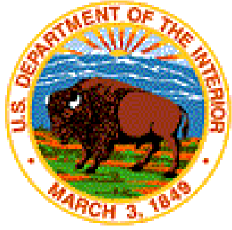


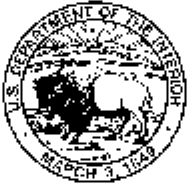
INTERIOR BOARD OF INDIAN APPEALS

Fort Berthold Land & Livestock Association v. Great Plains Regional Director, Bureau of Indian Affairs

35 IBIA 266 (12/20/2000)

Related Board cases:

- 35 IBIA 259
  - Disapproving in part, 8 IBIA 90
- 35 IBIA 279
- 35 IBIA 281
- 35 IBIA 283
- 40 IBIA 47



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

FORT BERTHOLD LAND AND LIVESTOCK ASSOCATION
v.
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 00-51-A Decided December 20, 2000

Appeal from an increase in the reservation minimum annual grazing rental rate for the Fort Berthold Reservation.

Vacated and remanded.

1. Board of Indian Appeals: Generally--Indians: Leases and Permits: Farming and Grazing--Indians: Leases and Permits: Rental Rates

   In reviewing a grazing rental rate adjustment or rental value determination, the Board of Indian Appeals does not substitute its judgment for that of the Bureau of Indian Affairs. Instead, it reviews the Bureau's decision to determine whether it is reasonable; that is, whether it is supported by law and by substantial evidence. The burden is on the appellant to show that the Bureau's action is unreasonable.

2. Board of Indian Appeals: Generally--Indians: Leases and Permits: Farming and Grazing--Indians: Leases and Permits: Rental Rates

   Even in cases involving the exercise of discretion, the Board of Indian Appeals has the full authority of the Secretary of the Interior to address allegations that the Bureau of Indian Affairs failed to follow required procedures or that its decision is legally deficient.

APPEARANCES: Karen R. Krub, Esq., and Lynn A. Hayes, Esq., Saint Paul, Minnesota, for Appellant; Carrie Prokop, Esq., Office of the Field Solicitor, Ft. Snelling, Minnesota, for the Regional Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Fort Berthold Land and Livestock Association seeks review of a June 25, 1999, decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), increasing the minimum annual grazing rental rate for the Fort Berthold Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this matter to the Regional Director for further consideration in accordance with this decision.

Background

On May 12, 1999, David M. Baker, a certified general appraiser in Rapid City, South Dakota, submitted to the Regional Director a grazing rate study for North Dakota for the 2000 grazing season (Baker study or study). The study was based on the average grazing rates paid by Farm Service Agency (FSA) stockmen for off-reservation grazing permits. 1/ Baker determined that, of the data provided by FSA, 27 off-reservation grazing permits were comparable to on-reservation permits. He stated:

> Comparables were omitted from the analysis if it was noted that the rental provisions included the use of buildings, cropland, or tame grassland. Comparables were also omitted from inclusion in the analysis if the information provided was not sufficient to allow for the calculation of a $\AUM [2/] rate. The analysis also excluded any comparables that exceeded a 2 standard deviation limit. This technique results in the omission of those rentals with extremely low or high rental rates.

Baker Study at unnumbered 2.

Baker adjusted the information on the comparables to reflect two differences between on- and off-reservation permits: (1) on-reservation permittees are required to pay a BIA preparation fee; and (2) on-reservation permittees are required to pay their annual grazing fee in full in advance of the grazing season, while off-reservation permittees have more payment options. The study continues: "Research has indicated that private lenders are currently charging approximately 11% for loans of this nature. Therefore, an adjustment has been applied against

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1/ For ease of reading, the Board will use the term "permit" in referring to the document granting either on- or off-reservation grazing privileges, even though such privileges may be granted off-reservation through a "lease." It will similarly use the word "permittee."

2/ AUM stands for animal unit month. The standard is the amount of forage consumed in one month by one cow with an unweaned calf at her side.

the adjusted ND Base Grazing Rate to reflect the extra costs incurred by the lessee due to the provisions contained in the permit, and which are not reflected in the market." Id. The study determined that the summer seasonal grazing rate for North Dakota reservations should be $11.54 per AUM and that the yearlong reservation grazing rate should be 60 percent of the seasonal rate, or $6.92 per AUM.

By memorandum of June 25, 1999, the Regional Director recommended to the Fort Berthold Superintendent (Superintendent) that a dual minimum grazing rental rate be established for the Fort Berthold Reservation. The recommended rental rate was $6.92 per AUM for yearlong grazing and $11.45 per AUM for summer seasonal grazing. Apparently, prior to this time, there was a single grazing rate of $4.30 per AUM at Fort Berthold.

In a September 22, 1999, memorandum to the Superintendent, the Regional Director established a reservation minimum grazing rate of $6.92 per AUM for yearlong grazing. The letter did not mention a separate rate for summer seasonal grazing.

By memorandum dated November 2, 1999, the Regional Director again wrote to the Superintendent, stating that she had established a dual grazing rate structure in her June 25, 1999, memorandum. She continued: "All grazing permits at Fort Berthold Agency expire on November 30, 1999. [3/] * * * Due to the time constraints involved in issuing new permits on the Fort Berthold Reservation, I have decided to partially implement part of the new [dual structure] policy. I am directing the Superintendent to implement the summer seasonal grazing rate for pasture livestock for the 2000 grazing season." The November 2, 1999, memorandum was clarified in a November 15, 1999, memorandum.

None of the Regional Director's memoranda to the Superintendent directed the Superintendent to inform interested parties of their right to appeal. The Superintendent did not independently inform interested parties of their right to appeal. Appellant's President nevertheless filed an appeal with the Regional Director. The Regional Director forwarded the appeal to the Board, which held that the appeal was timely under 25 C.F.R. § 2.7(b). 4/ See, e.g., Peoria

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3/ Although the Regional Director does not provide evidence in support of this statement on appeal, the statement is supported by the grazing permit held by Appellant's President, Edward S. Danks, Jr., which shows a term running from Dec. 1, 1994, through Nov. 30, 1999. Appellant also states at page 3 of its reply brief that "unlike the other reservations [in North and South Dakota], Fort Berthold is at the beginning of a new five-year permit season."

4/ Section 2.7 provides:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

Tribe of Indians of Oklahoma v. Muskogee Area Director, 32 IBIA 81, 83 (1998); Central Council of Tlingit and Haida Indian Tribes of Alaska v. Acting Chief, Division of Social Services, 28 IBIA 206, 207-08 (1995).

In addition to this appeal, the Board received eight other appeals relating to the Regional Director's setting of new rental rates for the 2000 grazing season on reservations in North and South Dakota. One appeal concerned the Standing Rock Sioux Reservation. Appellants in that appeal also filed suit in federal district court, where a settlement was reached. The Board dismissed the appeal before it on the basis of the settlement. Claymore v. Great Plains Regional Director, 34 IBIA 213 (2000). The Board consolidated the remaining appeals. Opening and reply briefs were filed by some of the appellants; other appellants relied on the information contained in their notices of appeal.

Although the Board had originally intended to issue one decision disposing of all of the appeals, it now finds that separate decisions should be issued because of factual differences among the various reservations. However, because consolidated briefs were filed with the expectation that all arguments raised by any appellant would be considered in the Board's decision, the Board will address relevant arguments made by an appellant in any of the appeals when it addresses a specific issue in this decision. It will not attempt to attribute each argument to the individual appellant(s) actually making that argument, but will instead treat the argument as if raised by the appellant here.

The Board has also received one appeal relating to an increase in the rental rate for the 2001 grazing season on the Rosebud Sioux Reservation. See Waln v. Great Plains Regional Director, 35 IBIA 283 (2000). 5/

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fn. 4 (continued)

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

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

5/ In addition to Claymore and Waln, related cases are: Cheyenne River Sioux Tribe v. Great Plains Regional Director, 35 IBIA 281 (2000); Lange v. Great Plains Regional Director, 35 IBIA 279 (2000), and Long Turkey v. Great Plains Regional Director, 35 IBIA 259 (2000).

Discussion and Conclusions

In Long Turkey, the Board addressed the question of whether the Regional Director has authority to increase grazing rental rates during the term of a five-year grazing permit. It held that she does not.

This appeal differs from Long Turkey in that the permits on the Fort Berthold Reservation expired on November 30, 1999. Therefore, in setting new rates for this reservation, the Regional Director was not adjusting a rental rate during the term of the permit, but rather was establishing a rate at the start of a new permit period. Therefore, the Board must here address those arguments made against the increased rental rate which were not addressed in Long Turkey.

[1, 2] The Board first considers the standard of review to be applied in this case. The setting of a rental rate here, like the setting of any other lease rate, requires the exercise of expertise and discretion. As to that part of a BIA decision which actually sets the rental rate, the Board

> has a well-established standard of review * * *. It has held that its role is to determine whether the adjustment or rental value determination is reasonable; that is, whether it is supported by law and by substantial evidence. If BIA's determination is reasonable, the Board will not substitute its judgment for BIA's. The burden is on the appellant to show that BIA's action is unreasonable.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, 17 IBIA 78, 81 (1989). However, the Board has the full authority of the Secretary of the Interior to address allegations that BIA failed to follow required procedures or that BIA's decision is legally deficient. Cf. Pawnee v. Acting Anadarko Area Director, 32 IBIA 273 (1998) (The Board reviews BIA discretionary decisions to ensure compliance with legal prerequisites to the exercise of discretion); Baker v. Muskogee Area Director, 19 IBIA 164, 169, 98 I.D. 5, 7 (1991) (The Board has full authority to review a legal conclusion reached in an otherwise discretionary BIA decision).

Appellant contends that the Regional Director failed in her responsibility to consult with it prior to increasing the rental rate. It cites various Presidential and Secretarial directives requiring consultation on matters affecting Indians in support of this argument. 6/ It also cites

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6/ The most recent consultation directives are Exec. Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," 65 Fed. Reg. 67249 (Nov. 9, 2000); and "Bureau of Indian Affairs Government-to-Government Consultation Policy," Dec. 13, 2000,

Winnebago Tribe of Nebraska v. Babbitt, 915 F.Supp. 157 (D.S.D. 1996), and Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395 (D.S.D. 1995), in support of its interpretation of the mandatory nature of the directives.

The Regional Director contends that she had no duty to consult because the directives do not create an enforceable right. 7/

In contending that the directives do not create an enforceable duty to consult, the Regional Director misses one very salient point: The Board is not a Federal court, in which Appellant has sought to enforce an Executive Branch directive. Instead, it is part of the Executive Branch agency whose Secretary issued some of the directives under discussion and which directly answers to the President, who issued the remaining directives. While a Federal court may or may not read the various directives as establishing a right enforceable in Federal court, that does not answer the question of whether the Board, which speaks for the Secretary of the Interior, may conclude that consultation was required under the directives.

In this case, the Board has determined that this matter must be remanded to the Regional Director for other reasons. The Board believes that, on remand, the Regional Director might wish to reconsider whether the position taken in her answer brief is consistent with the Federal policy which was clearly articulated in the Presidential and Secretarial directives. 8/

In addition to the Presidential and Secretarial directives, Appellant also argues that consultation is required by a 1993 Memorandum of Agreement (MOA) entered into by BIA and the American Indian Livestock Association. The MOA states:

> The new grazing rate will become effective as proposed on November 1, 1993. The Bureau of Indian Affairs (BIA) agrees to freeze this rate until a joint working committee establishes a methodology which can be used for future rate adjustments. This working committee will consist of representatives of the BIA,

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fn. 6 (continued)
http://www.doi.gov/BIA/information/consultation_doc.pdf. These particular directives had not been published when this appeal was briefed.

7/ The Regional Director also argues that she, in fact, did consult with the affected tribes. The administrative records transmitted to the Board do not reflect any consultation prior to the issuance of the Regional Director's decision.

8/ The Board notes that this policy was not first announced in the directives specifically cited by Appellant. See Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979), for a discussion of a 1972 directive on consultation.

> American Indian Livestock Association, Landowners, and Tribal Government. This group will work together to refine all aspects of the appraisal process, including (but not limited to) the cost of doing business under the permit system, cost sharing improvements, discounts, taxes, summer grazing vs. year long length of leases. This committee will submit their recommendations to the Area Director by July 1, 1994.

Neither the MOA nor the working committee's recommendations was included in the administrative record submitted to the Board. Despite the fact that several appellants mentioned this MOA and that Appellant included a copy of it as Exhibit Q to its opening brief, the Regional Director has not addressed the MOA. In fact, the memorandum transmitting to the Board the appeal in Waln v. Great Plains Regional Director, 35 IBIA 283 (2000), suggests that the Regional Director was not even aware of the MOA. Appellant contends that both the present Regional Director and her predecessors have ignored the MOA.

Although appellants clearly believe that this MOA is still in effect, the Board does not have sufficient information to make such a determination. Again, however, because this matter is being remanded to the Regional Director, the Board suggests that the Regional Director and her counsel determine the present status of this MOA and, if it is still in effect, further determine whether the Regional Director may have a contractual duty under it to consult with parties affected by grazing rental rate adjustments that is completely independent of any Presidential or Secretarial consultation directive or of any statute, regulation, or administrative or judicial decision. 9/

Additionally, the Regional Director might wish to consider the fact that the use of consultation, and other non-adversarial forms of dispute resolution--and dispute avoidance--tends to produce better decisions which are accepted by all parties, and to foster greater understanding and cooperation among parties. This is especially important when those parties are in long-term relationships, such as is the case here. The Regional Director might, therefore, wish to consider truly consulting with all affected parties even if there is no enforceable right to consultation.

9/ When it first received these appeals, the Board considered the possibility of addressing them through some form of alternate dispute resolution (ADR). It did not request that the parties engage in ADR only because of the logistical problems of implementing an ADR process with so many parties in the short period of time involved in the context of these appeals.

The existence of the MOA indicates that the parties themselves believed that grazing rental rates should be set in a manner equitable to all parties before disputes turned into contentious litigation, as they unfortunately have here. If the MOA had been followed, it appears that all of the issues raised in these related appeals would have been the subject of discussion and, perhaps, resolution among the affected parties.

Appellant contends that the Regional Director improperly failed to base her decision on an appraisal. The Regional Director states that she issued her decision under authority of 25 C.F.R. § 166.13(b). Section 166.13 provides:

> (a) Tribal governing bodies may determine the minimum rental rate to be charged for the use of tribal lands (1) included in advertisements for public sale and (2) by allocation, except that allocate Indian permittees shall be required to pay at least the reservation minimum rental rate established by the Area Director pursuant to paragraph (b) of this section for all non-Indian owned livestock which they may be authorized to graze on tribal lands. Prior to these determinations, the Superintendent shall provide the tribe with all available information including appraisal data concerning the value of grazing on tribal lands.
>
> (b) The Area Director shall establish a reservation minimum acceptable grazing rental rate. The reservation minimum rate shall apply to all grazing privileges permitted on individually owned lands, to non-Indian owned livestock which allocated permittees may be authorized to graze on tribal lands, and to all tribal lands when the governing body fails to establish a rate pursuant to paragraph (a) of this section. Except as otherwise provided in paragraph (c) of this section, the rate established shall provide a fair annual return to the land owners.
>
> (c) Indian landowners, in giving the Superintendent written authority to grant grazing privileges on their individually owned land, may stipulate a minimum rate above the reservation minimum set by the Area Director if justified because of above average value. They may also stipulate a lower rate than the reservation minimum, subject to approval by the Superintendent when the permittee is a member of the landowner's immediate family.

Nothing in 25 C.F.R. § 166.13(b) states how the Regional Director is to determine the rental rate. Section 166.13(a), however, suggests that the rental rate will be established using "appraisal data," because the Regional Director is required to provide such data to the tribe for use in setting rental rates on tribal lands.

Appellant argues that the Bureau of Indian Affairs Manual (BIAM) explicitly requires that the grazing rate be based on appraisal data. It quotes a BIAM provision in support of this argument:

> It is the Area Director's responsibility to assemble reliable appraisal data on the value of the rented grazing privileges on Indian land, whether tribally or individually owed, and furnish it to the Superintendent for use by the tribal

> governing body in its deliberations. Based upon the appraisal information assembled, the Area Director shall establish a reservation minimum acceptable grazing rate for the Superintendent to apply * * *.

55 BIAM (Supp. 1, Release 2) § 1.13(B) as quoted in Opening Brief of Fort Berthold Land and Livestock Association at 11-12. Citing Jackson County, Oregon v. Phoenix Area Director, 31 IBIA 126, 135 (1997); and Carter v. Acting Billings Area Director, 20 IBIA 195, 203-04 (1991), Appellant contends that the Board has previously held that BIAM provisions can be enforced against BIA.

The Board agrees with Appellant's reading of its prior cases regarding provisions found in the BIAM, but not in regulations. The Board has consistently followed the dictates of the Supreme Court in Morton v. Ruiz, 415 U.S. 199 (1974), in holding that the provisions of the BIAM are not regulations, do not have the force and effect of law, and cannot be applied against an outside party who does not have knowledge of those provisions. However, it has also held that those provisions can be enforced against BIA, the author of the BIAM. E.g., Jackson County; Carter.

The Board finds that the BIAM provision cited is consistent with the suggestion in 25 C.F.R. § 166.13(a) that rental rates will be determined on the basis of "appraisal data." Even without this finding, however, it concludes that the BIAM provision should be enforced against BIA.

Appellant argues that the Baker study was not based on "appraisal data," but was instead based on "market survey data." The Regional Director agrees that she did not use an appraisal to determine the rates. She contends, however, that the study on which she relied was "appraisal data."

No definition of the term "appraisal data" appears in the regulations. Nor has any party cited a BIAM definition of that term or the term "appraisal information," both of which appear in the relevant provision of the BIAM. There is no evidence, however, that either term was intended to have anything other than its literal meaning--that is, data or information derived from or based on an appraisal.

The Regional Director does not explain how information from the Baker study constitutes appraisal data when, as she concedes, the study is not an appraisal. The Board concludes that the Regional Director has failed to show that she based her grazing rental rate adjustments on appraisal data. 10/

10/ A proposed revision of 25 C.F.R. Part 166 published on July 14, 2000, would authorize valuation methods in addition to appraisals. Proposed 25 C.F.R. § 166.401 provides:

Appellant also objects to the specific rates determined in the Baker study. It argues that the rates were not set based on an analysis of Indian lands, because the study used off-reservation comparables. Appellant contends that the BIAM provision cited above requires that the grazing rate must be set based on the value of grazing privileges "on Indian land."

As the Regional Director notes, the Board has previously affirmed BIA's use of off-reservation comparables in determining appropriate rental rates on-reservation. See, e.g., Elliott v. Portland Area Director, 31 IBIA 287 (1997); Fort Berthold Land and Livestock Association v. Aberdeen Area Director, 8 IBIA 230, 88 I.D. 315 (1981). In fact, the Board has declined to require BIA to use only on-reservation rental rates because excluding off-reservation data "'merely creates an unending closed loop of information. At some point BIA must look beyond earlier BIA-approved [on-reservation] leases for information to see if land values are increasing.'" Elliott, supra, 31 IBIA at 292 n.6 (quoting from the brief filed on behalf of the Portland Area Director).

The Board finds that the Regional Director's use of off-reservation comparables is not sufficient in itself to warrant vacating or reversing her decision.

Appellant also argues that the Baker study does not sufficiently adjust off-reservation rental rates for the many differences between on- and off-reservation grazing. The determination as to what adjustments are made in an appraisal is normally a matter of professional expertise and judgment. In this case, Appellant has demonstrated considerable disagreement by other professionals with the limited adjustments made in the Baker study. Under the standard of review discussed above, such disagreement would not warrant Board disapproval of BIA's decision as long as BIA's decision is supported by law and substantial evidence. See, e.g., Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 179, 94 I.D. 172 (1987). In this case, however, nothing in the BIA appraisal or in the Regional Director's decision shows the reason for limiting the adjustments. Nor does the Regional Director explain the reason in her brief in this appeal, despite the forceful arguments made by Appellant. Under these circumstances, the Board finds that the Regional Director has not shown that her decision is supported by substantial evidence.

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fn. 10 (continued)

"How does the Secretary establish grazing rental rates?

"The Secretary establishes grazing rental rates by determining the fair annual rental through appraisal, advertisement, competitive bidding, negotiation, or any other appropriate method, in accordance with the Uniform Standards of Professional Appraisal Practices [sic, should be Practice] (USPAP)."

65 Fed. Reg. 43874, 43943 (July 14, 2000).

Another consideration here, assuming the MOA is still in effect, is the fact that the MOA contemplates that interested parties will participate in the determination of the methodology to be used for changes to grazing rental rates. Such a methodology would presumably include a means for determining the adjustments to be made for differences between on- and off-reservation grazing. Thus, it appears possible that the question of adjustments may have been removed from the strictly professional domain and made a subject for negotiation among interested parties. 11/

Appellant also contests the setting of two grazing rates--one for yearlong grazing and another for summer seasonal grazing. It cites the language of 25 C.F.R. § 166.13(b), which authorizes the Regional Director to "establish a reservation minimum acceptable grazing rental rate" (emphasis added) in support of its argument that the establishment of two rental rates is illegal. Appellant contends that, if properly set, the minimum grazing rate provides a fair annual return to the landowners for the use of their land, and that the setting of a summer-only grazing rate is an additional charge on top of the annual rate which provides the landowner with more than a fair annual return for the use of the land.

The Regional Director responds that the dictionary definition of the word "rate" can be read as plural. She continues:

> [The Regional Director's] use of a "dual rate" helps to fulfill the goals and purposes of the Part 166 regulations and [the American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3746]: to protect Indian landowners. * * * The grazing market has recognized the difference in value between a prime season rate (the seasonal rate) and a yearlong rate. The market reflects the reality that pasture grass is more valuable during the summer season. [The Regional Director] believes that the BIA should do the same and recognize the realities of the grazing market, thus ensuring that Indian landowners are compensated like non-Indian landowners in the area.
>
> The 2000 North Dakota grazing rate also helps to ensure that if "grass brokering" occurs, the Indian landowners will receive a fair annual return for the grazing of their lands. [The Regional Director's] decision is directly based on the Inspector General's Audit Report, which discussed the negative impacts of grass brokering on Indian landowners. * * *

11/ According to Appellant, there is also a forum within BIA for resolution of valuation disputes. Appellant states that BIA's Chief Appraiser, located in Washington, D.C., has indicated that his office could provide technical review when BIA's appraisal is in conflict with an appraisal submitted by interested parties.

> Further, permittees on the Fort Berthold Reservation are not impacted by the summer seasonal grazing rate when they graze **their own livestock**. The summer season grazing rate only applies to livestock that are **not** owned by the permittee and are allowed to graze under the permittee's grazing permit (with BIA permission). * * * The summer seasonal grazing rate was [the Regional Director's] attempt to ensure that more of the value of Indian grazing lands is paid to Indian landowners, instead of the permittees. There is no "double charge" * * *.

Regional Director's Answer Brief at 19-20.

The Board recognizes that the Regional Director has a trust responsibility to ensure that individual Indian landowners receive a fair annual rental rate for the use of their lands, even when the land is being used by another Indian. See, e.g., Johnson v. Acting Phoenix Area Director, 25 IBIA 18 (1993) (BIA's trust responsibility as to tribal land is owed to the tribe, not to an individual doing business on tribal land, even though that individual is a tribal member). It also has a duty--which does not, however, rise to the level of a trust responsibility--to assist in the development and maintenance of a healthy agricultural economy on reservations which have agricultural lands. See, e.g., 25 C.F.R. § 166.3(b).

From the materials before it, the Board understands that there is concern in the Great Plains Region about the practice of "grass brokering," in which ranchers run cattle owned by other parties, apparently most frequently during the summer when grass is more plentiful, and also more valuable. It understands that the permittees, rather than the landowners, receive the monetary return involved with "grass brokering." It also understands that the establishment of a dual rental rate system was the Regional Director's attempt to deal with this issue.

However, neither the administrative record nor the decision set out the source of the Regional Director's authority to establish dual rates. Nothing in 25 C.F.R. Part 166 authorizes, or even suggests the possibility of, dual rates. The Regional Director's citation of Webster's dictionaries and general discussion of goals does not overcome this deficiency.

Also, neither the administrative record nor the decision shows how the summer-only rate will be implemented. As is clear from Appellant's argument here, it believes that the summer-only rate will be imposed as an additional charge on top of the yearlong rate. The Regional Director, while denying that a "double charge" will occur, still fails in this appeal to explain how the dual charges would work. Thus the Regional Director has not shown that Appellant's understanding of the charges is erroneous.

On remand, the Regional Director shall first determine whether the MOA discussed above is still in effect and whether any other consultation duties are applicable to this matter.

The Board urges that, if at all possible, a valuation methodology, including a dispute resolution mechanism, be worked out among the interested parties. If these efforts fail, and the Regional Director issues a new decision under the present regulations, she shall show that she based her decision on appraisal data. The appraisal data shall show why particular adjustments were or were not made for differences between on- and off-reservation grazing. If the Regional Director again imposes a dual rate, she shall show that a dual rate is authorized under the regulations in effect at the time she issues her decision.

Appellant asks the Board to address due process issues which were raised in the appeals. Appellant indicates a belief that the Regional Director does not understand her responsibility to notify affected persons of her decisions, to inform them of their right to appeal, and to refrain from taking further action to implement her decisions while an appeal is pending. Appellant comments: "This is not the first time that appellants have needed the Board to restate its prior holdings in stronger terms for the benefit of BIA employees. See Wadena v. Acting Minneapolis Area Director, 30 IBIA 130, 138 (1996)." Opening Brief of Fort Berthold Land and Livestock Association at 22 n.6.

The Board believes that, as a result of these appeals, the Regional Director is more familiar with her responsibilities to provide interested parties with due process and to follow the appeal regulations in 25 C.F.R. Part 2. It hopes that further admonition will not be necessary.

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 Great Plains Regional Director's decision setting new rental rates on the Fort Berthold Reservation for the 2000 grazing season is vacated and this matter is remanded to the Regional Director for further consideration in accordance with this decision.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge