INTERIOR BOARD OF INDIAN APPEALS

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

60 IBIA 218 (04/29/2015)

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United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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NAVAJO NATION and HOPI TRIBE, Appellants,	)	Order Affirming Decision in Part, Vacating in Part, and Remanding
v.	)	Docket No. IBIA 13-008 13-009
WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	April 29, 2015

The Navajo Nation (Nation) and the Hopi Tribe (Tribe) appealed to the Board of Indian Appeals (Board) from an August 23, 2012, decision (Decision) of the Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision determined compensation owed by the Nation to the Tribe for use by the Nation's members of the Hopi Partitioned Lands (HPL) in 1998, and in 1999 for use by Navajo non-signers of "accommodation agreements,"[1] for grazing and farmsites.

The Nation and the Tribe each challenge, as either too high or too low, the Regional Director's determination of the amount owed for livestock grazing. Both tribes raise the same arguments they raised in an earlier appeal to the Board regarding the 1996-1997 period, e.g., the proper ratio for converting animal units[2] to sheep units, the daily forage consumption of sheep, and the compensation owed for trespass in addition to the cost of replacement forage. *See Hopi Tribe and Navajo Nation v. Western Regional Director*, 58 IBIA 71 (2013) (*Hopi II*). In *Hopi II*, we affirmed the Regional Director's determination of compensation. In this appeal we decline to revisit the merits of the same issues and arguments considered in *Hopi II*, and we affirm as to those issues on the same grounds, though in some cases we briefly expand on our reasoning.

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[1] Navajos who sign accommodation agreements with the Tribe are allowed to continue to occupy HPL lands, but the Nation owes compensation to the Tribe for use by both non-signers and signers of the agreements.

[2] An "animal unit" is defined as "one adult cow with unweaned calf by her side or equivalent thereof based on comparative forage consumption." 25 C.F.R. § 168.1(*l*).

In this appeal, in addition to arguments raised in *Hopi II*, the Tribe challenges the Regional Director's decision to apply the grazing rental rate to "over-permit" livestock in 1999, a period in which accommodation agreements were being negotiated, instead of charging the trespass rate. We agree with the Tribe that the Regional Director's justification for this portion of the Decision is flawed, and therefore we vacate and remand on this issue for further consideration and a new determination of whether to apply the grazing rental rate or the trespass rate to over-permit livestock, and a proper justification for the choice made.

The Nation challenges the Regional Director's finding that the price of corn was $1.50 per pound in 1998, as relevant to determining compensation for farmsites. We agree with the Nation that the Regional Director failed to reconcile two conflicting reports of the price of corn for that year. One stated that the price was $1.50, another stated that the price was $1.20, and both identified the same individual as the source of the information. It was arbitrary for the Regional Director to simply select one figure over the other, with no explanation or further fact finding to reconcile the discrepancy, and therefore we vacate the Decision on this issue and remand for further proceedings.

Both the Nation and the Tribe challenge the Regional Director's failure to directly address, or at least clarify, the issue of compensation for use of the HPL in 1999 by Navajos who did sign accommodation agreements. We vacate the Decision to the extent it could be construed as determining that an earlier bill sent by the Regional Director for 1999 for accommodation agreement signers constituted a final determination. That bill failed to include appeal rights, and thus was subject to the tolling provision of 25 C.F.R. § 2.7 and the automatic stay provision of § 2.6.[3] Moreover, the Regional Director expressly represented to the tribes in 1999 that the bill for accommodation agreement signers for that year would be reissued, with appeal rights, which was never done.

Finally, we have determined that even with respect to portions of the Decision that we otherwise affirm, e.g., as to methodology, the Regional Director made several calculation errors, and we vacate those portions of the Decision to the extent necessary and remand for correction of those errors.

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[3] Section 2.7 requires BIA decisions to be in writing, with appeal rights, and provides that the failure to include appeal rights tolls the time period for appealing the decision. Section 2.6 provides that a decision that is subject to appeal automatically remains without effect until the appeal period expires and no appeal has been filed.

Background

I. The Nation's Liability for Use of the Hopi Partitioned Lands

This case concerns the use of a long-disputed area of land between the Navajo and Hopi reservations. In 1962, a special district court panel held that the Tribe and the Nation shared "undivided and equal interests" in what was then known as the Joint Use Area. *Hopi II*, 58 IBIA at 72 (citing *Healing v. Jones*, 210 F. Supp. 125, 129-30, 192 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (*per curiam*)). The court's decision did not resolve the dispute, and in 1974 Congress passed the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d *et seq.* (Settlement Act), which eventually resulted in partitioning the Joint Use Area between the two tribes. Today, the land partitioned to the Tribe is known as the HPL. When the HPL was partitioned to the Tribe, many Navajos resided on, farmed, and grazed livestock on that land. The Settlement Act requires the gradual relocation of Navajos to the land partitioned to the Nation, *see* 25 U.S.C. § 640d-15(a), but in the meantime requires the Nation to "pay to the [Tribe] the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the [Tribe] . . . subsequent to the date of the partition thereof." *Id.*

The calculation of annual rent payments on the HPL has spurred much litigation and the Nation and the Tribe have repeatedly raised many of the same issues they raise here. Most recently, the United States District Court for the District of Arizona (District Court or Court) and the Board issued decisions regarding grazing and farmsite rent for the 1979-1995 and 1996-1997 periods, respectively, that directly addressed or are relevant to several issues raised in this appeal.

II. *Hopi I*: District Court Decision for the 1979-1995 Compensation Determinations

On December 30, 2009, the District Court reviewed various decisions of the Assistant Secretary – Indian Affairs (Assistant Secretary) regarding grazing and farmsite rents for 1979 through 1995. *Hopi Tribe v. Navajo Nation*, No. CV 85-801 PHX-EHC (D. Ariz. Dec. 30, 2009) (*Hopi I*). As relevant here, the Nation raised a variety of challenges to the Assistant Secretary's determination of compensation owed for livestock grazing, including his acceptance of an appraisal that used the "McGregor Range," a tract of public land, as comparable to HPL lands for purposes of determining grazing rental value; his inclusion of fence and maintenance costs in the rental rate; and his use of 6 pounds per day as the amount of forage consumed by sheep for purposes of calculating trespass fees. The Tribe, in turn, challenged the Assistant Secretary's modification of the ratio for converting sheep units to animal units from 4:1 to 5:1. *Id.* at 49.

The Court rejected the Tribe's challenge to the Assistant Secretary's conversion ratio, upholding his use of the 5:1 ratio. The Court rejected several of the Nation's challenges,

but agreed with the Nation that the Assistant Secretary's decision to change the conversion ratio to 5:1 required reconsideration of the Assistant Secretary's 6-pounds per day per sheep unit forage consumption figure in determining forage replacement costs. *Id*. at 55-56. The Court found that the Tribe did

> not meaningfully dispute that *if* the proper conversion ratio is 5:1, the forage replacement fee for trespassing livestock is too high. Because . . . the Court concludes that the Assistant Secretary did not act arbitrarily and capriciously in adopting the 5:1 conversion ratio, the Court finds that the trespass component of the 1979-95 grazing rental was overstated where it was not adjusted based on the modification of the conversion ratio. Accordingly, the Court will grant the Nation's motion for review and remand to the Assistant Secretary to consider whether the trespass charges are overstated in light of the modification of the conversion ratio.

Id. The Court also agreed with the Nation that the Assistant Secretary's decision to add fence and maintenance costs was arbitrary and capricious because the figure included costs embedded in the appraisal that used the McGregor Range as comparable to the HPL. *Id.* at 56.[4]

III. *Hopi II*: Board's Decision for the 1996-1997 Compensation Determination

Following the District Court's decision, the Regional Director issued a compensation determination for the years 1996-1997. The Regional Director applied the 5:1 ratio in all calculations requiring a conversion between sheep units and animal units, recalculated forage consumption by sheep to 5.2 pounds per day, declined to apply a 1.6 "range impact multiplier" to the cost of replacement forage for trespassing livestock, excluded additional costs for water and fence maintenance, and determined that the price of corn in 1997 was $0.95 per pound. In *Hopi II*, we affirmed the Regional Director's compensation determinations for 1996-1997. 58 IBIA at 72.[5]

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[4] The District Court also decided a variety of issues relating to farmsite rent determinations and orchard production that are not relevant to the issues to be decided in this appeal. *Hopi I* at 58.

[5] On March 18, 2014, the Court in *Hopi I* entered a stipulation and order through which the Tribe and Nation agreed not to challenge the Board's decision in *Hopi II*, without waiving any claims, arguments or rights with respect to other rental years. *See Hopi I*, No. 85-801 PHX-SRB (Mar. 18, 2014, Order); *id*. (Mar. 14, 2014, Stipulation and Proposed Order Regarding Settlement of 1996-1997 Grazing and Farmsite Rental Determinations).

IV. BIA's 1999 Rent Calculations for Accommodation Agreement Signers

Beginning in 1997, the Tribe and certain Navajo residents on the HPL entered into accommodation agreements to allow these residents to remain on the HPL, subject to the payment of compensation and compliance with enumerated conditions. Tribe Opening Brief (Br.), Dec. 14, 2012, Exhibit (Ex.) 1 (example of accommodation agreement, signed Mar. 17, 1997). The individual accommodation agreements were based on, and incorporated, a master Agreement signed by the Tribe, the Nation, and BIA. *See id.*, Ex. 1 at 1. Navajos entering into accommodation agreements could seek accommodations for homesites, farmsites, grazing, or other uses of the HPL. *Id.*, Ex. 1 at 4. Pursuant to the agreement, the Tribe was "entitled to compensation for its loss of use of part of the HPL" and "[u]nless and until the compensation [was] agreed to separately with the Nation, its payment [was] guaranteed pursuant to 25 U.S.C. § 640d-15(a)." *Id.*, Ex. 1 at 11.

By June of 1999, the Regional Director had received 68 individual accommodation agreements. Letter from Regional Director to Nation, Sept. 16, 1999, at 1 (1999 Bill) (Administrative Record (AR) Tab 1, Ex. 2). The Regional Director sent a letter to the Nation stating that, in the absence of a separate agreement between the Nation and the Tribe on the rental amount, BIA had determined the rent pursuant to 25 U.S.C. § 640d-15(a), which totaled $109,834.26. *Id.* The Regional Director did not provide appeal instructions in his determination, as required by 25 C.F.R. § 2.7.[6]

Following correspondence with the Nation and the Tribe, the Regional Director sent another letter to the Nation, agreeing that "as long as the Accommodation Agreement rents are set pursuant to 25 U.S.C. § 640d-15(a), they are subject to appeal," and agreeing to reissue the 1999 rent bill for accommodation agreement signers by following the same procedures used for previous billings. Tribe Opening Br., Ex. 6 (Letter from Regional Director to Nation, April 5, 2000). It is undisputed that the Regional Director did not reissue the bill for 1999 for accommodation agreement signers.

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[6] 25 C.F.R. § 2.7(c) provides:

> All written decisions, except decisions which are final for the Department pursuant to § 2.6(c), shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

V. Superintendent's Determination of 1998 Rent and of 1999 Rent for Non-Signers of Accommodation Agreements, and Appeals to the Regional Director

On April 12, 2000, the Superintendent issued rent determinations for 1998 and for non-signers of accommodation agreements for 1999. Letter from Superintendent to Nation and Tribe (Superintendent's Decision) (AR Tabs 11 & 12). The Nation and the Tribe appealed the Superintendent's decision. *See* Tribe Notice of Appeal to Regional Director, May 22, 2000 (AR Tab 7); Nation Notice of Appeal to Regional Director, May 30, 2000 (AR Tab 6); Tribe Amended Statement of Reasons, June 5, 2000 (AR Tab 4).

The Superintendent's decision was issued while the litigation in *Hopi I* was still pending before the District Court, and thus many of the issues raised by both tribes paralleled those being raised in the litigation. There were no further filings in the case until 2010, when the Nation withdrew the portion of its appeal concerning the 1998 and 1999 homesite rent determinations, while expressly maintaining its appeal of the 1998 and 1999 grazing and farmsite rent determinations. Nation Withdrawal of Appeal, Aug. 6, 2010 (AR Tab 1, Ex. 19).

On August 23, 2012, following the District Court's decision in *Hopi I*, the Regional Director issued his Decision on the Nation's and the Tribe's appeals. Decision (AR Tab 1). The Regional Director first concluded that neither the Nation nor the Tribe had appealed the 1999 bill for accommodation agreement signers, and thus he did not further address that issue. *Id.* at 3 n.1.

With respect to the 1998 bill and the 1999 bill for non-signers of accommodation agreements, the Regional Director concluded, in relevant part, that: (1) the Superintendent erred in using a 4:1 conversion ratio rather than a 5:1 conversion ratio in calculating grazing rates; (2) the Superintendent's calculation of trespass charges was erroneous and the trespass fee must be calculated using a forage factor of 5.2 pounds per sheep per day and the range impact multiplier penalty should not be applied; (3) the Superintendent's use of the McGregor Range as a comparable property for establishing annual grazing rental determinations was appropriate, although he erred in using rental rate figures from the wrong years to determine HPL grazing rates; (4) the Superintendent's finding of the price of corn, used to calculate farmsite rental rates, was adequately supported; (5) the Superintendent used the appropriate average rental rates in assessing per acre and per year charges for farmsite rents; (6) the Superintendent erred in billing the Nation the trespass rate for "over-permit" livestock in 1998, instead of using the same rate as for permitted livestock; and (7) the Superintendent appropriately excluded water and fence maintenance fees from the rental determination. *See id.* at 5-15. The Regional Director's billing calculations are summarized below:

1998 Bill					
Grazing					
	Sheep Units	**McGregor Animal Unit Year Long (AUYL)**	**Conversion Ratio**	**Sheep Unit Year Long (SUYL)**	**Subtotal**
Permitted Livestock	1,166	$11.06/AU* 12 =$132.72	5:1	$132.72/5= $26.54	1,166*$26.54=$30,945.64
Over-Permit Livestock	1,869	$11.06/AU* 12 =$132.72	5:1	$132.72/5= $26.54	1,869*$26.54=$49,603.26
	Sheep Unit Days (SUD)	**Hay Price/lb.**	**Pounds of Forage/ SUD**	**SUD**	**Subtotal**
Trespass Livestock	9,950.25	$0.0855	5.2	$0.0855*5.2= $0.4446	9,950.25*$0.4446=$4,423.88
Farmsites					
	Number	**Total Acres**	**Rent/ Acre/ Year**		**Subtotal**
Farmsite Rent	53	105.5	$112.32		105.5*$112.32=$11,850.00
			1998 Total		**$96,822.78**
1999 Bill for Non-Signers of Accommodation Agreements					
Grazing					
	Sheep Units	**McGregor AUYL**	**Conversion Ratio**	**SUYL**	**Subtotal**
Permitted Livestock	110	$13.87/AU* 12 =$166.44	5:1	$166.44/5= $33.29	110*$33.29=$3,661.90
	Sheep Unit Days	**Hay Price/lb.**	**Pounds of Forage/SUD**	**SUD**	**Subtotal**
Trespass Livestock	11,112.5	$0.08427	5.2	$0.08427*5.2= $0.4382	11,112.5*$0.4382= $4,869.50
Farmsites					
	Number	**Total Acres**	**Rent/ Acre/ Year**		**Subtotal**
Farmsite Rent	6	10	$112.50		10*$112.50=$1,125.00
		1999 Non-Accommodation Total			**$9,656.40**
		Grand Total for 1998 & 1999 Non-Signers of Accommodation Agreements			**$106,479.18**[7]
1999 Bill for Accommodation Agreement Signers ("unappealed")					
			Grazing Subtotal		**$83,011.95**
			Farmsites Subtotal		**$13,020.00**
1999 Accommodation Total					**$96,031.95**

[7] While the actual total of the Regional Director's rent calculations for 1998 was $96,8*22.78*, the Regional Director mistakenly stated that the total for 1998 was $96,8*82.78*; he then mistakenly calculated the total rent owed as $106,*539.18*, rather than the actual total of $106,*479.18*. *Compare* Decision at 4, 15 *with* Summary for 1998 and 1999 Rent Calculations (AR Tab 1, Ex. 8).

Id.; Summary for 1998 and 1999 Rent Calculations; Trespass Calculations (AR Tab 1, Ex. 12).

Both the Nation and the Tribe timely appealed the Decision to the Board. The Nation and the Tribe filed opening briefs, answer briefs, and reply briefs. The Regional Director did not file any briefs in this case.

Discussion

I. Standard of Review

The Regional Director's determination of grazing and farmsite rent and trespass fees involves an exercise of discretion. *Hopi II*, 58 IBIA at 75. We review the Decision to ensure that it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Hicks v. Northwest Regional Director*, 59 IBIA 285, 290 (2015). We review issues of law and challenges to the sufficiency of the evidence *de novo*. *Id.*; *Hopi II*, 58 IBIA at 76. Appellants bear the burden of showing error in the Regional Director's decision. *Hicks*, 59 IBIA at 290.

As we have previously explained, "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.'" *Hopi II*, 58 IBIA at 76 (alterations in original) (quoting *Navajo Nation v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 15 IBIA 179, 185 (1987)) (some internal quotation marks omitted).

II. Applicable Law

The Settlement Act requires that the Nation "pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of [the HPL]." 25 U.S.C. § 640d-15(a). In calculating the "fair rental value," the purpose is "to estimate the highest and best use of the land." *Hopi I* at 51 (internal quotation marks omitted). Therefore, BIA should not determine what income Navajo individuals actually generated from livestock grazing or the use of farmsites, but must instead determine what income could have been generated if the grazing land and farmsites had been rented on the open market. *Id.* at 51-52. In addition, for livestock that are trespassing on the HPL, the Department has recognized that the measure of compensation owed under § 640d-15(a) differs from the appraised rental value, and instead is based on compensatory damages for the impact of the trespass. *See* Assistant Secretary Letter Decision, Feb. 7, 1997, at 4 (AR Tab 1, Ex. 11) (using forage replacement cost to calculate trespass damages).

III. 1999 Rent Determination for Accommodation Agreement Signers

Both the Tribe and the Nation challenge the Decision's treatment of the 1999 rent for accommodation agreement signers. The Tribe argues that the Decision improperly failed to bill for this use of the HPL, thus undervaluing the total amount of rent owed to the Tribe for 1999. Tribe Opening Br. at 8-10. The Nation construes the Decision as erroneously treating the 1999 bill as final because it was not appealed by either tribe. Nation Opening Br., Dec. 13, 2012, at 7-8.

We agree with the Tribe that BIA's decision making for compensation owed for 1999 is incomplete. And we agree with the Nation that to the extent the Decision could be construed as concluding that the bill for accommodation agreement signers for 1999 was final, it must be vacated. It is undisputed that the bill for this portion of compensation owed to the Tribe was never issued by BIA with appeal rights, and thus remains nonfinal. *See* 25 C.F.R. § 2.7(b) ("[T]he time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with [§ 2.7(c)]."); *see also Estate of Uriah "Red" Alexander*, 59 IBIA 159, 163 n.4 (2014) ("BIA's failure to comply with § 2.7 does not automatically render the decision invalid, . . . but failure to provide appeal rights tolls the appeal period, thereby preventing expiration of the appeal period for purposes of rendering the decision final and effective." (internal citations omitted)). Moreover, the Regional Director expressly committed BIA to reissuing the bill in compliance with 25 C.F.R. § 2.7.[8]

Thus, we vacate the Decision to the extent it may be construed as concluding that the 1999 bill for accommodation agreement signers became final.

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[8] Because the Regional Director expressly committed to reissuing the bill for 1999, with appeal rights, we need not decide whether the lapse of time might otherwise bar an appeal, notwithstanding § 2.7, in an appropriate case. The absence of appeal rights in a BIA decision does not *prevent* a party from filing an appeal, and whether the tolling provision in § 2.7 was intended to allow parties, who otherwise knew or should have known of their appeal rights, to wait indefinitely to appeal, is an issue we need not address here. We note that in the present case, there were Federal court proceedings involving compensation determinations for prior years, and thus both tribes may reasonably have believed that when those were concluded, BIA would take the outcome of those proceedings into consideration before reissuing the 1999 bill for accommodation agreement signers.

IV. Compensation for Livestock Grazing

A. Introduction

The Tribe and the Nation dispute several aspects of the Regional Director's grazing rent determinations for permitted and over-permit livestock, and his determination of fees for trespassing livestock. For the reasons discussed in *Hopi II*, we affirm the Regional Director's use of the 5:1 conversion ratio to calculate the grazing rental fee for permitted livestock, and we affirm his decision not to add costs for water and fence maintenance.

We vacate the Regional Director's decision to use grazing rent as the measure of compensation for over-permit livestock because the Regional Director's rationale is based on an unsupported interpretation of correspondence from the Tribe and a misreading of a prior court decision. While we do not hold that the Regional Director is required as a matter of law to apply trespass fees to over-permit livestock, as argued by the Tribe, the Regional Director must articulate a reasonable basis, both as a matter of fact and as a matter of law, for whichever measure of compensation he selects.

B. Grazing Rent for Permitted Livestock

To calculate the rent owed for permitted livestock, the Regional Director first converted the number of sheep, cows, and horses grazed on the HPL each year to Sheep Units (SU). The Regional Director stated that the Court in *Hopi I* "determined that a 5:1 conversion ratio is the appropriate factor to be utilized" when converting AUs to SUs for determining annual grazing rates on HPL lands.[9] Decision at 5.

The Regional Director then affirmed the Superintendent's determination that the HPL was comparable to the McGregor Range, and located the animal unit month (AUM)[10] rates for the McGregor range for 1998 and 1999. *Id.* at 5-6, 8. He determined that the Superintendent had erroneously used bids for the wrong years when determining the AUM rates for 1998 and 1999. *Id.* at 14. Citing a 1999 rental rate study of the HPL prepared for the BIA by Arvel M. Hale (the Hale Report), the Regional Director determined the proper AUM rates ($11.06 for 1998 and $13.87 for 1999), the animal unit

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[9] Despite the Regional Director's stated intention to use a 5:1 conversion ratio, he mistakenly used the Superintendent's SU totals, which were based on a 4:1 conversion ratio for converting AUs to SUs, under which the number of sheep are multiplied by 1, the number of cows by 4, and the number of horses by 5. *Compare* Summary for 1998 and 1999 Rent Calculations *with* Superintendent's AR at 20-21 (1998 HPL Permittees) (AR Tab 1, Ex. 3) and *id.* at 268 (1999 HPL Permittees).

[10] An AUM is the amount of feed or forage required by an AU for one month.

year long (AUYL) rates ($132.72 for 1998 and $166.44 for 1999), and the sheep unit year long (SUYL) rates ($26.54 for 1998 and $33.29 for 1999).[11] *Id.* at 5-6, 14; *see also* Hale Report, Feb. 24, 1999, at Grazing Page 12 (AR Tab 1, Ex. 13). Multiplying the SUYL rates by the number of permitted SUs grazed each year, the Regional Director determined the permitted grazing fee to be $30,945.64 for 1998 and $3,661.90 for 1999. Summary for 1998 and 1999 Rent Calculations.

The Regional Director rejected the Tribe's contention that fence and water maintenance costs should be included in the grazing determinations. Decision at 13-14. Citing *Hopi I*, he reasoned that, while BIA had previously included water and fence maintenance costs in rent determinations, this was erroneous because these costs were already included in the McGregor range annual rates. *Id.* at 13. He explained that, on both the HPL and the McGregor range, the lessee bids for grazing privileges that include the value of forage and the cost of Bureau of Land Management (BLM)-maintained water facilities and the repair of damaged fences. *Id.* at 14.

1. 5:1 Conversion Ratio[12]

The Tribe argues that the Regional Director erred in using a 5:1 conversion ratio, raising the same arguments that it did in *Hopi II*, but with respect to the 1998-1999 grazing rent.

For the reasons discussed in *Hopi II*, we affirm the Regional Director's use of the 5:1 conversion ratio for determining grazing rent for 1998 and 1999. We are not convinced

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[11] While the Regional Director stated that he would use the McGregor Range rates from the Hale Report—and he actually used these rates in his calculations—in the Decision, he mistakenly quotes different values derived from the McGregor Range rate table used by the Superintendent. *See* Decision at 14; Tribe Amended Statement of Reasons at 4-5; Tribe Amended Statement of Reasons, Ex. E (range rate for 1998); Superintendent's AR at 24 (range rate for 1999). Using these different McGregor Range values, the Regional Director stated that the SUYL rate for 1998 was $34.33, and the rate for 1999 was $40.96. Decision at 14. The Regional Director also mistakenly used a 4:1 conversion ratio to derive these SUYL rates from the given AUYL rates in the McGregor Range table, although he clearly stated that a 5:1 conversion ratio should be used. *See id.* at 5-6,14. Despite these numerous inconsistencies in the Decision, the McGregor Range AUM rates actually used by the Regional Director in his calculations—derived from the Hale Report—have not been challenged by either party on appeal.

[12] To the extent the Tribe also disputes the Regional Director's use of a 5:1 conversion ratio in calculating trespass fees, our discussion of the conversion ratio here applies equally to trespass charges.

that there is any reason in this appeal to revisit the issue, nor has the Tribe alleged any change in factual circumstances between the 1996-1997 period and the 1998-1999 period that would warrant a different conversion ratio for one period than the other.

2. Water and Fence Maintenance Costs

The Tribe contends that there are significant differences between the McGregor Range and the HPL with respect to water and fence maintenances costs, and therefore the addition of those costs is necessary to properly reflect the fair market value of grazing uses of the HPL. Tribe Opening Br. at 29-32. The Nation responds that the Hale Report found that the HPL is comparable to the McGregor Range and that any additional water and fence maintenance fees would be unnecessarily duplicative. Nation Answer Br., Jan. 25, 2013, at 26-27. We agree that the Tribe has failed to show that the Regional Director erred in excluding additional costs for water and fence maintenance. As both *Hopi I* and *Hopi II* noted, because the Hale Report stated that any differences between the ranges were "minor," it would be "unreasonable" to include additional fees for water and fence maintenance. *See Hopi I* at 56-58; *Hopi II,* 58 IBIA at 83.[13] Though the Tribe points to specific differences in the provision of services on the McGregor Range compared to the HPL, the Tribe fails to argue how these differences are more than "minor" when considered in the context of all of the services provided by BLM and BIA on these lands. As was the case in *Hopi II*, the Tribe fails to provide evidence of specific costs associated with water and fence maintenance. Therefore, we uphold the Regional Director's decision not to include additional water and fence maintenance fees.

C. Measure of Compensation for Over-Permit Livestock Grazing

The Regional Director calculated the 1998 rent for livestock owned by permittees and grazed in excess of their permits at the same rate as permitted livestock. Decision at 11-12. The Regional Director reasoned that during the 1998 billing period, the negotiation and implementation of accommodation agreements was underway, the final permit numbers were still being negotiated, and both parties had asked for leeway during this time. *Id.* Specifically, the Regional Director relied on a letter from the Tribe's Chairman, dated September 29, 1997, to conclude that the grazing rental rate should apply "to honor the Tribe's request to hold off on trespass and livestock reduction actions while the Accommodation Agreement process was underway." *Id.* at 12. The Regional Director also relied on a 1982 court judgment in prior litigation involving the Joint Use Area, which

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[13] While the 1996 Hale study at issue in *Hopi I* was different from the subsequent 1999 Hale Report at issue in *Hopi II*, both reports determined that "differences between grazing permits on the McGregor Range and grazing permits on the HPL were 'minor.'" *Hopi II*, 58 IBIA at 83.

he suggested would be violated if he charged the trespass fee measure of damages for over-permit livestock, instead of the rental rate charged for permitted livestock. *Id.*; *see Hopi Tribe v. Watt*, Civ. No. 81-272 PCT-EHC, Judgment at 2 (D. Ariz. May 4, 1982) ("Defendants are required to coordinate with and obtain the concurrence of the Hopi Tribe before executing any conservation practice, including grazing control and range restoration matters, on the Hopi Reservation lands.") (AR Tab 1, Ex. 15).

In September 1997, the Tribe asked BIA to "hold off on livestock reduction until the Livestock Stocking Rate is approved." Letter from Tribe to Hopi Agency, Sept. 29, 1997 (AR Tab 1, Ex. 17). Two months later, however, the Tribe sent a second letter to BIA to "clarify" that it "had requested that the BIA refrain from impounding *permitted* livestock belonging to Navajo Families who signed the Accommodation Agreement residing on the Hopi Reservation." Letter from Tribe to Superintendent, Nov. 24, 1997, at 1 (AR Tab 1, Ex. 18) (emphasis added). In that letter, the Tribe stated that BIA should impound four categories of livestock, including "[l]ivestock that are illegally trespassing," and "[a]nimals *in excess* of permitted quota." *Id.* (emphasis added). The Tribe also stated that the animals not to be impounded "are those that are permitted and allocated adequately to owners within the HPL." *Id.*

On appeal, the Tribe argues that in light of its letter of clarification, it was an abuse of discretion for the Regional Director to bill over-permit livestock at the same rate as permitted livestock. Tribe's Opening Br. at 13-14. The Tribe contends that the presence of over-permit livestock is not authorized, and thus such livestock are, by definition, committing trespass. *See id.* at 11-12; 25 C.F.R. § 168.14 (prescribing penalties and damages for trespass on HPL and prohibiting "[g]razing livestock in excess of those numbers and kinds authorized on a livestock grazing permit approved by the [Regional] Director," and "[t]he grazing upon or driving across any of the [HPL] of any livestock without an approved grazing or crossing permit").

In response to the Tribe's arguments, the Nation contends that it would be impracticable and unjust to bill the Nation for over-permit livestock as if they were in trespass. Nation Answer Br. at 2. The Nation also argues that if the over-permit livestock are assessed trespass charges, the Nation can then only be required to pay for the number of days the livestock were actually shown to have been in trespass, rather than on a year-long basis, as is done for permitted livestock.[14] *Id.* The Nation also argues that BIA's decision not to impound the livestock of permittees during 1998, and the Superintendent's and Regional Director's decisions not to charge trespass fees for the over-permit animals, was

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[14] The Nation notes that if it is billed for these over-permit livestock as if they were in trespass all 365-days of the year, the Nation will owe $300,161.40—an amount much greater than the total rent for 1998 and 1999. Nation Answer Br. at 2.

consistent with the correspondence from the Tribe and the ongoing negotiations regarding actual permit numbers. *Id.* at 3.

We agree that the Regional Director did not satisfactorily justify his decision to apply the same rental rate to over-permit livestock as he did for permitted livestock. The grazing regulations applicable to the HPL treat over-permit livestock as trespass, and thus trespass fees are presumptively the appropriate measure of damages. While factual circumstances may provide a reasonable basis for BIA to determine compensation owed based on grazing fees, BIA must clearly, and reasonably, articulate its basis for doing so. In this case, the Regional Director's explanation, apparently relying on the Tribe's September 1997 letter, ignores the Tribe's subsequent correspondence, which does not appear to communicate the type of blanket acquiescence that the Regional Director appears to believe would be "honored" by declining to treat over-permit livestock as in trespass. Moreover, the 1982 court decision invoked by the Regional Director does not, in our view, stand for the proposition that the assessment of trespass fees for over-permit livestock would be forbidden under the terms of that decision. According to the Regional Director, that decision forbade BIA from taking action against over-permit livestock without the Tribe's concurrence. But by November 1997, the Tribe had already informed BIA that the only animals not to be impounded are "those that are permitted and allocated adequately to owners within the HPL." AR Tab 1, Ex. 18 at 1.[15]

That said, we are not convinced by the Tribe's argument that the Regional Director was required to assess trespass fees for over-permit livestock as a matter of law, in determining compensation owed to the Tribe under the Settlement Act. The Tribe itself appears to have distinguished between "trespassing" livestock and "over permitted" livestock. *See id*. Thus, there may be a reasonable basis for determining that the appropriate rate of compensation, under the Settlement Act, for over-permit livestock, or at least some over-permit livestock, is the same grazing rental rate that is charged for permitted animals. But BIA failed to clearly explain why over-permit livestock should not be treated as in trespass.

We agree with the Nation, however, that if BIA determines that trespass fees apply to over-permit livestock, BIA must have a proper evidentiary basis to support the trespass fees assessed. BIA may not simply assume, without more, that over-permit livestock were present for the entire year.

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[15] It is unclear whether "permitted" and "allocated" are two separate categories.

D. Trespassing Livestock

The Regional Director calculated the fees for trespassing livestock based on the value of the forage these animals consumed. He first converted the number of days that sheep, cows, and horses trespassed on the HPL into sheep unit days (SUD) using a 5:1 conversion ratio for a total of 9950.25 SUD for 1998 and 11,112.50 SUD for 1999. Trespass Calculations. The Regional Director stated that the standard weight for an AU is 1000 pounds, and the monthly consumption of forage—an AUM—is approximately 800 pounds of dry weight forage, based on a rate of approximately 26 pounds of forage per day. Decision at 7 (citing USDA, Natural Resources Conservation Service, National Range and Pasture Handbook, Chapter 6 (Grazing Lands Technology Institute, Rev. 1 2003)).[16] The Regional Director then used the same 5:1 conversion ratio to convert AUMs to SUDs, concluding that a SUD is 5.2 pounds.[17] *Id.*

He then multiplied the average price per pound of hay by 5.2 pounds to calculate a price per SUD for each year.[18] *Id.* Multiplying the price per SUD by the number of SUDs, the Regional Director determined that the total trespass fee was $4,423.88 for 1998 and $4,869.50 for 1999. *Id.* at 7-8; Trespass Calculations.

The Regional Director also determined that the Superintendent erred in applying a 1.6 range impact multiplier to the trespass bills. Decision at 7-8. He reasoned that a February 7, 1997, Letter Decision by the Assistant Secretary had "*disallowed* the range impact multiplier penalty." *Id.* at 7 (emphasis in original).

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[16] As was the case for the decision at issue in *Hopi II*, the Regional Director relied on the National Range and Pasture Handbook for these forage calculations, but he failed to include a copy of the Handbook, or excerpts from the Handbook, in the administrative record. *See Hopi II*, 58 IBIA at 74 n.5. The Board located a copy of the Handbook on the internet at http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/landuse/rangepasture/?cid=stelprdb1043084 (last accessed April 28, 2015). A copy of Chapter 6 has been added to the record.

[17] The Regional Director repeatedly referenced the "1996-1997" trespass calculations, though he apparently meant to refer to the 1998 and 1999 trespass calculations. Decision at 7.

[18] The Regional Director mistakenly reverses the price per SUD for 1998 and 1999 in his description of calculating trespass charges, although his actual calculations are correct. *See* Decision at 7.

1. Average Daily Consumption of Forage by Sheep on the HPL

Both parties dispute the Regional Director's use of 5.2 pounds per day of forage consumption by sheep as the basis to determine trespass fees. The Nation argues that sheep on the HPL consume no more than 4.8 pounds per day of forage. Nation Opening Br. at 20. The Nation contends that the parties' longstanding assumption that cows on the HPL weigh only 800 pounds, and consume less forage (24 pounds per day) than the "standard" AU, was never challenged or questioned in the Federal Court litigation.[19] *Id.* at 17-18. Applying the 5:1 ratio to an "HPL AU" yields a figure of 4.8 pounds per day for sheep units (24/5 = 4.8). *Id.* at 17-20.

The Tribe also relies on the historical "understanding" that a cow on the HPL weighs 800 pounds and consumes 24 pounds of forage per day, but uses those figures to defend the Superintendent's use of a 6 pounds-per-day per sheep unit figure for forage consumption on the HPL. Tribe Opening Br. at 16. According to the Tribe, the application of the 4:1 conversion ratio, when used in conjunction with the 800-pound HPL AU understanding, demonstrates that sheep on the HPL consume 6 pounds of forage per day (24/4 = 6). *Id.* The Tribe also criticizes the Decision as flawed because, even if the standard AU weight (1000 pounds) and the 5:1 conversion ratio are used, the Regional Director's 26-pounds-per-day figure was based on oven-dried forage, rather than air-dried forage, the equivalent of which would weigh 30 pounds. *Id.* at 17-18. Even if the 5:1 conversion ratio is justified, the Tribe argues, applying it to the corrected figure for air-dried forage yields 6 pounds per day per sheep unit (30/5 = 6). *Id.*

In *Hopi II*, we addressed similar arguments raised by the Tribe and the Nation and we affirmed the Regional Director's use of 5.2 pounds of forage per day as the average daily consumption of sheep on the HPL. 58 IBIA at 77-80. We noted that the 800-pound HPL AU, and the 24 pounds per day of forage consumption per AU on the HPL, were derived from an outdated AAI study which was "no longer temporally relevant." *Id.* (citing *Gulbranson v. Duluth, Missabe & Iron Range Ry. Co.*, 921 F.2d 139, 142 (8th Cir. 1990) (stating that outdated evidence is irrelevant)). Therefore, "where there are no known

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[19] This figure is apparently derived from a study conducted by American Ag International (AAI) sometime prior to 1981 and used by BIA since that time. *See* Nation Opening Br. at 17-18. The AAI study cited by the Nation is summarized in the 1981, "Initial Report to Navajo Tribe on Grazing Fees on the Hopi Partitioned Land." *See* Nation Notice of Appeal, Sept. 21, 2012, Ex. 4. The AAI study was not provided to the Board by the Nation or the Tribe and it does not appear 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." *Hopi II*, 58 IBIA at 78 n.6.

relevant and reliable studies available of local consumption rates and where there are such studies available of national forage consumption rates," we concluded that it was appropriate for the Regional Director to use national average figures to calculate trespass fees. *Id.* at 78. We are not convinced that there is any basis, as the Nation seeks to do, to combine the historical understandings and factual assumptions with the 5:1 conversion ratio, other than to yield a lower number than the 5.2 pounds accepted by the Regional Director.

In *Hopi II*, we were also unconvinced that the Tribe's argument that the Regional Director's failure to convert oven-dried weight of forage to air-dried weight rendered his decision arbitrary and capricious. It is clear that, in the absence of current and reliable HPL-specific figures, BIA's determinations regarding forage consumption, for purposes of calculating trespass fees, are at best an approximation. Moreover, we note that in *Hopi I*, in which the Nation expressly challenged the Assistant Secretary's use of 6 pounds per day for forage consumption by sheep, the Court found that the Tribe had not "meaningfully dispute[d]" that "*if*" the 5:1 conversion ratio is proper, then the forage replacement fee for trespassing livestock, i.e., the fee based on a 6 pounds-per-day figure, "is too high." *Hopi I* at 55-56. While both tribes seek to use various configurations of the numbers to their advantage, we are not convinced that either has shown that the Regional Director's use of 5.2 pounds per SUD was unreasonable.[20]

2. Additional Compensation for Trespass

The Tribe also contests the Regional Director's omission of the 1.6 range impact multiplier applied by the Superintendent. Tribe Opening Br. at 18. The Nation responds, in our view correctly, that the Tribe is precluded from raising this issue by administrative collateral estoppel. *See* Nation Answer Br. at 12.

In 1997, while reviewing trespass fees assessed on the HPL for 1979 to 1984 and 1986 to 1995, the Assistant Secretary determined that use of the 1.6 range impact multiplier developed by Barry Freeman in his AAI study was impermissible. Assistant Secretary Letter Decision at 4. She stated:

> [I]t would be inappropriate to include the range impact multiplier in the calculation of the forage replacement fee . . . . The range impact multiplier . . . is a penalty for trespassing animals. The rent determinations

[20] By affirming the Regional Director's use of 5.2 pounds, we do not suggest that the figure is inviolate, or that BIA is precluded from reexamining both the data and the assumptions that have been used in determining an appropriate forage consumption figure for sheep.

made pursuant to 25 U.S.C. § 640d-15(a) do not provide for a penalty assessment.

Id. We have previously noted that, while the Tribe filed a joint motion with the Nation for a remand of the 1997 decision, the Tribe did not specifically seek reconsideration of the Assistant Secretary's determination regarding the range impact multiplier. *Hopi II*, 58 IBIA at 80-81. Therefore, the Tribe is estopped from challenging the Regional Director's decision not to apply the 1.6 range impact multiplier to the forage replacement cost to determine trespass fees.

V. Farmsite Rent: The Price of Corn in 1998

The Regional Director affirmed the Superintendent's calculation of farmsite rent, which included a finding that the price of Indian corn in 1998 was $1.50 per pound. *See* Decision at 10. The Regional Director cited an internal BIA memorandum reporting data collected through verbal communication with the Hotevilla Village mill operator, who reportedly stated that "the prices have not changed since a year ago. The prices are still at $1.50 per pound." BIA Memorandum by Land Operations Officer (AR Tab 1, Ex. 14); *see also* Decision at 10. The Regional Director concluded that the Superintendent, "relying upon documented information from the Hotevilla Village mill, and Arvel Hale's appraisal report for 1998-1999, correctly applied the $1.50 per pound corn price in determining farmsite rentals." Decision at 10.

Neither party objects to the Regional Director's methodology for calculating farmsite rents based on the price of Indian corn at the Hotevilla Village mill. The Nation, however, contests the Regional Director's affirmance of $1.50 per pound as the correct price of corn in 1998. Nation Opening Br. at 21-22. The Nation contends that the Regional Director ignored, and failed to reconcile, the fact that the Hale Report found—based on the same source as the internal BIA memorandum, i.e., the Hotevilla mill operator—that the price of corn in 1998 at the Hotevilla mill was $1.20 per pound. Nation Opening Br. at 22; *see also* Hale Report at Farm Page 5 ("During 1998 season the price was $30.00 per 25 pound container or $1.20 per pound.").

We agree with the Nation. The record contains two conflicting reports of the price of corn in 1998, both purportedly from the same source. The Regional Director failed to explain why he accepted the price of $1.50 per pound, instead of $1.20 per pound. Therefore, we vacate this portion of the Decision and remand for further consideration including, as necessary, further fact finding by BIA.

VI. Computational Errors

The Regional Director clearly decided that a 5:1 conversion ratio is appropriate for converting AU to SU for purposes of determining compensation owed by the Nation to the Tribe for use of the HPL. *See* Decision at 5-6. However, rather than recalculating the number of SUs grazed on the HPL in 1998 and 1999 using the 5:1 conversion ratio, the Regional Director merely inserted the same SU totals calculated by the Superintendent, using the 4:1 conversion ratio that the Regional Director rejected. *See, e.g., supra*, at 224, 227 n.9, 228 n.11.[21] This was manifest error, *see* 43 C.F.R. § 4.318, and on remand the Regional Director shall correct this error and recalculate the amounts owed.

Conclusion

The Board affirms the Regional Director's use of the 5:1 conversion ratio, his use of 5.2 pounds per day per SU for forage consumption, his exclusion of water and fence maintenance costs, and his exclusion of the 1.6 range impact multiplier in determining trespass fees.

The Board vacates the Regional Director's decision to determine compensation for over-permit livestock based on the rental rate for permitted livestock, and vacates his adoption of $1.50 per pound as the price of corn in 1978, and remands these issues for further consideration. The Board also vacates the Decision to the extent it may be construed as finding that BIA's 1999 bill for accommodation agreement signers was final.

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 Decision in part, vacates the Decision in part, and remands for further proceedings consistent with this decision.

I concur:

// original signed	//original signed
Steven K. Linscheid	Thomas A. Blaser
Chief Administrative Judge	Administrative Judge

[21] To its credit, the Nation acknowledges this apparent computational error, even though the Tribe did not raise it. Nation Answer Br. at 2-3 n.2.