



INTERIOR BOARD OF INDIAN APPEALS

Rosebud Indian Land and Grazing Association v. Acting Great Plains Regional Director,
Bureau of Indian Affairs

41 IBIA 298 (10/26/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ROSEBUD INDIAN LAND AND	:	Order Vacating and Remanding
GRAZING ASSOCIATION,	:	Decision
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 04-11-A
ACTING GREAT PLAINS REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	October 26, 2005

The Rosebud Indian Land and Grazing Association (Appellant) seeks review of a September 16, 2003 decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), increasing the rental rate for grazing land on the Rosebud Sioux Reservation (Reservation). For the reasons stated below, the Board vacates the Regional Director’s decision and remands the matter to the Regional Director for further consideration.

Regulatory Background

With limited exception, federal regulations require a party wishing to use Indian trust land for grazing to obtain a permit to do so. 25 C.F.R. § 166.200. Permits may be issued by the Indian landowner, whether a tribe or an individual Indian, subject generally to BIA approval. Id. § 166.203. Alternatively, permits may be issued by BIA under certain circumstances, including if the Indian landowner requests it to do so. Id. § 166.205(a).

BIA establishes the grazing rental rate for individually owned Indian lands and for tribal land where the tribe has not established the rate. Id. § 166.400(b). The grazing rental rate is to represent the “fair annual rental,” which is defined as “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. The established rental rate may be determined by an appraisal completed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP), or by other methods, including competitive bids or negotiations, used in

conjunction with a market study, rent survey, or feasibility analysis developed in accordance with USPAP. Id. § 166.401. The total grazing rental payment for any permit is determined by multiplying the grazing rental rate by the number of animal unit months (AUMs) 1/ or acres covered by the permit. Id. § 166.409.

BIA may adjust the grazing rental rate to ensure that Indian landowners are receiving fair annual return. Id. § 166.408. The rate may be adjusted based upon an “appropriate valuation method, taking into account the value of improvements made under the permit, unless the permit provides otherwise, following the [USPAP].” Id. BIA is to review the rental rate annually or as specified by the permit. Id.

Procedural Background

On September 16, 2003, the Regional Director issued a memorandum to the Superintendents of the Rosebud, Lower Brule, and Crow Creek Agencies establishing a new minimum grazing rental rate for South Dakota reservations for the 2004 grazing season. The rate was issued pursuant to 25 C.F.R. § 166.408, which provides for the adjustment of previously established rates. The newly adjusted rate was set at \$11.70 per AUM, up from the rate for the 2003 grazing season, which appears to have been \$9.50 per AUM. The new rate was applicable to South Dakota reservations with existing permits that were issued after March 23, 2001, when new grazing regulations became effective.

The new rental rate was based on the South Dakota Grazing Rate Study for the 2004 Grazing Season (market study or study), conducted by David M. Baker of the Great Plains Regional Appraisal Office, which is part of the Office of the Special Trustee for American Indians. The market study opined on the “grass only” grazing rate for western South Dakota.

In order to determine the “going rate” for grazing fees, the study looked at Farm Service Agency (FSA) data on arms-length grazing agreements negotiated by FSA clients and financed by FSA. The market study looked at FSA data involving all or parts of 16 western South Dakota counties, reaching from Nebraska on the south to North Dakota on the north. The study omitted data from grazing agreements if the rental provisions included the use of buildings, cropland, and tame grassland; if the information was not sufficient to calculate a dollar per AUM rate; or if the grazing fees exceeded a two-standard-deviation limit and thus were extremely high or low. This resulted in 19 leases that were treated by the market study as “comparables.”

1/ Animal unit month (AUM) means “the amount of forage required to sustain one cow or one cow with one calf for one month.” 25 C.F.R. § 166.4.

The 19 comparables were based on seasonal rental agreements lasting from four to seven months and averaged \$17.11 per AUM. BIA rental agreements, however, cover a 12-month period. Based on FSA data, the study determined that, for annual rental, stockmen on private lands paid approximately 75 percent of the dollar per AUM rate that they would have paid for seasonal rental. The study adjusted the seasonal average accordingly, yielding an annual grazing rental rate for private lands of \$12.83 per AUM. The market study then made two additional adjustments to account for a two percent preparation fee charged by BIA and for the fact that BIA, unlike private lessors, requires the entire rental amount to be paid up front. These further adjustments yielded a grazing rental rate for 2004 of \$11.70 per AUM.

Mr. Baker certified that the study was prepared in conformity with USPAP. The study was reviewed by a Senior Review Appraiser, Robert E. Grijalva, who concurred in its results, concluding that the appraisal methods used were appropriate and that the analysis and conclusions were “totally reasonable.” The Regional Director adopted the study’s conclusion as the new grazing rate.²

Appellant — an association of approximately 80 members of the Rosebud Sioux Tribe who graze cattle on Indian land on the Reservation under BIA permits — filed a timely appeal of the Regional Director’s decision. Appellant filed an opening and reply brief, and the Regional Director filed an answer brief.³

²/ The Regional Director described the rate as the “minimum grazing rental rate.” Prior regulations required BIA to establish “a reservation minimum acceptable grazing rental rate.” 25 C.F.R. § 166.13(b) (2000). The market study also relied on and cited to these prior regulations. Those regulations, however, were no longer in effect at the time that the market study was conducted or when the Regional Director made her decision. The pertinent and current regulations provide for the setting of “the grazing rental rate.” 25 C.F.R. § 166.400(b) (2003).

³/ The Regional Director’s answer brief relies in part on a December 1, 2003 response by the regional appraiser (appraiser’s response) to Appellant’s arguments set forth in its Notice of Appeal. The Regional Director incorrectly included this document, which was prepared after the Regional Director’s decision, in the administrative record. See 43 C.F.R. § 4.335(a); California v. Acting Pacific Regional Director, 40 IBIA 70, 71 n.3 (documents not considered by BIA in rendering a decision are not part of BIA’s administrative record). The Board, however, may allow a party to supplement the record as long as the opposing party has an opportunity to respond. See California, 40 IBIA at 71 n.3. Appellant has had ample opportunity to respond to the appraiser’s response in its opening and reply briefs. The Board thus considers the appraisal response in rendering this decision.

Discussion

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

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

Fort Berthold Land & Livestock Association v. Great Plains Regional Director, 35 IBIA 266, 270 (2000), quoting Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, 17 IBIA 78, 81 (1989).

Appellant raises four challenges to the 2004 grazing rental rate: (1) the market study does not establish that the "comparables" it used are, in fact, from grazing lands comparable to those on the Reservation; (2) the market study does not make sufficient adjustments to the private land grazing rate to account for differences between on-reservation and off-reservation grazing; (3) the market study was not prepared in accordance with BIA regulations or acceptable appraisal practices; and (4) the Regional Director violated prior directives of the Board by failing to consult with Appellant and others before adjusting the grazing rental rate. We address each of these challenges in turn.

Appellant argues that the use of FSA data is flawed because the data is not localized to the Reservation and the study does not establish that the data provides accurate comparables. Appellant raises two concerns about the lack of localized data: first, that the pastureland in question may not be similar in quality to that of the reservation; and second, that the areas where the comparables are located may have different markets.

On the question whether the pastureland from which the comparables were derived is similar in quality, the appraiser's response explains that the quality of the rangeland is not significant in determining grazing rates. That is because the rate is based on the amount of feed it would take to sustain specified livestock for a month. Thus, differences in the quality of rangeland are to be accounted for by adjusting the AUMs assigned to a given range unit, not by altering the grazing rate. See 25 C.F.R. §§ 166.305 & 166.306 (describing BIA's responsibility for setting and adjusting grazing capacity). The Board finds this to be a reasonable explanation and concludes that Appellant has not demonstrated that the market study unreasonably failed to account for differences in quality of rangeland⁴

⁴ The Board notes that the record contains no evidence that BIA has actually adjusted the AUMs for range units on the Reservation to account for changed range conditions, but the question of appropriate AUM levels is not at issue in this appeal.

Appellant's argument that the comparables may have different markets, however, is not addressed by the Regional Director or the Department's appraisers. Appellant expresses two concerns: first, that the comparables, which are located throughout all of western South Dakota, may represent different grazing markets; and second, that FSA borrowers have limited resources and lease smaller tracts than those located on the Reservation and thus may not be appropriate for use in determining on-Reservation rates. In a different part of their brief, Appellants make a related argument, that the market study violated BIA regulations by setting a single grazing rate for reservations throughout all of western South Dakota instead of establishing a rate that is specific to the Reservation.

The Board agrees that the market study fails to explain why it is appropriate to set a single rate for all reservations in western South Dakota and why data from this expansive area provides accurate comparables for determining the grazing rate on the Rosebud Sioux Reservation. The Regional Director argues that the selection of the comparables was based on the expert professional judgment of the appraiser. Nothing in the market study, however, explains why the geographic area chosen for the market study is appropriate in terms of professional valuation methodology. To the contrary, the market study assumes that it is required to identify a single rate for all of western South Dakota, stating: "Because of the 25 CFR the reservation-grazing rate is a single rate that is applied to reservation range units located in western South Dakota." The appraiser's response repeats that the regulations, specifically 25 C.F.R. § 166.400(b), require the Regional Director to set "a single grazing rate for Reservation rangelands in western South Dakota" (emphasis in original).

BIA regulations do not require the establishment of a grazing rate over such a large area. While 25 C.F.R. § 166.400(b) provides for the setting of "a grazing rental rate," it does not specify the geographic area that any particular rate is to cover. The Board, however, need not address Appellant's contention that BIA regulations require the grazing rental rate to be set separately for each reservation. Even if the regulations required rates to be determined at the reservation level, the Regional Director's decision to set the same grazing rate for three western South Dakota reservations would not violate the regulations if the identical rates were justified by appropriate valuation methodology.

Here, however, the record lacks substantial evidence to demonstrate that the Regional Director's decision to set the same grazing rate for such a broad area has sound professional underpinnings. The Board thus remands the decision to the Regional Director for reconsideration as to whether it is appropriate to set a single grazing rate for all three western South Dakota Reservations and, if so, for a supporting explanation as to why rates from such an expansive area properly reflect the market for grazing on the Reservation.

As to Appellant's contention that FSA borrowers represent a different grazing market from that on the Reservation, Appellant has not met its burden to show that areas under FSA

lease are different from Reservation grazing land in a manner that would render the Regional Director's reliance on the market study unreasonable.

Appellant relies on the declaration of an appraiser, Steven T. Tomac, which states only that the use of this data "could be misleading" because "one could conclude that the size of the tracts leased by FSA borrowers are not comparable to reservation range units." See Declaration of Steven T. Tomac (Tomac Dec.), ¶ 5. Despite the fact that the market study specifically includes raw data describing the size of most of the tracts used as comparables, which range from 640 acres to 8,000 acres, neither Appellant nor Mr. Tomac explain how the size of the FSA units compare with the size of units on the Reservation. Mr. Tomac also fails to attest whether he, in fact, reaches the conclusion that the data is misleading or that such a conclusion would affect and alter the final valuation reached in the market study.

Appellant also contends that the market study overstated the average rate on FSA lands by determining the dollar per AUM rate on a per lease basis rather than by using a weighted average of the total rent paid on all the leases divided by the total number of head of cattle and the average length of the lease. Appellant's appraiser, Mr. Tomac, states that a weighted average would be a "more accurate indicator." See Tomac Dec. ¶ 6. The fact that there may be a more accurate way to determine the grazing rate does not mean that the method relied on by the Regional Director was unreasonable. The Board therefore rejects Appellant's argument.

Now we turn to the question whether the market study made sufficient adjustments to the average FSA lease rate to accurately reflect differences between the FSA leases, which are on private land outside the Reservation, and BIA permits on Indian land within the Reservation. Appellant argues that the Regional Director must make adjustments to the off-reservation grazing rates to take into account all additional expenses borne by the Indian operator. Appellant argues that on private, off-reservation lands, the landowner is responsible for certain costs that on-reservation landowners do not pay, such as costs of water development, fencing, and certain taxes. Appellant contends that the Board's decision in Fort Berthold requires the Regional Director to explain the failure to make adjustments for these costs.

In Fort Berthold, a livestock grazing association challenged a new BIA grazing rental rate established by the Great Plains Regional Director based on a study by David M. Baker, the same appraiser who prepared the market study at issue in this case. As here, that study determined an average private land grazing rate based on FSA data. As here, that study adjusted the rate to account for the BIA preparation fee and the fact that BIA requires full payment of the grazing rental payment in advance. See Fort Berthold, 35 IBIA at 267.

In Fort Berthold, the Board found that the market study insufficiently explained why only these adjustments were made. The Board ruled:

[N]othing in the BIA appraisal or in the Regional Director's decision shows the reason for limiting the adjustments. Nor does the Regional Director explain the reason in her brief in this appeal, despite the forceful arguments made by Appellant. Under these circumstances, the Board finds that the Regional Director has not shown that her decision is supported by substantial evidence.

Fort Berthold, 35 IBIA at 275.

The Board's reasoning in Fort Berthold applies equally here. Here, as in Fort Berthold, the market study fails to explain the reason for limiting the adjustments to the two adjustments made. The appraiser's response states that "[a]djustments were made only for those rate-influencing differences that existed in the provisions between a BIA grazing permit and a 'typical' private market grazing rental agreement." This statement, however, merely describes what the market study did, not why it was appropriate. ^{5/} Thus, in this case, as in Fort Berthold, the Regional Director has not shown that her decision is supported by substantial evidence.

On remand, the Board does not insist that the market study make additional adjustments unless they are warranted. But the market study must at a minimum provide an explanation for any limitation in adjustments in terms of proper valuation methodology. Any such rationale should, among other things, address Appellant's contention that sources other than the terms of BIA permits and FSA leases demonstrate the existence of uniform differences between grazing on private lands versus Indian lands on the Reservation. For example, Appellant submits a letter dated August 4, 2004, from FSA loan officer Carol Hutchinson to Jeff Waln, which states that FSA rates are "for privately owned land in which the landowner is responsible for water, fences and keeping cattle in condition," and notes that "this fact is stressed by our Agency when the report [to BIA] is submitted." Likewise, some of the adjustments that Appellant argues should be made are based on express requirements set forth in the Tribe's Resolution No. 01-137, which governs grazing contracts beginning November 1, 2001. These include, but are not necessarily limited to, the requirements to pay a tribal land use tax and to maintain fences. See Res. No. 01-137 §§ IV(B) and IV(J). Any rationale for limiting adjustments should specifically explain why adjustments should not be made for such differences.

^{5/} The appraiser's response also explains that adjustments for problems such as drought and prairie dogs, or the fact that areas for homes may be carved out of range units on the Reservation, are not appropriate because matters of the quality or quantity of the rangeland should be accounted for by adjusting the AUMs, not altering the grazing rate. The Board finds this explanation sufficient for factors that pertain to the quality of the rangeland. However, this explanation does not address Appellant's concerns about other factors such as fencing, water development, and tribal taxes.

Appellant also argues that the market study erred by making adjustments for the preparation fees charged to permittees based on a two percent fee, rather than the current three percent fee. The appraiser's response relied on by the Regional Director concedes that the market study incorrectly adjusted for a two percent BIA preparation fee, rather than the three percent fee that was in effect for the 2004 grazing season. The correct adjustment must be made on remand.

The third category of concerns raised by Appellant pertains to regulatory compliance. Appellant contends that the market study does not comply with the requirements of 25 C.F.R. §§ 166.401 and 166.408. The Board rejects these arguments.

First, Appellant argues that the market study fails to comply with USPAP, as required by 25 C.F.R. § 166.401. Specifically, Appellant asserts that the study does not "define the value being developed" as required by Standard 6.2(f) of USPAP. The market study states that its purpose is "to arrive at an opinion of the 'grass only' grazing rate for western South Dakota," but Appellant argues that this does not constitute a "value" within the meaning of USPAP. Appellant, however, fails to show or even allege that a correction of this alleged flaw might alter the market study and yield a revised decision that would benefit Appellant. Accordingly, even if there were such a failure, it would constitute harmless error. See, e.g., Canyon Development v. Acting Sacramento Area Director, 32 IBIA 66, 76 (1998). Because Appellant has not shown that a ruling on this question would make a difference in this case, the Board declines to decide whether the market study complied with USPAP.

Appellant argues that the Regional Director's use of the market study method violates 25 C.F.R. § 166.401 in a second respect. Appellant contends that section 166.401 allows grazing rental rates to be determined by use of a market study only "in conjunction" with other methods, and that the Regional Director relied solely on the market study. Appellant's argument fails because it relies on the wrong regulation. 25 C.F.R. § 166.401 applies to the initial establishment of the grazing rental rate, when grazing permits are initiated or renewed. The adjustment of grazing rental rates pertaining to existing permits, which is the subject of this appeal, is governed by 25 C.F.R. § 166.408, which states that a grazing rental rate may be adjusted "based upon an appropriate valuation method * * * following the [USPAP]." 6/

Realizing that it should have cited 25 C.F.R. § 166.408, Appellant argues in its reply brief that 25 U.S.C. § 166.408 refers back to and incorporates the requirements of 25 U.S.C. § 166.401. Thus, Appellant contends that the only "appropriate valuation methods" referred to in section 166.408 are those methods identified in section 166.401. The Board is unable to conclude that the valuation processes of sections 166.401 and 166.408 were intended to be the

6/ Because the Board concludes that 25 C.F.R. § 166.401 does not apply here, we do not consider whether Appellant's interpretation of 25 C.F.R. § 166.401, as requiring a market study to be accompanied by other valuation methods, is correct.

same. Section 166.408 could specifically have provided for grazing rates to be adjusted in the manner provided in 25 C.F.R. § 166.401, if that were intended. *See, e.g.*, 25 U.S.C. § 166.419(d) (specifically incorporating “methods listed in § 166.414(b) of this part”). Thus, Appellant has failed to demonstrate that the Regional Director’s reliance upon a market survey alone was reversible error.

Finally, we turn to the question of consultation. Appellant argues that the Regional Director failed to comply with the Board’s direction in Fort Berthold to determine whether she has a duty to consult with tribes, livestock producers, and landowners before imposing a new grazing rental rate for reservations in the Great Plains Region. Appellant contends that consultation is required by Presidential and Secretarial directives and a 1993 Memorandum of Agreement (MOA) with the American Livestock Association, all of which were at issue in Fort Berthold. Appellant further argues that, in the wake of Fort Berthold, the Regional Director made an unequivocal commitment to create a consultation process for interested parties that she has failed to implement.

The Regional Director argues that Fort Berthold does not control here and that Appellant lacks standing to challenge compliance with the Presidential and Secretarial directives and the MOA. The Regional Director further argues that her intent to create a consultation process does not constitute a decision that is subject to appeal.

The Board agrees that Appellant lacks standing to appeal on the question of consultation. Appellant argues it is in the same position as the appellant in Fort Berthold. While that may be true, it is immaterial because in Fort Berthold the Board addressed different threshold issues presented by the parties and did not reach the question of standing. Here, Appellant seeks relief beyond that granted in Fort Berthold: it seeks remand based on the Regional Director’s alleged failure to determine consultation requirements. In response, the Regional Director specifically argues that Appellant lacks standing. Thus, it is incumbent on the Board to address the standing question in this appeal.

In Fort Berthold, the appellant, a livestock grazing association, argued that the Regional Director failed to comply with Presidential and Secretarial directives regarding consultation. The Regional Director responded that she had no duty to consult because the directives did not create an enforceable right. The Board noted that, even if the duty to consult were not enforceable in federal court, it might be enforceable by the Board, which speaks for the Secretary of the Interior, who is accountable for those directives. The Board declined to reach the question of enforceability but advised the Regional Director that she “might wish to reconsider” whether her position regarding a duty to consult was consistent with the federal policies articulated in the directives. *See Fort Berthold*, 35 IBIA at 270-271.

Here, the Regional Director does not argue that she has no duty to consult, but rather contends that, if there is such a duty, it runs to the Rosebud Sioux Tribe, not to Appellant, and

that Appellant lacks standing to enforce any such duty. This issue was not presented or addressed in Fort Berthold. The Board agrees that Appellant has no basis to appeal regarding consultation under Presidential and Secretarial directives. Appellant has cited no specific directives that it contends apply here, and the directives identified in Fort Berthold pertain only to government-to-government consultation with tribes, which does not include Appellant. See id. at 270 n.6. Appellant may not appeal to the Board based on the Tribe's interests. See, e.g., Abby Bullcreek v. Western Regional Director, 40 IBIA 196, 201 (2005); Redfield v. Acting Deputy Assistant Secretary - Indian Affairs, 9 IBIA 174, 177 (1982).

Next, we examine Appellant's claim pertaining to the 1993 MOA. In Fort Berthold, the question presented was whether the 1993 MOA imposed a contractual duty on the Regional Director to consult. The Regional Director did not address the MOA, and the Board was unable to determine if it was even in effect. The Board therefore made no ruling regarding the MOA but advised the Regional Director to determine its status and, if it was still in effect, to determine whether the Regional Director might have a contractual duty under it to consult with parties affected by the grazing rental rate adjustments. See Fort Berthold, 35 IBIA at 272.

In this appeal, the Regional Director specifically argues that Appellant is not a party to the MOA and thus cannot enforce any consultation requirement it may impose. The question of who could seek to enforce the MOA was not raised or addressed in Fort Berthold. Appellant does not dispute that it is not a party to the 1993 MOA. Thus, even if the MOA were still in effect and imposed a duty to consult, Appellant has not established that any such duty would run to Appellant. Appellant has therefore failed to demonstrate its standing to raise the consultation requirements of the MOA.

Finally, the Regional Director's statement that she was working on developing a consultation process to be used in establishing grazing rental rates does not constitute a final administrative action or decision and is not enforceable by the Board. See 43 C.F.R. § 4.331.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the September 16, 2003 decision of the Regional Director and remands to the Regional Director for further consideration.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
David B. Johnson
Acting Administrative Judge