



INTERIOR BOARD OF INDIAN APPEALS

Ruth Linabery, et al. v. Great Plains Regional Director, Bureau of Indian Affairs

55 IBIA 27 (05/09/2012)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

RUTH LINABERY; MARY WALN;)	Order Affirming Decision in Part,
ANNA WALN; JUSTIN and JOSEPH)	Vacating in Part, and Remanding
WALN; SCOTT SHELBURN;)	
ARTHUR MORGAN; SAMMIE)	
WALN; MARY SCOTT; BEV WALN;)	
C. KEITH WHIPPLE; CLIFFORD)	
LAFFERTY; WILLIAM H.)	
WHIPPLE; TONI LAFFERTY; THE)	
JEFF WALN INDIAN LAND AND)	
GRAZING ASSOCIATION AND ITS)	
MEMBERS; OLETA MEDNANSKY,)	Docket Nos. IBIA 11-004
JUSTIN MEDNANSKY, RICHARD)	and 11-007
MEDNANSKY, AND DUANE)	through 11-021
MEDNANSKY; AND CRAIG)	
LAFFERTY,)	
Appellants,)	
)	
v.)	
)	
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	May 9, 2012

The above-named individuals and the Jeff Waln Indian Land and Grazing Association and its members (Association) (collectively, Appellants), have appealed to the Board of Indian Appeals (Board) from an August 12, 2010, decision (Decision) of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), not to adjust the grazing rental rate for individually owned Indian lands on the Rosebud Reservation (Reservation) for the 2011 grazing season. The Decision left unchanged the rental rate of \$18.40 per Animal Unit Month (AUM), which has been in place since the 2009 grazing season. Appellants hold grazing permits for range units on the Reservation,

and argue that \$18.40/AUM is too high and that the Regional Director should have set a lower rate for the 2011 season.¹

Except as applied to Appellants' permitted parcels of land located in Todd County, South Dakota, we affirm the Decision because Appellants have not met their burden to show that it was unreasonable for the Regional Director to leave the existing rate in place. For the most part, Appellants' arguments fail to demonstrate that the Decision was unreasonable. As we also hold today in deciding *Elk Valley, Inc. v. Great Plains Regional Director*, 55 IBIA 16 (2012), when BIA leaves the grazing rate unchanged after conducting an annual review, the grazing regulations do not require BIA to re-justify and support the rate to the same extent that BIA would need to justify and support a new rate, at least in an appeal by permittees. Thus, to the extent that Appellants' arguments are made without reference to any evidence that would demonstrate that grazing rental values decreased from 2010 to 2011, and that the Regional Director failed to consider such evidence, Appellants fail to satisfy their burden of proof.

But as applied to Appellants' permitted lands located in Todd County, we vacate the Decision because county-specific evidence in the record — upon which the Regional Director chose to rely as an indicator of market rent trends — showed a decrease in rental values for Todd County, but the Regional Director simply lumped that evidence with other county-specific evidence to extrapolate a *reservation-wide* “average” market trend as a justification for leaving the rental rate unchanged on a *reservation-wide* basis. The grazing regulations expressly define fair annual rental in terms of the *parcel-specific* estimated market rental value. As the Board previously has held, BIA's grazing regulations do not permit BIA to set a reservation-wide rental rate unless that rate can be justified as applied to each parcel. See *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 42-43 (2008). The only reason given by the Regional Director for leaving the rate unchanged for permitted lands in Todd County was that, on a reservation-wide basis, rental values were relatively stable. That reasoning, at least without some additional explanation and support in the record, is not consistent with the regulations. Having chosen to consider county-specific data as an appropriate indicator of whether rental rates had increased, decreased, or remained the same, the Regional Director could not, without explanation, simply lump together data from several counties to obtain a reservation-wide average, and then use that reservation-wide average as the justification for keeping the rental rate unchanged for grazing parcels in Todd County.

¹ The Association provided the Board with a membership list totaling 36. Fifteen individual appellants are also members of the Association. The Regional Director reports that a total of 129 individual permittees and over 15,000 landowners are affected by the Decision.

Background

I. Regulatory Framework and Definition of “Fair Annual Rental”

As a general rule, BIA establishes the rental rate for grazing permits for individually owned lands included in range units on a reservation, and that rate must be based on the land’s fair annual rental value. BIA’s regulations define “fair annual rental” to mean “the amount of rental income that a permitted *parcel* of Indian land would most probably command in an open and competitive market.” 25 C.F.R. § 166.4 (emphasis added). BIA may use either a per-acre rate or a per-AUM rate for a permitted parcel, but as the Board made clear several years ago, BIA’s grazing regulations no longer allow BIA to use a reservation-wide AUM rate *unless that rate satisfies the definition of fair annual rental* — i.e., it must be supported and justified on a parcel-specific basis. *See DuBray*, 48 IBIA at 42-43.

After BIA issues grazing permits, it must conduct an annual review of the rental rate and may adjust the rate. The purpose of the annual review is to ensure that landowners are receiving the fair annual return for their land. 25 C.F.R. § 166.408; *Elk Valley*, 55 IBIA at 17. In *Elk Valley*, we held that when BIA undertakes an annual rental rate review and decides to leave the existing rate unchanged, it owes no obligation to the permittees to support that decision with a market study or appraisal that conforms to the Uniform Standards of Professional Appraisal Practice. Instead, the burden is on permittees who challenge the decision to produce or point to evidence in the record that demonstrates a decline in the rental value of the permitted parcels that the Regional Director failed to consider or failed to adequately address and that might have affected BIA’s decision to leave the rate unchanged.

II. BIA Rate Decisions for 2009 and 2010, and BIA’s New Approach for 2011

BIA adjusted the grazing rental rate for individually owned Indian land on the Reservation to \$18.40/AUM for the 2009 grazing season, and left that rate unchanged for the 2010 season. The Board sustained BIA’s decision for the 2009 season against one permittee’s challenge, and sustained BIA’s decision for the 2010 season against challenges by 39 permittees. *See Linabery v. Acting Great Plains Regional Director*, 53 IBIA 42 (2011); *Elk Valley*, 55 IBIA 16. For both the 2009 and 2010 grazing rental rate decisions, BIA commissioned market studies, conducted by appraisers, to provide information on the fair annual rental value of individually owned Indian lands on the Reservation, expressed as a price per AUM.

For the 2011 grazing season, BIA decided to use a different approach for the annual rental rate review.² In light of repeated challenges to grazing rental rate decisions, which interrupted BIA's ability to make accurate and timely payments to landowners, BIA proposed an approach intended to be "equitable and fair" to the landowners and permittees. Letter from Regional Director to Landowners, Tribes, Permittees, and Other Interested Parties, Apr. 27, 2010, at 1 (AR Tab 14). Instead of commissioning reservation-specific market studies, BIA proposed to consider three sets of information: (1) county-level cash rent statistics from the National Agricultural Statistics Survey (NASS) for counties within the Reservation to determine trends in pastureland rental rates; (2) cattle futures market trends; and (3) other climatic and animal industry factors, such as drought and livestock disease outbreaks. *Id.* at 2.

For the NASS data, the Regional Director proposed using olympic averaging with data from a 5-year period. *Id.*³ The Regional Director described the approach as follows:

The change in the olympic average of the county cash rents reported to NASS for pastureland for the past five years will be used to adjust rental rates within the permit period, if supported by trends and other factors affecting the livestock industry. The adjusted rental rate will be weighted for range unit area within each county to determine a reservation-wide adjustment.

Id. The Regional Director solicited comments from interested individuals and entities on the new approach.

After the comment period, the Regional Director issued the Decision, announcing that she was implementing the new approach for the annual rental review, and that based on that approach, she had decided to keep the \$18.40/AUM grazing rental rate unchanged for the 2011 season. The Regional Director justified her decision by stating that "the weighted olympic average percentage [for the Reservation] is -0.01 percent." Decision at 1. Attached to the Decision is a table that apparently summarizes rental rate data for the

² Before announcing the proposed approach, the Regional Director first consulted with and sought comment from the Tribe's President. *See* Letter from Regional Director to President Rodney Bordeaux, Mar. 19, 2010 (AR Tab 15).

³ The Regional Director described "olympic averaging" as a running average calculated by removing the highest and lowest values of a set, in this case 5 years of per-acre cash rent statistics, and averaging the remaining values. *See* Letter from Regional Director to Landowners, Tribes, Permittees, and Other Interested Parties, Apr. 27, 2010, at 2 (AR Tab 14).

Reservation and for Mellette, Todd, and Tripp Counties since 1995.⁴ For the row of data for 2010, the table shows a 1.27 percent increase in the rental rate for Mellette County, a 1.28 percent decrease for Todd County, and a 3.26 percent increase for Tripp County. Using an olympic average for a 5-year period for the Reservation, and giving proportional weight to the county-specific data based on range unit area within each county, the Regional Director arrived at the reservation-wide average change of minus 0.01 percent.⁵

Apparently based on that reservation-wide average, which showed a de minimis change in average rental price trends, the Regional Director decided to leave the \$18.40/AUM rate unchanged, reservation-wide. The Regional Director characterized the advantage of the new approach as decreasing administrative costs associated with developing multiple, reservation-specific market studies, and addressing concerns by permittees about large and unpredictable fluctuations in rental rates, while “continu[ing] to provide a fair annual rental return for landowners.” Decision at 1.

III. The Appeals to the Board, the Issues Raised, and the Regional Director’s Response

Sixteen appeals from the Decision were filed with the Board by or on behalf of permittees, including the Association’s members. Several arguments are raised by most or all Appellants, including arguments that permittees do not receive proper credit for expenses that they must bear that are not borne by lessees of non-Indian lands (e.g., fencing, water development); and that severe weather conditions resulted in cattle losses and loss of cattle feed, thus decreasing revenue and increasing costs.⁶ For example, in its opening brief, the Association argues that earlier drought conditions continue to affect the land and the quality and nutrients of the feed, thus requiring more acres to feed the same number of cattle, additional costs for mineral and protein supplements, and additional costs for pest control. Assoc. Opening Br. at 3 (unnumbered). Similarly, Linabery argues that the overall economic downturn on the Reservation and nationwide has placed an extreme hardship on permittees, and although cattle prices came up a little, they are starting to decline again, while fuel and feed costs have skyrocketed. The Association also contends that the Regional Director may not rely on unverifiable surveys and “[y]ears and years of flawed and inconsistent market studies” to adopt and then “modify” the grazing rental rate,

⁴ The source data from NASS is not in the record.

⁵ The table indicates that 54 percent of Reservation range unit areas are within Todd County, 41 percent are within Mellette County, and 5 percent are within Tripp County.

⁶ Thirteen notices of appeal were identical to one another, as were two others. All of the notices of appeal contained arguments on the merits; the Association and Linabery also filed opening briefs. No briefs were filed in reply to the Regional Director’s answer brief.

without a calculated step-by-step breakdown of adjustments. *Id.* at 7. The Association argues that the Regional Director “needs to complete his findings by talking about specific range units with the Superintendent and looking into the files on hand to make educated and informed decisions [to make adjustments for permittee costs].” *Id.*

Linabery also contends that the “Todd County rate actually decreased on the Grazing Rental Rate sheet sent out,” but the rate was still set at \$18.40/AUM. Linabery Opening Br., Jan. 10, 2010. Linabery argues that it is difficult for permittees to compete in the grazing market when the grazing rental rate for Federal lands is less than \$2.00/AUM. *Id.* Finally, Linabery contends that BIA’s bills do not separate parcels of land between allottee rates and tribal rates, so she has no way of knowing how much she is paying for individual tracts. *Id.*

In answer to Appellants’ arguments, the Regional Director notes that she chose to use a new process for the annual review of grazing rates, using the county-specific NASS data to determine land rental *trends*, not to directly compare rental rates. Answer Br. at 5. The Regional Director contends that many of the arguments raised by Appellants are the same as or similar to arguments raised and rejected by the Board in earlier appeals. The Regional Director argues that if permittees make improvements, they “should specifically enumerate any improvement made . . . over the permit period” so that it may be considered by BIA. *Id.* at 12. With respect to other costs that may be borne by a permittee, e.g., weed and pest control, the Regional Director contends that these costs vary widely, and thus are not appropriate for an across-the-board deduction for the entire Reservation.⁷

In response to Linabery’s argument that it was unfair for the Regional Director to leave the rate unchanged for Todd County permittees, the Regional Director argues that “any difference in productivity from range unit to range unit will be reflected in the range unit’s carrying capacity,” and thus the amount of rent owed under a permit is the product of both carrying capacity and the value of the AUM. *Id.* at 9. The Regional Director contends that “BIA did not have before it any evidence to indicate that there was a change in the trend for rental values,” and “[s]ince there was no evidence of a trend change in rental values based on the NASS data, no change [in the \$18.40/AUM rate] was warranted.” *Id.* at 9-10. In response to Linabery’s argument that Federal public land rental rates make it difficult to compete, the Regional Director argues that unlike the regulation of grazing on

⁷ The Regional Director does not explain what process is used, if any, to provide each permittee an opportunity, during the annual rate review, to submit documentation of improvements and other costs that the permittee believes must be considered in determining the amount of rent that a given permitted parcel would most probably command in a competitive market.

public land, BIA has a trust duty to Indian landowners that requires BIA to set rental rates based on “an open and competitive market,” which, BIA contends, is not how rates on public lands are set. *Id.* at 10.

Discussion

I. Standard of Review

The Regional Director’s decision whether to adjust the grazing rental rate involves an exercise of discretion and may involve an exercise of expertise. *See Fort Berthold Land & Livestock Ass’n v. Great Plains Regional Director*, 35 IBIA 266, 270 (2000). The Board’s role in reviewing a discretionary decision by BIA is to determine whether the decision “is reasonable; that is, whether it is supported by law and by substantial evidence.” *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). If so, the Board will not set aside the decision, and the Board will not substitute its judgment for that of BIA. The burden is on the appellant to show that BIA’s decision is unreasonable. *Id.*

II. Appellants’ General Arguments Fail to Demonstrate that it was Unreasonable for the Regional Director to Leave the Grazing Rate Unchanged.

For the most part, Appellants make general arguments that BIA does not give permittees proper credit to account for the fact that permittees on the Reservation must pay for all their expenses, whereas in private lease arrangements the lessor may pay for some or most costs, such as fencing, water maintenance, and weed and pest control. Appellants also contend that climate conditions affecting forage and causing livestock losses, and declining cattle prices, have adversely affected them and should be taken into account in setting the grazing rate. The Association broadly criticizes BIA for repeatedly obtaining and relying on flawed market studies, and for failure to review each individual permittee’s file to make an adjustment to rent based on the permittee’s costs. Appellants do not show, however, that any of these factors had a new or different effect on land rental values for 2011, or that they were not considered or reflected in some manner when the \$18.40/AUM rate was first established in 2009. Instead, Appellants continue to disagree generally with whether BIA is giving proper consideration to these factors.

None of these arguments demonstrates that it was unreasonable for the Regional Director to leave the existing grazing rate unchanged for the 2011 season. Such generalized criticisms, standing alone, are insufficient to satisfy Appellants’ burden of proof. Notably, with respect to these arguments, Appellants offer no evidence to show that the factors identified were different for 2011 than for 2010, such that the Regional Director acted unreasonably in maintaining the rate that was either unchallenged (by most permittees) or

affirmed (with respect to others) for the previous season. *See Elk Valley*, 55 IBIA at 16 n.2, 17. And while we agree with the Association that BIA may be required to consider individual permittee costs to the extent relevant to the rental value of a permitted parcel, the Association has not shown, with respect to any specific parcels, how BIA's failure to consider cost information contained in BIA's files might have affected the decision to leave the rate unchanged.

We also reject Linabery's assertion that a lower AUM rate set for grazing on public lands demonstrates that the Regional Director acted unreasonably in leaving the rate unchanged for individually owned Indian lands on the Reservation. Even if a lower AUM rate set for public lands gives Linabery a competitive disadvantage, as she contends, it does not necessarily follow that the rate set for Indian lands does not reflect fair annual rental value, or that the Regional Director erred in leaving the rate unchanged.⁸

Linabery's argument that she was not provided with a clear invoice that distinguishes between the grazing rate that applies to individually owned Indian land and the grazing rate that applies to tribal lands is not relevant to our review of whether the Decision to leave the rate for individually owned lands unchanged was unreasonable. Thus, this argument provides no basis to set aside the Decision.⁹

III. The Regional Director's Decision to Leave the Todd County Rate Unchanged is Arbitrary and Capricious.

The one argument that has traction in this appeal is Linabery's argument that the Regional Director relied on county-specific NASS data to indicate market trends, but then left the rental rate unchanged for Todd County permittees even though the data showed a decrease in rental prices for Todd County. Linabery argues that this was unfair. In effect, the Regional Director disregarded the Todd County-specific data by lumping it together — without explanation — with data from two other counties to generate an average that was then used to justify leaving the rate unchanged reservation-wide. As noted earlier, the Todd County NASS data showed a 1.28 percent decrease in rental values for Todd County, but

⁸ Grazing rates on public lands administered by the Bureau of Land Management (BLM) are determined according to a formula contained in BLM's regulations, *see* 43 C.F.R. § 4130.8-1, which does not require BLM to determine what the rental value of permitted parcels might be in an open and competitive market, *cf.* 25 C.F.R. § 166.4.

⁹ If Linabery believes that BIA is not providing a proper invoice by which she can determine that the correct grazing rental rate is applied to respective individually owned and tribal lands in her range unit(s), she may request such an invoice from BIA and pursue her rights under 25 C.F.R. § 2.8 if BIA is unresponsive.

when combined with NASS data from Mellette County (a 1.27 percent increase) and Tripp County (a 3.26 percent increase), and weighted according to range unit areas in the counties, the Regional Director derived a 0.01 percent decrease, which she used to justify leaving the rental rate unchanged on a reservation-wide basis.

The Regional Director summarizes the definition of “fair annual rental” as the rent that “Indian land would most probably command in an open and competitive market,” Answer Br. at 3-4, but the regulation is more specific: Fair annual rental “means the amount of rental income that a *permitted parcel* of Indian land would most probably command in an open and competitive market.” 25 C.F.R. § 166.4 (emphasis added). Thus, as we held in *DuBray*, fair annual rental must be justified as applied on a parcel-specific basis. It may well be that many parcels of individually owned Indian land are comparable, and thus the same AUM rate may be appropriate. But the Regional Director appears to have assumed that her ultimate objective was to arrive at a single reservation-wide rate for “Indian lands” on the Reservation generally, rather than use the definition of fair annual rental as the benchmark. That assumption is inconsistent with the regulations. If parcel-specific or county-specific data indicate that the rental rate for certain reservation parcels may differ from the rate for other reservation parcels, the Regional Director must consider and address those data. There is simply nothing in the regulations that allows a reservation-wide grazing rate unless it can be explained, justified, and supported with respect to each permitted parcel to which the rate is applied.

In response to Linabery’s argument that the Regional Director’s decision is unfair to Todd County permittees, the Regional Director contends that “it should be remembered that any differences in productivity from range unit to range unit will be reflected in the range unit’s carrying capacity,” and “[t]hus, the amount owed under the permit is the product of the carrying capacity and the value of the AUM.” Answer Brief at 9. But the Regional Director never squarely addresses Linabery’s allegation that by leaving the rate unchanged for Todd County permittees, the Decision failed to address or properly consider the Todd County NASS data showing a decline in rental values and, instead, improperly combined the data from three counties without any apparent justification. The Regional Director does not explain how the carrying-capacity factor in the amount of rent owed bears any relationship to her decision to combine the data from three counties, and then make a decision as to Todd County lands that relies on averaging the tri-county data. And nowhere in the Decision or in the record is there any evidence that the reservation-wide average for rental rate trends was offset by carrying capacity adjustments for Todd County permittees that lowered their rent, consistent with the NASS data for Todd County. On the contrary, the Decision and the record suggest that the Regional Director had a pre-

determined goal of arriving at a reservation-wide AUM rate, and evaluated the county-specific (and other) data accordingly.¹⁰

We understand BIA's policy objectives of maximizing efficiency, lowering administrative costs, creating predictability for permittees and landowners, and setting a rate that is "equitable and fair." AR Tab 14. Indeed, it appears that Appellants do not necessarily disagree with the Regional Director's approach, in principle, although the parties' subjective notions of equity and fairness may differ. But while a grazing rate decision is an exercise in discretion, and may involve some level of judgment, that judgment must be exercised within the parameters set in BIA's regulatory definition of "fair annual rental," which has a parcel-specific, market value-based, focus. Whether that analysis requires BIA to adjust the rental rate for Todd County permittees is an issue we do not, and cannot, decide in this appeal, because the exercise of discretion involved in a grazing rate decision ultimately is reserved for the Regional Director. But because the Regional Director's Decision, as applied to Todd County permittees, is insufficiently explained and not supported by the record, we vacate the Decision with respect to permitted lands in Todd County and remand the matter for further consideration.¹¹

Conclusion

In deciding to leave the grazing rental rate unchanged for Todd County permittees, the Regional Director inexplicably relied on a reservation-wide average figure that she considered indicative of market rent trends, even though data specific to Todd County was

¹⁰ In *DuBray*, we noted that carrying capacity alone may not account for differences among range units, and in such cases a reservation-wide AUM rate may not be justified. For example, two range units could have the same overall number of AUMs, but differences in size or location could result in different permittee costs for fencing, water, and weed and pest control, which possibly could result in different AUM values for each range unit. *See DuBray*, 48 IBIA at 33. On the other hand, the relationship between differing permittee costs and differing land values may depend on the extent to which the (hypothetical) competitive grazing market on the Reservation, which the regulations use as a benchmark for determining fair annual rental, would be an efficient market that would take into account those differing costs.

¹¹ To be clear, we are not holding that the Todd County data required the Regional Director to lower rental rates in Todd County for the 2011 season. There may be a justification for leaving the rate unchanged, notwithstanding the NASS data. But having chosen to use county-specific NASS data to indicate rental rate trends, the Regional Director could not then use it in a manner that disregarded the definition of fair annual rental.

available and even though fair annual rental must be justified as applied to permitted parcels. In the absence of an explanation that reconciles the Decision with the regulatory definition of fair annual rent, we vacate the Decision with respect to Appellants' permitted lands in Todd County. In all other respects, we affirm the Decision.

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 August 12, 2010, Decision in part, vacates it in part, and remands the matter for further proceedings consistent with this decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge