



INTERIOR BOARD OF INDIAN APPEALS

Gene L. Cadotte and Standing Rock Grazing Association and its Members
v. Great Plains Regional Director, Bureau of Indian Affairs

48 IBIA 44 (10/16/2008)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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GENE L. CADOTTE and STANDING)	Order Vacating Decision
ROCK GRAZING ASSOCIATION)	and Remanding
AND ITS MEMBERS,)	
Appellants,)	
)	
v.)	Docket Nos. IBIA 06-112-A
)	07-17-A
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	October 16, 2008

Gene L. Cadotte and the Standing Rock Grazing Association and its members (collectively, “Appellants”) have appealed to the Board of Indian Appeals (Board) from an August 3, 2006, decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), which adjusted the grazing rental rate from \$10.50/Animal Unit Month (AUM)¹ to \$13.63/AUM for individually-owned Indian trust lands on the Standing Rock Reservation (Reservation) for the 2007 grazing season. Appellants are Indian ranchers who hold grazing permits for individually-owned trust lands on the Reservation and whose rent will increase under the Regional Director’s decision.

In adjusting the AUM rate for individually-owned trust lands on the Reservation, the Regional Director relied on a market study titled “Reservation Grazing Rate Analysis of the Cheyenne River and Standing Rock Reservations for the 2007 Grazing Season” (Market Study). The Market Study was prepared by David M. Baker, a certified appraiser, and reviewed by Geoff Oliver, the Great Plains Regional Appraiser in the Office of the Special Trustee for American Indians (OST Appraiser). As indicated by its title, the Market Study also covered the Cheyenne River Reservation, which lies to the south of, and shares a border with, the Standing Rock Reservation.

¹ An Animal Unit Month is defined as “the amount of forage required to sustain one cow or one cow with one calf for one month.” 25 C.F.R. § 166.4.

In a separate decision issued on August 3, 2006, the Regional Director relied on the Market Study to set a grazing rate of \$16.10/AUM for individually-owned trust lands on the Cheyenne River Reservation for the 2007 season. In *DuBray v. Great Plains Regional Director*, 48 IBIA 1 (2008), which we also are deciding today, the Board is vacating the Regional Director's grazing rate decision for the Cheyenne River Reservation, because neither the Market Study nor the Regional Director provided an adequate explanation for us to sustain his decision for the range units on that reservation.

Unlike the Cheyenne River Reservation, which lies entirely within the State of South Dakota, the Standing Rock Reservation straddles the North and South Dakota border and comprises Sioux County, North Dakota, and Corson County, South Dakota. In developing a recommended grazing rate for the Standing Rock Reservation, the Market Study employed the same overall approach that was used for the Cheyenne River Reservation, chose to rely on data from private lease comparables, relied on the same comparables for the South Dakota portion of the Standing Rock Reservation that were used for the Cheyenne River Reservation, and considered (or did not consider) the same factors for making (or not making) adjustments from the private lease data.

In the present appeal, Appellants raise some of the same objections to the Market Study that were raised by the appellants in *DuBray*. In *DuBray*, we concluded that, with a few exceptions, those objections warranted a remand to the Regional Director. The objections that we sustained in *DuBray* are equally well-founded here, and for the reasons discussed in *DuBray*, we also vacate the Regional Director's decision for the Standing Rock Reservation 2007 grazing season, and remand the matter to the Regional Director for reconsideration and issuance of a new decision consistent with *DuBray*.

In addition, Appellants in this case raise the following arguments that were not raised in *DuBray*:

(1) the Regional Director's decision must be vacated because the reviewing appraiser purported to approve the Market Study without qualification, but then made major changes to it by including additional calculations in the review report; the Uniform Standards of Professional Appraisal Practice (USPAP) require that an inaccurate or incomplete appraisal be rejected or accepted with qualifications, and prohibit it from being changed wholesale by the reviewer;

(2) the increase from \$10.50/AUM to \$13.63/AUM is unreasonable because the rate of increase from 2006 to 2007 is disproportionate to the rate of increase for grazing on private lands in the same period of time, as reported in statistics from the National Agricultural Statistics Service (NASS) of the U.S. Department of Agriculture;

(3) the Market Study is unreasonable because it used private lease comparables that have rental values that are 31% higher than more reliable NASS data, erred in converting per-acre rates to per-AUM rates, and erred in converting a seasonal-use rate to a year-long-use rate;

(4) the decision arbitrarily disregards leases of North Dakota and South Dakota School Lands,² which are comparable because, as is the case with permittees on Indian lands, lessees of State School Lands must pay for all services;

(5) the Market Study was not “Reservation-specific” because most of the data used was from South Dakota (including a large number of distant South Dakota comparables); the data used for developing a grazing rate for the Cheyenne River Reservation was arbitrarily applied to the Corson County, South Dakota, portion of the Standing Rock Reservation; and the boundary between North and South Dakota was arbitrarily used to divide and evaluate the comparables, even though the Standing Rock Reservation comprises Sioux County, North Dakota, and Corson County, South Dakota, and both counties are part of the same market area; and

(6) the Market Study fails to identify and analyze Tribal land use regulations and local conditions affecting Standing Rock grazing units, including fencing requirements, tribal taxes, a requirement that permittees obtain special permission to bring non-Indian-owned cattle onto range units, a requirement that permittees obtain health permits for bringing certain cattle onto the Reservation, and a prohibition against hay cutting.

We find merit, at least in part, in the second and fifth arguments: We agree that the apparent disparity between the rate of increase of rents reported in the NASS data and the rate of increase reflected in the Regional Director’s decision is not adequately explained; we also agree that neither the Market Study’s treatment of the boundary between North and South Dakota as delineating distinct markets, nor the Regional Director’s decision to treat the Standing Rock Reservation as a single market for which a single AUM rate is appropriate, is adequately explained or supported by the record. We reject Appellants’ remaining arguments, except to the extent that their argument regarding fencing costs may fall within the scope of our decision in *DuBray*.

² When the States of North and South Dakota were admitted to the United States, the Federal government granted each new State sections of public land that are referred to as “State School Lands” because the proceeds from the lands were dedicated to the support of schools. *See* Act of Feb. 22, 1889, §§ 10, 11, 25 Stat. 676, 679.

Background

A. Grazing Permits for Range Units on the Standing Rock Reservation for the 2005 - 2009 Period

1. Regulations Governing Grazing Permits

In order to manage grazing on individually-owned trust lands on a reservation, BIA consolidates various tracts of Indian rangeland into range units, *see* 25 C.F.R. §§ 166.4 and 166.302, and establishes a grazing rental rate for those lands, *id.* § 166.400(b).³ The grazing regulations allow the grazing rental rate to be set either as a price-per-AUM or a price-per-acre, based on the “fair annual rental” value. *See* 25 C.F.R. §§ 166.4. “Fair annual rental” is defined to mean “the amount of rental income that a permitted parcel of Indian land would most probably command in an open and competitive market.” *Id.*

When BIA establishes a grazing rental rate on a price-per-AUM basis, the rental payment due under a permit is the rental rate multiplied by the number of AUMs included in the permit. 25 C.F.R. § 166.409. The number of AUMs in a permit is based on the range unit’s grazing capacity, which in turn is based on the permitted parcel’s productivity (e.g., amount and quality of forage). *Id.* § 166.305.

2. Standing Rock Reservation Permits

Appellants hold 5-year grazing permits for range units that include individually-owned trust lands on the Reservation. The sample permit included in the administrative record, for Gene Cadotte, Sr., is for the period from November 1, 2004, through October 31, 2009.⁴ In 2005, BIA established a new grazing rental rate of \$10.50/AUM for individually-owned trust lands on the Reservation, which applied to the 2006 grazing season, beginning November 1, 2005. *See* Appellants’ Reply Brief, Ex. F (Letter from Regional Director to Permittees, Landowners, Tribes and Other Interested Parties,

³ For tribally owned lands, a tribe may establish the grazing rental rate, which may be above or below the rate set by BIA. 25 C.F.R. § 166.400(a).

⁴ The administrative record does not contain copies of the permits for each member of Appellant Standing Rock Grazing Association, but no party suggests that the permits affected by the rate increase differ in any material respect for purposes of deciding the issues raised in this appeal.

Aug. 31, 2005);⁵ see *Bickel v. Acting Great Plains Regional Director*, 42 IBIA 73 (2005) (dismissing challenge to \$10.50/AUM rate for failure to prosecute). The \$10.50/AUM rate that the Regional Director established for the 2006 grazing season was the rate recommended in a grazing rate study prepared by David Widdoss and Geoff Oliver of the Department's Office of Appraisal Services, Great Plains Region. See Appellants' Reply Brief, Ex. G (Widdoss & Oliver, Grazing Rate Recommendations for the Standing Rock Reservation, Aug. 30, 2005).

B. Market Study for Standing Rock Reservation 2007 Grazing Rate

As described more fully in *DuBray*, 48 IBIA at 7-14, in 2006, at the request of the Regional Director and under contract from OST, certified private appraiser David M. Baker prepared the Market Study for BIA's use in determining whether to adjust the grazing rate for the Reservation for the 2007 grazing season. See 25 C.F.R. § 166.408(a)(1) (BIA will review the grazing rental rate prior to each anniversary date or when specified by the permit).

Relevant to this appeal, Baker evaluated data from NASS surveys. Baker reported that the NASS survey data indicated a weighted seasonal grazing rate for "Cheyenne River area" rangeland of \$19.28 per AUM, which Baker stated "strongly supported" the seasonal rates indicated by the other data sources used in the Market Study. Market Study at 37. For Sioux County, North Dakota, Baker reported that the NASS data indicated typical rent for rangeland on a per-acre basis as \$9.90/acre. *Id.* at 11-12. Using an average seasonal stocking rate of 1.89 acres per AUM, which Baker derived from 9 private lease comparables in the Sioux County area, Baker converted the per-acre figure to a seasonal grazing rate of \$18.71/AUM ($9.90 \times 1.89 = 18.71$), which he described as strongly supporting the

⁵ The record is not clear whether new permits were issued in 2005. Cadotte's permit is for the period beginning November 1, 2004, and ending October 31, 2009. For the first year of the permit (the 2005 grazing season), the grazing rental rate apparently was \$8.50/AUM, based on a stipulation entered into in litigation between permittees and the Department of the Interior (Department). See *Twenty-Seven Individual Landowners on the Standing Rock Reservation v. Great Plains Regional Director*, 40 IBIA 239 & n.1 (2005). Notwithstanding the November 1, 2004, start date for Cadotte's permit, the Regional Director's August 31, 2005, decision stated that it was establishing a new rate of \$10.50/AUM "for the new permit period beginning November 1, 2005," i.e., beginning with the 2006 grazing season. We assume, for purposes of this appeal, that the \$10.50/AUM rate applied to both new and existing permits for the 2006 grazing season.

seasonal grazing rate indicated by the private lease comparables used in the Market Study. *Id.* at 11-12, 37.

Baker also reviewed and reported on data for North and South Dakota School Lands grazing rents. Baker reported that the State School Lands were rented for a 5-year period at a rate determined through a bidding process, and that the minimum annual rent — i.e., the minimum bid price — was based on a state-determined formula. *Id.* at 13-14. Baker stated that these are year-long-use leases, although a vast majority of the lands are utilized for grazing during the seasonal grazing period. *Id.* For State School Lands leases, rent must be paid in advance, although no preparation fee is charged. *Id.*

For the South Dakota School Lands leases, Baker prepared a summary table of a tax-adjusted average rent per AUM for the counties of Perkins, Campbell, Walworth, Ziebach, Corson, Potter, and Meade. The overall average was \$20.33/AUM. For Corson County (the South Dakota portion of the Reservation), the average rate was \$12.96/AUM.

For the North Dakota School Lands leases, Baker prepared a similar summary table of an average rent per AUM for the counties of Hettinger, Adams, Grant, and Morton, which was \$24.78/AUM. Baker reported a separate average rate for Sioux County, which was \$19.50/AUM. *Id.* at 14. To arrive at these figures, Baker took a figure identified as “land rent paid,” and then added \$1.50/acre (which the State deducts) and made a 10% upward adjustment (the State’s minimum opening bid is based on a 5-year moving average of lowest average cash rent, adjusted for fencing and reduced by 10 percent). Assuming that “land rent paid” referred to actual rent paid, it thus appears that Baker took the actual rent paid, and then added back in the deductions that the State makes, under its formula, in determining a minimum opening bid price. Without such adjustments, if the “land rent paid” figure for State School Lands in Sioux County is divided by the reported number of permitted AUMs, the average rent would be \$14.18/AUM. *See id.*

Baker considered the State School Lands rent data, and stated that “[t]he terms of a State grazing lease are very similar to those of a BIA grazing permit and as such the grazing rate would . . . require minimal adjustment to achieve comparability.” *Id.* at 37. Baker reported that the “seasonal grazing rate” indicated by the South Dakota School Lands data was \$20.33/AUM, and the “year-long” rate indicated by the North Dakota School Lands data was \$19.50/AUM. For the South Dakota data, Baker stated that because “the State School land rate is adjusted by an arbitrarily derived factor this data source was not as heavily relied upon as an indication of the grazing rate for [Cheyenne River and Corson

County, South Dakota]”⁶ as were other data sources used in this analysis.” *Id.* For the North Dakota data, Baker stated that although the terms of the state grazing leases were very similar to BIA permits, “the seasonal rate indicated by this data source is considerably higher than the rates indicated by the other sources. As a result the seasonal rate derived from the State School Lands data source for Sioux County area rangeland was not as heavily relied upon as were the indications derived from the other data sources.” *Id.*

In preparing a recommended AUM rate for the Standing Rock Reservation, Baker ultimately chose to rely on 81 private lease “comparables.” Sixty-three of the comparables were for land located in South Dakota (including six in Corson County), and those comparables were used to determine a single AUM rate for “Cheyenne River and Corson County,” i.e., for the Cheyenne River Reservation and for the portion of the Standing Rock Reservation located in South Dakota, prior to making adjustments for non-fee rental rate factors.⁷ Eighteen of the comparables were located in North Dakota (including three in Sioux County), and those comparables were used to determine an AUM rate for “Sioux County, North Dakota,” i.e., the portion of the Standing Rock Reservation located in North Dakota, without making adjustments for non-fee rental factors.⁸

In effect, Baker treated the South Dakota portion of the Standing Rock Reservation as a completely separate market from the North Dakota portion of the Reservation, and reported two different AUM rates, one for each portion. After converting the seasonal-use

⁶ The Market Study refers to the “Pine Ridge area,” but this appears to be an erroneous reference, given the context.

⁷ As noted in *DuBray*, 48 IBIA at 9, fifty-eight of the South Dakota leases were for seasonal use, and five were for year-long use.

The phrase “rental rate factors” (also referred to as “non-fee factors” or “non-fee rental factors”) is used in the Market Study to refer to various costs, services, or conditions related to the productivity or usability of grazing lands, or conditions or requirements associated with their use, which may affect their value (e.g., fencing, water). *See DuBray*, 48 IBIA at 7-8.

⁸ The North Dakota comparables included 10 leases for seasonal use and 8 leases for year-long use. The average rate for the seasonal-use leases was \$18.58/AUM, and the average for the year-long-use leases was \$13.85/AUM.

rate data to a year-long-use rate,⁹ and after deducting for BIA's preparation fee and prepayment requirement, *see DuBray*, 48 IBIA at 11, Baker reported a year-long-use rental value of \$19.98/AUM for the Corson County, South Dakota, portion of the Reservation, and a year-long-use rental value of \$12.42/AUM for the Sioux County, North Dakota, portion of the Reservation. Market Study at 38-40. As further described in *DuBray*, Baker also considered certain non-fee rental factors, *see* 48 IBIA at 11-13, and concluded that the only factors that warranted a further adjustment were fence materials and fence maintenance, depending upon whether the costs of those items were the responsibility of the lessee or the lessor. Based on his review of all 81 comparables collectively, Baker reported adjustment figures for fence materials (deduction of \$3.88/AUM if lessee is responsible) and fence maintenance (addition of \$5.75/AUM if the lessor is responsible), but did not make the actual adjustments in reporting North and South Dakota rangelands AUM rates.

Geoff Oliver, the reviewing OST Appraiser, described Baker's North and South Dakota pastureland AUM rates as based on "no services provided." In his review report, Oliver noted that Baker had estimated separate values for Corson and Sioux Counties, but that the scope of the assignment was to estimate a single grazing rate. To arrive at a single AUM rate for the Standing Rock Reservation, Oliver first deducted \$3.88/AUM from Baker's Cheyenne River/Corson County, and Sioux County, North Dakota, AUM rates, because permittees are responsible for the cost of fence materials. This resulted in an adjusted rate of \$8.54/AUM for Sioux County, North Dakota, and \$16.10/AUM for Corson County, South Dakota.¹⁰ OST Appraiser's Review Report (Review Report), at 3. Then, based on the percentage of trust acres on the Reservation in Sioux County, North

⁹ For Cheyenne River and Corson County, Baker calculated a seasonal adjustment rate by dividing the average AUM value of the 5 South Dakota year-long-use leases into the average AUM value of the 58 South Dakota seasonal-use leases, to arrive at a seasonal conversion factor of 95%. In *DuBray*, 48 IBIA at 28-30, we vacated and remanded the 95% seasonal conversion factor for the Cheyenne River Reservation, and that decision applies equally in this case, in which Appellants challenge the 95% rate for Corson County, South Dakota. For Sioux County, North Dakota, Baker applied the same methodology to the 18 comparables located in North Dakota (8 year-long use; 10 seasonal use), to arrive at a 75.4% seasonal adjustment factor.

¹⁰ Because the \$16.10/AUM rate was based on Baker's Cheyenne River/Corson County AUM rate, this is the same rate that was recommended to and accepted by the Regional Director for the grazing rate for the Cheyenne River Reservation for 2007, which is the subject of our *DuBray* decision.

Dakota (32.59%) and in Corson County, South Dakota (67.41%), Oliver applied a weighted average to calculate a single AUM rate for the Standing Rock Reservation (\$13.63/AUM). Thus, Oliver treated the Reservation as effectively a single market with a uniform AUM value based on a weighted average drawn from the South Dakota and North Dakota data.

On August 3, 2006, the Regional Director issued his decision to adjust the grazing rental rate for individually-owned trust lands on the Reservation from \$10.50/AUM to \$13.63/AUM for the 2007 grazing season. Appellants appealed the Regional Director's decision to the Board, and Appellants and the Regional Director filed briefs.

Standard of Review

The Board has a well-established standard of review of grazing rental rate decisions. The Board's role

is to determine whether the adjustment or rental value determination is reasonable; that is, whether it is supported by law and by substantial evidence. If BIA's determination is reasonable, the Board will not substitute its judgment for BIA's. The burden is on the appellant to show that BIA's action is unreasonable.

DuBray, 48 IBIA at 18, quoting *Rosebud Indian Land and Grazing Ass'n v. Acting Great Plains Regional Director*, 41 IBIA 298, 301 (2005) (internal citations omitted). We review questions of law de novo. *DuBray*, 48 IBIA at 18.

Discussion

A. Introduction

As a preliminary matter in this appeal, the Regional Director challenges Appellants' standing to bring this appeal on the same grounds that he challenged the rancher-appellants' standing in *DuBray*. As he did in *DuBray*, the Regional Director also argues that we should uphold his grazing rate decision as reasonable and as supported by substantial evidence because it relies on a market study and recommendations prepared and reviewed by professional appraisers. In *DuBray*, 48 IBIA at 19-22, we rejected those arguments, and we do so here for the same reasons.

Appellants, for their part, raise several of the same challenges to the Regional Director's rate decision that the appellants raised in *DuBray*: (1) failure to comply with the Regional Director's instructions and USPAP standards by failing to disclose or explain

assumptions, calculations, and the reasoning necessary to understand adjustments or non-adjustments made for non-fee rental factors; and (2) failure to consider effects of the 2006 drought on the value of an AUM.¹¹ With respect to these arguments, and for the reasons discussed in *DuBray*, we vacate the Regional Director’s decision and remand the matter to the Regional Director for reconsideration and issuance of a new decision consistent with *DuBray*.¹² In addition, Appellants in this case raise several arguments, summarized above, that were not raised in *DuBray*. We now address those additional arguments.

B. Appellants’ Arguments

1. Was it Impermissible for the OST Appraiser to Include Additional Calculations in the Market Study Review Report?

Appellants contend that Oliver, the reviewing OST Appraiser, purported to approve the Market Study without qualification, but then made major changes to it by calculating a single rate for the Standing Rock Reservation using a weighted average of the Market Study’s North and South Dakota AUM rates. Opening Brief at 13-14. Appellants also

¹¹ Appellants also make several arguments here that we rejected in *DuBray*: (1) that the Regional Director erroneously considered himself to be legally bound to accept and implement the Market Study’s recommended rate, and (2) that the Regional Director erred in accepting the rate of operating loans, 8.3%, to account for BIA’s prepayment requirement. *See DuBray*, 48 IBIA at 23-24, 27-28.

¹² With respect to the allegation that the Market Study was not prepared in compliance with USPAP, we note that in this appeal, the OST Appraiser asserts that the Market Study “does not fall under Standard 2 of the [USPAP]” because “Standard 2 of USPAP is designed for an appraisal of an individual property and not a market study.” Regional Director’s Answer Brief, Declaration of Oliver, at 3-4. Oliver’s own review of the Market Study asserts that the “purpose of the review is to determine if the appraisal has been prepared in accordance with those recognized methods and techniques of appraisal and written in compliance with Standard Rule 2-2(a) of the [USPAP].” Review Report at 3. Oliver’s inconsistency is troubling, to say the least. BIA’s rate adjustment authority expressly requires BIA to follow USPAP. *See* 25 C.F.R. § 166.408. And “fair annual rental” is based on the value of a “permitted parcel.” *See* 25 C.F.R. § 166.4. If specific standards within USPAP are not applicable to a particular methodology employed by BIA to determine fair annual rental value, it is incumbent upon BIA to clearly explain why. But the regulations do not allow BIA to disregard USPAP or to summarily declare USPAP inapplicable.

suggest that it was improper for Oliver, rather than Baker, to make adjustments for the fencing costs reported by Baker. *Id.* According to Appellants, USPAP requires that an inaccurate or incomplete appraisal be rejected or accepted with qualifications, and not changed wholesale. *Id.*

The Regional Director responds through the declaration of the OST Appraiser, who explains that the Market Study had separated the two counties that comprise the Reservation (Sioux County, North Dakota, and Corson County, South Dakota), and that because BIA had directed OST to calculate a weighted average of the two counties to develop a single, reservation-wide AUM, that is what the OST Appraiser did. Declaration of Oliver, at 14-15. Oliver states that he made no modifications to Baker's report itself, but "simply took the calculation one more step," further stating that his review report is not part of the original report.

Oliver accepted Baker's report as having been prepared in accordance with recognized methods and techniques of appraisal practice and written in compliance with USPAP. Baker's report, however, did not develop a single recommended rate for the Standing Rock Reservation, and therefore, apparently as instructed by BIA, Oliver completed the weighted average calculations and included a single AUM rate for the Reservation in his review report.

We agree with the Regional Director that the fact that Oliver included additional calculations in his review report does not, in and of itself, provide a basis for us to conclude that the Regional Director's decision must be vacated and remanded. Indeed, even though Appellants suggest that it was improper for Oliver to make adjustments for fencing costs, they do not substantively disagree with Oliver's deduction of \$3.88/AUM for fence materials. In addition, while Appellants argue that Oliver was precluded by USPAP from supplementing Baker's report or producing additional adjustments, they also argue that the Regional Director should have made adjustments to the Market Study's recommended rate based on the effects of the drought. It is unclear how Appellants reconcile their two arguments. We do not read the regulatory incorporation of USPAP, *see* 25 C.F.R. § 166.408, to preclude either a reviewing appraiser or BIA from making additional adjustments to the results of a market study, if such adjustments are warranted to ensure that the grazing rate will satisfy the definition of "fair annual rental" under 25 C.F.R. § 166.4. Of course, whether Oliver's calculations and the final recommended rate are otherwise properly supported and justified is a separate issue. But we reject Appellants' argument that Oliver's review report violated USPAP because of the fact that Oliver made additional calculations.

2. Is the Increase from \$10.50/AUM to \$13.63/AUM Unreasonable Because the Rate of Increase from 2006 to 2007 is Disproportionate to the Rate of Increase for Private Grazing Lands During That Period?

Appellants contend that the Regional Director's decision is unreasonable because the rate of increase from the \$10.50/AUM rate for 2006, to \$13.63/AUM for 2007, is four to six times higher than the rate of increase for rents for the same period of time on private grazing lands in the Dakotas, as indicated by NASS statistics. Appellants contend that the open and competitive market is tracked "with some exactitude" by NASS, and that while one would not expect completely uniform rates of increase, the Regional Director should provide at least some rational explanation for the significant disparity in the rates of increase between rents on private lands and the Regional Director's grazing rate decision for Indian lands. Opening Brief at 7. According to Appellants, the rate of private rent increases between 2006 and 2007 averaged 6.6 percent (North Dakota) and 4.9 percent (South Dakota), as reflected by NASS data. *See* Declaration of Duane Claymore ¶ 9 and Ex. 1. The Regional Director's \$13.63/AUM rate represents a 30 percent increase of the prior year's \$10.50/AUM rate.

The Market Study is, as described earlier, based on a review of rent from private lease comparables. It does not include a comparison of the rate of increase between the 2006 and 2007 grazing rates for Indian lands, and 2006 and 2007 rents for private pasturelands. The only response provided by the Regional Director to Appellants' argument is contained in a declaration by the OST Appraiser, who states that "[d]ue to previous appeals, prior rates per AUM were carried forward to the next grazing season on the Standing Rock Reservation. . . . Previous rate estimations or rental data are not considered when estimating the current year[']s rate, and any increase or decrease in rental rates is simply a reflection of market conditions at the time of the grazing rate study." Declaration of Oliver, at 3.

Oliver's response does not provide a satisfactory explanation. First, as Appellants point out in their reply brief, Oliver's assertion that the \$10.50/AUM rate for the 2006 grazing season was simply "carried forward" "due to previous appeals" appears to be just plain wrong. As noted earlier, the Regional Director's \$10.50/AUM rate decision for the 2006 season was a new rate, and was the rate recommended in a market study that was co-authored by Oliver. *See* Declaration of Claymore ¶ 8; Appellants' Reply Brief, Ex. G (Widdoss & Oliver, Grazing Rate Recommendations for the Standing Rock Reservation, Aug. 30, 2005). The rate for the 2005 grazing season (\$8.50/AUM) apparently was based on a stipulation entered into in the course of litigation, *see Twenty-Seven Individual Landowners on the Standing Rock Reservation*, 40 IBIA at 239 n.1, but that rate was not carried forward into the 2006 season, *see Bickel*, 42 IBIA 73 (dismissing challenge to

\$10.50/AUM rate for 2006 season for failure to prosecute). Therefore, Oliver's suggestion that the rate of increase can be explained on the basis that the \$10.50/AUM rate was not market-based (implying also that it was artificially low) is not supported by the evidence.

Second, Oliver's explanation that previous rates and rental data are not considered in setting a new rate is nonresponsive. Appellants' argument is that if BIA's grazing rate for Indian lands from year to year is based on a comparison of private rents, then one could reasonably expect that BIA's determination of the increased value of an AUM on Indian lands would at least roughly approximate the rate of rental increases for private pasturelands. Oliver's explanation that previous rental data is not considered misses the point.

The significant disparity that Appellants allege exists between the rate of increase for private rents and the rate of increase reflected in the Regional Director's decision may or may not be accurate, or it may be subject to some reasonable explanation. But the data supplied by Appellants, and the apparent disparity that exists, is sufficient to warrant a reasonable explanation in response, which the Regional Director has failed to provide. In the absence of such an explanation, we conclude that the alleged disparity between a one-year increase in private rents and the one-year increase in grazing fees for Indian rangeland requires us to set aside the Regional Director's decision and remand the matter for further consideration.

3. Is the Market Study Unreasonable Because the Comparables Have a Rental Value that Was 31% Higher than More Reliable NASS Data, and Did the Market Study Err in Converting Per-Acre Rates to Per-AUM Rates, and in Converting a Seasonal-Use Rate to a Year-Long-Use Rate?

Appellants contend that the Market Study is unreasonable because (1) it used private lease comparables that had rental values that are 31% higher than the "more reliable NASS data," (2) Baker erred in converting per-acre rental rates to per-AUM rental rates, and (3) Baker's seasonal conversion rate is in error. Opening Brief at 22-23. In support of their argument, Appellants offer the Declaration of Dr. Kevin Sedivec, Associate Professor in the Department of Animal and Range Sciences at North Dakota State University.

- a. Disparity Between Comparables' Values and NASS Data Values

Sedivec first asserts that the Market Study overestimated rental values by 28.9% "when compared to a more robust statistical survey (N=199) conducted by the North and South Dakota Agricultural Statistics Services." Declaration of Sedivec ¶ 7. According to Sedivec, this affects the credibility and accuracy of the Market Study. Sedivec states that in

his opinion, “the true numbers for rental value . . . would be drawn from the NASS data which considered 199 comparables from the Standing Rock Sioux Reservation counties, rather than eighteen counties and eighty comparables used by Baker.”¹³ *Id.* Sedivec attaches as an exhibit an information sheet produced by NASS, titled “North Dakota 2006 County Rents & Values,” which briefly describes the 2006 NASS survey and reports an average rent of \$9.90/acre for non-irrigated pastureland in Sioux County, based on 27 reports. Sedivec states that he reconverted Baker’s AUM rates to a per-acre rate to allow comparison and then calculated an average rental rate of \$12.62/acre from 80 of the comparables (excluding 1 comparable as having a “low value for rental opportunity”). According to Sedivec, the weighted average per-acre rate for the Standing Rock Reservation, based on the NASS data, would be \$8.97/acre, or 28.9% lower than the average rental rate derived from Baker’s private lease comparables. Declaration of Sedivec ¶ 7.

We conclude that Appellants, through the Sedivec declaration, have failed to demonstrate that Baker’s use of comparables resulted in excessively high rental rates as proven by a comparison with the NASS data. Although Sedivec asserts that the comparables yield an average per-acre rate of \$12.62, his declaration fails to disclose his calculations or provide the information needed for us to verify that figure. Thus, we are unable to verify how Sedivec arrived at the purported disparity between NASS data and that of the comparables.¹⁴ In any event, while Appellants contend that the NASS data is “more

¹³ Sedivec does not explain how he arrived at 199 as the number of comparables in the NASS data for the Standing Rock Reservation, although presumably it is based on his summation of reports from counties on or near the Reservation.

¹⁴ We note that with respect to Sioux County, North Dakota, Baker considered the \$9.90/acre typical rental rate reported in the NASS data. After converting the NASS data to a seasonal rate of \$18.71/AUM, Baker found that it was consistent with the \$18.58/AUM seasonal rate that he derived from the comparables. *See* Market Study at 11-12, 36-37. For the Cheyenne River and Corson County Area (comprising Corson, Dewey, and Ziebach Counties in South Dakota), Baker reported the average per acre rental rate of \$8.53, drawn from the NASS data. *Id.* at 11. Baker converted that figure to a seasonal rate of \$19.28/AUM, *see id.*, which he noted was at the low end of a range of figures drawn from the various data sources, the high end of which was represented by the comparables (\$23.72/AUM), *see id.* at 36. This does suggest, without any need to reconvert Baker’s figures to per-acre rates, that the Corson County AUM rate derived from Baker’s comparables was indeed higher than the AUM rate derived from the NASS data for Corson

(continued...)

reliable” than the data derived from Baker’s comparables, they provide no support for that assertion. Thus, even assuming some disparity between the NASS data and Baker’s figures, we would be unable to determine the relevance of that disparity.¹⁵

b. Baker’s Conversion from Per-Acre Rate to Per-AUM Rate

Sedivec’s second critique of the Market Study is that Baker made a “classic error when converting acre rates to AUM rates.” Declaration of Sedivec ¶ 8. In evaluating the NASS data for Sioux County, Baker multiplied the typical \$9.90/acre rent reported by NASS by the average seasonal stocking rate of 1.89 acres per AUM (derived from the comparables), to report a converted seasonal AUM rate of \$18.71/AUM. Sedivec claims that Baker’s converted AUM figure is wrong and vastly overinflates the value of the land on a per-AUM basis, which Sedivec calculates to be \$8.58/AUM.

To illustrate his point, Sedivec postulates a 5,000-acre ranch which, using Baker’s 1.89 acres-per-AUM stocking rate, has an annual capacity of 2,645 AUMs ($5000 \div 1.89 = 2,645.5$). Using the NASS per-acre figure of \$9.90/acre, the annual rent for the 5,000

¹⁴(...continued)

County. But unless it were established that the NASS data is indeed more accurate and comparable to Standing Rock Reservation grazing lands, the disparity would not prove that Baker’s use of comparables resulted in an excessively high rate.

¹⁵ Appellants contend that the NASS tracks the open and competitive market “with some exactitude,” Opening Brief at 7, and that the NASS survey and Market Study “purport to collect the same data,” Reply Brief at 11. However, according to a report that reviewed the valuation of grazing on the Standing Rock Reservation, which Appellants cite favorably in their separate appeal to the Board regarding 2008 grazing rates on the Reservation, the NASS

survey does not ask the landowner to report rental rates they may be paying or receiving on actual leases, only to provide their estimate of average rental rates in their local area. Further, the NASS survey does not establish any criteria or any assumptions about the terms or conditions of the lease agreements. That is, the terms, conditions, services provided, etc. of the leases are not specified.

Valuation of Grazing on Standing Rock Sioux Reservation, Report of Review Committee Established Pursuant to Court Order, Mar. 1, 2005, at 9 (Ex. A to Appellants’ Opening Brief, *Standing Rock Grazing Ass’n and its Members v. Acting Great Plains Regional Director*, 48 IBIA 75 (2008)).

acres would be \$49,500. Sedivec then uses a series of calculations by which he converts the per-acre rate to a per-AUM rate for a rancher who wants to rent the 5,000 acres for the 2007 season, but wants to use up the entire annual capacity of 2,645 AUMs in a 5.5 month period, and to calculate an appropriate lease price on an per-AUM basis. Sedivec notes that to use up the 2,645 AUMs in a 5.5 month period, the rancher could graze 481 animal units (AUs) (cows) during that period ($2,645 \div 5.5 = 481$). Figured on a per-AU basis for a 12-month contract, Sedivec arrives at a cost of \$103 per AU on an annualized basis ($\$49,500 \div 481 = \102.91). Then, according to Sedivec, because the rancher's calculations are based on a 12-month, \$9.90/acre contract, one must divide \$103 by 12, which Sedivec reports as "an AUM rate of \$8.58" ($103 \div 12 = 8.583$).

Sedivec's final step, and therefore his \$8.58/AUM figure, is erroneous. Although his per-AU annual cost (\$103) is correct, dividing that figure by 12 only produces a per-AU monthly cost to a lessee over the course of a year. But an AU (cow) is not an AUM (forage), and therefore the \$8.58 figure is meaningless in determining the cost of an AUM. We need only complete Sedivec's calculations to demonstrate that his purported conversion from a per-acre rate to a per-AUM rate is flawed: $\$8.58/\text{AUM} \times 2,645 \text{ AUMs} = \$22,694$. Under this scenario, Sedivec's rancher would offer the landowner \$22,694 to use up the entire annual AUM capacity on the 5,000 acres of land, even though its rental value is \$49,500.¹⁶ We note that Sedivec's approach is also inconsistent with the approach employed by Appellants' other declarant, Claymore, and that Claymore's methodology is, in fact, consistent with that employed by Baker. As discussed below, to convert a per-acre rental rate for State School Lands to a per-AUM rate, Claymore simply multiplied the per-acre rate by the stocking capacity. Applying Claymore's methodology to the NASS data reflects precisely what Baker did: $\$9.90/\text{acre} \times 1.89 \text{ acres per AUM} = \$18.71/\text{AUM}$.

c. Baker's Conversion from a Seasonal-Use Rate to a Year-Long-Use Rate

Appellants contend that the Market Study used a disproportionately high percentage for converting seasonal-use lease data to year-long-use lease data. According to Appellants,

¹⁶ Presuming, as Sedivec does, that the ranch's entire annual usable capacity of forage (2,645 AUMs) is available and will be consumed only during a 5.5-month period, by a total of 481 AUs (cows), and the annualized cost per AU is \$103 ($\$49,500 \div 481 = \103), then the cost to sustain each AU's (cow's) use of forage per month (one AUM) would be approximately \$18.72 ($\$103 \div 5.5 = \18.727). A figure of \$18.72/AUM would be an economically reasonable offer for the rancher to make because multiplying \$18.72/AUM times 2,645 AUMs equals \$49,514.40, which is roughly equivalent to the annual rental value of the land.

BIA traditionally converted seasonal-use to year-long-use rates by multiplying by 60%, then used a 74% conversion rate for Standing Rock in 2005, and then used a 73% conversion rate in 2006. *See* Declaration of Claymore ¶ 13. Appellants contend that with very little explanation, Baker increased the conversion rate to 95% in 2006 for Corson County (the South Dakota portion of the Reservation), while using a 75.4% conversion rate for Sioux County, North Dakota.¹⁷ Thus, according to Appellants, Baker concluded, improbably, that a Reservation landowner on the North Dakota side of the border would earn markedly more than an adjoining landowner on the South Dakota side of the border. Appellants also complain that Oliver then applied a 70% weight to the South Dakota figure to arrive at a single weighted average AUM rate for the Reservation as a whole. *Id.*

In addition, Appellants, through Sedivec's declaration, assert that Baker erroneously presumed that "renting pasture on a 12 month contract occurs at the same rate per month." Declaration of Sedivec ¶ 9. According to Sedivec, if a lessee rents pasture for a season, its value is actually quite different for each month because forage production peaks in late June through mid-August.

We are not convinced by Sedivec's assertion that the Market Study presumed that rental rates and forage values are constant throughout the year. On the contrary, the Market Study expressly noted, as does Sedivec, that forage value is reduced during the dormant season, compared to the growing season. *See* Market Study at 38. The fact that the Market Study arrived at a single AUM figure, on an annualized basis (because BIA's permits are for year-long use), does not mean that Baker presumed that forage values were constant throughout the year.

For the reasons discussed in *DuBray*, however, we agree that the 95% seasonal conversion rate used in the Market Study is not adequately explained or supported by the evidence. *See DuBray*, 48 IBIA at 28-30. In addition, for the reasons discussed below, *infra* at 63-65, we conclude that Baker's treatment of Corson County, South Dakota, and Sioux County, North Dakota, as separate and distinct markets, is not supported by a reasonable explanation or evidence, and Oliver's application of a weighted average between the two counties to arrive at a single Reservation-wide AUM rate is also not properly explained or supported. Therefore the Regional Director's decision must be vacated and remanded for further consideration.

¹⁷ Appellants do not actually challenge the 75.4% conversion rate in the present appeal.

4. Did the Market Study Arbitrarily Disregard State School Lands Leases?

Appellants contend that the Market Study arbitrarily disregards grazing leases for North Dakota and South Dakota School Lands. According to Appellants, of all the data that was considered in the Market Study, the State School Lands rental rates are the most comparable to Indian grazing permits because both are for 5-year terms, both are figured on an annual AUM rate, both require prepayment, both impose all fencing expenses and labor on tenants, and both require payment of taxes by tenants. Appellants note that “Baker admits [that] ‘the terms of a State grazing lease are very similar to those of a BIA grazing permit and as such the grazing rate would [] require minimal adjustment to achieve comparability.’” Opening Brief at 21, quoting Market Study at 37. But Appellants criticize the Market Study for proceeding to make more than “minimal adjustments” which, they contend, distort and overstate the rental rates for State School Lands. Thus, Appellants argue that the Market Study should have relied on State School Lands rents, but that the actual figures to be derived from the State School Lands leases are lower than those stated in the Market Study.

The primary reason cited by Baker for not relying on the State School Lands leases is that the “State School land rate is adjusted by an arbitrarily derived factor.” Market Study at 37. Baker explains that both South Dakota and North Dakota use formulas from which to derive an AUM rate, which is then reduced by a fixed or a minimum percentage, to establish a minimum bid price. *Id.* at 13-14. This explanation is verified by Appellants’ own exhibits. See Declaration of Claymore, Ex. 6 and 7. The OST Appraiser provides an additional explanation by stating that “School land AUM rates are based on State Law which dictates the formula used for rate calculation and has virtually no ties to agricultural land lease rates. Because of this, the School Land data is not considered Market Rent and was not considered in the final rate estimation.” Declaration of Oliver, at 15-16.

Baker and Oliver provide reasonable explanations for why the State formulas and the resulting *minimum bid prices* for an AUM are not reliable indicators of fair annual rental value. Moreover, even though Appellants contend that State School Lands leases are most “comparable” to Indian grazing permits, Appellants are at best vague in propounding specific, supportable numbers to contradict or undermine the numbers that Baker considered, and which Appellants contend are erroneously high. For example, for Sioux County, North Dakota, Appellants apparently propose the use of \$5.76 per acre grass rental as the appropriate figure. See Declaration of Claymore ¶ 16. But as illustrated below, that figure does not support Appellants’ argument that Baker was in error in declining to use State School Lands data as the foundation for a recommended rental rate, nor does it even support Appellants’ argument that the State School Lands data would necessarily result in a lower rate.

First, the \$5.76/acre figure proffered by Claymore is one that he admits is not based on actual rent, but is the “minimum opening bid” price for State School Lands in Sioux County. *See id.* ¶ 16 and Ex. 7 (North Dakota Land Department Fact Sheet). That figure, in turn, is derived from “the lowest average county rent in [the] region” for the last 5 years, which is then reduced by 10%, and reduced further by another \$1.50/acre for fencing. *See id.* Ex. 7. The \$5.76/acre figure simply cannot be squared with the definition of “fair annual rental” in the regulations, which is the value that the land would command in an open and competitive market. 25 C.F.R. § 166.4.

Second, Claymore’s conversion of the \$5.76/acre minimum bid figure to an AUM rate relies on a stocking rate that is not from the State School Lands data, but from the private lease comparables that Appellants insist are not comparable to Indian grazing lands. Using a methodology that is consistent with that employed by Baker, Claymore multiplies the \$5.76/acre minimum bid price by a stocking rate of 1.89 acres per AUM, to conclude that the proper rental value per AUM should have been \$10.88/AUM for Sioux County, North Dakota. Declaration of Claymore ¶ 16 ($\$5.76 \times 1.89 = \10.88). The 1.89 stocking rate appears in the Market Study, but as an average of the stocking rates of 9 private lease comparables that are identified as from the “Sioux County Area,” only two of which are actually in Sioux County. *See* Market Study at 12, 21-32. In contrast, the State School Lands data, from which Claymore draws his per-acre rate, indicates a stocking rate for State School Lands in Sioux County of 2.6 acres per AUM.¹⁸ Using Claymore’s own methodology, as applied to the actual State School Lands data, the AUM rate — even based on the minimum bid price — would be \$14.98/AUM ($5.76 \times 2.6 = 14.976$). After deducting BIA’s 3% preparation fee (-\$0.45) and an additional 8.3% for BIA’s prepayment requirement (-\$1.24), the rate would be \$13.29/AUM, which is higher than the \$12.42/AUM figure that Baker arrived at for Sioux County.

In discussing the North Dakota State School Lands, the Market Study reports that the rent paid for 2,427 AUMs grazed on State School Lands in Sioux County in 2006 was \$34,412. Market Study at 14. Dividing the total number of AUMs into the total rent, and without making the additional adjustments of which Appellants complain, these figures translate into an AUM rate of \$14.18/AUM ($34,412 \div 2,427 = 14.1788$) — again, higher than Baker’s figure for Sioux County derived from the private lease comparables.

¹⁸ The State School Lands data for Sioux County reported in the Market Study indicates that there are 2,427 permitted AUMs on a total of 6,308.80 acres. Dividing the number of permitted AUMs into the total acreage yields the 2.6 acres per AUM figure ($6,308.80 \div 2,427 = 2.599$).

For South Dakota School Lands, Claymore similarly disputes Baker's use of \$20.33/AUM as the average, arguing that the "actual number is \$9.60/AUM in 2005 on a year long basis." Declaration of Claymore ¶ 16. But Claymore's figure is derived from the State's formula, which appears to be calculated as 25% of the 5-year average price per pound. *Id.* Ex. 6. Baker's Market Study clearly acknowledges the \$9.60/AUM figure, *see* Market Study at 13, but as we have already stated, we find the explanations provided by Baker and Oliver for not relying on a minimum bid price as reflecting market value to be reasonable. Thus, we are not convinced by Claymore's contention that Baker erroneously calculated the South Dakota State School Lands figures and improperly failed to rely on the \$9.60/AUM figure.

We conclude that Appellants have not met their burden of proof to demonstrate that Baker erred in his consideration of the State School Lands data and in his decision not to rely on it as the basis for deriving a recommended AUM rate.

That said, we do find the Market Study confusing in its discussion of State School Lands rents, because it is not entirely clear what the various figures that are reported actually represent. For example, the table for North Dakota School Lands includes a column of "land rent paid," which would seem to suggest that it is reporting actual rent paid, and not minimum bid prices. *See* Market Study at 14. If so, it is not clear why Baker made additional adjustments to that figure, based on the calculations used to derive a minimum bid. In addition, if actual rent data is available for State School Lands, it is unclear why Baker and Oliver emphasized the arbitrariness of the minimum bid price, and appeared to reject further use of the State School Lands data on that ground. In addition, we note that the Market Study's table of South Dakota State School Lands Rents, which appears to be based on actual rent, reports an average of \$12.96/AUM for Corson County, South Dakota, compared to the \$19.98/AUM adjusted year-long rental rate calculated by Baker for Corson County. Although we find that Appellants have failed to sustain their burden of proof with respect to this issue, we are remanding the Regional Director's decision for other reasons, and it may be advisable for the Regional Director on remand to revisit and provide additional explanation of the appropriateness or inappropriateness of using State School Lands data in determining the appropriate grazing rental rate for range units on the Standing Rock Reservation.

5. Is the Market Study Flawed Because it is Not "Reservation-Specific," Gave Improper Weight to the South Dakota Comparables, and Arbitrarily Treated the State Boundary as Delineating Distinct Markets?

Appellants contend that the Market Study was not "reservation-specific" because most of the data used was from South Dakota (including a large number of distant South

Dakota comparables), the data used for developing a grazing rate for the Cheyenne River Reservation was arbitrarily applied to the Corson County, South Dakota, portion of the Standing Rock Reservation, and the boundary between North and South Dakota was arbitrarily used to divide and evaluate the comparables, even though the Standing Rock Reservation comprises Sioux County, North Dakota, and Corson County, South Dakota, and both counties are part of the same market area. The Regional Director responds that the appraiser did provide a reservation-specific market study, using comparables from counties surrounding the Standing Rock Reservation, including those contained in the Cheyenne River Reservation, and that the appraiser considered numerous non-fee rental factors and made adjustments where warranted. *But see DuBray*, 48 IBIA at 30-35.

The Regional Director does not provide a specific response to Appellants' allegations that it was arbitrary for Baker to divide the comparables into two distinct sets — those in North Dakota and those in South Dakota. Nor does the Regional Director respond to Appellants' contention that by lumping the comparables in South Dakota into a single group that was used to identify an AUM rate for the Cheyenne River Reservation and for the Corson County portion of the Standing Rock Reservation, Baker used comparables that were geographically distant from the Standing Rock Reservation, and thus possibly less “comparable” than those in North Dakota.

We agree with the Regional Director that the Market Study did not violate BIA's instructions to be “reservation-specific” simply because it combined an analysis of grazing rates for both the Cheyenne River and the Standing Rock Reservations. We also agree that it was not impermissible, per se, to use the same comparables for the Cheyenne River Reservation as those used for all or part of the Standing Rock Reservation. The problem with the Market Study is that we cannot verify that the comparables used to determine a rate for the Standing Rock (or Cheyenne River) Reservation were in fact “comparable,” whether with respect to lease terms or distance from the permitted lands for which a rate was determined.

For purposes of calculating a baseline AUM rate, the Market Study presumes, without adequate support or explanation, that the North Dakota portion of the Reservation reflects a distinct and different market than the South Dakota portion of the Reservation, in effect concluding that contiguous parcels on each side of the state border would command markedly different prices per AUM. If, in fact, the Standing Rock Reservation is within a single grazing market, it is unclear why the Market Study divided the comparables into two distinct groups according to the state in which they were located. The Regional Director does not contend that the Standing Rock Reservation is split into two distinct markets, and the basis for treating it as such is without support in the record.

On the other hand, by following BIA's instructions to produce a single, reservation-wide AUM rate for the Standing Rock Reservation, Oliver's figure implicitly presumes that the Reservation does constitute a single market for which a single AUM rate is appropriate. But a single-market assumption is nowhere explained or justified in the record, and Oliver's methodology to arrive at a single rate, by using a weighted average based upon the percentage of trust lands within each portion of the Reservation to produce a single rate, is not explained or justified as a matter of proper appraisal practice.¹⁹

We cannot tell from the record before us whether the \$13.63/AUM weighted average may be too high or too low for all or some of the range units on the Standing Rock Reservation. What is clear, however, is that the approach used by Baker and Oliver is not adequately supported or explained, and appears to make several arbitrary assumptions based solely on political boundaries.²⁰

6. Did the Market Study Improperly Fail to Consider Land Use Regulations and Other Local Conditions?

Appellants contend that the Market Study fails to identify and analyze land use regulations and local conditions affecting Standing Rock grazing units, including the Tribe's requirement that permittees provide partition fencing, tribal taxes that are imposed on non-Indian-owned livestock, the Tribe's requirement that permittees must obtain special permission to bring non-Indian-owned cattle onto range units, the requirement that permittees obtain health permits for bringing certain cattle onto the Reservation, and a prohibition against hay cutting.²¹ The only specific response provided by the Regional

¹⁹ We note that although the comparables were divided into 2 distinct sets for determining a baseline AUM rate, all 81 comparables were used, without explanation, for evaluating non-fee rental factors.

²⁰ Indeed, if as reported by the Market Study, the value of an AUM is markedly higher in Corson County, South Dakota, than it is in Sioux County, North Dakota, it would follow that the lands within these two counties are in significantly different markets, and by merging the two into a single rate, the result is to overcharge permittees in Sioux County and to undercharge permittees in Corson County, contrary to the definition of fair annual rental in 25 C.F.R. § 166.4.

²¹ These are the factors identified in Appellants' brief. In a declaration attached to the brief, permittee Duane Claymore also states that permittees on the Standing Rock Reservation

(continued...)

Director to this argument is through the declaration of the OST Appraiser, who states: “By direction of the . . . Regional Director, the assignment presented to [OST] was to provide a Reservation wide rental rate per AUM. Land Use Regulations are typically imposed after the lease issuance.” Declaration of Oliver, at 14.

Oliver’s explanation is less than responsive, and arguably incorrect, but in the present case, except for the issues of fencing and the Tribal tax, which we address separately below, we conclude that Appellants have failed to produce any evidence to support their bare allegation that the Market Study is flawed because it failed to evaluate these factors.²² We remand the fencing issue for the same reasons discussed in *DuBray*. Although it is undisputed that there is a Tribal tax on non-Indian-owned livestock, we nevertheless reject Appellants’ argument that the tax requires that BIA make an across-the-board adjustment in calculating a reservation-wide AUM rate.

a. Requirement to Provide Partition Fencing

It appears that there is no dispute between Appellants and the Regional Director that permittees on Indian lands are required to pay all costs of new fencing and fence maintenance, both materials and labor. Appellants contend that the Market Study failed to consider the Tribe’s requirement that permittees provide partition fencing, which is required by Tribal ordinance. In *DuBray*, we concluded that the Market Study failed to clearly distinguish between costs for fence materials and fence labor, and between costs (materials

²¹(...continued)

“must suffer the consequences of open hunting” and “must periodically (generally one or two times per year) count and herd the cattle so the BIA can verify the numbers of cattle on each grazing unit.” Declaration of Claymore ¶ 5. Claymore provides no evidence of costs associated with these factors, and we conclude that in the absence of such evidence, these bare assertions are insufficient for us to find that the Market Study improperly failed to consider these factors.

²² Appellants also contend that the Tribe requires permittees to pay for weed control and prairie dog control programs, and that the Market Study improperly failed to consider this requirement. The Tribe’s grazing ordinance does provide that “[a]ll permittees are required to participate in a prairie dog and noxious weed control program.” Standing Rock Sioux Tribe Policies and Procedures, Range Unit Grazing Privileges, VIII.O., at 6. But Appellants provide no evidence of what this “participation” requirement means, in practical terms, or what the standardized economic costs might be to permittees. At best, they suggest in general terms that there are ways that BIA could estimate the costs of weed control and prairie dog control. Opening Brief at 20. We conclude, as we did in *DuBray*, that they have failed to satisfy their burden of proof to demonstrate error in the Market Study with respect to these factors. See *DuBray*, 48 IBIA at 33.

and labor) associated with new fencing as opposed to fence maintenance. *See DuBray*, 48 IBIA at 31-33.

In the present case, it is unclear from Appellants' argument whether they contend that the partition-fencing requirement is a requirement that is unique to the Standing Rock Reservation, so that it should have been considered separately in the Market Study, in addition to the general review of fencing-related costs. Regardless of whether this is the case, to the extent that there are requirements to provide partition fencing for Reservation range units, that would be a factor to consider in determining whether private leases are comparable. Because Appellants in this case also raise the same objections to the fencing-related adjustments that are raised in *DuBray*, and because we are vacating and remanding the Regional Director's decision based in part on those objections, the Regional Director should consider on remand any information or evidence regarding the Tribe's fencing requirements that may affect the value of grazing rental rates on range units on the Reservation.

b. Tribal Taxes

Appellants contend that the Market Study failed to make an adjustment to account for the fact that the Tribe imposes a \$5.00/head tax on non-Indian-owned livestock.²³ Appellants note that Baker did consider state taxes in calculating the AUM rate that applied to State School Lands leases. The Regional Director responds that the tribal taxes are probably imposed to address the issue of grass-brokering, and that tribal taxes only apply when an Indian permittee chooses to allow non-Indian-owned livestock on his or her range unit. Grass-brokering refers to a practice whereby tribal member-permittees obtain grazing permits by exercising their tribal allocation preference, and then enter into arrangements with non-Indians to allow livestock owned by the non-Indians to graze on the range unit. Tribal law requires that tribal members to whom permit preference rights have been granted must own at least 50% of the cattle on their range unit, which means that the member-permittees may lawfully have up to 50% non-Indian-owned livestock on their range units. The non-Indian-owned livestock, however, are taxed at a rate of \$5.00/head.

Appellants agree with the Regional Director that the \$5.00/head tribal tax on non-Indian-owned livestock does not apply to all permittees. According to Appellants, however, many tribal members are financially unable to own all of the cattle on their range unit. In effect, Appellants contend that because some permittees have been awarded range units for which the grazing capacity exceeds the permittee's financial ability to fill with his or her own

²³ In their opening brief, Appellants also argued that a tribal tax of \$0.20/acre on non-Indian permittees should also have been considered, but in their reply brief, Appellants concede that the taxes on non-Indians don't apply, directly or indirectly, to them, and that this tax is not relevant to appraising the value of an AUM on their range units.

livestock, the \$5.00/head tax on non-Indian-owned livestock should be treated as an across-the-board deduction on the value of an AUM on all individually-owned Indian lands on the Reservation. We disagree. Unlike the tax on State School Lands, the tribal tax only applies to range units on which the Indian operators allow non-Indian-owned livestock, and then only on a per-head basis.

The Tribal tax is not imposed on the range unit itself, nor is the tax an incident of the permit itself. Instead, the tax is dependent upon a subsequent business decision by the permittee, after having exercised a preference for obtaining a permit for a particular range unit, to fill a portion of the grazing capacity with non-Indian-owned livestock. If anything, the apparent willingness of non-Indian livestock owners to pay a \$5.00/head tribal tax, in addition to the base AUM rate charged by BIA (plus an additional charge, if any, from the permittee), suggests that the actual rental rate that BIA charges may be below market value. The “fair annual rental” value of a permitted parcel of Indian land is based upon what rent the parcel would command in an open and competitive market. If, on the open and competitive market, there are operators who would be willing to fill a range unit with livestock at the AUM price set by BIA, and pay a \$5.00/head tax, it would follow that, in the absence of the tax, the market price of the AUM would be higher. The notion that the private market could sustain a sub-lease whereby the permittee presumably recovers not only his own rental costs, but possibly also a premium and, in addition, the sub-lessee will pay a \$5/head tax (directly to the Tribe or through the permittee), suggests that there is some additional market value that is not being captured in the fair annual rental set by BIA, at least for certain range units.²⁴

Appellants argue here that certain range units are not economically affordable to an Indian permittee without filling it out with non-Indian-owned livestock, which in turn triggers the tribal tax on those non-Indian-owned livestock. That allegation, however, is not supported by any evidence put forward by Appellants, and we are not convinced that from an appraisal standpoint, the tribal tax must be treated as an across-the-board deduction, in the same way that a deduction representing BIA’s preparation fees or BIA’s prepayment requirement is allowed. It may well be that, in an open and competitive market, certain range units would only be leased to Indian operators who bring in up to 50% of non-Indian-owned livestock, or to non-Indian operators who would be willing to pay the \$5.00/head tax for all of their livestock. In those cases, from the standpoint of appraisal practice, the Tribe’s tax may well be a relevant factor to consider on a range-unit-

²⁴ Of course, the nature of the tax raises the question of what constitutes an “open and competitive market,” for purposes of determining fair annual rental. Appellants view the tax as an added burden that is imposed when they operate their range units with non-Indian livestock. Viewed another way, however, it could be postulated that Indian permittees who own all of their livestock benefit from an exemption from the tax that might be imposed if the range unit was awarded to the highest bidder in an open and competitive market.

specific basis. But we are not convinced that the Market Study was flawed because it did not make an across-the-board deduction to account for the tribal tax.

- c. Did the Market Study Improperly Fail to Consider Other Tribal Land Use Regulations and Local Conditions?

Appellants contend that the Market Study is flawed because it failed to consider the Tribe's requirement that permittees must obtain special permission to bring non-Indian-owned livestock onto their range units, failed to consider the requirement that permittees obtain health permits before bringing certain cattle onto the Reservation, and failed to consider the prohibition against cutting hay on a range unit. Appellants fail to provide any evidence of actual costs that might be associated with these factors that could reasonably be expected to be reflected in an open and competitive market for grazing on Reservation lands. Not all differences between private leases and BIA permits for Indian lands would necessarily influence market prices for an AUM in an the open and competitive market. Appellants' bare allegations that certain factors or characteristics make BIA grazing permits different from private leases are insufficient to satisfy their burden of proof to demonstrate that the Market Study erred by failing to consider those factors or characteristics.

Conclusion

For the reasons discussed above, and for the additional grounds addressed in *DuBray*, we conclude that the Regional Director's decision must be vacated and the matter remanded for further consideration.

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 August 3, 2006, decision and remands the matter for further consideration consistent with this decision and our decision in *DuBray*, 48 IBIA 1. The Regional Director is directed to return all appeal bonds that were collected and retained by BIA, as authorized by the Board, while this appeal was pending.

I concur:

// original signed

// original signed

Steven K. Linscheid
Chief Administrative Judge

Lisa Hemmer
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.