



INTERIOR BOARD OF INDIAN APPEALS

Heirs and Successors in Interest to Mose Daniels v. Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

55 IBIA 139 (06/25/2012)

Reconsideration denied:

55 IBIA 214



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

HEIRS AND SUCCESSORS IN)	Order Affirming Decision in Part,
INTEREST TO MOSE DANIELS,)	Vacating in Part, and Remanding
Appellants,)	
)	
v.)	
)	Docket No. IBIA 10-029
EASTERN OKLAHOMA REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	June 25, 2012

Twenty-five individuals (Appellants)¹ who collectively own a two-thirds beneficial interest in a parcel of trust land in Oklahoma (Property)² appeal to the Board of Indian Appeals (Board) from an October 22, 2009, decision (Decision) of the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA). In the Decision, the Regional Director assessed damages, penalties, and costs against the Muscogee (Creek) Nation (Nation) for trespass on the Property through the unauthorized extraction of fill material for a road project and the associated destruction of trees and other vegetation.

Appellants contend that the amount assessed against the Nation is far too low. As a threshold argument, Appellants assert that the Regional Director and an attorney in the

¹ Appellants refer to themselves as the heirs and successors in interest to Mose Daniels, from whom their interests in the trust property are derived. Appellants are identified as Miley A. Beaver Hargis; Edwin S. Moore, Jr.; Edwin Stanton Moore, Sr.; David Glenn Moore, Sr.; Blanche Yeager Beaver; Leila J. Beaver; Dora L. Beaver; Miley Jean Beaver; Robert P. Beaver; Hanna L. Beaver; William Beaver Moore; Kelly R. Moore Wilson; Reta K. Beaver; Terri Diane Beaver; William P. Beaver; Johni M. Beaver; Mose A. Beaver; Nancy Beaver Osceola; Della R. Walkingsky; Karen Beaver Geyer; Cora S. Berryhill; Sally B. Beaver Wittman; Anita S. Daney; Letha M. Beaver Rutherford; and Martha J. Froman.

² The Property is more particularly described as the Northeast ¼ of Section 32, Township 17 North, Range 11 East, Creek County, Oklahoma, containing 160 acres, more or less.

Field Solicitor's office had conflicts of interest and were thus biased against Appellants. On the merits of the Decision, Appellants claim that the Regional Director applied the wrong regulations, under-estimated the damages, and wrongfully failed to charge the Nation for legal fees that Appellants incurred in a related Federal suit.

As to the threshold issue, we reject as without merit, and as unsupported by the evidence, Appellants' allegations that the Regional Director and the attorney had conflicts of interest or were biased, thus tainting the Decision and denying Appellants due process. On the merits, we first conclude that the Regional Director misapplied the test for determining which of two statutes (and implementing regulations) govern this case, but we also conclude that Appellants have not demonstrated that it affected the outcome, i.e., they have not shown that the amount of damages would differ depending on which statute is applied. As to the Regional Director's calculations and assessment of damages against the Nation, we affirm in part and vacate in part: Most of the Regional Director's damages determinations were reasonable and properly supported by the record, but she did not adequately explain her conclusions related to activity at the site prior to the Nation's trespass. Next, we affirm in part and vacate in part the Regional Director's assessment of restoration costs against the Nation. While we agree with the Regional Director that the Nation's liability for restoration costs is limited by the reasonableness and proportionality of those costs in relation to the harm done by the Nation, we conclude that the Regional Director erred in calculating restoration costs based on simply returning the Property to some type of productivity, in this case making it agriculturally productive, rather than using the pre-trespass condition as the restoration objective, even if restoration-based damages ultimately are limited. Finally, we affirm the Regional Director's decision not to assess against the Nation Appellants' attorney fees from the related Federal litigation.

Background

I. Procedural and Factual History

The United States holds an undivided two-thirds interest in the Property in trust for Appellants. A single owner holds the remaining one-third undivided interest in unrestricted fee. The 160-acre Property is hilly and forested with native trees (mostly a mixture of oaks, up to 40 feet tall and over 100 years old, but "scrubby" in appearance). Foote Appraisal at 3 (Administrative Record (AR) Tab 77); Office of the Special Trustee (OST) Appraisal at 10 (AR Tab 78). The Property contains several oil wells, *see* Appellants' Opening Brief (Br.), Attach. 1 at 7, 23, and a stock pond/reservoir, *see* Nation's Responses to United States' First Interrogatories at 6 (AR Tab 158), and apparently has some capacity for grazing, but neither crops nor trees can be sustainably grown and harvested, Foote Appraisal at 6 (AR Tab 77). In 1993, Appellants' predecessors-in-interest sold the right to

excavate fill material for an earlier county bridge-building project (Polecat Creek Project). The damages at issue in the present case arose from the Nation's unauthorized additional extraction from that excavation site.

On June 17, 2006, one of the Appellants discovered that a road-building crew had trespassed onto the Property and was excavating fill material,³ without the consent of the owners and BIA, from the pit created by the Polecat Creek Project. Opening Br., attach. 1 at 5. The road-building crew, run by the Nation under a Self-Determination Compact with BIA, used the fill material for a nearby road project (Kellyville Project). In the process of removing the fill material, the crew enlarged the existing excavation pit and removed or destroyed trees and vegetation.

It is undisputed that the Nation's actions on Appellants' property were not authorized and constituted a trespass. The Nation admits that it trespassed on the Property from April 4, 2005, until August 6, 2006. *See* Decision at 2 (unnumbered). Since the time Appellants discovered the trespass, erosion of the disturbed area has created gullies and caused flooding at nearby residential sites.

The record includes one undisputed estimate of the diminution in the value of the Property caused by the excavations. An OST appraiser calculated that the diminution in value to the entire 160-acre Property was \$5,600. OST Appraisal (AR Tab 78). The appraiser determined the per-acre value of the land (\$800/acre) and then carved out seven acres encompassing the approximately three-acre excavation site. *Id.* Nothing in the appraisal suggests that the appraiser considered the diminution in value to the Property caused by the Kellyville Project separate and apart from any diminution in value caused by the Polecat Creek Project. *Id.*

After the trespass was discovered, BIA informed Appellants that it would pursue trespass proceedings against the Nation under the American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701 *et seq.* (AIARMA). *See* Letter from Field Solicitor to Appellants, Apr. 5, 2007 (AR Tab 4). BIA also informed Appellants of their option to file a claim against BIA (as administrator of the Kellyville Project) under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (FTCA). *Id.*

³ The excavated material is referred to in the administrative record and in the pleadings by a variety of names (borrow, sandstone, stone, fill, dirt, etc.). We refer to it here as fill material.

Appellants filed an FTCA claim with BIA, which BIA denied. Appellants then filed suit against BIA in Federal court and BIA filed a third-party complaint against the Nation. *See Moore et al. v. United States*, No. 08-CV-306-GKF-FHM (N.D. Okla.). After discovery commenced, the court stayed the case to allow BIA to issue its Decision assessing damages against the Nation as trustee for the two-thirds interest in the Property held in trust for Appellants.⁴ Order Staying Federal Case, Aug. 28, 2009 (AR Tab 161).

The Regional Director issued her Decision on October 22, 2009. Applying AIARMA, the Regional Director assessed treble damages against the Nation on behalf of Appellants for the fill material and the trees that were removed or destroyed during the trespass. The Regional Director calculated the trebled damages to be \$143,302.50 plus interest (after reducing the damages by one third for the unrestricted owner who had settled her claim). Decision at 12 (unnumbered). The Regional Director also assessed \$10,110 against the Nation for restoration costs, but she reserved the right to raise or lower the assessment as needed (BIA's proposed restoration plan was projected to cost \$5,055). Decision at 10 (unnumbered). Finally, BIA billed the Nation for enforcement costs incurred by BIA and the Solicitor's Office. Decision at 11 (unnumbered).

Appellants timely appealed the Regional Director's Decision to the Board. Appellants filed an opening brief, the Regional Director filed an answer, and Appellants filed a reply. The Nation did not appeal the Decision or submit a brief in this appeal.

II. Arguments on Appeal

Appellants raise several issues on appeal. They first claim that both the Regional Director and Field Solicitor Jessie Huff Durham (Durham) have conflicts of interest because they worked on the Kellyville Project for BIA, opposed Appellants in the Federal suit, and then oversaw the trespass determination against the Nation. Appellants further assert that Durham has a conflict because she at one time worked for the Nation.

On the merits, Appellants argue that the National Indian Forest Resources Management Act, 25 U.S.C. § 3101 *et seq.* (NIFRMA), rather than AIARMA, should govern this case and therefore the Regional Director erred in assessing damages under AIARMA. They claim that the Regional Director's assessment for the value of the fill material and the trees was far too low under either set of regulations. Appellants argue that

⁴ The owner of the unrestricted one-third interest in the Property had already settled her claim before the court granted the stay; BIA's Decision is limited to recovery for the two-thirds trust interest.

the Regional Director should have assessed \$1,965,827 instead of \$10,110 for the site restoration and should have pursued a more comprehensive restoration program. Finally, Appellants claim that the Nation is liable for Appellants' expert witness and attorney fees from the Federal suit and that BIA should have assessed those costs against the Nation.

Discussion

I. Standard of Review

The Regional Director's determination of the trespass damages in this case involved an exercise of discretion. The proper role for the Board in reviewing BIA's discretionary actions is to determine whether BIA followed or considered all legal prerequisites in the exercise of its discretionary authority and whether the decision is supported by the record and adequately explained. *Spang v. Acting Rocky Mountain Regional Director*, 52 IBIA 143, 148-49 (2010). When an appeal raises issues of law or of the sufficiency of evidence, the Board reviews those issues *de novo*. *Id.* at 149. Appellants bear the burden of proving error in a regional director's decision. *Id.* at 149. Unsupported assertions do not carry the burden of proving error. *McCann Resources, Inc. v. Acting Eastern Oklahoma Regional Director*, 48 IBIA 84, 89 (2008).

II. Conflict of Interest/Bias

Appellants contend that they were denied an impartial and unbiased decision in the determination of trespass damages because the Regional Director and attorney Durham participated in the decision making process and Appellants allege that both have conflicts of interest. But Appellants fail to show that either the Regional Director or Durham had a personal or financial stake in the Decision, or that their participation in related matters created a presumption of bias or is evidence of actual bias.

Appellants claim that because Durham worked for the Nation until 1999 and signed a letter related to the Kellyville Project that year, she has a personal conflict that should have prevented her from working on this matter for BIA. But Durham left the employ of the Nation 6 years before the trespass occurred, and we do not think that her earlier involvement with the Kellyville Project can reasonably be treated as representing the Nation in the same "matter" that was before the Regional Director, i.e., determining the amount of damages for which the Nation is liable for its trespass on Appellants' land. Neither the rule nor the case that Appellants cite provides a basis for us to conclude that Durham was barred from advising BIA in this trespass matter. *See* Opening Br. at 12, 14 (citing Model Rules of Professional Conduct, Rule 1.9; *Livingston v. State*, 907 P.2d 1088, 1091 (Okla. Crim.

App. 1995)).⁵ Appellants therefore have not identified any personal or financial interests that Durham might have had in the outcome of this matter that would even arguably create a conflict.⁶

Appellants further claim that because both Durham and the Regional Director actively participated in defending BIA against Appellants' Federal suit, they both must be barred from participating in the determination of damages against the Nation. This alleged "conflict" relates not to any conflicts of interest personal to Durham or the Regional Director, but to an alleged conflict relating to BIA's defense of the *United States* from liability in response to litigation filed by Appellants on the one hand, and BIA's action on behalf of Appellants to assess damages for the trespass against the *Nation* on the other. It may be that BIA must pursue administrative remedies on behalf of landowners while at the same time defending the agency against tort suits brought by the same landowners, but we are not convinced that these dual responsibilities created a conflict that required recusal by the Regional Director or Durham or that gave rise to any implied or actual bias.

Appellants contend that BIA's defense of the tort action would lead the Regional Director to minimize the damages assessed against the Nation, and they seek to bolster that

⁵ Rule 1.9(a) of the Model Rules bars an attorney from representing a client in a "matter" and then representing a different client with materially adverse interests in the same or a substantially related "matter," without informed consent. Comment 2 of the Rule notes that the scope of a "matter" depends on the facts of the situation or transaction. Here, Durham signed a letter transmitting a memorandum related to the Kellyville Project, but she never advised the Nation on the trespass issue, or any other issue implicated by the trespass, and was no longer employed with the Nation at the time the trespass began. Because the "matter" at issue here, the trespass, did not occur until well after Durham was no longer employed by the Nation, this "matter" is different from the one she worked on for the Nation.

The *Livingston* case concerned an attorney who had represented a child in a case where the child's father testified against the child, and then represented the father in an unrelated case where the child was set to testify against the father. The attorney used confidential information from the child's case in the father's case, and then could not cross-examine the child in the father's case because of the acknowledged conflict of interest. Durham's former employment with the Nation, and her involvement in this case advising BIA, is not remotely analogous.

⁶ Appellants do not allege that the Regional Director had any personal or financial interest in the outcome here.

contention by arguing that the Regional Director's calculations of the assessed damages are themselves evidence of bias, claiming that she consistently chose the lowest possible damage assessments and had "shop[ped]" around for appraisals and surveys to support lower awards. Opening Br. at 27. As we discuss in the sections below, Appellants' allegations about the Regional Director's calculations are not founded in fact. Moreover, Appellants' reasoning that the Regional Director's defense of the tort claim would lead her to minimize damages is both speculative and questionable. *See* Opening Br. at 12 ("BIA's interests are materially adverse to the Creek Nation's interests"). Presumably, by ensuring that BIA collects damages against the Nation to the maximum extent defensible and reasonable, BIA would actually minimize its own potential alleged liability. Thus we see no basis to simply impute a conflict of interest based on the Regional Director's involvement in defending BIA against Appellants' tort claim. And Appellants' desire to assign the matter to other officials within the Department of the Interior would do nothing to allay their concerns of alleged institutional bias.

We therefore find no evidence of bias or prejudice in the Regional Director's Decision.⁷ Neither the Regional Director nor Durham had personal conflicts or any other interests that would merit recusal. The varying duties assigned to BIA do not give rise to actual conflict, and the Regional Director's damage award determinations are not evidence of any bias in the process. We therefore find that neither the Regional Director nor Durham were required to recuse themselves, and we proceed to the merits of Appellants' substantive arguments.

III. Applicable Statutes and Regulations

The parties disagree over whether AIARMA or NIFRMA regulations should govern this case. AIARMA generally applies to "Indian agricultural land," while NIFRMA generally applies to "Indian forest land." The Regional Director held that NIFRMA is not applicable to the Property. Decision at 10 (unnumbered). Appellants disagree that

⁷ Even if there were some evidence in this case of bias or prejudice on the part of the Regional Director or Durham, which there is not, Appellants would still be required to make the substantial showing necessary to overcome the presumption that the Regional Director and Durham discharged their official duties properly, and to establish that their recusal was required. *See Roberts County v. Acting Great Plains Regional Director*, 51 IBIA 35, 49 (2009) (substantial showing of bias required to disqualify a hearing officer in administrative proceeding to overcome presumption of honesty and integrity), *aff'd*, *South Dakota v. U.S. Dep't of the Interior*, 775 F. Supp. 2d 1129, 1136-37 (D.S.D. 2011) (same), *appeal dismissed*, 665 F.3d 986 (8th Cir. 2012).

NIFRMA is not applicable and claim that applying NIFRMA would result in a higher damage award and a more comprehensive restoration scheme. We conclude that the Regional Director erred in dismissing NIFRMA as inapplicable to the Property because she only considered one of several criteria for determining whether NIFRMA applies. Nonetheless, Appellants have not shown that the damages available under NIFRMA in this case would be different from the damages available under AIARMA. Both statutes include restoration-based damages, both provide treble damages for the products removed and destroyed in a trespass, and neither would allow the unlimited recovery that Appellants seek. Therefore, even though the Regional Director clearly erred in her legal analysis of NIFRMA's applicability, the error is not material to our consideration of this appeal and we need not consider it further, except to correct the analytical error in the event a difference between the statutes as applied to this case emerges on remand.⁸

A. The Regional Director Failed to Correctly Analyze Whether NIFRMA Applies.

The Regional Director rejected NIFRMA as applicable in this case based on her findings that the Property was “not ‘chiefly valuable’ for the production of forest products,” Decision at 10 (unnumbered), and that NIFRMA was inapplicable because the Property was already determined to be Indian agricultural land. Her analysis was clearly in error.

NIFRMA applies to “Indian forest land.” 25 C.F.R. § 163.3(a). “Indian forest land” refers to “Indian land, including commercial, non-commercial, productive and non-productive timberland and woodland, that [is] considered chiefly valuable for the production of forest products *or to maintain watershed or other land values enhanced by a forest cover*, regardless of whether a formal inspection and land classification action has been taken.” *Id.* § 163.1 (emphasis added).⁹ The Regional Director rejected NIFRMA as applicable to the Property because she found that it was not chiefly valuable for the

⁸ Arguably, Appellants' failure to show any material difference between the measures of damages in AIARMA and NIFRMA renders the issue moot. See § III.B *infra*. However, because we are remanding several issues, we find it appropriate to decide whether the Regional Director legally misinterpreted NIFRMA.

⁹ The definition in the regulations is the same as that found in the statute. See 25 U.S.C. § 3103(3). The regulations also contain a definition of “forest or forest land,” which means “an ecosystem at least one acre in size, including timberland and woodland, which: Is characterized by a more or less dense and extensive tree cover; contains, or once contained, at least ten percent tree crown cover, and is not developed or planned for exclusive non-forest resource use.” 25 C.F.R. § 163.1; *see also* 25 U.S.C. § 3103(2).

production of forest products, but she completely neglected to consider the next part of the definition. NIFRMA also applies to noncommercial Indian woodlands that are “chiefly valuable . . . to maintain watershed or other land values that are enhanced by forest cover.” *Id.* § 163.1 (definitions of “Indian forest land,” “forest or forest land,” “woodland,” “forest products,” and “noncommercial forest land”). Appellants have suggested that the Property has watershed values (erosion control) and also “other land values” (aesthetic and conservation values) that are enhanced by forest cover. Reply Br. at 4-6. Given that the Property is marginal at best for the production of forest products or for any sort of agricultural use, *see, e.g.*, Foote Appraisal at 3-8 (AR Tab 77), it is certainly possible that the Property is “chiefly valuable” for these other attributes suggested by Appellants. The Regional Director’s failure to consider the whole definition of Indian forest land was clear error.

Compounding the error, the Regional Director misconstrued an exclusionary clause found in the AIARMA definition of “Indian agricultural land.” AIARMA’s definition of Indian agricultural land specifically excludes Indian forest land, but not vice versa. *Compare* 25 C.F.R. § 166.4 (Indian agricultural land is “Indian land, including farmland and rangeland, *excluding Indian forest land*, that” (emphasis added)) *with* § 163.1 (definition of “Indian forest land” does not exclude “Indian agricultural land”).¹⁰ We interpret this exclusion as meaning that when, as apparently could be the case here, the land could qualify as either Indian agricultural land or Indian forest land (but for the exclusionary clause), that land should be classified as Indian forest land. The Regional Director, on the other hand, improperly held that because BIA had already classified the Property as Indian agricultural land, it could not be Indian forest land because the definition of the former excludes the latter. The Regional Director misinterpreted the regulations, and this misinterpretation compounded the error caused by her failure to consider the whole definition of “Indian forest land.” *See also* 25 C.F.R. § 163.1 (“Indian forest land” includes land that meets one or more of the criteria, “regardless of whether a . . . land classification action has been taken.”).

We therefore hold that the Regional Director erred as a matter of law by excluding the Property from NIFRMA’s coverage based on an incomplete and incorrect reading of the regulations. It appears that the Property could well be classified as “Indian forest land” under the NIFRMA definition, in which case it would be excluded from AIARMA, not the converse. But even though the Regional Director clearly erred in her analysis regarding the

¹⁰ If the Property were not classifiable as Indian forest land, then it appears that it could be classified as a type of agricultural grazing land that is not “rangeland.” *See* 25 C.F.R. § 166.4 (definitions of “Indian agricultural land” and “rangeland”).

potential applicability of NIFRMA, Appellants have not shown that applying NIFRMA instead of AIARMA in this particular case would result in a different outcome. Thus, we decline to decide whether NIFRMA does, in fact, apply, because we need not do so to resolve this appeal.

B. Appellants Have Not Shown That Recovery Under NIFRMA Would Be Different Than Under AIARMA

The measures of damages under both statutes would appear to produce the same results. The differences in the regulatory wording—key among them being those related to restoration costs and the valuation of materials—have no apparent effect on the available remedies or their values. If the measure of damages under both sets of regulations were identical, then the issue of whether NIFRMA or AIARMA properly applies would be moot.

Both sets of regulations require a trespasser to pay the costs associated with damage to land or property caused by the trespass. In calculating those damages under AIARMA, BIA must take into account “the costs of rehabilitation and *revegetation*, loss of future revenue, loss of profits, loss of productivity, loss of market value, damage to other resources, and other factors.” 25 C.F.R. § 166.815 (emphasis added). The equivalent NIFRMA regulation requires a trespasser to pay costs “includ[ing], but . . . not limited to, rehabilitation, *reforestation*, lost future revenue and lost profits, loss of productivity, and damage to other forest resources.” *Id.* § 163.29(a)(3)(ii) (emphasis added).

It is not apparent that there is any meaningful difference between these remedies—they are identical except that one includes “revegetation” and the other, “reforestation.” Both parties seem to assume that “revegetation” excludes or makes optional planting trees, while “reforestation” requires it, thus reflecting a lesser measure of damages in AIARMA. We find that interpretation of AIARMA overly narrow. There is no reason to interpret the word “revegetation” to include revegetation for some kinds of plants while excluding it for others: Revegetation may include re-establishing whatever vegetation populated the site prior to the trespass.¹¹ In this case, it is not disputed that trees were

¹¹ This interpretation is in line with use of the word “revegetation” found in other Federal regulations and in Federal case law. *See, e.g.*, 30 C.F.R. §§ 715.20(a)(2) (requiring for “revegetation” that “[a]ll disturbed lands . . . shall be seeded or planted to achieve a vegetative cover of the same seasonal variety native to the area”), 816.111(b)(2) (requiring that plant species used for “revegetation” have “the same seasonal characteristics of growth (continued...)”) (continued...)

removed and destroyed in the course of the trespass. Thus, in order to remedy the effects of the trespass, “revegetation” would include replanting trees. The extent of the tree-planting would be constrained by limits of reasonableness and proportionality (*see infra* § VI), which apply equally to both statutes.

Both sets of regulations also require that trespassers pay treble damages for products or property removed or destroyed in the trespass. AIARMA grants as damages triple the value of “products used or illegally removed” as measured by a “valuation of similar products or property.” 25 C.F.R. §§ 166.812(a), 166.814. Similarly, NIFRMA grants treble damages based on the “highest stumpage value obtainable.” *Id.* § 163.29(a)(3)(i).¹² Both grant treble damages based on the price that one could receive for the products taken or destroyed in the trespass. Appellants have failed to illustrate how application of NIFRMA’s regulations would allow a different measure of damages than the AIARMA regulations, and thus have failed to show that the Regional Director’s error is material to our review of the damages assessed by the Regional Director.

On remand, however, if the Regional Director has reason to conclude that a remanded issue would have a different outcome under one statute as opposed to the other, she should then reconsider her classification of the Property, using the correct scope of NIFRMA, and explain why and to what extent the damages and restoration costs would differ depending on which statute applies.

¹¹(...continued)

as the original vegetation”); *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 337 (6th Cir. 2006) (noting a mining plan that included “a revised revegetation plan that included the use of hardwood trees”); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (noting that one goal of a timber salvage sale in a burned area was “to . . . promote revegetation of trees”).

¹² The stumpage value is the value of the raw material, *in situ*, prior to extraction. This would be the amount a party would pay for the *right to extract* the products from the land (a royalty) and thus does not include the costs of extraction, transportation, or processing. *See* 25 C.F.R. § 163.1 (definition of “stumpage value”).

Appellants appear to argue that because the regulatory definition of “stumpage value” means the value of products before extraction, the stumpage value is the value of a living tree, as one might find in a nursery. This is incorrect. Stumpage value is essentially the royalty a party would pay for the right to harvest and sell a marketable forest product.

IV. Damages for Materials Taken or Destroyed in Trespass

The Regional Director assessed treble damages against the Nation for the fill material and the trees taken or destroyed during the trespass. She provided clear reasoning and substantial support for her findings as to damages, except with regard to the amount of material removed from the site for the Polecat Creek Project. On that issue we find that the Regional Director's conclusion was not adequately explained or supported by the record, so we vacate her conclusion and remand the issue for further proceedings consistent with this order. Apart from that, we affirm her conclusions as to the amount and value of the fill material taken or destroyed during the trespass.

A. Fill Material

1. Volume

Following the trespass, the parties obtained various estimates of the volume of fill material that had been removed. In determining the amount of excavated fill material attributable to the Nation's trespass, the Regional Director first determined the total volume that had been excavated from the site and then subtracted a volume to account for the earlier Polecat Creek Project excavation, to yield the amount removed by the Nation and for which it is liable. This method was necessary because no surveys of the site were done in the period after the Polecat Creek Project excavation but before the Nation's trespass.

a. Total Volume Excavated from Site

Seven estimates of the total volume of material removed from the excavation site were completed between 2006 and 2009. All of the estimates compared current on-site measurements to historical United States Geological Survey data. The appraisers used a variety of tools to make their on-site measurements, ranging from tape measures to vehicle odometers to highly accurate GPS equipment. The qualifications and expertise of the appraisers also varied. The Regional Director adopted an estimate that was reasonable, adequately explained, and supported by the record.

The Nation produced three estimates of the total amount of fill material that had been excavated from the site: 26,993 cubic yards (CY) (Tyler; staff appraiser; Sept. 2006;

AR Tab 75);¹³ 39,130 CY (Boatman Engineering; professional survey; Dec. 2006; AR Tab 106; *see also* AR Tab 180, last document); and 126,700 CY (Warnken; engineer; Nov. 2006; AR Tab 76).

Appellants produced two estimates of the total volume removed: 39,234 CY (Goss; professional survey; Oct. 2006; AR Tab 77); and 100,000 CY (Wollaston; environmental consultant; May 2009; AR Tab 93).

BIA produced two estimates: 117,700 CY of compacted material,¹⁴ equivalent to 153,000 CY of uncompacted material (BLM; mining engineers; May 2009; AR Tab 79); and 52,076 CY of compacted material, equivalent to 67,698 CY of uncompacted material (Axton; professional survey; Sept. 2009; AR Tab 87).

With the exception of the BLM and Axton estimates, none of the reports distinguish between compacted volume and uncompacted volume. Assuming that the measurements from the professional surveys commissioned by the Nation and Appellants were for compacted materials,¹⁵ and applying the 30 percent swell factor, the resulting estimates for uncompacted material would be 51,004 uncompacted CY (Goss) and 50,869 uncompacted CY (Boatman). These are within one percent of one another, but somewhat below the later Axton survey's 67,698 uncompacted CY estimate.

¹³ Tyler estimated that 80,978 CY had been removed, but she committed a calculation error which, if corrected, would result in an estimate of 26,993 CY. Tyler's estimate was rejected by the Department of the Interior's Office of Appraisal Services (OAS) based on Tyler's own concerns about the report and other problems that rendered it unreliable.

¹⁴ When fill material is in the ground it is "compacted." Once it is extracted, it expands and becomes "uncompacted." Fill material is measured for sale in uncompacted units. *See, e.g.*, Decision at 5 n.7, 7 (unnumbered). The fill material here apparently has a "swell factor" of 30% (i.e., its volume increases 30% after extraction). Thus, in-ground (i.e., compacted) volume measurements must be multiplied by 1.3 to compute uncompacted volume measurements for this fill material. *See, e.g., id.* at 7; *see also* BLM Estimate (AR Tab 79) (using a swell factor of 30%), Axton Survey (Tab 87) (same).

¹⁵ The method employed by Goss and Boatman (comparing current versus historical ground contours of the excavation pit, rather than measuring the volume of the material after it was excavated) along with the failure to account for the swell factor, suggests that these measurements were of *compacted* volumes.

In considering the widely varying estimates, the Regional Director reviewed project records to compare the projected amount of fill material needed for the Kellyville Project with the estimates of the volume actually excavated from the Property. The construction estimates, together with a post-construction survey, indicate that a total of 29,313 CY of fill material were needed for Phase 4¹⁶ of the Kellyville Project, a portion of which apparently had been obtained from a different source. *See* Original Plans for Phase 4, Sheet No. 3 (AR Tab 74); Chaney Estimates (AR Tab 106 at 6-7) (record of “additional dirt needed” for Phase 4); Nation’s Responses to United States’ First Interrogatories at 7, 15-18 (unnumbered) (AR Tab 158) (statement and invoices showing that at least 6,000 CY of fill material were purchased from another source for Phase 4 of the Kellyville Project).

The Regional Director rejected the Wollaston (Appellants), BLM (BIA), Tyler (Nation), and Warnken (Nation) estimates as having no rational relationship to the road construction records and as having been prepared using less accurate methods than the three professional surveys. Decision at 7. Of the three professional surveys, the Regional Director concluded that the Axton survey was the most accurate and the most recent. Thus, the Regional Director accepted Axton’s estimate of 67,698 uncompacted CY as the total amount of fill excavated from the site.

Appellants argue that the Regional Director commissioned the Axton survey because she was “disappointed” with the two estimates received from Warnken (126,700 CY) and BLM (117,000 CY) and that she “shop[ped]” around until Axton produced the desired result—a lower estimate. Opening Br. at 23, 27. There is no evidence in the record to support Appellants’ allegations.

When the Regional Director commissioned the Axton survey, she had the Warnken and BLM estimates, but she also had *Appellants’ own survey-based* estimate of 39,334 CY (Goss) and the Nation’s survey-based estimate of 39,130 CY (Boatman). She was also faced with documentation from the Nation suggesting that the amount of fill actually used for the road construction project was far below the volumes of material estimated by Warnken and BLM, a disparity that she concluded was reason for BIA to commission its own professional survey. Appellants disparage the Axton estimate as “compar[ing] favorably to the *trespasser’s* low ball estimate.” Opening Br. at 24 (apparently referring to

¹⁶ Phase 4 of the Kellyville Project was the portion adjacent to the Property. The Nation stated in interrogatories in *Moore*, *see supra* at 142, that the material taken from the Property was all used for Phase 4. *See* Nation’s Responses to United States’ First Interrogatories at 5 (AR Tab 158) (“All Dirt removed by the Creek Nation was utilized on Phase IV of the Kellyville Road Project.”).

the Boatman survey conducted for the Nation). But Appellants fail to acknowledge that their *own* professional survey (Goss) was nearly identical to the Nation's estimate (39,234 CY versus 39,130 CY), and both of those were lower than Axton's.¹⁷

Thus, the evidence in the record does not support Appellants' allegation that the Regional Director unreasonably rejected the higher estimates and impermissibly chose a lower estimate.¹⁸ Notably, Appellants make no attempt to refute the accuracy and reliability of the Axton survey. Nor do Appellants attempt to affirmatively demonstrate that the Warnken and BLM estimates were prepared using a more accurate methodology than that used by Axton and the other professional surveyors.

Instead, Appellants rely on their own calculations and speculation about construction-use volumes in an attempt to demonstrate the viability of the Warnken and BLM estimates. Appellants suggest that the Nation may have used fill material from the Property for other phases of the Kellyville Road project. But to support that suggestion, Appellants rely on a 1994 document as evidence of the amount of fill used as of 2004, and they misread that same document by confusing dollar figures with volume of material figures. *Compare* Kellyville Road Progress Estimate (Opening Br., Attach. 19) *with* Opening Br. at 25-26 (discussing the 1994 Progress Estimate). And perhaps most significantly, Appellants' argument assumes, without support or explanation, that the sole source of all excavated fill material used for Phases 2, 3, and 4 of the Kellyville Road project was the Nation's trespass on the Property. As BIA notes, the Nation represented in litigation interrogatories that the material taken from the Property was only used for Phase 4 of the Kellyville Road project. Appellants offered no reply to that assertion.

Finally, to the extent that the Regional Director may have reasonably selected any one of the three professional surveys as valid and accurate measures upon which to determine volume, she implicitly resolved any discretionary choices in favor of Appellants as the trust beneficiaries. And by choosing a later estimate that included not only material directly removed by the Nation, but also material removed by subsequent erosion, the

¹⁷ Appellants themselves used the Goss volume estimate in their FTCA claim against the United States. *See* Plaintiffs' Complaint and Amended Complaint (AR Tab 130) (alleging that the Nation removed approximately 39,234 CY).

¹⁸ As we concluded earlier, Appellants made no showing that the Regional Director was motivated by bias or prejudice, and her choice of Axton's higher estimate over the lower estimate provided by Appellants' own expert further undermines Appellants' unfounded characterizations of the Regional Director's motives.

Regional Director's assessment accounted for the resulting effect of the trespass.¹⁹ The Regional Director thus chose the estimate most beneficial to Appellants that was also factually reasonable and legally defensible. In doing so, she rejected the estimates that were not reliable, that employed less-accurate methods than professional surveys, and that produced results that were outside the range of possible volumes according to the project records. Her conclusion as to the total volume removed from the site was therefore adequately explained and supported by the record, and we will not disturb it.

b. Excavated Volume Attributable to Polecat Creek Project

Appellants' predecessors-in-interest apparently permitted fill material to be excavated from the Property for the Polecat Creek Project in 1993, and they were compensated for the excavation. In order to determine how much fill material the Nation excavated in the trespass, it was necessary for the Regional Director to determine how much was excavated for the Polecat Creek Project. The Regional Director considered two pieces of evidence relevant to that project. First, Oklahoma Department of Transportation (OK DOT) records show that the Polecat Creek Project used a total of 15,744 CY of fill material. *See* AR Tab 72. Second, tax records show that the predecessor-in-interest to the one-third unrestricted fee owner was paid \$1,866.66 for the excavation. *See* Unrestricted Fee Owner's Answers to United States' First Interrogatories at 2, 8 (unnumbered) (AR Tab 154). Based on that information, the Regional Director "surmised" that OK DOT had paid the then-owners \$0.35/CY for 16,000 CY of compacted material and that the unrestricted owner received one third of that payment. The Regional Director's conclusion is neither adequately explained nor supported by the record, so we vacate it.

The Regional Director did not explain why she chose to extrapolate the volume excavated for the Polecat Creek Project from the tax records instead of relying on the undisputed project information provided by the OK DOT. She apparently rejected the direct evidence of the volume of fill material used in the project and instead relied on a different number that she "surmised" based on indirect evidence. In extrapolating the volume from the tax record, she apparently assumed that the fee owner and the trust owners were all paid at the same rate, were paid proportionally to their ownership interests, and were paid on a per-unit basis instead of a flat rate. Further, even though she acknowledged that "loose cy [(uncompacted measurements)], . . . is how a cy is measured for sale," she

¹⁹ Photographs in the record make the impact of the erosion clear: Deep gullies formed on the site between 2006, when the trespass stopped, and 2009, when Axton surveyed the site. *Compare* photographs taken in 2006 (AR Tab 75 at 10-18 (unnumbered)) *with* photographs taken in 2008 (AR Tab 70).

inexplicably determined that the Polecat Creek Project purchased the fill material in compacted units. *See* Decision at 7 (unnumbered).²⁰ Unless these decisions—choosing the 16,000 CY figure over the 15,744 CY figure and treating the 16,000 CY figure as representing compacted instead of uncompacted units—are properly explained and supported, the Regional Director may have overstated the amount extracted by the Polecat Creek Project, which would result in undercalculating the excavation attributable to the Nation’s trespass.

The Regional Director’s conclusions regarding the volume extracted for the Polecat Creek Project were neither fully explained nor supported by the record. We vacate her finding and remand this issue to the Regional Director to apply the OK DOT’s 15,744 uncompacted CY measurement, unless she can provide additional information to support her adoption of the larger volume.

c. Excavated Volume Resulting from Nation’s Trespass

The Regional Director adopted the Axton survey’s estimate of the total volume of material removed from the site, 52,076 CY of compacted material (67,698 uncompacted CY). This estimate was recent, reasonable, highly accurate, and resolved differences among the professional surveys in favor of Appellants. The Regional Director adopted her extrapolated volume of 16,000 CY of compacted material (20,800 uncompacted CY) for the volume removed in 1993. She therefore calculated that the Nation had removed 36,076 CY of compacted material (46,899 uncompacted CY). Had the Regional Director adopted the lower volume for the Polecat Creek Project (15,744 uncompacted CY), the Nation would have been liable for 39,965 CY of compacted material (51,954 uncompacted CY), a difference of 5,055 uncompacted CY.

We leave in place the Regional Director’s adoption of the Axton Survey, but vacate her conclusion that 16,000 CY of compacted fill material were removed in 1993 for the Polecat Creek Project. On remand, the Regional Director shall apply the 15,744 uncompacted CY measurement unless she can provide additional information to support her adoption of the larger volume to attribute to the Polecat Creek Project and to subtract from the Axton figure.

²⁰ The Regional Director subtracted the 16,000 CY value from 52,076 CY (Axton’s *compacted* estimate) and then “factor[ed] in a 30 percent swell to obtain . . . loose cy.” Decision at 7 (unnumbered). Thus, her calculations considered the 16,000 CY volume to be a *compacted* volume.

2. Value

The Regional Director valued the fill material at \$1.25 per CY. Appellants disagree with the Regional Director's valuation and assert that it should be valued at \$3.00 per CY. The Regional Director's conclusion is reasonable and supported by the evidence, so we will not set it aside.

The Regional Director considered at least five appraisals of the fair market value of the fill material. *See* Tyler Appraisal (Nation) (AR Tab 75), Warnken Report (Nation) (AR Tab 76), Foote Appraisal (Appellants) (AR Tab 77), Wollaston Report (Appellants) (AR Tab 93), and Chaney Estimate (Nation) (AR Tab 106). Two appraisers, Tyler and Warnken, determined the local royalty value by polling local parties who regularly buy or sell fill material. The other appraisers offered either their own personal opinions or an opinion of another individual. The Regional Director rejected one valuation (Foote) because it was not a royalty value: Foote's estimate included excavation, loading, and overhead costs in addition to the cost of the fill material. The Regional Director apparently rejected two estimates (Wollaston and Chaney) that were not derived from reliable sources—Wollaston based his estimate on his own "opinion," *see* AR Tab 93 at 3, and Chaney's number was what he described only as the "standard rate," *see* AR Tab 106 at 2. She also did not consider a fourth appraiser's royalty data (Tyler) because OAS had rejected that appraisal for unrelated reasons.

The Regional Director relied on the data in the Warnken Report for the royalty value of fill material. *See* Decision at 7-8; Warnken Report at 4-7 (AR Tab 76). Warnken interviewed ten local parties who regularly deal in fill material and found that the royalty value of one cubic yard of uncompacted fill material was between \$0.41 and \$1.25. The OAS determined that Warnken's data were "excellent." AR Tab 76 at 1. The Regional Director adopted the highest estimate that Warnken received: \$1.25 per CY.²¹

²¹ It is notable that Warnken's range agrees with that found by the Tyler appraisal. Tyler, like Warnken, interviewed local parties who regularly deal in fill material. The range of royalty prices that she found was \$0.50 to \$1.00 per CY. *See* AR Tab 75 at 7 (unnumbered). OAS rejected her appraisal on other grounds, so we do not adopt it here, but note that her findings correlate with those in the Warnken report.

BIA's Eastern Oklahoma Region Division of Transportation Construction Branch Chief also conducted a poll that corroborates Warnken's data, but which was not discussed by the Regional Director. *See* BIA Polling Data (AR Tab 100). The Construction Branch Chief "polled [four] Commercial Contractors who work in the Tulsa County and Creek County area to determine the average material cost for Unclassified Borrow" and found a range of \$0.50 to \$1.25 per CY royalty for fill material. *Id.*

Appellants offered one value that was not a royalty value and another that was nothing more than their expert witness' personal opinion. They have not offered any evidence of the average royalty value obtainable for such material in the surrounding area. Appellants argue that nothing in the record supports the Regional Director's decision not to accept the \$3 price that they suggest is more reliable. We disagree. The Regional Director rejected evidence that the Nation paid \$3-\$5 for "unclassified borrow" as representing a royalty value because these figures were *budget* estimates, and included costs for extraction, transportation, watering, and compacting. *See* Decision at 7. The figures appear on invoices in the record from Century Construction, are clearly labeled "estimates," and Appellants identify no evidence in the record to rebut the Regional Director's conclusion that the \$3-\$5 figure was not reliable evidence of the royalty value of the fill material.

The Regional Director's valuation of the fill material is adequately explained and based on substantial evidence; Appellants have failed to establish that local royalty values for fill material exceed \$1.25 per uncompacted CY. We therefore affirm the Regional Director's conclusion on that issue.

B. Trees

The Regional Director determined that 86.85 cords²² of firewood, worth \$13,027.50, had been removed or destroyed in the trespass. Appellants do not dispute the Regional Director's estimate of the volume or price per cord, but argue that the Regional Director should have adopted an entirely different method for valuing the trees, the one employed by Appellants' expert witness. *See* Hennessey Report (AR Tab 89). The Regional Director was correct to reject Hennessey's methodology because, as we discuss below, it was not the measure of damages provided in the regulations.

AIARMA and NIFRMA, respectively, direct the Regional Director to "determine the value of the products or property illegally used or removed based upon a valuation of similar products or property," or "upon the highest stumpage value obtainable from the raw materials involved in the trespass." 25 C.F.R. §§ 166.814, 163.29(a)(3)(i). As we noted earlier (*see supra* § III.B), the measure of damages under either regulation would appear to be functionally the same.

²² A cord is equal to 128 cubic feet of stacked wood. Some documents in the record measure the wood in "ricks." One rick is one third of a cord.

BIA foresters and an independent appraiser hired by Appellants determined that the commercial value of the trees on the Property was as firewood. *See* Foote Appraisal at 7-8, 11 (“The value is recognized at what this wood would [sell] for as firewood.”) (AR Tab 77); Memorandum from BIA Regional Forester to BIA Acting Chief, Division of Natural Resources, Eastern Oklahoma Region (Division Chief), May 21, 2009, at 2 (commercial value as firewood is “the highest applicable value”) (AR Tab 80). After correcting a computational error by BIA’s Regional Forester, the Division Chief calculated the value of trees taken or destroyed as totaling \$13,027.50 (86.85 cords @ \$150/cord).²³ Appellants’ appraiser estimated that 52 cords of firewood had been removed, worth \$120 per cord. *See* Foote Appraisal at 8 (AR Tab 77). The Regional Director adopted the higher of the two appraisals, and rejected Appellants’ argument that she should adopt a completely different valuation methodology used by Hennessey.

On appeal, Appellants argue that the Regional Director should have used the Hennessey approach, which calculated the value of the trees based on the cost of purchasing 2,000 similar trees from a nursery.²⁴ We disagree. Hennessey’s approach is not based on the values of “similar products” because it does not value the trees as wild trees *in situ* on a hillside, but instead as specimens prepared for sale in a nursery. *See* Hennessey Report at 5 (unnumbered) (AR Tab 89). Nor is this value a “stumpage value,” because it does not represent the amount one would pay for the right to enter the Property and harvest the trees. *See supra* note 12. Appellants have not shown that the trees had any marketable value beyond that as firewood (e.g., as nursery specimens or any other product). Therefore, we conclude that the Regional Director was correct to reject Appellants’ argument that the value of the trees should be based on the cost of purchasing trees from a nursery. Hennessey’s approach was not consistent with the measure of valuation in the regulations.

The Regional Director adopted BIA’s estimates of volume and price per cord, which were higher than those prepared by Appellants’ own appraiser. The highest valuation of the trees on the Property was determined to be as firewood, and Appellants have not offered any evidence to the contrary. We therefore affirm the Regional Director’s valuation of the

²³ The Division Chief found that the Regional Forester had applied the price per rick (\$50) to the 86.85-cord figure, instead of the price per cord (\$150). AR Tab 99; *see* Memorandum from Regional Forester to Division Chief, May 6, 2009 (AR Tab 181).

²⁴ Hennessey estimated that approximately 2,000 trees with a diameter greater than 2 inches had been destroyed.

trees at \$13,027.50, and her assessment of \$26,055 against the Nation for this component of damages.²⁵

V. Interest on Damages

The Regional Director assessed both pre- and post-judgment interest against the Nation, “based upon the rates earned on Individual Indian Monies accounts.” Decision at 11 (unnumbered); *see also* Interest Calculations (AR Tab 96). The Regional Director then stated that the full amount of pre-judgment interest due was \$34,484.19 and established a flat per diem rate for post-judgment interest at \$22, accruing from October 22, 2009, until the date that payment is rendered. Appellants have not challenged the calculation of the interest, but ask that it be recomputed to account for any increase in the damage award.²⁶ The Regional Director’s Decision, by its terms, would appear to incorporate Appellants’ request and we find no need to further address this issue in this appeal.

VI. Restoration Costs

The Regional Director assessed against the Nation costs for a proposed restoration of the Property. She based the assessment on general principles of damages and on her interpretation of the governing regulations. First, she correctly concluded that the regulations do not limit the restoration costs to the diminution in value caused by the trespass. Next, she held, and we agree, that the assessment of restoration costs must be reasonable and proportionate to the diminution in value, even though the diminution in value is not a cap on assessable restoration costs. Finally, the Regional Director incorrectly inserted a limiting “objective” into the restoration plan, setting as the goal only “to place [the disturbed area] in a position to be productive again for agricultural use,” instead of using the Property’s pre-trespass condition as the starting point for developing restoration-based damages. *See* Decision at 9 (unnumbered). We therefore affirm the Regional Director’s holding that the restoration costs are not limited to the diminution in value but

²⁵ $\$13,027.50 \times 3$ (treble damages) $\times 2/3$ (Appellants’ two-thirds ownership interest) = \$26,055.

²⁶ Appellants also noted that the Regional Director stated that the trespass began on April 4, 2005, on one page (Decision at 11 (unnumbered)) and on April 1, 2006, on the next (Decision at 12 (unnumbered)). Appellants assert that the earlier date is the correct one. The Regional Director correctly used April 2005 as the starting point for the interest calculations. *See* Interest Calculations at 2 (AR Tab 96).

are limited by proportionality and reasonableness. We vacate the portion of her Decision that limits the restoration's goal to returning the area to agricultural productivity. We instead hold that restoration-based damages should use the Property's pre-trespass condition as the benchmark objective, even though the actual amount of restoration-based damages may be constrained by the limitations of reasonableness and proportionality to the harm caused by the trespasser.

The Regional Director held, and we agree, that “under the AIARMA, [BIA] may require a trespasser to pay the assessed cost of restoring and/or rehabilitating the land, even where the cost to restore exceeds the [diminution in] value.”²⁷ Decision at 9 (unnumbered). However, while neither the statute nor the regulations create an explicit cap on the restoration costs, we agree with the Regional Director that restoration costs must be both reasonable and proportionate to the harm done. We are not convinced that Congress, under either NIFRMA or AIARMA, intended that a trespasser be liable for restoration costs that are grossly disproportionate to the diminution in value of the property, or which cannot otherwise be justified based on the unique characteristics of the property. There are many cases that discuss the reasonableness of restoration costs in trespass-to-land cases, but they provide no clear guidance for determining what is “reasonable” or “proportionate.” See, e.g., *Heninger v. Dunn*, 162 Cal. Rptr. 104, 108-09 (Cal. Ct. App. 1980); *Ewell v. Petro Producers of La., Inc.*, 364 So. 2d 604, 609 (La. Ct. App. 1978); see also Restatement (Second) of Torts § 929 and cmt. b (1979), and cases cited therein. Nonetheless, we reject Appellants' contention that there is no upper limit to the assessment of restoration costs. The restoration costs that Appellants seek are more than 350 times the diminution in value caused by the trespass, or more than 15 times the value of the entire 160-acre parcel. See OST Appraisal (AR Tab 78) (the Property was worth \$800 per acre). We conclude that Appellants' claim for nearly \$2 million is unreasonable and disproportionate to the harm done, and exceeds the amount of restoration-based damages authorized by the statute.

The Regional Director erred, though, in assuming that the goal of restoration was only to make the Property productive based on the appraiser's determination that its highest and best use was for grazing. The Regional Director should have used restoration of the Property to its pre-trespass condition as the starting objective for calculating restoration-

²⁷ In many states, the assessment of restoration costs would be capped at the diminution in value to the property caused by the trespass. See, e.g., Restatement (Second) of Torts § 929 and cmt. b (1979), and cases cited therein.

based damages.²⁸ The Regional Director correctly noted that the regulations' objective is to "ensure that damage to Indian agricultural lands resulting from trespass is rehabilitated and stabilized at the expense of the trespasser." Decision at 9 (unnumbered) (quoting 25 C.F.R. § 166.801(d)). But she then concluded that, because one appraisal stated that the highest and best use of the property was for grazing, "the objective in restoring the property is to place it in a position to be productive again for agricultural use." *Id.* (citing 25 C.F.R. § 166.815). Based on that "objective," the Regional Director stated that the restoration need only stabilize the erosion and seed the area with native grass. *Id.* She continued by holding that because there was already "sufficient shade" elsewhere on the Property, reforesting the disturbed area (i.e., planting trees) was "unnecessary." *Id.* at 9-10 (unnumbered).

This limited goal has no basis in the regulations and is counter to their stated objective, which the Regional Director had already identified. The goal of the restoration should be to *rehabilitate* the damage caused by the trespass—to return the disturbed area to its pre-trespass condition. The Regional Director's claim that the objective was only to make the area suitable for grazing is not supported by the regulation she cited.²⁹ We find the Regional Director's interpretation of the scope and purpose of AIARMA to be overly narrow. The goal of the restoration (under either AIARMA *or* NIFRMA) should be to return the property to its pre-trespass condition, or as close to that condition as possible and appropriate while still keeping restoration costs reasonable and proportionate to the damage done.

On remand, the Regional Director shall redetermine the restoration cost liability, using the pre-trespass condition of the Property as the baseline for determining appropriate restoration costs and goals. The assessment for restoration costs shall be capped at the point where higher restoration costs would be grossly disproportionate to the diminution in

²⁸ And we note that the Property's pre-trespass condition was *not* pristine—the excavation pit left by the Polecat Creek Project existed well before the Nation's trespass began.

²⁹ The cited regulation, 25 C.F.R. § 166.815, states, in its entirety: "We will determine the damages by considering the costs of rehabilitation and revegetation, loss of future revenue, loss of profits, loss of productivity, loss of market value, damage to other resources, and other factors." This regulation does not limit the scope of restoration to merely making the disturbed area agriculturally productive.

value³⁰ of the Property caused by the trespass. Although there is no bright line for determining when restoration costs become so disproportionately expensive that they must be limited by reasonableness, at least one court, in dicta, has implied that restoration costs that are three times the loss in value would not be unreasonable. *See Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 443 n.7 (D.C. Cir. 1989). On remand, in redetermining the restoration costs to be assessed against the Nation, the Regional Director shall permit the parties to submit their views on whether the redetermined figure for restoration cost liability is too high or too low, and on the issues of reasonableness and proportionality, as applied in this case.

VII. Attorney Fees

The Regional Director rejected Appellants' claim for repayment by the Nation of the attorney fees and expert witness costs Appellants incurred in the Federal litigation. Appellants point to the "enforcement" provisions within the trespass regulations to support their claim, and also argue that their Federal tort suit was a necessary "catalyst" to the administrative action. Neither argument holds water. The Regional Director's decision to assess only enforcement costs incurred by BIA and the Solicitor's Office and to reject Appellants' claim was proper.

The trespass regulations in AIARMA do not grant attorney fees and costs to the landowners. Section 166.812(c) requires trespassers to pay "[t]he costs associated with enforcement of the regulations, including . . . witness expenses . . . and attorney fees." This provision is further explained in § 166.816, which states that such costs "may include detection and all actions taken *by us* [i.e., BIA] through prosecution and collection of damages." *See* 25 C.F.R. §§ 166.816 (emphasis added), 166.4 (defining "us" as BIA). Therefore, the AIARMA regulations require trespassers to pay the enforcement costs incurred by BIA, but not by others.

Nor would NIFRMA's trespass regulations grant enforcement costs to Appellants. Section 163.29(a)(3)(iii) requires trespassers to pay reasonable enforcement costs, but § 163.29(i) states that "[t]he Secretary may delegate by written agreement or contract, responsibility for detection and investigation of forest trespass." Because Appellants were never delegated enforcement responsibility, they could not have incurred reasonable enforcement costs within the meaning of § 163.29(a)(3)(iii), and thus would not be entitled to repayment of those costs under NIFRMA.

³⁰ The uncontested diminution in value to the Property caused by the trespass was \$5,600. *See* Background *supra*; *see also* OST Appraisal (AR Tab 78).

Appellants alternatively claim they are entitled to attorney and expert fees because they assert that the Regional Director would not have pursued administrative action but for the “catalyst” of the Federal suit. First, there is no indication that there was a “lack of action for over three years” on the part of the Regional Director. *See* Opening Br. at 40. BIA notified Appellants in April 2007 that it was pursuing the AIARMA claim against the Nation, *see* Letter from Field Solicitor to Appellants, Apr. 5, 2007 (AR Tab 4), and BIA was still investigating when Appellants filed the FTCA claim with BIA 2 months later, *see* Appellants’ FTCA Submission, June 13, 2007 (AR Tab 8).³¹ And second, if Appellants felt that the administrative action was delayed, they failed to use the established procedure for challenging a regional director’s inaction: Section 2.8 of 25 C.F.R. provides a process by which a party can demand action from the Regional Director and appeal her inaction to the Board. Appellants failed to use this procedure and instead expended unrecoverable funds on the Federal suit.

The Regional Director was correct in refusing to assess Appellants’ attorney and witness fees against the Nation. The regulations do not authorize BIA to do so and thus we affirm the Decision on this issue.

Conclusion

We thus affirm the Decision in part and vacate it in part. On remand, if the Regional Director determines that the relief available under NIFRMA would be different from that available under AIARMA, she shall reclassify the Property according to the proper legal standard and explain why, how, and to what extent the damages and restoration costs would differ depending on which statute applies. Also on remand, the Regional Director must either apply the OK DOT’s 15,744 uncompacted CY volume for the Polecat Creek Project excavation, or she must provide additional information to support her adoption of the larger, extrapolated volume, or a different volume. If she does adjust her finding as to the total volume of material excavated in trespass, then she will also have to adjust her assessment of interest to reflect the new damage award. Finally, on remand, the Regional Director must recalculate her assessment of restoration costs against the Nation. She must use the Property’s pre-trespass (post-Polecat Creek excavation) condition as the baseline for determining the restoration’s objectives. With the goal of restoring the site to its pre-trespass condition, she must limit the assessment to an amount that is reasonable and proportionate to the diminution in value to the Property caused by the trespass. If she

³¹ Appellants only initiated the FTCA claims after being advised that they could do so by BIA’s counsel. Letter from Field Solicitor to Appellants, Apr. 5, 2007 (AR Tab 4).

chooses to assess more than three times the diminution in value caused by the trespass, then she must explain why that value is not unreasonable or disproportionate.

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 in part and vacates in part the Regional Director's October 22, 2009, Decision and remands the matter for further action consistent with this order.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge