



INTERIOR BOARD OF INDIAN APPEALS

Rosebud Indian Land and Grazing Ass'n and its Members v.
Acting Great Plains Regional Director, Bureau of Indian Affairs

50 IBIA 46 (07/07/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

ROSEBUD INDIAN LAND AND)	Order Affirming Decision
GRAZING ASSOCIATION AND)	
ITS MEMBERS,)	
Appellants,)	
)	
v.)	Docket No. IBIA 08-12-A
)	
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS)	
Appellee.)	July 7, 2009

The Rosebud Indian Land and Grazing Association (Association) and its Members (collectively “Appellants”) have appealed the August 31, 2007, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), maintaining the current grazing rental rate of \$14.61 per Animal Unit Month (AUM)¹ for individually-owned (or allotted) Indian lands on the Rosebud Reservation (Reservation)² for existing permits for the 2008 grazing season.³ The \$14.61/AUM rate was initially set for new permits issued for the 2007 grazing season and, relevant to this appeal, would

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 The Reservation, which is the home of the Rosebud Sioux Tribe (Tribe) includes trust land in Mellette, Todd, Tripp, Gregory, and Lyman Counties in south-central South Dakota. *See* Administrative Record (AR) 8, Reservation Grazing Rate Analysis of the Rosebud Reservation for the 2008 Grazing Season (2008 Market Study or Study), at 3.

³ The rate also applies to any new permits issued for the 2008 grazing season, but the only permits at issue in this case are the existing permits.

remain unchanged for Appellants' existing permits. *See Rosebud Indian Land and Grazing Association and Its Members v. Great Plains Regional Director*, 44 IBIA 36 (2006).⁴

On appeal Appellants contend (1) that leaving the 2007 grazing rental rate unchanged is arbitrary, capricious, not reflective of the fair annual rental, and not supported by the 2008 grazing appraisal prepared at BIA's request; (2) that the Regional Director failed to comply with 25 C.F.R. § 166.408, which Appellants contend allows the rental rate to be less than fair annual rental under certain circumstances, but by implication does not allow it to be above fair annual rental; (3) that the \$14.61/AUM grazing rental rate provides in excess of a reasonable rate of return to landowners; (4) that the Regional Director's decision does not reflect costs Appellants must bear as a direct result of hunting access to the range units covered by the rental rate; (5) that the Regional Director ignored 25 C.F.R. § 166.407, which authorizes a tribe to set the grazing rental rate for tribal land, when he set the 2008 grazing rate for the Reservation; and (6) that the Regional Director contravened 25 C.F.R. § 166.403, which authorizes the approval of permits for less than fair annual rental if the permit is for the Indian landowner's immediate family, when he set the 2008 grazing rental rate. Appellants have not shown that the Regional Director's decision to maintain the current grazing rate is unreasonable and not supported by law and substantial evidence. We therefore affirm the Regional Director's decision to maintain the current \$14.61/AUM grazing rental rate for allotted Indian lands.

Regulatory Background

With limited exceptions, anyone wishing to graze livestock on Indian trust or restricted land must first obtain a permit to do so. 25 C.F.R. § 166.200. Permits may be issued by the Indian landowner, whether a tribe or an individual Indian, subject generally to BIA approval. 25 C.F.R. § 166.203. Permits may also be issued by BIA under certain circumstances, including when the Indian landowner requests BIA to do so. 25 C.F.R. § 166.205(a); *see also Rosebud Indian Land and Grazing Association v. Acting Great Plains Regional Director*, 41 IBIA 298 (2005).

BIA establishes the grazing rental rate for individually-owned Indian lands and for tribal lands where the tribe has not established the rate. 25 C.F.R. § 166.400(b). The grazing rental rate should represent "fair annual rental," which is defined as "the amount of

⁴ In *Rosebud*, the Board dismissed Appellants' appeal of the Regional Director's decision establishing the \$14.61/AUM grazing rental rate, as applied to new permits beginning with the 2007 season, for lack of standing and, as applied to three existing permits, for lack of ripeness. *Id.* at 44.

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. In order to establish the grazing rental rate, BIA may use an appraisal developed in accordance with the Uniform Standards of Professional Appraisal Practices (USPAP), or it may utilize “competitive bids, negotiations, advertisements, or any other method . . . in conjunction with a market study, rent survey, or feasibility analysis developed in accordance with the USPAP.” 25 C.F.R. § 166.401. The purpose of BIA’s determination of fair annual rental is to assist Indian landowners in negotiating a permit with potential permittees and to enable BIA to determine whether a permit is in the best interest of the Indian landowner. 25 C.F.R. § 166.402. Indian landowners may stipulate a rate higher than the grazing rate set by BIA, 25 C.F.R. § 166.400(c)(1); stipulated rates below the BIA-established grazing rental rate will also be allowed, subject to BIA approval, when the permittee is a member of the Indian landowner’s immediate family. 25 C.F.R. § 166.401(c)(2). The regulations also authorize BIA to grant or approve a permit at less than fair annual rental if, after competitive bidding, it determines that such action would be in the best interest of the Indian landowner, if the permit is for the Indian landowner’s immediate family or co-owner, or if the permit is for grazing on tribal land and the tribe has set the rate. 25 C.F.R. § 166.403.

The grazing regulations allow tribes to establish preference systems for tribal members to receive grazing permits without having to compete against other potential permittees on the open market. *See Hall v. Great Plains Regional Director*, 43 IBIA 39, 40 (2006). BIA will honor such allocations or preferences awarded by a tribe, *see* 25 C.F.R. § 166.218(a) & (b), subject to the authority of BIA or the landowners to set rental rates. If the tribal member to whom the tribal allocation or preference has been awarded agrees to the rate at which a permit for a new permit period is offered, he or she obtains the permit. If not, the price may be set by competitive bidding or advertisement.

In accordance with 25 C.F.R. § 166.408, after grazing permits are issued by BIA, BIA may periodically adjust the grazing rental rate to ensure that Indian landowners are receiving a fair annual return. Any such adjustment must be based upon an appropriate valuation method that takes into account the value of improvements made under the permit, unless the permit provides otherwise, and that follows the USPAP. *Id.* The regulation further directs BIA to review the grazing rental rate annually prior to the permit anniversary date or when specified by the permit and to provide the permittee written notice of any grazing rental rate adjustment 60 days prior to the anniversary date; the regulation also allows the adjusted rental rate to be less than fair annual rental if BIA determines that such a rate is in the best interest of the Indian landowner. 25 C.F.R. § 408(a).

BIA may consolidate various tracts of Indian rangeland into range units in order to manage grazing under a permit; such a range unit may include a combination of tribal, individually-owned, and/or government land. *See* 25 C.F.R. §§ 166.4 and 166.302; *see also DuBray v. Great Plains Regional Director*, 48 IBIA 1, 4-5 (2008). BIA sets the grazing rate for the individually-owned Indian lands included in a range unit, but the tribe sets the grazing rate for the tribal land in the unit. 25 C.F.R. § 166.407.

Factual and Procedural Background

BIA issued most of the current grazing permits for the Rosebud Reservation for a 10-year period beginning December 1, 2006. In issuing the permits, BIA set the annual grazing rental rate at \$14.61/AUM. Thus, the grazing rate for the 2007 season was \$14.61/AUM, which was the rate agreed to by the permittees receiving new 10-year permits.⁵ The Tribe's 2006 Grazing Resolution also specified that the allotted land rental rate was 14.61/AUM. 2006 Grazing Resolution at 1.

In order to comply with the annual rental rate review obligation imposed by 25 C.F.R. § 166.408(a)(1), by memorandum dated February 1, 2007, the Regional Director contacted the Office of the Special Trustee (OST) to request a reservation-specific market study to help him review and consider information and recommendations concerning the fair annual grazing rental value for allotted land on the Reservation. AR 10. The Regional Director identified several local conditions that might affect the grazing rate including the prepayment of the entire grazing rental, the payment of a 3% annual preparation fee, and the assessment of tribal use taxes (the fee costs). He also listed other services and considerations he wanted the appraiser to consider such as (1) fencing development and maintenance; (2) cattle round-up; (3) counting of cattle for BIA purposes; (4) weed control; (5) water development and maintenance; (6) tenure and duration of leases; (7) public hunting access; (8) imposition of first liens on livestock for unpaid rent; and (9) other factors distinguishing BIA grazing units from private pasture rentals. The Regional Director asked that the study identify each non-fee cost considered, document why it was considered, and explain why it was accepted or rejected as a

⁵ The Tribe's current permits, which were also issued effective December 1, 2006, for 10-year periods, set the minimum annual rental rate at \$9.60/AUM for tribal land and land managed by the Tribal Land Enterprise, unless otherwise stipulated. *See* Appellee's Answer Brief, Attachment A, Declaration of Cleve Her Many Horses, Rosebud Agency Superintendent (Superintendent Declaration), Ex. 1, Rosebud Sioux Tribe Resolution No. 2006-216 (2006 Grazing Resolution), at 1.

deduction, adding that the study needed to be very explicit and detailed, with all calculations shown.

The Regional Director provided a copy of the memorandum to the Tribe, inviting its comments on the process being used to determine the grazing rental rates for the allotted lands on the Reservation. AR 9.

David Baker, a private appraiser, conducted the 2008 Market Study on behalf of OST. AR 8. The Study, which the appraiser signed on June 24, 2007, and OST's Great Plains Regional Appraiser Geoff Oliver approved on June 25, 2007, reviewed livestock inventory and price projections; loan demand and interest rates; the 2007 U.S. Department of Agriculture (USDA) South Dakota Agricultural Statistics Service's Survey of rents paid by farmers and ranchers in Mellette, Todd, Tripp, and Gregory Counties, South Dakota; the South Dakota State University survey of agricultural lenders, USDA Farm Service Agency officials, rural appraisers, real estate agents/brokers, professional farm managers, and county extension agents concerning market rents for rangeland; South Dakota State School Land Rents; and 62 comparables to arrive at an opinion of the market rent appropriate for rangeland on the Reservation. In analyzing the rental comparables, which the Study compared to the rental rates obtained from the various studies, surveys, and rental analyses, the appraiser first used a 78.1% seasonal correction factor to convert the seasonal rental rates charged in most of the comparables to a 12-month rental rate and then adjusted that 12-month rate to compensate for the rental prepayment requirement, the preparation fee assessments, and the tribal use tax charges uniquely associated with BIA rental agreements, to reach a Reservation-wide year-long rental rate of \$17.54/AUM. *See* 2008 Market Study at 30-34.

The appraiser next considered the non-fee rental rate factors identified by the Regional Director. He found no correlation between those factors and the rent charged, with one exception. That one exception was livestock water facility maintenance. The appraiser noted that livestock watering facilities were varied and included stock dams, dugouts, springs, creeks, wells, or combinations thereof, the maintenance of which was generally the lessor's responsibility, with the lessee's obligation limited solely to any costs associated with the use of rural waterlines serving the property. He found, however, that there were two comparables that required "substantial" livestock watering facility maintenance by the lessee, and that there was a significant correlation between the rental charges and the duty of the lessee to provide that maintenance.⁶ Based on data from these

⁶ The Study does not identify the two comparables requiring substantial livestock water facility maintenance by the lessee, and the one comparable (No. 16) that clearly places the

(continued...)

two comparables, he calculated a year-long adjustment of \$8.23/AUM to reflect that factor. 2008 Market Study at 35. He then applied the adjustment by deducting the \$8.23/AUM water facility maintenance adjustment from the \$17.54/AUM year-long Reservation-wide grazing rate to determine that the appropriate adjusted year-long grazing rental rate was \$9.31/AUM. *Id.* at 36.

By memorandum dated July 13, 2007, the Superintendent advised the Regional Director of the Agency's concerns about the Study's inclusion of an across-the-board adjustment of \$8.23/AUM for livestock water facility maintenance provided by the permittee. AR 6. The Superintendent pointed out that there were many natural, government-developed, and privately-funded water sources associated with the range units on the Reservation, including dugouts, springs, waterlines, and wells, as well as water transportation systems, and that specific criteria for the implementation of such a deduction on a unit-by-unit basis would have to be identified.⁷

By memorandum dated August 16, 2007, the Regional Director asked OST for additional information about the recommended \$8.23/AUM adjustment for water facility maintenance. AR 5. The Regional Director noted that, unlike the private leases requiring the lessee to perform substantial water facility maintenance cited by the appraiser, BIA grazing permits did not require the permittee to provide water facility maintenance, although the maintenance that was necessary on some but not all of the range units was always paid for by the permittee. He also stated that water facilities could be wells, rural water system hookups, springs, creeks, dams, dugouts, or any combination thereof, each of which could require a wide range of maintenance and related costs. He, therefore, requested that OST provide a suggested rental rate with all supporting documentation by August 23, 2007. OST apparently did not respond to this memorandum.

By memorandum dated August 29, 2007, the Regional Natural Resources Officer recommended that the 2008 grazing rental rate for allotted lands remain at \$14.61/AUM. AR 4. He disagreed with the Study's \$8.23/AUM deduction for livestock water facility maintenance because (1) BIA rental agreements did not require water facility maintenance; (2) water facility was a broad category and included wells, springs, pipelines, dams,

⁶(...continued)

maintenance responsibility on the lessee does not indicate the extent of the maintenance required. *See* 2008 Market Study at 17.

⁷ Although the Regional Director forwarded a copy of the 2008 Market Study to the Tribe for its comments (AR 7), no comments from the Tribe appear in the administrative record.

dugouts, creeks/streams, or any combination thereof; and (3) each range unit might have different costs (including no cost) for water facility maintenance. He added that BIA did not control the amount or timing of water facility maintenance expenditures (if any), and that maintenance was left up to the permittee. He also noted that not all water facilities serving range units were located on allotted land; rather, some were on tribal and, in some cases, on private fee land. While he endorsed considering some water facility maintenance allowances in appropriate cases, he rejected the across-the-board \$8.23/AUM deduction as unreasonable. The Natural Resources Officer therefore recommended retaining the \$14.61/AUM minimum grazing rental rate as the fair annual rental for allotted lands since that number, which was less than the \$17.54 suggested by the Study if no water facility maintenance was required, would allow for the fact that some such maintenance might be required. The Regional Director concurred in that recommendation.

In his August 31, 2007, decision, the Regional Director advised permittees, among others, that, after reviewing the 2008 Market Study, he had determined that \$14.61/AUM provided fair annual rental to allotted land owners. AR 2. Accordingly, he concluded that the 2008 Rosebud Reservation year-long grazing rental rate for allotted lands would remain at \$14.61/AUM for new and existing permits where landowners had not established their own rental rate.

This appeal followed.

Standard of Review

The setting of a rental rate for grazing permits, like the setting of any other lease rate, requires the exercise of expertise and discretion. *Fort Berthold Land & Livestock Association v. Great Plains Regional Director*, 35 IBIA 266, 270 (2000). 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.

DuBray, 48 IBIA at 18, *quoting Rosebud Indian Land and Grazing Ass'n*, 41 IBIA at 301 (internal citations omitted). We review questions of law de novo. *DuBray*, 48 IBIA at 18; *see Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007).

Discussion

Standing

As a preliminary matter we address the question of Appellants' standing to bring this appeal, an issue raised by the Regional Director in his Answer Brief. 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. *See DuBray*, 48 IBIA at 19.

The Board also requires that a party satisfy the prudential rules of standing. To establish prudential standing in Federal courts, a party generally must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). As applied by the Board, this means that a party seeking to appeal must assert an interest arguably protected or regulated by the statute or regulation upon which the party bases its claim before the Board. The zone of interest test, however, is "not meant to be especially demanding." *Clarke v. Sec. Indus. Assoc.*, 479 U.S. 388, 399 (1987). A party not the subject of agency action is outside the zone of interests only if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* An analogous principle applies to interests created, protected, or regulated by a regulation, for purposes of the Board's evaluation of administrative standing.

Finally, where, as here, one of the appellants is an organization that claims to have standing to sue on behalf of its members, the organization must show that (1) its members would have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the issues to be resolved do not require the individual participation of the members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 181 (2000); *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Santa Ynez Valley Concerned Citizens v. Pacific Regional Director*, 42 IBIA 189, 192-93 (2006); *Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 13 IBIA 276, 285 (1985).

The Regional Director concedes that Appellants meet the constitutional standing requirements; he maintains, however, that they do not have prudential standing because their interests do not fall within the zone of interests protected by the relevant statute. Specifically, he contends that the interests of the ranchers/permittees do not fall within the zone of interests protected by the American Indian Agricultural Resources Management Act (AIARMA), 25 U.S.C. §§ 3701-3746, which explicitly grants the Secretary the authority, *inter alia*, to participate in the management of Indian lands, including the issuance and approval of grazing permits, in a manner consistent with the Secretary's trust obligations and the objectives of the beneficial owners, 25 U.S.C. § 3702(2), and directs the Secretary to "assist trust and restricted Indian landowners in leasing their agricultural lands for a reasonable annual return." 25 U.S.C. § 3711(a)(6). The Regional Director also asserts that the individual members' lack of standing precludes the Association from claiming derivative standing based on its members' standing.

Appellants disagree, arguing that AIARMA has other purposes which support their standing, including the development of agricultural resources on Indian land, the improvement of tribes' and their members' agriculture-related expertise and technical abilities, and the expansion of agricultural-related employment opportunities for Indians. While acknowledging that the Secretary's duty to assist in the development and maintenance of a healthy agricultural economy on reservations does not rise to the level of a trust responsibility, *see Fort Berthold Land and Livestock Association*, 35 IBIA at 277, Appellants maintain that their rights need not be based on trust duties to support their standing. Rather, they insist that the legally protected interests afforded by their permits, which were issued under statutes designed to promote their interests, suffice to establish their standing to bring this appeal. They further note that the Board has granted standing numerous times to associations, including the Association, as representatives of their members who have standing with regard to grazing rates.

We need not decide whether Appellants fall within the zone of interests of AIARMA because we conclude that, for purposes of administrative standing before the Board, they are within the zone of interests of the applicable regulation, 25 C.F.R. § 166.408. The Regional Director does not argue otherwise. Section 166.408 authorizes the Regional Director to adjust the grazing rental rate for existing permits to ensure that Indian landowners receive fair annual rental for their trust land. Although the overt purpose of the provision is to protect Indian landowners, the regulation does not, by its terms, authorize the Regional Director to adjust the rental rate for an existing permit to a rate that is *higher* than fair annual rental. The only interest that is both regulated *and* adversely affected if the rate is adjusted above fair annual rental is that of the ranchers who hold existing permits. Moreover, subsection 166.408(a) expressly requires that permittees receive written advance notice of a rate change, a procedural right that underscores our conclusion that they are

within the zone of interests of section 166.408.⁸ To hold otherwise would effectively preclude permittees from ever challenging a BIA rental rate adjustment as exceeding fair annual rental value, regardless of BIA's lack of authority to do so.⁹ Accordingly, we find that Appellants have prudential standing to challenge the rental rate adjustment.

Substantive Issues

On appeal, Appellants contend that the Regional Director's decision to maintain the 2007 grazing rental rate of \$14.61/AUM is not supported by law or substantial evidence. Specifically, they assert that the rate decision is arbitrary, capricious, not reflective of the fair annual rental, and not supported by the 2008 Market Study prepared at BIA's request because it ignores the \$8.23/AUM deduction for livestock water facility maintenance espoused in the Study and fails to provide adequate incentives or credits to encourage Appellants to perform the required water facility maintenance. Appellants also allege that, in declining to adjust the 2008 grazing rental rate, the Regional Director failed to comply with 25 C.F.R. § 166.408, which expressly allows rental to be less than fair annual rental under certain circumstances, and therefore, by negative implication, prohibits rates higher than the fair annual rental. Appellants further maintain that the \$14.61/AUM grazing rental rate provides in excess of a reasonable rate of return to landowners by failing to include an offset for the costs of making improvements and performing maintenance, which are borne solely by Appellants. Additionally, Appellants aver that the Regional Director's decision does not reflect the costs Appellants must bear as a direct result of hunting access to the range units covered by the rental rate, including the possible loss of the permittee's pre-paid investment should a hunter inadvertently start a range fire that destroys the grass upon which the

⁸ In the present case, of course, the Regional Director *declined* to adjust a grazing rental rate to which permittees had agreed when they received permits for the new permit period commencing with the 2007 grazing season. Because we conclude that the Regional Director's decision to maintain the grazing rate at \$14.61/AUM is supported by the record and by a reasonable explanation, and because the Regional Director does not argue that he has unreviewable discretion to leave a permit rate unchanged regardless of a potential change in fair annual rental value, we need not decide whether or under what circumstances the Regional Director could leave a permit rate unchanged during the course of a permit, despite some evidence of changes in fair annual rent with respect to other properties.

⁹ We only decide the issue of a permittee's standing to challenge a BIA rate adjustment for an existing permit issued by BIA. As noted earlier, Indian landowners are not precluded from offering new permits at a rate that is higher than that set by BIA.

permittee's cattle graze, and the expenses associated with rounding up any loose cattle escaping through gates left open by hunters, as well as the potential loss of loose cattle from accidental shootings, automobile accidents, or thefts.

Appellants raise two other issues. First, they complain that the Regional Director ignored 25 C.F.R. § 166.407, which authorizes a tribe to set the grazing rental rate for tribal land, when he set the 2008 grazing rate for the Reservation because he failed to acknowledge that the portions of a range unit consisting of tribal lands would be charged the rental rate established by the Tribe and not the rate set by BIA. Finally, Appellants insist that the Regional Director contravened 25 C.F.R. § 166.403, which countenances the approval of permits for less than fair annual rental if the permit is for the Indian landowner's immediate family, when he set the 2008 grazing rental rate, citing his failure to honor what they characterize as a request by Grace Waln that a permit be issued to her nieces for \$5.50/AUM.¹⁰ We find none of Appellants' arguments sufficient to show that the Regional Director's decision is unreasonable and not supported by law or substantial evidence.

As an initial matter, we note that although 25 C.F.R. § 166.408 requires BIA to *review* the grazing rental rate annually, it does not require BIA to *adjust* that rate annually. Rather, that regulation, which provides that BIA "may adjust the grazing rental rate established by BIA," simply grants BIA the discretion to adjust that rate if appropriate. Appellants concede that the Regional Director's authority is discretionary.

Although Appellants complain that the Regional Director erroneously refused to adopt the \$8.23/AUM deduction for lessee/permittee-required substantial livestock water facility maintenance, his refusal to accept that deduction is amply justified by the record. BIA has provided persuasive arguments against the wholesale adoption of that deduction. Although the permits do not expressly require that the permittee perform livestock water

¹⁰ Appellants raise several additional arguments for the first time in their Reply Brief, including objections to the 2008 Market Study's choice of comparables and analysis of non-fee factors and assertions that prairie dog population expansion and noxious weed proliferation created by BIA's alleged mismanagement of Indian lands have required the permittees to assume the responsibility and costs of addressing those problems. The Board does not consider issues raised for the first time before the Board in reply briefs. See *Gardner v. Acting Western Regional Director*, 46 IBIA 79, 89 n.9 (2007); *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 226 n.8 (2007). Appellants have provided no explanation for failing to address these issues in their earlier pleadings before the Board. We therefore see no reason to depart from that rule here, and we decline to consider those issues.

facility maintenance, BIA acknowledges that any such maintenance falls on the permittee. BIA points out, however, that the water facilities serving the various range units are extremely varied and include wells, springs, streams/creeks, pipelines, dugouts, dams, or any combination thereof; that each range unit might have different (including no) costs for water facility maintenance; and that not all water facilities serving the range units are located on allotted land. The Regional Director reasonably considered these circumstances and decided to retain the 2007 grazing rental rate of \$14.61/AUM.¹¹ Accordingly we find the Regional Director's refusal to adopt the \$8.32/AUM deduction falls well within his discretion and is amply supported by law and substantial evidence.

Additionally, flaws in the 2008 Market Study itself undermine the applicability of that deduction as a factor in determining the Reservation-wide fair annual rental for individually-owned Indian range land. The appraiser based the deduction on his determinations that 2 out of the 62 comparables required the lessee to perform *substantial* livestock water facility maintenance, and that a significant correlation existed between that responsibility and the rental for those comparables. The appraiser, however, did not identify which of the comparables place that duty on the lessee, and our review of the 2008 Market Study reveals only one comparable, No. 16, which places the water facility maintenance responsibility solely on the lessee, and one comparable, No. 61, where the lessee and lessor share that responsibility. Neither of those comparables, however, indicates that the required water facility maintenance is substantial, and, in fact, the only references to the quantum of water facility maintenance necessary for any of the comparables state that water facility maintenance expenses are minimal. *See, e.g.*, Comparable Nos. 36, 38, 41, 42. Even when requested by BIA to provide further explanation, OST did not explain why the appraiser determined that the fair annual rental for all the permits on the Reservation, regardless of the source of livestock water or the extent of any required water facility maintenance, should include the \$8.32/AUM deduction for substantial livestock water facility maintenance. These critical omissions undercut the legitimacy of that deduction. *DuBray*, 48 IBIA at 21.

Appellants have not shown that the \$14.61/AUM grazing rental rate retained by the Regional Director is, in fact, higher than the fair annual rental for individually-owned Indian land on the Reservation.

Appellants contend that the \$14.61/AUM grazing rental rate grants landowners more than a reasonable rate of return because that rate omits the \$8.32/AUM deduction for water

¹¹ In practical effect, the retention of the \$14.61/AUM rate effectively authorized a water facility maintenance deduction of \$2.93/AUM (the pre-deduction \$17.54/AUM suggested by the Study minus the \$14.61/AUM established rate).

facility maintenance and fails to provide appropriate credit for range improvements. Our conclusion that the Regional Director properly disallowed the \$8.32/AUM water facility maintenance deduction refutes this proffered justification for Appellants' position. As far as improvements are concerned, Appellants contend that they have been required to undertake various improvements to preserve the land's use for grazing purposes, and that the failure to recognize the costs of those improvements unjustly enriches the Indian landowner since most of those improvements cannot be removed from the land when the permit expires. Appellants have not, however, specifically identified any such improvements or quantified the costs of those improvements, and BIA points out that most of these allotments have been grazed for numerous years and that major improvements such as fencing have long been in place.¹² Relevant to this case, Appellants do not offer any evidence to show how any of these factors *changed* from the 2007 season to the 2008 season, such that the 2007 rate — to which new permittees agreed — no longer reflected fair annual rental value.

Similarly, Appellants' claim that the rental rate erroneously ignores the costs associated with hunting access does not support a finding that the \$14.61/AUM grazing rental rate grants the landowners more than a reasonable rate of return. Again, Appellants cite no change in hunting-related circumstances between 2007 and 2008 that indicates a corresponding change in rental value. Moreover, the only evidence Appellants provide to support this claim is a statement by C. Keith Whipple, attached to their Reply as Exhibit 3, which recounts an incident occurring in January 2008, after this appeal was filed, in which three cows were shot and butchered. This statement does not even address hunting-related accidents — Whipple describes the incident as a crime — let alone attribute any monetary value to the cows, or demonstrate that this is a systemic problem throughout the Reservation, especially given the lack of any other reported incidents. Appellants thus have not shown that the \$14.61/AUM grazing rental rate provides more than a reasonable rate of return to landowners.¹³

¹² While 25 C.F.R. § 166.408 includes the values of improvements made under the permit as a factor to be considered in adjusting a grazing rental rate, Appellants have not enumerated any specific improvements made under the current permits.

¹³ BIA also notes that essentially all of the grazing allotments on the Reservation have either issued permits or pending permits, and that the most recent competitive bids for permits on the Reservation established rental rates from \$14.61/AUM up to as much as \$16.19/AUM. Since fair annual rental is defined at 25 C.F.R. § 166.4 as the amount the land would command in an open and competitive market, the results of the competitive bidding process support the Regional Director's conclusion that \$14.61/AUM is a fair, not excessive, annual rental.

Appellants' last two challenges to the Regional Director's decision also have no merit. Although they assert that the Regional Director violated 25 C.F.R. § 166.407 by failing to explicitly recognize the Tribe's authority to set grazing rental rates for tribal land, the decision clearly states that it applies to *allotted* lands, not tribal lands. The fact that range units on the Reservation may contain both allotted and tribal lands does not mean that BIA will charge the same rate for both types of parcels; rather, as 25 C.F.R. § 166.407 makes clear, BIA charges the tribal rate for tribal land and BIA-determined rate for individually-owned land. "Individually-owned Indian land" is defined to include any "tract" in which the surface estate is owned by an individual Indian in trust or restricted status. 25 C.F.R. § 166.4. Thus, even though a tribe may own a fractional interest in allotted lands, the tract or parcel remains "individually-owned Indian land" for purposes of the grazing rate. Wholly-owned tribal lands are subject to the tribal rate. Appellants have not shown that the Regional Director's decision sought to charge the same rate for both types of land.

Appellants' complaint that the Regional Director failed to honor a stipulated rate for less than fair annual rental in violation of 25 C.F.R. § 166.403 falls outside the scope of the Regional Director's decision and is not properly before us. In any event, BIA explains that the one example cited by Appellants involved a situation in which BIA had previously accepted the stipulated rate, but had later declined to accept that rate, after learning of the landowner's death, in order to maintain the value of her estate pending completion of probate proceedings. *See* Superintendent Declaration at 3-4, ¶¶ 7-10. Moreover, as the Regional Director points out, the rate agreed to by the landowner was for "not less than" \$5.50 *per acre*, not per AUM, as Appellants represent.¹⁴

Conclusion

Appellants have not met their burden of showing that the Regional Director's decision is unreasonable and not supported by law or substantial evidence. Accordingly we affirm his decision to retain the \$14.61/AUM grazing rental rate for the 2008 grazing season.

¹⁴ Because this claim is outside the scope of this appeal, we need not address whether Appellant Association even has standing to raise a claim seeking to protect the interests of a landowner.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decision.

I concur:

 // original signed
Sara B. Greenberg
Administrative Judge*

 // original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.