



## INTERIOR BOARD OF INDIAN APPEALS

Joseph Waln and Justin Waln; and Scott Shelbourn v. Acting Great Plains Regional  
Director, Bureau of Indian Affairs

58 IBIA 139 (12/17/2013)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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JOSEPH WALN and JUSTIN WALN;	)	Order Affirming Decision
AND SCOTT SHELBOURN,	)	
Appellants,	)	
	)	
v.	)	Docket Nos. IBIA 12-022
	)	12-024
ACTING GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	December 17, 2013

Joseph Waln and Justin Waln and Scott Shelbourn (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from a September 12, 2011, decision (Decision) of the Acting Great Plains Regional Director, (Regional Director), Bureau of Indian Affairs (BIA), not to adjust the grazing rental rate for individually owned Indian lands on the Rosebud Reservation (Reservation) for the 2012 grazing season.<sup>1</sup> The Decision left in place a rental rate of \$18.40 per Animal Unit Month (AUM) that was first adopted for the 2009 grazing season and has remained unchanged since then.<sup>2</sup>

Appellants hold grazing permits for range units on the Reservation, and argue that \$18.40/AUM is too high and that the Regional Director should have set a lower rate for the 2012 season. We affirm the Decision because Appellants have not met their burden to show that the Regional Director's decision was unreasonable.

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<sup>1</sup> The appeal by Joseph Waln and Justin Waln (the Walns) was assigned Docket No. IBIA 12-022. The appeal by Scott Shelbourn (Shelbourn) was assigned Docket No. IBIA 12-024. The Board consolidated the appeals.

<sup>2</sup> An AUM is "the amount of forage required to sustain one cow or one cow with one calf for one month." 25 C.F.R. § 166.4.

## Background

### I. Regulatory Framework

In previous cases, the Board has described the regulatory framework for grazing permits and grazing rental rates for Indian trust or restricted lands. See *Linabery v. Great Plains Regional Director*, 55 IBIA 27, 29 (2012) (*Linabery II*); *Rosebud Indian Land and Grazing Ass'n v. Acting Great Plains Regional Director*, 50 IBIA 46, 47-49 (2009); *Hall v. Great Plains Regional Director*, 43 IBIA 39, 39-41 (2006).

BIA establishes the grazing rental rate for parcels of individually owned Indian lands included in range units by determining the fair annual rental value. See 25 C.F.R. §§ 166.400(b)(1), 166.401; see also *id.* §§ 166.4 (definition of “range unit”), 166.302. BIA’s regulations define “fair annual rental” to mean “the amount of rental income that a permitted parcel of Indian land would most probably command in an open and competitive market.” *Id.* § 166.4.

After BIA issues grazing permits, it must conduct an annual review of the rental rate and may adjust the rate. The purpose of the annual review is to ensure that landowners are receiving the fair annual return for their land. *Id.* § 166.408; *Elk Valley, Inc. v. Great Plains Regional Director*, 55 IBIA 16, 17 (2012). Where BIA undertakes an annual rental rate review and decides to leave the existing rate unchanged, it owes no obligation to the permittees to support that decision with a market study or appraisal that conforms to the Uniform Standards of Professional Appraisal Practice. *Elk Valley*, 55 IBIA at 21; *Linabery II*, 55 IBIA at 29. BIA may consider the current grazing rental rate and then determine whether the evidence before it demonstrates that the prevailing market rate is higher or lower, or whether parcel-specific variables require parcel-specific adjustments. *Elk Valley*, 55 IBIA at 21. The burden is on permittees who challenge the decision to produce or point to evidence in the record that demonstrates a decline in the rental value of the permitted parcels that the Regional Director failed to consider or failed to adequately address and that might have affected BIA’s decision to leave the rate unchanged. *Id.*; *Linabery II*, 55 IBIA at 29.

### II. Factual Background

The \$18.40/AUM grazing rental rate has been in place since the 2009 grazing season. The Board sustained BIA’s decision to adjust the rate from \$14.61/AUM to \$18.40/AUM for the 2009 grazing season against one permittee’s challenge in *Linabery v. Acting Great Plains Regional Director*, 53 IBIA 42, 50 (2011) (*Linabery I*). The Board next sustained BIA’s decision to leave the \$18.40/AUM rate unchanged for the 2010 season against challenges by 39 permittees in *Elk Valley*, 55 IBIA at 26. For both the 2009 and

2010 grazing rental rate decisions, BIA commissioned market studies, conducted by appraisers, to provide information on the fair annual rental value of individually owned Indian lands on the Reservation, expressed as a price per AUM.

For the 2011 grazing season, BIA decided to use a different approach for the rental rate review. Instead of commissioning reservation-specific market studies, BIA considered three sets of information: (1) county-level cash rent statistics from the National Agricultural Statistics Survey (NASS) for counties within the Reservation to determine trends in pastureland rental rates; (2) cattle futures market trends; and (3) other climatic and animal industry factors, such as drought and livestock disease outbreaks.<sup>3</sup> See *Linabery II*, 55 IBIA at 30. Appellants in the instant appeal, and a number of other permittees, challenged BIA's decision to leave the \$18.40/AUM rate unchanged for the 2011 season in *Linabery II*. See *id.* at 28 n.1 (discussing the identity and number of appellants). In *Linabery II*, we vacated the Regional Director's decision as applied to permittees in Todd County, South Dakota, because the Regional Director's rationale for leaving the rate unchanged in Todd County did not comport with the regulations. We affirmed the 2011 decision as applied in other counties. Although we vacated and remanded the decision with respect to Todd County, we did not hold that leaving the rate unchanged for Todd County was necessarily unreasonable—only that the Regional Director's explanation was arbitrary and capricious.

BIA used the same annual review process in reaching its September 12, 2011, Decision to leave the rate at \$18.40/AUM for the 2012 grazing season. Decision at 1. The Regional Director stated that the review process “required [her] to decide between \$18.40 per [AUM], the present rate, and \$18.48 per AUM, the present rate adjusted by the calculated weighted olympic average percentage of 0.42 percent.”<sup>4</sup> *Id.* In her decision to leave the rate in place for the 2012 season, the Regional Director stated that she “considered the livestock market and other factors influencing grazing rental rates.” *Id.*

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<sup>3</sup> BIA also consulted with the Rosebud Sioux Tribe. *Linabery II*, 55 IBIA at 30 n.2.

<sup>4</sup> The Regional Director explained the weighted olympic average percentage as follows: The weighted olympic average percentage is calculated from the annual [NASS] county level cash rents. . . . The olympic average is a 5 year average with the highest and lowest values removed . . . . The percent change of the olympic average from 2010 to 2011 is determined for each county . . . . The percent change of the olympic averages are added based upon the proportional area of each county within the reservation to determine the weighted olympic average percentage change.

Decision at 1.

Appellants appealed the Decision to the Board. The Walns included arguments in their notice of appeal and indicated that they would rely on those arguments in lieu of filing an opening brief. Shelbourn also included arguments in his notice of appeal without filing an opening brief. The Regional Director filed an answer brief and a motion to limit the scope of the appeal to those permits held by Appellants.<sup>5</sup> Appellants did not file reply briefs.

### III. Issues on Appeal to the Board and the Regional Director's Response

We begin by noting that none of the Appellants in this case have sought to rely on our decision in *Linabery II*—i.e., the portion vacating the 2011 rate decision in part—to argue that the \$18.40/AUM rate for 2012 should be vacated. Instead, Appellants rely on general arguments, without making any range unit-specific or even county-specific arguments, or offering evidence, to show that the value of forage on their range units had decreased since the \$18.40/AUM rate was first established for those range units in 2009.

The Walns argue that the grazing rental rate for the 2012 season is too high because they “continue to experience a very high cost of maintaining wells [and] fences,” including the cost of electricity to run wells; the cost of feed and fuel is high; they have other costs such as fees and taxes; “adverse weather can have an [e]ffect on the cost of many things”; and “there [are] always many other unforeseen issues.” Walns’ NOA at 1.

Shelbourn argues that the rate provides a windfall to landowners because the landowners do not make improvements or provide labor, and, at the same time, the permittee does not receive appropriate credit (as an offset against the grazing rental rate) for improvements and maintenance costs required by the terms of the permit. *See* Shelbourne’s NOA at 1. As relief, he seeks, first, an order directing the Regional Director to set a grazing rental rate that takes into account the differences between a BIA administered lease and a private lease, as well as the similarities between a BIA administered lease and one issued by the Bureau of Land Management or the United States Forest Service—which are allegedly issued at a much lower rate. *Id.* Second, he seeks an order directing the Regional Director to pay certain costs, including improvements and labor, where those costs were

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<sup>5</sup> A total of 129 permittees are affected by the Decision. The effect of granting the Regional Director’s motion under the circumstances of this case is unclear, and was not addressed in the motion, although the Regional Director acknowledged that she was not seeking a bond with respect to Appellants’ permits because the Decision did not purport to affect the status quo for any of the permits. When BIA leaves a grazing rental rate unchanged for existing permits, the automatic stay in 25 C.F.R. § 2.6 arguably has no practical effect. In any event, our affirmance of the Decision renders the motion moot.

not appropriately deducted in setting the grazing rental rate, or to deduct those costs from the permittees' grazing fees. *Id.*

The Regional Director argues that there is no substantive difference between the arguments that the Walns present in this appeal and the arguments they made in *Linabery II*, that the Board rejected each of their arguments in that case as insufficient to meet their burden on appeal, and, consequently, their instant appeal should also be dismissed for the same reason. The Regional Director argues that Shelbourn's notice of appeal is identical to the notice of appeal that he filed in *Linabery II*, that the Board rejected each of his arguments in that case, and, therefore, his present appeal should be dismissed based on collateral estoppel<sup>6</sup> or for failure to meet his burden on appeal.

## Discussion

### I. Standard of Review

The Regional Director's decision whether to adjust the grazing rental rate involves an exercise of discretion and may involve an exercise of expertise. *See Fort Berthold Land & Livestock Ass'n v. Great Plains Regional Director*, 35 IBIA 266, 270 (2000). The Board's role in reviewing a discretionary decision by BIA is to determine whether the decision "is reasonable; that is, whether it is supported by law and by substantial evidence." *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 18 (2008) (quoting *Rosebud Indian Land and Grazing Ass'n v. Acting Great Plains Regional Director*, 41 IBIA 298, 301 (2005)) (internal citations omitted). If so, the Board will not set aside the decision, and the Board will not substitute its judgment for that of BIA. The burden is on the appellant to show that BIA's decision is unreasonable. *Id.*

### II. Shelbourn's Arguments

We first address Shelbourn's arguments, because they are identical to those that he made, and we considered, in *Linaberry II*. Compare Shelbourn's NOA in Docket No. IBIA

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<sup>6</sup> "Collateral estoppel" or "issue preclusion" means that where the same issue arises and is material to two (or more) legal proceedings; where the issue is conclusively determined in the earlier proceeding; and where a party was present and had the opportunity to present evidence in the earlier proceeding and now seeks to raise the same issue in the later proceeding, that party will be estopped or precluded from raising the issue in the later, collateral proceeding. *See 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).

12-024 *with* Shelbourn’s NOA in Docket No. IBIA 11-010 (Answer Brief (Br.), Attach. D). We need not decide whether Shelbourn’s appeal should be dismissed based on principles of collateral estoppel, because Shelbourn failed to meet his burden on appeal. As we held in *Elk Valley* and reiterated in *Linabery II* decided on the same day, the burden is on the permittee challenging a decision not to change a grazing rental rate to identify evidence that the Regional Director failed to properly consider that might have led to a decision to change the rate. *Elk Valley*, 55 IBIA at 21; *Linabery II*, 55 IBIA at 29. Shelbourn provides no arguments or evidence in this appeal that any of the factors he identifies “had a new or different effect on land rental values for 201[2], or that they were not considered or reflected in some manner when the \$18.40/AUM rate was first established in 2009.” *Linabery II*, 55 IBIA at 33; *see id.* at 34 & n.8. *Ipso facto* he has failed to meet his burden in this appeal.

### III. The Walns’ Arguments

Turning now to the Walns’ appeal, we conclude that they also have not met their burden. In *Linabery II*, the Walns filed a notice of appeal that that was essentially identical to Shelbourn’s. *Compare* Waln’s NOA in Docket No. IBIA 11-010 (Answer Br., Attach. E) *with* Shelbourn’s NOAs in Docket Nos. IBIA 11-010 and 12-024. The Regional Director argues that, although the Walns’ notice of appeal in the instant appeal differs in form as compared to Shelbourn’s, it is not different in substance, in that, “[l]ike in last year’s appeal, the Walns have failed to support any of their bare allegations with supporting evidence or provide any explanation in order to show that the Regional Director’s decision was unreasonable.” Answer Br. at 9. The Regional Director contends that the Board considered and rejected the arguments that the Walns make here as too generalized and unsubstantiated in *Linabery I*, *Linabery II*, and *Elk Valley*. *See id.* at 9-13. We agree.

The Walns’ allegation that feed, fuel, and other costs they bear are “high,” Notice of Appeal at 1, is inadequate to meet their burden on appeal. In *Linabery I*, the Board rejected as unsubstantiated a permittee’s complaint that her costs had “skyrocketed,” where she did not quantify the costs of the agricultural necessities she identified or the alleged price increases, and—critically—did not explain how the rate decision was flawed as applied to her range units. *Linabery I*, 53 IBIA at 48 (citing *Bird v. Acting Rocky Mountain Regional Director*, 48 IBIA 94, 104 (2008)) (bare assertions, standing alone, are insufficient to satisfy an appellant’s burden of showing that the regional director’s decision is unreasonable). The Walns’ assertion that they “continue to experience” high costs of maintaining wells and fences, Notice of Appeal at 1, is also self-defeating inasmuch as it is a concession that these costs are not new and the Walns have offered no evidence to show that these costs had a

different effect on the value of forage in 2012 as compared to 2009-2011.<sup>7</sup> See *Linabery II*, 55 IBIA at 33. Nor have the Walns, in their allegation that they have other costs “such as fees and taxes,” Notice of Appeal at 1, met their burden to show that these costs were new, increased in 2012, or otherwise affected the value of forage such that it was unreasonable for the Regional Director not to adjust the rate for the 2012 season. See *Elk Valley*, 55 IBIA at 23 (rejecting appellant’s argument that deductions should be made for tribal use taxes and other costs where they were not alleged to be new or greater than before).<sup>8</sup>

Finally, the Walns’ observation that “adverse weather can have an [e]ffect on the cost of many things,” and “there [are] always many other unforeseen issues,” Walns’ NOA at 1, while perhaps true in the abstract, carried no necessary implication regarding a change in the value of forage from the 2009-2011 period to 2012.<sup>9</sup> Moreover, the Walns provided no evidence that adverse weather (or some other issue) did occur, and affected the value of forage in a manner or to an extent that should have been, but was not, considered by the Regional Director. On the other hand, the Regional Director points to evidence in the record that weather conditions during the previous winter were abnormally snowy, wet, windy, and cold, and that she decided not to increase the rental rate after considering various factors that affect grazing rental rates, including climate conditions. See Answer Br. at 12-13; AR Tab G at 3 (recommendation from natural resources officer to maintain the rate due in part to abnormal weather); AR Tab H, l-n (weather data); Decision at 1 (the Regional Director stated that she “considered the livestock market and other factors influencing grazing rental rates”). The Walns offer nothing in reply. Because the Walns

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<sup>7</sup> The Regional Director argues, without reply from the Walns, that since 2009 the grazing rental rate has included a \$1.00/AUM deduction for costs associated with fences, dams, and wells, applied against a yearlong rate of \$19.40/AUM recommended by an independent appraiser. Answer Br. at 11; see *Linabery I*, 53 IBIA at 45-46 n.5.

<sup>8</sup> Here, too, the Regional Director argues, without a response from the Walns, that since 2009 the grazing rental rate has taken into account certain reservation-based conditions that could affect the rate, including a prepayment requirement for the entire annual grazing rental and a 3% annual preparation fee. Answer Br. at 11; see *Linabery I*, 53 IBIA at 44, 45.

<sup>9</sup> For example, we have previously observed that “adverse” climate conditions might not necessarily decrease the value of forage for grazing and could conceivably increase the value due to scarcity. *Linabery I*, 53 IBIA at 47-48.

have not met their burden of showing that BIA's action is unreasonable, *DuBray*, 48 IBIA at 18, we dismiss their appeal.

### Conclusion

We conclude that none of the Appellants have sustained their burden to demonstrate that the Regional Director's decision to leave the 2011 grazing rental rate unchanged for the 2012 grazing season is unreasonable. 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 September 12, 2011, Decision.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge