



INTERIOR BOARD OF INDIAN APPEALS

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

48 IBIA 109 (11/13/2008)

Related Board case:

41 IBIA 119

Related Litigation:

O'Bryan v. United States, 93 Fed. Cl. 57, 2010 WL 1990049
(Fed. Cl. 2010)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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TODD O'BRYAN,)	Order Vacating Decision and Remanding
Appellant,)	
)	
v.)	
)	Docket No. IBIA 06-53-A
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	November 13, 2008

Appellant Todd O'Bryan appeals to the Board of Indian Appeals (Board) from a February 7, 2006, decision (Decision) by the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director, BIA), which assessed \$23,732.01 in "liquidated damages"¹ against Appellant for overstocking violations of grazing permits that he held for Range Units (RUs) 6 and 9 on the Pine Ridge Reservation in South Dakota.² This dispute is before the Board following the Board's remand in 2005 to the Regional Director to reconsider the liquidated damages portion of his December 8, 2003, decision (2003 Decision). See *O'Bryan v. Acting Great Plains Regional Director*, 41 IBIA 119 (2005) (*O'Bryan I*).

In *O'Bryan I*, we affirmed BIA's cancellation of Appellant's grazing permits, but we vacated and remanded the liquidated damages portion of the Regional Director's 2003 Decision. We acknowledged in *O'Bryan I* that Range Control Stipulation No. 2 (RCS

¹ Liquidated damages are contractually-specified damages that are agreed to by the parties to a contract for breaches of the contract. See *Knecht Enterprises, Inc. v. Great Plains Regional Director*, 44 IBIA 87, 96 n.11 (2007) (citing 22 Am. Jur. 2d *Damages* § 493 (2003)). Liquidated damages may be expressed as a fixed amount for a particular breach or as a formula from which the amount of damages is derived.

² Range units or RUs are consolidated tracts of rangeland that BIA creates with the consent of the Indian landowners for the purpose of grazing management. See 25 C.F.R. §§ 166.4, 166.302.

No. 2), which was part of Appellant's grazing permits and on which the Regional Director relied in calculating the liquidated damages, had been upheld as enforceable in prior decisions. RCS No. 2 provides in relevant part,

if the number of livestock authorized [to graze on the leased RU] is exceeded, the permittee shall be liable to pay as liquidated damages, in addition to the regular fees for the full grazing season as provided in the permit, a sum equal to 50 percent thereof for such excess livestock and such livestock shall be promptly removed from the unit.

However, we also noted that whether a liquidated damages provision, such as RCS No. 2, is enforceable “in any given situation may depend upon whether it is reasonable in that situation.” *Id.* at 128. We found that the facts of Appellant's case suggested a “strong possibility” that the application of the liquidated damages provisions — i.e., assessing \$94,928.04 in damages — might not be reasonable. *Id.* at 129. Therefore, and as recognized by the Regional Director in the present appeal, we remanded the matter to BIA and “instructed the BIA to calculate the actual damages, at least approximately, so that the reasonableness of applying the liquidated damages provision could be determined.” Answer Brief at 1.

On remand, the Regional Director attempted to “approximate” actual damages. But instead of using that approximation to determine whether it was reasonable to apply the \$94,928.04 liquidated damages sum, the Regional Director then imposed the approximated actual damages as “recalculated liquidated damages” in the amount of \$23,732.01. Answer Brief at 3. The Regional Director arrived at the amount by calculating the value of the forage consumed by the excess livestock (\$15,821.34) and adding this amount to an estimated “forecast [of] just compensation for the injury to the land” caused by the overgrazing (\$7,910.67). Answer Brief at 1, 3. The amount for forage was calculated by multiplying the permit price of an Animal Unit Month (AUM³) (\$9.14) by the number of excess cattle (577) and by the number of months (3) that the excess cattle foraged on the RUs. To compute damages for the injury to the land, the Regional Director multiplied the value of the forage by 50%, and added this figure to the damages that were based on forage consumption.

³ AUM or “Animal Unit Month” is used to refer to “the amount of forage required to sustain one cow or one cow with one calf for one month.” 25 C.F.R. § 166.4.

We conclude that the Regional Director's Decision must again be vacated and the matter remanded. We cannot affirm the Regional Director's assessment of \$23,732.01, either as "recalculated liquidated damages" or as actual damages. First, the liquidated damages calculation was not made pursuant to the formula set forth in Appellant's grazing permit and the Regional Director has no authority to impose a different formula. Second, although the Board did not find it necessary in *O'Bryan I* to address the different interpretations by the Superintendent and the Regional Director of RCS No. 2 in calculating liquidated damages, we now conclude that the Regional Director correctly interpreted and calculated the liquidated damages provision in his December 2003 Decision in the amount of \$94,928.04. Because we conclude (as, apparently, the Regional Director did also) that this amount is grossly disproportionate to the estimated actual damages, we conclude that BIA is limited to assessing actual damages, if any, against Appellant for his overstocking.

Finally, as to actual damages, we cannot affirm the Regional Director's assessment because, at best, it purports to approximate actual damages and is not adequately supported as an assessment of actual, provable damages. Therefore, we remand this matter to the Regional Director to determine whether actual damages are provable and, if so, to assess actual damages.⁴

Background

A. *O'Bryan I*

The history of Appellant's leases and lease violations is recounted more fully in *O'Bryan I*. We set forth only that history necessary for an understanding of our decision today.

In January 2001, Appellant was awarded 5-year grazing permits for RUs 6 and 9 that commenced on November 1, 2000. The permits authorized Appellant to graze 165 head of cattle on RU 6 and 168 head of cattle on RU 9 for a total of 333 head of cattle or "animal units" (AUs). The permits also incorporated a number of range control stipulations, including RCS No. 2, to govern the use and management of the leased rangelands. In 2003, BIA determined that Appellant was overstocking RUs 6 and 9.

⁴ Although we are again remanding the matter to the Regional Director, we reconfirm our holding in *O'Bryan I* that Appellant is liable for his overstocking violations, and we again reject Appellant's arguments to the contrary.

Specifically, BIA counted a total of 1,214 yearlings on the RUs, which were 577 AUs more than the aggregate number allowed under Appellant's 2 permits (i.e., nearly 3 times the number Appellant was authorized to graze).⁵ BIA observed the excess livestock on the RUs on various dates over a 3-month period. BIA urged Appellant to seek modification of his permits to allow the excess stock to graze on the RUs and informed him that a modification would be approved, but Appellant failed to submit any paperwork to request the modification.⁶

As the overgrazing continued and Appellant failed to submit a written request for a modification of his permits, the Superintendent of BIA's Pine Ridge Agency canceled his grazing permits in July 2003 and imposed liquidated damages against Appellant in the amount of \$55,504.50. Thereafter, by July 11, 2003, Appellant had removed all of his livestock from RUs 6 and 9, and he appealed the Superintendent's decision to the Regional Director.

In response to Appellant's appeal, the Regional Director reassessed liquidated damages against Appellant in the amount of \$94,928.04 and affirmed the cancellation of Appellant's permits. In reassessing (and increasing) liquidated damages, the Regional Director interpreted and applied RCS No. 2 by (1) calculating "regular fees" for the excess livestock for the full grazing season of 12 months and (2) adding 50%.⁷

⁵ BIA arrived at 577 AUs as follows:

$$1,214 \text{ yearlings} \times .75 \text{ AU} = 910.5 \text{ AUs}$$

$$910.5 \text{ total AUs} - 333 \text{ authorized AUs} = 577.5 \text{ unauthorized AUs}$$

As the Regional Director explained in his 2003 Decision, "[o]ne yearling is equivalent to .75 AU." *O'Bryan I*, 41 IBIA at 122.

⁶ There is no evidence in the record of the number of additional livestock that Appellant would have been permitted to graze had he applied for a modification of his permits, or the terms that would have been attached to any such modification.

⁷ The Regional Director calculated the "regular fees" by multiplying 577 (excess livestock) by \$9.14/AUM and, because Appellant held year-long grazing permits, again multiplied the sum by 12 months ($577 \times 9.14 \times 12$) for a total of \$63,285.36. To this amount, the Regional Director added 50% (\$31,642.68) to arrive at the liquidated damages amount of \$94,928.04.

On appeal to the Board in *O’Bryan I*, the Board affirmed BIA’s determination that Appellant overstocked RUs 6 and 9 by 577 AUs for a period of 3 months and affirmed the cancellation of Appellant’s grazing permits for these two RUs. 41 IBIA at 129-32. However, the Board vacated and remanded the assessment of liquidated damages. The Board acknowledged that — as a general rule — it “has held that the liquidated damages provision in the [RCS] is enforceable.” *Id.* at 128 (citing *Buffington v. Acting Great Plains Regional Director*, 37 IBIA 12 (2001); *Lopez v. Acting Aberdeen Area Director*, 29 IBIA 5 (1995)). The Board clarified, however, that “whether a liquidated damages provision in a contract is enforceable in any given situation *may depend upon whether it is reasonable in that situation.*” *Id.* (emphasis added). We could not determine in *O’Bryan I* whether the assessment of \$94,928.04 in liquidated damages was reasonable compensation for any injury sustained as a result of Appellant’s overstocking, and concluded that there was a “strong possibility” that it was an unreasonable amount. *Id.* at 129.

We explained that where a contract, such as a grazing permit, has been breached, the only permissible damages for the breach are compensatory damages, i.e., a monetary amount that compensates the non-breaching party for any actual injury or injuries sustained as a result of the breach. Damages that exceed compensation for injury are punitive and may not be assessed for breach of contract. *See id.* at 128-29 & n.12. By way of example only, we suggested that if \$9.14 represents the cost of forage consumed each month by one AU,

damages for forage consumed by 577 AUs for three months would be about \$15,821.34. *This figure is only approximate* because, among other possible considerations: (1) \$9.14 might not represent the true value of forage consumed; (2) there might be other actual damages, in addition to the value of the forage consumed; and (3) the other components of the formula might require adjustment. Another factor to be considered is the apparent absence of livestock on RUs 6 and 9, and thus the lack of any forage consumption, during the [remainder] of the year.

Id. at 129 (emphasis added). The Board then remanded the matter to the Regional Director for a calculation, or at least an approximation, of actual damages.⁸

⁸ The Board also reminded BIA of its duty, under 25 C.F.R. § 166.705(a), to consult where feasible with the landowners — including the Tribe — concerning the imposition of damages. *Id.* at 127.

B. Regional Director's February 7, 2006, Redetermination of Damages

On remand, the Regional Director assessed damages in the amount of \$23,732.01 against Appellant. He determined that “the value of the grazing” was \$9.14/AUM multiplied by the number of excess AUs (577) and by the number of months of overstocking (3), which yielded \$15,821.34 as “the fee which would have been charged to [Appellant] if the livestock had been authorized.” Decision at 1-2. Next, the Regional Director applied a 50% increase, or \$7,910.67, to the above grazing fee. According to the Decision, “[RCS No. 2] calls . . . for the payment of a sum equal to 50 percent . . . of [the fee that would have been charged had the excess livestock been authorized].” *Id.* at 2. The Decision does not identify any specific items of injury or loss caused by the overstocking beyond the “value of the grazing” that would have been charged nor does the Decision contain any determination that additional actual damages cannot be reasonably calculated or approximated. The Decision does not state whether the landowners were consulted.

Appellant has now appealed the Regional Director's Decision to the Board, and both Appellant and the Regional Director filed briefs. Appellant argues against the recalculated damages assessments on three grounds: (1) there is no authority for the recalculated damages assessed by the Regional Director, (2) the damages are unreasonable because BIA told Appellant that it would approve a modification to his permits to increase the grazing capacity of RUs 6 and 9, for which reason there cannot be any injury to the land, and (3) damages may not be assessed because there is no evidence that the Regional Director consulted with the Tribe or the other landowners before seeking damages.⁹

⁹ Appellant also raises new arguments against the imposition of *any* damages, which we reject. The time for Appellant to raise these arguments was on appeal from the 2003 Decision and, indeed, Appellant did so at that time. The Board considered Appellant's arguments at the time of its decision in *O'Bryan I* and rejected them. *See* 41 IBIA at 126-27. Appellant did not seek reconsideration of the Board's decision and the time for doing so is now long past. *See* 43 C.F.R. § 4.315. The fact that the Board remanded the damages portion of the 2003 Decision to the Regional Director does not provide Appellant with a second or renewed opportunity to challenge the imposition of damages on appeal from the Regional Director's decision after remand. The Board has affirmed the Regional Director's authority, under the facts of this case, to impose damages to redress any injury or loss to the landowners; what remains in dispute is a determination of injury or loss sustained, and the amount due to the landowners to compensate them for injury or loss, if any there be.

The Regional Director explains in his brief that the reduced assessment of \$23,732.01 constitutes his estimate of actual damages. He “calculat[ed] the value of the forage consumed and relied on the liquidated damages formula [in RCS No. 2] to approximate the actual damages caused by the permit violation of overstocking.” Answer Brief at 1-2. The Regional Director also submitted his declaration in which he outlines the damage that can occur to rangelands that are overgrazed. He relies on excerpts from an Ecological Site and Similarity Index Survey (ESSIS) done in Summer 2005 that shows that the stocking rate or grazing capacity of RUs 6 and 9 had declined.¹⁰ According to the ESSIS, the former stocking rate for RU 6 was 2.50 acres per AUM (Ac/AUM) while in 2005 the stocking rate had decreased to 3.32 Ac/AUM; the former stocking rate for RU 9 was 2.70 Ac/AUM while in 2005 it had decreased to 3.36 Ac/AUM.¹¹ The ESSIS also states that “the average stocking rate across all range units of the [Pine Ridge Reservation is] 3.33 ac/AUM (0.3 AUM/ac).” ESSIS at ES-2. The Regional Director does not opine whether the reduced productivity of the RUs is directly attributable to Appellant’s overgrazing and if so, the duration of the injury. Nor does the Regional Director indicate whether the costs of restoring quality and quantity of forage on the RUs can be determined.

The Regional Director also states in his declaration that if Appellant had requested a modification to his grazing permits to increase the grazing levels of RUs 6 and 9, certain “safeguards” would have been required before the modification could have been approved. Declaration of Regional Director at 3. The Regional Director does not explain what the safeguards would have been or how the safeguards would have reduced or avoided damage to the land, but presumably the safeguards would have protected the land from degradation. The Regional Director does not state how many additional AUs Appellant would have been permitted in any modification to his permits nor does he state what, if any, additional compensation would have been obtained for the landowners and whether the term would have changed from year-long to seasonal.

Appellant did not submit a reply brief.

¹⁰ The ESSIS is an inventory of plant composition and stocking rates on the Pine Ridge Reservation, including RUs 6 and 9, prepared for BIA by a private contractor.

¹¹ The ESSIS also determined that the total AUMs for RUs 6 and 9, before prairie dog town calculations, were 1,493 and 1,638, respectively, or a total of 3,131 AUMs, which calculates to 261 AUs for yearlong grazing (3,131 AUMs ÷ 12 months). Prairie dog town calculations would further reduce the available AUMs. *See* ESSIS at ES-3 (“The presence or absence of prairie dogs can significantly influence overall forage production for a particular range unit”).

Discussion

At the outset, we note that the Board remanded the matter to the Regional Director for calculation or approximation of the actual damages caused by Appellant's overstocking, but did not decide whether, in the final analysis, the imposition of liquidated damages could be justified or whether BIA was limited instead to assessing actual damages. We now reject the Regional Director's recalculated liquidated damages of \$23,732.01 because the parties did not agree to the methodology utilized by the Regional Director to calculate liquidated damages. We affirm, instead, the methodology originally utilized by the Regional Director to calculate liquidated damages in his 2003 Decision in the amount of \$94,928.04. However, we conclude that this amount is unreasonable, given that the Regional Director's effort to approximate actual damages yielded no more than \$23,732.01. Finally, we conclude that the Regional Director's calculation of \$23,732.01 cannot be sustained as approximate actual damages because there is no demonstrated nexus between the amount calculated and actual injury to the land. Therefore, we again remand this matter to the Regional Director for a calculation of *actual* damages. If there is no injury to the landowners, either in the form of injury to the land or forage consumed, BIA is limited to cancelling Appellant's permits as the remedy for his breach.

A. Standard of Review

Discretionary decisions by BIA, such as the Regional Director's assessment of damages, are reviewed to determine whether they are in accordance with the law, supported by the administrative record, or otherwise arbitrary or capricious. *Runsabove v. Rocky Mountain Regional Director*, 46 IBIA 175, 183 (2008); *Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007). At all times, the burden rests with Appellant to show that the Regional Director did not properly exercise his discretion. *See id.*

We review *de novo* any legal determinations made by BIA. *Id.* If the Board concludes that BIA's decision does not survive scrutiny under these standards, the Board does not substitute its judgment in place of BIA's but will remand the matter to the Regional Director for further consideration. *Runsabove*, 46 IBIA at 183.

B. Damages

1. Liquidated Damages

In his Decision, the Regional Director purported to impose "liquidated damages" that were, apparently, a hybrid of actual and liquidated damages. The Regional Director

determined that regular fees of \$9.14/AUM would have been collected for the forage consumed by the excess livestock for the 3 months they were observed on the RUs (577 excess AUs x \$9.14 value of forage x 3 months = \$15,821.34). To this amount, the Regional Director added 50% (\$7,910.67) to compensate for unspecified damage to the land from overgrazing. The Regional Director concedes that he borrowed the 50% factor from the liquidated damages provision of Appellant's permits, namely RCS No. 2. The Regional Director then assessed this hybrid total of \$23,732.01 against Appellant as liquidated damages. We cannot uphold the Regional Director's assessment, either as liquidated damages or as actual damages.

Appellant correctly points out that nothing in the regulations or in the RCS permits BIA to calculate liquidated damages pursuant to any formula other than that set out in RCS No. 2. As we have previously held, the parties are not free to unilaterally rewrite the terms of their contracts. *See, e.g., Merrill v. Portland Area Director*, 19 IBIA 81, 86 n.5 (1990) (tribes may not unilaterally alter the provisions of a lease).

The language of RCS No. 2 previously has been interpreted by both BIA and the Board. In *Lopez*, 29 IBIA at 10-11, the Board upheld BIA's interpretation of RCS No. 2 in connection with an overstocking violation where appellants held a yearlong grazing permit. We construed the phrase, "the regular fees for the full grazing season," as found in RCS No. 2, to mean "the *annual* fee per animal unit for each excess animal unit" because the permittee held a year-round permit. *Id.* at 11. To this amount, we held it was appropriate to add 50% of the regular fees calculated for the excess livestock to reach the total amount of liquidated damages. *Id.* Therefore, and accepting BIA's \$9.14/AUM figure as the appropriate "annual" or "regular" fee per AU, properly calculated liquidated damages for Appellant would be \$94,928.04 (\$9.14/AUM x 12 months x 577 excess AUs x 1.5). Nothing in the terms of Appellant's grazing permit or in the RCS permits the Regional Director to prorate the liquidated damages or apply a different formula than the one contained in and authorized by the RCS. Thus, the Regional Director's 2003 Decision correctly interpreted the liquidated damages formula and correctly calculated the total amount, leaving only this issue of whether that amount could be sustained as reasonable.¹²

¹² In essence, the Regional Director prorated the liquidated damages — as they would be calculated under the terms of Appellant's permit — to the length of time Appellant overstocked the RUs: $\$94,928.04 \div 4 = \$23,732.01$. As discussed above, nothing in the terms of Appellant's grazing permits allows liquidated damages to be calculated pursuant to any formula, including proration, other than the formula set out in RCS No. 2.

Given the Regional Director's determination in his most recent Decision that a lesser amount of liquidated damages reasonably approximates actual damages, it is evident that the imposition of the liquidated damages that he originally assessed would not be reasonable. Therefore, the only damages that may be assessed against Appellant are actual damages. We turn now to determine whether the Regional Director's assessment of \$23,732.01 can survive scrutiny as actual damages.

2. Actual Damages

We are unable to affirm the Regional Director's assessment of \$23,732.01 as actual damages. First, the Regional Director appears to assume that Appellant is liable for the forage consumed by the excess livestock notwithstanding the absence of Appellant's livestock from the RUs for the last quarter of the grazing season. Second, the Regional Director argues that overgrazing is known to cause plant life to die, noxious weeds to sprout, and plant vitality (including nutrients) to suffer, but the record does not reflect any correlation between Appellant's overgrazing for 3 months in 2003 with the documented degradation in grazing capacity on RUs 6 and 9 in 2005. We discuss each of these points in greater detail below.

a. Forage Consumption

The Regional Director asserts that "[t]he value of grazing" was \$9.14/AUM and that \$15,821.34 (577 x \$9.14 x 3 months) "would have been charged to [Appellant] if the livestock had been authorized." Decision at 1, 2. What the Regional Director does not address is the fact that Appellant did not complete the yearlong grazing season, which ran through October 31, but instead removed all of his livestock by July 11, 2003, and apparently did not return. *If* a component of actual damages is based on the value of *excess* forage consumed by unauthorized, excess livestock, then the Regional Director must consider not only the gross value of the amount of forage consumed but also whether this forage would likely have been consumed in the absence of Appellant's breach, i.e., during the remainder of the grazing season. *See O'Bryan I*, 41 IBIA at 120 (as a result of the overstocking, the available AUMs were "nearly used up").

Thus, on remand, the Regional Director must determine whether and to what extent Appellant took forage to which he was not entitled and determine the cost thereof in accordance with the above instructions.

b. Injury to Land

The Regional Director added an additional 50% to the grazing fee as an approximation of actual damages to the land from Appellant's overstocking. Because there is no factual correlation in the record between any injury to RUs 6 and 9 and Appellant's overstocking, we cannot sustain an assessment of damages for injury to the land. The Regional Director has not identified any specific injury to the land nor has the Regional Director explained how this amount (\$7,910.67) compensates the landowners for any specific injury to the land. Therefore, we must reject this portion of the Regional Director's assessment of damages.

The Regional Director explains in his declaration that overstocking generally leads to a reduction in plant vigor by causing plants to die and new plants to grow in their place that are less desirable and productive. He relies on the ESSIS study, which shows that in 2005, two years after Appellant overstocked RUs 6 and 9, both of the RUs had sustained a reduction in forage production, which then led to decreased grazing capacity. According to the ESSIS study, the acreage per AUM required on both RUs increased nearly 33%, which means that the overall grazing capacity for a year-long permit presumably decreased from 333 AUs to approximately 261 AUs.¹³ However, nothing in the record before the Board supports a finding that the degradation in forage on the RUs in 2005 is directly attributable in whole or in part to Appellant's overgrazing in 2003. At best, the Regional Director's declaration suggests that Appellant's overgrazing might have been a factor, which, in the absence of additional evidence, is speculative.

Even assuming that the Regional Director were able to directly attribute the degradation in forage to Appellant's overstocking (or can attribute a percentage of the degradation to the overstocking), the Regional Director does not explain the costs of restoring plant vitality to the RUs to what they would have been had Appellant not overgrazed. Instead, the Regional Director explains that he "could only approximate actual damages" because injury to the land occurs over time, which is why he "needed to continue to rely on the liquidated damages provision [i.e., 50% of the value of forage consumed] to forecast the just compensation owed Indian landowners." Answer Brief at 4. But, nothing in the record or the Regional Director's explanation informs us why 50% of the value of forage consumed is a reasonable calculation of the actual damage over time to the land from overgrazing.

¹³ This assumption does not take into account the effect of prairie dog towns, if any, on the RUs. See note 11 *supra*.

Alternatively and assuming that, over time and with proper range management, the plant life may regenerate on its own, the Regional Director could calculate the loss of future rental value for the estimated time it would take for the RUs to be rehabilitated. Costs of restoration may also be a combination of active restoration efforts and appropriate range management (passive restoration) that enables the RUs to recover any lost plant vigor. Again, the Regional Director would calculate the cost of active restoration efforts and loss of rental income to determine actual damages.

Therefore, we vacate the Regional Director's decision and remand this matter to him for his calculation and assessment of *actual* damages. On remand and assuming that the Regional Director can establish that actual damage or loss has occurred as the result of Appellant's overgrazing, the Regional Director should identify each element of actual injury and loss and calculate the costs of repair or restoration or the amount of loss.

C. Tribal Consultation

As we noted in *O'Bryan I*, 25 C.F.R. § 166.705(a) states that where a permittee fails to cure a violation, BIA "will consult with the Indian landowners, as appropriate, and determine [what course of action will be taken]." 41 IBIA at 127 (quoting section 166.705(a)). We questioned whether Appellant, as a permittee, would have standing to assert the interests of the landowners, and stated that, "[a]t a minimum, it would seem that Appellant would need to show that [BIA's] action was in fact contrary to the landowners' wishes." *Id.* Because Appellant adduces no evidence to show that the Regional Director's assessment of damages was contrary to the wishes of the landowners, we conclude that he has not met his burden of showing error.¹⁴

Conclusion

We cannot affirm the Regional Director's assessment of "recalculated liquidated damages" because nothing in Appellant's lease, including the attached RCS, permits the Regional Director to modify unilaterally the liquidated damages calculation in RCS No. 2. To the extent that the recalculated liquidated damages are an approximation of actual damages, we cannot affirm because there has been no determination of actual loss or injury

¹⁴ We do not suggest that, even if such evidence were produced, Appellant has standing to assert the interests of the landowners or that the failure by BIA to consult would require us to vacate an assessment of damages. These issues — as well as the extent to which BIA must consult with the landowners — also remain to be decided.

by the Regional Director and no determination of the amount of any loss or cost of restoration. Therefore, we vacate his decision and remand this matter 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 February 7, 2006, decision assessing liquidated damages against Appellant and remands for further consideration consistent with this decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge