



INTERIOR BOARD OF INDIAN APPEALS

Robert W. Demery v. Acting Great Plains Regional Director, Bureau of Indian Affairs

60 IBIA 304 (05/13/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ROBERT W. DEMERY,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 13-021
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	May 13, 2015

Robert W. Demery (Appellant) appealed to the Board of Indian Appeals (Board) from an August 24, 2012, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision adjusts the grazing rental rate from the 2012 rate of \$14.10 per Animal Unit Month (AUM)¹ to a rate of \$14.29/AUM for the 2013 grazing season, for individually-owned Indian lands on the Standing Rock Reservation (Reservation). Appellant owns land on the Reservation that is subject to grazing permits to which BIA’s rental rate determination applies. Appellant argues that the Decision contains several specific errors, and is flawed because the Regional Director failed to consider using an alternative methodology that Appellant contends had been recommended within BIA and is a more realistic method for determining AUM values on the Reservation, and would benefit the landowners.

We affirm the Decision. Appellant has not shown that the Decision contains errors, or that the alleged errors were material to the rate determination made by the Regional Director. And whether or not another methodology exists for determining whether to adjust the grazing rental rate to ensure that Indian landowners receive fair annual rental value, Appellant has not shown, on this record, that the Regional Director abused his discretion by failing to employ the alternative method proposed by Appellant.

¹ An AUM is “the amount of forage required to sustain one cow or one cow with one calf for one month.” 25 C.F.R. § 166.4.

Background

Appellant is a member of the Standing Rock Sioux Tribe (Tribe) and holds an ownership interest in four tracts of land² that are subject to three grazing permits³ affected by the Decision. Notice of Appeal at 4 (unnumbered); Memorandum from Regional Director to Board, Nov. 8, 2012. BIA issued the permits for a 5-year period beginning November 1, 2010. Email from Carson to Ellis, Dec. 4, 2012, Exhibits (Ex.) 1, 3, 4.

By regulation, when Indian landowners do not negotiate their own rate, BIA establishes the grazing rental rate for parcels of individually owned Indian lands included in range units by determining the fair annual rental value. *See* 25 C.F.R. §§ 166.400(b)(1), 166.401; *see also id.* §§ 166.4 (definition of “range unit”), 166.302. BIA’s regulations define “fair annual rental” to mean “the amount of rental income that a permitted parcel of Indian land would most probably command in an open and competitive market.” *Id.* § 166.4. Because the grazing permits for the lands owned by Appellant do not stipulate a grazing rental rate, the annual rental rate set by BIA applies to the permits. Email from Carson to Ellis, Dec. 4, 2012, Ex. 1, 3, 4.

After BIA issues grazing permits, it must conduct an annual review of the rental rate and may adjust the rate. 25 C.F.R. § 166.408; *Waln v. Acting Great Plains Regional Director*, 58 IBIA 139, 140 (2013). The purpose of the annual review is to ensure that landowners are receiving the fair annual return for their land. 25 C.F.R. § 166.408; *Waln*, 58 IBIA at 140. If BIA determines that the rental rate should be adjusted, the adjustment must be based upon an appropriate valuation method that takes into account the value of improvements made under the permit, unless the permit provides otherwise, and that follows the Uniform Standards of Professional Appraisal Practice. 25 C.F.R. § 166.408; *Linabery v. Acting Great Plains Regional Director*, 53 IBIA 42, 43 (2011) (*Linabery I*).

In addition to being a landowner, Appellant is also a former employee of BIA’s Standing Rock Agency.⁴ This appeal grows out of Appellant’s dissatisfaction with the

² Specifically, Allotment Nos. 847-C, 1175-A, 1846-A, and S 1994-A. Email from Carson to Ellis, Dec. 4, 2012.

³ The grazing permits are identified as Nos. 0007211015, 0000651015, and 0001421015. Memorandum from Regional Director to Board, Nov. 8, 2012 (attachment to email from Carson to Eichhorn, Nov. 14, 2012).

⁴ According to the Regional Director, Appellant’s position was eliminated after the functions of his office were contracted to the Tribe under the Indian Self-Determination

(continued...)

Regional Director's use of a particular methodology in determining the amount of rental adjustment. The methodology relies on a variety of data as indicators of market trends, including but not limited to county-specific land rental data, from which BIA determines whether the value of an AUM may have increased or decreased, and if so by what percentage.⁵

Applying the methodology in conducting the annual rental rate review for Standing Rock grazing lands, for the 2013 grazing season, BIA considered: (1) county-level cash rent statistics from the U.S. Department of Agriculture National Agricultural Statistics Service (NASS) for counties within the Reservation⁶ to determine trends in pastureland rental rates; (2) cattle market trends; and (3) other climatic, economic, and animal industry factors. Memorandum from Regional Natural Resources Officer to Regional Director, Aug. 24, 2012, at 1-3 (AR Tab 4).⁷ Based on the data considered, the Regional Natural Resources Officer recommended that the grazing rental rate be increased from \$14.10/AUM to \$14.29/AUM for the 2013 season. *Id.* at 1. She stated that \$14.29/AUM represented "the present rate adjusted by the calculated weighted olympic average change of

(...continued)

and Education Assistance Act, 25 U.S.C. § 450 *et seq.* Answer Brief (Br.), Apr. 11, 2013, at 6, n.7.

⁵ The methodology has been used by BIA for rental rate reviews on the Reservation since the 2011 grazing season, and the Board has described it in previous cases. *Waln*, 58 IBIA at 141; *Linabery v. Great Plains Regional Director*, 55 IBIA 27, 30-31 (2012) (*Linabery II*). In *Linabery II*, the Board vacated a portion of a rate decision for the Rosebud Reservation because BIA failed to justify its decision to leave the rate unchanged for one county that showed a decrease in rental values. 55 IBIA at 34-37. Here, Appellant does not argue that BIA improperly adopted a reservation-wide rental rate, nor does he make any county-specific, or tract-specific arguments.

⁶ The Reservation straddles the South and North Dakota border, 71% of the Reservation's range units are in Corson County, South Dakota, and 29% of the Reservation's range units are in Sioux County, North Dakota. *Cadotte v. Great Plains Regional Director*, 48 IBIA 44, 45 (2008); Memorandum from Regional Natural Resources Officer to Regional Director, Aug. 24, 2012, at 2 (Administrative Record (AR) Tab 4).

⁷ BIA also consulted with the Tribe, *id.* at 1, although the rate only applies to individually owned Indian lands and BIA's trust duty is to the individual Indian landowners. The Tribe establishes its own rental rate for tribal lands. Nothing in the record indicates that BIA consulted with any individual landowners.

1.33[%],” derived from the annual NASS county level cash rents. *Id.*⁸ A table attached to the Natural Resource Officer’s recommendation memorandum contains a compilation of past rates (implemented and proposed) for individually owned lands on the Reservation, NASS data for Corson and Sioux Counties, and a calculation of the average 5-year olympic average change for the Reservation, weighted by range unit area within each of the two counties. The Natural Resource Officer’s recommendation memorandum states that the decision to adjust the rate by the weighted olympic average change “is based upon trends in the land rentals and the livestock industry, climatic conditions, and other factors which could influence rental rates such as blizzards, drought, financial market episodes, etc.” *Id.* at 1. In a section addressing climatic conditions, the memorandum states that the Reservation at the time had abnormally dry to moderate drought conditions, and that “[t]he US Seasonal Drought Outlook is predicting drought development likely through October 31, 2012.” *Id.* at 3. The Regional Director accepted the recommendation and issued the Decision to adjust the grazing rental rate to \$14.29/AUM for the 2013 season. Letter from Regional Director to Landowners, Aug. 24, 2012, at 1 (Decision) (AR Tab 2).⁹

Appellant appealed the Decision to the Board and filed a statement of reasons and an opening brief. Appellant contends that the Decision is flawed because (1) the weighted olympic average calculated by BIA is based on average prices per acre, as reported by NASS, while BIA charges grazing fees on a price-per-AUM basis; (2) the cattle market information used by BIA was based on the three markets closest to the Reservation, but producers use other markets as well, and utilization of additional markets would provide a larger representation of the livestock market for the Reservation; (3) the table attached to the Decision contains the wrong data for Reservation rental prices in 2007 and 2008; and (4) adjusting the rental rate for a possible drought is not fair. Notice of Appeal at 1-2 (unnumbered); Opening Br. at 1-2 (unnumbered). In addition, Appellant proposes a

⁸ The Natural Resource Officer described the weighted olympic average percentage as follows:

The olympic average is a five year average with the highest and lowest values removed The percent change of the olympic average from 2011 to 2012 is determined for each county The percent change of the olympic averages are added based upon the proportional area of each county within the reservation to determine the weighted olympic average percentage change.

AR Tab 4, at 1.

⁹ The Decision itself incorrectly states that the \$14.29 rate for 2013 was derived by adjusting the 2012 rate by “0.78 percent,” Decision at 1, but the rate reflects an increase of 1.33%, as explained in the Natural Resource Officer’s memorandum and as shown on the table compiling the NASS data. Decision, Ex. 1; AR Tab 4 at 1.

different methodology “based on competitive bids of the range units themselves and rent surveys of the Pasture Authorization compensation amounts,” which he contends provides a more realistic means to determine the price of an AUM on the Reservation, and will benefit the landowners. Notice of Appeal at 2-4 (unnumbered).

The Regional Director filed an answer brief, arguing that Appellant’s alternative method does not show that the Regional Director’s method of calculating the grazing rental rate was unreasonable. Answer Br. at 5-6. With respect to alleged errors concerning the application of the methodology used, the Regional Director contends that BIA rejected converting the NASS per-acre data to per-AUM figures because that would have required “the introduction of assumptions.” *Id.* at 6, n.8. The Regional Director argues that the grazing rates in BIA’s table for 2007 and 2008 are correct because, with limited exceptions, the figures listed are the rates collected during those grazing seasons. *Id.* at 7. The Regional Director contends that Appellant’s assertions are too general and unsupported to show error in the Decision, and that Appellant fails to demonstrate that the 2013 grazing rental rate is unreasonable as applied to the specific lands in which he owns an interest. *Id.* at 8.

Appellant did not file a reply brief, and no other briefs were filed.

Standard of Review

A regional director’s decision whether to adjust the grazing rental rate involves an exercise of discretion and may involve an exercise of expertise. *Waln*, 58 IBIA at 143. The Board’s role in reviewing a discretionary decision by BIA is to determine whether the decision “is reasonable; that is, whether it is supported by law and by substantial evidence.” *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 18 (2008) (quoting *Rosebud Indian Land and Grazing Ass’n v. Acting Great Plains Regional Director*, 41 IBIA 298, 301 (2005)) (internal citations omitted). If so, the Board will not set aside the decision, and the Board will not substitute its judgment for that of BIA. *Waln*, 58 IBIA at 143. The burden is on the appellant to show that BIA’s decision is unreasonable. *Id.* Unsupported allegations are insufficient to sustain this burden of proof. *Northern Cheyenne Livestock Association v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 135 (2008).

Discussion

We affirm the Decision because Appellant has not demonstrated, with respect to the methodology used, that BIA misapplied data, or used incorrect or insufficient data, in arriving at its decision to adjust the rental rate by 1.33% for 2013. We also agree with the Regional Director that Appellant has not shown in this appeal, simply by offering a proposed alternative methodology as theoretically superior, that the grazing rental rate

decision for 2013 is unreasonable as applied to his land.¹⁰ We address each of Appellant's arguments in turn.

First, Appellant criticizes BIA's use of NASS county pastureland rental rates because they are reported on a per-acre basis, not a per-AUM basis, which is the "way permittees of [r]ange [u]nits are assessed their rentals."¹¹ Notice of Appeal at 1 (unnumbered). As noted above, the Regional Director asserts that BIA rejected converting the data because it would have introduced "assumptions" into its analysis. Answer Br. at 6, n.8. That defense, by itself, is not particularly compelling, given the fact that numerous assumptions appear to be embedded in BIA's methodology, although it is not unreasonable to suggest that additional assumptions may lead to less reliability. In this case, it appears that Appellant's critique is simply misplaced. BIA used the NASS data to determine a "trend over time" and then applied the data to determine a percentage change (i.e., the weighted olympic average change). *Id.* It is true that BIA apparently assumed that if the price per acre had increased, on average, by a certain percentage, the price of an AUM is likely to have increased, on average, by the same percentage. But Appellant has not argued or otherwise shown that such an assumption was unreasonable.

Second, Appellant argues that there were additional local cattle markets with sales data that BIA could have used, which would have provided a larger representation of the cattle market for the Reservation. Notice of Appeal at 2 (unnumbered). The fact that BIA might have used a larger sample of data, standing alone, is not sufficient to demonstrate that it was unreasonable for BIA to have done otherwise. Appellant did not provide evidence that the three local markets used by BIA were not sufficiently representative, or that the markets chosen somehow understated the cattle market data for the Reservation.

Third, Appellant contends that BIA's table of rental rate data mistakenly reports \$10.50/AUM as the rental rate for the 2007 and 2008 seasons. Notice of Appeal at 2 (unnumbered); Opening Br. at 1 (unnumbered). Appellant acknowledges that for those years, BIA's decisions to increase the rate from \$10.50/AUM to \$13.63/AUM (for 2007), and to \$14.63/AUM (for 2008), were appealed to the Board by existing permittees, thus

¹⁰ The Regional Director argues that because Appellant's critique of BIA's methodology appears to be based on his experience as a BIA employee, i.e., having his method rejected by superiors, the Board should discount or disregard that critique. Answer Br. at 6-7. We disagree. Appellant's arguments on the merits are entitled to no less consideration simply because they are based on his experience within BIA advocating for what he contends is a superior method for determining grazing rental rates on the Reservation.

¹¹ Appellant's argument suggests that only per-AUM rates are used for permitted parcels, but BIA may use either a per-acre or a per-AUM rate. 25 C.F.R. § 166.409.

preventing those rates from going into effect. Notice of Appeal at 2 (unnumbered). Moreover, in *Cadotte*, 48 IBIA at 47-48, and *Standing Rock Grazing Ass'n v. Acting Great Plains Regional Director*, 48 IBIA 75, 75 (2008), the Board ultimately vacated the Regional Director's decisions, which applied to existing permits. But Appellant contends that the higher rates should have been included in BIA's table because they were applied to new permits. The Regional Director counters that \$10.50/AUM was the rate collected for these two grazing seasons "with limited exceptions." Answer Br. at 7. Regardless of whether the spreadsheet fully captures the applicable rates for the 2007 and 2008 grazing seasons, Appellant has not shown that the past grazing rates listed on BIA's table had any effect on BIA's calculations. BIA calculated the 2013 rental rate by analyzing the NASS data from Corson and Sioux Counties to determine market trends, and applying the change in the weighted olympic average drawn from the NASS data to the 2012 rental rate. AR Tab 4 at 1-2. Consequently, Appellant does not show how the rental rates applied by BIA in 2007 and 2008 affected the determination that the weighted olympic average supported a 1.33% increase from the 2012 rate, to \$14.29/AUM for 2013.

Fourth, we are not convinced that BIA's consideration of drought conditions, or drought forecasts, rendered the rate increase decision unfair. Appellant argues that "[a]djusting the rental rate for a possible drought isn't fair." Opening Br. at 2 (unnumbered). The record shows that BIA considered the climate conditions on the Reservation, *see, e.g.*, AR Tab 4 at 3, which may have factored into whether or not to adjust the rate at all, but the actual rate was based, without further adjustment, on the NASS data. *Id.* at 4; Decision at 1.

With respect to the alternative methodology proposed by Appellant, we agree with the Regional Director, at least on this record, that Appellant has not demonstrated that the methodology used by BIA was unreasonable. Appellant contends that the purpose of his appeal was to attempt to have the Regional Office of BIA "consider an alternative method" that Agency staff had proposed when Appellant was employed by the Agency. Opening Br. at 2. The method advocated by Appellant is based on AUM prices obtained for range units that were bid on the Reservation and on rent surveys of amounts paid for Pasture Authorizations. Notice of Appeal at 2 (unnumbered). According to Appellant, using these prices would have resulted in an increase in the value of an AUM on the Reservation above the \$14.29 figure arrived at by BIA.

The fact that Appellant's method would result in a higher rental rate, to the benefit of landowners, does not, standing alone, demonstrate that the rate selected by BIA was unreasonable as applied to Appellant's lands. Undoubtedly, as Appellant contends, BIA's trust duty is owed solely to the landowners, not to the permittees, but the requirement

imposed on BIA in adjusting the rental rate is to ensure that landowners receive fair annual rental value, not necessarily the highest value that a particular methodology might yield.¹² We do not discount the possibility that BIA should at least take a hard look at the type of data offered by Appellant, in determining fair annual rental values for AUMs on Reservation range units. *See* 25 C.F.R. § 166.4 (defining “fair annual rental” to mean “the amount of rental income that a permitted parcel of Indian land would most probably command in an open and competitive market.”). But on this record, we are not convinced that Appellant has demonstrated that the rate selected by the Regional Director was unreasonable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director’s Decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

¹² Appellant does not contend that BIA’s methodology does not conform to the Uniform Standards of Professional Appraisal Practice, and thus we do not consider that issue.