



INTERIOR BOARD OF INDIAN APPEALS

Todd O'Bryan v. Acting Great Plains Regional Director,
Bureau of Indian Affairs

41 IBIA 119 (07/11/2005)

Related Board case:
48 IBIA 109

Related Litigation:
O'Bryan v. United States, 93 Fed. Cl. 57, 2010 WL 1990049 (Fed. Cl. 2010), aff'd.,
417 Fed Appx. 979, 2011 WL 1366613 (Fed. Cir. Apr. 12, 2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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TODD O'BRYAN,	:	Order Affirming Decision in Part,
Appellant,	:	Reversing Decision in Part,
	:	Vacating Decision in Part,
v.	:	and Remanding Case
	:	
	:	
ACTING GREAT PLAINS REGIONAL	:	Docket No. IBIA 04-36-A
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	July 11, 2005

Appellant Todd O'Bryan appeals from a December 8, 2003, decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning the cancellation of grazing permits for Range Units (RUs) 6 and 9 on the Pine Ridge Reservation, the assessment of liquidated damages for overstocking, and the assessment of a fee for grazing livestock without a pasture authorization. For the reasons discussed below, the Board affirms the Regional Director's decision in part, reverses it in part, vacates it in part, and remands the matter to the Regional Director for further proceedings.

Background

Appellant, a member of the Oglala Sioux Tribe (Tribe), was the successful bidder for RUs 6 and 9 for the permit period November 1, 2000, through October 31, 2005. 1/ On January 8, 2001, he was issued permits for the two units by the Superintendent, Pine Ridge Agency, BIA. The permits authorized yearlong grazing by 165 head of cattle on RU 6 and 168 head of cattle on RU 9.

On May 15, 2003, two BIA employees counted 286 yearling steers on RU 6 and 703 yearling steers on RU 9. They reported that the steers were branded, about half and half, with

1/ Appellant states that he was not eligible for allocation of grazing privileges under the Tribe's grazing ordinance, Ordinance 95-05, and therefore submitted bids under the preference provisions of the ordinance. Appellant's Sept. 3, 2003, Affidavit at 1.

Each of Appellant's permits is marked "2nd PREFERENCE BID" in the upper right corner.

two brands registered to Appellant and that one of the brands was also registered in Nebraska to the Schmidt Cattle Company. In the report of their field inspection, the employees stated that “[t]here seems to be an ownership issue” and that “these units are yearlong which would leave the AUM’s [(animal unit months)] available nearly used up.” On May 24, 2003, the same two BIA employees counted a total of 1214 yearling steers on the two units and observed the same two brands.

On May 28, 2003, the Superintendent wrote to Appellant, stating in part:

Your units are yearlong. Range Unit 6 is for 165 head and Range Unit 9 is for 168 head for a total of 333 head, converted to yearlings equals 444 head of yearlings. [2/] You are overstock[ed] by 770 head, computed as follows: 1214 head – 444 head = 770 head of yearlings overstocked. Because of the recent drought conditions, this is a threat to immediate, significant and irreparable harm to the Indian rangeland.

The Range Control stipulations which are attached and made a part of you[r] grazing permit contract state: “If the number of livestock authorized is exceeded, the permittee shall be liable to pay as liquidated damages, in addition to the regular fees for the full grazing season as provided in the permit, a sum equal to 50% thereof for such excess livestock and such livestock shall be promptly removed from the range unit.”

This overstocking is considered intentional and the livestock must be removed immediately within three (3) days from the receipt of this letter. In the event they are not removed, you will be billed as provided in the above stipulation.

You are further advised that failure to abide by the specified use in your permit could subject the range unit permit to cancellation in 10 days from the receipt of this letter. [25 C.F.R. §] 166.704 states the written notice of permit violation will provide the permittee with ten days from the receipt of the written notice to:

- (a) Cure the permit violation and notify us that the violation is cured.

2/ Under Ordinance 95-05, a yearling is considered to be three-fourths of an animal unit. See definition of “Animal Unit,” Ordinance 95-05 at 2.

- (b) Explain why we should not cancel the permit or,
- (c) Request in writing additional time to complete corrective actions. If additional time is granted, we may require that certain corrective actions be taken immediately.

Another violation is the use of more than one brand unless the brand is authorized by the allocation committee. [One of the two brands observed by the BIA employees] is not authorized on your permit contract nor is there committee action for the authorization.

Superintendent's May 28, 2003, Letter at 1-2.

On June 16, 2003, the Tribe's Land Committee approved a motion requesting "THAT [BIA] STOP ALL ACTIONS FROM THIS DAY FORWARD AGAINST [APPELLANT] UNTIL WE SET UP A MEETING TO RESOLVE THIS ISSUE IN A POSITIVE WAY." At the same meeting, the Land Committee voted to hold another meeting on June 30, 2003, to discuss the issue further. See Land Committee Secretary's June 17, 2003, Memorandum to Appellant.

Appellant received the Superintendent's May 28, 2003, letter on June 19, 2003. He responded on June 22, 2003, contending that, based on seasonal use for three months, he was not overstocking RUs 6 and 9. He requested that his permits be changed to seasonal use. He stated that he had informed a BIA employee on April 23, 2003, that he wanted to run his livestock on a seasonal basis and that he would be putting yearlings on the units. He also stated that he would remove the yearlings in July 2003, except for 80 head, which he would remove in August. As to the brand violation, he stated that he had assumed that, because the subject brand was approved for another range unit for which he held a permit, the brand was also authorized for RUs 6 and 9.

In an undated letter received by BIA on July 3, 2003, Appellant stated that he would remove most of the yearlings by July 10 or 11, 2003, but that he would like to leave 100 head on the units until August 30, 2003.

On July 10, 2003, the Superintendent cancelled Appellant's permits for RUs 6 and 9 and assessed him \$55,504.50 in liquidated damages under section 2 of the Range Control Stipulations. The Superintendent held that Appellant had failed to cure his permit violations, had not made a timely request for a change in his grazing permits to allow seasonal use, and had been requested to provide a grazing plan but had not done so. He stated that livestock counts had been conducted on June 22, 2003, when 1405 yearlings were counted, and June 26,

2003, when 1420 yearlings were counted, and that the yearlings bore the same brands as were seen during the May 24, 2003, count. 3/ The Superintendent then stated:

Besides the brand violation identified in the May 28, 2003 letter, you are also in violation of ownership requirements as required by Section (3) (e) of the Oglala Sioux Tribal Grazing Ordinance 95-05 and Animal Health requirements under Oglala Sioux Tribal Grazing Ordinance 95-05, Page 10, Section h. [4/]

I am providing you official notice that [your permits for RUs 6 and 9] are hereby canceled for not following the terms of your grazing permit contract for each unit. Enclosed is [a bill for collection] in the amount of \$55,504.50 for liquidated damages as listed in Range Control Stipulation Number 6 [sic, should be 2], calculated as follows: Range Unit 9: \$18,500.00 + Range Unit 6: \$18,503.00 = \$37,003.00 x 1.5 = \$55,504.50.

Superintendent's July 10, 2003, Decision at 1.

Appellant appealed the Superintendent's decision to the Regional Director, who issued a decision on December 8, 2003, in which she affirmed the cancellation of Appellant's permits and the imposition of liquidated damages. She held, however, that the Superintendent had calculated the damages incorrectly. She stated:

The total number of livestock authorized jointly by both permits is 333 animal units (AU). The agency counted 1214 yearling livestock. One yearling is equivalent to .75 AU. The 1214 yearlings are equivalent to 910 AUs. This conversion shows that there were 577 Unauthorized AUs. The penalty identified by the Range Control Stipulations is "in addition to the regular fees

3/ Although not mentioned in the Superintendent's July 10, 2003, decision, another count was conducted on July 7, 2003, at which time 1436 yearlings were counted on RU 9. The report of this count stated: "Permittee was on the Range Unit and said they were rounding up to remove the livestock by July 11, 03."

RUs 6 and 9 were checked again on July 12, 2003, at which time no livestock were found.

4/ Subsection 3.e of Ordinance 95-05 concerns ownership requirements for allocation privileges. The requirements also apply to second preference grazing privileges, such as those held by Appellant. See Ordinance 95-05, subsection 4.e(2).

Subsection 3.h, Animal Health, which appears on page 10 of Ordinance 95-05, is a part of the section concerning allocation. However, the wording of the subsection indicates that it is intended to apply to all permittees.

for the full season as provided in the permit, a sum equal to 50% thereof for such excess livestock.” The regular fees, which would be charged for 577 animal units is $(\$9.14 * 12 * 577)$ \$63,285.36. The penalty would be half of seasonal fee or in this case \$31,642.68. The total amount due should be \$94,928.04. The Agency incorrectly calculated the amount due for the permit violation.

Regional Director’s Dec. 8, 2003, Decision at 2. Based upon these calculations, the Regional Director directed the Superintendent to issue a new bill for collection in the amount of \$94,928.04.

The Regional Director also held that 667 of the yearlings found on RUs 6 and 9 were not owned outright by Appellant and that Appellant was therefore required to have a pasturing authorization and pay a pasturing fee under section 10 of Ordinance 95-05. 5/ Id. She directed the Superintendent to issue another bill for collection for grazing livestock without a pasture authorization, stating: “This fee shall be calculated at the rate of \$15.00 per animal per month, 3½ months in this case, for the 667 animals (OST grazing ordinance 95-05 (10)) belonging to the Schmidt Cattle Company which were on the range units.” Id. at 3. Under the Regional Director’s formula, this assessment would total \$35,017.50.

Appellant appealed the Regional Director’s decision to the Board. Appellant and the Regional Director filed briefs.

Discussion and Conclusions

Appellant contends: (1) BIA should have modified his permits to allow seasonal grazing; (2) BIA was required to abide by the Land Committee’s June 16, 2003, request to cease action against Appellant until the matter was resolved by the Land Committee; (3) BIA lacked authority to assess liquidated damages without consulting the landowners; (4) the liquidated damages assessed in this case were invalid as a penalty; (5) one of the Agency employees involved in the actions against Appellant was biased; (6) the livestock counts were unreliable; (7) the calculation of damages was incorrect; (8) the Range Control Stipulations are ambiguous, so only actual damages can be collected; (9) the Range Control Stipulations are not part of Appellant’s grazing permits; (10) BIA impermissibly combined trespass and permit violation proceedings; (11) BIA’s determinations concerning ownership and health issues were not included in the May 28, 2003, notice of violation and so could not be a basis for the actions

5/ Section 10 of Ordinance 95-05 requires that permittees with allocated and/or first or second preference grazing privileges obtain a pasturing authorization from BIA for livestock in excess of the ownership requirements in subsection 3.e. It provides further: “Any livestock pastured without an approved pasturing agreement or in violation of an authorized pasturing agreement shall be assessed a penalty of \$15.00 per head, per month.”

taken against Appellant; (12) Appellant was not precluding from grazing cattle with a brand not authorized for RUs 6 and 9 when the brand was authorized on another RU permitted to him; and (13) BIA lacks authority to assess penalties and damages in an administrative action.

The Board addresses Appellant's tenth argument first because that argument alludes to an issue with implications extending beyond this appeal. That issue is whether, under the current grazing regulations, BIA should have considered overstocking under the permit violation regulations in 25 C.F.R. Part 166, Subpart H, or the trespass regulations in 25 C.F.R. Part 166, Subpart I.

Appellant argues that BIA impermissibly combined trespass and permit violation proceedings. In fact, nothing in the record suggests that BIA ever invoked the trespass regulations. Rather, it is clear that BIA relied entirely on the permit violation regulations.

The present regulations suggest the possibility, however, that overstocking violations are now to be treated as trespasses. 25 C.F.R. § 166.700 states that Subpart H, Permit Violations, "addresses violations of permit provisions other than trespass" (emphasis added), thus suggesting that trespass, although not ordinarily thought of as occurring under a permit, does include at least some permit violations for purposes of Part 166. "Trespass" is defined in section 166.4 as "any unauthorized occupancy, use of, or action on Indian lands" and in section 166.800 as "any unauthorized occupancy, use of, or action on Indian agricultural lands."

Two provisions in Subpart H specifically state that trespass proceedings may be brought against a permittee under Subpart I: section 166.708, concerning emergency action where immediate, significant and irreparable harm is threatened, and section 166.709, concerning holding over. It is possible that these two situations are the only two in which trespass proceedings against a permittee are authorized with respect to actions on lands permitted to him. However, it is also possible that a broader application of the trespass provisions to permittees was intended, 6/ and section 166.700 clearly appears to leave that possibility open. As to other permit violations which might be deemed trespasses, overstocking is perhaps the most likely candidate, as it entails the unauthorized occupancy or use of permitted Indian lands and so would apparently fall under the definitions of "trespass" in sections 166.4 and 166.800.

6/ Such a possibility is suggested in the Federal Register preambles to the proposed and final versions of the present Part 166. See 65 Fed. Reg. 43,874, 43,884 col. 2 (July 14, 2000); 66 Fed. Reg. 7068, 7085 col. 3 (Jan. 22, 2001) ("Failure by a permittee to meet these expectations [in the provisions concerning permit requirements] may result in an imposition of fines or penalties under subpart H, 'Permit Violations' or subpart I, 'Trespass'"); 65 Fed. Reg. at 43,885 col. 3; 66 Fed. Reg. at 7087 col. 3 ("Subpart I, 'Trespass,' defines trespass under a grazing permit to include any unauthorized occupancy, use of or action on Indian agricultural * * * lands" (emphasis added)).

The Board noted a question on this point in Buffington v. Acting Great Plains Regional Director, 37 IBIA 12 (2001). ^{7/} In so doing, the Board hoped to elicit some further explanation from BIA in an appropriate case, such as this one, as to the true intent of the regulatory language and, in particular, how BIA intended to address the possible conflict between the regulation (assuming overstocking is to be treated as trespass) and the liquidated damages provision in the standard Range Control Stipulations. Unfortunately, no further elucidation has been forthcoming in this case. The Regional Director discusses the Board's statement in Buffington and argues that, because the Board stated that it was unclear what effect would be given to liquidated damages provisions in permits, "nothing prevents the Government from [applying] the liquidated damages provision in the Range Control Stipulations to overstocking, whether it is treated as a permit violation or a trespass." Regional Director's Brief at 8-9. The Regional Director also cites United States v. Fraser, 156 F. Supp. 144, 152 (D. Mont. 1957), aff'd, 261 F.2d 282 (9th Cir. 1958), for the proposition that the Government may choose whether to treat overstocking as a permit violation or a trespass.

The Board agrees that BIA has the authority to determine whether overstocking should be treated as a permit violation or a trespass. However, the Regional Director appears to be contending that each BIA Superintendent should be able to make that choice on an ad hoc basis. Absent evidence of a grant of such authority to the Superintendents, which the Regional Director has not produced, the Board is not willing to presume that Superintendents have been given such authority. Rather, until it is convinced otherwise, the Board will continue to presume that the choice was made, for all BIA employees, by the Assistant Secretary – Indian Affairs when he promulgated the regulations in the present Part 166. Without a more developed argument concerning the intent of the new regulations, however, the Board is reluctant to reach a conclusion as to exactly what the Assistant Secretary's choice encompassed.

For purposes of deciding this case, the Board finds that it need not reach a broad conclusion as to the intent of the present regulations. Appellant's permits were issued in January 2001, prior to the promulgation of the present regulations. Thus, the liquidated damages provision in the Range Control Stipulations were a part of Appellant's contract (see discussion in the following paragraph) prior to promulgation of the present regulations. Under the circumstances of this case, the Board finds that Appellant cannot complain that BIA treated his overstocking as a permit violation rather than a trespass.

Appellant's ninth, twelfth, and thirteenth arguments may be dealt with summarily. In his ninth argument, Appellant contends that the Range Control Stipulations, including

^{7/} The Board stated in part: "The language of § 166.700 (2001) suggests that overstocking under permits will be considered under the trespass provisions of the new regulations rather than the provisions concerning permit violations. It is not entirely clear what effect will be given to liquidated damages provisions in permits." 37 IBIA at 17 n.4.

the liquidated damages provision contained therein, were not part of his grazing permits. This argument is rejected here for the same reasons the identical argument was rejected in Buffington, 37 IBIA at 15. Appellant's twelfth argument, concerning a brand not authorized under his permits for RUs 6 and 9, is in essence an argument that he was not bound by his permits. Each of his permits states: "Brands.—Unless authorized by the Superintendent of the Agency in writing, only livestock bearing the brands and marks herein shown shall be grazed under authority of this permit." Neither permit shows the brand that the Superintendent found to be unauthorized. Appellant was in violation of his permit when he grazed cattle bearing a brand not authorized under the permit. In his thirteenth argument, Appellant contends that BIA lacks authority to assess penalties and damages in an administrative action and therefore must take Appellant to court. While BIA may ultimately have to resort to judicial action against Appellant, there is nothing that precludes BIA from attempting to resolve the matter administratively.

In his first argument, Appellant seems to recognize that he probably could have avoided his overstocking problems by obtaining a modification of his permits to provide for seasonal grazing. 8/ He argues that he made several oral requests for a permit modification but did not receive one because a BIA employee was biased against him. He acknowledges that he did not make a written request until June 22, 2003, after the Superintendent formally notified him that he was in violation of his permit.

It was Appellant's responsibility to obtain a permit modification before adding livestock to RUs 6 and 9. Therefore, if the bias of a BIA employee hindered Appellant's attempt(s) to obtain a modification, it was Appellant's responsibility to pursue the matter, even if it became necessary to elevate his modification request to the employee's supervisor or the Superintendent. Appellant certainly could have submitted a timely, written modification request directly to the Superintendent and requested a timely response.

Appellant repeats his allegation of bias in his fifth argument. He fails to show, however, that the alleged bias of a BIA employee was the cause of Appellant's permit violation or that it affected either the Superintendent's decision or the Regional Director's decision.

In his second argument, Appellant contends that BIA was required to abide by the Tribal Land Committee's June 16, 2003, request to cease action against Appellant until the matter was resolved by the Land Committee. In his third argument, he contends that BIA was required to consult with the landowners prior to assessing liquidated damages.

8/ The Regional Director appears to have reached this conclusion in her decision: "If [Appellant] had modified the permits prior to placing the livestock on the permit, the agency would have let him do so." Regional Director's Dec. 8, 2003, Decision at 1.

The Tribe owns a substantial amount of the land included in RUs 6 and 9. Thus, in addition to its authority under Ordinance 95-05, the Tribe had a landowner's interest in consultation under 25 C.F.R. § 166.705(a). That provision does not require consultation in all cases but provides: "If the permittee does not cure a violation within the required time period, we will consult with the Indian landowners, as appropriate, and determine [what course of action will be taken]." In light of the Tribe's evident interest in the matter, the Superintendent should have consulted with the Land Committee before issuing his July 10, 2003, decision. 9/

It is not clear, however, whether a permittee has standing to assert BIA's lack of consultation with landowners as a defense to an action taken by BIA for a permit violation. At a minimum, it would seem that Appellant would need to show that the Superintendent's action was in fact contrary to the landowners' wishes.

According to the Land Committee Secretary's June 17, 2003, memorandum, the Land Committee intended to take action on Appellant's issue at a June 30, 2003, meeting. Appellant states, at page 3 of his September 3, 2003, affidavit, that the June 30, 2003, meeting was held but that no action was taken. He does not, however, produce any documentation from the Land Committee to support his statement. Nor does he discuss what, if anything, the Land Committee ultimately decided. Appellant's unsupported statement is not sufficient to show that the Land Committee continued to oppose action by BIA following its June 30, 2003, meeting. Under these circumstances, the Board finds that Appellant's arguments concerning the Land Committee's June 16, 2003, resolution and the Superintendent's alleged failure to comply with 25 C.F.R. § 166.705(a) do not establish that cancellation of his permits was improper.

Despite its rejection of Appellant's second and third arguments, the Board finds that, given the consultation provision in 25 C.F.R. § 166.705(a), a BIA Superintendent should, in issuing a decision under section 166.705, state whether or not the landowners have been consulted and, if not, explain why it was not appropriate under the circumstances. 10/

In his fourth argument, Appellant contends that the liquidated damages assessed in this case were invalid as a penalty. He cites Knecht Enterprises, Inc. v. Great Plains Regional

9/ It is possible that the Superintendent did so, even though he did not mention it in his decision.

10/ The Board recognizes that, where a range unit includes highly fractionated allotments, consultation with all landowners may not be feasible. Nevertheless where, as here, a tribe owns a substantial portion of the land affected, or in a case where only a few landowners are involved, consultation might well be "appropriate."

Director, 37 IBIA 258, 265 (2002), and Myers v. Muskogee Area Director, 32 IBIA 242, 248-49 (1998), in which the Board discussed the enforcement of liquidated damage provisions in contracts.

The Regional Director contends that the issue of whether liquidated damages assessed under a grazing permit constitute a penalty was settled in United States v. Fraser, *supra*, 156 F. Supp. at 152-53, in which it was held that the overstocking provision in the then-current Range Control Stipulations were enforceable as a provision for liquidated damages, even though the Stipulations used the term “penalty” rather than the term “liquidated damages.” ^{11/} The district court held that “[t]he excess charge is a reasonable forecast of just compensation for the harm caused by the breach, and the harm is one that is incapable or very difficult of accurate estimation.” *Id.* at 153. The United States Court of Appeals for the Ninth Circuit agreed. *See* 261 F.2d at 287.

Like the Federal courts in Fraser, the Board has held that the liquidated damages provision in the Range Control Stipulations is enforceable. Buffington, *supra*; Lopez v. Acting Aberdeen Area Director, 29 IBIA 5 (1995). However, the Board has also recognized that the question of whether a liquidated damages provision in a contract is enforceable in any given situation may depend upon whether it is reasonable in that situation. In Myers, the Board found a liquidated damages clause in a lease invalid when applied to a partial breach because it purported to make the lessee liable for the same amount regardless of the degree to which he had performed under the contract. 32 IBIA at 249. In Knecht Enterprises, the Board ordered the Regional Director to make a determination of the reasonableness of the liquidated damages assessed against a lessee. 37 IBIA at 266.

The general rule concerning contractual provisions for liquidated damages is set out in section 356 of the Restatement (Second) of Contracts (1981):

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term

^{11/} Paragraph 3 of the Range Control Stipulations, as they existed at the time of Fraser, provided in relevant part:

“[I]f the number authorized is exceeded without previous authority, the permittee will be required to pay in addition to the regular charges as provided in the permit, a penalty equal to 50 percent thereof for such excess stock and the stock will be held until full settlement has been made.” 156 F. Supp. at 151.

fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty. 12/

See also the other authorities cited in Myers, 37 IBIA at 248-49.

In order to assess the reasonableness of the liquidated damages provision in the Range Control Stipulations, as applied by the Regional Director in this case, it would be necessary to calculate, at least approximately, the actual damages caused by Appellant's permit violation. Presumably, the \$9.14 figure in the Regional Director's formula represents the charge per AUM under Appellant's permits. 13/ The Regional Director found that there were 577 unauthorized AUs present on RUs 6 and 9. It appears from the record that the unauthorized AUs were on the range units for about three months. If \$9.14 is taken to represent a fair compensation per AUM for forage consumed, damages for forage consumed by 577 AUs for three months would be about \$15,821.34. This figure is only approximate because, among other possible considerations: (1) \$9.14 might not represent the true value of forage consumed; (2) there might be other actual damages, in addition to the value of the forage consumed; and (3) the other components of the formula might require adjustment. Another factor to be considered is the apparent absence of livestock on RUs 6 and 9, and thus the lack of any forage consumption, during the other nine months of the year. These considerations suggest the strong possibility that the \$94,928.04 assessed by the Regional Director is not "an amount that is reasonable in light of the anticipated or actual loss" caused by Appellant's overstocking violation. The Board will therefore remand this matter to the Regional Director for a calculation of actual damages. 14/

12/ In the comment for § 356, the Restatement explains:

"[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy."

In contrast to a contractual remedy, a remedy for trespass may be punitive. See, e.g., 25 U.S.C. § 3713, which requires the issuance of "regulations that—(1) establish civil penalties for the commission of trespass on Indian agricultural lands, which provide for—(A) collection of the value of the products illegally used or removed plus a penalty of double their values." See also 25 C.F.R. § 166.812(a).

13/ This figure approximates the amounts arrived at by dividing the rent shown on Appellant's permits by 12 and by the number of livestock authorized. However, it is not exact.

14/ Given this disposition, the Board finds it unnecessary to address the large disparity between the liquidated damages assessed by the Superintendent and those assessed by the Regional Director. However, as both officials made their calculations under the same

In his sixth argument, Appellant contends that the livestock counts made by the two BIA employees were unreliable. In support of this argument, Appellant submits a March 24, 2004, declaration from two individuals who state that, on July 7, 2003, they were rounding up cattle for Appellant and observed the two BIA employees counting cattle. The declarants state that the BIA employees were counting cattle in different areas, after which they added their counts together. Appellant contends that this method of counting amounted to counts by single individuals and therefore violated the directives of the Board in Buffington.

Appellant did not present this declaration to the Regional Director. Indeed, the declaration did not exist at the time of the Regional Director's December 8, 2003, decision. The Board ordinarily does not consider evidence or arguments presented for the first time on appeal. See Edwards v. Rocky Mountain Regional Director, 41 IBIA 77, 80 (2005), and cases cited therein.

Appellant's new evidence, and his argument based thereon, are not persuasive enough to warrant abandonment of the Board's usual practice. For one thing, Appellant reads Buffington too broadly. The Board did not, in that case, issue any directives for livestock counts. Indeed, it stated that it did "not attempt to describe specific requirements for a valid livestock count." 37 IBIA at 17. Further, this case differs from Buffington in that, in this case, several counts were made and, for all the counts, the reports were signed by two BIA employees. Finally, the declaration Appellant submits concerns only one of the several counts made by BIA. Thus, even if that declaration were sufficient to invalidate the July 7, 2003, count, it would not be sufficient to invalidate the other counts.

Appellant also argues, for the first time on appeal to the Board, that the variance in the counts made on different days shows that the counts were unreliable. Appellant was well aware of the variance at the time he filed his appeal with the Regional Director because the Superintendent's May 28 and July 10, 2003, letters had informed him of the totals counted on May 24, June 22, and June 26, 2003. Appellant should have made this argument to the Regional Director. 15/

The Board follows its usual practice and declines to consider Appellant's belated evidence and argument. Accordingly, as Appellant has not shown error in the livestock count

fn. 14 (continued)

liquidated damages provision, the fact that they arrived at such different results suggests that the language of the provision might require clarification.

15/ In any event, as the Regional Director's calculations were based on the lowest of the three counts, Appellant cannot claim harm based on the variance.

relied upon by the Regional Director, she may employ the figure of 577 unauthorized AUs in calculating actual damages to be assessed against Appellant.

In his eleventh argument, Appellant contends that BIA's determinations concerning ownership and health issues were not included in the Superintendent's May 28, 2003, notice of violation and so could not be a basis for cancellation of his permits or assessment of charges against him. In her December 8, 2003, decision, the Regional Director stated that these violations were not the basis for the cancellation of Appellant's permits.

The Superintendent's July 10, 2003, cancellation letter contained the first mention of a violation of the ownership and animal health provisions of Ordinance 95-05. It is not entirely clear whether the Superintendent intended to rely on these alleged violations to support cancellation of Appellant's permits. If he so intended, he should have mentioned them in his May 28, 2003, notice letter, so that Appellant could respond to the charges, as he was entitled to do under 25 C.F.R. § 166.704.

The Board finds that the ownership and health issues cited by the Superintendent in his July 10, 2003, cancellation decision were not proper grounds in this case for cancellation of Appellant's permits. However, the Board also finds that Appellant's overstocking violation was sufficient, without more, to support cancellation of Appellant's permits.

The Superintendent did not attempt to assess a fee for violation of any requirements of Ordinance 95-05. However, as indicated above, the Regional Director did so in her decision, assessing an amount of \$35,017.50 for violation of the pasturing requirements in section 10 of Ordinance 95-05. She did not identify the source of her authority to impose a penalty under tribal law. ^{16/} If she deemed Appellant's purported violation of tribal law to constitute a permit violation under Part 166, Subpart H, her assessment suffers the same deficiency as the ownership and health citations just discussed, because Appellant was never given an opportunity to respond to charges prior to imposition of the assessment. If she was purporting to act solely under tribal law, she failed to so advise Appellant and, more importantly, failed to advise him of his rights under tribal law.

The Regional Director makes no attempt to defend this assessment before the Board. The Board construes her silence as a confession of error.

^{16/} Appellant's permits required that he abide by Ordinance 95-05, and Subpart B of 25 C.F.R. Part 166 provides for the application of tribal law to grazing permits.

25 C.F.R. § 166.103(b) provides that, while a tribe is primarily responsible for enforcing tribal laws pertaining to Indian agricultural land, BIA will assist in the enforcement of tribal laws. However, nothing in Part 166 sets out procedures for such BIA assistance.

Given its disposition of this case, the Board finds it unnecessary to consider Appellant's seventh and eighth arguments.

For the reasons discussed above, and 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 the cancellation of Appellant's grazing permits for RUs 6 and 9; reverses the assessment of \$35,017.50 for violation of the pasturing requirements in Ordinance 95-05; vacates the assessment of \$94,928.04 in liquidated damages; and remands this matter to the Regional Director for calculation of the actual damages caused by Appellant's overstocking of RUs 6 and 9. 17/

I concur:

// original signed
Anita Vogt
Senior Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

17/ In her answer brief, the Regional Director asked the Board to make her decision effective immediately or, in the alternative, to require Appellant to post an appeal bond to cover 2004 rent for RUs 6 and 9. The Regional Director argued that, although "Appellant was aware of his right to continue to use the permits while his appeal was pending," Regional Director's Brief at 8 n.3, he had not paid his rent for 2004.

In her brief, which is dated May 10, 2004, the Regional Director recognized that, under 25 C.F.R. § 166.707, her decision was ineffective while it was on appeal, unless made immediately effective under 25 C.F.R. Part 2. Even so, she stated in a letter dated May 15 or 17, 2004 (the letter bears both dates) to Senator Tim Johnson that Appellant "cannot use either Range Unit." In his reply brief, Appellant confirmed that he has not been permitted to use the range units. Thus, it appears that the Regional Director purported to put the cancellation portion of her decision into immediate effect without awaiting action from the Board.

The Board declined to grant either of the Regional Director's requests. The Regional Director is reminded that, under 25 C.F.R. § 2.6(a), a decision to place a decision into immediate effect must be made by the official before whom an appeal is pending, not the official who made the decision being appealed. E.g., Dentel v. Portland Area Director, 31 IBIA 282, 283 (1997); Wallace v. Aberdeen Area Director, 26 IBIA 150, 153 (1994).