



## INTERIOR BOARD OF INDIAN APPEALS

Knecht Enterprises, Inc. v. Great Plains Regional Director, Bureau of Indian Affairs

44 IBIA 87 (01/16/2007)

Related Board case:  
37 IBIA 258



## United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS  
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KNECHT ENTERPRISES, INC., : Order Affirming in Part, Vacating in  
Appellant, : Part, and Remanding for Further  
 : Proceedings  
v. :  
 : Docket Nos. IBIA 05-24-A  
GREAT PLAINS REGIONAL : 05-25-A  
DIRECTOR, BUREAU OF INDIAN :  
AFFAIRS, :  
Appellee. : January 16, 2007

Knecht Enterprises, Inc. (Appellant) seeks review of an October 14, 2004 decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (BIA) (IBIA 05-24-A), and an October 20, 2004 decision of the Great Plains Regional Director (Regional Director) (IBIA 05-25-A). 1/ Both decisions were issued on remand from the Board's decision in Knecht Enterprises, Inc. v. Great Plains Regional Director, 37 IBIA 258 (2002) (Knecht I), and involve 19 agricultural farm and pasture leases of Indian allotted lands on the Winnebago and the Omaha Reservations in Nebraska. Appellant was the lessee for all of the leases, which were entered into between 1997 and 2000 and cancelled by BIA in decisions issued in 2000 and 2001.

The Regional Director's October 14, 2004 decision directed Appellant to pay \$32,828.63 in damages for violations of conservation plan requirements in 14 of the leases, which were cancelled for those violations. 2/ The Board now vacates the October 14 decision because the Regional Director failed to provide a sufficient explanation for his

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1/ For the purposes of this decision, we will refer to both BIA deciding officials as the Regional Director.

2/ The fourteen leases involved, and the Allotment numbers they cover, are Lease Nos. 101439-98-03 (814N), 171023-98-03 (T904), 101603-99-04 (600-A, B, C, D, and 599-1), 101619-99-04 (933-O), 101851-00-05 (940-1 & 3064), 141867-00-05 (variously identified as "T940-3," and "T904-3"), 101770-00-05 (931-O), 131861-00-01 (907), 131747-00-01 (233), 131772-00-01 (LW-45), 131775-00-01 (918, 918-A, LW-29), 131756-00-01 (908 & 908-A), 131755-00-01 (LW-46 & 454-A), and 131776-00-01 (LW-17).

decision and failed to address the arguments that Appellant raised in Knecht I, as the Board had instructed.

In his October 20, 2004 decision, the Regional Director determined that Appellant owed a balance of \$6,119 in rent for the year 2001 for five additional cancelled leases. 3/ The Board affirms the October 20 decision because we find that BIA acted reasonably to minimize damages after these five leases were cancelled. 4/

We also address an argument raised by Appellant regarding both decisions — that the Regional Director was required to hold a formal evidentiary hearing before issuing the decisions. We conclude that this issue is moot with respect to the October 14, 2004 decision because we are vacating and remanding that decision on other grounds. With respect to the October 20, 2004 decision, we conclude that Appellant’s argument for a hearing is without merit.

I. October 14, 2004 Decision: Damages for Conservation Plan Violations  
(Docket No. IBIA 05-24-A)

A. Background

1. Appellant’s Leases, BIA’s Previous Decision, and Knecht I

The history of the leases cancelled for conservation plan violations is set forth more fully in Knecht I, and we need only to recount the facts relevant to this appeal. Each of the agricultural leases held by Appellant incorporated a “Plan of Conservation Operations” (Conservation Plan), which imposed certain lease-specific conservation practices, including crop rotation and ground cover requirements. Each Conservation Plan included a schedule of “liquidated damages” for noncompliance with the various specified conservation practices. Paragraph 14 of the liquidated damages provisions addressed violations of crop rotation and ground cover requirements. With minor wording variations between Conservation Plans, Paragraph 14 provided as follows:

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3/ The rental amount due was for Lease Nos. 101769-00-05, 101793-00-05, 131440-98-03, 131654-99-04, and 131774-00-05.

4/ The Board consolidates these appeals for purposes of issuing this decision.

14. LIQUIDATED DAMAGES FOR NON-COMPLIANCE WITH THE ROTATION REQUIREMENTS ARE AS FOLLOWS:

A. Each year excessive row crop: \$100 per acre.

\* \* \* \* \*

C. FAILURE TO NO-TILL WHERE REQUIRED: \$100 PER ACRE.

D. Ground cover requirements: GROUND COVER IS TO BE MAINTAINED ACCORDING TO FARM PLAN REQUIREMENTS. IF GROUND COVER IS BELOW REQUIREMENTS, GUIDELINES FOR LIQUIDATED DAMAGES SHALL BE:

1. 50-95% OF REQUIRED GROUND COVER - \$50 PER ACRE.

2. 0-49% OF REQUIRED GROUND COVER - \$75 PER ACRE.

Lease No. 171023-98-03 (Allotment T904) Conservation Plan ¶ 14 (emphasis in original).

As recounted in Knecht I, on June 13, 2000, the Winnebago Agency Superintendent (Superintendent) notified Appellant that it was in violation of the Conservation Plan requirements in 14 of Appellant's leases. The Superintendent set out in detail the alleged violations (mostly for violating crop rotation and no-till provisions) and ordered Appellant to show cause why the leases should not be cancelled. On June 28, 2000, after meeting with Appellant to discuss the violations, the Superintendent cancelled the leases, and ordered Appellant to pay \$46,715 in liquidated damages. On December 19, 2000, the Regional Director affirmed the Superintendent's decision.

On appeal to the Board in Knecht I, Appellant did not object to the lease cancellations, but contended that the liquidated damages provisions were unenforceable as a penalty. See Knecht I, 37 IBIA at 260. Appellant contended that the amounts were excessive and not reasonably related to the amount of damages that the Conservation Plan violations actually caused. Appellant contended that the proper measure of damages was the diminution in value of the property based on loss of productivity resulting from soil erosion caused by the violations, plus any incidental damages such as cleaning and repairing ditches damaged as a result of excess soil erosion. See Opening Brief in Knecht I at 6. Appellant also contended that the liquidated damages provisions should have been narrowly tailored to the Conservation Plan requirements and to approximate the actual likelihood of erosion caused by violations, but instead BIA had "arbitrarily picked a dollar value and \* \* \* applied it to every lease without regard to the potential damage that could be suffered [by the breach]." Id. at 7-8.

In Knecht I, the Board concluded that there were no facts in the record that would allow a determination as to whether or not the liquidated damages provisions in the leases were reasonable, and therefore enforceable. 37 IBIA at 265. The Board vacated the Regional Director's decision and remanded the matter for further proceedings, directing the Regional Director to attempt to resolve the matter through negotiation with Appellant, with the assistance of the Solicitor's Office. The Board ordered that

If a new decision is required, the Regional Director shall take into consideration the arguments made by Appellant in [Knecht I], shall make determinations of the reasonableness of the liquidated damages assessed against Appellant, with respect to each violation listed in the Superintendent's June 28, 2000, decision, and shall explain the reasons for her determinations.

Id. at 266.

## 2. BIA Proceedings on Remand from Knecht I

On December 16, 2003, the Regional Director wrote to Appellant regarding the 14 leases that had been cancelled for Conservation Plan violations, stating that BIA would accept \$32,828.63 as a "final settlement for the liquidated damages" for the violations. Dec. 16, 2003 Letter from Regional Director to Appellant at 2. The Regional Director explained the basis for his calculation of damages as follows:

We calculated the total liquidated damages by determining soil erosion resulting from the farming methods used, and multiplying the soil loss times the value of the soil. The soil loss determinations were made using the Universal Soil Loss Equation [(USLE) formula], as published in the Soil Conservation Service Field Office Technical Guide, which was developed by the United States Department of Agriculture [(USDA)]. [5/]

The [USLE] is used to determine rates of soil loss under various conditions related to land use, in this case the farming practices employed on the subject fields. The practices set forth in the approved Plan of Conservation Operations under each lease yielded a predicted soil loss rate. This was then compared to the calculated soil loss based on field

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5/ The USLE is a formula that calculates soil erosion in tons per acre per year using the following factors: rainfall and runoff; soil erodibility; slope length and steepness; cover and management; and support practice.

measurements of the practices actually used on the fields. The difference represents quantifiable damage to the property.

Using this method, we determined the total damages to be \$59,227.02. The lease agreements only allowed for a maximum of \$100 per acre, therefore we are reducing the figure to \$32,828.63. This is considerably less than the \$46,715 for which you were originally billed.

Id. at 1-2.

The Regional Director attached to the letter a table showing the summary of his calculations, organized by tract and field number. Overall, Appellant violated the Conservation Plans on 24 fields. One column on the table listed “calculated damages” using the USLE for each field. The total amount of calculated damages was \$59,227.02. A second column listed “assessed damages,” based on the liquidated damages clause, for each field — \$100 per acre for overcropping and no-till violations, and \$50 per acre for ground cover violations. The total amount of liquidated damages was \$43,615. Below this column, the Regional Director noted “this figure does no[t] include \$3,100 in overcropping Allot. LW-45.” 6/

In general, in determining the amount of total damages due the landowners, the Regional Director demanded the USLE-based damages figure if the amount was less than the liquidated damages for a field, and demanded the liquidated damages amount if it was less than the USLE-based damages figure for a field. However, for the field covered by Lease No. 101439-98-03, the Regional Director included the liquidated damages calculation in his demand, even though the USLE-based damages calculation was less than the liquidated damages amount. 7/

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6/ When the \$3,100 is added to the \$43,615, the sum is \$46,715 — the total amount of liquidated damages as originally calculated and assessed by the Superintendent in his June 28, 2000 cancellation letter.

7/ For the tracts with more than one field, the Regional Director calculated an “amount due land owners” for each field, and then came up with a “total for parcel.” For Allotment LW-45, and Allotments 918, 918-A & LW-29, the “total for parcel” column appears to contain typographical errors. The Regional Director’s total amount of \$32,828.63 damages represents the sum of the damages listed for each field, and not the sum of the “total for parcel” damages listed, which appears to be incorrect on the table.

To show how he reached the USLE-calculated damages amounts, the Regional Director also attached separate pages to his settlement offer showing the erosion and damages calculations for each field, using the USLE. The worksheet of calculations for each field or allotment recited the USLE formula, followed by the Conservation Plan rotation and ground cover requirements for each field, and the actual rotation and ground cover for each field. The Regional Director listed the USLE factors under both the Conservation Plan and the actual practices of Appellant, and calculated the tons per acre of soil erosion under each. Each worksheet then subtracted the amount of erosion expected under the Conservation Plan from the amount of “actual” erosion calculated to get the “accelerated erosion due to deviation from plan,” in tons of soil per acre. The only difference in the calculations under the Conservation Plan and the actual practice was in the cover and management factor. The worksheets did not identify how the Regional Director determined the appropriate values to assign to each factor, nor does the record before the Board include a copy of the Soil Conservation Service Field Office Technical Guide published by the USDA, on which the Regional Director purported to rely in making these calculations.

The tons-of-accelerated-erosion-per-acre number was then multiplied by \$7, which, according to the Regional Director, was the value of one ton of soil lost to erosion, as measured by the cost of the nutrients in one ton of soil. It is unclear how the Regional Director arrived at the \$7 valuation figure, but it is less than an estimate provided to BIA by Douglas Malo, a professor in the Plant Science Department at South Dakota State University. <sup>8/</sup> The Regional Director’s calculation resulted in a per-acre monetary cost for the additional eroded soil, which was multiplied by the acreage of the field, to arrive at the

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<sup>8/</sup> Relying on soil textbooks, a journal article, and nutrient values taken from the “USDA, NASS [National Agricultural Statistics Service] data from the Northern Plains (KS, NE, SD, and ND) [and] data from 2001-2003 prices paid,” Malo estimated the “nutrient value of one ton of eroded soil” at \$8.33 per ton. Feb. 25, 2004 letter from Malo to BIA at 1. Malo also stated that no “application costs (at least \$3.50/acre)” were considered in the preparation of the table, and that there were “many more additional costs associated with water loss, reduced soil quality, loss of applied fertilizers and pesticides, and off-site expenses associated with sediments.” *Id.* at 1, 2. “Application costs” apparently refer to the cost of applying the nutrients to the soil.

amount of monetary damages per field. <sup>9/</sup> As noted above, this USLE/“actual” erosion based damages calculation was then compared to the liquidated damages amount, and with the one exception identified, supra at 91, the lesser amount was used for assessing damages.

By letter dated March 3, 2004, Appellant advised the Regional Director that it “had reviewed [his] calculation of the liquidated damages \* \* \* as well as our own financial situation and do not believe it is appropriate at this time to accept [the settlement] offer.” Mar. 3, 2004 Letter from Appellant to Regional Director. The Field Solicitor for the Great Plains Region contacted Appellant’s counsel to discuss possible resolution of the matter. On June 7, 2004, Appellant wrote to the Field Solicitor and notified her that it was not willing to make a counter-offer to resolve the matter. Appellant stated,

[We] think that our position in this matter is primarily based upon the formula that is being used to calculate the measure of damages. First, we are not convinced that the proper formula for measuring damages is utilizing a formula that calculates the amount of soil loss to determine the damages that were caused. Even if that is a proper formula, the formula the BIA is using is outdated and has been replaced by the U.S. Department of Agriculture. Finally, it appears that damages were calculated at the rate of \$7 per square yard [sic] of topsoil. While that may be the price that a person would pay for potting soil, it is well in excess of the amount that any person would pay for soil bought in bulk.

On October 14, 2004, the Regional Director issued his decision on the amount of damages due for violations of the Conservation Plans. The Regional Director responded to Appellant’s June 7 letter by stating that while Appellant had “questioned the formula [BIA] used for determining soil loss and [BIA’s] method of computing liquidated damages,

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<sup>9/</sup> If we understand BIA’s worksheets correctly, BIA applied the USLE and calculated the amount of soil erosion anticipated annually, even with full compliance with the conservation plans, as ranging from 1.36 tons per acre (Allotment No. 600-A, B, C, & D, Field No. 7) to 31.92 tons per acre (Allotment Nos. 908 & 908-A, Field No. 2). BIA’s worksheets also show that the accelerated (i.e., additional) soil erosion attributable to Appellant’s actual practices ranged from 4.91 tons per acre (Allotment Nos. 940 & 3064, Field No. 3) to 77.52 tons per acre (Allotment Nos. LW-46 & 454-A, Field No. 5). Using BIA’s \$7 per ton valuation, the value of soil anticipated to be lost to erosion annually, even under the conservation plans, thus ranged from \$9.52 per acre to \$223.44 per acre, and the value of the accelerated soil loss attributable to Appellant’s practices (BIA’s “actual” damages calculation) ranged from \$34.37 per acre to \$542.64 per acre.

[Appellant] provided no alternatives.” Oct. 14, 2004 Regional Director Decision at 2. The Regional Director noted that “[o]ther versions of the USLE exist, but this version was appropriate for this situation and was the version used when developing the operating plans to which [Appellant] agreed.” *Id.* The Regional Director further stated that BIA “ha[d] provided ample opportunity for [Appellant’s] input on this matter and negotiations have failed.” *Id.* The Regional Director directed Appellant to pay \$32,828.63, the same amount proposed in his December 16, 2003 settlement offer, which the Regional Director described as “actual damages.”

Appellant then appealed to the Board. Appellant and the Regional Director filed briefs.

## B. Arguments on Appeal

### 1. Appellant’s Arguments

Appellant challenges both the liquidated damages amount and the USLE-based damages amount included in the Regional Director’s decision. With respect to the liquidated damages, Appellant argues, as it did in *Knecht I*, that the liquidated damages provisions in the leases are unenforceable because they constitute a penalty rather than compensation reasonably related to the violations. Appellant contends that liquidated damages are only allowed when they are “reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.” Opening Brief at 8 (quoting Restatement (Second) of Contracts § 356 (1981)). Here, according to Appellant, damages are readily ascertainable — loss of topsoil leading to lower productivity and reduced value of the property — and an appraisal could determine any loss in fair market value of the property resulting from Appellant’s violations. According to Appellant, “[a]ny loss in the fair market value of the property as a result of the cultivation by the Appellant would be the differential that would allegedly be owed.” *Id.* at 9. Appellant contends that damages could also be calculated based on the diminished rent received for the property because of the erosion. Appellant argues that the liquidated damages in the leases are unreasonably large, bear no relation to the probable harm arising from the violations, and are clearly intended as penalties rather than as compensation, thus rendering them invalid.

Appellant also contends that the USLE is not appropriate for calculating actual damages because the USLE only gives an annual average soil loss figure and is not a calculation of the actual loss of soil that occurred in this case. Appellant argues that the USLE does not purport to accurately estimate actual erosion for a specific year, and that BIA has no evidence that there was any loss during the year in question. For example, Appellant asserts that it may be true “in the long term that the implementation of the

conservation plan may save 7.59 tons of soil per acre per year on Allotment Number 907, but [BIA] has no evidence that there was any loss during the year in question.” Opening Brief at 15. Appellant also questions the basis for the numbers that BIA inserted into the formula, noting that BIA has not offered any information about who prepared the calculations, the qualifications of the person calculating the soil loss, and why these particular numbers were inserted into the formula. Finally, Appellant contends that there is no evidence in the record to support using an amount of “\$5.00 per ton” to calculate damages for the estimated soil loss. Id. at 17. 10/

## 2. Regional Director’s Arguments

The Regional Director responds that the liquidated damages provisions in the Conservation Plans are not penalties. The Regional Director asserts that “[s]ince the BIA is administering numerous leases on behalf of the beneficial owners of thousands of acres of land, and since violation of the leases’ incorporated conservation plan provisions may result in damages which are difficult to quantify and value, it is reasonable for those leases to set liquidated damages as a simple mechanism to compensate owners for damages resulting from violation of these provisions.” Answer Brief at 10-11. The Regional Director argues that “[a]lthough the assessed liquidated damages based on per/acre calculations were arguably appropriate given the potential damages and the difficulty in assessing the actual amount of damages done, the BIA sought to determine an amount of liquidated damages based [on] calculations of actual damages from soil loss in this area.” Id. at 14.

The Regional Director also contends that BIA’s methodology and assumptions in calculating actual damages were reasonable. The Regional Director asserts that BIA “consulted internally and with outside experts in seeking to provide a calculation of damages based on the facts of the documented violations and reasoned assumptions provided by experts in the field.” Id. at 12.

With respect to the soil value figure, the Regional Director states that BIA consulted Malo to determine the value of a ton of soil lost to erosion. Considering Malo’s estimate of the per ton value of soil at \$8.33, based on the value of the nutrients in the soil, the Regional Director contends that “BIA’s use of [\$7] per ton in its calculation of actual

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10/ Appellant and the Regional Director both erroneously refer in their briefs to BIA’s damages calculations as based on the soil being valued at \$5 per ton. The record indicates that BIA calculated the damages using a \$7 per ton figure. Neither party’s argument is dependent on whether the figure is \$5 or \$7 — BIA contends that the figure is conservative and Appellant contends it is arbitrary.

damages may be considered low, and certainly not unreasonable.” *Id.* at 4. The Regional Director also argues that Appellant failed to suggest alternative sums or methodologies for determining appropriate damages, or even to make a counter-offer when the Regional Director attempted to settle the issue of damages with Appellant.

The Regional Director variously characterizes his damages claim of \$32,828.63 as “liquidated damages,” *see* Dec. 16, 2003 Letter at 1, and “actual damages,” *see* October 14, 2004 Decision at 1. In fact, the figure represents a hybrid of liquidated damages and the USLE-based damages. <sup>11/</sup> In his October 14, 2004 decision, the Regional Director apparently treated the liquidated damages amount as applicable only when the amount was less than the USLE-based damages. When the USLE-based amount was less than the liquidated damages, the Regional Director accepted the lower damages amount, which the Regional Director apparently considered “actual” damages.

### C. Discussion

We conclude that the Regional Director failed in his decision to address the arguments that Appellant raised in *Knecht I*, as the Board instructed him to do, and that he does not adequately explain the basis for his decision. Therefore, we will vacate his October 14, 2004 decision and remand the matter to the Regional Director. In doing so, however, we reject Appellant’s arguments that the cost figure for soil is unsupported by any evidence and that the USLE may never be used for calculating damages.

In *Knecht I*, the Board specifically ordered the Regional Director, if settlement were not achieved, to address the arguments that Appellant raised in its brief to the Board in the earlier appeal. As noted above, in *Knecht I* Appellant argued that the proper measure of “actual” damages is the diminution in market value of the property caused by the violations and the resulting additional soil erosion. In his decision on remand, the Regional Director does not explain why he chose the replacement cost of the nutrients in the additional soil estimated to have been lost to erosion as the proper measure of “actual damages,” nor does

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<sup>11/</sup> Liquidated damages are specific amounts agreed to by the parties to a contract for breaches of the contract. A liquidated damages clause is prima facie valid unless the challenging party proves that its application amounts to an unenforceable penalty. 22 Am. Jur. 2d *Damages* § 493.

Notwithstanding Appellant’s attempts to disassociate itself from the liquidated damages provisions in the contracts, attributing them solely to BIA, it is undisputed that Appellant voluntarily agreed to the leases, which included the liquidated damages schedules as part of the lease-specific Conservation Plans.

he address the arguments Appellant raised in Knecht I. It appears that the Regional Director may have selected this approach as a restoration or replacement-based measure of damages, although it is also possible that the Regional Director believed that there was a direct correlation between the value of the lost nutrients and the diminished value of the property. We cannot tell however, why the Regional Director selected the measure of damages that he did, either for determining “actual damages” or as a benchmark for evaluating the reasonableness of the liquidated damages.

As we recognized in Knecht I, the general rule concerning contractual provisions for liquidated damages is set out in the Restatement (Second) of Contracts:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

Restatement (Second) of Contracts § 356; see also Uniform Commercial Code § 2-718(1) (“Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty”). Some courts have described the reasonableness test as whether the stipulated sum is “grossly disproportionate” to the actual damages sustained. 22 Am. Jur. 2d Damages § 513; see also 25 C.J.S. Damages § 108 (“wholly disproportionate to the actual damages sustained”). If a liquidated damages provision is determined to be a penalty, the landowner’s recovery for breach by the lessee is limited to actual damages. Knecht I, 37 IBIA at 265; Myers v Muskogee Area Director, 32 IBIA 242, 248 (1998).

A determination that liquidated damages are unreasonable, and therefore unenforceable, requires a comparison between the liquidated damages and the “anticipated or actual loss caused by the breach,” which in turn requires a determination of the proper measure of damages for valuing the anticipated or actual loss. As Appellant notes, see Opening Brief at 9, the general rule for determining compensatory damages for harm to land is stated in the Restatement (Second) of Torts. Damages include “the difference between the value of the land before the harm and the value after the harm, or at [the landowner’s] election in an appropriate case, the cost of restoration that has been or may be reasonably incurred.” Restatement (Second) of Torts § 929(1)(a) (1979). The Restatement also notes that “the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery.” Id. cmt. b. The Restatement goes on to

say, however, that “[i]f \* \* \* the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the [harmful conduct], unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm.” Id.; see also 22 Am. Jur. 2d Damages § 256.

As noted above, it is unclear whether the Regional Director gave any consideration to the actual or estimated diminution in value of the property that resulted from Appellant’s violations of the leases, or to Appellant’s argument that diminution in value was the proper benchmark against which to evaluate liquidated damages. Instead, the Regional Director concluded, without explaining the basis for his choice, that nutrient replacement cost was an appropriate measure for determining either “actual” damages or for evaluating the reasonableness of the liquidated damages provisions of the leases. Based on the record, we cannot determine whether the measure of damages selected by the Regional Director is justified. 12/ Therefore, we conclude that the Regional Director’s October 14, 2004 decision must be vacated and the matter remanded for further consideration. 13/ On remand, the Regional Director shall consider Appellant’s arguments and shall explain and justify his method for calculating “actual” damages, either as a basis to assess actual damages against Appellant or as a basis for evaluating the reasonableness of liquidated damages.

In remanding this matter to the Regional Director, we emphasize that we are not holding, as Appellant argues, that the USLE may never be used in determining damages for

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12/ Included in the administrative record is an excerpt from BIA’s brief in Morgan v. Acting Aberdeen Area Director, 28 IBIA 138 (1995), supporting liquidated damages as directly related to actual damages, and not in the nature of penalties. That excerpt states that “[e]rosion of topsoil renders land less productive for farming,” and emphasizes the importance of “conserving the soil, which is the necessary economically productive resource in farming.” Id. at 7 & 8. That discussion also appears to assume, however, without discussion, that the proper measure of “actual” damages for such lost productivity is based on the cost of the lost soil, rather than compensation based on the reduced market value of the property.

13/ Even assuming the measure of damages selected by the Regional Director may be proper, it is unclear, except in the context of a proposed settlement, why the Regional Director automatically selected the “actual” damages amount whenever it was less than the liquidated damages amount. In order for liquidated damages to be unenforceable, they must be unreasonable — i.e., disproportionate to the actual or reasonably anticipated damages. Merely exceeding an estimate of actual damages would not automatically render liquidated damages disproportionate to the actual damages and therefore unreasonable.

violations of conservation requirements in a lease. If soil nutrient replacement costs can be justified as the appropriate measure of damages, either for assessing “actual” damages or for determining the reasonableness of the liquidated damages, we do not agree with Appellant that the USLE may not be used to determine the erosion caused by Appellant’s violations. The USDA acknowledges that soil losses computed with the USLE are “best available estimates, not absolutes,” USDA Handbook No. 537 (December 1978) at 47, and that “specific-year estimates of soil loss will be less accurate than USLE estimates of long-term, crop-year averages,” because irregular fluctuations in the variables tend to balance over long-term periods. *Id.* at 42. The reliance on averages does not render the USLE useless to determine the likely “actual” amount of erosion caused by Appellant’s activities. However, if the Regional Director’s decision is dependent on a determination of either actual erosion or estimated actual erosion for determining damages using the USLE formula, we agree with Appellant that the Regional Director must also explain the basis for the values inserted into the formula. 14/

In addition, if damages may properly be based on the value of lost nutrients, we disagree with Appellant that there is “no evidence” in the record to support the Regional Director’s decision that the lost soil may be valued at \$7 per ton. In its June 7, 2004 letter to the Regional Director, Appellant contended that BIA’s cost figure greatly exceeded the cost of soil bought in bulk, but Appellant failed to offer any evidence to support that assertion. On appeal to the Board, Appellant has not challenged the qualifications of Malo, on whose estimate BIA relied, nor has Appellant offered any evidence of its own on the cost of replacement soil or soil nutrients. Malo estimated the nutrient value of one ton of eroded soil at \$8.33 per ton; BIA assessed damages based on what it describes as a “conservative” \$7 per ton figure. Appellant has failed to demonstrate that the Regional Director’s use of a value of \$7 per ton of soil is unreasonable or not supported by the record.

In summary, on remand, the Regional Director should consider and address Appellant’s arguments concerning the appropriate measure of damages — i.e., diminution

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14/ In 1997, the USDA published the Revised Universal Soil Loss Equation (RUSLE) in Handbook No. 703. The Regional Director apparently concluded in his October 14, 2004 decision that an earlier version of the USLE formula was “appropriate for this situation and was the version used when developing the operating plans to which the lessee agreed,” Oct. 14, 2003 Decision at 2, but does not explain why that version is “appropriate,” particularly if more recent versions are considered more accurate. Appellant does not argue on appeal that BIA should have used the RUSLE instead, but rather argues that BIA should not have used any version of the formula. Accordingly, we need not address whether the Regional Director should have used the RUSLE.

in value versus replacement costs. The Regional Director should issue a new decision explaining and justifying the measure of damages that he chooses, either to justify the assessment of liquidated damages or, if he concludes that the liquidated damages are unreasonable, to assess actual damages. The fact that the liquidated damages exceed the estimated “actual” damages does not automatically render the liquidated damages unreasonable or unenforceable. However, if the liquidated damages are unreasonable, when compared to reasonably anticipated or estimated actual damages, then the Regional Director should assess actual damages against Appellant. If the Regional Director continues to rely on the USLE, he should explain the basis for the values used in the formula, and whether they are based on annual averages or on year-specific evidence.

II. October 20, 2004 Decision: 2001 Rental Payments Due  
(Docket No. IBIA 05-25-A)

We next address the Regional Director’s October 20, 2004 decision, in which he concluded that Appellant was liable for \$6,119 in rent for the year 2001 for the five additional cancelled leases. Appellant challenges this decision by contending that BIA failed to mitigate the damages resulting from Appellant’s lease violations and BIA’s cancellation of the leases. We uphold the Regional Director’s decision to assess \$6,119 in damages against Appellant for non-payment of rent in 2001, and reject Appellant’s argument that BIA did not reasonably mitigate damages.

A. Background

As discussed in more detail in Knecht I, in a decision dated April 9, 2001, the Superintendent cancelled five of the leases held by Appellant for nonpayment of rent for 2001 and sought to collect the unpaid rent. <sup>15/</sup> On May 11, 2001, the Regional Director affirmed that decision, and Appellant appealed to the Board, arguing that BIA could not collect the full amount of rent due for the remaining five leases because BIA had not mitigated damages for those leases.

In Knecht I, the Board held that BIA was entitled to collect the unpaid rent for 2001, but only to the extent that the rent due exceeded any rent for 2001 received under new leases for the same properties. Id. at 266. The Board also directed the Regional

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<sup>15/</sup> The Superintendent’s decision actually purported to cancel 12 leases, but seven of those had already been cancelled as part of the Superintendent’s June 28, 2000 decision cancelling the 14 leases for conservation plan violations, leaving only five leases still subject to cancellation. See Knecht I, 37 IBIA at 258 n.2, 266.

Director to attempt to resolve the matter through negotiation with Appellant, with the assistance of the Solicitor's Office. The Board ordered the Regional Director, if the parties were unable to resolve the matter through negotiation, to "recalculate damages [for the five additional leases cancelled] for failure to pay 2001 rent [but] \* \* \* [to] reduce damages \* \* \* by the amount of 2001 rent received under any new leases for the same property," and issue a new decision. Id. at 266-67.

Following the Board's decision in Knecht I, on November 6, 2002 the Superintendent sent Appellant a bill for collection for the 2001 rent due for the five leases cancelled for nonpayment of rent. The Superintendent noted that one of the five leases (No. 131440-98-03) had generated more income from a new lease than the \$1,050 rent due, and therefore Appellant did not owe anything for that lease. With respect to the remaining four leases, the Superintendent listed the amounts of "rent paid new leases" which, when subtracted from the amounts due under Appellant's leases (\$8,130), left a balance of \$6,119.00 rent owed by Appellant. The Superintendent stated that Appellant had 10 days from receipt of the letter to make payment.

By letter dated November 18, 2002, Appellant requested the Regional Director to instruct the Superintendent to stay any action regarding collection until the parties entered into negotiations to resolve the issue of the unpaid rentals pursuant to the Board's decision. There is no evidence in the record that the Regional Director responded to this letter, but neither is there evidence that the Superintendent took further action to collect the unpaid rentals.

On January 12, 2004, the Regional Director sent Appellant a settlement proposal for the unpaid rent for 2001 for the five leases cancelled for nonpayment of rent. Pursuant to the Board's decision, the Regional Director recalculated the rental amounts due on the five leases by subtracting the amount of income received for the properties in 2001 from the amount of 2001 rent otherwise owed by Appellant for the properties, and determined that Appellant owed a balance of \$6,119. 16/ The Regional Director stated that the properties covered by the five leases "were not re-leased in 2001 but the Agency staff did hay these properties and distributed the income received to the landowners." Jan. 12, 2004 Letter from Regional Director to Appellant at 1. The Regional Director noted that Appellant did not owe any money for Lease No. 131440-98-03 because the hay cut and sold from that property generated more than the rental amount due. The Regional Director stated that BIA would "accept **\$6,119** as a final settlement for the rental due on the leases,"

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16/ It appears that the Regional Director adopted the calculations that were used by the Superintendent in his November 6, 2002 letter to Appellant.

id. (emphasis in original), and gave Appellant 10 days from receipt of the letter to accept the offer. By letters dated March 3 and June 7, 2004, Appellant declined to accept the Regional Director's settlement offer and declined to make a counter-offer.

On October 20, 2004, the Regional Director issued his decision on this matter, directing Appellant to pay \$6,119 for rent due on these five leases, and Appellant appealed to the Board. Appellant and the Regional Director filed briefs.

## B. Arguments on Appeal

### 1. Appellant's Arguments

Appellant contends that the Regional Director erred in assessing rent for the 2001-2002 crop year because BIA failed to show that it took reasonable efforts to mitigate damages. In its opening brief, Appellant asserts that "[t]here is no credible evidence that [BIA] took any steps to mitigate their damages. The only evidence that the Appellant has been provided is the statement in the letter that the property was not rented but that the hay was harvested." Opening Brief at 19. Appellant also argues that there is no evidence to support BIA's claim regarding the payments it received for selling the hay. Appellant asserts that "[i]t is unknown what steps, if any, the Bureau took to attempt to lease the property and obtain new tenants after [BIA] terminated the lease agreements." Id. Appellant contends that, because it is "not required to pay for damages that could have been mitigated by [BIA]," and BIA made no attempt to re-let the properties and only harvested hay, the Board "should \* \* \* hold the Appellant owes [BIA] nothing." Id. at 20.

### 2. Regional Director's Arguments

The Regional Director acknowledges that BIA did not re-lease the parcels in 2001 after Appellant's leases were cancelled, and that BIA did not attempt to place the cancellation decision in immediate effect to mitigate damages from lease cancellation, as was advised by the Board in French v. Aberdeen Area Director, 22 IBIA 211, 215 (1992). The Regional Director argues that "the practicalities of the leasing cycle at the Winnebago Agency, in combination with the delaying effects of the initial appeals of the April 9 and May 11, 2001 decisions, prevented re-leasing of the tracts for the 2001 crop year." Answer Brief at 7. Relying on a Declaration from Rosalyn LaPointe, the Acting Realty Officer in the Regional Office, the Regional Director asserts that it is difficult to lease (or re-lease) land after the beginning of May, because the cultivation and planting period is over.

LaPointe's declaration, which was submitted with the Regional Director's answer brief, provides additional documentation to explain and support the Regional Director's

decision. LaPointe's declaration states that if payment on a lease is not received, BIA first attempts to collect the overdue rent, and that as a practical matter it is difficult to re-lease farm lands after the month of May in any given year because the cultivation and planting period is over. Her declaration further states that because BIA's lease cancellation decision was automatically stayed during Appellant's appeal in Knecht I, as provided in 25 C.F.R. § 2.6, BIA was precluded from advertising or seeking new leases in 2001. Finally, LaPointe explains that BIA did not, as stated in the Regional Director's decision, hay all five parcels, but only one, for which it received income in excess of the rent due from Appellant. With respect to the other four parcels, LaPointe states that BIA did receive conservation reserve payments from the Farm Services Agency (FSA) for 2001, after advising the FSA that Appellant was no longer cultivating or growing crops on those lands.

The Regional Director contends that BIA took reasonable action to mitigate damages under the circumstances. He points out that BIA sold hay of sufficient value to cover the unpaid rental from one of the leased properties. The Regional Director states that, although BIA did not sell hay from the remaining four properties, it notified the FSA of the cancellation, and received conservation reserve payments. The Regional Director asserts that the conservation reserve payments were paid to the landowners and were used to offset the amount of rental payments at issue as determined in the October 20, 2004 decision. The Regional Director has attached copies of bills for collection, and asserts that "some of the payments [from FSA] to the lessors are reflected on the 'Bills for Collection.'" Declaration of Rosalyn LaPointe ¶ 6.

Appellant did not file a reply brief, and therefore did not respond to LaPointe's declaration.

### C. Discussion.

The general rule is that an injured party to a contract cannot recover damages that could have been avoided without undue risk, burden, or humiliation, but the injured party is not precluded from recovery to the extent that he has made reasonable but unsuccessful attempts to avoid the loss. See Restatement (Second) of Contracts, § 350; 22 Am. Jur. 2d Damages § 353; A. Corbin, Corbin on Contracts, § 57.11 (2005). The rationale behind this rule is to encourage the injured party to avoid loss. Restatement (Second) of Contracts § 350, cmt. a. The burden of proving that losses could have been avoided by reasonable effort and expense must always be borne by the party who has broken the contract. Corbin on Contracts, § 57.11. Courts have applied the doctrine of avoidable consequences to leases, and held that a landlord cannot recover damages for readily avoidable consequences. See id.; C. Vaeth, Landlord's Duty, On Tenant's Failure to Occupy, or Abandonment of,

Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, 75 A.L.R. 5th 1, § 2[a] (2000).

Applying this doctrine, the Board has held that BIA has a responsibility to mitigate damages resulting from the breach and cancellation of a lease of trust or restricted property. See Knecht I, 37 IBIA at 266; French, 22 IBIA at 215; Kombol v. Acting Assistant Portland Area Director, 21 IBIA 116, 122 (1991); Walch Logging Co. v. Assistant Portland Area Director (Economic Development), 11 IBIA 85, 98 (1983). We have noted that the avoidance of consequent damages may require BIA to take action to ensure that trust or restricted lands continue to be income producing, and to otherwise protect them. French, 22 IBIA at 215. However, the doctrine of avoidable consequences, or the duty to mitigate damages, does not require BIA to be perfect in all actions taken after a breach of contract, nor makes BIA a guarantor for the breaching party. Kombol, 21 IBIA at 123. It simply requires BIA to exercise reasonable care in attempting to minimize the damages resulting from breach. Id.

The information BIA initially provided to Appellant about its efforts to minimize damages was misleading at best — the Superintendent’s November 6, 2002 collection letter stated that BIA offset the amount of rent due by “rent paid new leases,” even though BIA did not re-lease the property and the January 12, 2004 settlement offer did not mention the FSA payments but said that BIA hayed the properties. However, on appeal, through the declaration of realty officer Rosalyn LaPointe, BIA has offered additional evidence and clarified the steps it took to minimize damages. Although Appellant was afforded the opportunity to submit a reply brief to address BIA’s explanation, it did not do so.

It is true that BIA did not attempt to place the decision in immediate effect, so that it could re-lease the property. However, based on the unrebutted declaration and additional evidence, we agree with the Regional Director that he acted reasonably to mitigate the damages resulting from Appellant’s failure to pay 2001 rentals and the subsequent cancellation of the five leases. The evidence shows that BIA hayed the property covered by Lease No. 131440-98-03, and collected enough income from the sale of the hay to cover the 2001 rent. With regard to the other four leases, BIA notified the FSA that Appellant would no longer be leasing the properties, and received conservation reserve payments for not cultivating or growing any crops on these properties. The Regional Director has explained BIA’s failure to lease the properties by stating that it was too late in the growing season to advertise and seek out new leases. As noted above, BIA was not required to be perfect in all actions taken after Appellant’s breach of the contract, it only needed to act reasonably to minimize the damages. Under the circumstances, we hold that BIA acted reasonably to minimize the damages to the landowners from Appellant’s failure to pay rent. Accordingly, we affirm the Regional Director’s assessment of \$6,119 in damages against

Appellant for non-payment of rent for 2001 on Lease Nos. 131654-99-04, 131774-00-05, 131440-98-03, 101793-00-05, and 101769-00-05.

### III. Evidentiary Hearing

As grounds for challenging both of the Regional Director's decisions, Appellant argues that the Regional Director erred by failing to hold a hearing and afford it the opportunity to present evidence and cross-examine BIA employees. The regulations do not require the Regional Director to hold a formal hearing before issuing an administrative decision assessing damages for lease violations, and Appellant cites no statute or regulation giving it a right to such a hearing. <sup>17/</sup> However, because we vacate the Regional Director's October 14, 2004 decision and remand the issue of liquidated damages, we conclude that Appellant's request for a hearing on that issue is moot with respect to that decision, and is not ripe with respect to a future decision. With respect to the Regional Director's October 20, 2006 decision, because Appellant failed to respond to the Regional Director's evidence concerning mitigation of damages, we find that there are no material facts in dispute, for which a hearing (or a remand) might be appropriate.

### IV. Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Regional Director's October 14, 2004 decision and remands the matter of liquidated damages for further proceedings consistent with this opinion. The Board affirms the Regional Director's October 20, 2004 decision.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge

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<sup>17/</sup> We also note that Appellant never requested an opportunity to present evidence to the Regional Director.