



INTERIOR BOARD OF INDIAN APPEALS

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

52 IBIA 94 (09/24/2010)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

YAKAMA NATION,)	Order Affirming Decision in Part,
Appellant,)	Vacating Decision in Part, and
)	Remanding
v.)	
)	Docket Nos. IBIA 07-132-A
NORTHWEST REGIONAL)	08-08-A
DIRECTOR, BUREAU OF)	08-149-A
INDIAN AFFAIRS,)	
Appellee.)	September 24, 2010

In these appeals before the Board of Indian Appeals (Board), the Yakama Nation (Nation) seeks review of three decisions by the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), dated July 31, 2007, August 22, 2007, and August 7, 2008, in which he upheld certain Operation and Maintenance (O&M) bills issued to the Nation in 2006 and 2007 by BIA's Wapato Irrigation Project (WIP).¹ We hold that we lack jurisdiction to consider whether the applicable O&M regulations are invalid, whether BIA lacks authority to bill idle lands for O&M fees, and whether BIA is estopped from billing idle lands by its past practice of not doing so; we vacate that portion of the Regional Director's decisions in which he determined that all assessable acreage was liable

¹ The Nation's appeal from the July 31, 2007, decision is docketed as No. IBIA 07-132-A; the appeal from the August 22, 2007, decision is docketed as No. IBIA 08-08-A; and the appeal from the August 7, 2008, decision is docketed as No. IBIA 08-149-A. The first two appeals, Nos. IBIA 07-132-A and IBIA 08-08-A, were consolidated. *See* Notice of Docketing, Nos. IBIA 07-132-A, IBIA 08-08-A, Oct. 23, 2007, at 2. We declined to consolidate these two appeals with No. IBIA 08-149-A because the Nation argued in support of its motion to modify the briefing schedule in its third appeal that the Regional Director raised "new issues and argument." Order Permitting Supplementation of Record, Docket Nos. IBIA 07-132-A, IBIA 08-08-A, IBIA 08-149-A, Nov. 5, 2008, at 2. Therefore, it appeared at that time that there might not have been common issues sufficient to effect a savings of time and effort. *Id.* Notwithstanding this initial finding, the Board now finds it appropriate to decide these three appeals together.

for O&M fees regardless of whether WIP's infrastructure was capable of delivering water to a given delivery point; and we reject the remainder of the Nation's challenges to the Regional Director's decisions.

Summary

I. Parties' Contentions

The Nation maintains that the regulations governing the O&M fees at issue in this case are invalid, and therefore no O&M fees may be levied ("Conditional Argument A"). Even assuming the regulations are valid, the Nation argues that WIP lacked authority under 25 C.F.R. § 171.19(a) to levy O&M charges against lands to which WIP's infrastructure was incapable of delivering water. In connection with this argument, the Nation also contends that WIP was required to determine annually, prior to levying the annual O&M charges, whether its infrastructure was sufficient to deliver water to every assessable parcel. The Nation next contends that, under 25 U.S.C. § 385, idle lands are not liable for O&M fees because such lands are not generating income and, thus, the Indian landowner (i.e., the Nation) lacks adequate funds to pay the fees. In a related argument, the Nation also maintains that BIA may not collect fees for WIP's operation and maintenance unless BIA determines that the Indian landowner has adequate funds to pay and the charges are recoupments under § 385. Further, the Nation argues that BIA is estopped by its "historical practice" of not charging idle lands for O&M fees from discontinuing this practice, and that the United States has a trust duty to lease the Nation's lands or to make the Nation's lands otherwise productive to cover the O&M fees.

The Nation also makes two arguments under the rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553: The Nation contends that BIA must publish notice of its decision to discontinue its "historical practice" of not billing idle lands, and that BIA must also publish for notice and comment a 1960 budget memorandum on which BIA allegedly relied to conclude that WIP could be a self-sustaining Indian irrigation district ("Conditional Argument B").

Additionally, the Nation maintains that the billing system is systemically flawed because ownership, ownership interests, or parcel sizes (acreage) are incorrectly reflected on billing invoices, and argues that its bills should therefore be canceled. Finally, the Nation seeks an order from the Board directing the Regional Director to issue a decision on its request for a waiver of O&M charges under the Leavitt Act, 25 U.S.C. § 386a.

The Regional Director argues that the Board lacks all jurisdiction over the Nation's appeals because the appeals, which could determine whether some or all of the O&M fees

may be collected from the Nation, challenge the 1995 decision of the Assistant Secretary – Indian Affairs (Assistant Secretary) to collect O&M fees from Indian landowners of idle lands, including the Nation. Alternatively or in addition, the Regional Director argues that we lack jurisdiction because the issues raised in the appeals should have been raised during the comment period for O&M’s annual rate setting notice published in the *Federal Register*. Apart from his argument that all jurisdiction is lacking, the Regional Director also contends that the Board lacks jurisdiction to decide whether the O&M regulations are valid and whether the 1960 budget memorandum is required to be published in accordance with the APA. On the merits, the Regional Director disagrees with the Nation’s contentions, and argues that the O&M bills should be upheld in their entirety.

2. The Board’s Conclusions

We reject the Regional Director’s argument that the Board is without all jurisdiction over the Nation’s appeals, although we agree that we lack jurisdiction over three issues raised by the Nation. First, because the Assistant Secretary decided in 1995 to bill idle Indian trust lands in WIP’s service area for O&M fees in accordance with applicable rules and regulations and because we have no authority to review decisions of the Assistant Secretary, we lack jurisdiction to consider the Nation’s argument that BIA has no authority to bill the Indian owners of idle lands or lands that fail to generate sufficient income to cover the annual O&M charges. See *Edwards v. Portland Area Director*, 34 IBIA 215, 219 (2000).² Similarly, we lack jurisdiction to consider the agency’s argument that WIP is estopped from billing idle lands for O&M because BIA had historically refrained from doing so. Finally, we also agree with the parties that it is well-settled that the Board lacks jurisdiction over challenges to the validity of BIA’s regulations, including the challenge brought by the Nation to the O&M regulations (“Conditional Argument A”).

The Nation’s remaining arguments, however, address purported exemptions from or conditions predicate to O&M levies. For example, the Nation argues that, pursuant to 25 C.F.R. § 171.19(a) (2006)³, its O&M bills must be canceled because WIP’s

² Subsumed within our determination that we lack jurisdiction is the Nation’s further argument that the Nation *ipso facto* lacks adequate funds to pay the annual O&M fees where its lands are idle or fail to generate sufficient funds to pay the annual O&M fees.

³ In 2008, Part 171 of Title 25 of the Code of Federal Regulations underwent significant revision, 73 Fed. Reg. 11,028-11,041 (Feb. 29, 2008), and § 171.19(a) was not carried over into the revision. Cf. 25 C.F.R. § 171.515(b) (2010) (“If you own or lease assessable
(continued...)”)

infrastructure cannot deliver water to some of the Nation's lands, because BIA must first determine whether the Nation has adequate funds to pay its O&M fees prior to billing, and because the United States has not met certain trust responsibilities relative to the lands. These and other issues challenge BIA's compliance with applicable law rather than BIA's authority to bill the Indian owners of idle lands, and therefore do not implicate the Assistant Secretary's decision. We have jurisdiction to consider these arguments as well as the Nation's argument that BIA was required to but did not follow the APA's rulemaking procedures.

Turning to the merits of the Nation's arguments, we agree with the Nation that the applicable regulation, 25 C.F.R. § 171.19(a), required that O&M charges be levied against all allotments, farm units, and tribal units within Indian irrigation districts that were "assessable *and to which irrigation water can be delivered by the project operators from the constructed works. . . .*" (Emphasis added.) If WIP's infrastructure did not permit the delivery of water, then O&M fees could not be levied against or collected from the affected lands. Therefore, to the extent that the Nation has established that WIP's infrastructure could not deliver water to certain parcels, BIA must cancel these bills. But, we find no support in the statutes or the regulations for the Nation's further argument that WIP was required to conduct annual inspections — prior to levying O&M charges — to determine whether the infrastructure supported the delivery of water to all delivery points.

We also are not persuaded by the Nation's contention that 25 U.S.C. § 385 provides an exemption for the Nation from O&M fees. Section 385 governs, *inter alia*, reimbursements owed to the Federal government for certain funds appropriated and expended by the United States to construct and support Indian irrigation districts, and conditions reimbursement on whether "the Indians have adequate funds to repay the Government" (adequate funds proviso). The Nation does not show (nor does it appear) that the adequate funds proviso applies to WIP because that proviso applies only to reimbursement of general funds appropriated under Pub. L. No. 63-160, 38 Stat. 582 (Aug. 1, 1914) (1914 Act) and WIP was ineligible to share in those funds. We also reject the Nation's argument that BIA has a fiduciary duty to make the Nation's lands productive and, if it fails to do so, BIA is precluded from charging O&M fees for the Nation's lands.

³(...continued)

lands within a BIA irrigation facility, you will be billed for annual [O&M] assessments, whether you request water or not, unless otherwise specified in § 171.505(b).")
Therefore, all references in this decision to Part 171 are to the 2006 regulations, unless otherwise noted (Part 171 remained unchanged in 2007).

Whether or not such a duty exists, which we doubt, the Nation fails to show how it is relevant to the Nation's liability for O&M fees.

We reject the Nation's claim that its O&M bills are null and void because a 1960 budget memorandum was not published for notice and comment pursuant to the APA, 5 U.S.C. § 553. The Nation claims that BIA relied on the memorandum to determine that WIP landowners were able to pay for WIP's operation and maintenance. We disagree. There is no showing that the ability to pay is relevant to O&M billing.⁴

To the extent that the Nation claims that there are systemic flaws in WIP's billing system — based on the Nation's allegations of errors in ownership, acreage, and lease status — we conclude that the Nation has not met its burden of supporting its claims, and we affirm the Regional Director's decision not to adjust or cancel the invoices on these grounds.

As for its request for an order from the Board directing the Regional Director to consider the Nation's request for a waiver of O&M charges under the Leavitt Act, 25 U.S.C. § 386a, we note that the Nation has not demonstrated compliance with the requirements of 25 C.F.R. § 2.8. Therefore, we dismiss this claim as premature.

Facts

WIP is one of the oldest of over 70 Indian irrigation projects administered by BIA. GAO⁵ Report to Congress, GAO/RCED-97-124 (GAO Report), May 1997, "BIA's Management of the Wapato Irrigation Project," at 1, 3 (Exhibit D to Second Declaration of Jeffrey S. Schuster, Esq., submitted with the Nation's opening brief in Docket Nos. IBIA 07-132-A and IBIA 08-08-A). WIP is located within the Nation's boundaries, and was established to provide irrigation water to at least 140,000 acres of land that are held in both fee and trust status. *Id.* at 1 (142,000 acres); *see also* declaration of L. Niel Allen (Allen

⁴ The Nation also claims that when BIA discontinued its "historical practice" of refraining from delivering O&M bills to the Nation, BIA was required to comply with the APA's rulemaking procedures before doing so. This argument is presented for the first time on appeal to the Board, for which reason we decline to consider it.

⁵ GAO is now known as the Government Accountability Office but was, at the time of the cited report, known as the General Accounting Office.

Declaration), Dec. 13, 2000, at 3 (Administrative Record (AR)⁶ 9, Tab 1) (140,000 acres). Today, WIP consists of three districts or “units.” The largest, consisting of 95% of WIP’s lands, is the Wapato-Satus Unit; the remaining two are the Toppenish-Simcoe Unit and the Ahtanum Unit. GAO Report at 3; *Edwards*, 34 IBIA at 216.⁷

According to the Regional Director, WIP’s infrastructure consists of approximately 786 miles of canals and laterals, approximately 6,283 structures (including approximately 3,150 turnouts or delivery points), and around 312 miles of drainage canals. July 31, 2007, Decision at 2. WIP serves over 3,000 accounts. *Id.*

Regulations to assess fees specifically for the operation and maintenance of WIP have been in existence since at least 1932. *See* 25 C.F.R. § 124.15 (1938); *see also id.* § 124.19 (WIP’s O&M regulations have been in effect since December 1, 1932). However, while WIP apparently generated bills for O&M charges for idle lands, the bills were not sent if the owners of those lands were Indians. *See* GAO Report at 7-8. Apparently, these past due O&M charges “bec[a]me a lien against the Indian trust land, and their collection [was] deferred until the land [was] sold.” *Id.* at 7. Meanwhile, the farm economy served by WIP dwindled over the years, and by 1996 it was estimated that 21% of the land (30,000 acres) was idle. *Id.* at 4. At the time of the GAO Report, over 75% of the idle land was Indian trust land. *Id.*

Although Congress initially funded the construction as well as the operation and maintenance of reservation irrigation projects, it also determined in 1914 and 1920 that Indian and non-Indian landowners of lands within the boundaries of an Indian irrigation

⁶ The Regional Director submitted one Administrative Record for the consolidated appeals (Docket Nos. IBIA 07-132-A and IBIA 08-08-A), a separate Administrative Record consisting of documents pertaining solely to Docket No. IBIA 08-08-A, and a third Administrative Record for the appeal in Docket No. IBIA 08-149-A, which substantially duplicates the consolidated record for the first two appeals. Therefore, all references herein to the Administrative Record are to the consolidated record submitted for the consolidated appeals.

⁷ The Inspector General for the Department of the Interior (IG; Department), in an audit report, states that WIP “consists of the Wapato-Satus Unit and *three* smaller units,” but does not identify the three smaller units. IG’s Audit Report, Wapato Irrigation Project, Report No. 95-I-1402 (IG’s Report), Sept. 1995, at 1 (Attachment to Declaration of Karin L. Foster, submitted with the Nation’s Statement of Reasons to the Regional Director in Docket No. IBIA 07-132-A) (AR 9, Tab 13) (emphasis added).

project should reimburse the Federal government for certain of these costs, 25 U.S.C. §§ 385, 386, and bear responsibility for ongoing O&M costs, *id.* § 385.⁸ However, as to Indian landowners, Congress also provided in § 385 that reimbursement is appropriate “where the Indians have adequate funds to repay the Government.” *Id.*⁹

In 1936, Congress provided that lands within an Indian irrigation project that “cannot be cultivated profitably due to a present lack of water supply, proper drainage facilities, or need of additional construction work,” may be declared “temporarily nonirrigable” for periods of up to 5 years during which time no charges will be assessed. *Id.* § 389a. Similarly, where BIA determines that the lands are “permanently nonirrigable,” the lands may be removed from WIP with the consent of the landowner. *Id.* § 389b; *see also* Pub. L. No. 87-316, 75 Stat. 680, § 6 (Sept. 26, 1961) (1961 Act).

In 1961, Congress enacted legislation governing the allocation of construction costs on the Wapato-Satus Unit of WIP. 1961 Act. Among other things, Congress directed the Secretary of the Interior (Secretary) to designate “the lands that are capable of being served by the irrigation works that have already been constructed on the Wapato-Satus unit” 1961 Act at § 1(a). In 1962, the Secretary submitted his report to Congress. *See* “Designation Report of Wapato-Satus Unit” (Designation Report), Aug. 1962 (AR 9, Tab 3). In that report, the Secretary identified those allotments to which water could be delivered from the then-existing constructed works as well as those to which water would be deliverable at a future date. According to the report, WIP was then designed to deliver water to 136,559.59 acres. *Id.* at A, 88. Of this acreage, the Secretary identified 131,216.34 acres as assessable lands. *Id.* Another 5,343.25 acres were designated for “future” service, *id.*¹⁰

In 1995, the IG issued a report of his audit of WIP in which he determined that, while BIA was appropriately collecting construction costs, it had not “taken actions necessary to obtain all the [O&M] charges owed to [WIP] and to ensure the proper

⁸ Congress apparently continued to subsidize the operation and maintenance of WIP through at least 1984. GAO Report at 8, 10.

⁹ The parties dispute whether this provision applies only to construction expenditures (the Regional Director’s contention) or applies also to O&M costs (the Nation’s contention).

¹⁰ The Nation’s affiant, Dr. Allen, refers in his declaration to an “Additional Works Project” that was completed and included in WIP in 1975, which resulted in adding 5,494 acres to WIP. Allen Declaration (AR 9, Tab 1) at 4.

maintenance of [WIP's] facilities and equipment.” Memorandum from Acting Inspector General for Audits to Assistant Secretary, Sept. 30, 1995, at 1 (AR 9, Tab 13).¹¹ The IG found, *inter alia*, that BIA failed to properly calculate the costs of maintaining WIP's facilities and equipment and to “mail annual O&M bills to all water users¹² and landowners of idle allotted Indian trust lands.” *Id.* at 2. In particular and with respect to the failure to send bills to all water users and landowners of idle Indian trust lands, the IG reported that BIA attributed its failure to a lack of current names and addresses for water users, and a reluctance on WIP's part to bill the Nation and Indian landowners “because of the Nation's belief that payment of [O&M] charges was part of [BIA's] trust responsibility,” *id.*, and because of instructions in the BIA Manual, IG's Report at 8 (“when assessable Indian trust lands were idle and the collection of assessments was ‘impossible’ during the current irrigation season, bills ‘[were required to] be prepared and kept on file’”).¹³ With respect to assessments of O&M charges against both water users and the owners of idle lands, the IG cited BIA as being out of compliance with 25 C.F.R. § 171.19(a) and recommended that BIA “comply with Departmental billing regulations and procedures, which require that all owners or water users of Project lands be billed annual [O&M] charges.” *Id.* at 12.¹⁴ The Assistant Secretary concurred in the IG's recommendation without comment.

Pursuant to the Assistant Secretary's determination, WIP commenced delivery in 1998 of O&M bills to the Nation for the Nation's idle lands. *See Edwards*, 34 IBIA at 217 (“In March 1998, for the first time, [WIP] sent bills to Indian owners of idle lands.”). In April 2006, the Nation appealed to the Regional Director from all O&M bills it received in

¹¹ The IG identified six reports written between 1976 and 1993 that “address[ed] the deteriorated physical condition of [WIP].” IG's Report at 1 (AR 9, Tab 13).

¹² As used in the IG's report, “water users” appears to refer to persons or entities other than the landowners who are liable for O&M fees, e.g., lessees.

¹³ The IG also made a number of other findings related to O&M billing, including WIP's failure to increase O&M rates adequately after Federal funding for O&M charges ended in 1984 and failure to require bonds from lessees of Indian lands to ensure compliance with lease conditions, including the obligation to pay O&M fees.

¹⁴ Although the IG's Report discussed the deterioration and poor condition of WIP's equipment and structures, the IG did not purport to determine whether or to what extent WIP's infrastructure was capable of delivering water to any particular trust lands.

March 2006 for tribally-owned land interests.¹⁵ The Nation attached copies of six bills and indicated that it was appealing other bills that could not then be located.¹⁶ It contended that WIP cannot bill these parcels for O&M charges for one or more of the following reasons: (1) WIP's infrastructure is incapable of delivering water to certain parcels, particularly "Wanity Slough" and "Unit 2," (2) regulations authorizing the collection of O&M charges violate Federal statutory law, which prohibits billing for O&M if the parcel is not generating sufficient income to cover O&M charges, i.e., "idle lands," (3) the Federal Government has failed in its trust duty to lease its lands to enable the Nation to pay the O&M charges, (4) BIA, in violation of the rulemaking requirements of the APA, 5 U.S.C. § 553, classified WIP as a self-supporting "Class I" Indian irrigation project without first publishing this proposed rule for notice and comment, and (5) the O&M billing process is beset with systemic flaws, e.g., erroneous ownership, interest, and acreage information for billed parcels, requiring the withdrawal of all O&M bills. The Nation requested that, if the O&M bills were upheld on appeal, the Regional Director waive the charges under the Leavitt Act, 25 U.S.C. § 386a.

In June 2006, the Nation appealed to the Regional Director from an O&M bill, which it received in May 2006 for Allotment No. 3753.¹⁷ The Nation raised the first three arguments, above, with respect to the latter bill as it did in its April 2006 appeal. The following year, in April 2007, the Nation appealed to the Regional Director from 4 more O&M bills and 1 supplemental bill, all of which concern the Nation's interests in 616

¹⁵ The Nation previously has appealed O&M invoices. *See Confederated Tribes and Bands of the Yakama Nation v. United States*, No. CV-06-3032-LRS, slip. op. at 2 (E.D. Wash. Dec. 19, 2006) (dismissed for failure to exhaust administrative remedies), *aff'd*, 296 Fed. Appx. 566 (9th Cir. 2008) (*Confederated Tribes*); *Yakama Nation v. Northwest Regional Director*, 43 IBIA 190 (2006) (remanded at the request of the Regional Director); *Yakama Nation v. Acting Northwest Regional Director*, 36 IBIA 49 (2001) (appeal settled). The merits were not reached in these appeals.

¹⁶ The six bills for which the Nation submitted copies were Bill Nos. 2006000001912, and 2006000001943 through 2006000001947. According to the Regional Director, BIA canceled approximately \$355,000 of O&M charges following BIA's review of leases provided by the Nation that covered some of the lands billed for O&M fees and that documented the lessees' agreement to pay O&M fees. BIA reissued bills for the canceled fees and sent them to the lessees. *See* Regional Director's Answer Brief, Docket Nos. IBIA 07-132-A and IBIA 08-08-A, at 4 n.2.

¹⁷ Bill No. 2006000002234.

parcels consisting of approximately 20,637 acres. Aug. 7, 2008, Decision at 3.¹⁸ Again the Nation raised the same arguments in April 2007 as it did the previous year in its April 2006 appeal to the Regional Director.

On July 31, 2007, August 22, 2007, and August 7, 2008, the Regional Director decided the Nation's three appeals. He rejected each of the Nation's arguments that O&M fees could not be collected for the Nation's land interests within WIP's service area, and did not address the Nation's request for a waiver pursuant to the Leavitt Act. He did concede that, *inter alia*, "WIP's infrastructure makes it impossible to pump sufficient water to the lands [in Unit 2] to irrigate all of them due to . . . insufficient pump capacity." Aug. 7, 2008, Decision at 10. The Nation timely appealed to the Board from the three decisions, which we now decide.

Discussion

I. Standard of Review

We review the Regional Director's decisions to determine whether they are in accordance with the law, whether they are supported by substantial evidence, and whether they are otherwise arbitrary or capricious. *Quinault Indian Nation and Anderson & Middleton Co. v. Northwest Regional Director*, 48 IBIA 186, 193-94 (2008); *LeCompte v. Acting Great Plains Regional Director*, 45 IBIA 135, 142 (2007). We review de novo any legal determinations made by the Regional Director. *Quinault Indian Nation*, 48 IBIA at 194; *Bernard v. Acting Great Plains Regional Director*, 46 IBIA 28, 29, 33 (2007). At all times, an appellant bears the burden of showing error in the challenged decisions. *Valley Bank of Glasgow v. Director, Office of Indian Energy and Economic Development*, 49 IBIA 42, 50 (2009); *Quinault Indian Nation*, 48 IBIA at 193; *LeCompte*, 45 IBIA at 142.

II. Analysis

A. Jurisdiction

1. The Assistant Secretary's Decision to Bill Indian Landowners of Idle Lands for O&M Fees

At the outset, we address our jurisdiction to decide the Nation's appeals. The Regional Director argues, based on our decision in *Edwards*, that the Board lacks

¹⁸ Bill Nos. 2007000002039, 2007000002073, 2007000002074, 2007000002076, and 2007000002271 (supplemental).

jurisdiction to hear these appeals in their entirety. He maintains that all of the Nation's arguments either directly or indirectly challenge the 1995 decision of the Assistant Secretary to bill landowners or water users for O&M fees, and that the Board lacks authority to review the decisions of the Assistant Secretary. *See* 25 C.F.R. § 2.6(c) (decisions of the Assistant Secretary are final for the Department unless the decision states otherwise); *Haney v. Acting Assistant Secretary – Indian Affairs*, 39 IBIA 25 (2003).

We agree in part with the Regional Director. To the extent that the Nation contends that WIP (1) lacks any authority to issue O&M bills to the Indian landowners of idle trust lands or Indian landowners of lands that do not generate sufficient income to cover O&M fees, or (2) is estopped by “historical practice” from issuing O&M bills to such landowners, we agree that review by the Board is foreclosed by the Assistant Secretary's determination in 1995, in response to the IG's report, that all owners and water users must be billed for O&M charges in accordance with applicable rules and regulations, i.e., in accordance with 25 C.F.R. § 171.19(a). *See Edwards*, 34 IBIA at 219 (“It is clear that the decision to bill the Indian owners of [idle] trust land was a decision made in 1995 by the then Assistant Secretary”).

However, insofar as the Nation contends that its liability for O&M charges is otherwise excused (i.e., on grounds other than the status of the lands as idle or as not generating income sufficient to pay O&M charges), such issues fall within our jurisdiction because they challenge BIA's implementation of the Assistant Secretary's decision, not the authority to bill Indian owners of idle trust lands for O&M charges.

Our decision today conforms to our earlier decision in *Edwards*. In *Edwards*, the appellant raised several challenges related to his O&M bill. The Board held that it lacked jurisdiction to entertain two of these challenges. First, we held that we did not have jurisdiction over Edwards' claim that WIP lacked authority “to bill the Indian owners of [idle] trust land.” 34 IBIA at 219. Second, Edwards challenged the O&M rate applied to him, over which we held we lacked jurisdiction because the O&M rates were published in the *Federal Register*, and thus had the force and effect of a regulation that we could not disregard or overturn. *Id.* at 223. In contrast, we held that the Board did have jurisdiction to decide several other issues raised by Edwards that went to the implementation of the Assistant Secretary's 1995 decision. Among these issues was Edwards' contention that he is exempt by law from paying O&M charges because he lacks “first water rights” and because he never signed a promissory note authorizing the assessments. *Id.* at 220-23. In the instant appeal, the Nation similarly argues that BIA has disregarded certain exemptions from liability claimed by the Nation. Consistent with our decision in *Edwards*, we conclude that we have jurisdiction to review these claims of exemption because the Assistant

Secretary, in concurring with the IG's recommendation to bill idle lands, did not specifically address and decide the applicability and effect of these exemptions, i.e., whether the bills challenged by the Nation are subject to cancellation because WIP's infrastructure cannot deliver water to the billed parcels; whether WIP must first determine that the Nation possesses adequate funds to pay its O&M charges; and whether BIA has certain unmet trust responsibilities that affect the validity of the challenged O&M bills.

The Regional Director also contends that the Board lacks jurisdiction over the Nation's appeals because, he argues, they indirectly implicate the annual O&M rate setting.¹⁹ According to the Regional Director, all acreage — including acreage for idle and unproductive lands — is included in the total acreage that serves as the basis for apportioning the annual costs of operating and maintaining WIP. Therefore, the Regional Director argues, the time for the Nation to have appealed errors in acreage or exemptions from O&M was during the annual comment period for the new O&M rates, and, because the rate setting is now final and the rates have the effect of law, the Board lacks jurisdiction to consider any argument that would challenge or undermine the 2006 and 2007 rate setting processes.

We reject this argument. The rate setting notice — which consists of publication in the *Federal Register* of the proposal to increase rates, followed by a comment period, and thereafter by publication of the final notice of rates — announces the anticipated budget for the Indian irrigation projects, the total number of acres included in the projects, and the expected cost per acre that will be billed for the coming year. There is nothing in the rate setting notice that informs individual landowners that their land (including lands in which the landowner holds a fractured interest) is included in this calculation or, more importantly, that if they claim an exemption from O&M charges, such claim(s) should be raised in a timely response to the annual rate setting notice. Therefore, we conclude that there is inadequate notice to landowners that claims of exemption from O&M fees should

¹⁹ The Nation moves to strike this argument because it is raised for the first time in the Regional Director's Answer Brief in Docket No. IBIA 08-149-A and after representing to a Federal district court and to the Ninth Circuit Court of Appeals that the Nation was required to exhaust its administrative remedies before pursuing suit in Federal court. *See Confederated Tribes*. We reject the Nation's argument. The Regional Director may raise arguments going to the Board's jurisdiction at any stage of an appeal. *See Navajo Nation v. Office of Indian Education Programs*, 40 IBIA 2, 11 (2004). Moreover, the Board is the appropriate entity to determine in the first instance its own jurisdiction unless it is patently clear that jurisdiction is lacking.

be raised at the time that notice of rate setting is published, and the Nation is not required to object to the annual rate setting notice in order to raise the issues we decide today.

In short, to the extent that the Nation challenges BIA's authority to bill Indian landowners of idle trust lands (including lands that are producing income but insufficient income to cover O&M expenses) and argues that BIA is estopped — by its “historical practice” of refraining from sending O&M bills to Indian landowners of idle trust lands — from discontinuing its practice, the Nation's arguments are not within our jurisdiction to review. But to the extent that the Nation contends that it is entitled to seek an exemption from paying the O&M bills on one or more grounds that were not addressed by or necessarily encompassed within the Assistant Secretary's decision, these arguments are subject to our review authority. Therefore, we reject the Regional Director's argument that we lack all jurisdiction over these appeals.²⁰

2. Validity of O&M Regulations (“Conditional Argument A”)

The Nation makes several arguments challenging the validity of BIA's O&M regulations at 25 C.F.R. Part 171. The Nation argues that the regulations violate 25 U.S.C. § 385 and are therefore invalid because they (1) fail to provide sufficiently for those Indian landowners who lack adequate funds to pay O&M fees, and (2) fail to provide relief for those whose lands are idle and therefore do not produce adequate funds to pay for the O&M assessments. The Nation also contends that 25 C.F.R. § 171.19(a) is invalid because it allegedly is predicated upon a BIA budget memorandum issued in 1960 that was not promulgated in accordance with the rulemaking provisions of the APA, 5 U.S.C. § 553.

It is well settled that the Board lacks authority to determine duly promulgated regulations to be invalid. *See State of South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84, 103 n.18 (2009), and cases cited therein. Therefore, we do not address further these contentions by the Nation.

²⁰ In a related argument, the Nation contends that BIA must publish for notice and comment its decision to discontinue its historical practice of declining to bill idle lands for O&M charges. Because this issue was not raised before the Regional Director, we decline to consider it for the first time on appeal. 43 C.F.R. § 4.318; *Delorme v. Acting Great Plains Regional Director*, 46 IBIA 107, 110 n.5 (2007).

B. Nation's Motion to Strike

The Nation moves to strike the declaration of Pierce Harrison, submitted by the Regional Director in support of his answer brief in Docket No. IBIA 08-149-A. The Nation argues that any discussion of WIP's budget, which is the subject of Harrison's declaration, is irrelevant to the issues in the Nation's appeals.

We need not reach the merits of the Nation's motion because we do not find it necessary to rely on Harrison's declaration for any portion of our decision. Therefore, the motion is moot.

C. Merits

1. Ability to Deliver Water – 25 C.F.R. § 171.19(a)

The Nation argues that, pursuant to 25 C.F.R. § 171.19(a), O&M charges could only be levied against lands within WIP that were designated as “assessable” and “to which irrigation water [could] be delivered by the project operators from the constructed works.” The Nation also contends that, before assessments could be levied each year against lands within WIP, BIA bore the burden of determining that WIP was capable of delivering irrigation water from the constructed works to each assessable parcel regardless of whether a request for water had been submitted. We conclude that the Nation is partially correct: Subsection 171.19(a) permitted O&M charges to be levied only against those assessable parcels to which WIP's infrastructure could deliver water. However, we disagree with the Nation that BIA had a duty — prior to levying O&M charges against parcels — to conduct annual inspections of WIP's infrastructure to determine whether water could be delivered to the 3,150 delivery points on more than 140,000 acres served by WIP.

Subsection 171.19(a) provides in relevant part,

Operation and maintenance 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.

Thus, as the Nation points out, § 171.19(a) sets out two factors that determine whether O&M assessments will be levied against lands within an Indian irrigation project: (1) the

allotment or farm unit²¹ must be designated as “assessable,” *and* (2) irrigation water must be deliverable to the allotment or farm unit “from the constructed works.” The Nation does not argue that its lands were not designated as assessable. Instead, the Nation focuses on the second factor, and argues that WIP’s infrastructure either failed to exist or had so deteriorated that irrigation water could not be delivered to certain lands for which the Nation was billed O&M charges in 2006 and 2007. The Nation submitted declarations and reports in support of its assertions, and maintains that it is BIA’s responsibility first to determine whether the infrastructure can support the delivery of water before charging O&M fees.

The Regional Director argues that it makes little sense to require WIP to bear the burden of determining the deliverability of water to each parcel in WIP before O&M charges may be levied. He argues that, given the ongoing budgetary shortfall at WIP and WIP’s responsibility to administer WIP “to provide the maximum possible benefits from the project’s . . . constructed facilities,” 25 C.F.R. § 171.1(c), it would not be economical for WIP to expend valuable resources to evaluate whether WIP can actually deliver water to the Nation’s parcels, especially where water has not been requested. The Regional Director also contends that § 171.19(a) cannot be considered in a vacuum but must be read in conjunction with other requirements in Part 171, citing §§ 171.17 (accrued O&M charges must be paid to date before water will be delivered) and 171.7(a) (water must first be requested before it will be delivered). Although the Regional Director does not argue in his brief that water must be requested before BIA will determine whether WIP’s facilities are capable of delivering water, it is implied by his arguments and he specifically so states in his decisions. *See* July 31, 2007, Decision at 6 (unnumbered); Aug. 22, 2007, Decision at 4; Aug. 7, 2008, Decision at 8. Finally, the Regional Director argues that the only statutory authority for exemptions from the 2006 and 2007 O&M assessments is found at 25 U.S.C. §§ 389a and 389b, and thus any exemption found in § 171.19(a) from O&M charges is derived from these two statutory provisions. Therefore, the Regional Director contends that unless the Nation requests nonirrigable status for its lands (either temporary or permanent), WIP is entitled to bill and collect O&M fees for the Nation’s lands.²² Notably,

²¹ At the time of the O&M invoices challenged in this appeal, a “farm unit” for WIP was generally defined as at least 80 contiguous acres under the same ownership or leased by the same lessee(s) unless the original Indian allotment consisted of less than 80 contiguous acres. 25 C.F.R. § 171.4(d).

²² In his briefs, the Regional Director refers to this status as temporarily or permanently “non-assessable,” which is consistent with the terms used in the recently revised regulations. (continued...)

in his briefs before the Board, the Regional Director does not directly address the Nation's legal contention that § 171.19(a) permits O&M fees to be collected only from those lands to which water can be delivered via the irrigation district's infrastructure nor, with the exception of Unit 2, does the Regional Director directly address the Nation's factual contentions that WIP's infrastructure in certain locations either does not exist or has deteriorated to such a degree that water cannot be delivered to the farm unit or allotment.

We disagree with the Regional Director, and conclude that § 171.19(a) meant what it said: O&M charges could be levied only against those lands designated as assessable *and* "to which irrigation water [could] be delivered . . . from the constructed works."

Subsection 171.19(a) was promulgated in 1977 as § 191.19(a) in a comprehensive revision of BIA's irrigation regulations. *See* 42 Fed. Reg. 30,361 *et seq.* (June 14, 1977).²³ Prior to 1977, each Indian irrigation project had its own regulations, governing, *inter alia*, the operation and maintenance of the irrigation project. *See, e.g.*, 25 C.F.R. Part 200 (WIP's regulations).²⁴ A number of the former regulations — but not WIP's — contained the following provision: "The annual . . . charge for operation and maintenance shall be levied against the entire irrigable area of each farm unit or allotment *to which irrigation water can be delivered from present constructed works.*" *See* 25 C.F.R. §§ 191.16 (Blackfeet Irrigation Project), 192.15 (Colville Irrigation Project), 193.16 (Crow Irrigation Project, 194.17 (Flathead Irrigation Project), 198.16 (Fort Peck Indian Irrigation Project), and 201.16 (Wind River Irrigation Project) (1976) (emphasis added). In contrast, WIP's regulations formerly provided for O&M charges to "be issued each year . . . for *all* tracts of land designated for inclusion in [WIP]." *Id.* § 200.15 (1976) (emphasis added). There was no restriction in § 200.15 or elsewhere in WIP's regulations for O&M fees to be levied only against those lands "to which irrigation water can be delivered from present constructed works." New Part 191 (later redesignated Part 171) harmonized these disparate

²²(...continued)

See, e.g., 25 C.F.R. § 171.101 (2010) (defining "temporarily non-assessable" and "permanently non-assessable"). Because the revised regulations did not exist at the time of the O&M bills at issue in this decision, we will use the term "nonirrigable," which is found in 25 U.S.C. §§ 389a and 389b, rather than "non-assessable."

²³ Part 191 was redesignated as Part 171 in 1982. *See* 47 Fed. Reg. 13,326-13,328 (Mar. 30, 1982).

²⁴ Regulations governing O&M charges, and related matters, were contained in a separate regulation. *See, e.g.*, 25 C.F.R. Part 221 (1976).

regulations, and thus effected a change in O&M billing for WIP. *See* 41 Fed. Reg. 39,030, 39,031 (Sept. 14, 1976) (one purpose of the new regulation is to consolidate the several irrigation project regulations into a single, uniform regulation). Instead of billing “all tracts of land,” WIP could only bill those that were assessable and to which WIP could deliver water from the constructed works.²⁵

Moreover, the Department consciously carved out exceptions to § 171.19(a) without altering the operative language limiting the collection of O&M fees from assessable lands to those lands irrigable from the constructed works. For example, with respect to the Toppenish-Simcoe unit, the Department limited the collection of O&M fees to those water users whose applications for water were approved *and* whose lands “can be irrigated from the constructed works.” 25 C.F.R. § 171.19(a)(2). Thus, the Department not only considered exceptions to § 171.19(a), but *reinforced* the requirement that only lands irrigable from the constructed works were liable for O&M fees. *Cf. id.* § 171.19(a)(1) (O&M fees will be levied on lands served by the Colville Indian Irrigation Project “to which water can be delivered for irrigation”).

Finally, we note that § 171.19(a) is consistent with the purpose of O&M charges, which is to provide for the *ongoing* operation and maintenance of the irrigation project’s infrastructure to facilitate the delivery of irrigation water to the designated delivery points.²⁶ Therefore, if certain water delivery infrastructure was not built to serve a particular allotment or farm unit, it follows that no charges for operating and maintaining infrastructure could be collected from these lands because they could not benefit from WIP. Similarly, WIP cannot collect O&M fees from lands to which it would not have been able to deliver water within a reasonable time after receiving a request for water because, in return for paying O&M fees, the landowner reasonably expects that the infrastructure will

²⁵ Although no definition appears for “constructed works,” we have no difficulty construing this phrase to mean the infrastructure necessary to deliver water to the designated delivery points within WIP. *See, e.g., Spring Val. Water Co. v. City and County of San Francisco*, 165 F. 667, 688 (C.C.Cal. 1908) (“constructed works” for a municipal irrigation district include reservoirs, pipes, conduits, pumping stations, city distributing system, wells, filter beds, and meters).

²⁶ The Indian irrigation district “will deliver irrigation water to one point on the boundary of each farm unit.” 25 C.F.R. § 171.5(a). The landowner or water user is responsible for the distribution of irrigation water from the delivery point. *See e.g.,* 25 C.F.R. §§ 171.5, 171.18; *cf. id.* § 171.6(e)(3).

be maintained and that he will be entitled *and able* to receive water (depending on the availability of water) within a reasonable time after submitting a request.

We reject the Regional Director's claim that WIP was authorized to bill the Nation for O&M fees for its lands unless the Nation obtained nonirrigable status for its lands. *See* 25 U.S.C. §§ 389a, 389b. Congress granted the Secretary the authority to "fix maintenance charges[,] which shall be paid *as he may direct*. . . ." 25 U.S.C. § 385 (emphasis added). Congress did not place limitations or restrictions on the Secretary's authority nor did the Secretary's regulations require that lands be designated as nonirrigable to be exempt from O&M fees. Instead, the Secretary determined that O&M fees would only be levied against assessable lands "to which irrigation water can be delivered . . . from the constructed works." 25 C.F.R. § 171.19(a). Therefore, whether the lands were placed in nonirrigable status is irrelevant to the determination of whether the lands were liable for or exempt from O&M charges.²⁷

To the extent that the Regional Director maintains that water must be affirmatively requested by the Nation before BIA will determine whether WIP's facilities can deliver water to a given allotment or farm unit, this allegation has no merit. The regulation specifically states that O&M assessments "will be levied . . . *whether water is requested or not*, unless specified otherwise in this section." 25 C.F.R. § 171.19(a) (emphasis added). The only exception in § 171.19 that applies to WIP is an exception for lands in WIP's Toppenish-Simcoe Unit. *See supra* at 110.

With respect to the Nation's argument that BIA must first determine whether WIP can deliver water via its infrastructure *prior* to levying O&M charges, we conclude that the Secretary has already done so. In 1961, Congress directed the Secretary to designate within one year "the lands that are capable of being served by the irrigation works that have already been constructed on the Wapato-Satus Unit." 1961 Act, § 1. The Secretary responded in 1962 and designated 131,216.34 acres within the Wapato-Satus unit as capable of being served by WIP. Any parcels that were designated after 1962 as nonirrigable under 25 U.S.C. §§ 389a or 389b would be exempt from O&M charges either temporarily or permanently, respectively. *See, e.g.*, Pub. L. No. 88-159, 77 Stat. 278 (Oct. 28, 1963)

²⁷ With the changes to Part 171 in 2008, we note that a new provision became available that permits landowners to apply each year for an exemption from O&M charges. *See* 25 C.F.R. Part 171, Subpart G (2008). In addition, the regulations now permit O&M assessments to be waived in return for an agreement to improve idle lands where BIA determines that such an agreement is also in the best interest of the irrigation facility. *See* 25 C.F.R. §§ 171.100 ("incentive agreement"), 171.610 (2010).

(78.12 acres of assessable land removed from WIP). Similarly, any acreage added after 1962 to WIP's service area that was designated as assessable and to which WIP is able to deliver water through its constructed works became subject to O&M charges. *See e.g.*, Allen Declaration (AR 9, Tab 1) at 4 (an "Additional Works Project" that was completed and included in WIP in 1975 added 5,494 acres to WIP). Thus, the Secretary identified those parcels to which WIP could deliver water, and the burden then shifted to the landowners to notify WIP when it became apparent that the infrastructure could no longer support water delivery to their land(s).

Therefore, we vacate this portion of the Regional Director's decision. Subsection 171.19(a) directs the levying of O&M charges on acreage within allotments and farm units designated as assessable *and* to which WIP can deliver water from its constructed works. As part of its appeal to the Regional Director, the Nation presented evidence supporting its contention that WIP's infrastructure could not deliver water to a number of parcels owned by the Nation in whole or in part. *See, e.g.*, Allen Declaration (AR 9, Tab 1) at 12-16 and related appendices. BIA does not address this evidence. We therefore remand this appeal to the Regional Director to determine in the first instance whether the Nation met its burden of showing that WIP's infrastructure could not, at the time of the bills challenged by the Nation, deliver water to certain allotments or farm units owned in whole or in part by the Nation.²⁸ If BIA determines that the information proffered by the Nation meets the Nation's burden of demonstrating that WIP's infrastructure could not support the delivery of water to certain of the Nation's allotments or farm units,²⁹ BIA must then cancel

²⁸ We do not suggest that deficiencies in existing infrastructure, without more, entitles the Nation to a cancellation of its O&M fees. For example, if an existing infrastructure could not support the delivery of water because of a deficiency that could be remedied within a reasonable time period, it is doubtful that such a deficiency would have rendered the infrastructure incapable of delivering water within the meaning of § 171.19(a). On the other hand, the complete absence of any infrastructure must result in the cancellation of O&M bills for those farm units, tribal units, or allotments to which it was an impossibility to deliver water. We leave it to BIA to determine whether the Nation identified deficiencies in WIP's infrastructure that would have made it impossible for BIA to deliver water within a reasonable time to lands that are the subject of the bills challenged herein.

²⁹ Apart from the Regional Director's July 31, 2007, and August 7, 2008, Decisions, in which he acknowledges that the deterioration in WIP's infrastructure rendered it impossible to deliver water to lands in "Unit 2," the administrative record does not contain any documents from or by BIA that confirm that, due to deterioration in its facilities, WIP was unable to deliver water to certain allotments or farm units owned in whole or in part by the Nation during the relevant time period.

or adjust (as appropriate) the Nation's O&M bills to remove O&M charges for those tribal allotments or farm units to which WIP's infrastructure could not deliver water.³⁰

2. The Adequate Funds Proviso

The Nation argued before the Regional Director and again before the Board that, pursuant to the adequate funds proviso of 25 U.S.C. § 385, "BIA only has . . . authority to recoup its costs of running [WIP] when the O&M charges are reimbursable." Opening Brief, Docket Nos. IBIA 07-132-A and IBIA 08-08-A, at 24. Also, in Docket No. IBIA 08-149-A, the Nation argues that the Ninth Circuit's ruling in *Confederated Tribes*, 296 Fed. Appx. at 568, compels BIA to determine who is able or unable to pay O&M fees and which parcels generate income to pay the O&M fees. We disagree. The law simply does not support the Nation's position because the specific language in § 385 on which the Nation relies does not apply to WIP. Moreover, the Nation misconstrues the Nation's decision in *Confederated Tribes*, which dismissed the Nation's claims in their entirety for failure to exhaust administrative remedies.

Section 385 provides in relevant part:

For lands irrigable under any irrigation system or reclamation project the Secretary . . . 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 . . . may prescribe

Second and third emphases added.³¹ The Nation contends that the proviso imposes "significant limitations" on WIP's ability to levy O&M charges. Opening Brief, Docket Nos. IBIA 07-132-A and IBIA 08-08-A, at 23.

The Regional Director explains that the adequate funds proviso applies only to fees levied to recoup the costs of constructing WIP and not to O&M fees. The Regional

³⁰ BIA should respond in writing to the Nation's factual contentions for each bill. BIA should also provide appropriate appeal instructions with its response.

³¹ The first proviso in § 385, which required reports to Congress, was repealed in 1982. See Pub. L. No. 97-293, § 224(f), 96 Stat. 1273 (Oct. 12, 1982).

Director also disagrees with the Nation's characterization of the Ninth Circuit's decision in *Confederated Tribes*. The Regional Director explains that the court dismissed the Nation's suit, and did not order BIA to take any particular action(s).

We agree with the Regional Director that the adequate funds proviso does not apply to O&M fees billed by WIP but for a different reason: The adequate funds proviso in § 385 has no applicability to WIP. Section 385 is a small excerpt from the 1914 Act, which was a large Indian appropriations act. The 1914 Act begins with general language, including a general appropriation of \$335,000 for Indian irrigation projects *except* those for which a specific appropriation is included in later portions of the Act. 38 Stat. at 583. It is this general appropriation (\$335,000) to which the adequate funds proviso applies. *See* Solicitor's Opinion M-28701, Sept. 24, 1936, I *Opinions of the Solicitor* 672, 675 (DOI 1974) (“[The adequate funds] proviso was intended to apply to those [Indian irrigation] projects which were financed out of this and previous general appropriations” and not to irrigation districts for which specific appropriations were made).³² And because the 1914 Act contains a specific appropriation for WIP, *see* 38 Stat. at 604-05, WIP could neither share in the general funds appropriated under the 1914 Act or seek relief under the adequate funds proviso.³³

The Nation cites a later Solicitor's Opinion, M-36175, in support of its argument that the adequate funds proviso does apply to WIP. This Opinion, which addressed the

³² 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); 209 DM 3.2A(11), 3.3 (delegation of authority to the Solicitor); *see also* Solicitor's Opinion M-37003 (Jan. 18, 2001) (Secretary Bruce Babbitt, concurring).

³³ The Nation maintains that while § 385 has not been enacted into positive law, “it is entitled to be considered ‘prima facie’ evidence of the original Statute at Large [unless it is shown to be] inconsistent with the original Statute at Large.” Opening Brief, Docket Nos. IBIA 07-132-A and IBIA 08-08-A, at 34. The Nation argues that the parts of the 1914 Act that were codified at § 385 therefore apply to the Nation unless shown otherwise.

The fact that § 385 has not been enacted into positive law means that it must be understood and considered in context with the remaining portions of the 1914 Act. *See, e.g., United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (“in order to construe the immunity provision of the Appropriations Act of February 25, 1903, we must read it in the context of the entire Act, rather than in the context of the ‘arrangement’ selected by the codifier.”). Ergo, we look at the statute in its entirety and not just the excerpt selected for codification.

issue of whether Indian irrigation projects could be included within State irrigation districts, contained the following broad sentence: “[T]he [1914 Act], which made maintenance charges reimbursable, did so only ‘where the Indians have adequate funds to repay the Government.’” Solicitor’s Opinion M-36175, July 30, 1953, II *Opinions of the Solicitor* 1612, 1615 (DOI 1974). This sentence is not inconsistent with Solicitor’s Opinion M-28701 because Solicitor’s Opinion M-36175 did not address or determine whether the adequate funds proviso applied to *all* Indian landowners billed for O&M fees or only those in irrigation districts that shared in the general appropriated funds. In contrast, as we have explained, Solicitor’s Opinion M-28701 specifically determined that the adequate funds proviso only applied to those tribes sharing in the general funds appropriated in the 1914 Act and in previous acts. Finally and even assuming that the adequate funds proviso might apply to the Nation, the Nation does not make any showing that it is unable to pay its O&M bills or that the challenged bills constitute repayment to the United States for past maintenance expenditures by BIA.

We also reject the Nation’s argument that the Ninth Circuit’s decision in *Confederated Tribes* is relevant to this appeal. In *Confederated Tribes*, the issue before the Ninth Circuit was whether administrative remedies had been exhausted. The Ninth Circuit *affirmed* the district court’s *dismissal* of the Nation’s claims on procedural grounds, *i.e.*, failure to exhaust administrative remedies. Neither court reached the merits of the Nation’s substantive contentions. In addition, the Ninth Circuit — again without reaching the merits — simply provided theoretical examples of what the administrative record might contain if the Nation were to exhaust administrative remedies and how that information theoretically might assist the court in its review of the merits if the merits were before it.³⁴ Because neither the district court or the Ninth Circuit reached the merits of the Nation’s claims, the Ninth Circuit’s decision is not relevant to the merits of this appeal. Moreover, even the example offered by the Ninth Circuit, *see* n.34, is not relevant because the Nation has made no showing that it cannot pay its O&M bills.

Therefore, for these reasons, we hold that the adequate funds proviso of § 385 has no applicability to the collection of O&M fees for the ongoing operation and maintenance

³⁴ For example, the Ninth Circuit speculated that information “as to who precisely cannot – and to what extent they cannot – pay their [O&M] assessments” would assist the court in applying the regulations. *Confederated Tribes*, 296 Fed.Appx. at 568. Additionally, the Nation argued that BIA previously arranged leases of lands belonging to a tribal member, but the leases had expired and, despite repeated requests to BIA to lease the lands again, BIA had not done so. The Court observed that “[t]hese facts, and their legal relevance, are best considered by the agency in the first instance.” *Id.* at 568-69 (footnote omitted).

of WIP. We also conclude that the Ninth Circuit's decision in *Confederated Tribes* is inapplicable to the instant appeals.³⁵

3. Trust Responsibility

The Nation argues that BIA owes a trust duty to the Nation to make the Nation's lands productive, e.g., by leasing or directly farming idle lands. If BIA fails to make the lands productive, the Nation argues that the lands are exempt from O&M fees. We disagree. Assuming such a trust responsibility exists — and we do not suggest that it does — the Nation fails to show how that trust responsibility is relevant to the Nation's O&M charges. That is, if such a trust responsibility exists, the Nation fails to show how the failure to execute that responsibility bars BIA from levying O&M charges against the Nation's lands. We find nothing in the statutes or regulations that conditions the levying of O&M fees on the satisfaction of trust responsibilities or, more specifically, on a duty to make the Nation's lands productive. We also disagree with the Nation that the regulations impose a trust responsibility on the United States to install additional water delivery points. Finally, to the extent that the Nation argues that the United States has a trust responsibility for the management of the Nation's water resources, the Nation fails to explain how such a trust responsibility is related to the challenges raised in this appeal to the Nation's 2006 and 2007 O&M bills.

The trust responsibilities of the United States towards individual Indians and their tribes are formed by Congress through treaties, statutes, and regulations implementing those treaties and statutes. *See United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (“the analysis [of whether a trust responsibility and duty exist] must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions”); *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (“A substantive right [establishing the Government's trust responsibility] must be found in [a] source of law”). The Supreme Court has examined several statutory schemes enacted by Congress to find that they impose a trust responsibility

³⁵ Because we find no vagueness or ambiguity in the statute, we find it unnecessary to resort to the canons of construction utilized in Indian law. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (“The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist.”).

Given our conclusion that the adequate funds proviso does not apply to WIP, we need not reach the Nation's related argument that each year BIA must determine the ability of each Indian landowner to pay O&M fees prior to billing the landowner. But, we note that neither the statute nor the implementing regulations place such an obligation on BIA.

in areas such as managing timber resources in *Mitchell* and managing a specific land site in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). But no court has held that the United States has a trust responsibility to make the Nation's lands productive, much less that O&M fees may not be levied against lands that the United States has not made productive.

The Nation cites *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15 (2007), *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), and *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir. 1992), to support its argument that the Federal government has a broad trust responsibility to make the Nation's lands productive. The Nation also cites several statutes — 25 U.S.C. §§ 380, 394, 395, and 415 — that address the leasing of Indian trust lands and, according to the Nation, support the existence of a trust duty to lease land. But these cases and statutes do not impose any such duty and, in any event, they are irrelevant to the issue of whether BIA may bill the Nation for O&M charges for the Nation's lands.³⁶

Next, the Nation cites 25 C.F.R. § 171.5 to argue that BIA has a trust responsibility to add delivery points for water to enable lands to be irrigable and productive. We disagree. Subsection 171.5(a) provides in relevant part that “[t]he Officer-in-Charge *may* establish additional delivery points when in his judgment it is impractical for the landowner to irrigate his farm unit from the one delivery point for such reasons as topography, isolation, or cost.” Emphasis added. Whether or not an additional water delivery point is established is discretionary.

In the same vein and citing the Conditional Final Order entered on September 12, 1996, in *In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin v. Acquavella*, No. 77-2-01484-5 (Super. Ct. Yakima Cty) (*Acquavella*), the Nation also argues in Docket No. IBIA 08-149-A that the Federal trust responsibility for the stewardship of the Nation's water resources requires BIA to allocate and distribute water in accordance with Federal law. But, the Nation does not explain how this responsibility is related to the Nation's O&M fees, and nothing in the Conditional Final Order addresses O&M fees.

Therefore, we reject the Nation's trust responsibility arguments as irrelevant to the appeals from its 2006 and 2007 O&M bills. To the extent that the Nation argues that the

³⁶ Similarly, the Nation's argument that the United States must be held to the fiduciary standards that govern private trustees is irrelevant.

alleged trust responsibilities render the Nation's idle lands exempt from O&M fees, our review of these issues is foreclosed by the Assistant Secretary's 1995 decision.

4. 1960 Budget Memorandum of the Assistant Commissioner, Bureau of Indian Affairs ("Conditional Argument B")

The Nation contends that, based on criteria in a 1960 budget memorandum, BIA determined that the landowners within WIP's boundaries were able to pay their pro rata share of WIP's operation and maintenance expenses sufficient to enable WIP to be self-supporting. *See* Memorandum from Assistant Commissioner (Administration) to Area Directors, July 11, 1960 (1960 budget memorandum) (AR 9, Appendix (attached to Memorandum of Law Regarding Conditional Argument B)). The Nation thus assumes that ability to pay is relevant to the levying of O&M fees, and argues that because BIA was required to but did not publish the 1960 budget memorandum for notice and comment pursuant to the APA, 5 U.S.C. § 553, the 2006 and 2007 O&M bills are invalid. We disagree and conclude that the 1960 budget memorandum is irrelevant to the O&M charges appealed by the Nation.³⁷

The Nation relies on the IG's Report to argue that the 1960 budget memorandum must be published for notice and comment. In his report, the IG stated that,

based on criteria in a 1960 memorandum from the Assistant Commissioner (Administration), [BIA] determined that lands within [WIP] were capable of supporting the full amount of [WIP's] annual operation and maintenance costs. Therefore, under [BIA] regulations (25 CFR 171.19(a)), all lands, regardless of whether water is requested, should be assessed [O&M] charges that cover the full costs of delivering water.

IG's Report at 6 (AR 9, Tab 13); *see also* GAO Report at 3 ("In 1960, BIA classified [WIP] as self-sustaining. . . . Therefore BIA's regulations require that all irrigable lands within the

³⁷ The Nation appears to suggest that the Board may lack jurisdiction over this issue, but does not brief it. *See* Nation's Opening Brief, Docket Nos. IBIA 07-132-A and IBIA 08-08-A, at 60, 62. The Board previously has held that it has jurisdiction to determine whether BIA is required to comply with the APA's rulemaking procedures. *See, e.g., Pretty Paint v. Rocky Mountain Regional Director*, 38 IBIA 177, 179-181 (2002); *Atchison, Topeka & Santa Fe Railway Co. v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 14 IBIA 46, 53-55 (1986). We see no reason here to depart from our past decisions.

project be assessed annual operation and maintenance charges. . . .”).³⁸ The IG’s report thus draws a connection between the 1960 budget memorandum and BIA’s regulations on which the Nation relies to argue that the former should have been published for notice and comment. The Nation’s reliance is misplaced for several reasons.

First and notwithstanding the reports by the IG and GAO, there is no support, historical or otherwise, for the assumption that liability for O&M fees is contingent upon the ability to pay. Thus, there is no basis for requiring the publication of this particular criteria. To the extent that the Nation relies on 25 U.S.C. § 385 as a source for this assumption, we have rejected this claim. *See supra* at 113-116.

Second, prior to and at the time of the 1960 memorandum, WIP’s regulations had long required O&M fees to be levied against all lands served by WIP. *See* 25 C.F.R. §§ 200.15 (1958) (“Bills for the yearly assessments of . . . [O&M] charges will be issued each year to the owners of record for *all* tracts of land designated for inclusion in [WIP].” Emphasis added); 124.15 (1938) (same). Nothing in WIP’s regulations conditioned liability for O&M fees on the ability to pay. Thus, the 1960 budget memorandum did not effect any change in nor did it have any impact on WIP’s O&M billing.

Finally, even if BIA’s regulations relied on criteria in the 1960 budget memorandum in requiring all assessable lands served by WIP to be levied O&M charges, § 171.19(a) — originally, § 191.19(a) — was published for notice and comment in 1976. This new section provided that “[o]peration and maintenance 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 . . . whether water is requested or not.” Emphasis added. *See* 41 Fed. Reg. at 39,035. The publication of this regulation for notice and comment effectively notified the Nation that its lands would be liable for O&M fees, and rendered moot any reliance that BIA may have placed on the determination, published in the 1960 budget memorandum, that WIP could be self-supporting.

Based on the above, we conclude that the Nation has not met its burden of showing that the 1960 budget memorandum had any bearing on the 2006 or 2007 O&M invoices that are the subject of this appeal and, therefore, the memorandum is irrelevant. Further,

³⁸ The reports both overlooked 25 C.F.R. § 171.19(a)(2), which excepts from O&M charges those lands within WIP’s Toppenish-Simcoe unit that have not been approved for water delivery. Therefore, contrary to GAO’s report and the IG’s report, not all of WIP’s lands are subject to O&M charges.

we conclude that the 1976 publication for notice and comment of 25 C.F.R. Part 191 (now, Part 171), which included the text of § 171.19(a), superseded and supplanted the reliance, if any, that the agency may have placed on the 1960 budget memorandum for purposes of levying O&M charges, and provided sufficient notice to the Nation that its lands were liable for O&M fees.³⁹

5. Challenges to O&M Bills for Specific Allotments

As part of its appeal to the Regional Director, the Nation challenged specific O&M assessments levied against certain land interests owned by the Nation, and contended that there was a systemic problem with the O&M assessment process that warranted setting aside all O&M bills until the problems were corrected. The nature of the alleged error(s), where the error can be ascertained, generally falls into one or more of the following categories: Owner liability (either a lessee is liable for the O&M charges, or the Nation maintains that it does not own an interest in the allotment, or that the percentage of its ownership interest is different than asserted by WIP); idle lands; amount of acreage (the Nation contended that the amount of acreage shown for the allotment is inaccurate or that a homesite or school was not excluded from assessable acreage); and inability to deliver water. In addition, the Nation challenges the billing for certain allotments for the first time in its appeals to the Board or raises new arguments that were not initially presented to the Regional Director. The Regional Director contends that some corrections were made, *see e.g.*, n. 16, *supra*, and the remaining charges are correct. *See* Declarations of Linda Queahpama, submitted with the Regional Director's answer briefs in these appeals.

We do not address those arguments raised for the first time on appeal. *See Delorme*, 46 IBIA at 110 n.5.⁴⁰ To the extent that the Nation contends that it is not liable for O&M

³⁹ The Nation also argues for the first time on appeal to the Board that because BIA "historically" declined to collect O&M fees from the owners of idle lands, BIA must now comply with the notice and comment provisions of the APA, 5 U.S.C. § 553, before it may cease this practice and bill the Nation for O&M fees for its idle lands. We conclude that this issue is not within the scope of the Nation's appeals because it was not raised before the Regional Director.

⁴⁰ A description of errors for Allotment Nos. 498, T-403-B, 757, 758, 759, T-2702, and T-3458-A were provided for the first time on appeal to the Board. The Nation also submits the declaration of Matthew Ike to the Board in which Ike states that he "was asked to
(continued...)

fees for idle lands, this argument is discussed *supra* at 103-106. The Nation's argument that it is not liable for O&M charges for allotments to which WIP's infrastructure does not permit the delivery of water is addressed *supra* at 107-113.

To the extent that the Nation contends that there is a discrepancy in ownership or in the amount of acreage for which it is billed, the Nation failed to provide documentation to determine the nature of the discrepancy. For example, the Nation did not provide evidence in support of its allegations that its ownership interest is different than that reflected on BIA's records nor does it provide evidence showing that the acreage of the lands in which it has an ownership interest differs from that reflected on BIA's records. Even though the Nation did not document its contentions, BIA nevertheless reviewed its records and, where appropriate, corrected its records. *See* Queahpama Declarations.

In sum, we reject the Nation's claims concerning O&M billing for certain interests owned by the Nation with the exception of the Board's decision *supra* concerning O&M charges for lands to which WIP is unable to deliver water because of failures in WIP's infrastructure.

6. Leavitt Act Waiver

The Nation avers that, in its Statements of Reasons on appeal to the Regional Director in its three appeals, the Nation requested a waiver of the levied O&M fees pursuant to the Leavitt Act, 25 U.S.C. § 386a, and further represents that it has not received a decision on its requests. Therefore, the Nation requests that we compel the Regional Director to decide this issue pursuant to 28 C.F.R. § 2.8.

Section 2.8 is an action-prompting provision that permits an appellant to appeal from the inaction of a BIA official on a request for action or response. The scope of any appeal before the Board under § 2.8 is limited to determining whether the Regional Director has acted upon a request from the appellant and, where he has not, to prompt a response from BIA. *See Koontz v. Northwest Regional Director*, 51 IBIA 269, 270 (2010).

⁴⁰(...continued)

provide *additional* descriptions of errors.” Declaration of Matthew Ike, submitted with the Nation's Opening Brief in Docket Nos. IBIA 07-132-A and IBIA 08-08-A, at ¶ 3 (emphasis added). The Board disregards the new errors alleged by Ike. The time to have raised these arguments was during the Nation's appeal to the Regional Director.

For two reasons, we decline to order the Regional Director to issue a decision on the Nation's request for a waiver of the 2006 and 2007 O&M bills. First, the Nation has not demonstrated compliance with the requirements of § 2.8, which require the Nation to send a demand letter to the Regional Director for a decision. *See* 25 C.F.R. § 2.8(a). Therefore, the Nation's request for review by the Board is premature. Second, the Nation did receive a response from the Regional Director to the Nation's request for a waiver of its O&M bills under the Leavitt Act, which then became the subject of a subsequent appeal from the Nation. *Yakama Nation v. Northwest Regional Director*, Docket No. IBIA 10-040. Prior to briefing in Docket No. IBIA 10-040, the Regional Director requested that his decision be remanded to him for additional consideration following the Board's decision in *Yakama Nation v. Northwest Regional Director*, 51 IBIA 187 (2010). Therefore, on May 11, 2010, the Board vacated the Regional Director's decision in Docket No. IBIA 10-040, and remanded the matter to him as he requested. *See Yakama Nation*, 51 IBIA at 257. It is evident that the Regional Director is aware of the need to issue a decision, and we have confidence that he will do so without further action on our part.⁴¹

Conclusion

We vacate the Regional Director's decisions to affirm the Nation's 2006 and 2007 O&M bills for those farm units, tribal units, and allotments to which WIP's infrastructure is incapable of delivering water. On remand, the Regional Director shall cancel those bills for assessable lands to which BIA agrees that its constructed works cannot presently deliver water. To the extent that the Nation presents evidence of deterioration in WIP's infrastructure that has not been confirmed by BIA, we remand this matter for further action consistent with our decision.

We affirm the Regional Director's decisions in all other respects, as may be modified herein, and dismiss the Nation's claim under 25 C.F.R. § 2.8 for a decision on its request for a waiver of O&M fees under the Leavitt Act, 25 U.S.C. § 386a, as premature.

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, vacates in part, and

⁴¹ If no decision is forthcoming from the Regional Director, the Nation may pursue its remedies under § 2.8.

remands the Regional Director's decisions of July 31, 2007, August 22, 2007, and August 7, 2008, for further consideration consistent with our decision.⁴²

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Sara B. Greenberg
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.

⁴² Any arguments raised by the Nation that are not specifically addressed in our decision were considered and rejected.