



INTERIOR BOARD OF INDIAN APPEALS

Delbert “Pete” Longbrake; Gregg and Edwina Mowrer; Fredric DuBray; and
Carlyle Ducheneaux v. Acting Great Plains Regional Director, Bureau of Indian Affairs

48 IBIA 70 (10/16/2008)

Related Board cases:

48 IBIA 1

48 IBIA 44

48 IBIA 75



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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DELBERT "PETE" LONGBRAKE;)	Order Vacating Decision and
GREGG AND EDWINA)	Remanding
MOWRER; FREDRIC DUBRAY;)	
and CARLYLE DUCHENEAX,)	
Appellants,)	
)	Docket Nos. IBIA 07-128-A
v.)	07-134-A
)	07-135-A
ACTING GREAT PLAINS REGIONAL)	07-136-A
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	October 16, 2008

These consolidated appeals seek review by the Board of Indian Appeals (Board) of a July 24, 2007, decision by the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), which adjusted the grazing rental rate to \$16.21 an Animal Unit Month (AUM)¹ for individually-owned Indian trust lands on the Cheyenne River Reservation (Reservation) for the 2008 grazing season, pursuant to 25 C.F.R. § 166.408.² Appellants are Indian ranchers who hold BIA grazing permits, and whose rent would increase under the Regional Director's decision.

In establishing the grazing rental rate for the 2008 grazing season, the Regional Director relied on a market study titled "Reservation Grazing Rate Analysis of the Cheyenne River Reservation for the 2008 Grazing Season" (Market Study), prepared by David M. Baker, a certified appraiser, and reviewed by Geoff Oliver, the Great Plains Regional Appraiser, Office of the Special Trustee for American Indians. The Market Study recommended \$16.21 as the Reservation-wide value of an AUM, and employed the same

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.

² Section 166.408 authorizes BIA to adjust the grazing rental rate for existing grazing permits.

approach used by Baker in another market study that was relied upon by the Regional Director to establish a grazing rental rate for the Reservation for the 2007 grazing season.

In *DuBray v. Great Plains Regional Director*, 48 IBIA 1 (2008), which we are also deciding today, the Board is vacating the Regional Director's rental rate decision for 2007 and remanding the matter for further consideration, based on several deficiencies in the market study used in that case. In the present case, Appellants raise some of the same — and equally well-founded — objections to the Market Study. In addition, Appellants make a broadside attack of the entire grazing rate setting process in BIA's grazing regulations. We reject the broadside attack, but conclude that Appellants' objections to the Market Study are sufficient to warrant vacating the Regional Director's decision and remanding the matter for further consideration, in light of our decision in *DuBray* and the related decision, *Cadotte v. Great Plains Regional Director*, 48 IBIA 44 (2008) (vacating grazing rate decision for Standing Rock Reservation for 2007 grazing season and remanding).

Discussion

A. Appellants' Objections to BIA's Process for Determining and Adjusting Grazing Rental Rates

Appellants first argue that the Regional Director's decision should be invalidated because the process that BIA uses for determining reservation grazing rates is "inherently flawed and should be struck down by the Board." Opening Brief at 7. Appellants seemingly take issue with BIA's regulations as lacking sufficient detail or guidance, thus making the rate-setting process subject to arbitrary manipulation, notwithstanding the incorporation into the regulations of the Uniform Standards of Professional Appraisal Practice. *See, e.g., id.* at 7-8 (regulations do not define "appraisal data" or explain how appraisal data is to be used; when appraisals are based on comparable leases, the data is easily subject to manipulation). Appellants argue that another "inherent" problem in the process is that the current regulations allow BIA to adjust the grazing rate annually, which was not the case under the previous regulations. Opening Brief at 8; *see Long Turkey v. Great Plains Regional Director*, 35 IBIA 259 (2000) (pre-2001 regulations did not allow rental rate adjustments for grazing permits with a term of 5 years or shorter). Appellants contend that BIA has given priority to getting the most money for the landowners, without considering the interests of the ranchers.

It is well-established that the Board lacks authority to strike down regulations. *See San Carlos Apache Tribe v. Western Regional Director*, 41 IBIA 210, 220 (2005); *Jones v. Acting Sacramento Area Director*, 13 IBIA 124, 125 (1985). Thus, to the extent that

Appellants' broadside against BIA's process for establishing grazing rental rates, and making annual adjustments, is an attack on BIA's grazing regulations — as much of it appears to be — we reject it as a ground for us to invalidate the Regional Director's decision. Similarly, to the extent that Appellants suggest that the Regional Director is required to balance the interests of the landowners against the interests of the ranchers in determining an appropriate grazing rental rate, Appellants are wrong.

The regulations define “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.” 25 C.F.R. § 166.4. That definition controls BIA's determination of the grazing rental rate, *see id.* §§ 166.400, 166.408, except as otherwise specifically provided, *see, e.g., id.* § 166.408(a)(3) (rate may be adjusted to less than fair annual rental if BIA determines that it is in the best interest of the Indian landowner).³ Under the regulations, the extent to which the interests of permittees are considered is subsumed within the definition of fair annual rental, and no balancing test applies.⁴ Moreover, BIA's fiduciary obligations as trustee are owed to the landowners, and not to permittees, even if the permittees are tribal members. *See Fort Berthold Land and Livestock Ass'n v. Great Plains Regional Director*, 35 IBIA 266, 277 (2000).

On the other hand, among the criticisms made by Appellants is their assertion that BIA uses an average reservation rate, instead of setting grazing rates based on the condition of each tract of land. The issue of whether a single, reservation-wide AUM rate is appropriate is an issue that we address in *DuBray*, in which we emphasize that BIA must ensure that its grazing rate decision satisfies the regulatory definition of “fair annual rental.” Because, as discussed below, we are vacating the Regional Director's decision based on deficiencies in the Market Study, the issue of whether a reservation-wide AUM rate satisfies

³ Appellants argue that because “the market forces of competitive bids and negotiations are removed from the permit allocation program at Cheyenne River,” it is “impossible” for private leases to be used as comparables for valuing range units on the Reservation. Reply Brief at 5. We are not convinced. The fact that a determination of “fair annual rental” for Indian lands may have a hypothetical element (what the lands “would most probably command in an open and competitive market,” 25 C.F.R. § 166.4) does not, by itself, demonstrate that it is impossible to use private leases as comparables (with appropriate adjustments).

⁴ If the rental rate is set below fair annual rental, e.g., under 25 C.F.R. § 166.408(a)(3), the permittee will of course benefit, but the only party's *interest* that is considered in such a case is that of the landowner.

the definition of fair annual rental will necessarily also have to be considered by the Regional Director on remand in this case, in light of *DuBray*.

B. Appellants' Objections to the Market Study

Appellants argue that the Market Study relied upon by the Regional Director is flawed because it does not disclose calculations, fails to make appropriate adjustments for the value of non-fee rental rate factors,⁵ and uses a percentage factor for converting a seasonal-use rate to a year-long-use rate that is not supported by the evidence. As noted earlier, the Market Study relied upon in this case is very similar to the market study that we concluded, in *DuBray*, was deficient in several respects, including the failure to disclose certain calculations and the failure to adequately explain and properly support the conclusion that the percentage used to convert a seasonal-use AUM rate to a year-long-use AUM rate was appropriate. For the reasons given in *DuBray*, and in the related decision, *Cadotte*, we conclude that the Regional Director's decision in this case must also be vacated.⁶

Conclusion

When compared to the extensive arguments made, and the supporting evidence offered, by the appellants in *DuBray*, who challenged the Regional Director's grazing rate decision for the Reservation for the 2007 grazing season, Appellants' arguments in this appeal are long on generalities and short on specifics. Viewed, however, in light of the decisions that we are issuing today in *DuBray* and in *Cadotte*, Appellants' arguments are sufficient to convince us that the Regional Director's 2008 grazing rate decision for the Reservation should be vacated and remanded for reconsideration to address the issues remanded in those decisions. In particular, we agree that the Market Study used to determine the 2008 rate does not adequately disclose calculations, explain certain

⁵ The phrase "non-fee rental rate factors" is used in the Market Study to refer to various costs, services, or conditions related to the productivity or usability of grazing lands, or conditions or requirements associated with their use, which may affect their value (e.g., fencing, water). The rental value of land may vary depending upon whether or to what extent the lessee or the lessor is responsible for particular costs or services. See *DuBray*, 48 IBIA at 7-9.

⁶ Although we find it unnecessary to describe in detail the Market Study used in this case, our conclusion that *DuBray* and *Cadotte* control here is based on our comparison of the specific market studies involved in these cases.

adjustments (or the failure to make certain adjustments), or adequately support the ratio chosen to represent the seasonal adjustment factor. In addition, as is the case in *DuBray* and *Cadotte*, the Regional Director must ensure that his rate decision on remand is consistent with the definition of “fair annual rental” in the regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Regional Director’s July 24, 2007, decision, and remands the matter to him for further consideration.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Lisa Hemmer
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.