



INTERIOR BOARD OF INDIAN APPEALS

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

62 IBIA 315 (03/25/2016)

Related Board cases:

58 IBIA 71

60 IBIA 218



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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HOPI TRIBE,)	Order Vacating Decisions in Part,
Appellant,)	Affirming in Part, and Remanding
)	
v.)	
)	Docket No. IBIA 14-081
WESTERN REGIONAL DIRECTOR,)	15-056
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	March 25, 2016

In these appeals,¹ the Hopi Tribe (Tribe) seeks review by the Board of Indian Appeals (Board) of two decisions of the Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA), determining the compensation that the Navajo Nation (Nation) owes the Tribe for livestock grazing by members of the Nation on Hopi Partitioned Lands (HPL). One decision, issued on February 10, 2014, covers use for the year 2000 (2000 Decision); the other decision, dated December 2, 2014, covers use for the years 2001-2009 (2001-2009 Decision).

The Tribe argues that both decisions failed to assess trespass charges for over-permit and unpermitted livestock, which the Regional Director excluded for lack of sufficient evidence of year-long trespass. Although we are not convinced that the evidence of over-permit and unpermitted livestock—annual livestock counts—is sufficient to establish, by itself, that all of the livestock identified during the counts were trespassing for the entire year, we are also not convinced that it was reasonable for the Regional Director to completely disregard the potential probative value of the evidence in making reasonable inferences regarding use of the HPL by the individuals whose livestock was counted. Considered with other evidence, the livestock counts might support a conclusion that additional use occurred that was not captured by incidental trespass reports, or the evidence might support a different conclusion. But it was error for the Regional Director to take an all-or-nothing approach without providing an adequate explanation. Therefore, we vacate the decisions with respect to this issue and remand for further consideration of the evidence and a new determination on whether, and if so to what extent, the Nation owes compensation for trespass based on evidence of over-permit and unpermitted livestock.

¹ We consolidate the appeals for purposes of this decision.

The Tribe also argues that both decisions fail to account for injuries to rangeland and infrastructure caused by livestock trespass activities, because they limit compensation to the cost of replacement forage, thus failing to fully compensate the Tribe for that type of use of the HPL. We agree that the Regional Director erred by not considering the inclusion of such compensatory damages. Although the Regional Director correctly concluded that the Tribe was estopped from arguing that a 1.6 “range impact multiplier” (1.6 x value of forage) should be applied, the Tribe also argued, in the alternative, that exclusion of the 1.6 multiplier, as an impermissible penalty, did not foreclose BIA from considering evidence of actual injury to the rangeland and infrastructure on the HPL caused by trespass, and determining appropriate compensation owed by the Nation to the Tribe. In past decisions, we have construed the Tribe’s argument as limited to seeking application of the 1.6 multiplier, and have upheld the application of collateral estoppel. But we are not convinced that the doctrine is properly invoked to foreclose any additional compensatory relief to the Tribe, i.e., based not on the application of one particular formulaic multiplier but on evidence-based compensatory damages for injuries to the HPL resulting from trespass on the HPL. Therefore, we vacate this portion of the decisions and remand for further proceedings.

In its appeal of the 2000 Decision, the Tribe contends that the Regional Director erred in omitting fence maintenance costs from its grazing fees determination for permitted livestock. For the reasons stated in our earlier decisions in *Navajo Nation and Hopi Tribe v. Western Regional Director*, 60 IBIA 218 (2015) (*Navajo Nation*), and *Hopi Tribe and Navajo Nation v. Western Regional Director*, 58 IBIA 71 (2013) (*Hopi II*), we affirm the Regional Director’s conclusion that the Tribe did not make the necessary evidentiary showing to avoid the preclusive effect of prior decisions to exclude fence maintenance costs from the grazing rate for the HPL.

In its appeal of the 2001-2009 Decision, the Tribe argues that the Regional Director impermissibly established an “ad hoc” standard for evaluating the evidence for assessing incidental trespass charges against the Nation. We disagree. The Regional Director did not alter any existing legal standard for determining what evidence would be considered sufficient to impose liability on the Nation for occurrences of incidental trespass. Whether, as the Tribe suggests, BIA formerly assessed incidental trespass charges based on more lax evidentiary standards than applied for the 2001-2009 period, such a de facto practice did not prevent BIA from applying greater rigor in evaluating the evidence in this case, as long as the criteria applied were reasonable, which we conclude they were. Therefore, we affirm this portion of the decision.

Finally, the Regional Director made several calculation errors in the 2000 Decision, and therefore we vacate portions of that decision to the extent necessary and remand for correction of those errors.

Background

I. Hopi Partitioned Lands (HPL)

The HPL are lands that were partitioned to the Tribe pursuant to the 1974 Navajo-Hopi Settlement Act, 25 U.S.C. § 640d *et seq.* As relevant here, the Act 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.” 25 U.S.C. § 640d-15(a). Thus, BIA must determine the annual fair rental value for all use by Navajo individuals of the HPL, which BIA separates into grazing, farmsite, and homesite use.² Only compensation for grazing use is at issue in these appeals.

II. Determination of Grazing Use Rental Value for 2000

On December 12, 2001, the Superintendent issued a decision in which he determined, for the year 2000, the compensation owed by the Nation to the Tribe for livestock grazing by Navajo individuals on the HPL.³ Letters from Superintendent to Begay and Taylor, Dec. 12, 2001, at 7-10 (Superintendent’s 2000 Decision) (Docket No. 14-081 Administrative Record (14-081 AR), Document (Doc.) 3, Exhibit (Ex.) 10).⁴ The Superintendent’s decision contains no discussion or explanation, but an accompanying chart summarizes the grazing assessment as based on 2,306 sheep units (SU)⁵ for permitted livestock (\$74,114.84), 955 SUs for year-long trespass (\$226,573.75), and 5,556 SUs for incidental⁶ trespass (\$3,626.96). *Id.* at 11. Three additional charts provide breakdowns of the figures on which each total is based. *See id.* at 11-13, 21-22. The year-long trespass charges were determined by multiplying 955 SUs times a year-long cost-of-forage rate,

² For a more information on the origin of the HPL, and the history of decision regarding rent assessments on the HPL, see *Navajo Nation*, 60 IBIA 218, and *Hopi II*, 58 IBIA 71.

³ The decision also assessed charges for homesite and farming use, but as noted, those are not at issue in these appeals.

⁴ The Regional Director’s administrative records for these appeals were submitted to the Board in electronic format. In citing AR 14-081, we refer to the document and, where applicable, exhibit numbers, and cite to the page numbers appearing on the documents themselves, rather than the PDF page numbers.

⁵ All livestock is converted into “sheep units” for purposes of applying grazing rates and determining trespass charges. *See infra* at 318 n.8 (explaining conversion ratios).

⁶ The chart itself only refers to “trespass” for this portion of the charges, but an additional supporting chart makes clear this category is for occurrences of “incidental trespass,” as documented on Monitoring/Trespass Reports.

based on 365 days of trespass for each SU. The incidental trespass charges were determined based on a per-day charge multiplied by 5,556 sheep unit days (SUDs). Neither of the charts for year-long trespass and incidental trespass identifies the underlying data or evidence upon which the numbers are derived, but the Superintendent's administrative record includes numerous individual Monitoring/Trespass Reports for 2000, each of which is dated for the day of observation. *See, e.g., id.* at 24. In calculating SUs, the Superintendent used a 1:4 ratio of cows:sheep. *Id.* at 22. In calculating charges for incidental trespass, the Superintendent multiplied the price of forage per day per sheep by a 1.6 "penalty" to determine the total price per sheep day. *Id.* at 22. The Superintendent did not include a separate assessment for fence and water maintenance costs for the HPL.

Both the Tribe and the Nation appealed the Superintendent's decision for 2000. *See* Tribe Notice of Appeal to Regional Director, Jan. 8, 2002 (14-081 AR, Doc. 7); Nation Notice of Appeal to Regional Director, Jan. 9, 2002 (14-081 AR, Doc. 6).⁷ Although not raised as issues in the present appeal, the Regional Director concluded, among other things, that the Superintendent used the wrong conversion ratio (1:4 instead of 1:5)⁸ and the wrong amount of forage per SUD (6 lbs. instead of 5.2 lbs.). Letter from Regional Director to Nation and Tribe, Feb. 10, 2014 (2000 Decision) (14-081 AR, Doc. 1 at 4-5). Thus, the Regional Director recalculated the number of SUDs for incidental trespass from 5,556 to 6,418.75 SUDs, and also recalculated the charge per SUD. *Id.* at 6.

As relevant to the Tribe's appeal to the Board, the Regional Director (1) concluded that the Superintendent erred in charging the Nation for year-long trespass, and he eliminated entirely the amount the Superintendent had charged for 955 SUs in year-long trespass, finding insufficient documentation in the record to verify that 955 SUs had been in trespass for 365 consecutive days in 2000; (2) concluded that the Superintendent erred in applying the 1.6 multiplier, finding that the Assistant Secretary – Indian Affairs (Assistant Secretary) had previously disallowed it as an impermissible penalty; and (3) affirmed the Superintendent's omission of water and fence maintenance fees from the grazing charges on the grounds that the Tribe is compensated for these costs in annual Federal appropriations. *Id.* at 5-7, 10.

⁷ Many of the issues raised by the Nation and the Tribe in their appeals paralleled those being raised in the litigation in *Hopi Tribe v. Navajo Nation*, No. CV 85-801 PHX-EHC (D. Ariz. Dec. 30, 2009) (*Hopi I*). Following the resolution of *Hopi I* by the United States District Court for the District of Arizona (District Court), the Tribe and the Nation provided the Regional Director a joint notice of their settlement of the 1979 to 2000 homesite rent. Joint Notice, Aug. 12, 2010 (14-081 AR, Doc. 3, Ex. 7).

⁸ Under the 1:4 ratio, one cow equals 4 SUs (and one horse equals 5 SUs). Under the 1:5 ratio, one cow equals 5 SUs (and one horse equals 6.25 SUs).

After eliminating compensation for year-long trespass, and recalculating the figures for permitted livestock and incidental trespass, the Regional Director concluded that the Nation was liable to the Tribe for \$61,423.24 as compensation for grazing in 2000. *Id.* at 3.

III. Determination of Grazing Use Rental Value for 2001-2009

On January 20, 2012, the Superintendent issued his decision determining what the Nation owes the Tribe for grazing on the HPL for the years 2001 through 2009.⁹ Letter from Superintendent to Nation and Tribe (Superintendent's 2001-2009 Decision) (Docket No. 15-056 AR at 2324-2327).¹⁰ In his decision for this period, the Superintendent used a 1:5 ratio for converting cows to SUs, and used 5.2 pounds of forage per day for calculating the value of forage consumed by trespassing animals. The Superintendent included compensation for permitted livestock, and for incidental trespass, but did not include, nor discuss, any charges for year-long livestock trespass. This time, the Superintendent did not apply the 1.6 range impact multiplier to the cost of forage, in calculating incidental trespass charges, nor—consistent with his decision for 2000—did he include separate compensation for water and fence maintenance on the HPL.

Both the Tribe and the Nation appealed from this decision as well. *See* Tribe Notice of Appeal to Regional Director, Feb. 22, 2012 (15-056 AR at 67); Nation Notice of Appeal to Regional Director, Feb. 22, 2012 (15-056 AR at 33); Tribe Statement of Reasons for Appeal, Mar. 23, 2012 (15-056 AR at 77). In the course of the proceedings, the Regional Director asked the Tribe to submit any “corrected or supplemental data that would inform the 2001-2009 rental determinations.” Letter from Regional Director to Tribe, Dec. 23, 2013 (15-056 AR at 430). The Tribe submitted supplemental information on March 3, 2014. Letter from Tribe to Regional Director (15-056 AR at 572).

In his decision for the 2001-2009 period, the Regional Director concluded, in relevant part, that (1) the Superintendent did not err in omitting charges for year-long trespass, because annual livestock counts were insufficient evidence to support charges for a 365-day period; (2) the Superintendent was correct in not applying the 1.6 range impact multiplier; and (3) the Superintendent underestimated incidental trespass for the years 2001

⁹ As was the case for the Superintendent's decision for 2000, the decision included compensation for farmsite and homesite rental value, neither of which is at issue in the Tribe's appeal to the Board from the Regional Director's decision for this period.

¹⁰ BIA's administrative record for the Regional Director's decision for the 2001-2009 period, which we cite as 15-056 AR, is paginated as WRO-1 through WRO-5384. For ease of reference, we omit the WRO prefix.

through 2008, and overestimated incidental trespass for 2009. Letter from Regional Director to Tribe and Nation, Dec. 2, 2014 (2001-2009 Decision) (15-056 AR at 1).

In rejecting the Tribe's appeal from the exclusion of year-long trespass charges for over-permit and unpermitted livestock, the Regional Director stated that the Tribe relied on the annual livestock counts as evidence of the trespass. *Id.* at 17. The Regional Director noted that annual livestock counts "are predominantly made at pre-arranged locations, such as corrals or homesites, and generally not while livestock are openly grazing on permitted range units." *Id.* The Regional Director concluded that a single count annually, without more, was not sufficient evidence to demonstrate that the livestock had grazed on the HPL for a 365-day period. *Id.* Thus, he found that the evidence did not support year-long trespass charges. *Id.* at 18.

The Regional Director also rejected, as precluded by collateral estoppel, the Tribe's challenge to the Superintendent's failure to apply the 1.6 range impact multiplier in calculating trespass fees. *Id.* at 18. The Regional Director concluded that the Board had previously upheld the exclusion of the 1.6 multiplier based on collateral estoppel. *Id.* (citing *Hopi II*, 58 IBIA at 80).

With respect to incidental trespass, the Regional Director concluded that summary sheets relied on by the Superintendent understated the amount of incidental trespass for the period as a whole. *Id.* at 16. The Regional Director found that individual field-data reports reflected a wide range of data recording methodologies, and found many inconsistencies in how technicians wrote up their reports. *Id.* at 14-16. As a result, the Regional Director found it necessary to apply protocols to interpret the data in order to determine the total SUDs of trespass. The Regional Director stated:

We were able to determine SUDs of trespass when data sheets contained the following information:

- a. An identifiable, date, time and specific location where trespass was occurring (e.g. range unit number, GPS coordinates, physical land feature); and
- b. A description of the animals in trespass (e.g. bovines, equines, ovine, horses, sheep, goats, cattle); and
- c. A description of identifiable brands, earmarks, waddles, ear tags, coloration, or paint markings making each trespass situation unique and identifiable within the written record; and
- d. A physical description of animals in trespass (e.g. bay gelding, roan mare, Hereford cow); and
- e. Pictures of trespass animals; and
- f. Witness signature of trespass occurrence (reporting party).

Id. at 14-15. The Regional Director stated that if a data sheet did not contain enough information to allow a follow-up investigation, or if he “determined that an independent reviewer or potential permittee could not recognize the location of trespass; and the number, type, and the physical characteristics of the animals in trespass were not discernable, the data sheet was not validated.” *Id.* at 15. The decision includes additional discussion to illustrate how BIA interpreted the data and made its determinations.

The Tribe appealed both decisions of the Regional Director to the Board. In each case, the Tribe filed an opening brief, the Nation filed an answer brief, and the Tribe filed a reply brief. The Regional Director did not file any briefs in either case.

Discussion

I. Standard of Review

A regional director’s determination of grazing rents and trespass fees is an exercise of discretion. *Hopi II*, 58 IBIA at 75. Determinations of fair rental value require an exercise of judgment, about which reasonable people, and experts, may differ. *Navajo Nation*, 60 IBIA at 225. We review discretionary decisions to ensure that they comport with the law, are supported by substantial evidence, and are not arbitrary or capricious. *Id.* We review questions of law and challenges to the sufficiency of the evidence *de novo*. *Hicks v. Northwest Regional Director*, 59 IBIA 285, 290 (2015). An appellant bears the burden of showing error in the regional director’s decision. *Id.* Simple disagreement with the regional director’s reasoning, or general allegations of error, are insufficient to meet an appellant’s burden. *Hopi II*, 58 IBIA at 76.

II. Trespass Charges for Over-Permit and Unpermitted Livestock

The Tribe contends that the Regional Director erred in denying any compensation for year-long trespass. The Tribe argues that the evidence in the record is sufficient to conclude that the numbers of over-permit and unpermitted livestock documented during annual livestock counts were in year-long trespass, or that the evidence is at least sufficient to warrant trespass charges in addition to those included for incidental trespass. The Tribe argues that Navajo livestock trespass on the HPL is prolific and widespread, that trespass undermines the Tribe’s authority to manage the land responsibly, and that trespass can have a detrimental impact on the long-term health of the range. 2000 Opening Brief (Br.), July 9, 2014, at 11; *see also* 2001-2009 Opening Br., May 1, 2015, at 6. The chart relied on by the Superintendent for including year-long trespass charges in his decision for 2000, which the Regional Director removed, identified the livestock owner, brand, range unit, species, and quantity of animals. *See* 14-081 AR, Doc. 3, Ex. 10, at 21. The source of the

data is not identified. The record for the 2001-2009 period includes charts with the same data as that for the 2000 chart, but clearly identifies the data as based on a “livestock count,” apparently referring to an annual livestock count. *See* 2001-2009 Livestock Counts (15-056 AR at 582-603); 2001-2009 Opening Br. at 7. On the summary tables, if an individual whose livestock is counted holds a grazing permit, the permit is compared with the number of animals counted at the livestock count, and the animals in excess of those allotted in the grazing permit are reported on the chart as “over.” *See, e.g.*, 15-056 AR at 582. For individuals without a permit, all livestock counted are reported on the chart as “over.” *Id.*

We agree with the Regional Director that these charts, standing alone, are insufficient evidence to support assessing year-long trespass charges for all of the over-permit and unpermitted livestock counted during an annual count. But it was unreasonable for him to adopt an all-or-nothing approach, based on the limited explanation provided. The Regional Director acknowledged that trespass may have occurred from over-permitted livestock numbers on HPL lands, but rejected the evidence as sufficient to support charges for a 365-day period with the following explanation:

Each rancher’s livestock numbers could fluctuate annually due to predation, death loss, slaughter for personal consumption, sale of livestock for income generation, and gifting of animals to events or family members. Additionally, animal numbers could increase, after annual counts were made, resulting from births, purchase, gifts, or acquisition through [barter].

2001-2009 Decision at 17. That may well be the case, and combined with the description of how annual counts are conducted, is sufficient to reject a finding that the annual counts, standing alone, support assessing year-long trespass for all of the over-permit and unpermitted livestock. But the Tribe also contends that the annual livestock counts, when considered in conjunction with additional evidence—e.g., the subsistence nature of Navajo grazing practices of the individuals whose livestock is counted, the incidental trespass reports—are sufficient to support findings of trespass in addition to that captured by the incidental trespass figures.

It may or may not be reasonable to assume that permittees would graze all of their livestock in the same area, but some explanation is warranted to interpret the evidence. Similarly, if individuals without permits for grazing on the HPL are known to use lands, as suggested by the charts associating unpermitted individuals with range units, it may be reasonable to assume that their livestock recorded during the annual counts are being

grazed on those lands.¹¹ The fact that annual livestock counts, by themselves, may not support trespass charges on a year-long basis, does not necessarily mean reasonable inferences may not be drawn, based on the evidence as a whole, in order to determine the magnitude of trespass for which the Nation owes the Tribe.¹²

III. Compensation for Trespass-Related Injuries to Rangeland and Infrastructure Not Captured by the Cost of Replacement Forage

A. Application of Collateral Estoppel

The Tribe contends that the Regional Director erred in failing to even consider awarding compensation for costs associated with trespassing animals other than forage replacement costs. Both the Regional Director in his decisions, and the Nation on appeal, argue that the Tribe is precluded by administrative collateral estoppel from seeking any compensation for trespass beyond forage replacement costs, because the issue of applying the 1.6 multiplier was previously adjudicated and rejected, and collateral estoppel applies. As we concluded in both *Hopi II* and *Navajo Nation*, the Tribe is estopped from challenging the Regional Director's decision not to apply the 1.6 range impact multiplier to the forage replacement costs to determine a trespass fee. See *Hopi II*, 58 IBIA at 80-81; *Navajo Nation*, 60 IBIA at 234-35.

But, in contrast to prior proceedings, we disagree that the Tribe's argument below, and on appeal, was limited to seeking to have the 1.6 multiplier applied. The Tribe argued that even if the specific formulaic multiplier rejected by the Assistant Secretary cannot be applied, the Tribe is still entitled to full compensation for the use of the HLP by Navajo individuals, and that must include compensation for injuries to the rangeland and infrastructure resulting from trespass activities. We agree with the Tribe that it is entitled to such compensation, as long as the compensation is adequately supported by evidence in the record.

¹¹ We note that none of the annual counts resulted in overall totals that were *below* the number of permitted livestock.

¹² Neither of the Regional Director's decisions, nor the record, makes clear the relationship between the evidence contained in the Trespass/Monitoring Reports, used for findings of incidental trespass, and the annual livestock counts. In some cases, it would seem that the combined evidence might support findings of additional trespass, although in other cases, imposing charges based on both the annual counts and Trespass/Monitoring Reports might result in double counting.

In a February 1997 decision regarding fees 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 an American Ag International study was impermissible. *Hopi III*, 60 IBIA at 234. The Assistant Secretary characterized the Freeman range impact multiplier as “a penalty for trespassing animals,” and stated that “25 U.S.C. § 640d-15(a) does not provide for a penalty assessment.” Assistant Secretary Letter Decision, Feb. 7, 1997, at 4 (15-056 AR at 532). Because the Tribe did not specifically seek reconsideration of the Assistant Secretary’s determination regarding the range impact multiplier, we have previously concluded that the Tribe was estopped from challenging the Regional Director’s subsequent decisions not to apply the 1.6 range impact multiplier to the forage replacement cost to determine trespass fees. *See Navajo Nation*, 60 IBIA at 235; *Hopi II*, 58 IBIA at 80-81.

For collateral estoppel to apply: (1) “the issue sought to be precluded must be the same as that involved in the prior litigation”; (2) the “issue must have been actually litigated”; (3) the issue “must have been determined by a valid and final judgment”; and (4) “the determination must have been essential to the prior judgment.” *Citizen Potawatomi Nation v. Director, Office of Self-Governance*, 42 IBIA 160, 167 (2006) (citing Restatement (Second) of Judgments § 27 (1982)).

We are not convinced that the issue raised by the Tribe in the proceedings below, and now on appeal, is limited to seeking application of the 1.6 range impact multiplier that was rejected by the Assistant Secretary.¹³ The Assistant Secretary did not purport to adjudicate or decide that any compensation beyond the cost of replacement forage was impermissible. As long as the additional damages are limited to damages for injuries to rangeland and infrastructure that can fairly be shown to compensate the Tribe for the use of HPL lands by Navajo individuals, and supported by the evidence, the Tribe is entitled to such compensation.

¹³ We do agree with the Regional Director that to the extent the Tribe seeks to characterize the Superintendent’s application of a 1.6 multiplier for the year 2000 as something different than the 1.6 range impact multiplier that was rejected by the Assistant Secretary, the Tribe’s argument is subject to collateral estoppel. The summary chart in the Superintendent’s record seemingly relies on 25 C.F.R. § 168.14 as the source of the 1.6 multiplier, *see* 14-081 AR, Doc. 3, Ex. 10 at 22, but that figure is not incorporated in the regulations, and the only source identified is the Freeman study.

B. Measure of Damages

The Tribe argues that the Settlement Act, 25 U.S.C. § 640d-15(a), requires BIA to assess rent for “*all* use by Navajo individuals” of the HPL. 2001-2009 Opening Br. at 15. The Tribe notes that, under 25 C.F.R. § 168.14, Navajo landowners are liable for reasonable compensation for damage to property including trampled forage, compacted soil, damage to fences, water consumed, and damage to water delivery systems. *Id.* The Tribe also notes that on the McGregor Range, which BIA has deemed to be a comparable range used for determining fair rental value on the HPL, the trespassing fees include not only the cost of forage consumed by trespassing livestock, “but also the cost of damage to federal property (including fences and water delivery systems), and expenses associated with impoundment and disposal of unclaimed livestock.” *Id.* at 16-17.

The Settlement Act and 25 C.F.R. § 168.14 support the Tribe’s arguments that compensation for the impact of trespassing livestock is not limited to the cost of replacement forage. The Nation contends that the record does not support trespass fees beyond forage replacement costs. *See* 2001-2009 Answer Br., June 4, 2015, at 13. But because the Regional Director failed to consider this issue at all, we leave it to him to evaluate the evidence and determine, in the first instance, whether to impose additional charges for livestock trespass based on injury to the rangeland and infrastructure. We thus remand this issue to the Regional Director. On remand, the Regional Director must evaluate the record to determine what damages are supported by sufficient evidence and what methodology for determining compensation is appropriate.

IV. Fence Maintenance Costs in Grazing Fees (2000 Period)

The Tribe argues that both the Superintendent and the Regional Director erred in excluding fence maintenance costs from their decisions for the year 2000.¹⁴ 2000 Opening Br. at 16. Grazing rates on the HPL are calculated based on grazing rates on the McGregor Range, which was deemed comparable to the HPL in the appraisal prepared by Arvel M. Hale (the Hale Report). *Id.* at 16-17; *see also Navajo Nation*, 60 IBIA at 227-229 (discussing use of the McGregor Range rates to establish grazing rates on the HPL). The Tribe contends that because annual grazing rates on the HPL are based on the annual grazing rate on the McGregor range, and because lessees on the McGregor Range are “responsible under the grazing contract for almost all fence maintenance costs,” permittees on the HPL should also be responsible for fence maintenance costs. 2000 Opening Br. at

¹⁴ The Tribe did not challenge the Regional Director’s decision not to include additional fence maintenance fees in the grazing calculations for 2001 through 2009 and therefore, for this issue, we consider only the 2000 Decision.

16. The Tribe also argues that the cost of fence maintenance and repair on the HPL is significantly greater than that of the McGregor range because the HPL suffers from “chronic and pervasive vandalism of its boundary fences” to facilitate trespass. *Id.* at 17.

As we explained in *Navajo Nation*, the Hale Report concluded that any differences between the McGregor Range and the HPL were minor, and that it would therefore be unreasonable to include additional fees for water and fence maintenance on the HPL. 60 IBIA at 229. While there are certain differences in the provision of services on the two ranges, these differences must be considered in the context of all services provided by the Bureau of Land Management and BIA on these ranges. For the year 2000, the Tribe has not met its burden to demonstrate how these differences were so great as to justify a departure from the accepted practice of refraining from including additional charges for fence maintenance on the HPL in charging for permitted livestock. In so much as the Tribe is arguing that significant damage to fences on the HPL results from trespass, this argument should be considered by the Regional Director in the remand for trespass charges, as discussed above, and not in the permitted grazing charges. The Tribe has failed to show that the Regional Director erred in excluding additional costs for fence maintenance in his 2000 grazing charges and therefore we uphold the Regional Director’s decision on this matter.

V. Protocols for Evaluating Evidence and Determining Incidental Trespass (2001-2009 Period)

The Tribe contends that the Regional Director unreasonably imposed a retroactive standard for establishing trespass on the HPL for the years 2001 through 2009. 2001-2009 Opening Br. at 17-18. It complains that the Regional Director did not communicate the standards and protocols he would use in evaluating trespass reports until years after the trespass reports were created, and that there is no way of identifying which reports satisfied the Regional Director’s new standards. *Id.* at 18. The Tribe then argues that the new trespass standards go “far beyond any requirements communicated to the [Tribe],” and that the Tribe “does not have sufficient resources to conduct the monitoring of the range to capture all trespass . . . in the fashion described by the [2001-2009] Decision.” *Id.* at 19.

The Tribe mischaracterizes the Regional Director’s 2001-2009 Decision as creating a “retroactive standard.” The fact that the Regional Director was evaluating evidence and determining compensation for a period of time pre-dating by years the date of his decision does not mean that he created a “retroactive standard,” in the sense of changing a previously promulgated legal standard. And to the extent he departed from BIA’s previous de facto practice, the Tribe has not shown that the protocols selected by the Regional Director were unreasonable.

The Regional Director explained his methodology in assessing the trespass fees, which, for the majority of years, led him to augment the trespass fees in relation to those originally calculated by the Superintendent. *See* 2001-2009 Decision at 16 (“[T]he Superintendent’s use of Incidental Trespass Summaries provided within the AR underestimated the number of documented [sheep units] of trespass on HPL lands from 2001-2008[;] . . . the trespass summaries for 2009 overestimated the number of [sheep unit] days of trespass in 2009.”). The Regional Director explained that due to the range of data recording methods used on trespass reports, it was necessary to establish certain protocols to interpret the reports, and to use professional judgment in applying these standards and protocols to the reports. 2001-2009 Decision at 14-15.

A review of the trespass reports indicates that despite the many inconsistencies in how each technician completed the reports, which the Regional Director acknowledged, 2001-2009 Decision at 15, the criteria identified by the Regional Director were present in the majority of reports. *See, e.g.*, 2001 Trespass Reports (15-056 AR at 2369-2461); 2002 Trespass Reports (15-056 AR at 2487-2651); 2003 Trespass Reports (15-056 AR at 2678-2908); 2004 Trespass Reports (15-056 AR at 2931-3263); 2005 Trespass Reports (15-056 AR at 3291-3607); 2006 Trespass Reports (15-056 AR at 3631-4131); 2007 Trespass Reports (15-056 AR at 4161-4556); 2008 Trespass Reports (15-056 AR at 4585-4812); 2009 Trespass Reports (15-056 AR at 4835-5157). The Regional Director explained that these criteria were applied leniently, to the extent that “[i]f brands were not visible, but all other information fields were complete, . . . the total number of animals identified were counted in trespass.” 2001-2009 Decision at 15. But, trespass reports were not validated if the “data sheet did not contain specific enough information that would allow a follow-up investigation by tribal/enforcement personnel; and/or . . . an independent reviewer or potential permittee could not recognize the location of trespass; and the number, type, and the physical characteristics of the animals in trespass were not discernable.” *Id.*

The Regional Director also described his methodology for determining livestock to be in continuous trespass for multiple days. He explained that “[t]o charge for continuous trespass, there must be a documentation trail that demonstrates that the same animals were in the same location over a documented time period between when they are first recognized and when they were removed.” 2001-2009 Decision at 15. The Regional Director therefore determined that if the same animals were reported to be in trespass at the same location twice within ten days, then the animals were recorded to have been in trespass for the entire recorded period. *See id.* However, if more than ten days elapsed before there was a second report of the same animals in trespass at the same location, only single days of trespass were recorded. *Id.*

Whether or not the evidence could also have supported a different approach, we are not convinced that the Regional Director acted unreasonably or otherwise abused his discretion.

VI. Computational Errors

In the 2000 Decision, the Regional Director concluded that the Superintendent erred in using a 1:4 ratio for converting the number of cows to sheep (and the corresponding conversion of horses to sheep), for the purpose of determining the compensation owed by the Nation to the Tribe for grazing animals on the HPL. *See* 2000 Decision at 4-5. Based on our decision in *Hopi II*, the Regional Director determined that a 1:5 conversion ratio was appropriate and the Tribe does not appeal this determination. *Id.* Despite this determination, the Regional Director failed to recalculate the number of sheep units grazed on the HPL in 2000 using the 1:5 conversion ratio. Rather, the Regional Director used the same sheep unit totals calculated by the Superintendent using the 1:4 conversion ratio. The Regional Director also purported to make corrections to the number of livestock grazed by certain permittees on the HPL in 2000.¹⁵ *See* 2000 Decision at 11. However, his narrative explanation of these corrections does not accord with his calculations. *Compare* 2000 Decision at 11 *with* Regional Director's 2000 Calculations at 1 (14-081 AR, Doc. 3, Ex. 8). These inconsistencies constitute manifest error, *see* 43 C.F.R. § 4.318, and on remand the Regional Director shall correct these errors and recalculate the amounts owed.

Conclusion

The Board vacates the Regional Director's decision to disregard counts of over-permit and unpermitted livestock as evidence of trespass, and vacates his decision not to consider including additional compensation for injuries to rangeland and infrastructure caused by trespass activities. The Board also vacates the Regional Director's decision for the year 2000 to the extent necessary to permit the correction of computational errors.

¹⁵ The Regional Director purported to amend the sheep unit totals for Joann Yellowhair and Kenneth Jensen to 40 sheep units year-long and 67 sheep units year-long respectively. *See* 2000 Decision at 11. However, the Regional Director did not amend the total sheep unit year-long on the HPL by a corresponding amount. Furthermore, it is unclear whether the Regional Director applied the proper 5:1 conversion ratio when amending the sheep unit year-long totals for Joann Yellowhair and Kenneth Jensen.

The Board also affirms the Regional Director's exclusion of fence maintenance costs from the grazing rate, and affirms his methodology for evaluating the evidence in determining occurrences of incidental trespass.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Decisions in part, affirms the Decisions in part, and remands for further proceedings consistent with this decision.

I concur:

 // original signed
Steven K. Linscheid
Chief Administrative Judge

 //original signed
Thomas A. Blaser
Administrative Judge