



INTERIOR BOARD OF INDIAN APPEALS

Dan Bird *et al.* v. Acting Rocky Mountain Regional Director,
Bureau of Indian Affairs

48 IBIA 94 (11/10/2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

DAN BIRD <i>ET AL.</i> ,)	Order Affirming Decision, Subject to
Appellants,)	a Limited Remand
)	
v.)	
)	Docket No. IBIA 06-108-A
ACTING ROCKY MOUNTAIN)	
REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	November 10, 2008

Dan Bird and 20 other individuals (Appellants)¹ who hold grazing permits on the Blackfeet Reservation (Reservation) jointly appealed to the Board of Indian Appeals (Board) from a July 5, 2006, decision of the Acting Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director upheld a decision by the Blackfeet Agency Superintendent (Superintendent), BIA, to adjust the rental rate for existing grazing permits from \$10.75 an Animal Unit Month (AUM)² to \$18.00/AUM for individually-owned Indian lands on the Reservation, beginning with the 2006 grazing season, for the remaining 3 years of the 10-year permits. Appellants contend that the Regional Director’s decision was unreasonable because the appraisal upon which BIA relied to adjust the grazing rate (1) was conducted in an improper manner;³ (2) is inconsistent with other appraisals performed by the Office of the Special Trustee for American Indians (OST); (3) was not a “market analysis,” as requested by the Superintendent, but was instead an “appraisal;” and (4) was conducted by an unqualified

¹ The other appellants are Sam Bird III, Gilbert England, Bill Fenner, Lester “Bud” Gray, Lillian Hibbs, R. Wayne Hibbs, Rodney Hibbs, Carmelita Hoyt, Ted Hoyt, Arnie Johnson, Mike Loring, Jay Bob Lytle, Robert Lytle, Polite Pepion, Bill and Robert Powell, Rick Reagan, Albert Vaile Jr., Neil Gus Vaile, and Larry Whitford.

² An AUM is defined as “the amount of forage required to sustain one cow or one cow and one calf for one month.” 25 C.F.R. § 166.4.

³ Appellants argue that the appraiser employed inherently unreliable data; made improper assumptions about rental rates reported, and used too few comparables.

appraiser. We affirm the Regional Director's decision because Appellants have not met their burden of proof as to any of their arguments. However, exercising the Board's authority to prevent manifest error, we remand the case to the Regional Director to determine whether adjustments to the rental rate should be made to account for BIA's preparation fee and prepayment requirement, to ensure consistency with BIA's practice in setting grazing rental rates on other reservations.

Background

Appellants hold tribally-allocated⁴ grazing permits from BIA for individually-owned Indian lands on the Reservation, for the period from March 10, 1999, through March 9, 2009. The grazing rate for the permits was \$10.75/AUM. Under regulations applicable in 1999 when Appellants' permits were issued, the grazing rate of \$10.75/AUM represented BIA's determination of a "reservation minimum acceptable grazing rental rate" to "provide a fair annual return to the land owners." *See* 25 C.F.R. § 166.13(b) (1999). The applicable regulations provided "for review of the grazing fees by the Superintendent at the end of the first 5 years and for adjustment as necessary." 25 C.F.R. § 166.14(c) (1999).

The regulations at 25 C.F.R. Part 166 were amended after the permits in this case were issued. *See* 66 Fed. Reg. 7126 (Jan. 22, 2001). The regulations, as amended, no longer provide for a "reservation minimum acceptable grazing rental rate." The regulations now expressly provide that grazing rental rate adjustments conform to "fair annual rental" value, which 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." *See* 25 C.F.R. § 166.4 (2008). This definition does not preclude a reservation-wide AUM grazing rate, but it does require that such a rate be justified as applied to each permitted parcel of land. *See DuBray v. Great Plains Regional Director*, 48 IBIA 1, 4, 42-43 & n.35 (2008).

A Blackfeet Tribal Business Council resolution governing grazing privileges for the 1999-2009 permits provided for review of the grazing rate at the end of the 2004 grazing season. *See* Grazing Privileges on the Blackfeet Indian Reservation, Resolution No. 27-99,

⁴ Under BIA's grazing regulations, Indian tribes may allocate grazing privileges to tribal members, and BIA implements the allocations for grazing permits issued for individually-owned Indian lands. The grazing allocation gives the recipient a preference for obtaining a grazing permit without competition. *See* 25 C.F.R. § 166.10 (1999); 25 C.F.R. § 166.218(a)-(c) (2008); *see also Hall v. Great Plains Regional Director*, 43 IBIA 39, 40 (2006) (describing grazing allocation preference system).

Sec. VI. A(2). The Regional Director found that the Superintendent had authority, under BIA delegations of authority, under applicable regulations, and under the Tribe's Resolution No. 27-99, to adjust the rate.⁵

In October of 2004, the Superintendent requested a "market analysis of grazing rental rates for [the Reservation]" from OST. Memorandum from Superintendent to Barry Smith, Lead OST Appraiser, Oct. 20, 2004. By cover letter dated September 10, 2005, and pursuant to a contract with OST, Sue Hoell, a Montana Certified General Real Estate Appraiser with Value Consultants LLC, submitted what she characterized as the "Appraisal Report," entitled "Fair Grazing Rental Rates for the Blackfeet Indian Reservation" (Appraisal). *See* Letter from Sue Hoell to Barry Smith, Sept. 10, 2005. The Appraisal estimated that the market rental rate for grazing lands on the Reservation was \$18.00/AUM. Appraisal at 2 (Executive Summary), 7.⁶ The Appraisal was reviewed by James C. Ridgway, the OST Rocky Mountain Review Appraiser (Review Appraiser).

⁵ Appellants do not challenge this portion of the Regional Director's decision. The record does not contain a copy of an actual permit issued to any permittee. The record does, however, include a sample Grazing Permit Form 5-5521, dated May 1970. *See* Addendum to "Fair Grazing Rental Rates for the Blackfeet Indian Reservation," prepared by Value Consultants LLC (S. Hoell), July 27-Sept. 19, 2005. This form subjects the permit to the "regulations (25 CFR 166) prescribed by the Secretary of the Interior."

The May 1970 grazing permit form was subsequently revised, approved under OMB Control No. 1076-0157, and expanded to include a list of 18 Range Control Stipulations, which expressly address such matters as grazing an excess or deficit of the number of livestock permitted, permittee responsibilities for range improvements, etc. *See, e.g.*, Cheyenne River Reservation Grazing Permit No. 340 35071 (LeRoy DuBray) (copy from administrative record in *DuBray*, 48 IBIA 1). These stipulations are not found on the permit form in the record for this appeal.

⁶ Hoell described her assignment and the Appraisal as intended to enable BIA to establish "a market rental rate on the reservation as required by [25 C.F.R. § 166.400]," Appraisal at 7, a copy of which she included in the addendum to the Appraisal. Section 166.400 was promulgated after the permits in the present appeal were issued and does not require a reservation-wide rate, but as noted, the earlier regulations did provide for a "reservation minimum acceptable grazing rental rate." Hoell's approach was consistent with the earlier regulations, which apply in this case, and we find no basis to conclude, for purposes of deciding this appeal, that her reference to the subsequently promulgated regulations affected the validity of her appraisal.

The Appraisal offered an “opinion of market lease value,” employed a “market comparison approach,” and was primarily based on information obtained from 24 landowners and 40 private leases. *Id.* at 7, 10, 26. The appraiser began by compiling a list of 172 landowners thought to be either lessors or lessees, who were then contacted by phone or letter. Of those contacted, 76 reported that they did not currently lease land, 52 did not respond, 11 declined to provide information, 9 indicated that they were leasing government lands, and 24 provided information regarding one or more private leases, resulting in a total of 40 leases considered in the Appraisal. *See id.* at 10. The appraiser also obtained information from BIA offices in Billings, Montana; Farm Services Agencies; and lenders in Conrad, Shelby, and Cut Bank, Montana, including loan officer Bill Jimmerson of Stockman’s Bank in Conrad. The appraiser considered information from leases in Montana counties surrounding and including the Reservation, and found that “[m]ost leases were in the same tight value range, regardless of location⁷ or exact range conditions.” *Id.* The appraiser reported finding eight leases below \$18.00/AUM, ten leases at \$18.00/AUM, twelve leases at \$20.00/AUM, and four leases above \$20.00/AUM. *Id.* at 26.⁸ Thus, most leases were in the \$18.00/AUM - \$20.00/AUM range.

Hoell’s statement of experience and qualifications, attached as an addendum to the Appraisal, states that she is certified for, among other things, agricultural land appraisal. In the appraisal itself, Hoell examined the physical environment, climate, vegetation patterns, water resources, utility of the land for grazing or crops, the local economy, and prevailing market conditions. *Id.* at 11-13. She explained that the highest and best use of Reservation land is generally for agriculture and grazing, and that “[i]ncreasing demand for other uses is not observed.” *Id.* at 14. She described the effect of a 1997-2004 drought on grazing land availability, as well as the beneficial effects of 2005 precipitation on water levels. *Id.* at 12. She noted that with increasing costs of transportation, land, and fuel, lessees and other sources explained that trucking cattle is too expensive for small ranchers, and thus they are limited generally to a 10-mile radius where cattle can easily be herded. *Id.* Thus, she noted

⁷ Most of the lease information gathered was in Pondera County, which is partly within the boundaries of the Reservation and partly outside the Reservation, but “[t]o obtain sufficient Market Rent data,” the area researched included (in addition to Pondera County) properties north of the Reservation to the U.S. - Canada border, west to Glacier National Park, and part of Toole County, Montana. Appraisal at 2 (Executive Summary), 10.

⁸ Six leases are not reflected in this summary because the consideration was not reported in a price per AUM. *See, e.g.*, Appraisal, Table 1, Lease #28 (grazing rights exchanged for labor).

that physical proximity is a critical element to whether grazing is the highest and best use of land. *See id.* at 14.

Hoell described the Reservation as separated into 473 range units, explaining that the western-most part of the Reservation is steeper and has more woody vegetation; the remainder of the Reservation ranges from level to rolling and sloping terrain; and the range units are “partly fenced and cross-fenced and partly open range.” *Id.* at 13. She named eight “significant” surface water resources within the Reservation which “add value for grazing use and were considered in the final conclusion of value.” *Id.* She incorporated precipitation level maps and photographs identifying six precipitation zones, ranging from 10-12 inches of annual precipitation, to a narrow strip receiving 20-24 inches annually. *Id.* at 13-14; 15-16 (study area maps); *see id.* at 16-21 (maps of precipitation areas, and photographs of representative range units).

Hoell then presented the lease data in tables summarizing similarities and differences among the private lease samples. She examined whether the private leases placed responsibility on either the lessor or the lessee for maintaining fences and stockwater, and she prepared charts from which the AUM value could be compared to the allocation of such burdens. *See* Appraisal, Tables 1 & 2.

Hoell attempted to determine the significance of particular factors to price. She noted that the rates most often reported were in the \$18.00-\$20.00/AUM range, whether the information was obtained from lessees, lessors, lenders, or government staff. Explaining that an “efficient market” would place higher value on higher quality grazing resources, she concluded that the material collected suggested an inefficient market at work, where such factors as precipitation and quality of “grazing resources” did not have as much relevance to price as other variables. Appraisal at 22, 27. Dynamics contributing to lease prices included the fact that leases were contracts between neighbors. Hoell analyzed factors that would contribute to leasing in an efficient market, *id.* at 22-28, but explained that the extent to which such factors drive up or down the market rate was not indicated when so many leases clustered in the \$18.00-\$20.00/AUM range. *Id.* at 28. She concluded that the factor given “the most weight in land lease decision-making, is . . . convenience of the location, assuming at least average quality of grazing resources. That position was supported by the market evidence showing that the most westerly land leased for \$18/AUM even though some grazing resources may be superior in that area.” *Id.* at 30.

Hoell also looked to statewide average data and Federal lease rates. She stated that the latest data available showed that the average price paid in 2004 for leases per AUM in all of Montana was \$16.20-\$17.40/AUM. *Id.* at 28. By contrast, leasing of Federal lands is

based on a specific formula rather than an independent assessment of fair market value. *Id.* at 28-29.

Hoell found that the leases in the \$18.00-\$20.00/AUM range included various allocations of responsibility between the lessor and lessee for various services. *See id.* Tables 1 & 2. She concluded that when the lessee bears land and facility maintenance responsibilities, the lower-end rental rate within the range of \$18.00-\$20.00/AUM is indicated. The appraiser summarized her conclusions:

In the final analysis, Reservation lands are compared with Large agency lands and Private lands to make a qualitative adjustment between the \$18 & \$20/AUM range. For conditions which may make Reservation lands more desirable than the other options, \$20 was indicated. For those conditions which may make Reservation lands less desirable than the other options, \$18 was indicated. Where no difference was apparent, \$19 was indicated.

Id. at 30. In her final conclusion of value, the appraiser stated that “[c]onsidering the market driving factors mentioned most often by lessees and non-lessees, \$18/AUM is indicated as the overall lease-rate most applicable to Reservation lands as of August 31, 2005.” *Id.* at 32.

On December 15, 2005, relying on the Appraisal, the Superintendent issued a decision to adjust the grazing rental rate from \$10.75/AUM to \$18.00/AUM, beginning with the 2006 grazing season, for individually-owned Indian lands on the Reservation. Appellants appealed to the Regional Director, and on July 5, 2006, the Regional Director upheld the Superintendent’s decision.

Appellants appealed the Regional Director’s decision to the Board. Appellants filed an opening brief, and the Regional Director filed an answer brief.

Standard of Review

The Board has a well-established standard of review for 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.

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

Appellants argue first that the Regional Director's decision was unreasonable because the Appraisal relied upon inherently unreliable data, improperly assumed that the \$18.00/AUM rate reported was a grass-only rental rate,⁹ and used too few comparables, and thus was conducted in an improper manner. According to Appellants, the Appraisal therefore does not meet the Uniform Standards of Professional Appraisal Practice (USPAP). Second, Appellants argue that the Appraisal is inconsistent with appraisals conducted by OST for reservations in South Dakota because the rate set for the Reservation is higher. Third, Appellants argue that the Regional Director's decision is flawed because the Superintendent elected to request a "market analysis," but instead the appraiser provided an "appraisal." Finally, Appellants challenge the appraisal as unreliable because, they contend, the appraiser was unqualified to evaluate grazing rental rates. We conclude that all of Appellants' arguments lack merit, and therefore we affirm the Regional Director's decision. We address each argument in turn.

I. Was the Appraisal Conducted in an Improper Manner?

Appellants make three arguments that the appraisal was conducted in an improper manner and does not meet USPAP. First, Appellants contend that the evidence used by the appraiser was inherently unreliable because the appraiser didn't verify that survey respondents were providing her with accurate information over the phone. We disagree. Appellants provide no authority, either in USPAP or elsewhere, that an appraiser must separately verify all information supplied by survey respondents. In addition, as the Regional Director points out, the appraiser in this case collected information from numerous sources, covering 40 leases, and resulting in a relatively narrow range of values. Hoell explained that she obtained the names of possible sources of information from available documents in her file; the Montana Cadastral Survey Mapping Project; the Montana Secretary of State resources; Federal and State agency real estate staff; and lenders, realtors, and tribal staff. Appraisal at 7-8. She included the names the landowners and

⁹ In this case, we infer that a "grass-only rental rate" refers to the rental rate that a lessee would pay only for grass forage, without consideration of the value of or allocation of responsibility for land management services that benefit the lessee (e.g., fence construction and maintenance; maintenance of water facilities).

lessees contacted in the Appraisal file. *Id.* at 7.¹⁰ Appellants have produced no evidence to indicate any reason to suspect bias on the part of the respondents that would lead to inaccurate reporting, and we reject their bare allegation that the evidence was inherently unreliable simply because its accuracy was not separately verified in the Summary Report.

Appellants' next argument for why the appraisal was unreliable is that the appraiser mistakenly assumed that an \$18.00/AUM rental rate reported to her was a grass-only rental rate for AUMs. According to Appellants, the \$18.00/AUM rate was for both grass and land management services by lessors. In support of their argument, Appellants submit two affidavits. One affidavit is from Bill Jimmerson, a former loan officer who provided information to the appraiser. The other affidavit is from Gus Vaile, a rancher who resides on the Reservation. Jimmerson's affidavit states:

[A]t the time that I worked for Stockman Bank, . . . I know that no one was paying \$18.00 AUM rental rate for the reason that cattle prices were too high and that there was no way the ranchers could afford \$18.00 AUM rental. Further a \$10.75 AUM rental rate was closer to what the ranchers could afford; and

. . . [A]s a loan officer for Stockman Bank, *we would loan them \$18.00 AUM rental rate for the lease; however, only \$10.75 was the AUM rental rate, the remaining \$7.25 was used by the landowner to administer or care for cattle that were running on their property; and*

. . . [T]he \$10.75 AUM rental rate loaned by the bank was marginal; . . . ; and

[T]here is no doubt in my mind that the \$18.00 AUM rental rate is too high; that the AUM rental rate is much less than \$18.00; and that I would disagree with any statements made representing that I agreed with an \$18.00 AUM rental rate.

Affidavit of Jimmerson, ¶¶ 5-7 (emphasis added).

¹⁰ In addition, Hoell reported that she made diligent efforts to obtain information from around the Reservation, but that several lessees and lessors were unwilling to participate in her efforts. *Id.* at 22.

Vaile's affidavit states:

. . . [W]e may pay \$18.00 for lease, but this includes not only payment for grass, but also management of the cattle, which may include fencing, water, electricity, or whatever else is needed to protect the cattle; and

. . . [I]n the past we have paid \$10.75/AUM rental rate, plus \$7.25 for the management of the cattle; and

. . . . I have recently contacted my banker and asked if there was any way I could get the additional amount in a loan and the banker refused me stating that there is not enough income from the cattle.

Affidavit of Gus Vaile, at ¶¶ 3, 4, & 7.

These affidavits provide some evidence¹¹ that the \$18.00/AUM rate reported for some leases may include more than simply a grass-only rental rate. But this evidence is not inconsistent with data considered by the appraiser. The Appraisal itself specifically identifies several leases, at a rental rate of \$18.00/AUM, in which the lessor was responsible for maintaining fences and stockwater. What the appraisal also found, however, was that most of the leases were in the \$18.00-\$20.00/AUM range, and included various allocations of responsibility between the lessor and lessee for various services. *See* Appraisal, Tables 1 & 2. The appraiser concluded that when the lessee was responsible for various services, the lower-end rate of \$18.00/AUM was indicated, which is consistent with the Regional Director's decision.

In offering Jimmerson's affidavit to support their argument that the appraisal data is unreliable, Appellants refer to the appraiser's statement that she considered the market data obtained from Jimmerson to be "among the most reliable of the lease information gathered." Opening Brief at 2 (unpaginated) (quoting Appraisal at 9). But Jimmerson's affidavit does not describe or identify the actual data that he provided to Hoell, nor does he identify where the Appraisal itself purportedly misinterprets or misapplies that specific data. Jimmerson's and Vaile's assertions that an \$18.00/AUM rental rate included land management services do not establish that the appraiser misinterpreted or misapplied the

¹¹ The Regional Director criticizes the affidavits as anecdotal. We agree that they are not supported with documentation, and we have no basis for verifying Jimmerson's suggestion that, in loaning money to ranchers, lenders divide the loan into an AUM-cost component and a land-management-services component. But because the evidence provided is not inconsistent with evidence evaluated by the appraiser, we need not decide whether the evidentiary weight of these affidavits should be discounted.

data Jimmerson had provided, nor does Jimmerson deny, in the language emphasized above, having advised Hoell that \$18.00/AUM might be a representative rate.¹²

We conclude that the affidavits provided by Appellants are insufficient to satisfy their burden of proof to demonstrate that the Appraisal made improper assumptions or unreasonable estimations, or misapplied the data provided. Appellants express disagreement with the \$18.00/AUM rate, but we conclude that the affidavits are insufficient to establish that the appraiser's conclusion was unreasonable or was not supported by substantial evidence.

Appellants' third argument for why the Appraisal does not meet the standards of the USPAP is that the sample size was too small to be accurate or reliable. We are not persuaded. Appellants suggest that because the appraiser began with a list of 172 landowners thought to have leases, and ended with obtaining information from 24 landowners based on 40 leases, the response rate was only 14% ($24 \div 172 = 0.139$), and it somehow follows that the sample size itself was too small. But Appellants argument regarding the response rate is based on the premise that all 172 individuals on the appraiser's initial list had lease information to provide, which is either unsupported or flatly contradicted by the Appraisal. And they provide no authority in the USPAP or elsewhere to support their assertion that the 40 leases considered by the appraiser constituted an unacceptably small sample size for purposes of estimating the rental value of grazing on the Reservation.

From the initial list of 172 landowners, and except for the 24 landowners who provided information, the Appraisal explains that 76 of those contacted reported that they did not currently lease land, and a majority of the remaining persons were nonresponsive or refused to cooperate. *Id.* at 10. Thus, Appellants' premise that a response rate can be calculated based on the initial list of 172 landowners is erroneous. With respect to the issue of whether 40 leases constituted an unacceptably small sample size, the Regional Director's

¹² The two affidavits imply that when the rental rate was \$10.75/AUM, permittees actually paid an additional \$7.25/AUM to the landowner so that the landowner could use the money on land maintenance activities. But that would be inconsistent with Appellants' assertion that it is the permittees (not the landowners) who perform those obligations. Vaile's assertion that he was willing to pay a total of \$18.00/AUM for a lease, in what presumably would have been a private lease, is not supported by documentation showing that the parties separately itemized the value of the grass and the value of the land management services. As we have noted however, Vaile's assertion is not inconsistent with some of the data identified and considered by the appraiser.

decision quoted the Review Appraiser, who stated that “[t]he wide area & thorough data search resulted in an ample number of leases (40) located on & bordering 3 sides of the reservation to analyze & value the subject leases. The range of values is relatively narrow.” Decision at 5. We note that the appraiser’s conclusion regarding rental rates is supported by market data from the State showing that for leases in the year 2004, the statewide rental rate was significantly higher than the 1999 value of \$10.75/AUM — a value that Appellants suggest has remained unchanged ever since. Appellants have the burden of proof to demonstrate that the Regional Director’s decision is unreasonable, and we conclude that they have failed to do so based on their claims that the response rate was inadequate or that the sample size of comparable leases was so small as to render the appraiser’s conclusion unreasonable or not supported by substantial evidence.

II. Is the Regional Director’s Decision Unreasonable Because OST Appraisals for Grazing Rates are Inconsistent?

Appellants contend that appraisals by OST are inconsistent in determining grazing rental rates because on the Blackfeet Reservation ranchers are facing “a 71% increase in one year” in annual rental rates, while in South Dakota, “the value of land is three times the value and the amount of rain . . . is three times as high as it is on the Blackfeet Reservation and they pay \$7.00 AUM.” Opening Brief at 3. The Regional Director responds by arguing that market conditions, forage quality, and local geographical characteristics are different between the Reservation, in northwestern Montana, and reservations on the plains of South Dakota.

Appellants provide no evidence to support their assertions regarding the value of land in South Dakota, the amount of rain, or the \$7.00/AUM rate, nor do they provide evidence to demonstrate that the markets, conditions, and costs are otherwise comparable. Appellants do not offer as evidence any other appraisals prepared by or approved by OST that purportedly are inconsistent with Hoell’s appraisal. Appellants’ bare assertions, standing alone, are not sufficient to satisfy Appellants’ burden of proof that the appraisal used in this case to set the rate was unreliable or inconsistent with other appraisals, or that the Regional Director’s decision was unreasonable.¹³

¹³ This appeal is distinguishable in several respects from recent appeals in which the Board vacated four grazing rate decisions issued by the Great Plains Regional Director, BIA, and remanded them for further consideration. See *Standing Rock Grazing Ass’n v. Acting Great Plains Regional Director*, 48 IBIA 75 (2008) (Standing Rock grazing rate decision for 2008 season); *Longbrake v. Acting Great Plains Regional Director*, 48 IBIA 70 (2008) (Cheyenne (continued...))

III. Is the Regional Director’s Decision Flawed Because the Appraiser Prepared an “Appraisal” Instead of the “Market Study” that the Superintendent Requested?

Appellants contend that the Superintendent requested a “market analysis,” and not an appraisal, but Hoell conducted an appraisal. Alluding to a regulation that was promulgated after the permits were issued, 25 C.F.R. § 166.401 (2008), Appellants assert that BIA’s grazing regulations provide that if an appraisal is not desired, any other method can be used in conjunction with a market study. *See* Opening Brief at 3.¹⁴ Apparently, Appellants construe this regulation to compartmentalize “appraisals” and “market analyses” into mutually exclusive categories. In their view, because the Superintendent requested a

¹³(...continued)

River grazing rate decision for 2008 season); *Cadotte v. Great Plains Regional Director*, 48 IBIA 44 (2008) (Standing Rock grazing rate decision for 2007 season); *DuBray*, 48 IBIA 1 (Cheyenne River grazing rate decision for 2007 season). First and foremost, the analysis and logic in the Appraisal in this case are transparent. Second, in *DuBray* in particular, the appellants met their burden of proving that the market study relied upon in that case was flawed, by submitting a detailed critique of particular findings and noting the absence of calculations and explanations necessary to understand how the appraiser arrived at certain figures. In the present case, Appellants have identified no similar flaws, and the two affidavits they submit are insufficient to undermine our conclusion that the analysis and conclusion reached by Hoell are supported by substantial evidence. Third, the recent decisions involving the Cheyenne River and Standing Rock Reservations arose under the post-2000 grazing regulations, which incorporate a specific definition of “fair annual rental” that focuses on the value of a permitted parcel of land and departs from the previous concept of a “reservation minimum acceptable grazing rental rate.” *See supra* at 95. Finally, the permits in this appeal differ from and pre-date the permits in effect in the Cheyenne River and Standing Rock cases. Unlike those cases, in the present case Appellants do not rely on any obligations arising under their permits, such as obligations or conditions included in the Range Control Stipulations, that allegedly would distinguish their permits from the private leases reviewed by Hoell.

¹⁴ Section 166.401 (“How does the BIA establish grazing rental rates?”) provides:

An appraisal can be used to determine the rental value of real property. The development and reporting of the valuation will be completed in accordance with the Uniform Standards of Professional Appraisal Practices (USPAP). If an appraisal is not desired, competitive bids, negotiations, advertisements, or any other method can be used in conjunction with a market study, rent survey, or feasibility analysis developed in accordance with the USPAP.

“market analysis,” he meant to preclude an “appraisal” approach, and therefore BIA’s grazing rate decision is procedurally defective for relying on Hoell’s appraisal.

Appellants’ argument is unfounded for several reasons. First, the regulatory provision on which Appellants rely does not even apply here. Section 166.401 was promulgated in 2001, after Appellants’ permits were issued.¹⁵ The 1999 permits at issue in this appeal are subject to the regulations at 25 C.F.R. Part 166 in effect at the time the permits were issued. Second, it is clear that Hoell used a “market comparison approach,” *see* Appraisal at 7, and Appellants provide no substantive explanation for how a market comparison approach purportedly differs from a “market analysis,” although the two would appear to be the same or similar. Thus, we find no inconsistency between what Hoell provided and what the Superintendent requested. Third, it is equally clear from Hoell’s report that she considered the market comparison approach as a type of an appraisal. *See id.* at 7 (“An appraisal is an opinion of value. . . . The Market Comparison Approach is the applicable approach to arrive at a credible opinion of value”). We reject Appellants’ implication that a “market analysis” and an “appraisal” are mutually-exclusive terms, and we find no basis for construing the regulations or the USPAP as creating such mutual exclusivity. Thus, Appellants’ argument that Hoell’s “Appraisal Report” employed a methodology that was contrary to the request from the Superintendent for a market analysis, and which rendered BIA’s rate decision procedurally defective, is without merit.¹⁶

IV. Was the Appraiser Qualified?

Appellants’ final argument is that the appraisal process was defective because Hoell had an appraisal license but no experience in appraising rural or agricultural land. Opening Brief at 2-4. We agree with the Regional Director that this argument is unfounded and without merit. Hoell’s appraisal certification includes certification for conducting agricultural appraisals. The appraisal itself employs data, maps, and information from relevant sources regarding the highest and best use of land for agricultural and grazing

¹⁵ Moreover, section 166.401 applies to BIA’s determination of a rate for new permits. *See Rosebud*, 41 IBIA at 305-306. A separate provision, 25 C.F.R. § 166.408, applies to grazing rental rate adjustments for existing permits.

¹⁶ We summarily reject an additional argument made by Appellants that contrary to the regulations, it was OST, rather than BIA, that made the grazing rate decision in this case. It is clear that BIA made the decision; OST simply provided the appraisal. *Cf. DuBray*, 48 IBIA at 23-24 (rejecting argument that Regional Director mistakenly believed he was legally bound by the appraiser’s recommended grazing rate).

purposes. Absent some extraordinary evidence to draw an appraiser's qualifications into question, the Board will not look behind the certification of an appraiser or evaluate an appraisal based on the relative experience of the particular appraiser. Appellants have presented no such evidence here.

V. Adjustments for BIA's Preparation Fee and Prepayment of Grazing Fees

Although we have rejected Appellants' vague and generalized allegations that the Appraisal was inconsistent with other appraisals conducted by OST, we address, *sua sponte*, one issue that is not raised by Appellants, but which implicates the Board's authority to examine a matter outside the normal scope of review in order to correct manifest error. *See* 43 C.F.R. § 4.318.¹⁷ In each of the four grazing rental rate cases that the Board recently decided, BIA instructed the appraiser to include a deduction to adjust for the cost of BIA's 3% preparation fee and the cost to the permittees of being required to pay their entire annual grazing fee at the beginning of the grazing season ("prepayment requirement"). *See, e.g., DuBray*, 48 IBIA at 6-7. In none of those cases was the propriety of these deductions at issue.

In the present case, the Appraisal does not indicate that any adjustments were made for either of these factors. But if it was appropriate for BIA to make those deductions as a matter of course in setting an appropriate rental rate for Indian lands on other reservations, it may be inappropriate for BIA to fail to do so here. The regulations in place in 1999, at the time the permits in this case were issued, required the advance payment of annual grazing fees. 25 C.F.R. § 166.21 (1999). They also required assessment of a preparation fee on the permittee, 25 C.F.R. § 166.22 (1999) (though the assessment could be as low as 1% and never exceed \$250, and was not necessarily imposed if expenses are paid from tribal funds).

If, as appears to be the case, BIA now accepts the necessity of making these deductions, arguably the Board should require consistency for Blackfeet grazing fees, and has authority to do so under 43 C.F.R. § 4.318. We cannot determine from the record, however, whether such preparation fees were actually charged to the permittees, or whether prepayment was actually required in all cases. In order to ensure that proper deductions are made for these factors, we remand this limited issue to the Regional Director. On remand,

¹⁷ Section 4.318 provides that the scope of review for an appeal will be limited to those issues that were before the decision maker whose decision has been appealed, but also provides the Board with authority to expand its review where appropriate to correct a manifest injustice or error.

the Regional Director shall either make adjustments to the \$18.00/AUM rate to account for these factors, or explain why no further adjustments are necessary.

Conclusion

Appellants have not met their burden to show that the Regional Director's decision is unreasonable or is not supported by substantial evidence. 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 affirms the Regional Director's July 5, 2006, decision, subject to the limited remand described above.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Lisa K. Hemmer
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.