



INTERIOR BOARD OF INDIAN APPEALS

Hopi Tribe and Navajo Nation v. Western Regional Director, Bureau of Indian Affairs

58 IBIA 71 (11/01/2013)

Subsequent history: Order, *Hopi Tribe v. Navajo Nation*, No. 85-801-SRB (D. Ariz. Mar. 18, 2014) (entering Parties' Stipulation and Proposed Order Regarding Settlement of 1996-1997 Grazing and Farmsite Rental Determinations)

Related Board cases:

60 IBIA 218

62 IBIA 315



United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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HOPI TRIBE and NAVAJO NATION,)	Order Affirming Decision
Appellants,)	
)	
v.)	Docket Nos. IBIA 12-007
)	IBIA 12-009
WESTERN REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	November 1, 2013

The Hopi Tribe (Tribe) and the Navajo Nation (Nation) both appeal to the Board of Indian Appeals (Board) from an August 15, 2011, decision (Decision) of the Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA).¹ The Decision addressed the April 7, 2000, amended Bill for Collection (Bill) sent to the Nation by BIA's Hopi Agency for use of lands within the Hopi Partitioned Lands for the 1996-1997 calendar years. The Bill contains charges for various uses of the HPL by the Nation and its members—including charges for trespassing livestock, grazing fees, and farmsite rents—which accrue to the Tribe. In these appeals to the Board, both the Tribe and the Nation challenge the trespass assessments for both years. In addition, the Tribe appeals the absence of fees for water and fence maintenance in setting grazing rates, and appeals from the corn price used to determine farmsite rent for 1997. We conclude that the tribes have not met their burden of showing that the Regional Director's decision was in error, and we affirm.

With respect to trespass fees, both tribes raise arguments that challenge various elements of BIA's formula for calculating damages from trespassing sheep, e.g., the daily forage consumption of cattle utilized to calculate the forage consumed by sheep, the size of sheep and cattle, whether the cost of forage should be based on air-dried forage or oven-dried forage, and compensation for alleged damages other than forage. We conclude that these arguments suffer from a lack of competent evidence, assuming any evidence is offered at all, and we affirm the Regional Director's decision with respect to the trespass fees.

¹ The Tribe's appeal is docketed as No. IBIA 12-007; the Nation's appeal is docketed as No. IBIA 12-009.

Turning to the Tribe's challenges to the grazing fees, we again remain unpersuaded by the Tribe's arguments. The Tribe's challenges are limited to two issues previously decided by the district court in *The Hopi Tribe v. The Navajo Nation*, No. CV 85-801 PHX-EHC (D. Ariz. Dec. 30, 2009) (*The Hopi Tribe*),² on which the Regional Director relied: (1) the 5:1 conversion ratio for determining the forage consumption of sheep and (2) the decision not to seek additional fees for water and fence maintenance. The decision in *The Hopi Tribe* addressed the two tribes' challenges to the collection bills for 1979-1995, and the Tribe has offered no evidence or argument that undermines the Regional Director's decision to rely on the district court's decision in establishing grazing fees for 1996-1997. Therefore, we affirm the grazing fees set by the Regional Director.

Finally, the Tribe disputes the price of corn relied upon by the Regional Director to establish farmsite rents. But, the Tribe offered no support for its argument that corn sold for a price higher than that applied by the Regional Director (and supported by the record). Therefore, we affirm this portion of the Regional Director's decision.

Background

The origins of the HPL go back over 130 years to an executive order by President Chester A. Arthur that set aside nearly 3,900 square miles in northeastern Arizona for the Hopi Indians "and such other Indians as the Secretary of the Interior [Secretary] may see fit to settle thereon" (Hopi Reservation). Exec. Order (Dec. 16, 1882). In 1962, after many years of discord between the Tribe and the Nation concerning a portion of the Hopi Reservation known as the Joint Use Area, a special district court panel held that the Tribe and the Nation shared undivided and equal interests in this area. *Healing v. Jones*, 210 F. Supp. 125, 129-30, 192 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (*per curiam*). However, the district court's decision did not resolve the discord, which led Congress to legislate a remedy in 1974. 25 U.S.C. § 640d *et seq.* (the Settlement Act or Act). Pursuant to the Settlement Act, the Joint Use Area was partitioned between the Tribe and the Nation. The Act further mandates the gradual relocation of Hopi and Navajo residents in the former Joint Use Area to the land partitioned to their respective tribes. Those lands partitioned to the Tribe are the Hopi Partitioned Lands or HPL. The Act also requires BIA to determine the fair rental value for those lands set aside for one tribe but that remain occupied or used by members of the other tribe pending relocation. *See* 25 U.S.C. § 640d-15.

² The unpublished district court decision is found in the administrative record as Exhibit 11 to the Regional Director's decision.

On February 12, 1998, the BIA's Hopi Agency sent the Nation a Bill for calendar years 1996 and 1997. This bill was amended on April 7, 2000, to "correct[] computational errors." Decision at 1. The Bill addressed homesite rentals, farmsite rentals, grazing rentals, and livestock trespass charges for Navajo individuals and families residing on the HPL. Both the Nation and the Tribe appealed to the Regional Director from the Bill.

The Regional Director issued his decision on August 15, 2011.³ Of relevance to our decision today, the Regional Director reduced the charges for the Nation's grazing rental fees (including trespass charges) from \$99,352.64 to \$89,923.41. In calculating the trespass charges, the Regional Director determined that sheep eat on average 5.2 pounds of forage each day. In arriving at his decision that sheep eat on average 5.2 pounds of forage each day, the Regional Director explained,

Although there is a difference of opinion, currently, among animal nutritionists and resource professionals regarding the amount of forage required by a sheep on a daily basis, it is currently recognized that animal carcass size and birth rates have, over time, increased with improved genetics. Therefore, the amount of feed that is required to sustain larger-framed animals has also changed. Professional feeding guides show that the amount of feed required to sustain a lactating 150 lb. sheep with a lamb generally averages between 5 to 7 lb. of forage per day. Therefore, the following definitions and determinations apply to re-calculating trespass charges for 1996 and 1997:

- A. An Animal Unit Month (AUM) is defined as the amount of feed or forage required by an animal unit for one month. An Animal Unit (AU) is considered to be one mature (1,000 lb.) cow and a calf as old as 6 months, or their equivalent.
- B. The Natural Resource Conservation Service has elected to use 26 lb. of oven-dry weight of forage per day as the standard forage demand for a 1,000-lb. cow.

³ During the intervening years between the issuance of the Bill and the Regional Director's decision, the parties were in district court litigating the February 10, 1998, final decision of the Deputy Assistant Secretary – Indian Affairs (Deputy Assistant Secretary) concerning the tribes' issues over the earlier bills for 1979-1995. See *The Hopi Tribe*, slip op. at 1.

C. Therefore, an AUM is approximately 800 lb. of dry weight forage per month, per [AU].

Using the definitions identified above and the Court's 5:1 conversion ratio [from *The Hopi Tribe*⁴], the following formulas can then be used to convert [AUMs] into Sheep Unit Days (SUD):

$$\frac{800 \text{ lb. of forage} \div 5 \text{ SU} = 160 \text{ lb. of forage per SU per month} \div 30.5 \text{ days} = 5.2 \text{ lb./day per SU; or}$$

$$\frac{800 \text{ lb. of forage} \div 30.5 \text{ days per month} = 26.22 \text{ lbs. of forage per day per AU and } 26.22 \text{ lb./day} \div 5 \text{ SU per AU} = 5.2 \text{ lb. of forage per SUD.}$$

Decision at 6 (footnotes omitted).⁵ In addition, the Regional Director, pursuant to a 1997 decision of the Assistant Secretary – Indian Affairs (Assistant Secretary), disallowed a range impact multiplier that the Hopi Agency had included in the Bill. *Id.*; *see also* letter from Assistant Secretary to the Nation and the Tribe, Feb. 7, 1997, at 4 (explaining that it would be inappropriate to include a range impact multiplier in the calculation of the forage replacement fee because “[t]he rental determinations made pursuant to 25 U.S.C. § 640d-15(a) do not provide for a penalty assessment.”) (Regional Director’s Decision, Exh. 13). The Regional Director explained that the Hopi Agency’s decision to apply a

⁴ The 5:1 conversion ratio assumes that, on average, a sheep will consume one-fifth of the forage consumed by a mature cow. The district court affirmed that portion of the February 10, 1998, decision of the Deputy Assistant Secretary, in which he applied the 5:1 conversion ratio as part of the calculation of the grazing rates for the years 1979-1995. *See The Hopi Tribe*, slip op. at 49-50; *see also Masayeva v. Hale*, 118 F.3d 1371, 1379-80 (9th Cir. 1997) (affirming the application of the 5:1 conversion ratio for determining the fair value of the Nation’s grazing use of the HPL from 1962 to 1979).

⁵ The Regional Director cites as his source the National Range and Pasture Handbook (Handbook) by the U.S. Department of Agriculture’s Natural Resources Conservation Service (NRCS), Chapter 6. The administrative record does not include the Handbook or any excerpts from it. The Board relied on an Internet copy found at www.nrcs.usda.gov/wps/portal/nrcs/detail/national/landuse/rangepasture/?cid=stelprdb1043084. The Regional Director is reminded that all documents (or, where voluminous, appropriate excerpts) must be included in the administrative record. At a minimum, the Regional Director may cite to an internet address where particular documents may be found, but there is the risk that the document may be moved to a new Internet address or even removed from the Internet entirely. We have added appropriate excerpts from the Handbook to the record.

range impact multiplier “must be corrected to conform to . . . the February 7, 1997, decision of the Assistant Secretary,” in which she disallowed the multiplier because she determined it to be an impermissible penalty. Decision at 7.

In setting grazing rates for the HPL for 1996 and 1997, BIA relied on an appraisal by Arvel M. Hale (1999 Hale Study). See 1999 Hale Study, Feb. 24, 1999 (Regional Director’s Decision, Exh. 18). Of relevance to the Tribe’s appeal, Hale found that nearby rangelands, known as the McGregor Range, which were offered for bid by the Bureau of Land Management (BLM), “were similar enough [to the HPL] that no adjustments in the McGregor fees were required to indicate a fair value for the HPL range units.” *Id.* at Grazing Page 4. Although the services provided to permittees by BIA and BLM differed in some respects, see *id.* at Grazing Page 10, Hale described these differences as “minor,” *id.* at Grazing Page 11. Consequently, in setting grazing rates for 1996 and 1997 on the HPL, the Regional Director did not increase the rate for water or fence maintenance.

Farmsite rents for 1997 were based on a formula that takes into account the price that corn fetched that year. The Regional Director rejected the Hopi Agency’s price of \$1.20 per pound for which the Regional Director could not find support in the record. Instead, he applied the price of \$0.95 per pound, based on the price paid in 1997 at a local corn mill on the Hopi Reservation and documented in a memorandum. See Memorandum of Fred Chavez, July 31, 2000 (Chavez Memorandum) (Regional Director’s Decision at Exh. 10).

Both the Tribe and the Nation appealed to the Board from the Decision. Both tribes challenge the trespass fees assessed against the Nation. In addition, the Tribe challenges the grazing rental fee for both years and a component of the calculation of the farmsite rent for 1997. The issues were fully briefed by the two tribes, including opening briefs, answer briefs, and reply briefs. The Regional Director did not submit a brief.

Discussion

I. Standard of Review

A decision that assesses trespass charges and establishes grazing fees and farmsite rent is discretionary. *Navajo Nation v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 15 IBIA 179, 184-85 (1987); see also *Heirs and Successors in Interest to Mose Daniels v. Eastern Oklahoma Regional Director*, 55 IBIA 139, 143 (2012) (trespass charges); *Linabery v. Great Plains Regional Director*, 55 IBIA 27, 33 (2012) (grazing fees); *Wapato Orchard Partnership v. Portland Area Director*, 18 IBIA 254, 255 (1990) (farmsite rent). We review discretionary decisions by BIA’s regional directors to ensure that they comport with the law, are supported by the administrative record, and are neither arbitrary nor

capricious. *O'Bryan v. Great Plains Regional Director*, 48 IBIA 109, 116 (2008). However, issues of law and challenges to the sufficiency of the evidence are reviewed *de novo*. *Heirs and Successors in Interest to Mose Daniels*, 55 IBIA at 143. Appellants bear the burden of showing that a regional director failed to exercise his discretion properly, *id.*, and simple disagreement with a regional director's reasoning or a general allegation of error without more is insufficient to meet the appellants' burden, *King v. Eastern Oklahoma Regional Director*, 46 IBIA 149, 153 (2007). Rather, appellants are charged with supporting their allegations of error. *Heirs and Successors in Interest to Mose Daniels*, 55 IBIA at 143.

As we explained in *Navajo Nation*, determinations of fair rental value "require the exercise of judgment [and r]easonable people, and experts, may differ in their calculation of 'fair rental value.'" 15 IBIA at 185.

II. Applicable Law

The Settlement Act provides that the Nation "shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe [under the Settlement Act]." 25 U.S.C. § 640d-15(a). The "fair rental value" should be based on the "highest and best use of the property." *See The Hopi Tribe*, slip op. at 51; *Navajo Nation*, 15 IBIA at 187 (footnote omitted).

Grazing regulations promulgated pursuant to the Settlement Act specifically address livestock trespass and provide for "the replacement value of the forage consumed and a reasonable value for damages to property injured or destroyed." 25 C.F.R. § 168.14.

III. Trespass Charges

We affirm the Regional Director's decision as to livestock trespass charges. The Tribe raises several factual disagreements with the Regional Director's decision, but fails to provide any evidence in support of its various arguments.

The Nation also disputes the trespass charges. The Regional Director had reduced the Hopi Agency's assessment of trespass fees in response to the Nation's appeal from the Bill. On appeal to the Board, the Nation remains dissatisfied with the final amount and with the Regional Director's explanations. We reject the Nation's arguments and uphold the Regional Director's decision as to trespass charges. We conclude that the Nation's arguments are inadequately unsupported.

We turn to an examination of the Tribe's and the Nation's contentions.

A. Average Daily Forage Consumption by Sheep and Replacement Cost

To calculate the replacement cost of the forage consumed by the trespassing sheep in 1996 and 1997, the Regional Director began by using the average daily consumption of forage for one cow with calf, which he concluded is 26 pounds of dry weight forage. He then applied a conversion ratio of 5:1 to determine that the daily consumption of dry forage by one sheep is 5.2 pounds ($26 \div 5$) and not 6 pounds, as determined by the Hopi Agency. He determined the number of days of trespass and the number of sheep trespassing on each day of trespass. He relied on invoices from 1996 and 1997 from a local feed store for the cost of forage.

The Tribe argues that the Hopi Agency correctly determined that sheep ordinarily consume six pounds of forage per day. The Tribe explains that forage ordinarily purchased on the HPL is air-dried and, according to the Handbook, the average daily consumption of air-dried forage for a cow is 30 pounds, which is higher than the 26-pound figure that the Regional Director used. If so, application of the 5:1 conversion ratio then yields 6 pounds per day of air-dried forage for sheep. Therefore, the Tribe argues, the Regional Director erred in determining that sheep consume 5.2 pounds of dry weight forage, which it claims is not readily available for purchase on the HPL. The Nation, on the other hand, argues that the correct amount of daily consumption was less. We reject both arguments as unsupported.

The Nation argues that the Regional Director, after noting disagreement in the community concerning the amount of daily forage required by sheep, “summarily concluded that cattle on the HPL at that time consumed twenty-six pounds of forage per day, so sheep thereon consumed 5.2 pounds of forage per day.” Nation’s Opening Brief (Br.) at 6. The Nation misunderstands the Regional Director’s explanation. The Regional Director explained that he would apply the 5:1 conversion ratio that was adopted by the Deputy Assistant Secretary in 1998, and which was affirmed by the district court in *The Hopi Tribe*. Next, given the district court’s disapproval of the Deputy Assistant Secretary’s determination that sheep require six pounds of forage daily, *see The Hopi Tribe*, slip op. at 55-56, the Regional Director applied the 5:1 conversion ratio to the NRCS’s determination that a cow with calf consumes 26 pounds of dry weight forage daily, which the NRCS described as a “conservative value.” Handbook at 6-9. Chapter 6 of the Handbook, on which the Regional Director relied, was not revised in 2003 as argued by the Nation, but retained its original issue date of 1997. *Comp. Chap. 6* (Sept. 1997) *with, e.g., Chap. 3* (Dec. 2003). Therefore, its data was current as of 1997 and therefore relevant to the Regional Director’s determinations. The Nation complains that the Regional Director did not explain why he chose to adopt the Handbook’s determinations, but the Regional Director need not explain the obvious: The Nation itself acknowledges that the Handbook addressed “recent conditions nationwide.” Nation’s Opening Br. at 8.

The Nation does not express disagreement with the NRCS's determinations except to complain that it "speak[s] in broad terms about recent national trends, not the unique conditions on the HPL in the mid-1990s." *Id.* at 9. The Nation directs our attention to a 1996 study by Hale but that study did not address the cost of replacement forage. The 1996 Hale Study provided an appraisal for purposes of setting an appropriate grazing fee for permitted livestock grazing. The Nation also urges us to require BIA to consider a study done by American Ag International (AAI study), in which the writers opined that cattle on the HPL consumed 24 pounds of forage daily. This study apparently was done sometime prior to 1981.⁶ Such a study is no longer temporally relevant. *See* Nation's Opening Br. at 9 (citing *Gulbranson v. Duluth, Missabe & Iron Range Ry. Co.*, 921 F.2d 139, 142 (8th Cir. 1990) ("evidence 'too remote in time' from period in question is 'irrelevant' and not admissible")). Finally, the Nation offers a "market rental appraisal" in which the author asserts that in 1992-1995, "the required [forage] replacement [for trespassing sheep] is three pounds of good quality alfalfa hay per SU day." Notice of Appeal, Exh. 4. But nothing in the excerpt provided by the Nation explains how the author arrived at this amount nor does the author provide any source for this assertion. This one-line statement in the appraisal lacks any indicia of reliability that would merit a remand of this issue to the Regional Director. Thus, we conclude that the Nation has not met its burden of showing error in the Regional Director's decision. Moreover, nothing in the Settlement Act or in the regulations requires the Regional Director to premise the amount of forage consumed (for purposes of calculating forage replacement values) on local consumption rates, at least where there are no known relevant and reliable studies available of local consumption rates and where there are such studies available of national forage consumption rates.

Next, the Tribe fails to offer any evidence in support of its assertions that forage purchased on the HPL is air-dried and, thus, sheep require 6 pounds, rather than 5.2 pounds daily. Finally, the Tribe fails to offer sufficient evidence of its contention that sheep on the HPL are larger than the average American sheep and, even if they were able to establish a larger size, the Tribe fails to show how this information should impact the amount of forage consumed by the sheep. The Tribe relies on one sentence in a report by an appraiser that provides no information concerning the actual average size of sheep on the

⁶ The AAI study was cited in a 1981 "Initial Report to Navajo Tribe on Grazing Fees on the Hopi Partitioned Land" (Initial Study). The AAI study itself was not provided to the Board by the Nation nor is it found in the administrative record. Parties appearing before the Board bear the burden either to cite to the record where support exists for their assertions or to attach support for their assertions to their briefs. Here, the Nation provided a copy of the Initial Study, dated 1981, which criticized the earlier AAI study that the Nation apparently urges us to have BIA consider.

HPL nor does the appraiser compare the size of the sheep to cattle on the HPL or provide any meaningful information or context that would enable BIA to determine the amount of forage consumed by sheep on the HPL. In addition, the appraiser does not indicate how he arrived at his conclusion that sheep are larger on the HPL nor is it evident that he possesses the requisite qualifications to render a professional opinion concerning the size of sheep. Therefore, we disregard this argument.

For its part, the Nation argues that the Regional Director relied on one document that asserts that cattle have increased in size and then he assumed that sheep likewise increased in size. The Nation misunderstands the feeding estimates. The record provided to the Board for this appeal reflects that the industry, as a whole, has concluded that forage is consumed at a ratio of 5:1 for sheep and cattle, respectively. *See Handbook at 6-8; Sheep Pocket Guide, May 1996, at 35* (<http://library.ndsu.edu/tools/dspace/load/?file=/repository/bitstream/handle/10365/17453/AS-989-1996.pdf>) (excerpt added to record); *see also* 43 C.F.R. § 4130.8-1(c); *Public Lands Council v. Babbitt*, 529 U.S. 728, 735 (2000); *The Hopi Tribe*, slip op. at 49; *Masayesva*, 118 F.3d at 1380; *County Bd. of Equalization of Wasatch County v. Stichting Mayflower Recreational Fonds*, 6 P.3d 559, 565 (Utah 2000). This ratio is not dependent on any particular weight, but rather on a relationship or ratio between the feeding habits of sheep and cattle. Moreover, in relying upon the standard of 26 pounds of dry weight forage per day for one cow with calf, the Regional Director used a conservative rate. *See Carter, John G., "Updating the Animal Unit Month," May 15, 2007, at 3-4* (http://projects.ecr.gov/tushar/pdf/Carter_AUM_paper.pdf) (copy added to the record) (cited in the Decision at 6 n.1). Therefore, while the Regional Director may have commented on the increased size of livestock nationwide, he relied on a conservative weight to which he then applied a commonly accepted conversion ratio. It is the Nation's burden to come forward with evidence showing that an alternate calculation or study better approximates the forage consumed by sheep on the HPL.

The Nation argues that the Handbook points out that numerous factors—size of the animal, age of the animal, high temperatures, low forage quality and availability, and low water quality and availability—could reduce the consumption of forage, and criticizes the Regional Director for failing to consider these factors. But nowhere does the Nation direct our attention to evidence of these conditions on the HPL, much less *how* they would affect forage consumption.

Finally, the Nation argues that BIA has, in the past, determined that cattle on the HPL consume 24 pounds of forage a day. The Nation cites a 1982 decision by the Acting Deputy Assistant Secretary as stating that “livestock weights on the HPL do not reflect the national average.” Nation's Opening Br. at 13 (emphasis omitted). Again, the Nation

offers no evidence to show that, 14-15 years later, that statement remains true, nor does the Nation offer any evidence of the livestock weights in 1996 or 1997.⁷ And, again, the Regional Director is not precluded from relying on national averages in determining forage consumption.

At the end of the day, it is undisputed that the Nation is liable for trespassing sheep on the HPL. The amount owed by the Nation has been calculated by BIA based on relevant, temporally available evidence: That, on average, a mature cow (or cow with calf) will consume 26 pounds a day of forage and, through application of the 5:1 conversion ratio, that a sheep will consume a fifth of that amount or 5.2 pounds of forage per day. The Regional Director then multiplied that number by the number of days and number of sheep found trespassing to determine the total amount of forage to be replaced. He then multiplied that total number by the price per pound that would be paid at a local feed supply for replacement forage. If the Nation and the Tribe believed that the Regional Director should have taken other factors into consideration in determining the cost of forage replacement, they bore the burden of coming forward with relevant and temporally appropriate evidence. They did not do so. Therefore, we affirm the Regional Director's decision as to trespass charges.

B. Damage Caused by Trespassing Livestock

The Hopi Agency had applied a range impact multiplier to provide an additional measure of damages for the Tribe, which the Regional Director eliminated based upon the Assistant Secretary's determination that it was an impermissible penalty. On appeal, the Tribe challenges the Regional Director's decision to do so, but we agree with the Nation that this issue is precluded by administrative collateral estoppel.⁸ The Tribe had an

⁷ The Nation claims the Regional Director's determination of animal weight and forage consumption is "a departure from BIA's viewpoint in 1996 and 1997." Nation's Opening Br. at 12. But nowhere does the Nation direct our attention to any document from BIA concerning those years.

⁸ Collateral estoppel is intended to promote judicial or, here, administrative economy by laying to rest matters of dispute between the same two or more parties. Generally, a party "may not relitigate an issue actually and necessarily determined by a court of competent jurisdiction." *Citizen Potawatomi Nation v. Director, Office of Self-Governance*, 42 IBIA 160, 167 (2006), *aff'd*, *Citizen Potawatomi Nation v. Salazar*, 624 F.Supp.2d 103 (D.D.C. 2009). Collateral estoppel applies where "the issue sought to be precluded must be the same as that involved in the prior litigation; that issue must have been actually litigated; it must have been determined by a valid and final judgment; and the determination must have been essential to the prior judgment." *Id.*

opportunity to challenge the Assistant Secretary's 1997 determination that the range impact multiplier was impermissible and the Tribe did not seek reconsideration from the Assistant Secretary of this issue despite its joint motion with the Nation for a remand of the 1997 decision and briefing from both tribes on reconsideration.

The Tribe asserts that its argument is not limited to the range impact multiplier but that it seeks to recover for damages beyond the forage consumed by the trespassing livestock. But the Tribe did not identify for us any evidence of such additional damage in the record, e.g., damages to fences. Moreover, the Tribe does not identify any appeal or brief in which it argued for such damages. Our jurisdiction ordinarily is limited to reviewing those issues that were before the Regional Director and his decision as to those issues, and we see no reason to depart from this rule. 43 C.F.R. § 4.318; *Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296 (2013). The Tribe should have raised this argument in its response to the Nation's challenge to the range impact multiplier, in briefing before the Regional Director. It did not. Therefore, we conclude that the Tribe failed to exhaust its claim for damages before BIA and we uphold the Regional Director's decision on this issue.

IV. Grazing Fee Rates

The Tribe raises two arguments with respect to the grazing fees: (1) BIA failed to articulate a basis for applying a 5:1 conversion ratio (sheep to cow) and (2) BIA failed to include water and fence maintenance fees. We affirm the Regional Director's decision as to the grazing fee rate. He relied on the district court's decision in *The Hopi Tribe* to apply the 5:1 conversion ratio and in refraining from assessing fees for water and fence maintenance, and we find no fault with his reliance.⁹

A. Conversion Ratio

The Tribe makes two arguments concerning BIA's application of the 5:1 conversion ratio: (1) The Regional Director failed to explain why the ratio was warranted for the 1996-1997 years and (2) BIA is required by regulations to utilize a 4:1 conversion ratio. We reject both of these arguments.

The Deputy Assistant Secretary, in his 1998 decision that was affirmed in relevant part by the district court, concluded that the 5:1 conversion ratio was appropriate for

⁹ The Tribe does not seriously dispute the application of the 5:1 conversion ratio in the context of assessing fees for livestock trespass. To the extent that it does, our discussion here of the conversion ratio also applies in the context of trespass charges.

determining grazing fee rates. See Deputy Assistant Secretary Decision, Feb. 10, 1998, at 3-4, *aff'd in relevant part, The Hopi Tribe*, slip op. at 49.¹⁰ Although the Deputy Assistant Secretary's decision was written in the context of setting grazing rates for the years 1979-1995, his reasoning was not so limited. He explained that "[t]he 5:1 conversion ratio is the standard for the livestock industry throughout the United States." *Id.* at 3, 4. The Deputy Assistant Secretary also determined that since he was determining fair rental value, not stocking rates, the 5:1 conversion ratio was appropriate. The rental rate was set by applying the average bids/AUM received for neighboring, off-reservation rangelands known as the McGregor Range.

We affirm the Regional Director's decision to apply a 5:1 conversion ratio. While it is true that the Regional Director appeared to believe that the district court had "determined that a 5:1 conversion ratio [should be applied to] determin[e] annual grazing rates on HPL Lands," Decision at 5, a remand is not necessary. The court's decision affirmed the Deputy Assistant Secretary's application of the 5:1 conversion ratio, and the Tribe has not shown any new or changed circumstances that would merit a departure from this standard. Instead, the Tribe argues that BIA is required to apply a 4:1 conversion ratio, citing 25 C.F.R. §§ 168.1(*l*), 167.6. Clearly, the courts disagree and so do we. See, e.g., *The Hopi Tribe*, slip op. at 49. Nothing mandates the application of a 4:1 conversion ratio to the grazing rental rates on the HPL. Rather, BIA is charged with determining "fair rental value," 25 U.S.C. § 640d-15, and, here, that rate is based in part on a conversion ratio of 5:1. Section 168.1(*l*), simply permits BIA to utilize a 4:1 conversion ratio but does not require it; § 167.6 does not apply because it pertains to carrying capacities, rather than grazing rates, and because it applies to the Navajo Reservation, not the HPL.

Since it is undisputed that the Regional Director applied the ratio in the same context as the Deputy Assistant Secretary—to determine fair rental value—and because the Tribe does not show that the 5:1 conversion ratio was no longer the industry standard in 1996 or 1997¹¹ or that the grazing rental rate set by BIA is not a fair market rate, we affirm.

B. Water and Fence Maintenance Fees

We affirm the Regional Director's decision to decline to increase the grazing fees for those water and fence maintenance services provided by BIA. The district court in *The Hopi Tribe* expressly held that "where grazing rent was based on the Hale study[, it] was not

¹⁰ This conversion ratio previously was affirmed by the Court of Appeals for the Ninth Circuit in *Masayesva*. See 118 F.3d at 1380.

¹¹ The Handbook relied on a 5:1 conversion ratio in 1997. See Handbook at 6-9 at Table 6-5.

reasonable [to increase the rate for water and fence maintenance].” *The Hopi Tribe*, slip op. at 56. Although the Hale study at issue in *The Hopi Tribe* was an earlier study done in 1996 rather than the 1999 Hale Study on which the Regional Director relied, the two studies both relied upon grazing permits issued on the McGregor Range and the relative services provided by BLM and BIA on the McGregor Range and the HPL, respectively, for grazing permittees. In the 1999 Hale Study, Hale again determined that the differences between grazing permits on the McGregor Range and grazing permits on the HPL were “minor.” 1999 Hale Study at Grazing Page 11 (Regional Director’s Decision, Exh. 18).

The Tribe argues that the district court did not tell BIA it *could not* include fees for water and fence maintenance but that the court remanded the issue “to consider whether the addition of costs for fence and water maintenance on the HPL were improperly added.” *Id.* And the Tribe argues that it has provided reasons to BIA that justify adding fees for the water and fence maintenance. We disagree.

The district court expressly held that it was unreasonable, without more, for BIA to include fees for water and fence maintenance if BIA intended to rely upon the earlier Hale study. Although BIA relied on the subsequent 1999 Hale Study to establish the grazing fees for 1996 and 1997, to which the Tribe has not objected, Hale again described as “minor” any differences between the services offered by BLM and BIA to the permittees on the respective ranges. In addition, while the Tribe claims that “[r]equired fence maintenance services and associated costs are significant on the HPL,” Tribe’s Opening Br. at 18, the Tribe provided no evidence of these costs and no evidence that any such costs, when considering the totality of the costs of the services provided by BLM and those provided by BIA, were other than “minor.”¹² Therefore, we uphold the Regional Director’s decision as to water and fencing maintenance fees.

C. Price of Corn (1997 Farmsite Rental Calculation)

In calculating rent for farmsites on the HPL, BIA apparently relies in part on the price yielded per pound of corn at a local corn mill. For the 1997 year, the Hopi Agency applied a corn price of \$1.20 per pound; in response to the Nation’s appeal, the Regional Director reduced this price to \$0.95 per pound because he found no support in the record

¹² The Tribe suggests that BIA “could easily calculate these costs,” Tribe’s Opening Br. at 20, while also asserting that it is the Tribe that maintains the fencing on the HPL, *id.* at 18, 19. If these costs are easily calculable, the Tribe should have provided them to BIA along with evidence showing that the costs are other than minor when compared to the costs of other differences in services provided by BLM and BIA on the McGregor Range and the HPL, respectively.

for a corn price in 1997 of \$1.20 per pound.¹³ Instead, according to the record, corn prices remained flat for both 1996 and 1997 at \$0.95 per pound. *See* Chavez Memorandum (Regional Director's Decision, Exh. 10).

The Tribe argues that the Regional Director failed to provide evidence that the price utilized by the Hopi Agency "was excessive." Tribe's Opening Br. at 20. The Regional Director's burden is to establish fair rental value, 25 U.S.C. § 640d-15, and, in doing so, must support his factual determinations. Here, there was no support for \$1.20 per pound for corn in 1997 in the 1999 Hale Study or elsewhere (nor is there any support in the record for the Tribe's assertion that the price of corn per pound rose to \$1.50 in 1998). Therefore, the Regional Director reduced the farmsite rent by applying a corn price of \$0.95 per pound, which is consistent with the Chavez Memorandum. Given the evidentiary support for the Regional Director's conclusion, we affirm.

Conclusion

We conclude that neither tribe has prevailed on its arguments due chiefly to an absence of support for their respective positions.

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 August 15, 2011, decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

¹³ According to the 1999 Hale Study, corn sold in 1998 at the Hotevilla Village mill on the Hopi Reservation for \$30.00 per 25 pound container or \$1.20 per pound. 1999 Hale Study at Farm Page 5. The Hopi Agency may have inadvertently relied upon this corn price instead of the price of corn sold in 1997 when it calculated the farmsite rent for 1997.