



INTERIOR BOARD OF INDIAN APPEALS

Alfreda Denny et al.; Ernestine Broncho Werelus et al.; Kim and Rick Shawver;
Bobette Haskett et al.; and Arlene Ortiz v. Northwest Regional Director,
Bureau of Indian Affairs

36 IBIA 220 (07/24/2001)

Related Board case:
41 IBIA 172



United States Department of the Interior

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

ALFREDA DENNY ET AL.,
ERNESTINE BRONCHO WERELUS ET AL.,
KIM AND RICK SHAWVER,
BOBETTE HASKETT ET AL.,

and

ARLENE ORTIZ

v.

NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-104-A, 98-105-A, 98-106-A,
00-92-A, and 00-93-A

Decided July 24, 2001

Appeals from two decisions concerning Fort Hall Lease 91-26.

Appeal in Docket No. 98-105-A dismissed; decision dated March 12, 1998, affirmed in part and vacated and remanded in part; decision dated April 26, 2000, vacated and remanded.

1. Appraisals--Board of Indian Appeals: Generally--Indians: Lands:
Fair Rental Value--Indians: Leases and Permits: Rental Rates

Where the Bureau of Indian Affairs decides not to adjust the rental for a lease of Indian land, and its decision is based on a determination of fair rental value, the Board of Indian Appeals reviews the Bureau decision under the standard of review applicable to Bureau decisions making rental adjustments. In either case, the Board's role is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence. An appellant who challenges either kind of decision bears the burden of proving that the decision is unreasonable.

APPEARANCES: Howard A. Belodoff, Esq., Boise, Idaho, for Alfreda Denny et al. and Bobette Haskett et al.; Thomas J. Lyons, Esq., Pocatello, Idaho, for Kim and Rick Shawver; Arlene Ortiz, *pro se*; Colleen Kelley, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Regional Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

These are five consolidated appeals concerning a March 12, 1998, decision and an April 26, 2000, decision, both issued by the Northwest Regional Director, ^{1/} Bureau of Indian Affairs (Regional Director; BIA), and both pertaining to Fort Hall Lease 91-26.

Appellants in Docket No. IBIA 98-104-A are Alfreda Denny, Loretta Flint, Janalee Montes, Bobette Haskett, Carmencita Wadsworth, Howard Meeks, Wolverna Covington, Rosalean Johnnie, El Teresa Ferguson, and Utahana Watson. Appellants in Docket No. IBIA 98-105-A are Ernestine Broncho Werelus, Adrian Broncho, Lucille Eldridge, Gwendolyn Galloway, Arlene Ortiz, Frank Papse, Jr., Mitchell Piper, Alfreda Sanchez, Della Two Bulls, Clarice Baker Villa, Franklin Wheeler, Diane B. Williams, and Christine L. Wildcat. Appellants in Docket No. 98-106-A are Kim and Rick Shawver. Appellants in Docket No. IBIA 00-92-A are Bobette Haskett, Janalee Montes, and Howard Meeks. Appellant in Docket No. IBIA 00-93-A is Arlene Ortiz.

For the reasons discussed below, the Board dismisses the appeal in Docket No. 98-105-A; affirms the Regional Director's March 12, 1998, decision in part and vacates it in part; vacates the Regional Director's April 26, 2000, decision; and remands the vacated issues to the Regional Director for further consideration.

Background

Lease 91-26 was a sprinkler-irrigated farm lease under which Kim and Rick Shawver (Shawvers) were the lessees. The lease was entered into on January 10, 1991, and approved by the Superintendent, Fort Hall Agency, BIA, on the same day. It covered 29 allotments on the Fort Hall Reservation, with a total acreage of approximately 543 acres, of which no more than 511.5 acres were to be cultivated. The annual rental rate was \$85 per acre for the farmable acreage, a total of \$43,477.50 per year. With respect to 22 of the 29 allotments, the lease term was ten years, beginning January 1, 1991, and ending December 31, 2000. With respect to the remaining seven allotments, the lease term was five years, beginning January 1, 1991, and ending December 31, 1995.

In November 1994, BIA staff prepared an appraisal for the purpose of determining whether a rental adjustment should be made on January 1, 1996, for the 22 allotments subject

^{1/} The Northwest Regional Director was known as the Portland Area Director at the time his Mar. 12, 1998 decision was issued. He will be called "Regional Director" in this decision regardless of the time period concerned.

to the ten-year lease term. ^{2/} The appraisal estimated fair annual rental, as of the date of the appraisal, at \$75 per acre, or \$10 less per acre than the rental shown in the lease. The Superintendent did not adjust the lease rental.

On December 31, 1995, Lease 91-26 expired for the seven allotments with five-year terms. However, the Shawvers continued to farm those allotments. In late 1996 and early 1997, three new leases were negotiated with the Shawvers. These three leases covered six of the seven allotments. The new leases were approved by the Superintendent for four-year terms, beginning January 1, 1997, and ending December 31, 2000. The owners of Allotment 3020 were unable to reach agreement with the Shawvers, and so Allotment 3020 remained unleased.

The Shawvers did not farm Allotment 3020 after 1996. However, their irrigation equipment remained on the allotment.

On April 4, 1997, the Superintendent issued a decision assessing trespass damages against the Shawvers for trespass to the seven allotments during 1996. These damages were based upon negotiated rates, except with respect to Allotment 3020. For Allotment 3020, the Superintendent assessed damages at \$140 per acre, which was equal to the highest negotiated rate for any of the other six allotments.

On May 30, 1997, the Superintendent issued a decision allowing the Shawvers to leave their irrigation equipment on Allotment 3020. He stated that he reached that decision because Allotment 3020 included the irrigation delivery point for the 28 allotments still under lease. He stated further: "This decision is based in part on the United States Trust Responsibility to all lands served from this delivery point and the negative impact that equipment removal would create." Superintendent's May 30, 1997, Decision at 1.

Both the April 4 and May 30, 1997, decisions were appealed to the Regional Director, each by two groups of landowners. On March 12, 1998, the Regional Director issued a single decision addressing the appeals from both decisions. He affirmed the Superintendent's April 4, 1997, decision. However, he vacated the May 30, 1997, decision, holding that the Superintendent had no authority to allow the Shawvers to continue to use Allotment 3020 without the consent of the landowners. He directed the Superintendent "to request an appraisal to determine the rental rate for the area used for the pump site and the lines that are partly under the farmable acreage of the allotment." Regional Director's March 12, 1998, Decision at 18.

^{2/} Both Lease 91-26 and 25 C.F.R. § 162.8 (1991) required rental reviews at five-year intervals for leases with terms longer than five years.

BIA's leasing regulations, as they appeared in 25 C.F.R. Part 162 (1991), were in effect at all times relevant to this appeal. New leasing regulations became effective on Mar. 23, 2001. 66 Fed. Reg. 7109 (Jan. 22, 2001).

He expressed hope that, on the basis of that appraisal information, the owners of Allotment 3020 and the Shawvers would be able to settle their dispute and agree upon a new lease. However, he also stated that, unless the parties were able to reach agreement the Superintendent was to issue a decision concerning trespass damages and the ownership of the pump and ancillary equipment which occupied the pump site. 3/

Three appeals were filed with the Board from the Regional Director's March 12, 1998, decision. The Appellants in two of the appeals, Docket Nos. IBIA 98-104-A and 98-105-A, own interests in one or more of the allotments subject to Lease 91-26. The Appellants in the third appeal, Docket No. IBIA 98-106-A, are the Shawvers. The Board stayed proceedings in these appeals to allow the Superintendent to complete the proceedings ordered by the Regional Director.

Pursuant to the remand ordered by the Regional Director, BIA staff determined that the irrigation equipment occupied a .1 acre portion of Allotment 3020. Accordingly, BIA appraisers were asked to appraise that portion, together with its improvements. An appraisal was prepared in August 1999. The Superintendent sent copies of the appraisal summary to the owners of Allotment 3020 and requested that they attempt to negotiate a settlement with the Shawvers. 4/ Howard A. Belodoff, who represents the Appellants in Docket Nos. IBIA 98-104-A and 00-92-A in these proceedings, initiated negotiations by letter to the Shawvers' attorney. The negotiations proved unsuccessful and, by letter of December 7, 1999, Mr. Belodoff demanded that the Shawvers remove the pump and equipment from Allotment 3020. The Shawvers did so.

When the Superintendent had not issued a decision concerning trespass damages by February 7, 2000, nine landowners filed a notice of appeal with the Regional Director under 25 C.F.R. § 2.8, "Appeal from inaction of official." 5/

3/ The Regional Director declined to address any issue concerning the five-year rental review, finding that the matter was not properly before him because it had not been addressed in either of the Superintendent's decisions.

4/ The Superintendent's Aug. 23, 1999, letter to the landowners suggests that the entire appraisal was being transmitted. However, it appears from statements made in this appeal that the landowners received only the first page, containing a summary of the appraisal.

5/ These were nine of the ten landowners (all except Utahana Watson) who are Appellants in Docket No. 98-104-A. As further discussed below, not all of these landowners own interests in Allotment 3020.

The Regional Director issued a decision in that appeal on April 26, 2000. He found that the Shawvers had used a .1 acre portion of Allotment 3020 for a pump site without the consent of the landowners for a period beginning January 1, 1996, and ending in December 1999. He further found that, because Lease 91-26 authorized the Shawvers to remove their irrigation equipment from the leased premises, that equipment did not become the property of the landowners upon expiration of the lease. Therefore, he based his assessment of damages solely upon the land occupied by the equipment. He found the Shawvers liable for damages in the amount of \$180 per year, plus 6% interest.

Two appeals from the April 26, 2000, decision were filed with the Board. The first, Docket No. IBIA 00-92-A, was filed by the same nine landowners who appealed to the Regional Director under 25 C.F.R. § 2.8. Of the nine, only three appeared on a list of owners of Allotment 3020. These were Bobette Haskett, Janalee Montes, and Howard Meeks. The Board made a preliminary determination that only those three had standing to bring the appeal. None of the other would-be appellants in Docket No. IBIA 00-92-A have subsequently shown that they have standing to bring the appeal.

The second appeal, Docket No. IBIA 00-93-A, was filed on behalf of another group of landowners by a person who was determined not to be a qualified representative under 43 C.F.R. § 1.3. The Board gave the landowners an opportunity to file an amended notice of appeal, noting that they were entitled to receive assistance from the unqualified representative but must sign their filings themselves. Only Arlene Ortiz chose to continue her appeal. Ms. Ortiz owns an interest in Allotment 3020 and thus has standing to bring this appeal.

As indicated above, the three appeals from the Regional Director's March 12, 1998, decision and the two appeals from the Regional Director's April 26, 2000, decision have been consolidated.

Discussion and Conclusions

Docket No. IBIA 98-105-A

The Regional Director seeks summary dismissal of the appeal filed by Werelus et al., Docket No. IBIA 98-105-A, for failure of those Appellants to carry their burden of proof.

Weruselus et al. did not file a brief and made no arguments in their notice of appeal. Although they adopted the notice of appeal filed by the Appellants in Docket No. IBIA 98-104-A, the adopted filing contained only unsupported allegations. Werelus et al. later made some procedural filings in these appeals. However, they made no arguments on the merits, either directly or by adoption of the arguments of others.

Appellants who fail to make any arguments in support of their allegations of error have not carried their burden of proof. Price v. Acting Muskogee Area Director, 32 IBIA 290 (1998), and cases cited therein. The Board finds that the appeal filed by Werelus et al. must be dismissed for failure of those Appellants to carry their burden of proof.

Docket Nos. IBIA 98-104-A and 98-106-A

As a preliminary matter, the Board observes that the briefs of the Appellants in Docket Nos. IBIA 98-104-A, 00-92-A, and 00-93-A (collectively, Landowner Appellants) ^{6/} include broad and far-reaching complaints about BIA leasing practices. Most of these complaints are beyond the scope of these appeals and outside the Board's jurisdiction. The Board does not have general supervisory authority over BIA. Rather, it has authority to review BIA actions only with respect to specific decisions made or specific actions taken. Edwards v. Portland Area Director, 34 IBIA 215, 219-220 (2000); 25 C.F.R. Part 2; 43 C.F.R. Part 4, Subpart D. In this case, the Board's authority is limited to the review of the Regional Director's March 12, 1998, and April 26, 2000, decisions.

The Shawvers challenge only the Regional Director's March 12, 1998, decision and challenge that decision only to the extent that it vacated the Superintendent's May 30, 1997, decision (which had allowed the Shawvers to leave their irrigation equipment on Lease 3020). They did not appeal the Regional Director's April 26, 2000, decision and, in fact, state that they have paid the assessment made in that decision.

The Shawvers contend that the Regional Director erred in finding them in trespass on the portion of Allotment 3020 occupied by their irrigation equipment. They argue that they were not in trespass because the Superintendent had specifically authorized them to leave the equipment there. They also argue that the Superintendent's action was authorized by his trust responsibility for the allotments remaining under lease.

The Regional Director responds: "[A]lthough it might have been the Superintendent's intention to minimize the disruption to the farming of the allotments for which Lease 91-26 had not expired, he had no authority to allow Shawvers to continue to use the property without first granting and/or approving a new lease on allotment 3020." Regional Director's Answer Brief at 4. The Board agrees.

^{6/} Not all of the landowners who are appellants in these consolidated appeals have standing to raise all of the issues addressed herein. However, it appears that at least some of the appellants have standing with respect to each issue. The term "Landowner Appellants" as used herein should be read to apply to those of the Landowner Appellants who have standing to raise the particular issue under discussion.

The Superintendent's trust responsibility for the other allotments did not authorize him to condone a trespass on Allotment 3020. The Board affirms the Regional Director's conclusion that the Shawvers were in trespass on a .1 acre portion of Allotment 3020 from January 1, 1996, until the irrigation equipment was removed.

The Shawvers and the Landowner Appellants disagree as to whether these appeals properly include any issue concerning the five-year rental review for the 22 allotments subject to the ten-year lease term. The Shawvers contend that they do not. The Landowner Appellants contend that they raised the issue in an appeal they filed with the Regional Director under 25 C.F.R. § 2.8 and that the Regional Director therefore erred in declining to consider it. The Regional Director states that "[w]hile [he] still contends that the issue of rental review was not properly before him when he made the 1998 decision, it would serve no purpose to ignore the issue at this stage." Regional Director's Answer Brief at 7.

The Regional Director's March 12, 1998 decision stated at page 9:

[The Shawvers] contend correctly that the rental review is outside of the scope of this appeal since no mention of it was made in the Superintendent's decision. * * * [T]he Superintendent did not need to make a rental adjustment since the lessees were paying more than the amount that the rent would be adjusted to. By not making an adjustment, the Superintendent protected the Indian landowners by not decreasing their rental payments.

A similar statement appears on page 12 of the same decision. Despite his statement that the issue was not before him, the Regional Director seems to have approved the Superintendent's apparent decision not to adjust the rent. The Board finds that the Regional Director addressed the issue sufficiently to make it properly a part of these appeals.

The Board has a well-established standard of review in rental adjustment cases. That standard was described in Strain v. Portland Area Director, 23 IBIA 113, 117-18 (1992):

The Board has recognized that the determination of "fair annual rental" requires the exercise of judgment and that reasonable people may differ in their calculation of "fair annual rental." * * * The Board does not substitute its judgment for BIA's. Rather, it reviews a rental adjustment to determine whether it is reasonable, that is, whether it is supported by law and substantial evidence. The Board overturns a BIA determination only when it finds the determination unreasonable. * * * [Citations omitted.]

The Board also stated in that case that "[t]he burden of proving a rental adjustment unreasonable is on the person who challenges it." Id. at 118.

[1] This case differs from the rental adjustment appeals usually seen by the Board in that the challenge here is to a decision not to adjust lease rental rather than a decision to adjust it. However, in both kinds of cases, the matter in dispute is BIA's determination of fair annual rental. The Board therefore finds that the standard of review and burden of proof described above apply here as well.

At all times relevant to this appeal, rental rate adjustments were governed by 25 C.F.R. § 162.8 (1991), which provided in relevant part:

[U]nless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made with the written concurrence of the owners and the approval of the Secretary.

The Landowner Appellants contend that the rent for the second five-year period of the lease should have been set at \$135 per acre or more. They base this contention on the rental rates in leases that were negotiated, not only after the BIA appraisal was prepared, but after the second five-year period of the lease began on January 1, 1996. Clearly, BIA could not have included such leases as comparables in its appraisal, which necessarily must have been prepared prior to January 1, 1996.

As noted above, the BIA appraisal at issue here was prepared in November 1994. The Regional Director states that appraisals are normally prepared a few months prior to the five-year anniversary date so that the lessee can be given advance notice if an adjustment is to be made. In this case, the Regional Director states, the appraisal was prepared earlier because of the appraisers' workload.

BIA prepared two more appraisals for Lease 91-26 in December 1996, one estimating fair annual rental as of January 1, 1996 (January 1, 1996, appraisal), and the other estimating fair annual rental as of December 19, 1996 (December 19, 1996, appraisal). ^{7/} Neither of these appraisals was in existence at the time the rental adjustment had to be made and so could not have been relied upon in making a decision to adjust, or not to adjust, the rent.

^{7/} These were evidently prepared in connection with negotiation of the three new leases discussed above.

It is arguable that BIA can be faulted for relying on an appraisal prepared over a year in advance of the five-year anniversary date of the lease. In this case, however, it appears unlikely that an appraisal prepared closer to the anniversary date would have produced a different rental adjustment decision. The January 1, 1996, appraisal estimated fair annual rental at \$80 per acre, \$5 less than the rental in the lease. ^{8/} Thus, even if the Superintendent had had the benefit of the January 1, 1996, appraisal, he would most likely not have adjusted the rent. Therefore, to the extent BIA may have erred in preparing its rental review appraisal too far in advance of the anniversary date, the Board concludes that the error did not harm the Landowner Appellants in this instance.

The Landowner Appellants have not shown that any information in existence at the five-year anniversary date would have resulted in a rental increase. Further, although they make generalized and unsupported attacks on the 1994 appraisal, those attacks show at most disagreement with the appraisal. The Board finds that the Landowner Appellants have failed to show either that the 1994 appraisal was unreasonable or that the Superintendent's decision not to adjust the rent was unreasonable.

The Landowner Appellants also contend that the Superintendent violated the provision in 25 C.F.R. § 162.8 (1991) which stated: "Any adjustments of rental resulting from [a rental] review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made with the written concurrence of the owners and the approval of the Secretary." Their argument appears to be that landowner concurrence was required in this case with respect to some action taken by the Superintendent. However, the regulation required landowner concurrence only where a rental adjustment was made and then only in cases where BIA did not have authority to grant leases. Because no rental adjustment was made in this case, no occasion for landowner concurrence ever arose. The Board finds that BIA did not violate the regulatory provision cited by the Landowner Appellants.

The Landowner Appellants make two arguments concerning the trespass damages assessed by the Superintendent for 1996: (1) BIA should have assessed civil penalties under section 103 of the American Indian Agricultural Resource Management Act (AIARMA), 25 U.S.C. § 3713; and (2) BIA should have required the Shawvers to pay interest on the trespass damages.

^{8/} By contrast, the December 19, 1996, appraisal estimated fair annual rental at \$100 per acre. That appraisal included several leases negotiated during 1996 among the comparables it analyzed.

It is not clear whether the Landowner Appellants intend to make these arguments with respect to all seven of the allotments subject to the 1996 trespass or only with respect to Allotment 3020. The Regional Director contends that only Allotment 3020 is at issue here, because trespass damages for the other six allotments were arrived at through negotiation.

The Landowner Appellants do not argue, let alone provide support for such an argument, that the owners of the other six allotments should be permitted to disavow the agreements they reached with the Shawvers. In the absence of a persuasive argument to that effect, the Landowner Appellants would be hard put to carry their burden of proof with respect to those allotments. Therefore, the Board construes these two arguments as directed only to Allotment 3020.

In Papse v. Acting Portland Area Director, 33 IBIA 175 (1999), the Board held that BIA had no authority to assess civil penalties under 25 U.S.C. § 3713 in the absence of the implementing regulations required by the statute. ^{9/} On January 22, 2001, BIA published implementing regulations. 66 Fed. Reg. 7126, 7140. The regulations became effective on March 23, 2001, and are codified at 25 C.F.R. Part 166, Subpart I (2001). The Landowner Appellants recognize that the necessary regulations had not been promulgated when the Regional Director issued his March 12, 1998, decision. However, they contend that, because the regulations are now in effect, the Board should assess civil penalties.

The Board has no authority to assess penalties for trespass. Under 25 C.F.R. § 166.802(a) (2001), Departmental authority to assess such penalties is vested in BIA. ^{10/} As discussed above, the Board's authority here is limited to the review of decisions made by BIA or actions taken by BIA.

^{9/} The Board's decision in Papse was appealed to Federal court in December 1999. Papse v. Bureau of Indian Affairs, CIV 99-589-E-BLW (D. Idaho). On Dec. 14, 2000, the District Court dismissed the plaintiffs' second through sixth claims for relief but retained jurisdiction over their first claim, concerning BIA's failure to publish regulations establishing civil penalties under 25 U.S.C. § 3713.

^{10/} 25 C.F.R. § 166.802 (2001) provides:

"Who can enforce this subpart?"

"(a) The BIA enforces the provisions of this subpart. If the tribe adopts the provisions of this subpart, the tribe will have concurrent jurisdiction to enforce this subpart. Additionally, if the tribe so requests, we will defer to tribal prosecution of trespass on Indian agricultural lands."

At the time the BIA decisions under review were issued, the regulations implementing 25 U.S.C. § 3713 were not in effect. The Board therefore affirms the Regional Director's conclusion that he lacked authority, as of the date of his decisions, to assess civil penalties under 25 U.S.C. § 3713.

The Landowner Appellants contend that they are entitled to interest on the damages assessed by the Superintendent for the 1996 trespass to Allotment 3020. They further contend that the Superintendent's assessment could not have included interest because he made no specific statement to that effect in his decision.

In his answer brief, the Regional Director contends:

[T]he value assessed for use of allotment 3020 was equal to the highest amount of any of the negotiated values, and since those values did not separate out any amount for interest, it was reasonable to conclude that \$140 per acre without any additional amount for interest also would be a fair recovery for allotment 3020.

Regional Director's Answer Brief at 6. The Landowner Appellants continue to contend, however, that a separate calculation of interest is required. They also contend that the assessed amount is not fair because "there is ample justification in the record to conclude that allotment 3020 is more valuable than \$140 per acre." Appellant's Reply to Appellee's Answer at 5.

The Superintendent did not base his assessment of damages for Allotment 3020 on the fair rental value of that allotment. Had such a value been the basis of his assessment, it would clearly have been appropriate, indeed necessary, to add interest to the assessment to compensate the landowners for any delay in payment. However, because the Superintendent's assessment does not necessarily represent fair rental value, it cannot be assumed that the addition of interest, based upon a percentage of that assessment, is appropriate.

As noted above, two appraisals were prepared for the entire lease in 1996, one estimating fair annual rental as of January 1, 1996, at \$80 per acre and the other estimating fair annual rental as of December 19, 1996, at \$100 per acre. As is evident, both appraised values are considerably below the damages of \$140 per acre which were assessed by the Superintendent. However, neither of the 1996 appraisals was specific to Allotment 3020.

The Landowner Appellants appear to be contending that Allotment 3020 has a higher rental value than some of the other allotments covered by the lease. Although they offer no persuasive evidence to support their contentions, it is possible that Allotment 3020, if appraised by itself, would be shown to have a higher per-acre rental value than the lease as a whole.

The Board concludes that, in fairness to both the owners of Allotment 3020 and the Shawvers, the Superintendent should have based his assessment of damages for 1996 upon the fair rental value of Allotment 3020. 11/ Therefore, the Board vacates the Regional Director's holding concerning 1996 trespass damages for Allotment 3020 and remands this issue to him. Upon remand, the Regional Director shall order an appraisal of Allotment 3020 to determine fair rental value for 1996. When the appraisal has been completed, the Regional Director shall calculate interest on that amount at a rate he determines to be appropriate for that time period. If the total of rental value and interest is more than \$140 per acre, he shall assess the Shawvers for the difference. If the total is less than \$140 per acre, and the amount paid by the Shawvers remains in escrow, he shall refund the overpaid amount to them. 12/

Docket Nos. IBIA 00-92-A and 00-93-A

As indicated above, these two appeals pertain to the Regional Director's April 26, 2000, decision concerning trespass damages for use of the pump site on Allotment 3020. The Landowner Appellants contend that the Regional Director erred in that decision by basing trespass damages on the land only, rather than on the land with some improvements. They contend:

The [Regional] Director's assessment of damages is based upon two false assumptions. The first is that the appraiser was valuing the pump and ancillary equipment which was the property of the [Shawvers]. Second, the [Shawvers] used only .1 acre of the allotment and that the trespass damages should be based upon this figure.

The Landowners' trespass claim was that the [Shawvers] were using the irrigation pump "site" including the concrete pivot pads, electrical lines, and buried main lines without consent or compensation, not the pump and ancillary equipment. * * * The underground water main traversed the entire length of allotment 3020.

Landowner Appellants' Opening Brief at 43-44. On the basis of this statement and Mr. Belodoff's December 7, 1999, letter, demanding that the Shawvers "remove the pump and

11/ The Board has previously found this to be an appropriate method of determining trespass damages where there is no claim of damage to the property. E.g., Papse, supra, 33 IBIA at 181.

12/ The Shawvers state that they have paid all assessments against them. Thus they have presumably already paid the \$140 per acre assessed by the Superintendent in 1997.

equipment which is reserved in the lease," the Board concludes that the Landowner Appellants do not claim ownership of the pumps and ancillary equipment. 13/

The Shawvers question whether any of the irrigation mainline runs under Allotment 3020. Further, they contend: "[T]here are no center pivot pads on allotment 3020 being used by Shawvers. The only area of allotment 3020 previously used by Shawvers was less than .1 acres for the pump site and diversion point from the Gibson Canal." Shawvers' Answer Brief at 3.

BIA's appraisal of the pump site includes the following property description: "The subject property is a triangular-shaped parcel containing .01 [sic, should be .1] acres all of which is used as a pump site. * * * The property is improved with electric power, two pumps, a sump, 153 foot of 10" steel mainline, and an access road." Pump Site Appraisal at 1. The appraisal estimated the fair annual rental of the land and improvements, as of January 1, 1996, at \$3,000. This value was arrived at by estimating the market value of the land, the two pumps, the sump and the steel main line, and then applying a rate of return to the land and a rate of recapture to each of the improvements.

The market value of the land was estimated at \$180. The fair annual rental for the land was estimated at \$16.20, based upon a 9% rate of return. It is apparent from his April 26, 2000, decision that the Regional Director misread the appraisal on this point. He read the appraisal as estimating fair annual rental at \$180, rather than \$16.20, and so assessed the Shawvers \$180 per year, plus interest, for the trespass.

The Shawvers did not appeal the Regional Director's April 26, 2000, decision and thus, under other circumstances, would not be entitled to correction of this error. 14/ However, given the other problems discussed below, the Board concludes that it must vacate the April 26,

13/ In speaking of the pump and equipment "reserved in the lease," the Landowner Appellants evidently refer to paragraph 16.C of the Plan of Conservation Operations for Lease 91-26, which states:

"The lessee owns 2 irrigation pumps, 2 irrigation motors, electrical panels, 2 center pivots from point of attachment to concrete pivot pad, portable handlines, portable mainlines and ancillary equipment with the right of removal from the lease premises. The landowners will own the buried irrigation mainline, buried electrical lines and concrete pivot pads."

14/ It appears that the Shawvers were not provided with a copy of the appraisal while this matter was pending before BIA. Thus, it is likely that the Shawvers were unaware of this error until after the appeal period had expired.

As noted above, the owners of Allotment 3020 were apparently provided with copies of the first page of the appraisal, but not the remainder.

2000, decision. On remand, the Regional Director shall correct the error as to fair annual rental for the land.

It is not clear from the record what equipment the Shawvers removed from Allotment 3020 and what improvements remained on the allotment. Because the Appellant Landowners do not contend that the Shawvers removed any equipment that was not properly theirs under the lease, the Board concludes that there is no dispute on that point. Clearly, however, there is a dispute as to whether any of the buried mainline runs under Allotment 3020. If it does, it would be the property of the landowners under the terms of the lease. ^{15/} Although neither the Landowner Appellants nor the Shawvers mention the sump, that item is described in the appraisal as concrete and thus may well have remained on the allotment. The Board finds that there is a need to determine what improvements remained on Allotment 3020 after the Shawvers removed the equipment that belonged to them.

Therefore, the Board vacates the Regional Director's April 26, 2000, decision and remands this matter to him. Upon remand, the Regional Director shall determine what improvements, if any, remained on Allotment 3020 after the Shawvers removed their equipment. He shall deem the unremoved improvements to be the property of the owners of Allotment 3020 during the trespass period. He shall recalculate damages based upon the corrected fair annual rental for the land, as discussed above, and the fair annual rental for any improvements deemed to belong to the landowners during the trespass period. If, in the professional opinion of BIA appraisers, a new appraisal is necessary to properly estimate value under these circumstances, the Regional Director shall order a new appraisal. If a new appraisal is determined not to be necessary, the Regional Director shall recalculate fair annual rental based on the existing appraisal. He shall calculate interest on that amount at a rate he determines to be appropriate for that time period. If the total of rental value and interest is more than the amount of damages already assessed, he shall assess the Shawvers for the difference. If the total is less than the amount already assessed, and the amount paid by the Shawvers remains in escrow, he shall refund the overpaid amount to them.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal in Docket No. 98-105-A is dismissed. The Regional Director's March 12, 1998, decision is affirmed, except with respect to his conclusion concerning 1996 trespass damages for Allotment 3020. As to that issue, his decision is vacated, and

^{15/} As noted above, the appraisal listed "153 foot of 10" steel main line" as an improvement to the pump site. It is possible that this was "portable mainline," and thus the property of the Shawvers under the lease, rather than "buried irrigation mainline" owned by the landowners. However, that is not entirely clear.

the matter is remanded for further consideration in accordance with this decision. The Regional Director's April 26, 2000, decision is vacated, and that matter is remanded to him for further consideration in accordance with this decision. 16/

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

16/ Issues raised in these appeals but not discussed in this decision have either been considered and rejected or determined not to be relevant.