



## INTERIOR BOARD OF INDIAN APPEALS

Leonie Gopher v. Rocky Mountain Regional Director, Bureau of Indian Affairs

60 IBIA 189 (04/28/2015)

Reconsideration Denied:

60 IBIA 315

Related Board case:

58 IBIA 151



# United States Department of the Interior

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

LEONIE GOPHER,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 12-061
ROCKY MOUNTAIN REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	April 28, 2015

Leonie Gopher (Appellant) appealed to the Board of Indian Appeals (Board) from a December 2, 2011, decision (Decision) of the Rocky Mountain Regional Director, Bureau of Indian Affairs (BIA), upholding BIA’s grant of a right-of-way (ROW) renewal to Phillips 66 Pipeline LLC (formerly known as ConocoPhillips Pipeline Company) (Phillips 66) across Allotment No. 426 (Allotment), in which Appellant owns an interest, on the Blackfeet Indian Reservation (Reservation).<sup>1</sup> Appellant, who did not consent to the ROW renewal, argues that the consent of landowners collectively holding a majority interest in the Allotment was not properly obtained, and that the compensation paid by Phillips 66 for the ROW is less than fair market value, as evidenced by compensation paid by Phillips 66 to the Blackfeet Tribe (Tribe) in an agreement regarding the ROW.

We affirm the Decision. The record supports BIA’s finding that the owners of a majority interest consented to the ROW, and Appellant has not shown that their consent was invalid. With respect to the valuation issue, Appellant has not shown that it was unreasonable for the Regional Director, in approving the ROW, to rely on an appraisal of the fair market value that was approved by the Office of Appraisal Services (OAS) in the Office of the Special Trustee for American Indians (OST), without considering the agreement between the Tribe and Phillips 66 as a comparable transaction. In affirming the Decision, we decline to consider arguments raised and evidence presented by Appellant late

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<sup>1</sup> This appeal was originally consolidated with an appeal by Alvin Crawford, a co-owner of a different allotment that was also affected by BIA’s renewal of the ROW for Phillips 66. Crawford’s appeal was separately dismissed by the Board. *See Alvin Crawford v. Rocky Mountain Regional Director*, 58 IBIA 151 (2013).

in these appeal proceedings that were not raised or presented during briefing on the merits of the appeal, and which were not presented to the Regional Director.

### Background

Phillips 66 filed an application for a ROW with the Blackfeet Agency Superintendent (Superintendent) on October 14, 2010. Decision at 1 (unnumbered) (Supplement to the Administrative Record (AR Supp.) Tab 7). The application combined three existing ROWs into a single ROW for a term of 45 years. *Id.* The ROW crosses the Allotment, in which Appellant owns a 6.67% (0.0666666667) surface interest, and the application states that the ROW affects approximately 4.03 acres of the Allotment. Title Status Report, July 28, 2011, at 2 (Administrative Record (AR) Tab 11); ROW Renewal Application, July 13, 2011, at 1 (AR Tab 12).

Phillips 66 obtained an appraisal for the ROW, and OAS reviewed the appraisal and concurred in the appraiser's opinion that the fair market value for the ROW across 4.03 acres of the Allotment was \$925. Letter from Regional Appraiser to Superintendent, June 2, 2009 (AR Tab 20); Letter from Regional Appraiser to Superintendent, Mar. 7, 2011 (AR Tab 16). Phillips 66 offered to pay the landowners twice the appraised value for the ROW, and subsequently submitted to BIA signed consent forms from landowners. *See* Consent Forms, Oct. 13, 2009 to June 17, 2011 (AR Tab 13); *see also* Letter from Lonewolf Energy, Inc. to Appellant, June 17, 2011 (AR Tab 6) (requesting consent to the ROW and attaching unsigned consent form). Subsequently, the Superintendent sent a letter to the landowners, notifying them that consent of a majority interest in various allotments affected by the ROW, including the Allotment, had been obtained, and that BIA had approved the ROW. Letter from Superintendent to Landowners, Sept. 26, 2011, at 1 (unnumbered) (AR Tab 4).<sup>2</sup>

Appellant appealed the Superintendent's decision to the Regional Director. In her statement of reasons, Appellant argued that it was unclear whether BIA had obtained majority consent and that the amount of compensation was inadequate. Statement of Reasons (SOR), Nov. 7, 2011, at 4-7 (AR Supp. Tab 5). The Regional Director upheld the Superintendent's approval of the ROW. *See* Decision at 1-2 (unnumbered). On the

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<sup>2</sup> The ROW renewal grant was signed by the Superintendent on July 29, 2011. ROW Renewal Grant, July 29, 2011, at 3 (AR Tab 10). The ROW grant describes the ROW as taking "3.06 acres," *see id.* at 1, not the 4.03 acres stated in the application. Because the appraisal, the consents, and the amount of compensation to landowners were based upon the larger acreage stated in the application, the discrepancy does not affect our disposition of the issues raised in this appeal.

compensation issue, the Regional Director rejected an argument by Appellant that an agreement between the Tribe and Phillips 66, in which the Tribe granted its consent to the ROW over tribal lands, demonstrated that the appraised value of \$925 for the ROW across the Allotment was far below fair market value. *Id.* at 2 (unnumbered). In that agreement, Phillips 66 agreed to make payments to the Tribe in excess of \$50 million during the duration of the ROW. The Regional Director noted that the Tribe has sovereign authority within its Reservation, including the authority to levy taxes and fees, and thus the compensation agreed to by the Tribe and Phillips 66 was based on factors that were not comparable to those involving individually owned lands, and did not purport to represent a determination of fair market value. *Id.* The Regional Director found that the amount that Phillips 66 had agreed to pay the landowners—twice the \$925 appraised fair market value of the portion of the Allotment affected by the ROW—satisfied the regulatory requirement that the landowners be paid not less than fair market value. *Id.*; *see* 25 C.F.R. § 169.12 (unless waived in writing, compensation for a ROW “shall be not less than but not limited to the fair market value”).

Appellant appealed the Decision to the Board. In her notice of appeal, Appellant again contended that it was unclear whether BIA had obtained majority consent from the landowners for the ROW, and that BIA had not offered proof that such consent was actually obtained. Notice of Appeal, Dec. 30, 2011, at 5 (AR Supp. Tab 8). Appellant also alleged that BIA had tried to “intimidate” allottees “by threatening them with . . . condemnation proceeding[s]” if they did not consent. *Id.* Appellant reiterated her argument that the compensation for the ROW was less than fair market value because it was less than what the Tribe had obtained for its consent to the ROW across tribal lands. *Id.* at 6-7.

After receiving Appellant’s notice of appeal, the Board ordered the administrative record from the Regional Director. On February 17, 2012, after receiving the record, the Board issued a notice of docketing, provided Appellant and other interested parties copies of the Regional Director’s table of contents to the record, and scheduled briefing on the merits of the appeal. Appellant did not object to the administrative record. *See* 43 C.F.R. § 4.336 (“Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing.”).

Appellant filed an opening brief. In her opening brief, Appellant acknowledged that the record included consent forms, which she characterized as “alleg[ing] a sufficient majority of consenting signatures.” Opening Brief (Br.), Mar. 29, 2012, at 11. Appellant argued, however, that the consent forms used by BIA and Phillips 66 were misleading or that landowners who granted consent had been coerced into doing so. *Id.* at 11-15. Appellant again argued that the compensation to be provided to the landowners was below fair market value. *Id.* at 15-17.

The Regional Director and Phillips 66 filed answer briefs. Phillips 66 objected to Appellant's opening brief as raising new arguments—e.g., alleged coercion—that were not raised below. Phillips 66 Answer Br., Apr. 16, 2012, at 4. In his answer, the Regional Director noted that Appellant had not provided consent to the ROW, nor was her consent necessary to establish the majority consent required for the ROW. Regional Director's Answer Br., Apr. 27, 2012, at 2.

Appellant filed a reply brief, asserting that throughout the appeals process, she had challenged whether Phillips 66 had actually obtained majority consent to the ROW. Reply Br., May 1, 2012, at 2. Appellant argued that while “it *appears* that majority consent . . . is supported by the consent forms included in the administrative record,” from the beginning of the appeals process, she had “challenged the manner in which these consents were obtained.” *Id.* at 6.

During the Board's consideration of the appeal, it became apparent to the Board that the administrative record filed by the Regional Director was incomplete. The Board ordered the Regional Director to complete the record, and allowed the parties to respond to the supplementation. In response, Appellant raised a variety of new arguments challenging the ROW application and grant, most based on documents that were included in the original record submitted by the Regional Director. *See* Appellant's Response to Regional Director's Supplement, Mar. 3, 2015 (Appellant's Response). Appellant also submitted copies of two “Refusal” forms, one purportedly signed by Brenda Gopher (Brenda) on June 6, 2011, and the other purportedly signed by Clarence Gopher (Clarence) on June 15, 2011, refusing or withdrawing their consent to the ROW. Appellant's Response, Ex. I. Brenda and Clarence collectively own a 13.3334% interest in the Allotment, and their consent was included among the consents in the Regional Director's record, and counted as part of the majority consent for the ROW. *See* AR Tab 11 at 1, 3; AR Tab 13. Brenda and Clarence are Appellant's siblings. Opening Br. at 7.

### **Motion to Strike Appellant's New Arguments and Evidence**

Phillips 66 moved to strike Appellant's new arguments as untimely because Appellant did not demonstrate that her ability to raise those arguments was dependent on the Regional Director's completion of the record.<sup>3</sup> Phillips 66's Reply to Appellant's Response, Apr. 8, 2015, at 4-5. Phillips 66 also objects to Appellant's attempt, after the

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<sup>3</sup> Phillips 66 also addresses Appellant's additional arguments on the merits in case the Board should decide to consider them.

appeal had been pending over 3 years, to introduce new and unsubstantiated evidence regarding the issue of majority consent. *Id.*

We grant Phillips 66's motion to strike. As a general rule, the Board does not consider arguments made or evidence presented by an appellant for the first time on appeal, which could have been made or presented in the proceedings below. 43 C.F.R. § 4.318; *see also Goodwin v. Pacific Regional Director*, 60 IBIA 46, 55 (2015); *Wallowing Bull-C'Hair v. Rocky Mountain Regional Director*, 49 IBIA 120, 124 (2009). The Board may exercise its inherent authority to correct a manifest injustice or error where appropriate. 43 C.F.R. § 4.318. But in the present appeal, Appellant has provided no justification for us to depart from the normal scope of review and to consider arguments and evidence that could have been presented in the proceedings below, or at the latest could have been presented during briefing on the merits of the appeal.

When the Board—for its own purposes in reviewing the case—ordered the Regional Director to complete the record, the Board allowed interested parties to respond to the supplementation, but did not reopen briefing on the merits. To the extent that the Regional Director's supplemented record might provide grounds to reopen one or more issues, notwithstanding Appellant's failure to object to the record as originally constituted, Appellant was thus provided an opportunity to make such an argument. Appellant's response, however, raises a host of new arguments that could have been, but were not raised previously, either in the proceedings below or during briefing on the merits. Appellant does not even attempt to offer a justification for her failure to raise these arguments earlier.

The same is true for the new evidence offered by Appellant, purporting to show that Brenda and Clarence withdrew or revoked their consent to the ROW before it was approved by BIA. Neither of these purported revocations is included in BIA's record, either the original or as supplemented. Nor has Appellant provided any evidence, or even alleged, that these documents were delivered to BIA, i.e., that the purported revocations were communicated to BIA. Appellant does not explain when she first obtained copies of these documents from her siblings, or why she did not submit them to the Regional Director during her appeal from the Superintendent's grant of the ROW.<sup>4</sup>

The Board concludes that Phillips 66's motion to strike is well-founded. Thus, the Board declines to consider Appellant's new arguments and new evidence submitted for the first time after the Regional Director's submission of the remainder of the record.

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<sup>4</sup> Neither Brenda nor Clarence appealed from the Regional Director's decision, and neither participated in this appeal.

## Standard of Review

The Board reviews a regional director's decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Adakai v. Acting Navajo Regional Director*, 56 IBIA 104, 107 (2013); *see also Nemont Telephone Cooperative, Inc. v. Acting Rocky Mountain Regional Director*, 55 IBIA 75, 79 (2012). We review legal determinations and the sufficiency of the evidence *de novo*. *Adakai*, 55 IBIA at 107. An appellant bears the burden of showing error in a regional director's decision. *Dobbins v. Acting Eastern Oklahoma Regional Director*, 59 IBIA 79, 87 (2014).

## Discussion

### I. Statutory Framework

BIA, exercising the authority of the Secretary of the Interior, has the authority to grant oil pipeline ROWs across allotted Indian trust lands. *See* 25 U.S.C. §§ 321 - 325; *see also* 25 C.F.R. Part 169 (implementing regulations). BIA may renew a ROW across an allotment without all of the individual landowners' consent when "the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant." 25 U.S.C. § 324; *see* 25 C.F.R. § 169.3(c)(2) (same). Unless properly waived by the landowners and approved by BIA, the landowners must receive no less than fair market value for any grant or renewal of a right-of-way across trust land, and may receive more than fair market value. 25 C.F.R. § 169.12.

### II. Majority Consent

As noted earlier, in her opening and reply briefs, Appellant did not contend that the evidence in the record was insufficient to support BIA's finding that majority consent to the ROW had been obtained. While adding the unexplained qualifier that the consent forms in the record "allege" a sufficient majority of consenting signatures on the allotments, Appellant directed her challenge to the *manner* by which consent was obtained from the landowners. Opening Br. at 11; *see also* Reply Br. at 6.

But to the extent Appellant intended to challenge the sufficiency of the evidence in the record, we conclude that the Regional Director's determination that majority consent was obtained is supported by the record. The record includes copies of consents signed by landowners whose collective ownership interest in the Allotment is 58.125%. *See* Consent Forms (AR Tab 13); *see also* Title Status Report, July 28, 2011 (AR Tab 11). It is undisputed that Appellant did not consent to the ROW, and undisputed that BIA did not purport to include Appellant's fractional interest to calculate the consent obtained. To the

contrary, the Regional Director concluded that Appellant's consent "was not required because the other beneficial co-owners of [the Allotment] had already provided consent in excess of 58 percent." Decision at 2.<sup>5</sup>

Appellant also contends that the landowners' consents were improperly obtained.<sup>6</sup> First, Appellant argues that the consent forms "are misleading and appear calculated to obtain allottee consent through obfuscation." Opening Br. at 11. The consent forms identify the amount of compensation to be paid for the total acreage affected by the ROW, and separately state, in bold lettering just above the signature line, that "[p]ayment will be made . . . in the amount of your proportionate share of the Allotment." Consent Forms (AR Tab 13). The consent forms included in the record also include the individual landowner's fractional interest in the Allotment, immediately below the signature line. *See id.* What the consent forms do not do is provide the landowners with the calculation of the dollar amount of their proportionate share of the compensation. The Board agrees that the forms would be more helpful to landowners if they included both the total amount of compensation for the acreage affected, and the specific amount to be paid to the individual, based on his or her proportionate share. But we are not convinced that the forms, on their face, are necessarily confusing or misleading, and thus to the extent Appellant contends that the consents given are *per se* invalid based on the forms, we disagree. In addition, we note that Appellant has failed to provide evidence that any of the landowners who did consent to the ROW renewal were misled or deceived by the consent forms.<sup>7</sup>

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<sup>5</sup> Elsewhere in the Decision, the Regional Director states that those consenting owned a 60% interest in the Allotment, but the consent forms in the record add up to 58.125%, which is still a majority. *See* 25 U.S.C. § 324; 25 C.F.R. § 169.3(c)(2).

<sup>6</sup> The parties dispute whether Appellant's argument about the validity of the consents was raised in the proceedings below. In her Statement of Reasons to the Regional Director, Appellant argued that BIA was taking advantage of the landowners' "limited financial means and legal sophistication" to "intimidate allottees into giving their consents, rather than informing them of their rights should they not give their consent." Statement of Reasons, Nov. 7, 2011, at 5-6 (AR Supp. Tab 5). Thus the record shows that Appellant objected in the prior proceedings to the manner in which consent was obtained. Although arguably some arguments on appeal regarding the manner in which consent was obtained are new or more specific, we decline to bar them from consideration.

<sup>7</sup> Although we have granted Phillips 66's motion to strike the new evidence submitted by Appellant late in this appeal, we note that the self-styled refusal forms submitted by Appellant and purportedly signed by Brenda and Clarence Gopher assert that they would not have consented to the ROW had they known that "ConocoPhillips was not offering . . . the comparable payment amount as the Blackfeet Tribal Government was being paid."

(continued...)

Second, Appellant argues that the landowners may have been coerced into consenting to the renewal. Appellant attached to her opening brief an affidavit from her brother, Mike Gopher, describing his experience with Phillips 66 representatives. Opening Br., Attachment (Affidavit of Mike Gopher, Mar. 27, 2012). Gopher's affidavit is presented for the first time on appeal. As previously stated, the Board does not usually consider evidence that could have been, but was not, presented to the decision maker in the prior proceedings. *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 307 (2014); *DeFoe v. Acting Midwest Regional Director*, 58 IBIA 1, 7 (2013). We find no grounds to depart from that practice here and thus conclude that Gopher's affidavit is not properly before the Board.

But even if we considered Gopher's affidavit, we would not find that it is sufficient to satisfy Appellant's burden of proof on appeal to demonstrate that the consents given were coerced and invalid. Gopher contends that representatives of Phillips 66 sought to coerce him into consenting to the ROW, but that he refused. Appellant does not, however, provide any evidence that any of the landowners who did consent did so out of coercion. And whatever pressure Mike Gopher felt to agree to the renewal apparently was not sufficient to coerce him into granting consent. Thus, Gopher's affidavit would not be sufficient to satisfy Appellant's burden to demonstrate that majority consent was not properly obtained for the ROW.<sup>8</sup>

### III. Fair Market Value

Appellant also argues that BIA breached its trust obligation to the landowners by approving the ROW renewal for less than fair market value, or by not attempting to obtain more than Phillips 66 agreed to pay. Opening Br. at 16. Appellant agrees that fair market value may be determined by a "comparison of similar transactions," Appellant's Reply to BIA, May 25, 2012, at 3, but she argues that BIA failed to consider, as a comparable transaction, the Right-of-Way Consent Agreement (Agreement) between the Tribe and

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(...continued)

Appellant's Response, Ex. I ("Refusal of the ConocoPhillips Pipeline 'Renewal'"). But that assertion would not support a conclusion that the landowners were misled by the consent forms as to the amount of compensation that they would actually receive for the ROW.

<sup>8</sup> It is not clear whether Appellant, who refused her consent, even has standing to challenge the validity of the consents that were given, but we have addressed her arguments in the interest of completeness. In contrast, we do not question that Appellant has standing to challenge the sufficiency of the compensation paid her as a landowner.

Phillips 66. Opening Br. at 2-3, 15-17 & Ex. C. According to Appellant's calculation, the Agreement resulted in the Tribe receiving "over \$42,000 per tract per year." Notice of Appeal at 7. This, according to Appellant, demonstrates that BIA agreed to the ROW across the Allotment for far less than fair market value, even considering the fact that the Agreement included factors other than the fair market value of the affected tribal lands.

For several reasons, we conclude that Appellant has not shown that it was unreasonable for the Regional Director to rely on the OAS-approved appraised value, and not to consider the Agreement as a transaction that must be treated as a "comparable" for purposes of determining the fair market value of the ROW across the Allotment. First, the Regional Director provided a reasonable explanation for why the Agreement is not a comparable transaction, for appraisal purposes. The Agreement recites that the Tribe is entering into it "in both its sovereign capacity and in its capacity as a landowner," and that the Tribe "possesses sovereign powers within its Reservation, including but not limited to Tribal Lands . . . and all activities thereon." Agreement at 1 (Opening Br., Ex. C). The compensation agreed to includes "[a]ny tax payments required of [Phillips 66] under the Blackfeet Tax Code or any other tribal ordinance or law, whether past, present or future." *Id.* at 11. Phillips 66's annual payments "shall constitute and be deemed to be the full and complete payment by [Phillips 66] of any and all Tribal taxes, fees, permits, and assessments of any kind or character assessed or levied against [it] with regard to the subject matter of [the] Agreement." *Id.* And in exchange for its consent to the ROW, the Tribe also agreed to refrain from enacting certain tribal laws, *id.* at 13, and agreed to certain use of tribal waters by Phillips 66, *id.* at 14. Thus, on its face, the Agreement encompasses negotiated compensation involving tribal authority and rights, and various matters, other than those ordinarily limited to a straightforward sale of a ROW.

In addition, even assuming that the fair market value of the Tribe's lands is embedded within the Agreement, Appellant provides no means by which an appraiser, applying the Uniform Standards of Appraisal Practice, would be able to make proper adjustments in order to "extract" all of the differences between the Tribal transaction and an individual landowner transaction, in order to estimate the fair market value of individually owned lands. Appellant's speculation that there is a fair-market-value component of the Agreement that is well above the amount Phillips 66 agreed to pay for the ROW across the Allotment is not sufficient to meet her burden of proof on appeal.

Moreover, we note that there is a substantial question whether a transaction by the sovereign Tribe, involving tribal lands that are immune from condemnation, could appropriately be considered a "comparable" for purposes of determining the fair market value of individually owned lands that are not immune from condemnation. *See* 25 U.S.C. § 357. To be clear, the fact that individually owned Indian lands are subject to

condemnation does *not* mean that the *fair market value determination* for those lands may be based on sales that were made under a threat of condemnation. Appellant correctly states the principle that a comparable transaction, for appraisal purposes, is one in which a willing seller and a willing buyer agree to a sales price in an arms-length transaction, without threat of condemnation. Opening Br. at 16. It does not necessarily follow, however, that the transaction by a sovereign, involving lands *immune* from condemnation, and involving numerous other factors, would be comparable to a “fair market” transaction between individual landowners, and in our view Appellant has not demonstrated that to be the case.

Appellant has not demonstrated that the transaction between the Tribe and Phillips 66 is a comparable transaction to that of a sale of a ROW across individually owned lands, and thus she has not met her burden to show that the Regional Director acted unreasonably in relying on the OAS-approved fair market value without considering the Agreement.<sup>9</sup>

And finally, whether or not Phillips 66 might have been willing to pay more than twice the appraised fair market value for the ROW across the Allotment, the regulations do not impose on BIA an affirmative duty to Indian landowners to negotiate or insist upon a higher rate of compensation than fair market value for a ROW renewal. *See* 25 C.F.R. § 169.12 (consideration for a ROW shall be “not less than . . . fair market value”). Thus, we are not convinced that BIA abused its discretion by approving the ROW based on the amount of compensation that Phillips 66 agreed to pay.

In summary, Appellant has not demonstrated that, based on the record before him, the Regional Director acted unreasonably in relying on the appraised fair market value of the Allotment, as approved by OAS, to determine that Phillips 66’s offer was no less than the fair market value of the ROW.

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<sup>9</sup> We reject Phillips 66’s argument that the Board must accept OAS’s opinion of fair market value without question, and we agree with Appellant that our decision in *Hohman v. Acting Rocky Mountain Regional Director*, 52 IBIA 245 (2010), does not stand for that proposition. Whatever limitations may exist on our jurisdiction to consider appeals from OST decisions, we have not held that we are precluded—in an appeal from a BIA decision—from reviewing the sufficiency of the evidence for BIA’s decision. We have rejected the argument that BIA’s reliance on a professionally prepared appraisal, including one approved by OST, is *per se* reasonable or beyond our review. *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 1-3 (2008).

## 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 affirms the Regional Director's December 2, 2011, decision.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge