to publish the final rate in the Federal Register, although he was prevented from doing so by the institution of this appeal. Appellant, as the representative of the persons affected by the rate, 8/ was, however, given personal notice of the final 1988 rate.

[2, 3] Regardless of his intent, appellee has followed the procedures necessary for the promulgation of a rule. As noted by appellee, the Board has consistently held that it does not have authority to change or declare invalid duly promulgated Departmental regulations. See, e.g., Northern Natural Gas v. Minneapolis Area Director, 15 IBIA 124, 126 (1987), and cases cited therein. Normally, therefore, this case would be dismissed for lack of jurisdiction. Here, however, even though the proper procedures for promulgation of a rule were followed, the Board is not aware of a delegation of authority to the Area Directors to sign final rules.9/ Accordingly, this case is remanded to BIA for a determination of whether appellee has been delegated such authority, either in the delegation to establish operation and maintenance rates or elsewhere, and for the proper completion of the rulemaking proceeding. 10/

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7/ This holding does not constitute an invalidation of 25 CFR 171.1(e), but rather is an interpretation of it. The Board does reject the attempt in the comments to the regulation, which are explanatory only and do not have the force and effect of law, to characterize the rate-setting procedure as not involving rulemaking.

8/ See note 2, supra.

9/ The delegation of authority to the Area Directors in effect at the time appellee's decision includes the following limitation:

"This delegation does not include authority to issue documents in the Code of Federal Regulations or to waive any provisions of the Code of Federal Regulations issuances of the Bureau of Indian Affairs, except Area Directors may issue notices in the Federal Register including notices of user rates which fix operation and maintenance charges to users at irrigation and power projects."

230 DM 3.2C (Feb. 9, 1987). As discussed above, 25 CFR 171.1(e) authorizes the Area Directors "to fix as well as to announce, by notice published in the Federal Register, the annual operation and maintenance rates for the irrigation projects or units within his area of responsibility."

10/ Because of its finding that operation and maintenance rates are properly set through rulemaking proceedings, the Board declines to review the substance of this appeal. Under the circumstances of this case, the Board will not interpose itself into the rulemaking proceeding.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the decision of the Portland Area Director setting the 1988 operation and maintenance rate for the Flathead Irrigation District is dismissed and the case is remanded for proper completion of the rulemaking process.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge