



INTERIOR BOARD OF INDIAN APPEALS

David C. Morris v. Northwest Regional Director, Bureau of Indian Affairs

59 IBIA 266 (12/17/2014)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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DAVID C. MORRIS,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	Docket No. IBIA 12-108
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	December 17, 2014

David C. Morris (Appellant) appealed to the Board of Indian Appeals (Board) from an April 16, 2012, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming the decision of the Puget Sound Agency Superintendent (Superintendent) to increase Appellant’s annual rent from \$5,100 to \$7,250 for Lot 13 of the Capet Zalsiluce Waterfront Tracts on the Swinomish Indian Reservation, Washington. Appellant argues that the rent increase is contrary to local waterfront real estate market conditions and based on a flawed appraisal of the property’s value. Because the Regional Director does not sufficiently address Appellant’s allegations of error, we vacate the Decision and remand the matter to the Regional Director for further consideration.

Background

On January 1, 2007, Appellant entered into a 50-year ground lease for home site and recreation purposes, Lease No. 122 2088180656 HS (Lease), covering Lot 13 of the Capet Zalsiluce Waterfront Tracts on the Swinomish Indian Reservation (Reservation). Lease, Jan. 1, 2007, at 1 (unnumbered) (Administrative Record (AR) Tab 2).¹ Lot 13, which is located within the Pull and Be Damned neighborhood, consists of an approximately 0.15-acre “waterfront lot with a good water view.” Summary Appraisal Report, July 29, 2011 (Appraisal), at 16 (AR Tab 4); Lease at 1 (unnumbered). The Lease sets the base annual rent at \$5,100. Lease at 1 (unnumbered).

¹ The leasehold is situated in Government Lot 1, Section 3, Township 33 North, Range 2 East, Western Meridian, Skagit County, Washington. Lease at 1 (unnumbered).

Paragraph 7 of the Lease provides that the annual rent is “subject to review and adjustment . . . at not less than five-year intervals in accordance with the regulations in 25 CFR 162.” *Id.* ¶ 7; *see also* 25 C.F.R. § 162.607 (2006) (leases “shall provide for periodic review, at not less than five-year intervals, of the equities involved”).² Under the Lease and the regulations, each adjustment must “give consideration to the economic conditions at the time, exclusive of improvements or development required by the contract or the contribution value of such improvements.” Lease ¶ 7; 25 C.F.R. § 162.607 (same).

For purposes of the first rent adjustment under paragraph 7 of the Lease, an appraiser within the Department of the Interior’s Office of the Special Trustee for American Indians (OST) conducted an appraisal to provide an opinion on the annual market rent for Lot 13 as of the effective date of the appraisal, December 20, 2011. Appraisal at 10. The appraiser found that a comparison of leases in the market area was not possible, *id.* at 25, but that there were adequate similar land sales in the market area to employ the sales comparison approach to estimate the market value of Lot 13. *Id.* at 13.³

The appraiser identified two segments in the waterfront market: “traditional suburban” lots in highly developed subdivisions, and “natural” lots in more rural settings. *Id.* at 16. The appraiser visited Lot 13, as well as 59 other properties in the Puget Sound market area, and, after determining that the Pull and Be Damned neighborhood is mostly natural in character, selected 4 sales of natural waterfront lots for further review and comparison to Lot 13. *Id.* at 13, 16. The comparable properties sold between July 2009 and November 2010 for prices ranging from \$95,000 to \$520,000. *Id.* at 16. The appraiser considered characteristics of the properties and the transactions that may explain variances in prices paid for real property, including market conditions, property rights conveyed, lot size, width, location, waterfront bank type, and utilities. *Id.* at 16-18, 24. With respect to the local market conditions, the appraiser found that “in the time period prior to the effective date of the appraisal [the market] was still in decline.” *Id.* at 17. The appraiser also stated that, due to their rarity, the demand for waterfront properties is less elastic than for non-waterfront properties. *Id.*

² We cite to BIA’s leasing regulations in effect at the time the Lease became effective in 2007. *See Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 263 n.3 (2013). In January 2013, new leasing regulations became effective. *See* 77 Fed. Reg. 72440, 72440 (Dec. 5, 2012).

³ The sales comparison approach entails comparison of the subject property with recent sales of properties with similar design and utility. Appraisal at 15. Adjustments are made to account for major differences between the comparable sales and the subject property, such that the resulting market price of each comparable sale is an indication of the value of the subject property in the current sales market. *Id.*

After making a negative adjustment to the value of each comparable sale to account for declining market conditions, the appraiser found that three of the four comparable sales were superior overall to Lot 13 due to a combination of factors, including property rights conveyed, lot size, width, location, and bank type. *Id.* at 24. Comparable Sale #1, in particular, was determined to be an “exceptional property, as low bank properties with beach access are rare and highly prized,” and was given less weight in the value opinion. *Id.* at 20, 24. Comparable Sale #2 was the only property determined to be inferior overall to Lot 13, due to a “[v]ery high bank (no access)” and lack of sanitary sewer service. *Id.* at 21, 24. The resulting value indication for Lot 13 was a price range greater than \$95,000 (Comparable Sale #2) and less than \$206,000 (Comparable Sale #3), and the appraiser concluded that after all qualitative adjustments, the market value of Lot 13 was \$145,000. *Id.* at 24.

The appraiser then analyzed the market rates of return for various types of property based on the risk of investment, and determined that the risk associated with Appellant’s lease most closely corresponds to the Forest Service’s leases of recreational lots.⁴ *Id.* at 26. Accordingly, the appraiser applied the Forest Service’s 5% rate of return to the appraised value of Lot 13, which, in his opinion, made the annual market rent \$7,250. *Id.* at 27. The Appraisal was reviewed and approved by an OST review appraiser on August 9, 2011. Northwest Regional Office, OST, Review, Aug. 9, 2011, at 1-4 (AR Tab 4).

On October 25, 2011, the Superintendent gave Appellant written notice of the Appraisal and explained that, pursuant to paragraph 7 of the Lease, Appellant’s annual rent would be increased to \$7,250, effective December 20, 2011. Superintendent’s Decision, Oct. 25, 2011, at 1 (unnumbered) (AR Tab 5).

Appellant appealed to the Regional Director. Notice of Appeal to Regional Director, Nov. 30, 2011 (AR Tab 7). While Appellant contended that the effective 42% rent increase over the original rent was not justified “during a period of declining property values,” *id.* at 1 (unnumbered), Appellant went on to allege specific errors in the Appraisal. First, referring to a prior OST appraisal of adjoining Lot 15, which Appellant also leases, Appellant alleged that OST miscalculated the relative sizes of the two lots and, by purportedly misidentifying the location of the bank, also overestimated the “usability” of both properties. *Id.* Next, Appellant alleged that although the lots share a common

⁴ See 71 Fed. Reg. 16622, 16633 (Apr. 3, 2006) (Procedures for Appraising Recreation Residence Lots and for Managing Residence Uses Pursuant to the Cabin User Fee Fairness Act); *see also* 16 U.S.C. § 6206.

boundary, OST described Lot 13 as medium bank and Lot 15 as high bank,⁵ whereas “the slope and foliage of the bank of [Lot 13] precluded beach access, such that we had a stairway constructed for beach access (at our expense) from [L]ot 15” *Id.* Appellant contended that, due to lack of beach access, Lot 13 was overvalued relative to Lot 15 and should be considered “quite comparable” to Comparable Sale #2, apart from the latter’s larger size.⁶ *Id.* at 2 (unnumbered). Finally, Appellant identified a pending listing of a bank-owned property for \$99,500 as undermining the \$145,000 appraised market value of Lot 13. *Id.*

BIA’s Northwest Regional Office requested that OST review Appellant’s arguments and submit a response to BIA. Request for Appraisal Services, Jan. 4, 2012 (AR Tab 8). In OST’s response, which we address further in our discussion of the merits, *infra*, OST identified a sale of another “medium bank” waterfront property in March 2011 (2011 Sale) for \$200,000, and opined that after adjustments “the sale is supportive of a value opinion of \$145,000” for Lot 13. Memorandum from Northwest Regional Appraiser, OST, to Northwest Regional Realty Officer, BIA, Jan. 25, 2012, at 3 (OST Response) (AR Tab 8). OST did not enclose documentation of the 2011 Sale.

Appellant submitted a supplemental notice of appeal to BIA, in which he argued that the bank-owned property he previously identified had sold for \$78,500 in February 2012. Notice of Appeal Update, Mar. 5, 2012, at 1 (AR Tab 9). Appellant stated that although it was a foreclosed property, he “was told” that the sale price was consistent with an appraisal obtained by the bank. *Id.*

On April 16, 2012, the Regional Director issued the Decision affirming the rent adjustment. Decision at 1. The Regional Director found that Appellant “presented no evidence and/or documentation to refute [the] adjusted annual rental amount.” *Id.* at 6. Adopting the reasoning in OST’s response, the Regional Director concluded that the Appraisal was reasonable and supported by the record. *Id.*

⁵ The Regional Director and OST acknowledge that the description of Lot 15 as high bank was a typographical error, explaining that both lots are medium bank properties. *See* Decision, Apr. 16, 2012, at 4 (AR Tab 10).

⁶ While the complete appraisal for Lot 15 was not provided to the Board, it appears that the appraisal was made a few months prior to the Appraisal for Lot 13, and appraised the market value of Lot 15 as \$147,500, with an annual rent of \$7,375. Notice of Appeal at 3 (unnumbered).

Appellant appealed to the Board and included arguments in his notice of appeal. Notice of Appeal to Board, May 14, 2012 (Notice of Appeal). The Regional Director filed an answer brief, and Appellant filed a reply brief.

Discussion

I. Standard of Review

The Board reviews the Regional Director's decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Kamb v. Northwest Regional Director*, 52 IBIA 74, 80 (2010) (citing *Strain v. Acting Portland Area Director*, 23 IBIA 114, 118 (1992)). We apply a *de novo* standard when reviewing the sufficiency of the evidence. *Clingan v. Northwest Regional Director*, 56 IBIA 185, 189 (2013). Appellant bears the burden of demonstrating error in the Regional Director's decision. *Kamb*, 52 IBIA at 80; *Clingan*, 56 IBIA at 189.

II. Analysis

On appeal, Appellant argues that the effective 42% rent increase over the original rent is unjustifiable on its face and contrary to declining market conditions, and that the Appraisal contains errors, which, if corrected, would lower the appraised value of Lot 13. Notice of Appeal at 1-2 (unnumbered). Further, Appellant disputes that the 2011 Sale identified by OST in its response of January 25, 2012, and relied on by the Regional Director, is comparable to Lot 13. *Id.* at 3 (unnumbered). Appellant offers two additional sales that occurred in March 2012, between the Appraisal's effective date and the Decision, as supportive of a lower valuation for Lot 13. *Id.*, Attach. 2-3. Appellant also now contends that BIA's decision to apply a 5% rate of return was arbitrary. *Id.* at 1 (unnumbered).

We vacate the Decision and remand the matter to the Regional Director for further consideration. The Regional Director has not adequately responded to Appellant's contentions that Lot 13 is overvalued based on Appellant's claim—which BIA has not disputed as a factual matter—that Lot 13 lacks beach access, and that the 2011 Sale is superior to Lot 13 and does not support OST's value opinion for Lot 13. Because we find that the case should be remanded on those grounds, the Board also identifies four remaining issues that merit further consideration by the Regional Director during remand.

A. Impact of Lack of Beach Access on Value of Lot 13

Appellant argues that due to the topography of the bank, Lot 13 lacks beach access and should therefore be valued more as a water view, rather than a waterfront, property.

Notice of Appeal at 2 (unnumbered). Appellant contends that this would lower its value and result in an appraised market value more closely aligned with Comparable Sale #2. *Id.* Appellant also contends that Lot 13 is similar to adjoining Lot 15 except that Lot 13 lacks beach access, and was incorrectly appraised to have roughly the same value. *Id.* at 2-3 (unnumbered). The Regional Director does not dispute, as a factual matter, Appellant's claim that there is not a reasonable means of beach access from Lot 13. Instead, the Regional Director's position, based on OST's response, is that "lack of beach access is not typically recognized in the marketplace unless the bank is very high," and that "[t]he main attraction for a waterfront lot is that there are no properties between the lot and the water, which provides a superior view." Decision at 4; *see also* Answer Br. at 10; OST Response at 2. Having determined that beach access is not material, the Regional Director also argues that "the fact that [the Lot 13 and Lot 15] appraisals are similar for similar, adjacent properties provides support for the government's position that the appraiser is returning consistent, accurate appraisals for the Pull & Be Damned lots." Answer Br. at 10.

In our *de novo* review of the sufficiency of the record to support the Regional Director's decision, *see Clingan*, 56 IBIA at 189, we conclude that the record does not support the Regional Director's finding of the impact of beach access on the appraised value of Lot 13. The Regional Director appears to have found, in effect, that medium bank waterfront property with beach access is no different, from the market's perspective, from medium bank waterfront property without beach access. But it appears from the Appraisal that Comparable Sale #2 was valued by the market more as a water view property than as a waterfront property, and not solely because it has a very high bank, but also due to the lack of beach access resulting from the topography. *See* Appraisal at 21 (describing the property as "[v]ery high bank, no access," and noting that the agent "considered this property more of a water view property than a waterfront lot"). Also indicative of a market appreciation for beach access, the Appraisal states that Comparable Sale #1 is an "exceptional property, as low bank properties *with beach access* are rare and highly prized." *Id.* at 20 (emphasis added). Thus, the record appears to support Appellant's position that beach access, or lack thereof, can materially affect the value of medium bank waterfront property such as Lot 13. Logic also supports that position: Appellant argues, and the Regional Director does not dispute, that beach access enables more recreational use. *See* Notice of Appeal at 2 (unnumbered).

Moreover, we note that the Board previously remanded a rent adjustment decision by BIA for further consideration of the impact of water access on the property's valuation. In *Rosenfield v. Portland Area Director*, 30 IBIA 204, 207 (1997), the appellants challenged a rent increase on property that BIA considered "medium bank with access to waterfront." Similar to Appellant's claim regarding lack of beach access from Lot 13, the appellants in *Rosenfield* argued that their leased property was a "view lot," and not a waterfront lot, as there was "no way normal . . . [to] get to the water from our lot." *Id.* Based on

photographs submitted by the appellants, the Board considered it unlikely that the average person would consider the water to be accessible from the property. *Id.* The Board remanded the matter for clarification, stating that “[i]f the appraiser valued [the lot] as if it had direct access to the water, and if it does not actually have such direct access, the valuation may be too high.” *Id.* at 207-08.

Because the Regional Director’s findings regarding the impact of beach access on the valuation of Lot 13 are inconsistent with or otherwise not supported by the record, we vacate the Decision and remand the matter for further consideration. In doing so, we note that while a regional director may rely on an appraiser’s opinions, a regional director has an independent obligation to consider each issue, and if an appraiser’s explanation is inadequate, to obtain more information or clarification.

B. Similarity of the 2011 Sale to Lot 13

Relying again on OST’s response, the Regional Director cites, in addition to the four comparable sales analyzed in the Appraisal, the “medium bank” waterfront property that sold in March 2011 for \$200,000 as further support for the appraiser’s opinion of the \$145,000 market value of Lot 13. Decision at 5; *see also* OST Response at 3. On appeal to the Board, Appellant contends that the 2011 Sale property is clearly superior to Lot 13, because it has 64 feet of *low* bank frontage whereas Lot 13 has 50 feet of medium bank frontage without beach access. Notice of Appeal at 3 (unnumbered). In support of his objection, Appellant submitted a copy of the listing for the property with a photograph of its beachfront. *Id.*, Attach. 3.

The listing submitted by Appellant shows that OST and the Regional Director were incorrect in characterizing the 2011 Sale property as medium bank. The listing clearly describes the property as “low bank.” *Id.* Appellant’s objection warrants a response from the Regional Director, and we therefore vacate the Decision and remand the matter to the Regional Director to reconsider and explain what effect, if any, the 2011 Sale has on the appraised value of Lot 13.

C. Appellant’s Rent Increase Relative to Market Conditions

While the beach access and 2011 Sale issues are sufficient grounds for remand, and may ultimately lead to a different rent adjustment decision by BIA, we also address, and reject in part, Appellant’s arguments that the effective 42% rent increase over the original rent “is simply unjustifiable” and also unreasonable in light of the declining market for waterfront properties in the Puget Sound area during the course of the Lease. Reply Br. at 1 (unnumbered); Notice of Appeal at 1 (unnumbered).

With certain exceptions not relevant here, the rental amount for properties leased through BIA shall be the fair market rental value, 25 C.F.R. § 162.604(b), taking into consideration the economic conditions at the time of any rent adjustment, *id.* § 162.607. “Fair annual rental” is defined as “the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market.” *Id.* § 162.101. The determination of fair market rental value “should be made in accordance with generally accepted appraisal principles.” *Strain*, 23 IBIA at 118 (citation omitted). However, “the determination of ‘fair annual rental’ requires the exercise of judgment and . . . reasonable people may differ in their calculation of ‘fair annual rental.’” *Id.* at 117-18. As we have explained, the Board will overturn a BIA determination only if it finds the determination unreasonable, and the burden of proving a rent adjustment unreasonable is on Appellant. *See id.* at 118.

In accordance with the foregoing standard, we have said “the fact that a rental adjustment results in a substantial increase does not prove that it is unreasonable.” *Id.* Instead, the Board has allowed that a significant increase could suggest that “previous rental rates were unrealistically low,” or reflect a “true increase in the market.” *Id.* Thus, we conclude that the effective 42% rent increase over Appellant’s original rent, standing alone, does not require that the Decision be set aside.

The Board has also upheld rent increases even when made during a general economic downturn. In *Drew v. Acting Northwest Regional Director*, 56 IBIA 132, 141 (2013), the Board found that the appellants failed to show that their new rate was unreasonable when they alleged only that the most recent 4 years of a 10-year period without adjustment experienced a general decline in the housing market, and did not demonstrate that the property’s value experienced a net decline over the 10-year period. More recently, in *Hadley v. Northwest Regional Director*, 59 IBIA 150, 156 (2014), the appellant argued that his rent should not be increased due to “current terrible real estate market and general economic conditions.” We found this generic argument insufficient to meet an appellant’s burden to show the adjustment is unreasonable, explaining that the appellant “provide[d] no evidence to support his negative view of the market conditions *for water view property in the Puget Sound area*, which is the relevant market in this case.” *Id.* (emphasis added).

In the present case, Appellant argues on appeal, and the Decision and record support, that the specific market for waterfront property in the Puget Sound area experienced a decline throughout the adjustment period. In his Decision, the Regional Director acknowledges that the general market for residential property was in decline and finds, based on the Appraisal and OST’s response, that Lot 13 “is a waterfront property, the most rare and most desirable segment of the general market,” and that for this segment of the market “[t]he most recent analysis of waterfront properties (under 0.65 acre) in the

Puget Sound area indicates a very slight negative correlation between the passage of time and the sale price per lot . . . over the last four years.” Decision at 3-4; *see* OST Response at 1 (same). The Regional Director states that the appraised value of Lot 13, and the increase in rent, is reasonable because the comparable sales analyzed in the Appraisal were given a negative adjustment to account for the declining market conditions. Decision at 4 (citing Appraisal at 24).

In *Hadley*, after we rejected the appellant’s arguments regarding general market conditions as insufficient, the Board noted that—as here—an OST appraisal found a slight decrease in the relevant real estate market and the appraiser made adjustments to the comparable sales to account for the decline. *Hadley*, 59 IBIA at 156. Critical to our decision in *Hadley*, the appellant did not show that the adjustments made to the comparable sales for the relevant market conditions were inadequate or that other errors were made in the appraisal. *See id.* at 156-57.

As we have discussed, separate from issues of market conditions, Appellant makes specific allegations of error that may result in a different rent adjustment decision. In light of Appellant’s allegations of error that warrant remand, we need not decide whether it would be appropriate to remand the Regional Director’s decision based solely on the unexplained disparity that remains, after the appraiser’s adjustments for relevant market conditions, between the amount of the rent increase over the original rent and the slight decline that BIA found in the market.⁷

D. Issues Meriting Further Consideration

Because we find that the Decision must be vacated and the matter remanded, the Board also identifies four remaining issues raised by Appellant that might affect BIA’s determination of the fair annual rent for Lot 13, and which it should specifically address during remand, to establish that the issues have been considered.

1. Lot size

Appellant challenges the lot size calculated and used by the appraiser to estimate the market value of Lot 13. *See* Notice of Appeal at 2 (unnumbered); Reply Br. at 2-3 (unnumbered). As we understand Appellant’s arguments, the “physical” size of the lot, as

⁷ We note, however, that a determination of fair annual rent, when based on an appraisal as was done here, entails more than the application of market conditions since the time of the last adjustment to the current rent, and that it is an appellant’s burden to show that a BIA rent adjustment decision is unreasonable. *Strain*, 23 IBIA at 118.

opposed to the “legal” size used by the appraiser, should be used to determine market value, because the legal size includes beyond-bank land that is less usable. *See* Reply Br. at 2 (unnumbered). And, according to Appellant, the appraiser misjudged the beyond-bank area. Appellant’s position is that the beyond-bank area should be measured from the top of the bank—as purportedly indicated by two survey markers that roughly bisect the property—down to 10 feet from the high water mark. *Id.* Appellant contends that the comparatively short, remaining 10-foot distance to the high water mark, which was the entire distance the appraiser considered to be the beyond-bank distance, is outside the property boundary. *Id.*; Notice of Appeal at 2 (unnumbered). Based on Appellant’s proposed method, the physical or “more usable” size of Lot 13 would be approximately half the 0.154-acre size reported in the Appraisal as the property’s legal size. Reply Br. at 2 (unnumbered); OST Response at 1 (explaining that the 0.154-acre size is OST’s calculation of the legal size).

The Regional Director has not adequately responded to Appellant’s arguments regarding lot size. The Regional Director stated, based on OST’s response, that the legal lot size “is typically larger than the physical lot size of waterfront lots due to the difference between the above-bank and below-bank areas.” Decision at 4; OST Response at 1 (same). But if Appellant’s contention is correct that the appraiser applied an erroneous beyond-bank distance in determining property size, the difference between the physical and legal sizes of Lot 13 would appear to be significantly larger than that suggested by BIA. And although the Regional Director states that differences in sizes between Lot 13 and the comparable sales were considered, he does not explain why the legal sizes of the lots was used for comparison rather than their physical sizes.

While we emphasize that the Board makes no judgment at this time on the merits of Appellant’s arguments regarding lot size, we conclude that they merit further consideration and a response from the Regional Director on remand.

2. Sewer service

The Regional Director found that Comparable Sale #2 and the bank-owned property identified by Appellant were, after adjustments, inferior overall to Lot 13 due in part to inferior utilities, i.e., absence of sanitary sewer service. Decision at 4-5; Answer Br. at 7-8. The three overall superior comparable sales in the Appraisal and the 2011 Sale later identified by OST also lacked sanitary sewer service. *See* Appraisal at 24; OST Response at 3. Appellant argues that BIA did not consider a “substantial charge” for the cost of sewer and water services for Lot 13, which charge he asserts is “comparable or more than required for independent construction of a septic system.” Notice of Appeal at 2 (unnumbered). According to the Appraisal, an assessment for the development of sewer and water services is attached to the lots in the Pull and Be Damned neighborhood in which Lot 13 is located.

Appraisal at 7. On remand, the Regional Director should consider what impact, if any, the assessment for sewer service on Lot 13, if known, has on the valuation of Lot 13 relative to the other properties.

3. Additional property sales identified by Appellant

For the first time on appeal, Appellant offers evidence of two more allegedly comparable sales, which occurred in March 2012, after the effective date of the Appraisal and prior to the Regional Director's decision. Notice of Appeal, Attach. 1-2. The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that were not, but could have been, raised to the Regional Director. *See id.* However, we note that the Regional Director has discretion to consider any additional relevant information on remand. Thus, the Regional Director may consider these additional sales as appropriate.⁸

4. Five percent rate of return

Appellant also argues for the first time in his notice of appeal that the 5% rate of return applied by BIA was "somewhat arbitrary." Notice of Appeal at 1 (unnumbered). As previously explained, the Board ordinarily does not consider issues that could have been, but were not, raised to the Regional Director. 43 C.F.R. § 4.318. However, because we remand the matter on other grounds, and the Regional Director does not address the issue in his Decision except to state that "[t]he Forest Service uses a 5% rate of return" and the appraiser applied that rate, Decision at 3, he should address it further on remand.

⁸ Because the Lease provides for adjustments at *not less* than 5-year intervals, *see* Lease ¶ 7, BIA is not precluded from considering sales that occurred after the first 5-year anniversary of the Lease, January 1, 2012.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Decision and remands the matter to the Regional Director for further consideration and issuance of a new decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Robert E. Hall
Administrative Judge