



## INTERIOR BOARD OF INDIAN APPEALS

Carmencita Sonya Wildcat Wadsworth et al. v. Northwest Regional Director,  
Bureau of Indian Affairs

41 IBIA 172 (08/15/2005)

Related Board case:  
36 IBIA 220



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

CARMENCITA SONYA WILDCAT  
WADSWORTH, et al.,  
Appellants,  
  
v.  
  
NORTHWEST REGIONAL DIRECTOR,  
BUREAU OF INDIAN AFFAIRS,  
Appellee.

: Order Affirming Decision in Part,  
: Vacating Decision in Part, and  
: Remanding Matter to the  
: Regional Director  
:  
:  
: Docket No. IBIA 02-128-A  
:  
: August 15, 2005

Appellants Carmencita Sonya Wildcat Wadsworth, Howard A. Meeks, Alfreda Meeks Sanchez, JanaLee R. Meeks-Montes, Bobette Kay Wildcat Haskett, and Johnette L. Piper appeal from a June 4, 2002, decision of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning trespass damages owed by Kim and Rick Shawver (Shawvers) for unauthorized use of Fort Hall Allotment 3020. The Regional Director's decision was issued following the Board's remand in Denny v. Northwest Regional Director, 36 IBIA 220 (2001). For the reasons discussed below, the Board affirms the Regional Director's decision in part, vacates it in part, and remands this matter to the Regional Director for further consideration.

## Background

Under the remand in Denny, the Regional Director was required to determine trespass damages for the Shawvers' farming use of Allotment 3020 during 1996 and trespass damages for their use of a .1-acre portion of the allotment for a pump site from 1996 through 1999. With respect to the farming trespass, the Board order the Regional Director to have a new appraisal prepared for Allotment 3020 to determine fair rental value for 1996. 36 IBIA at 231. With respect to the pump site trespass, the Board stated:

Upon remand, the Regional Director shall determine what improvements, if any, remained on Allotment 3020 after the Shawvers removed their equipment. He shall deem the unremoved improvements to be the property of the owners of Allotment 3020 during the trespass period. He shall recalculate damages based

upon the corrected fair annual rental for the land, as discussed above, [1/] and the fair annual rental for any improvements deemed to belong to the landowners during the trespass period. If, in the professional opinion of BIA appraisers, a new appraisal is necessary to properly estimate value under these circumstances, the Regional Director shall order a new appraisal. If a new appraisal is determined not to be necessary, the Regional Director shall recalculate fair annual rental based on the existing appraisal.

Id. at 233.

With respect to both the farming trespass and the pump site trespass, the Board ordered the Regional Director to calculate interest in an amount he determined appropriate for the time period and to assess the Shawvers for damages and interest to the extent the amounts exceeded the amounts already paid by the Shawvers. Id. at 231, 233.

After the case was returned to the Regional Director, a BIA staff appraiser prepared a new appraisal with an effective date of January 1, 1996, in which he appraised Allotment 3020 for farming purposes and also appraised the pump site with selected improvements. The appraiser described the subject property as “18.87 farmable acres, .10 nonfarmable acres (pump site) and 1.21 unusable acres (canal right-of-way) for a gross acreage of 20.18, more or less.” June 3, 2002, Appraisal at 1.

For the farming use, the appraiser employed a lease comparison appraisal methodology, using leases for sprinkler-irrigated croplands which were described in a document titled “1996 Models, Fort Hall Agency, Agricultural Lease Study” (1996 Models). The leases he considered were included in the “Sprinkler Model” section of the 1996 Models, titled “Sprinkler Irrigation Canal/Lateral,” which included leases of “croplands that are sprinkler irrigated with water pumped from storage sumps or similar facilities,” 1996 Sprinkler Model at 2, and had rents ranging between \$27 and \$85 per acre. The appraiser found that Allotment 3020 had an overall productivity rating of 2 and an operating efficiency of S-NL-IRR. 2/ He selected three

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1/ In his original decision concerning the pump site, the Regional Director had mistakenly construed an August 1999 BIA appraisal as finding that the fair annual rent for the land within the pump site was \$180, when in fact the appraiser valued the land itself at \$180 and found that the fair annual rent was \$16.20.

2/ With respect to productivity and operating efficiency, the appraisal states:

“Productivity. Production capability is a combination of the following factors: soil types, size, topography, conditions, and shape. Productivity ratings are used to identify these factors and [are] based on a five tier rating system with 1 representing the highest level and 5 representing the lowest level of productivity. \* \* \*

(continued...)

leases, with rents from \$60 to \$75 per acre, as most closely comparable to Allotment 3020, stating that he had placed “primary emphasis \* \* \* on selecting leases that were: closest in distance to the subject, had similar land use or mixed uses, had similar size, and closest to the current date [i.e., January 1, 1996].” 2002 Appraisal at 2. He concluded that the most comparable lease was one with a rent of \$75.00 per acre. Applying the \$75 per-acre figure, he concluded that fair annual rent for the 18.87 acres of farmable acres was \$1,415.25, which he rounded to \$1,400.00.

For the pump site use, the appraiser appraised the land within the site, as well as selected improvements, namely a concrete sump and a wood utility pole, which he stated he had been instructed to include. In appraising the land, he incorporated the lease comparisons he had used for the farming appraisal and, again estimating a fair annual rent of \$75 per acre, found the fair annual rent for the .10-acre pump site to be \$7.50.

The appraiser found that the concrete sump was located on two allotments and that 78 percent of the total area of the sump was within Allotment 3020. He estimated the cost of the sump when new at \$3200 and stated:

[I]t is estimated that the effective age of this sump is 30 years with an economic useful life of 60 years. Based on this analysis, the concrete sump is 50 percent depreciated and has a contributory value of \$1,600.00 as of January 1, 1996. When \$1,600 is multiplied by 78 percent, the [result] is \$1,248, which represents the depreciated value of the sump on Allotment 3020.

Id. at 8. He applied a rate of return for improvements (9 percent) and a recapture or return of the original investment (3.33 percent), which he combined for a total of 12.33 percent. He then stated: “When this rate is applied to the residual value of the sump of \$1,248, the result is an indication of annual rent for this feature of \$153.88 or **\$154.00** rounded.” Id.

With respect to the wooden pole, the appraiser estimated its value when new at \$200 and found that it had been installed about 1981 and had an economic life of 30 years. He concluded that the pole was 50 percent depreciated and had a remaining economic life of 15 years. He then stated: “[A] rate of return of this investment can be calculated as 1/15 or

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2/ (...continued)

“Operating efficiency. Refers to the suitability of a tract of land for farming purposes and its cost of operation. It is significantly influenced by physical characteristics of the tract such as the Size of a parcel which will be represented by the following legend: S = small (*less than 40 acres*), L = large (*more than 40 acres*). Topography is represented by the legend: UN = undulating, NL = nearly level, and Shape of the parcel of the parcel is represented by the legend: IRR = irregular, REC = rectangular, SQU = square.”  
2002 Appraisal at 3.

.0667 which when included with a rate of return on investment of .09 indicates an overall rate of .1567. When this rate is applied to the depreciated value of this improvement of \$100.00 an annual rent for this feature in 1996 would be \$15.67 or **\$16.00** rounded.” Id.

Adding the values for the land, the sump, and the pole, the appraiser arrived at a total of \$177.50, which he rounded to \$180.00. He therefore estimated the fair annual rent for the pump site with selected improvements at \$180. Id.

The appraiser issued his appraisal on June 3, 2002, and the Acting Northwest Regional Chief Appraiser approved it on June 4, 2002. Also on June 4, 2002, the Regional Director issued his decision on remand, stating in part:

A Bureau appraiser prepared a retroactive appraisal with an effective date of January 1, 1996. He found the comparable leases in effect at the time indicated a rental value from \$60.00 to \$75.00 for the subject property, with the \$75.00 per acre rate being the most comparable for the subject. The Shawvers paid an amount based on the \$140.00 per acre vacant land value rate. Therefore the Shawvers were assessed more than what was appropriate.

\* \* \* \* \*

With respect to improvements remaining on the land, I have determined that the buried 10 inch mainline is located entirely on Allotment 641 based on an inspection by the Soil Conservationist, the location of survey markers (where they exist), and the location of the risers which go to the surface from the main line. [3/] Therefore the value of the mainline has no relevance with respect to the assessment of trespass damages.

Regional Director’s Decision at 2.

The Regional Director adopted all of the values in the appraisal and found that, for 1996, the Shawvers should have paid rent in a total amount of \$1577.50 (\$1,400 for 18.87 acres of farmland, \$154 for the concrete sump, \$16 for the wood pole, and \$7.50 for the land in the pump site) Id. at 3. He then stated: “The Shawvers paid \$1,572.50 on December 6, 1995, for the 1996 lease year. This amount was \$5.00 less than the amount which would have been due under the above calculation.” Id. at 4.

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3/ The location of the buried mainline was a subject of dispute in Denny. See 36 IBIA at 231-32.

As to interest, the Regional Director determined that a reasonable rate was 5 percent, based on the rate published in the Federal Register for debts owed to the Government during 1996. He concluded:

Interest is due on the \$5.00 delinquent amount that should have been paid on January 1, 1996. Six years and six months will have passed by July 1, 2002, the date that we are imposing on the Shawvers to pay this amount. Interest is computed as follows:  $\$5.00 \times .05 \text{ interest} \times 6.5 \text{ years} = \$8.25$ . [4/]

\* \* \* \* \*

Based on the preceding discussion, it is my decision that \$8.25 additional compensation is due from the Shawvers for their unauthorized use of Fort Hall Allotment 3020. \* \* \* In addition, I find that the mainline is not on Allotment 3020 and therefore does not belong to the landowners of that allotment; and that the concrete sump is partly owned by the owners of allotment 3020; and the power pole is the property of the owners of allotment 3020.

Id.

Although he was not specifically required to do so by the Board's remand, the Regional Director also addressed the question of whether civil penalties could be assessed under 25 U.S.C. § 3713. He held that, because the regulations implementing 25 U.S.C. § 3713 were not in effect at the time of the Shawvers' trespass, he could not assess civil penalties under that provision. Id.

Appellants appealed the Regional Director's decision to the Board. Briefs have been filed by Appellants, the Regional Director, and the Shawvers.

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4/ Applying this formula, the Board reaches a result of \$1.625, rounded to \$1.63. When interest in the amount of \$1.63 is added to \$5.00, the total amount due under the Regional Director's analysis would be \$6.63, rather than \$8.25.

## Discussion and Conclusions

Appellants first contend that the administrative record is incomplete. <sup>5/</sup> They allege that the Regional Director relied on documents that he did not include in the administrative record. What they are actually arguing, however, is that there are documents relevant to this dispute that the Regional Director did not include in the record. The fact that there may be other relevant documents does not mean that those documents were before the Regional Director when he issued his decision. In his October 29, 2002, memorandum transmitting the administrative record to the Board, the Regional Director certified that the record “contain[ed] all information and documents utilized by [him] in rendering the decision being appealed.” Appellants have not shown that the Regional Director’s certification was untruthful. <sup>6/</sup>

Next, Appellants object to the 1996 Models, contending that the document is incomplete and unreliable and that there is no information in the record concerning who prepared the document, and how and when it was prepared. The Board discusses this objection below in connection with Appellants’ other arguments concerning the appraisal and the Regional Director’s reliance thereon.

Appellants next argue that their due process right have been violated. Their principal concerns appear to be that they were not afforded an opportunity to participate in the appraisal process or an opportunity to cross-examine BIA personnel. Further they contend that the Regional Director was biased against them and that a BIA employee engaged in ex parte communications.

The issues remanded to the Regional Director were, for the most part, valuation issues. The Board’s remand required that the Regional Director assign those issues to an appraiser. It did not require that he involve any of the parties—either Appellants or the Shawvers—in the appraisal process or that he conduct a hearing. Rather, the Board contemplated that the remanded appraisal tasks would be undertaken by a certified appraiser who would exercise professional skills and judgment. The Regional Director did not violate Appellants’ due process rights by complying with the Board’s remand order.

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<sup>5/</sup> 43 C.F.R. § 4.336 requires that objections to the administrative record be filed within 15 days of receipt of the Board’s notice of docketing. Although Appellants’ opening brief was not filed within that time period, the Board concludes that, by reason of an earlier filing, which might be deemed an objection to the record, Appellants made a timely objection and are therefore entitled to continue their objection in their opening brief.

<sup>6/</sup> It appears possible that Appellants actually intended to argue that the administrative record is insufficient to support the Regional Director’s decision. There are some problems with the record in this regard. They are addressed later in this decision.

Appellants produce no evidence of the Regional Director's alleged bias against them. Nor do they show how the Regional Director's decision, which for the most part simply adopted the values assigned by the appraiser, was tainted by bias. Finally, they do not specify what ex parte communications the BIA employee allegedly engaged in.

The Board finds that Appellants have failed to show that their due process rights were violated.

Next, Appellants argue that the Regional Director failed to comply with the Board's remand instructions.

As noted above, the Board's remand in Denny assigned two appraisal tasks to the Regional Director, one concerning the farming trespass and the other concerning the pump site trespass. Appellants confuse the two, contending that BIA should not have prepared a new appraisal at all because BIA appraisers did not make a determination that a new appraisal was necessary. However, their argument is based entirely on the Board's direction concerning the pump site trespass and ignores the Board's explicit direction that the Regional Director was to have a new appraisal—specific to Allotment 3020—prepared for the farming trespass. It was only for the pump site that BIA appraisers were to make the determination as to whether a new appraisal was necessary.

Appellants' purpose in confusing the two remanded tasks becomes apparent in their next argument, where they contend that the Regional Director should have applied the land valuation from a 1999 appraisal of the pump site (discussed in Denny, 36 IBIA at 232) to the entire allotment for purposes of the farming trespass. They surmise that, if this were done, the allotment would be shown to have a fair annual rent of \$162 per acre, based on the conclusion in the 1999 pump site appraisal that the land within the pump site (.1 acre) had a fair annual rent of \$16.20.

Appellants miss a critical point in the 1999 pump site appraisal—the purpose for which the appraisal was done. The 1999 appraisal states on page 1: “**PURPOSE:** “A retrospective estimate of Fair Annual Rental for pump site lease, as of 1/1/96.” On the same page, the appraisal states: “**HIGHEST AND BEST USE:** The subject property is currently used as a pump site. Although it may be otherwise, for this report the highest and best use is assumed to be the same as a pump site.” It is evident that the 1999 appraisal valued the land within the pump site for use as a pump site, not for farming purposes.

Appellants present no authority whatsoever for the proposition that an appraisal prepared to value a small parcel of land for one use may be validly applied to the valuation of a much larger parcel for a different use. The Board is not willing to assume that such an application of the 1999 pump site appraisal is valid. It therefore rejects Appellants' contention

that the Regional Director should have used the land valuation in the 1999 pump site appraisal to determine trespass damages for the 1996 farming trespass.

While some of Appellants' remaining arguments are undoubtedly directed to both the farming trespass and the pump site trespass, the Board first addresses their arguments as they apply to the farming trespass. The pump site trespass is considered separately below.

Appellants contend that it was unreasonable for the Regional Director to rely on the 2002 appraisal because the appraiser violated recognized appraisal standards and the BIA Appraisal Handbook and because the appraisal was based on inaccurate and unreliable data, namely the 1996 Models.

As Appellants contend, BIA appraisals are required to be prepared in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). 25 C.F.R. § 162.211(b). Appellants object to the appraiser's statement concerning a jurisdictional exception to USPAP. The statement reads: "Jurisdictional Exception: Parts of this report may have been completed without regard to USPAP in accordance with jurisdictional exception to comply with applicable BIA statutes and directives. The parts of USPAP disregarded may include but are not limited to [list of rules]." 2002 Appraisal at 1. Appellants contend that this statement means that the appraiser did in fact depart from the rules.

The Regional Director responds that the quoted language is common in BIA appraisals and "is intended to remind readers that USPAP recognizes a 'Jurisdictional Exception Rule' [which] is intended to allow an appraiser to depart from a USPAP standard if she or he is required to do so by law or public policy." Regional Director's Brief at 11. He notes that the appraisal language states only that parts of the report may depart from USPAP, not that they did in fact depart. Further, he notes that the appraiser would have been required by the Jurisdictional Exception Rule to specify any departure that occurred, and he did not specify any such departures.

In reply to the Regional Director's argument, Appellants contend that the appraiser violated USPAP by departing from the USPAP standards without identifying the departures. Their argument simply repeats their other objections to the appraisal and attempts to characterize them as departures from various USPAP standards. However, they make only broad assertions concerning the alleged departures and fail to support those assertions with any analysis. The Board finds that Appellants' broad assertions are insufficient to show that the appraiser departed from any USPAP standard or otherwise violated USPAP.

Appellants object to the 1996 Models because there is no information in the record as to who prepared the document and how and when it was prepared. They also contend that the document lacks an index and instructions for use and that it otherwise appears incomplete. In

his answer brief, the Regional Director describes the document as “in essence a data base of agricultural leases to be used by Department of the Interior appraisers preparing appraisals of land on the Fort Hall Reservation.” Regional Director’s Brief at 12. He states that “[i]t contains individual Lease Data and Analysis sheets for every lease for which information could be verified.” Id.

While it is true, as Appellants contend, that the 1996 Models lack introductory and explanatory material, it appears that the intended audience consisted of appraisers who likely understood the material without the need for further explanation. In any event, the document includes model appraisals for various categories of leases, together with lease data sheets supporting them. These are the materials most relevant to the appraisal of Allotment 3020. The Board finds that the lack of introductory and explanatory material does not render the 1996 Models invalid or make the appraiser’s reliance on them unreasonable.

Appellants also object to the appraiser’s selection of comparable leases from the 1996 Models. They contend that the tracts subject to those leases are “15 miles apart on different sides of the reservation[,] \* \* \* substantially varied in size from 15 to 226.90 acres[,] and [that the leases for those tracts] were not negotiated during the relevant period of 1996.” Appellants’ Opening Brief at 14. They contend further that the 2002 appraisal “offers no explanation why the 1996 Models failed to include leases with higher rental rates or why it was not important to consider that the [Shawvers] had agreed to pay substantially higher lease rents for the land adjoining allotment 3020.” Id. at 16. They then suggest that the appraiser should have included four other leases from the 1996 Models which had rents of \$100 and \$108 per acre.

Appellants do not explain why the distance between the selected tracts, or their relative size, would make them unreasonable comparables. “Size” is one component of “Operating Efficiency” and thus clearly has some bearing on value. However, if Appellants are contending that size should have been a more important factor in the appraiser’s consideration, they must also recognize that the tract closest in size to Allotment 3020 had a rent of \$60 per acre, \$15 less than the fair annual rent estimated by the appraiser. Thus, Appellants would necessarily be contending that Allotment 3020 should have been appraised for a lesser amount than it was. The Board finds that Appellants have failed to show that the comparables chosen by the appraiser were unreasonable because of the distance between them or because of their size.

Appellants argue that the appraiser should have considered leases negotiated during 1996. The 2002 appraisal was a retrospective appraisal, i.e., it was prepared after the effective date of the appraisal, which was January 1, 1996. On that date, leases negotiated during 1996 were not in effect. As stated above, BIA appraisals to determine fair annual rent must be prepared in accordance with USPAP. The USPAP standard concerning retrospective appraisals allows consideration of data subsequent to the effective date of the appraisal “as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date.” However,

the standard specifies that, “[i]n the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used for the cut-off date for data considered by the appraiser.” USPAP Statement on Appraisal Standards No. 3 (SMT-3) (2002). Under this standard, the appraiser could not have considered leases negotiated during 1996 unless those leases confirmed market expectations as of January 1, 1996.

The leases Appellants seem most anxious to have used as comparables are leases negotiated in 1996 and early 1997 between the Shawvers and the owners of allotments close to Allotment 3020. Those leases were negotiated in the context of a trespass dispute similar to the one at issue here, see Denny, 36 IBIA at 221-22, and, given that fact, may well be deemed inappropriate comparables for any appraisal purpose. In any event, Appellants fail to show that those leases, or any other leases negotiated during 1996, “were consistent with and confirmed market expectations as of” January 1, 1996, and thus met the USPAP standard. 7/

As to the four leases in the 1996 Models with rents of \$100 and \$108 per acre, those leases were in the “Deep Well Model” sections of the 1996 Models, which concern leases of “croplands that are sprinkler irrigated with water pumped exclusively from deep wells.” 1996 Deep Well Models at 2. 8/ However, Appellant does not contend that Allotment 2030 is irrigated from a deep well. As far as the record shows, Allotment 2030 falls within the category described in the “Sprinkler Model” section of the 1996 Models, i.e., “croplands that are sprinkler irrigated with water pumped from storage sumps or similar facilities.” 1996 Sprinkler Model at 2. As stated above, this was the section of the 1996 Models from which the appraiser drew his comparables. Appellant fails to show that the appraiser should have considered leases of croplands in categories other than the category into which Allotment 2030 falls.

Appellants object to the productivity rating of 2 which the appraiser assigned to Allotment 3020. They contend that Allotment 3020 has a productivity exceeding that of all the leases listed in the “Sprinkler Model” section of the 1996 Models, including those with productivity ratings of 1. In support of their contention, they submit a March 20, 2000, document titled “S. M. C. Resource Data Sheet.” This is apparently a BIA document intended for some lease-related use. It concerns an area of approximately 600 acres including Allotment 3020 and states that the level of productivity is “Potatoes 325-350 cwt per acre, grain 85-200 bu per acre, alfalfa 4.0-5.0 tons per acre, pasture 8-10 aums per acre, sugar beets 22 to 26 tons per acre.”

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7/ Appellants do not contend that an effective date other than Jan. 1, 1996, should have been chosen.

8/ The same four leases appear in both the model titled “Deep Well Inside of Fort Hall Irrigation Project” and the model titled “Deep Well Outside of Fort Hall Irrigation Project.”

Neither the S. M. C. Data Sheet nor the 2002 appraisal equates the productivity ratings (i.e., ratings of 1 through 5) to the levels of productivity described in the S. M. C. Data Sheet. However, a document titled “Fort Hall Productivity Ratings,” which is attached to the 1999 pump site appraisal, has a chart showing what levels of productivity equate to the numerical ratings 1 through 5. Under this chart, the 600-acre area analyzed in the S. M. C. Data Sheet would have a rating of 2 for potatoes, a rating of 1 to 3 for grain, a rating of 3 for alfalfa, a rating of 3 for pasture, and a rating of 3 for sugar beets. Appellants do not dispute the validity of the chart in the “Fort Hall Productivity Ratings.” Thus they have not shown that the 600-acre area should have received a productivity rating of 1. Nor have they shown that the 20-acre Allotment 3020, if rated separately, should have received a productivity rating of 1. In any event, even if Allotment 3020 were to receive a productivity rating of 1, it would make no difference in this case. Although the appraiser assigned a productivity rating of 2 to Allotment 3020, the lease he chose as most comparable had a productivity rating of 1 and, of all the leases in the relevant section of the 1996 Models, it had potato and grain productivity closest to that which Appellants attribute to Allotment 3020. Appellants’ argument therefore supports the appraiser’s choice.

The Board concludes that Appellants have failed to show error in the appraiser’s use of the 1996 Models or in his choice of comparables. It concludes further that they have failed to show error in the 2002 appraisal or in the Regional Director’s decision as they concern the farming trespass. The Board therefore affirms the Regional Director’s decision as it concerns the 1996 farming trespass. 9/

Turning to the pump site trespass, the Board first observes that neither the 2002 appraisal nor the Regional Director’s decision addressed the pump site trespass for the years 1997-1999. These are omissions that cannot be corrected on appeal. Even if the Regional Director’s decision were affirmed for the pump site trespass during 1996, the 1996 valuation cannot be applied to the later years because it is not clear that the values remained the same during those years and, perhaps more importantly, it is not clear that the pump site, when appraised alone and specifically for pump site purposes, would be appraised in the same manner as if it were part of a larger parcel being used for farming purposes. 10/ Thus, even though Appellants unaccountably do not object to the failure of the Regional Director to assess damages for the pump site trespass for the years 1997-1999, the Board finds that the matter of the pump site trespass must again be remanded to the Regional Director.

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9/ Appellants do not challenge the Regional Director’s determination concerning interest.

10/ In 1996, the Shawvers used the entire allotment for farming purposes, as well as the pump site. However, after 1996, the Shawvers did not farm the allotment but continued to use the pump site.

Another concern the Board has with the 2002 pump site appraisal is that it employed a different methodology for valuing the land within the pump site than did the 1999 pump site appraisal but does not explain the reason for departing from the earlier method. As noted above, the 2002 appraisal employed a lease comparison methodology. By contrast, the 1999 pump site appraisal estimated the market value of the land and applied a rate of return. The two methodologies produced significantly different fair annual rents for the land for 1996—\$7.50 in the 2002 appraisal and \$16.20 in the 1999 appraisal. While the methodology chosen by the 2002 appraiser may be perfectly appropriate, there is no explanation in the record for his decision to employ a methodology different from that employed in the 1999 appraisal.

In his brief before the Board, the Regional Director states:

The BIA appraiser assigned the task made his determination [to prepare a new appraisal for the pump site] based upon two factors. First, the 1999 appraisal relied upon four sales that did not exist as of the date of valuation. Second, it was not supportable to use a 9% rate of return to determine fair annual rental for land (as opposed to improvements).

Regional Director's Brief at 10. However, there is nothing in the administrative record to support this statement. 11/ As the pump site appraisal must be revisited, the appraiser who is assigned this matter on remand should be required to explain his choice of methodology for appraising the land within the pump site.

Appellants raise objections to the 2002 appraisal's valuation of the improvements on the pump site. They contend that the appraiser should not have used the cost approach for this purpose. This is a puzzling argument in that the 1999 pump site appraisal, which Appellants strongly favor, 12/ also used the cost approach. It is particularly puzzling that Appellants object to use of the cost approach in the 2002 appraisal but not in the 1999 appraisal, even though the only improvement which appears in both appraisals—the concrete sump—was

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11/ The record lacks any statement from the appraiser concerning his determination that a new appraisal of the pump site was necessary. It also lacks any specific direction to the appraiser from the Regional Director or other BIA official. While the appraiser clearly understood his assignment as it related to the farming trespass, it is not clear that he understood what he was supposed to do with respect to the pump site trespass.

12/ For example, see discussion above, 41 IBIA at 178-79. Throughout their briefs, Appellants compare the 1999 and 2002 appraisals, always to the detriment of the 2002 appraisal.

given a much higher value in the 2002 appraisal (fair annual rent of \$154) than in the 1999 appraisal (fair annual rent of \$45). 13/

Where the 2002 appraisal is concerned, Appellants evidently favor use of either the market data approach or the income approach, both of which they mention but fail to discuss. While they assert that “the cost approach is the least reliable” for purposes of this appraisal, Appellants’ Opening Brief at 19, they fail to show how either of the other two approaches would have produced a more reliable result. Accordingly, they also fail to show that the appraiser should have used a different approach.

Next, Appellants argue that the Regional Director lacked evidence for his conclusion that the buried mainline is not located on Allotment 3020. They contended in Denny that “the underground water main traversed the entire length of allotment 3020.” 36 IBIA at 231. The Shawvers disputed Appellants’ claim, id. at 232, and the Board ordered the Regional Director to determine on remand what improvements remained on Allotment 3020 after the Shawvers removed equipment belonging to them. Id. at 233. Thus, the Regional Director was necessarily required to make a determination as to whether the buried mainline was on Allotment 3020.

On remand, the Regional Director “determined that the buried 10 inch mainline is located entirely on Allotment 641 based on an inspection by the Soil Conservationist, the location of survey markers (where they exist), and the location of the risers which go to the surface from the main line.” Regional Director’s Decision at 2. However, there is nothing in the administrative record documenting either the Soil Conservationist’s inspection or the location of the survey markers and risers. Thus, there is no way to assess the reasonableness of the Regional Director’s reliance on the inspection or on information concerning the survey markers and risers. As the Regional Director indicates that he relied solely on these factors to make his determination, yet fails to include any documentation in the record, the Board is forced to conclude that his determination concerning the buried mainline is not supported by the administrative record. 14/ Therefore, in accordance with the Board’s usual practice, the

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13/ The two appraisers had significantly different estimates of the sump’s cost, effective age, and economic life. Given the large discrepancy, the appraiser assigned this matter on remand should be required to furnish a more detailed explanation of his estimates of the sump’s cost, effective age, and economic life.

14/ There are two documents in the record concerning the location of the buried mainline—an undated map attached to the 2002 appraisal and an Apr. 30, 1998, “Conservation Plan Map” attached to an Aug. 30, 2001, memorandum from the Superintendent, Fort Hall Agency, to the Regional Director. The undated document attached to the appraisal appears to be a partial

(continued...)

Regional Director's determination concerning the buried mainline will be vacated, and the matter will be returned to him for further consideration. See, e.g., Ziebach County, South Dakota v. Great Plains Regional Director, 36 IBIA 201, 204 (2001); Jeffers v. Portland Area Director, 26 IBIA 134, 136 (1994) (vacating decisions not supported by the administrative record).

Lastly, Appellants contend that the Regional Director erred in declining to assess civil penalties under 25 U.S.C. § 3713. They recognize that the Board has held that civil penalties could not be assessed under that provision in the absence of implementing regulations 15/ and that, in Denny, the Board affirmed "the Regional Director's conclusion that he lacked authority, as of the date of his [March 12, 1998, and April 26, 2000] decisions, to assess civil penalties under 25 U.S.C. § 3713." 36 IBIA 230. Appellants contend, however, that the situation is different now because the Regional Director's decision at issue here was issued after the implementing regulations, 25 C.F.R. Part 166, Subpart I, became effective on March 23, 2001.

Appellants also attempt to resurrect an argument that was made and rejected in Papse—that the civil penalties authorized in 25 U.S.C. § 3713 became effective when that

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14/ (...continued)

copy of the 1998 document. (It includes the entire map but lacks some of the annotation from the 1998 document.)

In both documents, the map depicts the boundary between Allotments 641 and 3020, a power pole on Allotment 3020, and a structure labelled "Pumping Station Concrete Box," which is shown as straddling the allotment boundary. (This is presumably the concrete sump.) Lines are drawn 10 feet from either side of the boundary. An annotation to the map states in part:

"The center line of the buried irrigation mainline that goes north and south from the pumping station to the irrigation equipment is totally on Allotment 641. However, for easement purposes associated with the trespass claim, we have allowed for a twenty (20) feet right-of-way for the mainline, ten (10) feet on either side of the boundary line."

The mainline is not depicted on the map. The map is therefore not evidence that the entire mainline is on Allotment 641, even if, as the annotation states, the center line of the mainline is on Allotment 641.

The map does not show who prepared it. Further, it was evidently prepared prior to Apr. 30, 1998, and so predates the Board's remand in Denny. In any event, there is simply no evidence that the map reflects the Soil Conservationist's inspection upon which the Regional Director relied.

For these reasons, the map is not sufficient support for the Regional Director's determination concerning the buried mainline.

15/ Papse v. Acting Portland Area Director, 33 IBIA 175 (1999).

provision was enacted by Congress in 1994. The Board will not revisit that argument here. The civil penalties authorized in 25 U.S.C. § 3713 did not go into effect until March 23, 2001. Therefore, Appellants' argument must be construed as an argument for retroactive application of 25 C.F.R. Part 166, Subpart I. Appellants offer no support whatsoever for such an argument.

In Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), the Supreme Court struck down retroactive rules promulgated by the Secretary of Health and Human Services. The Court stated:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. [Citations omitted.] By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Nothing in 25 C.F.R. Part 166, Subpart I, indicates that the subpart is to have retroactive application. Nor do the Federal Register preambles to the proposed or final regulations evidence any such intent. See 65 Fed. Reg. 43,874, 43,882, 43,885 (July 14, 2000) (proposed); 66 Fed. Reg. 7068, 7087-88 (Jan. 22, 2001) (final). Further, Congress did not, in enacting 25 U.S.C. § 3713, expressly convey to the Secretary the power to promulgate retroactive rules. The Board finds that, under Bowen, the regulations in Part 166, Subpart I, cannot be applied retroactively. Accordingly, the Board affirms the Regional Director's holding to that effect.

For the reasons discussed, the Board affirms the Regional Director's decision except with respect to the pump site trespass. As to the pump site trespass, the Board vacates the Regional Director's decision and remands the matter to him for (1) a specific, documented determination as to the location of the buried mainline and (2) an appraisal of the pump site for the years 1996-1999, which is to include the land within the pump site; the concrete sump (or portion of the sump within Allotment 3020); the wooden pole; and, if any portion of the buried mainline is determined to be on Allotment 3020, that portion of the mainline. The Regional Director shall provide written directions to the appraiser. Given the nature of this dispute, he shall request the appraiser to explain, in detail, his choice of methodology for appraising the land and improvements and to explain, to the extent he is able to do so, any differences in his valuation and the valuations in the 1999 and 2002 appraisals. Following receipt of the appraisal, the Regional Director shall issue a new decision assessing trespass damages for the pump site trespass. As Appellants have not challenged the methodology employed in the Regional Director's June 4, 2002, decision to determine an appropriate rate of interest, the June 4, 2002, decision is affirmed in that regard, and the Regional Director

may therefore employ the same methodology to calculate interest on the trespass damages he assesses in his new decision.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's June 4, 2002, decision is affirmed in part, vacated in part, and remanded to him for the actions discussed in the preceding paragraph. 16/

I concur:

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// original signed  
Anita Vogt  
Senior Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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16/ Issues raised by Appellants but not discussed in this decision have either been considered and rejected or determined not to be relevant.