FORT PECK WATERUSERS ASSOCIATION
DWIGHT A. SIBLEY
CAROL J. SIBLEY

v.

BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-26-A, 94-27-A, 94-28-A Decided July 6, 1994

Appeals from a decision to expend reimbursable appropriated funds for the rehabilitation and betterment of the Fort Peck Indian Irrigation Project.

Affirmed.

1. Appropriations--Indians: Generally

The allocation of funds from a lump-sum appropriation is committed to agency discretion.

APPEARANCES: Joe Day, its President, and Thomas Q. Nichols, for the Fort Peck Waterusers Association; Dwight A. Sibley, pro se; Carol J. Sibley, pro se; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The Fort Peck Waterusers Association (Association), Dwight A. Sibley, and Carol J. Sibley each seek review of an October 19, 1993, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), to expend $995,000 in reimbursable appropriated funds for the rehabilitation and betterment of the Fort Peck Indian Irrigation Project (Project). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

By letter dated August 11, 1993, the Superintendent, Fort Peck Agency, BIA (Superintendent), wrote to non-Indian waterusers (waterusers) on the Fort Peck Indian Reservation, stating:

> As you are aware, $995,000 was appropriated in FY 1991 by the U.S. Congress for rehabilitation and betterment of the Fort Peck

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Irrigation Project. This money is reimbursable, which means that the money must be paid back to the Federal Treasury by the owners of Project land. Since there are 21,989.50 acres on the project, the cost per acre will be $45.25.

The proposed budget for this money was presented to the waterusers at the September 15, 1992 meeting in Wolf Point, MT and was briefly discussed again at the April 6, 1993, waterusers meeting. It will involve primarily the rehabilitation of canals, laterals, drains, and structures; replacement of one of the pumps at Wiota. The project is now over 50 years old, and is greatly in need of rehabilitation. All of the proposed work is essential and will need to be done either with the $995,000 of appropriated money or by additional increase in O&M [operation and maintenance] fees. We believe that it will be considerably less expensive for the waterusers to utilize this [appropriated] money than to pay for the rehabilitation by higher O&M fees, because O&M fees must be paid in advance of expenditures.

Indian trust lands comprise more than half the land on the Project. On the basis of my trust responsibilities, and in accordance with the wishes of the tribal council, I have decided to proceed with these rehabilitation expenditures. Since the money is reimbursable, liens will be filed on the Project lands for repayment of the money. * * *

However, owners of trust land within the project are by law not required to enter into contract for the repayment of reimbursable construction funds such as these. This results from the Act of July 1, 1932, 47 Stat. 564 [1/], in which Congress deferred all construction charges on trust lands until the lands are removed from trust status.

We have prepared the enclosed contract to provide for the repayment of this money for all property held in fee. The contract provides for repayment of the rehabilitation money on a no-interest, equal annual installment basis, over a 40 year period. * * *

In the absence of a repayment contract, repayment terms will be made on a policy basis, subject to change. Our intention at the present time is to collect $1.13 per acre per year for repayment of the $995,000 appropriation. On lands subject to old construction debts, an additional $.50 per acre per year will be collected for repayment of these old debts. Repayment of the $1.13 will commence in the 1994 Irrigation season.

1/ Those statutes cited in the Superintendent's and Area Director's decisions which are directly relevant to the arguments raised on appeal are quoted in text, infra.

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Appellants appealed to the Area Director. By separate letters dated October 19, 1993, the Area Director affirmed the Superintendent's decision:

> The subject investment, $995,000, was appropriated in Fiscal Year 1991. Once expended, the money must be paid back to the United States Treasury by the owners of Project land as compelled by the Act of May 18, 1916 (39 Stat. 140), the Act of February 14, 1920 (41 Stat. 409), and the Act of March 7, 1928 (45 Stat. 200, 210).
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> The superintendent, as Project officer-in-charge, is responsible for taking any action which in his judgment is necessary for the proper operation, maintenance, and administration of the Project. In making such judgments, the superintendent is under an obligation to consult with water users and tribal council representatives, and is guided by the basic requirement that the Project be operated in a safe, economical, beneficial, and equitable manner [25 CFR 171.1(c)]. The record shows that the superintendent's decision to invest $995,000 of appropriated money in Project rehabilitation was made after consultation with water users and the tribal council. The record further shows that rehabilitation of the Project is overdue and postponement will constitute unsound management.
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> In placing liens on all Project land benefitting from the subject investment, and in encumbering trust and non-trust land differently, the superintendent is acting in accordance with Federal law. Where reimbursement of appropriated money for Federal irrigation project construction, operation and maintenance is required by law, the Act of March 7, 1928, directs the Secretary of the Interior (through the Project officer-in-charge) to collect such charges. The Act further provides that outstanding, unpaid charges constitute a first lien against Project lands.
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> Each Federal agency, including the Bureau of Indian Affairs, is under a regulatory duty to collect all claims of the United States arising out of activities of that agency [4 CFR 101.1 and 102.1(a)]. Federal law and regulations recognize the capacity of the superintendent to enter into installment contracts to repay outstanding irrigation project debts [25 U.S.C. 386, 25 CFR 134 (as applicable) and 4 CFR 102.11]. Repayment contracts are not required from individual Indians or Indian tribes because Federal law has deferred the collection of all construction costs against Indian-owned lands within any government irrigation project. 25 U.S.C. 386a [Act of July 1, 1932 (47 Stat. 564)]. Federal law does not exempt Project trust lands from their pro rata share of current construction costs, but merely defers their collection until the Indian title to such lands is extinguished (25 U.S.C. 386a). [Bracketed material in original.]

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Three separate appeals were filed with the Board from this decision. Briefs were filed by the appellants and the Area Director.

Discussion and Conclusions

Although providing information relating to relevant Federal law governing repayment of Indian irrigation project costs, the substance of both the Superintendent's and Area Director's decisions was solely the question of whether or not to expend the $995,000 appropriated by Congress for the rehabilitation and betterment of the Project. Most of the arguments the Association raises do not address this issue, but instead relate to previously accrued reimbursable costs arising out of the construction of the Project. Although these concerns might legitimately be raised in another proceeding, 2/ they do not relate to the subject matter of the decision under review. Accordingly, the Board will not address any of those arguments.

Because the Association's arguments are all to some degree related to its concern over previously accrued reimbursable costs, it is difficult to separate out arguments that specifically relate to the decision to expend the $995,000 reimbursable appropriation. However, the following discussion addresses each argument relating to the present decision that can be discerned from the materials submitted by the Association.

The Association contends that the FY 1991 appropriation was requested for a new irrigation unit on the east end of the Reservation, not for the Wiota Unit or the Frazer-Wolf Point Unit, where BIA intends to do rehabilitation work. The appropriation was made in P.L. 101-512, the 1991 Appropriations Act for the Department of the Interior and Related Agencies, and was part of a lump-sum appropriation of "$168,536,000, to remain available until expended" for, inter alia, the "construction, major repair, and improvement of irrigation * * * system." 104 Stat. 1915, 1930.

[1] The Supreme Court addressed agency use of lump-sum appropriations in Lincoln v. Vigil, ___ U.S. ____, 113 S. Ct. 2024, 2031 (1993):

> The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. * * * For this reason, a fundamenta1 principle of appropriations law is that where "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as

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2/ In fact, the Area Director's decision informed the Association it could raise these issues in the proper forum: "[Y]our request for cancellation of outstanding construction debts is an issue outside the scope of the decision you have appealed, and I recommend you address that issue with Project personnel" (Oct. 19, 1993, Decision at 1).

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> to how the funds should or are expected to be spent do not establish any legal requirements on" the agency. LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975); cf. * * * Tennessee Valley Authority v. Hill, 437 U.S. 153, 191 (1978) ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress").

See also Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director, 25 IBIA 236, 239 n.7 (1994); Hopi Tribe v. Director, Office of Trust Responsibilities, 24 IBIA 65, 76 n.7 (1993). The Board concludes that the specific use of the appropriated funds was committed to agency discretion.

The Association argues that contracts for the repayment of new reimbursable costs are contrary to 47 Stat. 564, 25 U.S.C. § 386a (1988); 3/ and 49 Stat. 1803, 25 U.S.C. § 389, and do not reflect the intent of Congress as set forth in those statutes. 25 U.S.C. § 386a states:

> The Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made: Provided, That the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished, and any construction assessments heretofore levied against such lands in accordance with section 386 of this title, and uncollected, are hereby canceled: * * *.

25 U.S.C. § 389 provides:

> The Secretary of the Interior is authorized and directed to cause an investigation to be made to determine whether the owners of non-Indian lands under Indian irrigation projects and under projects where the United States has purchased water rights for Indians are unable to pay irrigation charges, including construction, maintenance, and operating charges, because of inability to operate such lands profitably by reason of lack of fertility of the soil, inadequacy of water supply, defects of irrigation works, or for any other causes. Where the Secretary finds that said landowners are unable to make payment due to the existence of such causes, he may adjust, defer, or cancel such charges, in whole or in part, as the facts and conditions warrant. In adjusting or deferring any such charges the Secretary may enter into contracts with said land owners for the payment

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3/ All further citations to the United States Code are to the 1988 edition.

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> of past due charges, but such contracts shall not extend the payment of such charges over a period in excess of ten years.

Section 386a does not address reimbursable costs assessed against non-Indian lands within an Indian irrigation project. Even assuming that section 389 would apply to new reimbursable costs as well as to previously accrued costs, neither it nor section 386a prohibit the use of repayment contracts for the recovery of such costs. Furthermore, contrary to the Association's suggestion, BIA did not require waterusers to enter into repayment contracts, but rather notified them of two repayment options. The Board rejects this argument.

The Association contends that BIA's objective, apparently either in setting the repayment rate or in seeking repayment contracts, was at least in part to collect debts that had previously accrued, but had not been paid. However, it presents no evidence that the amounts to be collected through the proposed repayment schedule would result in the payment of more than the $995,000 to be expended under this decision. In fact, the Board's calculation of the amount that will be collected under the proposed repayment schedule shows a recoupment of only $993,925.40, which is less than the $995,000 to be expended. 4/

In different places, the Association asserts both that the Project is not in need of repair and that the expenditure of $995,000 is insufficient for all of the major rehabilitation that needs to be done. Because of the inconsistency in these arguments, the Association has not shown that the Area Director erred or acted arbitrarily in determining that the Project needed rehabilitation.

The Association argues that public notice of the assessment rate was not issued, and that authority for fixing assessments for the repayment of construction costs was set at $.50 per acre by 25 U.S.C. § 386. Section 386 provides:

> The Secretary of the Interior is authorized and directed to require the owners of irrigable land under any irrigation system constructed for the benefit of Indians and to which water for irrigation purposes can be delivered to begin partial reimbursement of the construction charges, where reimbursement is required by law, at such times and in such amounts as he may deem best, all payments hereunder to be credited on a per acre basis in favor of the land in behalf of which such payments shall have been made and

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4/ It is possible that the Association's argument here is based on the statement in the Superintendent's decision that an additional $.50 per acre per year would be collected on lands subject to old construction debts. The Board reads this statement to mean that previously accrued reimbursable costs assessed against particular lands world not be cancelled because of the new assessment but would remain payable, as previously, at the rate of $.50 per acre per year. The total charge against lands assessed both old and new charges would be $1.63 per acre per year.

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to be deducted from the total per acre charge assessable against such land.

Assuming for the purposes 0f this discussion only that section 386 would apply to the repayment of the reimbursable appropriation at issue here, the Board finds nothing in that statute restricting the total repayment rate to $.50 per acre, or requiring public notice of the assessment rate. Although repayment of previously accrued construction costs had apparently been set at $.50 per acre per year, that rate was established under the discretionary authority granted in section 386. Additionally, the Board finds that the Association, as well as the Project waterusers, was in fact given notice of the assessment rate in the Superintendent's August 11, 1993, letter.

The Association argues that under 25 U.S.C. § 389 the repayment period should be 10 years consistent with the ability to repay, not a fixed annual rate over 40 years. The repayment contract language in section 389, which was quoted supra, applies only in situations where the Secretary adjusts or defers past due reimbursable costs. The establishment of repayment periods and rates is within BIA's discretion under section 386, also quoted supra. Furthermore, if this argument were accepted, the remedy would be to require repayment from the waterusers in one-quarter the time BIA has given them.

The Board concludes that none of the Association's arguments show that BIA erred in determining to expend the $995,000 appropriation for the rehabilitation and betterment of the Project.

Dwight and Carol Sibley contend only that they cannot afford the additional assessment against their land. To the extent that this argument can be construed as a request for relief from previously accrued reimbursable costs, it is not addressed for the same reasons as are set forth above concerning the Association's similar arguments. The Board finds no basis in the relevant statutes or regulations for concluding that BIA erred in deciding to proceed with rehabilitation of the Project because repayment of the funds expended might cause financial difficulties for some of the waterusers.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 19, 1993, decision of the Billings Area Director is affirmed.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge

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