INTERIOR BOARD OF INDIAN APPEALS

Leroy and Linda DuBray, Cheyenne River Sioux Tribe, et al.
v. Great Plains Regional Director, Bureau of Indian Affairs

48 IBIA 1 (10/16/2008)

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United States Department of the Interior

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LEROY AND LINDA DUBRAY, CHEYENNE RIVER SIOUX TRIBE, CLAY CLAYMORE, DUANE GRAY, JAMES R. PEARMAN, FREDRIC DUBRAY, IONE OPP, MARIE LONG, TINA CLEMENT, RUSSELL AND KAREN PEARMAN, DUANE PEARMAN, FLOYD T. HILL, EDWINA AND GREG MOWRER, DAVID LONG, LYLE DUCHENEAUX, PATRICK M. GRAY, NELLIE HOLLENBECK, and ROBERT DUCHENEAUX, Appellants,	)	Order Vacating Decision and Remanding
v.	)	
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Docket Nos. IBIA 06-114-A 06-121-A through 06-123-A 07-3-A through 07-16-A
	)	October 16, 2008

These consolidated appeals seek review of an August 3, 2006, decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), which adjusted the grazing rental rate from $9.60/Animal Unit Month (AUM)[1] to $16.10/AUM for the 2007 grazing season for individually-owned Indian trust lands on the Cheyenne River Reservation (Reservation) in South Dakota. In setting the rate, the Regional Director accepted a recommended rate, based on an opinion of the Reservation-wide value of an AUM, contained in a market study titled "Reservation Grazing Rate Analysis of the Cheyenne River and Standing Rock Reservations for the 2007 Grazing Season" (Market

[1] An AUM is defined as "the amount of forage required to sustain one cow or one cow with one calf for one month." 25 C.F.R. § 166.4.

Study). The Market Study was prepared by a private appraiser and reviewed by the Office of the Special Trustee for American Indians (OST) Regional Appraiser (OST Appraiser). The appeals to the Board were filed by individual Indian ranchers (Ranchers) who hold grazing permits on the Reservation and by the Cheyenne River Sioux Tribe (Tribe) (collectively, "Appellants").

After the Regional Director issued his decision, the Tribe asked him to reconsider the rate increase, or waive its implementation, arguing that the Market Study on which the Regional Director relied had failed to consider the effects of an extreme, multi-year drought on the value of an AUM and the value of the permitted lands. The Regional Director declined the request.

In this appeal, the Ranchers argue that the Market Study is inconsistent with a rate-adjustment provision in their permits, but that even if that is not the case, the $16.10/AUM rate is above the fair annual rental value of an AUM on the Reservation lands for which they hold permits. The Ranchers contend that the Regional Director misunderstood the scope of his discretionary authority in adopting the Market Study's recommended rate, and that the Market Study itself is flawed for numerous reasons.

The Tribe also challenges the $16.10/AUM rate as, at least potentially, too high.[2] The Tribe owns fractional interests in individually-owned trust lands on the Reservation, and thus, as a landowner, would stand to receive a share of a rent increase. However, the Tribe contends that if the new rate is too high, the Tribe as a landowner is injured because the permittee-ranchers will be unable or unwilling to take proper care of the land. In addition to supporting or joining in the Rancher's arguments, the Tribe also argues that the Regional Director's decision is flawed because BIA failed to consult with the Tribe before setting the rate, and improperly declined to consider its request for a "waiver" of the rate increase.

The Regional Director argues that the Ranchers and the Tribe lack standing to bring this appeal, but also defends his decision on the merits. On the merits, the Regional Director argues that because he relied upon a market study prepared and reviewed by certified, professional appraisers, the Board should rule that his decision is reasonable and supported by substantial evidence. In addition, the Regional Director responds to Appellants' substantive objections to the Market Study, arguing that the appraiser

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[2] The Tribe disclaims taking a position on whether the rate is too high or too low, although its arguments implicitly suggest that the rate is too high.

considered all relevant factors and that the recommended rate, which the Regional Director adopted, is reasonable and supported by the evidence.

We conclude that the Ranchers have standing to bring this appeal because they have contract rights that are adversely affected by the Regional Director's decision. We need not decide whether the Tribe has standing because the Tribe and the Ranchers effectively challenge the rate decision on the same substantive grounds. By vacating the Regional Director's decision on the merits and remanding the matter for further consideration, our decision effectively provides the Tribe with the substantive relief that it seeks, and the Regional Director apparently is willing to consult with the Tribe. Under the circumstances, we leave it to another case to address whether BIA must consult with the Tribe with respect to a rate adjustment decision for individually-owned trust lands, and if so, what relief is available when no consultation occurs.

On the merits, we vacate the Regional Director's decision. First, we reject the Regional Director's argument that we should uphold his decision as reasonable and supported by substantial evidence simply because he relied on a market study and an opinion of value prepared by professional appraisers. Whatever deference may be owed to the professional judgment and expertise reflected in an appraisal or market study, it does not follow that a BIA decision that relies on a professionally prepared appraisal or market study is *per se* reasonable, as the Regional Director contends.

Second, we conclude that Appellants have satisfied their burden, on several issues, to show that the Market Study relied on by the Regional Director cannot be judged to be reasonable, because it fails to include calculations and explanations that are necessary to determine whether the $16.10/AUM rate is a reasonable statement of the value of an AUM on the relevant Reservation range units. For example, the Market Study derives a baseline rate by lumping together a variety of private lease "comparables" and taking an average of their AUM rates, without examining potentially relevant distinctions among the leases. It then converts a baseline seasonal-use rate to a year-long-use rate using a conversion factor that is not adequately supported and justified. The appraiser's calculations from which certain adjustments are then derived are not disclosed and the Market Study's failure to make certain other adjustments is not adequately explained. The $16.10/AUM rate may well approximate the market value of an AUM on some or all of the Reservation lands covered by the Ranchers' grazing permits, but we are unable to verify that this is so, on this record.

Third, on the specific issue of the drought, we conclude that the Regional Director did not sufficiently respond to Appellants' contention that he should have considered, either under the rate-adjustment language of the permits or under the regulations, the effect of the

drought as a possible basis for modifying the recommended $16.10/AUM rate. The Regional Director argues that the drought was considered by making adjustments in grazing capacity based on reduced forage availability. But he does not address Appellants' argument that in the absence of normal sources of livestock water, otherwise available forage may be unusable or reduced in economic value to the extent that a permittee must pay for livestock water deliveries to render the forage usable. Nor does he address their argument that, independent of grazing capacity adjustments, the severity of the drought so compromised the nutritional value of the forage that the market value of the forage was also reduced. Appellants have made a credible argument that these effects of a drought might have an effect on the value of an AUM on grazing lands, and because the Regional Director has not provided a reasonable explanation in response, we conclude that this issue must be remanded for further consideration.

In remanding this case, we note that the Regional Director apparently asked the appraiser for a single reservation-wide AUM rate, and the Regional Director characterized his decision as setting a "reservation minimum grazing rental rate." That language was borrowed from previous grazing regulations that are no longer applicable. *See* 25 C.F.R. § 166.13(b) (2000). The current regulations, which apply to the Ranchers' permits, provide for "fair annual rental," 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) (emphasis added). 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. In this appeal, we conclude that, even as a reservation-wide AUM rate, the $16.10/AUM figure is not adequately supported by the record. On remand, however, any new decision by the Regional Director should clearly explain how the grazing rate conforms to the definition of fair annual rental.

Background

A. Grazing Permits for Individually-Owned Trust Lands on the Reservation for the 2003 - 2008 Permit Period

1. Regulations Governing Grazing Permits

In order to manage grazing on individually-owned trust lands on a reservation, BIA consolidates various tracts of Indian rangeland into range units, *see* 25 C.F.R. §§ 166.4 and

166.302, and establishes a grazing rental rate for those lands, *id*. § 166.400(b).[3] The grazing regulations allow the grazing rental rate to be set either as a price-per-AUM or a price-per-acre, based on the fair annual rental value. *See* 25 C.F.R. §§ 166.4 (definition of "grazing rental rate"), 166.409. "Fair annual rental" is defined to mean "the amount of rental income that a permitted parcel of Indian land would most probably command in an open and competitive market." *Id.* § 166.4.[4]

When BIA establishes a grazing rental rate on a price-per-AUM basis, the rental payment due under a permit is the rental rate multiplied by the number of AUMs included in the permit. 25 C.F.R. § 166.409. The number of AUMs in a permit is based on the range unit's grazing capacity, which in turn is based on the permitted parcel's productivity (e.g., amount and quality of forage). *Id.* § 166.305. The regulations include separate provisions for BIA to adjust grazing capacity, *id.* § 166.306, and to adjust the grazing rental rate, *id.* § 166.408, for existing permits.

Section 166.408 provides in relevant part that "[t]o ensure that Indian landowners are receiving the fair annual return, [BIA] may adjust the grazing rental rate . . . based upon an appropriate valuation method, taking into account the value of improvements made under the permit, unless the permit provides otherwise, following the Uniform Standards of Professional Appraisal Practice [(USPAP)]." The regulation also authorizes BIA to set the grazing rental rate at less than the fair annual rental if BIA determines that it is in the best interest of the Indian landowners to do so. *Id.*

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

[4] The reliance in the definition of "fair annual rental" on a determination of what the Indian land "would most probably" command in an open and competitive market reflects the fact that the regulations allow tribes to impose a preference system, or "tribal allocation," for tribal members to receive grazing permits without competition, *i.e.*, without an open and competitive market. *See* 25 C.F.R. §§ 166.4 (definition of "allocation"), 166.218(c) (BIA implementation of tribal allocation). According to the Regional Director, the Tribe has allocated to tribal members all of the grazing permits available on the Reservation. Answer Brief at 10 n.9.

2. Cheyenne River Reservation Permits

The Ranchers hold grazing permits for range units that include individually-owned trust lands on the Reservation.[5] BIA issued the permits in 2003 for a 5-year term extending generally from November 1, 2003, to October 31, 2008, with a grazing rental rate of $13.55/AUM. *See Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 309 (2005) ($13.55/AUM rate decision); Grazing Permit No. 340 35071 (LeRoy DuBray Permit) (permit for period from Nov. 5, 2003 to Oct. 31, 2008).[6] The permits contain a provision stating that "[t]he fees for the 2003-2008 Grazing Permit period will be subject to change from year to year depending upon range condition."[7] LeRoy DuBray Permit, Special Permit Requirements and Provisions No. 5. BIA reduced the rate to $9.60/AUM for the 2005 and 2006 grazing seasons, *see* Answer Brief at 2 n.3, but the factual and legal basis for that reduction is not indicated by the record in this appeal.

Permittees must pay their full annual grazing fee at the beginning of the grazing year. The permits provide that unless the number of livestock specified in a permit is reduced by BIA, the permittee will not be allowed a credit or refund if the full number of livestock is not grazed on the unit — i.e, if the full number of AUMs in the permit is not used. LeRoy DuBray Permit, Range Control Stipulation No. 2. Thus, if grazing capacity is reduced, e.g., due to drought, a permittee is not entitled to a refund or credit unless BIA modifies the permit to reflect the reduction in available AUMs.

According to the Regional Director, there are 268 grazing permits on the Reservation held by a total of 207 permittees. There are over 4,300 individual landowners, who own over 22,000 fractional interests in allotted lands subject to grazing permits. The Tribe owns undivided interests in approximately 28,000 of approximately 289,000 acres of individually-owned trust lands covered by grazing permits. Declaration of William

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[5] The administrative record does not contain copies of the permits for each Appellant Rancher, but Appellant Ranchers contend that they hold such permits and BIA does not dispute that contention.

[6] The only grazing permit in the administrative record, for Appellant LeRoy DuBray, includes the number of livestock permitted and the total annual rental amount, but does not state a grazing rate per AUM, nor does it indicate what types of lands are covered by the permit, e.g., tribal lands, individually-owned trust lands, or a combination.

[7] For purposes of the issues raised in this appeal, we assume that all of the permits that are subject to the Regional Director's decision contain identical language.

Benjamin. BIA's rate only applies to individually-owned trust lands. The Tribe also has sole ownership interest in approximately 910,000 acres of land on the Reservation, for which it sets the grazing rate. *See* 25 C.F.R. § 166.400(a).

B. Market Study for a Grazing Rate for the 2007 Season

1. Instructions for the Market Study

In December of 2005, OST contracted with David Baker, a State Certified General Appraiser with experience appraising agricultural lands on the Reservation, to prepare a market study of grazing rates and to provide an opinion of reservation-wide year-long rate(s) per AUM for 2007 for the Cheyenne River and Standing Rock Reservations.[8] *See* Declaration of Geoff Oliver, at 2 (¶ 4) and 10.[9] The Statement of Work (SOW) directed Baker to report separate AUM rates for the two reservations, if appropriate, but also allowed a single AUM rate estimation if the market did not indicate a significant variation between the two reservations. The SOW instructed the appraiser to make deductions to account for a 3% preparation fee that BIA charges permittees and for BIA's requirement that permittees pay the entire annual grazing fee at the beginning of the grazing season ("prepayment requirement").[10]

In addition, the SOW required the appraiser to report and document market-driven deductions (if any) for what are characterized somewhat interchangeably as "non-fee factors," "non-fee rental rate factors," or "non-fee rental costs," including "[f]encing,

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[8] The Standing Rock Reservation straddles the North and South Dakota border, comprising Sioux County, North Dakota, and Corson County, South Dakota, and abutting the northern boundary of the Cheyenne River Reservation.

[9] Oliver's declaration is attached to the Regional Director's Answer Brief. Oliver states that OST "was requested to provide a Reservation wide rate per AUM" for the Reservation. *Id.* ¶ 4. The record contains no written documentation of any such request that preceded OST's contract with Baker.

[10] The effect of the prepayment requirement is that if a loan is necessary to pay the grazing fee, interest will be due for the entire year, which would not be the case if the grazing fee were due in installments and the loan taken accordingly. The SOW indicated that the prepayment deduction typically is based on the current and local agricultural interest rate for operating loans from the Federal Reserve Bank. SOW, *inserted in* Declaration of Oliver, at 10.

livestock water development, or other items that are typically provided by the lessor in private grazing leases." SOW, *inserted in* Declaration of Oliver, at 10. Non-fee factors include costs for necessary or desirable services related to the productivity or usability of grazing lands, or conditions or requirements associated with their use, which may affect their value. For example, other things being equal, a parcel of land for which a lessor provides all materials and labor for new fence construction and for existing fence maintenance would be expected to command a higher price from a lessee than a parcel of land for which the lessee must incur such costs. BIA's permits for individually-owned trust lands on the Reservation do not impose any obligation on BIA or the landowners to provide services (e.g., fencing, water) with respect to the permitted parcels of land, and thus the responsibility for these services rests with the permittees.

Neither the SOW nor the requisition form for the contract with Baker refers to the USPAP. The SOW states that "[t]he goal is to receive a well-written, unbiased, logical and supported grazing rate study, which reflects lease rates paid on and around the [Reservation]," "[t]he purpose of [which] is to provide assistance in lease negotiations," and for which "there is a *low* risk of any legal action." *See* SOW, *inserted in* Declaration of Oliver, at 10-11.

On January 31, 2006, after OST had already awarded the contract to Baker, the Regional Director sent a memorandum to the OST Appraiser requesting the preparation of reservation-specific market studies for seven reservations, including the Cheyenne River and Standing Rock Reservations, for BIA's use in determining appropriate new or adjusted grazing rental rates. The Regional Director directed that the market studies address

> services and considerations such as fencing, cattle roundup and counting for [BIA] purposes, weed control, water development, tenure and duration of leases, public hunting access, imposition of first liens on cattle for unpaid rent, and other factors which distinguish BIA grazing units from private pasture rentals. [The] study should identify each non-fee cost considered, document why it was considered, and why it was accepted or rejected as a deduction.
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> These market studies need to be very explicit with great attention given to detail when comparing other lease or permit information to grazing permits issued by BIA. . . . Please show all calculations and proofread for accuracy. Taking these steps will assist me in setting the minimum grazing rental rate under the authority found in 25 CFR . . . [§] 166.408.

Memorandum from Regional Director to OST Appraiser, Jan. 31, 2006. The OST Appraiser forwarded the Regional Director's memorandum to Baker as additional direction for his Market Study.

2. Baker's Market Study

Baker prepared the Market Study, which the OST Appraiser reviewed and certified as acceptable on May 31, 2006. The Market Study reported information, from several sources, on market rents for rangeland in the vicinity of the Cheyenne River and Standing Rock Reservations: (1) the U.S. Department of Agriculture's National Agricultural Statistics Service (NASS) annual surveys for North and South Dakota for 2006; (2) a South Dakota State University survey from 2005; (3) North and South Dakota State School Lands[11] rents for 5-year leases, beginning in 2006; and (4) eighty-one private lease "rental comparables" (comparables). Sixty-three of the comparables were located in South Dakota: five allowed year-long grazing and fifty-eight allowed seasonal grazing. The remaining eighteen comparables were located in North Dakota.[12] Baker concluded that the comparables supplied the most reliable grazing rate data for determining rangeland rental values on the two reservations because they reflected actual market transactions. Market Study at 37.

For each of the comparables, Baker identified its location by county and state, the acreage, the rental rate per AUM, and the period of allowable use (e.g., 5-month seasonal

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

[12] Baker used the South Dakota comparables to generate a "Cheyenne River and Corson County" grazing rate, and the North Dakota comparables to generate a "Sioux County, North Dakota," grazing rate, both of which rates were further adjusted in the OST Appraiser's review report to account for Baker's evaluation of non-fee rental factors. In a separate grazing rate decision for the Standing Rock Reservation for the 2007 grazing season, the Regional Director used a weighted average of the Corson County, South Dakota, and Sioux County, North Dakota, grazing rates, after adjusting for the non-fee rental factors, to determine a single reservation-wide rate of $13.63/AUM for the Standing Rock Reservation. The Regional Director's decision for the Standing Rock Reservation is the subject of a separate Board decision issued today. *See Cadotte v. Great Plains Regional Director,* 48 IBIA 44 (2008) (vacating decision and remanding).

grazing, year-long grazing). For 19 of the 63 South Dakota comparables, Baker identified the duration of the lease (e.g., 3-year lease). In describing each comparable, Baker also identified the division of responsibility or costs between the lessor and lessee for the following non-fee rental factors: materials for fence maintenance, labor for fence maintenance, livestock watering facility maintenance, weed control, supplemental costs and herding, and control of access for hunting.[13]

To arrive at an AUM rate for the Cheyenne River Reservation, Baker began with a baseline, unadjusted, seasonal AUM rate, which was determined by calculating an average AUM rate from the 58 seasonal-use comparables in South Dakota, without considering any non-fee factors that might distinguish those comparables from one another, such as the division of responsibility between lessors and lessees for various services. The average AUM rate for the seasonal-use comparables was $23.72/AUM. Market Study at 37.

Baker then adjusted this average "seasonal grazing rate" to account for the fact that BIA grazing permits authorize year-long use. As explained by Baker, a year-long rental rate includes only a portion of a seasonal rate because a year-long rate includes payment

> not only for the seasonal grazing period, but also for the months when livestock grazing forage is in marginal/poor condition (primarily the winter months). Due to the marginal/poor livestock forage condition[,] winter-only rental rates are typically significantly lower than the rental rates for the seasonal grazing period. A seasonal factor converts a seasonal rental rate into a year-long rental rate and is expressed as the percentage that the year-long rental rate comprises the seasonal rental rate.

Id. at 38.

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[13] It is important to distinguish between the period of allowable use during the course of a year and the total duration, or "term" of the permit or lease. For example, a lease with a 3-year term may allow grazing for only 5.5 months of the year, *see* Market Study at 26 (Comp. 44), or it may allow year-long grazing, *see id.* at 28 (Comp. 52). BIA permits are issued for 5-year terms and provide for a year-long grazing season. *See* LeRoy DuBray Permit.

To arrive at the seasonal conversion factor, Baker apparently divided the average of the five year-long-use comparables[14] ($22.63/AUM) by the average of the 58 seasonal-use comparables ($23.72/AUM), which yielded 0.9540, rounded to 95%. *Id.* Thus, according to Baker, the market data indicated that the difference between a year-long AUM rate and a seasonal AUM rate is 5%. Applying the 95% seasonal conversion factor to the baseline seasonal-use average, Baker arrived at a year-long average AUM rental rate of $22.53 ($23.72 x .95 = $22.53).[15]

Baker then deducted from the year-long rate BIA's 3% preparation fee (a deduction of $0.68/AUM), and the financial effect of BIA's prepayment requirement (a deduction of $1.87/AUM, based on the agricultural interest rate of 8.3% for operating loans in the Ninth District of the Federal Reserve). *Id.* The adjusted year-long rental rate for "Cheyenne River and Corson County," without considering non-fee factors, was $19.98/AUM. ($22.53 - ($0.68 + $1.87) = $19.98). Baker described this average as "**not** includ[ing] any costs or services that are typically paid by the lessee as the rental rate indicated in this report represents a 'grass only' rental value." *Id.* at 39 (emphasis in original).

Baker then turned to an evaluation of non-fee rental factors, which he divided into the following categories: (1) fence materials, (2) fence maintenance, (3) livestock water facility maintenance, (4) salt/mineral supplements, (5) weed control, (6) hunting access, (7) herding/counting services, and (8) imposition of first liens for unpaid rent. *Id.* at 41-42. In evaluating these factors, it is apparent that Baker considered all 81 comparables from North and South Dakota. Thus, while Baker used only South Dakota comparables for determining an adjusted year-long rental rate for the Reservation (prior to considering non-fee factors), he used all of the comparables in both States for evaluating the relevance and value of non-fee rental factors.

For the "fence materials" category, Baker reported that there were 12 comparables "where the lessee was responsible for providing fence materials for fence construction." *Id.* at 41. The portion of the Market Study that separately identifies the comparables variously describes 12 leases (11 in South Dakota, 1 in North Dakota) as ones for which the

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[14] Comps. 1, 39, 40, 49, 57.

[15] The mathematical effect of this was the same as if Baker had relied solely on the five year-long-use comparables to produce a year-long grazing rate average. The difference between the average of the five year-long-use lease rates ($22.63/AUM) and the "adjusted" average year-long-use lease rate ($22.53/AUM) is attributable only to rounding the adjustment factor down to 95%.

lessee provided "[f]encing materials and maintenance," "fence materials and labor for fence maintenance," or similar language. *See id.* at 16-35 (Comps. 4, 17, 30, 32, 36, 37, 60, 76, 77, 78, 80, 81). Baker reported that "[t]he statistical analysis of the rental data sample indicated a high degree of correlation between the lessee providing fencing material for fence construction and rental value," and that "[t]he analysis indicated an adjustment of [minus] $3.88 per AUM where fence materials were to be provided by the lessee in the rental agreement." *Id.* at 41. The Market Study does not include any documentation or calculation showing how Baker arrived at the $3.88/AUM figure as the appropriate value of fence materials, nor does it address the fact that Baker's lease-specific descriptions for what appear to be the 12 referenced comparables did not distinguish between "materials" and "maintenance." Thus, the "fence materials" category apparently included leases in which "fencing materials and maintenance" were lumped together.

In the "fence maintenance" category, Baker reported that there were 13 comparables "where the lessor was either solely responsible or agreed to a shared responsibility with the lessee for fence maintenance." *Id.* at 41. The specific descriptions of the comparables identify 13 leases (all in South Dakota), variously described as those for which "[f]ence maintenance materials and labor are the responsibility of the lessor," or "[t]he lessor is responsible for fencing materials [and] fence maintenance." *See id.* at 15-31 (Comps. 1, 2, 5, 13, 22, 24, 26, 33, 34, 35, 39, 40, 62). Thus, these 13 leases do not appear to include arrangements where there is a shared responsibility for fence maintenance. There are, however, 56 leases that are described as ones for which "[f]encing materials are provided by the lessor and fence maintenance is provided by the lessee." *See, e.g., id.* at 15 (Comp. 3). Baker reported that "[t]he analysis of the rental data sample indicated a high degree of correlation between the lessor providing fence maintenance and rental value," and that the "analysis indicated an adjustment of [plus] $5.75 per AUM where the lessor was required to provide fence maintenance in the rental agreement." *Id.* at 41. The Market Study does not include any documentation or calculation showing how Baker arrived at the $5.75/AUM figure as the average value of fence maintenance, as derived from the lease data. And, like the "fence materials" category, the comparables considered for the "fence maintenance" category appear to include leases for which materials and maintenance are not distinguished.

Baker's summary of the "livestock water facility maintenance" category stated that for a majority of the comparables, "livestock watering facilities consisted of stock dams, dugouts, springs, creeks, or a combination," and the lessor was responsible for their maintenance. *Id.* Baker reported that it "was stated on many occasions [that] the maintenance expense of these facilities was minimal." *Id.* The specific descriptions of the comparables include numerous leases for which "[m]aintenance of the livestock water facilities is the responsibility of the lessor, but expenses are minimal as livestock water is

provided" by sources such as stock dams, dugouts, live streams, or a combination. *See, e.g., id.* at 15-17 (Comps. 3, 4, 6, 9). Baker stated that "[t]he analysis of the data sample indicated that there was not a significant correlation between a lessee providing livestock water facility maintenance and rental value." *Id.* at 41. Therefore, he did not make any adjustment for the cost of water facility maintenance.

For each of the five remaining categories (salt/mineral supplements, weed control, hunting access, herding/counting services, imposition of first liens for unpaid rent), Baker repeated the conclusion, with no additional explanation, that the analysis of the data sample indicated that there was not a significant correlation between which party to the lease provided a particular service (or controlled a particular factor) and rental value. *See id.* at 41-42. Baker did not address whether differing terms among the leases (e.g., 1-year leases, 3-year leases), as compared to BIA's 5-year grazing permits (with the possibility of annual rate adjustments), affected value.

Baker concluded the Market Study by offering his opinion of the year-long grazing rate for the Reservation: $19.98/AUM.[16] This figure represented the average of the 58 seasonal South Dakota leases, reduced by the 5% seasonal-to-year-long conversion factor, and from which deductions had been made for BIA's preparation fee and the prepayment requirement, but which had not been adjusted for any non-fee factors. Baker described the $19.98/AUM figure as the "grass-only" year-long rental value for the permitted lands on the Reservation, which "**does not** include any costs or services that are typically paid by the lessee." *Id.* at 39. Baker certified that his report had been prepared in conformity with the USPAP. In his certification, he also stated that "[c]orrelation and regression techniques were used in the analysis of market data in order to identify the significant factors applicable to the property under appraisement," and explained that the techniques were used "because they objectively test for the correlation of property characteristics with value." *Id.* at 43. The Market Study does not include any documentation showing how and for which data correlation and regression techniques were used.

Baker's report was reviewed by Geoff Oliver, the OST Appraiser, to determine if it had been prepared in accordance with recognized methods and techniques of appraisal practice and written in compliance with USPAP Standards Rule 2-2(a). *See* OST Appraiser

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[16] As noted earlier, *supra* note 12, the year-long rate for the Reservation was reported as the year-long rate for "Cheyenne River and Corson County," for both the Cheyenne River Reservation and the Corson County portion of the Standing Rock Reservation.

Review Report (Review Report), at 3.[17] Oliver's review report included additional calculations to account for Baker's opinion of the market value of fence material and maintenance costs. Oliver described Baker's $19.98/AUM figure as a "no services provided" figure. Review Report, at 1. Oliver then subtracted Baker's $3.88/AUM from that figure, resulting in a rate of $16.10/AUM for the Cheyenne River Reservation, which Oliver described as "Fencing Materials Provided by Lessee." Oliver then added Baker's $5.75/AUM to the $16.10/AUM figure, resulting in a rate of $21.85/AUM, which Oliver described as "Fencing Maintenance Provided by Lessor." Oliver certified that the Market Study was acceptable for its intended use.

For the Standing Rock Reservation, Oliver subtracted $3.88/AUM from Baker's "Cheyenne River and Corson County" rate ($19.98 - $3.88 = $16.10/AUM) and from his "Sioux County, North Dakota" rate ($12.42 - $3.88 = $8.54/AUM), and then calculated a weighted average of the two according to the percentage of Standing Rock trust lands in Corson County, South Dakota, and in Sioux County, North Dakota. *See id.* at 3. The result was a reservation-wide recommended AUM rate of $13.63/AUM for the Standing Rock Reservation.

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[17] A copy of USPAP Rule 2-2(a) is not in the Regional Director's administrative record. However, USPAP Rule 2-2(a) (2008) describes what must be included in a real property appraisal report referred to as a "Self-Contained Appraisal Report." Among other things, a Self-Contained Appraisal Report "must be consistent with the intended use of the appraisal, and, at a minimum . . . describe information sufficient to identify the real estate involved in the appraisal, including the physical and economic property characteristics relevant to the assignment; . . . describe the information analyzed, the appraisal methods and techniques employed, and the reasoning that supports the analyses, opinions, and conclusions; . . . clearly and conspicuously . . . state all extraordinary assumptions and hypothetical conditions; and . . . state that their use might have affected the assignment results." The Rule 2-2(a) Comment states that "[t]he appraiser must provide sufficient information to enable the client and intended users to understand the rationale for the opinions and conclusions, including reconciliation of the data and approaches," and that "[t]he appraiser['']s reasoning in support of the opinion must be provided in the depth and detail required by its significance to the apprisal." USPAP Rule 2-2(b) describes what is required in a "Summary Appraisal Report," and the Comment describes the "essential difference . . . [as] the level of detail of presentation." A Summary Appraisal Report must still "provide sufficient information to enable the client and intended users to understand the rationale for the opinions and conclusions, including reconciliation of the data and approaches." Comment to USPAP Rule 2-2(b)(viii).

C. Regional Director's Decision and Requests for Reconsideration or Waiver

On August 3, 2006, the Regional Director issued the decision that is the subject of this appeal. The decision announced that the Regional Director was establishing a "reservation minimum grazing rental rate" of $16.10/AUM for allotted lands (i.e., individually-owned trust lands) on the Cheyenne River Reservation for the 2007 grazing season, pursuant to 25 C.F.R. § 166.408. The decision did not include any separate analysis, but stated that copies of the Market Study were available from BIA, and advised interested persons of the right to appeal the decision to the Board.

On August 14, 2006, the Superintendent of the Cheyenne River Agency (Superintendent; Agency), BIA, sent a memorandum to the Regional Director requesting reconsideration of the rate. Describing a prevailing drought, the Superintendent stated that "[f]orage is short to non-existent with virtually no current year's growth," and that "[t]o compound the situation, stock dams are boggy and drying up making many areas unusable due to the lack of water." Memorandum from Superintendent to Regional Director, Aug. 14, 2006. The Superintendent reported that the Agency was conducting field evaluations to make recommendations on stocking rate adjustments to range units on an individual basis to account for drought conditions, but also stated that "this will only reduce the number of AU's our producers can stock; it does not alleviate the cost per AU." *Id*. The Superintendent expressed support for the landowners to obtain the highest return for their land, but also expressed concern that the rate hike might put Indian ranchers out of business. He stated that if BIA was unable to lease the land, it would adversely affect landowners.

By memorandum dated August 25, 2006, the Acting Regional Director asked the OST Appraiser to reconsider the suggested rate because of the effects of the severe drought, stating that the nutritional value of the forage was severely compromised by the drought, and that it might not be reasonable to charge rates based on comparables that assumed the presence of forage with average nutritional value. In addition, the Acting Regional Director asked the OST Appraiser to clarify why no monetary value or consideration was given to non-fee factors, other than fence materials and maintenance. The Acting Regional Director noted that the "explanations" in the Market Study for the decisions not to adjust for other non-fee factors used phrases such as "did not indicate" or "was not a significant correlation," and asked the OST Appraiser to explain in more detail why no monetary value was ascribed to those factors.

Also on August 25, 2006, the Tribe wrote to the Regional Director and asked him to reconsider his grazing rate decision on the grounds that BIA had not consulted with the Tribe and that the Market Study did not take into account "the exceptional drought

circumstances occurring which decrease the valuation of the lands in question significantly." Letter from Tribe to Regional Director, Aug. 25, 2006, at 1-2. The Tribe stated that the Market Study had assumed no drought, that the U.S. Drought monitor had listed both Dewey and Ziebach Counties (on the Reservation) as experiencing an "exceptional" drought (the highest possible level). The Tribe's letter contended that while the Market Study had concluded that access to water did not significantly affect rental value, it also assumed that access to water was available. Noting that the Market Study described stock dams as constituting "the principal source of livestock water," the Tribe asserted that, under prevailing conditions, the majority of stock dams on the Reservation were completely dry and expected to remain dry. *Id.* at 2. The Tribe also stated that Reservation lands with access to pasture taps had been flow-restricted by the water company due to water system failure in drought conditions.[18] The Tribe contended that the Market Study's failure to account for whether there was access to water was a "major and fundamental error" because "[t]he ability to access water and the cost of securing water access is a primary factor in the marketability of these grazing lands. It is not just the value of the grass but the value of land that is to be accounted for pursuant to 25 C.F.R. § 166.408." *Id.*

The Tribe also asserted that if the rental rate is raised and stocking rates are reduced (because of a reduction in forage), local producers would be driven out of business and "outside cattle producers who have large operations will then be the entities left who can afford to pay these higher rates." *Id.* at 3. The Tribe argued that BIA's decision would promote "'grass brokering' by ensuring that local small producers cannot afford to operate without outside large operators supporting their local operations." *Id.*

On September 6, 2006, the Tribe again wrote to the Regional Director, this time asking for a "waiver" of implementation of the Regional Director's rate decision under 25 C.F.R. §§ 1.2, 166.2, or 166.408, and asserting that Tribal ordinances had been adopted to address the drought.[19] The Tribe argued that the Tribe and its members needed flexibility and a waiver from the "huge proposed grazing rate increase due to drought

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[18] A pasture tap apparently refers to a device that taps into a rural utility water supply.

[19] Section 1.2 reserves the authority of the Secretary of the Interior to waive the regulations in chapter I of 25 C.F.R., which includes the grazing regulations. Section 166.2 authorizes BIA to waive application of the grazing regulations if they "conflict with the objectives of [an] agricultural resource management plan provided for in § 166.311 of [25 C.F.R.], or with a tribal law . . . unless the waiver would constitute a violation of a federal statute or judicial decision or would conflict with BIA's general trust responsibility under federal law." As noted earlier, section 166.408 grants authority to BIA to adjust the rental rate for existing grazing permits.

conditions which will not allow the lands to sustain the increase." Letter from Tribe to Regional Director, Sept. 6, 2006, at 2. The Tribe contended that as an owner of interests in lands subject to the rate increase, the Tribe would be harmed because the rate increase would undermine the long-term sustainability of the lands. The Tribe also argued that its members would be harmed because "[o]ut of 266 Range Units on the Reservation, over 50% are used by tribal member operators . . . , and there are others who sublease using Pasture Authorizations or Cattle Care Agreements." *Id*. The Tribe contended that the rate increase would "put hardships on the lands that are used for grazing, and either force operators and others to cut corners or force tribal member operators and others out of business[, which would be] contrary to the long term sustainability of grazing lands, and is not in the best interests of the Tribe or its members." *Id*.

On September 21, 2006, the OST Appraiser responded to the Regional Director's request to reconsider the rate recommendation based on the drought and to clarify and explain the Market Study's conclusion that, except for fence materials and fence maintenance, none of the non-fee factors were considered to have any measurable economic value. The OST Appraiser stated that "[a]fter researching the effects of this year's drought in relation to lease rates per AUM, there is no measurable adjustment which can be applied." Memorandum from OST Appraiser to Regional Director, Sept. 21, 2006. According to the OST Appraiser, "[c]omparable rentals were used to estimate this rate and it has been found that lessees receive no adjustments to the rate per AUM due to drought," and "[t]hese operators incur the same risk of drought as would operators on grazing units within the reservation boundaries." *Id.* The OST Appraiser also noted that "drought conditions dictate forage capacity which in turn decreases the stocking rate," which in turn "would indicate an overall decrease in total lease rates." *Id*.

With respect to the Regional Director's request for clarification regarding Baker's consideration of non-fee factors, the OST Appraiser stated that Baker "was directed by the Regional Appraisal Office through the Regional Director's Office to ask specific questions to lessors/lessees regarding the [non-fee] factors when collecting market data." *Id*. According to the OST Appraiser,

> [w]hen verifying each of the comparable leases within the grazing rate study, the appraiser asked each individual if any of the above items were factors in negotiating the rent per AUM. Statements like 'did not indicate' and 'was not a significant correlation' meant that the factor had no monetary influence on the negotiated rate per AUM. . . . [T]he market dictates any and all economic influences and if a factor, whether it's drought or any of the [non-

> fee factors], can not be measured and verified, the [OST] Office of Appraisal Services can not support an adjustment to the estimated rate per AUM.

Id.

On September 28, 2006, the Acting Regional Director rejected the Tribe's request for reconsideration or waiver of the grazing rate decision. The Acting Regional Director recounted her correspondence with the OST Appraiser, and reported that the OST Appraiser had stated "that there is no measurable adjustment which could be applied to the recommended rental rate for drought conditions," and "[t]herefore, I cannot give any consideration to the Tribe's request for a waiver" of the decision. Memorandum from Acting Regional Director to Board, Sept. 28, 2006.[20]

In this appeal to the Board, the Ranchers, the Tribe, and the Regional Director all filed briefs.

Standard of Review

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

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

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. *See Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007).

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[20] The first of these consolidated appeals was filed on August 31, 2006, and the Tribe's appeal was filed on September 6, 2006. In a preliminary order dated September 15, 2006, the Board noted that the filing of the appeals had divested the Regional Director of jurisdiction over the grazing rate adjustment, but solicited a statement from the Regional Director whether or not he wished to consider the Tribe's request for a waiver. The Board treats the Acting Regional Director's September 28, 2006, memorandum to the Board as a decision that is subsumed within the scope of this appeal.

Discussion

A. Regional Director's Threshold Arguments

The Regional Director raises two threshold arguments which, if accepted, would obviate the need for us to consider the merits of Appellants' arguments challenging the adjusted grazing rate. First, the Regional Director contends that both the Ranchers and the Tribe lack standing to raise their claims in this appeal. Second, the Regional Director contends that his reliance on the Market Study and opinion of value offered by professional appraisers necessarily is reasonable and the Market Study necessarily constitutes substantial evidence to support the grazing rate decision. Thus, according to the Regional Director, the Board's review is limited to determining whether he correctly followed the appraisal.

With respect to standing, we conclude that the Ranchers have standing to appeal the Regional Director's decision. We do not decide whether the Tribe has standing because the Tribe's substantive challenges to the grazing rate raise the same claims as those raised by the Ranchers, and our resolution of those claims — vacating the Regional Director's decision and remanding — means that we can grant no further relief based on the Tribe's claim that the grazing rate is invalid because the Regional Director did not consult with the Tribe prior to issuing his decision, or should have waived implementation of the rate adjustment. With respect to the Regional Director's reliance on the Market Study, we reject his argument that, because it was prepared and reviewed by professional appraisers, it was reasonable *per se* for BIA to rely on the Market Study.

1. Standing

In order to have standing, an appellant must be an interested party whose interests could be adversely affected by the decision being appealed. *See* 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested Party"); 43 C.F.R. § 4.331 (Who may appeal). To evaluate standing, the Board follows the three elements of constitutional standing described in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). An appellant to the Board must show that (1) he has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *Id*. at 560-61.

Applying this test, we conclude that the Ranchers have standing. They have a legally protected interest — a contract right embodied in their permits — that is adversely affected by the allegedly impermissible and unsupported rate increase. Their injury is traceable to the Regional Director's decision, and is redressable by a favorable decision by the Board.

The Regional Director argues that the Ranchers lack standing because the rate adjustment authority in the grazing regulations, section 166.408, is solely for the benefit of ensuring that Indian landowners receive fair annual rental for their lands, and thus the Ranchers derive no right or interest from the regulations. The flaw in the Regional Director's argument is in suggesting that the regulatory source of authority for the Regional Director's decision is also the source of the interest asserted by the Ranchers. It is not. The Ranchers' interest derives from their permits, and an unlawful application of regulatory authority would interfere with those permits rights. Thus, we reject the Regional Director's argument.

The Regional Director also challenges the Tribe's standing to bring this appeal, noting that the Tribe does not argue as a landowner that the $16.10/AUM rate is too low. The Regional Director argues that the Tribe's assertions that it will be injured if the grazing rate is set too high are too speculative and conjectural to satisfy a showing of imminent, concrete, and particularized injury.[21] We need not decide whether the Tribe has standing because the Tribe and the Ranchers effectively challenge the rate decision on the same substantive grounds, and our resolution of the merits of the Ranchers' challenges resolves the Tribe's substantive challenges as well. The Tribe's procedural claim that the Regional Director's decision must be vacated and remanded, because he did not first consult with the Tribe, is a claim for which we can grant no further meaningful relief. The same is true with respect to the Tribe's additional argument that the Regional Director did not properly consider its request for a "waiver" of implementation of the $16.10/AUM rate.

2. Regional Director's Reliance on a Market Study and Recommendation Prepared and Reviewed by Professional Appraisers

The Regional Director argues that we should uphold his decision as reasonable and as supported by substantial evidence, *per se*, because he relied on a market study and opinion of value offered by certified, professional appraisers. We disagree.

The Board has not accepted a BIA decision as reasonable and as supported by substantial evidence simply by virtue of the fact that BIA relied on and followed the recommendation of a certified, professional appraiser. For example, in *Rosebud Indian Land*

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[21] The Tribe suggests that even if the $16.10/AUM rate is one that the market will bear, the result is that the Ranchers will not take proper care of the land, and a lower rate will encourage the Ranchers to voluntarily invest the difference in range conservation and improvement practices, rather than taking the difference as profit. We agree that such speculation is unsupported.

and Grazing Ass'n, the reviewing appraiser had approved a grazing rate market study as "totally reasonable," but the Board found that the study was deficient in certain respects and thus vacated the Regional Director's grazing rate decision. *See* 41 IBIA at 300, 302. The Board rejected the Regional Director's attempt to rely on the expert professional judgment of the appraiser when the market study itself failed to include a satisfactory explanation with respect to issues raised by the appellant. *See, e.g., id.* at 302 (Regional Director's decision failed to explain why it was appropriate to set a single grazing rate for reservations throughout all of western South Dakota, when the record lacked substantial evidence to demonstrate that the decision had sound professional underpinnings); *id*. at 304 (market study failed to explain the appraiser's reasoning).

The "reasonableness" standard of review includes some deference, and, as the Board has stated previously, "the determination of 'fair annual rental' requires the exercise of judgment and [] reasonable people may differ in their calculation of 'fair annual rental.'" *Strain v. Portland Area Director*, 23 IBIA 114, 117-18 (1992). But a determination of "fair annual rental" still requires that BIA's decision be supported by a sufficient explanation and sufficient evidence to allow the Board to understand and evaluate the decision in the face of challenges asserted by an appellant.

When a grazing rate decision purports to be based on "fair annual rental" value, the Board must be able to determine whether the decision comports with the regulatory definition of that term, which as we have noted 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. If the Regional Director relies solely on a grazing rental rate recommended by an appraiser, then the appraiser's report (or accompanying documentation) must provide sufficient detail to allow third parties to review and understand the assumptions, data, calculations, and conclusions. Appellants undoubtedly have the burden of proof to demonstrate that an appraisal is based on inappropriate methodologies, data, or assumptions, or makes erroneous calculations. And to the extent that certain assumptions or conclusions rest on the expertise and sound professional judgment of the appraiser, there may be grounds for deference in determining whether a rational basis exists for the conclusion. But that expertise and judgment still must be adequately explained and the conclusions must be supported by the evidence. *Cf. Lone Pine Television, Inc.*, 158 IBLA 86, 97 (2002) (where a BLM appraisal or other method of determining rental value is found to be based upon erroneous or faulty methodology, or is lacking in sufficient detail to permit independent verification of the conclusions contained therein, BLM's decision is properly set aside and remanded); *Kitchen Productions, Inc.*, 152 IBLA 336, 345 (2000) (same). Thus, we reject the Regional Director's argument that

because he relied on the Market Study, we should find his decision reasonable and supported by substantial evidence, without reviewing the Market Study itself.

B. Appellants' Arguments

The Ranchers, joined in whole or in part by the Tribe, raise ten[22] arguments on appeal:

(1) the Regional Director erroneously considered himself legally bound to adopt and implement the grazing rate recommended by the appraisers;

(2) under the terms of the grazing permits, the grazing rate may be adjusted based solely on "range condition," a factor that the Market Study admittedly did not consider;

(3) it was unreasonable for the Market Study to use the interest rate for operating loans (8.3%) in making a deduction to account for BIA's prepayment requirement;

(4) the 95% seasonal adjustment factor does not reflect the sharply-reduced value of winter forage, is unreasonable, and is not supported by substantial evidence;

(5) the Market Study's baseline "no services," year-long AUM rate of $19.98 is flawed because embedded in the figure are numerous services provided by lessors in private leases that are not provided by BIA or Indian landowners;

(6) the Market Study failed to disclose the calculations from which the fencing-related costs were derived, and failed to explain why the cost of fence materials was deducted from the baseline figure, but not the cost of fence maintenance, even though BIA permittees are responsible for both;

(7) the Market Study improperly failed to adjust the AUM rate to account for the permittees' responsibilities to control prairie dogs and weeds on their range units;

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[22] Appellants also lodge an objection to the Regional Director's administrative record as not properly certified, and object to the fact that the record as originally submitted was incomplete and was supplemented by the Regional Director when he filed his answer brief. Appellants suggest that the record may still be incomplete, and seek sanctions against the Regional Director. The only "sanctions" available to the Board when a Regional Director submits an incomplete record, or supplements it during briefing, are to ensure that interested parties have an opportunity to respond (which Appellants did) or to vacate the decision and remand based on an incomplete record or the Regional Director's failure to comply with an order to produce necessary documents. *See, e.g.*, *White Mountain Apache Tribe v. Acting Phoenix Area Director*, 16 IBIA 51, 53 (1988). Because Appellants had an opportunity to respond to the record as supplemented, and because we are vacating the decision and remanding, Appellants' objection to the record and their request for sanctions are moot.

(8) the Market Study failed to adequately explain its conclusion that other non-fee factors had no measurable economic value that could be factored into the AUM rate recommendation;

(9) the Market Study erroneously assumed the presence of normal sources of livestock water on Reservation lands and neither the Market Study nor the Regional Director (in refusing to consider a drought-related adjustment) considered whether the presence or absence of normal sources of livestock water could affect the value of an AUM on the land; and the Regional Director failed to consider that the severity of the drought so affected the nutritional value of the forage as to reduce its value; and

(10) the Regional Director's decision is arbitrary and capricious because he established a rate of $16.10/AUM for the Cheyenne River Reservation, and a rate of $13.63/AUM for the adjacent Standing Rock Reservation, when the two reservations are in the same market and share similar climatic and topographic conditions.

As explained below, we conclude that the Regional Director's decision, and the Market Study on which it was based, are not adequately explained or supported by substantial evidence in several respects, and therefore the decision must be vacated and the matter remanded. In reaching our conclusion, we express no opinion on whether the $16.10/AUM rate is too high, too low, or a reasonably accurate statement of fair rental value for the 2007 season for forage on some or all of the individually-owned permitted lands on the Reservation. We address each of Appellant's arguments in turn.

1. Was the Regional Director's Decision Based on the Erroneous Premise that the Regional Director Lacked Discretion and Was Legally Required to Adopt and Implement the Appraisers' Recommended Rate?

Appellants contend that the Regional Director's decision to accept the Market Study's recommended rate, and his refusal to consider an adjustment based on the drought, demonstrate that he considered himself legally bound to adopt and implement the recommendation of the appraisers. Appellants argue that this was legal error, and that as a result, the Regional Director failed to exercise discretion afforded to him under the regulations to decide whether to accept the recommended rate, adopt a different adjusted rate, or leave the rate unchanged. Appellants contend that the regulatory language in section 166.408, stating that BIA "may" adjust the grazing rate during the term of a permit, means that BIA has discretion whether to adjust the rate at all. Appellants suggest that this is the case, regardless of whether the rental value of grazing rights has increased.

The Regional Director's decision itself does not suggest that the Regional Director considered himself legally bound to adopt and implement whatever rate was recommended by the appraisers, nor does it state that the action being taken was required by

section 166.408. Instead, his decision only identifies section 166.408 as the source of his authority for adjusting the AUM rate. On appeal, the Regional Director clearly takes the position that his action to adjust the rate involved an exercise of discretion. The Regional Director argues that he had discretion to consider and to follow the advice of the appraisers, thus also impliedly taking the position that he had discretion not to follow that advice.

This position on appeal makes clear that the Regional Director does not, as Appellants argue, believe himself to be legally bound to accept and implement whatever rate may be recommended by an appraiser. In the present case, of course, the Regional Director ultimately accepted the appraisers' recommendation in full and without additional adjustments or explanation, but that fact alone does not demonstrate that he was laboring under a mistaken interpretation of the nature of his authority. Thus, we reject Appellants' argument that the Regional Director's decision is based on a mistaken legal premise regarding the scope of his discretion.[23]

Nonetheless, this does not answer whether the Regional Director has adequately explained his exercise of discretion, and in particular the conclusion that BIA *could not* consider reducing the AUM rate based on the effects of the drought. As discussed later, we agree that the Regional Director has failed to adequately respond to Appellants' argument that an absence of natural and usual sources of livestock water during the drought, and the lack of nutritional value of the forage, had an effect on the value of an AUM on affected lands. Thus, while we are not convinced that the Regional Director's refusal to adjust the rate on this basis rested on an erroneous legal understanding of his discretion, we agree that the Regional Director has not adequately explained his failure to consider the potential effect of the drought on the value of an AUM.

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[23] The Regional Director's response to the Tribe's request for a "waiver" of implementation of the $16.10/AUM rate, based on the drought, stated that he "cannot" give consideration to the request, and to that extent the argument that the Regional Director erroneously believed that he lacked discretion also implicates the Tribe's argument regarding its waiver request. Although our resolution of the drought issue obviates any need to separately consider the Tribe's argument that the Regional Director failed to properly consider its waiver request, we note that the Tribe's request did not identify any alleged violation of a tribal law or agricultural management plan, and thus did not conform to the standard for granting a waiver set forth in 25 C.F.R. § 166.2.

2. Is BIA Limited to Adjusting the Grazing Rate for the Ranchers' Permits Based Solely on "Range Condition"?

As noted earlier, the Ranchers' permits contain the stipulation that "[t]he fees [during] the 2003-2008 Grazing Permit period will be subject to change from year to year depending on range condition." *See* LeRoy DuBray Permit, Special Permit Requirements and Provisions No. 5 (Provision No. 5). The Ranchers argue that this language precludes BIA from adjusting the rental rate based on a change in the market value of an AUM that is not also based on range condition.[24] Therefore, even assuming that the Market Study accurately estimated $16.10/AUM as the value of an AUM for 2007 on the Ranchers' range units, as measured by what an AUM on those units would command in an open and competitive market, Appellants contend that because of the permit language, BIA cannot adjust their grazing fees unless the new rate is based on range condition.

We disagree. The permits are expressly subject to the regulations at 25 C.F.R. Part 166. These regulations provide in relevant part that "[t]o ensure that Indian landowners are receiving the fair annual return, [BIA] may adjust the grazing rental rate . . . based upon an appropriate valuation method." 25 C.F.R. § 166.408. Provision No. 5 does not purport to exempt the permit from operation of BIA's rate adjustment authority in section 166.408. In the absence of an express permit provision stating that no adjustment will be allowed under section 166.408, except as expressly provided in the permit, we will not construe Provision No. 5 to trump section 166.408 and divest BIA of its rate adjustment authority under that section.[25]

On the other hand, neither we nor BIA can ignore the contractual permit language. The Regional Director apparently interprets Provision No. 5 as intended to refer only to the number of AUMs in the permit. The Regional Director notes that if range conditions change so that the grazing capacity in a permit must be adjusted, the total "fees" owed under the permit (the revised number of AUMs multiplied by the grazing rate) will change

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[24] Note that it is only by operation of 25 C.F.R. § 166.409 that the total grazing rental fee (i.e., rental rate multiplied by the number of AUMs) may be reduced (or raised) by a rate adjustment. *See supra*, at 5. Thus, the Ranchers are in no position to, and do not actually assert, that Part 166 does not otherwise apply.

[25] Of course, to the extent that Appellants argue that BIA is precluded from exercising authority under section 166.408 to adjust the rental rate upward based upon a change in the value of an AUM that is not tied to range condition, that same constraint would apply to BIA in adjusting the rate downward.

accordingly. Thus, the Regional Director's interpretation of Provision No. 5 is that it is only relevant to grazing capacity.

The difficulty with that interpretation is that the regulations already provide BIA with discretion to adjust the grazing capacity authorized in a permit. *See* 25 C.F.R. § 166.306. Given that the permits are subject to BIA's regulatory authority under 25 C.F.R. Part 166, including its authority to adjust grazing capacity under section 166.306, and AUM value under section 166.408, there is no apparent reason to construe Provision No. 5 as singling out grazing capacity as the only basis for adjusting total fees to account for changes in range condition. To the extent that range condition can be relevant either to grazing capacity or to the actual value of an AUM, the language clearly does not preclude an adjustment based on a change in the value of an AUM, and indeed when range condition is relevant to the value of an AUM, we construe Stipulation No. 5 to require that range condition be considered as part of any rate adjustment decision.

Thus, while we reject Appellants' argument that Provision No. 5 precludes BIA from adjusting the grazing rate, except on the basis of range condition, we also reject the Regional Director's construction of Provision No. 5 as applicable only to the adjustments of grazing capacity. When range conditions, either on a parcel-specific or larger geographical basis, affect the economic value of forage, Provision No. 5 is relevant, and the AUM rate is subject to change.

In the present case, Appellants have identified range-condition-related factors that arguably could affect the value of an AUM (independent of their effect on grazing capacity), and arguably could either justify or require an adjustment of the AUM rate. The OST Appraiser admits that "[b]ecause of the broad scope of the assignment, range condition was not considered in estimating a rate per AUM." Regional Director's Answer Brief, Declaration of Oliver, at 2. When the Superintendent and the Tribe squarely brought information about the drought to the Regional Director's attention, and described the potential effect of drought conditions on the value of an AUM, the Regional Director, after consulting with the OST Appraiser, stated that he could not give consideration to drought conditions as part of the decision to set the grazing rate. The Regional Director's assertion that he could not consider the effects of the drought in evaluating an adjustment of the AUM rate appears to be based on an unduly restrictive reading of Stipulation No. 5, as well as an apparent presumption that drought conditions were relevant *only* to grazing capacity, and not to AUM valuation. The Regional Director's reading of Stipulation No. 5 was in error. Thus, his determination that he could not consider range condition was also in error.

3. Was it Unreasonable for the Market Study to Use 8.3% as the Discount Rate for BIA's Prepayment Requirement?

Appellants argue that it was unreasonable for the Market Study to use the interest rate for operating loans (8.3%) in making an adjustment for BIA's prepayment requirement. Appellants contend that because their permits do not allow for refunds, BIA's prepayment requirement shifts the entire risk of drought (or other factors that prevent the use of AUMs covered by the annual fee) onto the permittees.[26] Thus, according to Appellants, the interest rate used to discount the AUM rate, to account for the prepayment requirement, should have been higher, such as 18%, to reflect that risk allocation. We disagree that BIA was required, as part of the adjustment for BIA's prepayment requirement, to consider the allocation of risk described by Appellants.

There is no indication in the SOW or other instructions that in directing the appraiser to make adjustments for BIA's prepayment requirement, BIA intended the adjustment to account for the allocation of risk that AUMs may become unusable during the course of the year. Instead, the apparent purpose of making the adjustment to account for BIA's prepayment requirement was to account for the time value of money,[27] based on the assumption that permittees may need to obtain loans to pay full annual grazing fees at

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[26] As noted earlier, if a permittee does not use the full number of AUMs allowed by his or her permit, no refund or credit is allowed for the unused AUMs that were paid for in the annual fee at the beginning of the grazing year. *See* LeRoy DuBray Permit, Range Control Stipulation No. 2. But as also noted, the permits do include an exception to the no-refund rule when BIA reduces the number of livestock allowed by a permit. Presumably, if a permittee believes that the carrying capacity of his or her range unit has been reduced due to drought (or other factors), such that the amount of forage present will not sustain the number of livestock allowed in the permit, the permittee may ask BIA to adjust the permit accordingly. A downward adjustment of the number of AUMs in the permit would not, of course, mitigate for lost anticipated profits, but it would allow a credit or refund of the portion of the grazing fee that was paid for AUMs that are no longer included in the permit. The Regional Director states that for 2007, BIA reduced the grazing capacity on 68 permits due to drought conditions. Answer Brief at 27. The Regional Director does not explain why a similar reduction was not warranted for the remaining 199 permits.

[27] The concept of the time value of money is that money received today is more valuable than money received in the future because money received today can be invested and begin earning a return. Conversely, if a payment is due in a lump sum today, and a borrower must borrow the full amount, it will cost the borrower-payor more in interest than if he or she could draw upon a loan in installments and only pay interest from the date money is drawn.

the beginning of the permit year. The Market Study's use of an interest rate tied to operating loans is reasonable because it fairly reflects the effect of the prepayment requirement, viewed in this context.

This does not mean that the issue raised by Appellants is irrelevant to appraising fair annual rental for Reservation lands. Instead, consideration of the risk described by Appellants — that they are unable to use AUMs allowed by a permit and not entitled to a refund — properly belongs in the appraiser's identification or evaluation of comparables. For example, if the allocation of such a risk in private leases differs from the allocation of the same risks in BIA permits, the private leases might not be considered to be comparable, or adjustments would be required to account for the differences. But we do not find error in the Market Study's adjustment to account for BIA's prepayment requirement, and we uphold the use of the 8.3% adjustment figure as reasonable.

4. Was it Unreasonable for the Market Study to Use 95% as the Rate for Converting a Seasonal AUM Value to a Year-Long Value?

Appellants contend that the 95% seasonal adjustment factor does not reflect the sharply-reduced value of winter forage, is unreasonable, and is not supported by substantial evidence. We conclude that the 95% conversion rate is not adequately explained, and therefore we agree with Appellants that the Regional Director's acceptance of that rate cannot be sustained as reasonable.

First, we note that the rationale provided by the Market Study for using a conversion factor states: "Due to the marginal/poor livestock forage condition[,] winter-only rental rates are typically *significantly lower* than rental rates for the seasonal grazing period." Market Study at 38 (emphasis added). A 5% downward adjustment from a seasonal rate is not "significantly" lower than the seasonal rate. But even in the absence of this disconnect between the appraiser's characterization and the actual figure, the 95% figure required some reasonable explanation on appeal in response to Appellants' arguments that the seasonal adjustment factor is skewed because of the small number of year-long leases and because the characteristics of the leases used did not correspond to BIA grazing permits. While there may be a reasonable explanation to support the 95% figure, such an explanation is lacking in this case.

As described earlier, the Market Study apparently arrived at the 95% figure by dividing the average rental value of 5 year-long-use South Dakota leases ($22.63/AUM) by the average rental value of 58 seasonal-use South Dakota leases ($23.72/AUM) to determine the appropriate factor for converting the seasonal rate to a year-long rate. In doing so, the Market Study lumped together all of the seasonal-use comparables, without

regard for the various categories of service allocations between lessors and lessees, or the number of leases within each category. The Market Study did the same for the year-long-use comparables.

As a matter of appraisal practice, it is unclear what purpose was served by calculating a "seasonal adjustment factor" to apply to the average seasonal rate, when the mathematical result (except for the effects of rounding) was effectively to adopt the average year-long rate as reflected in the 5 year-long-use South Dakota leases. The "seasonal adjustment factor" merely reflects the ratio between the two permit types, and applying the ratio to the seasonal average simply restates the average of the rental rates of the year-long-use leases that were used to determine the ratio.

More significant, however, is the fact that by lumping together leases reflecting various categories of service allocations between lessors and lessees, the reliability and reasonableness of the 95% figure is drawn into doubt. In defending the Market Study's approach, the Regional Director argues that "there are few year-long rates" and the appraiser explained that he had "*no other means* of establishing a rate other than with the comparables used." Answer Brief at 20 (quoting Declaration of Oliver, at 6) (emphasis added). But that explanation is conclusory and fails to address the issue of whether the results may have been skewed because of the *way* in which the comparables were used (i.e., without distinguishing among differing categories within each set of year-long-use leases and within each set of seasonal-use leases). It also falls short of explaining why it was reasonable to assume (apparently), that the fact that there were differing numbers of leases within each category was statistically irrelevant. It is not clear why this particular methodology, as applied to the comparables, constituted the "only means" for determining an adjustment rate.

Moreover, it can be documented mathematically that embedded costs within particular categories of comparables might skew the results in determining an appropriate seasonal adjustment rate. For example, if the seasonal conversion factor is determined by using all 63 of the South Dakota comparables (58 seasonal-use and 5 year-long-use), the resulting percentage is 95%. But if the seasonable conversion factor is determined by using only the "full-service" leases in which the lessor provides all fencing (and often other) services (10 seasonal-use and 3 year-long-use), the seasonal conversion factor is 86%. If the seasonable conversion factor is determined by using only the "shared-cost" comparables, in which lessors and lessees share costs of fencing services (37 seasonal-use and 2 year-long-use), the seasonal conversion factor drops to 80%. And because there were no year-long-use lease comparables in the "no services" category (i.e., lessor provides no services at all), we have no samples from which to derive a seasonal conversion factor for this category, which most approximates Indian grazing permits, and which presumably would have

resulted in a lower over-all average AUM rate for the year-long-use leases. If Baker's 95% figure in fact represents *only* the difference between seasonal-use lease values and year-long-use lease values that is attributable to the "sharply reduced value of forage during the winter months," Market Study at 38, then one might reasonably expect that the conversion factor would be the same regardless of whether all leases are lumped together or whether the calculation is applied to each subset of the comparables, defined by the allocation of service obligations. That does not appear to be the case, nor does it appear to be the case that Baker's methodology necessarily is the "only" means available, or that the ratio was developed using leases that were most comparable to BIA's permits.

In summary, the Market Study's reliance on a 95% factor for converting an average seasonal AUM rate to an average year-long AUM rate is not adequately explained or supported by substantial evidence. Therefore, the Regional Director's decision, which relies on and incorporates this conversion factor, must be vacated and the matter remanded for further consideration.

5. Is the Market Study's Baseline "Grass-Only" or "No Services" Rate Flawed?

Appellants argue that the adjusted year-long AUM rate of $19.98, which Baker described as a "grass-only" rate and Oliver described as a "no services" rate, is flawed because embedded in that average figure are numerous services. For example, Appellants argue that all of the comparables had preexisting fencing because unfenced pasture land has no value, and thus describing the $19.98/AUM figure as a "no services" figure is not accurate. Appellants also argue that the Baker and Oliver descriptions of what that adjusted rate represents are inconsistent with one another.

Baker describes the $19.98/AUM figure as the "grass-only" rate that "**does not** include any costs or services that are typically paid by the lessee." Market Study at 39.[28] Oliver describes the $19.98/AUM rate as based on "comparable rentals where the lessor provided fencing materials and the lessee provided fencing maintenance." Declaration of Oliver, at 4. *Cf.* Tribe's Opening Brief at 22 ($19.98/AUM figure is, in fact, a weighted average of private leases with fencing and a variety of other services). The descriptions by Baker and Oliver are at variance with each other, and elsewhere even Oliver describes the

[28] Presumably, as a lessee's obligations materialize, to satisfy permit requirements or to take actions that are necessary to utilize available forage, the amount that the lessee is willing to pay for that forage goes down, when compared to a lease in which a lessor pays for some or all of those costs.

rate as a "no services" rate. We agree that these characterizations of the $19.98/AUM figure appear to be inconsistent, and thus warrant a satisfactory explanation.

In addition to the apparently inconsistent descriptions, we agree with Appellants that the Regional Director has not adequately explained why the costs and differing allocations of services between lessors and lessees, which apparently are embedded in the $19.98/AUM figure, would not render that figure unreliable. For example, Baker's baseline "grass-only" rate was derived from first averaging the AUM rental rates of the 58 South Dakota seasonal-use comparables ($23.72), and then making the deductions discussed above (seasonal-to-year-long; preparation fee; prepayment cost). But as Appellants point out, Baker's use of even these South Dakota seasonal-use comparables did not distinguish among those leases that impose all obligations to provide services on the lessee, those for which responsibilities are shared between lessors and lessees, and those for which the lessor provides all services. Among the 58 South Dakota seasonal-use comparables, there are 10 comparables where the lessor provided all fencing services, 37 comparables where the lessor and lessee shared different fencing responsibilities, and 11 comparables where the lessee provided all fencing services. Baker appears to assume that by averaging all of these comparables, the varying allocations for the cost of services are embedded in the comparables in such a way that the average represents a "no services" value. This assumption is not explained or justified, and we are thus unable to verify that the $19.98/AUM figure reasonably represents a "grass-only," or "no services," or some other baseline figure.

The assumption that the average AUM rate of the 58 South Dakota seasonal-use comparables yields a reasonable baseline figure from which to make adjustments for non-fee factors (or for range conditions) may well be capable of adequate justification and explanation, but we find them to be lacking in the Market Study.

6. Is the Market Study Flawed Because it Does Not Disclose or Explain the Calculations Relating to Fencing?

Appellants contend that, contrary to the requirements of the USPAP to disclose assumptions and calculations, *see supra* note 17, and contrary to explicit instructions from the Regional Director ("Please show all calculations"), the Market Study failed to disclose or explain the calculations for fencing-related costs or explain why the cost of fence materials was deducted from the baseline figure, but not the cost of fence maintenance, even though permittees are responsible for both. Appellants also point out that it is unclear whether the "fence maintenance" category in the Market Study includes materials, labor, or both. Appellants accept the appraiser's deduction of $3.88/AUM for the cost of fence

materials, but argue that the $5.75/AUM cost of fence maintenance should also be deducted, rather than added, because permittees pay all costs of fence maintenance.[29]

The Regional Director responds that because the permittees have agreed to accept fencing responsibilities by agreeing to the terms of the permits, we should disregard Appellants' complaints. But that misses the point. It is the *fact* that all fencing obligations lie with the permittees that is relevant to an appraisal in determining comparability of private leases or making appropriate adjustments to their value.

Moreover, Appellants are correct that the Market Study fails to disclose the calculations from which either fencing cost figure is derived. The Market Study attributes a value of $3.88 to the cost of fence materials, and a value of $5.75 to the cost of fence maintenance.[30] The calculations for generating those figures are not disclosed, and the Board has been unable to verify or recreate them based on the data included in the Market Study.[31] Although Baker purported to extract separate values for the cost of fence materials and the cost of fence maintenance, it is unclear from his lease descriptions in the Market Study whether fence maintenance sometimes or always includes materials *and* labor, or only labor. As noted earlier, Baker's descriptions variously refer to materials, maintenance, and labor, but only materials and labor would appear to be mutually-exclusive categories, and maintenance could include one or both. Fencing costs would appear to fall into four discrete categories: new fence materials; new fence labor; fence maintenance materials; and fence maintenance labor. Thus, to use "materials" and "maintenance" as the two distinct

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[29] We note that although Appellants are willing to embrace the $3.88 deduction for "fence materials," if that category includes new fence construction, it is not clear from the Market Study or the record how often Appellants' range units require new fence construction, or if this is even a category that is appropriate for across-the-board treatment, as opposed to range-unit-specific rate adjustments.

[30] Whether one or both costs should be deducted depends on what values are embedded in a baseline figure which, as we found in the earlier section, is not adequately explained.

[31] Appellants correctly note that Baker states that there were 13 leases where the lessor was either solely responsible for fencing or shared responsibility with the lessee, when in fact the 13 leases were those in which the lessor was solely responsible for fencing. There were 56 leases out of the 81 comparables in which the lessor and lessee shared fencing responsibilities. As noted earlier, Baker's baseline AUM figure was derived by averaging the rent in the 58 South Dakota seasonal-use comparables, but when making adjustments for non-fee factors, such as fencing, Baker used all 81 of the comparables.

categories for purposes of the appraisal, when the descriptions of the categories suggest both overlap and omission, requires justification and explanation that is not provided in the Market Study.

7. Is the Market Study Flawed Because it Failed to Adjust the AUM Rate to Account for the Permittees' Responsibility to Control Prairie Dogs and Weeds?

Appellants contend that the Market Study is flawed because it failed to adjust the AUM rate to account for the fact that permittees are responsible for controlling prairie dogs and weeds on their range units. The Regional Director responds that these factors may be relevant to the carrying capacity of the land, but not to the value of an AUM. We do not decide whether the Regional Director's explanation is reasonable because in the present case, Appellants have not sufficiently articulated how these two factors would affect the value of an AUM or, more particularly, how these factors implicate the comparables considered in the Market Study.

In the present case, the Tribe has submitted documentation that both prairie dogs and weeds have affected Reservation lands, and their effects were exacerbated by the drought. Both prairie dogs and weeds undoubtedly may affect the amount of available forage, and thus the carrying capacity of the land. One option, as the Regional Director suggests, is for BIA to reduce the number of livestock allowed in a permit, as the productivity of the land decreases. But whether BIA's ability to reduce the number of livestock allowed in a permit will fully capture the economic effects of prairie dogs and weeds is unclear at best. For example, if two range units have an equal number of AUMs available for livestock and thus the corresponding permits allow the same number of livestock, but only one range unit requires expenditures to control prairie dogs and weeds to *preserve* the AUMs necessary to sustain the livestock, there may be no basis for BIA to reduce the carrying capacity, but economic theory would hold that the AUMs on the range unit that requires those added expenditures are worth less.

In the present case, however, Appellants do not articulate or produce evidence of how the effects of the drought, with respect to weed control and prairie dog control, would not likely have also affected the private lease comparables. Thus, in this case, we conclude that Appellants have not satisfied their burden of proof to show that the Market Study is flawed because it failed to account for these factors.

8. Is the Market Study Flawed Because it Does Not Adequately Explain the Failure to Attribute Economic Value to Non-Fee Factors Other than Fencing?

Appellants contend that the Market Study is flawed because it failed to adequately explain its conclusion that non-fee factors besides fencing had no measurable economic value that could be factored into the AUM rate recommendation. Appellants also argue that the appraiser failed to evaluate the duration of leases, as requested by the Regional Director. We agree with both arguments.

The Acting Regional Director recognized that the Market Study did not explain sufficiently why no economic value could be assigned to the non-fee factors other than fencing. She requested further clarification and explanation with respect to the non-fee factors that the Market Study appeared to summarily dismiss as having no measurable economic value, using conclusory statements such as that the market "did not indicate" any value. The OST Appraiser's response to the Regional Director was not illuminating:

> [w]hen verifying each of the comparable leases within the grazing rate study, the appraiser asked each individual if any of the above items[32] were factors in negotiating the rent per AUM. Statements like 'did not indicate' and 'was not a significant correlation' meant that the factor had no monetary influence on the negotiated rate per AUM. . . . [T]he market dictates any and all economic influences and if a factor, . . . can not be measured and verified, the [OST] Office of Appraisal Services can not support an adjustment to the estimated rate per AUM.

Memorandum from OST Appraiser to Regional Director, Sept. 21, 2006. The OST Appraiser's additional explanation on appeal, through a declaration attached to the Regional Director's brief, essentially reasserts this conclusory explanation.

The OST Appraiser's response is difficult to verify and fails to give any evidentiary support for what amounts to a barebones economic conclusion. First, the Market Study does not describe any interviews conducted regarding the non-fee factors, so it is impossible to know what questions were asked or what answers were given. Second, to attribute no value to any of these factors would appear contrary to basic economic principles, which would hold that a parcel of land is worth less to a tenant who must pay for certain necessary

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[32] Livestock water, mineral supplements, weed control, hunting access, herd maintenance, and imposition of first liens for unpaid rent.

services, than it would be if the owner provided such services. The fact that a private lessor and lessee would not address costs of various services each time they negotiate, or renegotiate, a lease does not mean that the economic value of such services is not embedded in the price. Asking whether these were factors in negotiating the rent per AUM is not the same as asking whether it would be a factor if responsibilities were allocated differently. Baker seems to have assumed that the two questions were synonymous. Because the Market Study includes only the most cursory and conclusory explanation for dismissing these factors as without measurable economic value, and provides no records of the interviews apparently relied upon to justify the conclusion, we cannot find that it is adequately supported by the record.

In addition, as Appellants point out, it appears that the Market Study entirely failed to consider the duration of the private leases in determining whether to treat them as "comparables." The Market Study identifies the term of the lease for only 19 of the 63 South Dakota comparables. Fourteen of the comparables are 3-year leases. The Ranchers' grazing permits are 5-year permits, subject to annual adjustment of the grazing fee, but also subject to the Ranchers' preference rights to accept new permits for the same range units without competition. Whether some or all of the private leases are subject to annual adjustments, or a right of first refusal to accept a new lease at the price offered by a lessor, is not disclosed or addressed in the Market Study.

Notwithstanding the Regional Director's instructions that the Market Study must be "very explicit with great attention given to detail," Memorandum from Regional Director to OST Appraiser, Jan. 31, 2006, it is not sufficiently transparent for us to understand why it is reasonable to conclude that an open and competitive market would disregard the non-fee factors for which no value was ascribed, and it fails entirely to consider whether the terms of the private lease "comparables" are relevant to a determination of an annual adjustment to AUM charges in the Rancher's 5-year permits. In the absence of additional explanation, properly supported by evidence in the record, we must vacate the Regional Director's decision with respect to this issue and remand for further consideration.

9. Is the Regional Director's Decision Flawed Because it Failed to Consider the Relevance of the Drought on the Value of an AUM?

Appellants argue that the Market Study erroneously assumed the presence of natural sources of water for livestock and failed to consider the effect of the absence of such water on the value of an AUM and of the land. In requesting a rate adjustment to account for the drought, the Tribe contended that the stock dams were completely dry or so boggy in 2006 that they had to be fenced off from livestock. Appellants also contend that the drought in

2006 was so severe that the nutritional value of forage was so compromised that it reduced the economic value of the forage itself, apart from carrying capacity issues.

We agree that the Market Study appears to have assumed the presence of natural sources of livestock water. *See* Market Study at 7 ("Stock dams constitute the principal sources of livestock water."). Whether or not this was an assumption that would render invalid a determination of an AUM rate for the 2007 grazing season, we agree with Appellants that the Regional Director has not adequately explained or justified why this factor was not considered and why it could reasonably be assumed not to affect the accuracy or reasonableness of the AUM rate. In addition, the record contains no evidence from which we can conclude that the comparables used by Baker were in fact comparable to the range units on the Reservation, with respect to the presence or absence of natural water sources, or the need (or lack thereof) for the lessee to pay to bring livestock water onto the land. It may be that unless the drought was highly localized on the Reservation, the absence of natural sources of livestock water might already be reflected in the private lease comparables. But no such explanation is provided by the Regional Director.

Appellants contend that an AUM on a range unit that lacks access to a natural source of water is less valuable that an AUM on a range unit that has a natural and sufficient source of livestock water. The Ranchers support their allegation with a document entitled "Determining Pasture Rents," which is a guide for negotiating pasture rents produced by the South Dakota State University College of Agricultural and Biological Sciences. Ranchers' Opening Brief, Ex. 7. The document states that "[s]ervices the landowner provides to the livestock owner will greatly influence the actual rental rate." *Id.* It also states that "[t]he availability of a good quality water source in the proper locations improves cattle weight gain. If water is unavailable during part of the grazing season, consider the costs of hauling water or removing livestock." *Id.*

In its August 25, 2006, letter to the Regional Director, the Tribe asserted that normal sources of water were not available in 2006, and contended that they were unlikely to become available in the foreseeable future. *See* Letter from Tribe to Regional Director, Aug. 25, 2006, at 2. This suggested that the effects of the drought could carry over into 2007. The Tribe contended that the severity of the drought disrupted the usual sources of livestock water, and also compromised the nutritional value of the grass to such an extent that its marketability was affected. *Id.* The Ranchers make the same allegations on appeal, supported in some cases by individual testimony or evidence. *See, e.g.*, LeRoy and Linda DuBray Brief at 3; Fred DuBray Brief at 2; Patrick Gray Brief at 2; Ranchers' Opening Brief, Exs. 8, 11. The Regional Director does not dispute Appellants' assertions that usual

sources of livestock water were either unavailable or severely diminished by the drought, at least with respect to some range units.

Both the OST Appraiser and the Regional Director apparently viewed the drought as relevant solely to the quantity of forage available, and thus relevant to a determination of grazing capacity, but not to the value of an AUM. *See, e.g.*, Answer Brief at 27 ("*Instead of* affecting the AUM rate, drought conditions affect the grazing capacity or stocking rate.") (emphasis added). Appellants contend, however, that the value of an AUM itself is affected by whether or not the land on which the AUM is located has livestock water available, and whether the drought has so severely compromised the nutritional value of grass that its economic value has declined as well.

In his September 21, 2006, memorandum to the Regional Director, the OST Appraiser asserted that "[c]omparable rentals were used to estimate this rate and it has been found that lessees receive no adjustments to the rate per AUM due to drought," and that "[t]hese operators incur the same risk of drought as would operators on grazing units within the reservation boundaries." In his declaration submitted on appeal, the OST Appraiser states that "[t]he investigation of these possible effects indicated that the comparable leases used within the grazing rate study had no drought provisions where adjustments to the negotiated rates per AUM are made to the contract rent during a drought year. Therefore, any adjustments to estimated rate due to drought conditions are not substantiated and can not be measured in the market." Declaration of Oliver, at 3. Oliver also asserts that "if there is no evidence within the market to justify an adjustment and the adjustment can not be measured, no adjustment can be made." Declaration of Oliver, at 5.

The Regional Director summarizes Oliver's explanation to mean that "it was found in the market that typical grazing leases do not have drought provisions *where adjustments are made to the contract rent during a drought year*," (emphasis added), and therefore the OST Appraiser "concluded that any adjustments to estimated rate due to drought conditions are not substantiated and cannot be measured in the market." Answer Brief at 27. As best we can decipher, the explanation for not considering the effect of the drought on the value of an AUM is that private leases had no drought provisions where the parties negotiated an adjustment during the year to adjust for drought conditions.

How that relates to BIA's grazing permits is not clear. There is no evidence in the Market Study's description of the comparables to support the assertion that all of the lessees assumed the full risk of a drought, except for changes in carrying capacity. Complicating the matter is the fact that the Market Study does not identify the duration of the lease for most of the comparables. A 5-year permit, such as those held by the Ranchers, may not be

comparable even to a lease that has no drought adjustment provision, if the lease is renegotiated each year. Appellants have provided specific evidence of the cost of transporting water to certain range units, and additional evidence that drought reduces the nutritional value of forage. Either or both of these at least arguably could reduce the value of an AUM on the permitted lands. We find Oliver's explanations to be either unsupported or nonresponsive.

The Regional Director does assert that one effect of a drought is to increase demand for pasture, and thus *increase* the price of pastureland. Answer Brief at 28, citing Declaration of Benjamin ¶ 23. It may well be that during a drought, as demand increases and supply is limited, the overall value of an AUM increases. *Cf. Lower Brule Sioux Tribal Council v. Great Plains Regional Director*, 40 IBIA 211, 212 (2005) (limited supply of forage has resulted in the market bidding up the prices on all available grassland and pasture). But there is nothing in the record that would permit us to simply assume that the decreased value of forage on a given parcel of land because of water transportation costs, or because nutritional value is compromised, is necessarily offset by the increased value of forage due to scarcity, such that the failure to consider these drought-related factors was harmless error.

The Regional Director also argues that because of the timing for conducting the Market Study, it was virtually impossible for the appraiser to consider changed circumstances based on drought conditions. Answer Brief at 26. That may explain why the Market Study did not address the possible effects of drought on AUM values, but it does not explain why no consideration could be given to the Tribe's request, after the Regional Director' s decision was issued, to reconsider the rate. The OST Appraiser's response to the Regional Director did not suggest that timing was the problem. Instead, he appears to have summarily dismissed drought conditions as irrelevant to the market value of an AUM, or at least as not capable of being quantified in an appraisal.

On the other hand, we note that Appellants presume that all range units were affected equally by the drought — e.g., that all range units equally lacked natural sources of water and that the examples provided of water transportation costs are representative of all range units. Thus, Appellants apparently would have the Regional Director use a few examples of water transport costs as a basis for adjusting the AUM rate downward for the Reservation generally. Appellants also assume that with one exception, none of the comparables was affected by the drought. *See* Opening Brief of Appellants at 15 (80 of the 81 comparables used in the Market Study had one or more water sources). These assumptions are questionable. Nor, as we have noted, is it apparent how the drought in 2006 may or may not have affected AUM market rates for 2007. Nonetheless, at least to the extent that Appellants have proffered evidence suggesting that costs of transporting

water in a drought, or the severe reduction in the nutritional value of forage, may affect the AUM value on a "permitted parcel," and because the Regional Director's response is at best incomplete, Appellants have satisfied their burden of proof.

We conclude that the Regional Director has not provided a rational basis to support the assumption or conclusion that a lessee/permittee would pay the same rate for a certain number of AUMs on land that has a good quality water source, as the lessee/permittee would pay for the same number of AUMs on otherwise comparable land that does not have a source of livestock water, and for which the lessee/permittee would be required to incur costs to transport water. Nor has the Regional Director adequately responded to Appellants' argument that the drought so severely compromised the nutritional value of grass that its economic value going into the 2007 season was reduced.

10. Is the Regional Director's Decision Arbitrary and Capricious Because of the Disparity between the Cheyenne River Reservation Rate of $16.10/AUM and the Standing Rock Reservation Rate of $13.63/AUM, When the Two Reservations Adjoin One Another?

Appellants contend that the Regional Director's decision is arbitrary, capricious, and unreasonable because he set a rate of $16.10/AUM on the Cheyenne River Reservation, but a rate of $13.63/AUM on the Standing Rock Reservation, when the two reservations are contiguous, are in the same market, and share similar climates and topographic conditions. *See* Tribe's Opening Brief at 23. Appellants note that some of the lands subject to BIA's permits are less than 100 feet apart, yet the Cheyenne River Reservation lands have a grazing rate that is sharply higher than the Standing Rock lands. According to Appellants, the effects of the drought were more severe on the Cheyenne River Reservation, yet the Regional Director set a lower rate per AUM on the Standing Rock Reservation. The Regional Director responds that the differences in rainfall, snowfall, and average temperatures between the two reservations explain the differing values of an AUM.

The Regional Director's response may reasonably explain why the value of an AUM may vary over a geographical area as climatic conditions change, but it does not reasonably explain why the value of an AUM would differ so dramatically based solely on a political boundary. In determining that an AUM was worth $16.10 on the Cheyenne River Reservation, and worth $13.63 on the Standing Rock Reservation, the Regional Director effectively determined that a permitted parcel of land on the Cheyenne River side of the reservation boundary would be expected to be worth 18% more in an open and competitive market than an otherwise comparable permitted parcel of land on the Standing Rock side of the boundary. It may well be that there are differences between the two reservations that would warrant a finding that the value of an AUM is not the same on both. But we

conclude that the Regional Director's explanation is insufficient to explain the difference. And we note that for purposes of the baseline AUM rate, the Market Study relied only on the South Dakota comparables, while for evaluating non-fee factors, the Market Study apparently treated all 81 comparables as within a single market. Finally, the Regional Director's decision to set a reservation-wide AUM rate for each of the two reservations, which we discuss further below, also appears to have contributed to the disparity between AUM values for lands near the reservations' common boundary that would appear to be within the same market area.

C. Tribe's Consultation Argument

The Tribe argues that BIA had a duty to consult with it prior to adjusting the grazing rate and that BIA failed to fulfill this duty.[33] The Tribe contends that as a consequence of BIA's failure to consult, the Tribe is suffering adverse effects, including "BIA['s] failure to issue lease payment checks of any kind until after December 31, 2006; uncertainty in the annual grazing rate for [2007]; and significant time and expense in attempting to correct the errors with the Market Study that could have been avoided with proper and timely tribal consultation." Tribe's Opening Brief at 12.

The Regional Director does not dispute the Tribe's assertion that consultation must occur regarding an adjustment of the grazing rate to the fair annual rental rate, although he argues that because BIA has a duty to ensure that landowners receive fair annual rent, the duty of consultation is limited to obtaining information from the Tribe and considering its concerns, and does not supersede BIA's duty as trustee to ensure that the landowners receive fair annual rent for their lands. *See* Answer Brief at 33. With respect to the present case, the Regional Director concedes that "initially, there was minimal, if any, truly meaningful consultation by the Regional Director with the Cheyenne River Sioux Tribe

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[33] As sources of BIA's consultation duty, the Tribe relies on (1) BIA's Government-to-Government Consultation Policy, Dec. 13, 2000 (consultation on "actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes"), which was issued pursuant to Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), 65 Fed. Reg. 67,249 (Nov. 9, 2000); (2) 512 Departmental Manual §§ 2.3(A)(2) (policy to consult with tribes whose trust resources or assets are potentially affected) and 2.4(B) (duty to consult if an evaluation reveals any impacts on Indian trust resources or trust assets); and (3) 303 Departmental Manual § 2.7(D) (trust principle to promote tribal control and self-determination over tribal trust lands and resources).

prior to issuing the grazing rate decision." *Id*. at 35. The Regional Director contends, however, that subsequent settlement discussions between the parties, though not successful, effectively cured any violation of a duty to consult. *Id.* at 35-36.

The Tribe apparently agrees with the Regional Director that any duty that BIA has to consult with the Tribe does not supersede BIA's trust duty to ensure that the landowners receive fair annual rent for their lands. *See* Tribe's Reply Brief at 24 ("[t]he Tribe, as with all other landowners, has a right to a fair market value"). But the Tribe disputes the Regional Director's contention that settlement discussions that took place after these appeals were filed may be deemed to satisfy BIA's duty to consult.

The Board has never decided whether or to what extent one or more tribal consultation policies applies to a determination by BIA of what constitutes fair annual rental value for individually-owned trust lands. In the present case, it is not clear that the injuries alleged by the Tribe as resulting from BIA's failure to consult would constitute the type of "substantial direct effects" envisioned by consultation policies. *See, e.g.*, E.O. 13175 ("actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes"). Given our decision to vacate the Regional Director's decision and remand the matter for further consideration, and the Regional Director's expressed willingness to consult with the Tribe, we decline to address whether the Tribe's alleged injuries are traceable to BIA's failure to consult, whether the grazing rate decision triggered the consultation requirement, and what the scope of that requirement might be.[34]

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[34] Several of the Tribe's arguments suggest an even broader argument that BIA should charge permittees less in fees but encourage or require them to invest the difference between the annual charge and the fair annual rent by taking measures to protect or increase the productivity of the land. *See* Tribe's Opening Brief at 18 (BIA should make adjustments to rental rate so that permittees will live up to their responsibility to properly care for the land and can afford to execute their responsibility to control noxious weeds and prairie dogs). Such policy arguments may well be appropriate for discussion and consultation in the context of proposed rulemaking revisions, but they are outside the scope of an annual review of what amount constitutes "fair annual rental" under 25 C.F.R. § 166.4 for a given year. And, of course, the Regional Director has no authority to alter the regulatory definition of "fair annual rental" to accommodate such policy arguments.

D. Remand Instructions

As discussed above, we conclude that in several respects, the Market Study and the Regional Director's decision, even as further explained on appeal, fail to disclose what Appellants have argued convincingly could be relevant assumptions and calculations, and fail to provide a reasonable explanation and sufficient evidence to support the $16.10/AUM rate. In addition, Appellants' arguments implicitly raise the issue of the appropriateness of applying a single reservation-wide AUM rate when adjusting the grazing rate during a permit term.

Prior to 2001, BIA's grazing regulations required the Regional Director to establish a "reservation minimum acceptable grazing rental rate," which arguably required, or at least allowed, a single, reservation-wide AUM rate for grazing permits. *See* 25 C.F.R. § 166.13(b) (2000). Under that system, the primary range-unit-specific variable was grazing capacity (which in turn affected the overall amount that was due for a given range unit), unless an adjustment were made to take into account the value of improvements on the range unit.

The current regulations still allow for individual grazing fee variations. However, the current regulations, which were adopted in 2001, deleted the "reservation minimum acceptable grazing rental rate" provision and for the first time explicitly defined "fair annual rental" as 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) (emphasis added). The Regional Director admits that the Market Study "resulted in a generalized statement of what rents should be based on the range of prevailing lease rates for land in the area." Answer Brief at 12.

In the present appeal, we have concluded that $16.10/AUM, even as a "generalized statement" of what rents should be on Reservation lands, is not adequately explained or supported in the record. But in addition to that, Appellants' allegations and evidentiary submissions illustrate the possibility that range-unit-specific variables could affect the actual value of the forage on a given range unit, i.e., on a "permitted parcel of Indian land." *Cf. Rosebud*, 41 IBIA at 302 (BIA's grazing regulations do not specify the geographic area that any particular grazing rental rate is to cover). Although the regulations expressly allow BIA to take into account the value of improvements made under a permit, *see* 25 C.F.R. § 166.408, it appears doubtful that consideration of "improvements" alone is sufficient to capture range-unit-specific variables, and it is unclear whether BIA has satisfactory procedures in place to ensure that the grazing rental rate set for each range unit complies with the definition of "fair annual rental."

On remand, if the Regional Director continues to apply a reservation-wide AUM rate, he must justify and explain it with sufficient specificity to allow it to be evaluated

under the definition of "fair annual rental." In particular, the appraisal or market study should clearly explain and justify the selection of the lands that are considered comparable to the Reservation lands for which a grazing rate is being determined, whether all Reservation lands or categories of Reservation lands. To the extent that variances between range units are not attributed solely to differences in grazing capacity, but might also affect the value of the forage on the range unit, that must be taken into account, with adjustments as appropriate.[35] *Cf.* Tribe's Opening Brief at 12 (Market Study fails to provide an explanation of why the comparables used were an appropriate market area).[36]

Conclusion

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and for the reasons discussed above, the Board vacates the Regional Director's August 3, 2006, decision, and remands the matter for further consideration consistent with this decision. The Regional Director is directed to return all appeal bonds that were collected and retained by BIA, as authorized by the Board, while this appeal was pending.

I concur:

// original signed

Steven K. Linscheid
Chief Administrative Judge

// original signed

Lisa Hemmer
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.

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[35] We are not holding that a reservation-wide AUM rate is impermissible. But, to the extent that the previous grazing regulations could be read as requiring or permitting a reservation-wide rate based on the "reservation minimum" rate language, that language no longer exists in the current regulations.

[36] It is not clear why the appraiser did not at least consider whether the subleasing market on the Reservation might be relevant. For example, if, as some of the appellants in this appeal allege, non-Indian ranchers are paying $18.00 to $22.00/AUM plus $6.00 per head in taxes to the Tribe for subleases, the effective seasonal rate reflected by actual market conditions on the Reservation might well provide useful comparable information, subject of course to adjustment for the year-long-use nature of Reservation permits. The definition of "fair annual rental" requires a projection of what an open and competitive market on the Reservation would command in terms of grazing rental fees, and to the extent that a secondary market exists, it may be an indicator of the actual value of grazing lands on the Reservation.