



INTERIOR BOARD OF INDIAN APPEALS

Luke Hartman, a minor, and Kerry Hartman v. Acting Great Plains Regional Director,
Bureau of Indian Affairs

50 IBIA 138 (08/21/2009)



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

LUKE HARTMAN, a minor, and)	Order Affirming Decision
KERRY HARTMAN,)	
Appellants,)	
)	
v.)	Docket No. IBIA 07-61-A
)	
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	August 21, 2009

Appellant Kerry Hartman (Kerry) appeals from a decision dated November 22, 2006, by the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which the Regional Director affirmed the October 18, 2005, decision of the Superintendent, Fort Berthold Agency, BIA, finding Kerry in trespass on Allotment No. 316A¹ on the Fort Berthold Reservation and ordering him to vacate the property.² Kerry also appeals on behalf of his minor son, Luke Hartman (Luke), from that portion of the Regional Director's decision in which the Regional Director declined to approve a gift deed application by Della Austin (Della), now deceased, of her small (5%) interest in Allotment No. 316A to Luke. We affirm the Regional Director's November 22 decision. The Regional Director properly declined to approve the gift deed application once Della informed BIA that she no longer wanted to give her interest in the allotment to Luke, and

¹ Allotment No. 316A consists of 318.47 acres, and is located in Sec. 3, T. 149 N., R. 90 W., 5th P. M., McLean County, North Dakota.

² Previously, Kerry had appealed to the Board under 25 C.F.R. § 2.8 to compel the Regional Director to decide his appeal from the Superintendent's October 18 decision. *Hartman v. Great Plains Regional Director*, 43 IBIA 28 (2006) (*Hartman I*). The Board determined that the appeal was deficient, and provided Kerry with the opportunity to cure the deficiencies. No response was received from Kerry, for which reason the appeal was dismissed by the Board on April 24, 2006. *Id.*

properly concluded that Kerry has no legal right to occupy any part of Allotment No. 316A and is therefore in trespass.

Factual Background

Approximately 17 individuals share undivided ownership of Allotment No. 316A, which is located on the Fort Berthold Reservation. Among the owners are Kerry's former wife, Sheri Fox (Sheri), who owns an approximate 8% undivided interest in the allotment; several of Sheri's siblings; and the Estate of Della Austin, which owns slightly more than a 5% undivided interest. It is undisputed that Kerry, a non-Indian, is not one of the owners of the allotment, although he contends in this appeal that he owns a leasehold interest. In 1995, Luke was born to Sheri and Kerry. Apart from Kerry's contention that Della gave her interest in Allotment No. 316A to Luke prior to her death, which contention presently is before the Board in this appeal, it is undisputed that Luke has no present ownership interest in Allotment No. 316A.³

In 1995, the owners of Allotment No. 316A leased 2.5 acres of the allotment to the Fort Berthold Housing Authority (FBHA or housing authority).⁴ The lease states that it is between the "Heirs of Bryon Young Bird for Sheri Fox Hartman, . . . the 'LESSOR,' and the Fort Berthold Housing Authority . . . the 'LESSEE.'" Rachel Fox (Rachel), Sheri's mother; Ivan Zotti; and Della signed the lease as lessors. All three lessors are now deceased. Sheri signed the lease as a witness. Kerry's name does not appear anywhere on the lease. The lease, No. 97-99-22, was approved by BIA in 1997. Although the administrative record does not contain a subsequent lease between the housing authority and Sheri (or Sheri and Kerry), the housing authority apparently provided funds to Sheri for the construction of a basement on the allotment, and Sheri and Kerry purchased a mobile home through private financing that then was moved into place above the basement.

³ Kerry contends that Luke is also an "heir" to the land. To the extent that Kerry means that Luke has inherited an interest through a decedent whose estate inventory included an interest in Allotment No. 316A, he fails to produce any evidence to support his claim and the record does not support any such contention. To the extent that Kerry means that Luke will be an heir when a current, living owner passes away, he errs because heirship is not determined until the time of death of a decedent. See *WELSA Heirship Determination of Benjamin B. Wilson*, 26 IBIA 115 (1994).

⁴ The leasehold is situated in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 3, T. 149 N., R. 90 W., 5th P. M., McLean County, North Dakota.

Sheri, Kerry, and Luke apparently resided in the home on Allotment No. 316A for some unspecified time thereafter.

Sheri and Kerry divorced in March 2000. Judgment, *Hartman v. Hartman*, Civil No. 28-99-C-1062 (So. Central Jud. Dist., N.D. Mar. 21, 2000) (divorce decree). The divorce decree awarded custody of Luke to Sheri, and also awarded her the mobile home on Allotment No. 316A. Nothing in the divorce decree addresses any leasehold interest on Allotment No. 316A. Six months later, Kerry sought to amend the divorce judgment to obtain the mobile home, and his motion was granted. The judgment thus was amended to award the mobile home to Kerry “with the deck and central air conditioning, the garage, and the barn located in McLean County [on Allotment No. 316A], covered by Bureau of Indian Affairs Lease No. 97-99-22. . . .” Order Amending Judgment, Sept. 20, 2000, *Hartman v. Hartman*, at 6. In this same order, the State court set forth that it had previously “found that it had no jurisdiction over the ownership or leasing of [the land subject to Lease No. 97-99-22] and that it could not order that it be conveyed to a non-enrolled Indian.” *Id.* at 1. The court also found that Kerry was non-Indian. *Id.* Five days later, the State court entered another judgment, which contained the same terms as the divorce decree, with the exception of awarding the mobile home and related improvements to Kerry, and modifying the property settlement in light of the transfer of title in the mobile home. Amended Judgment, Sept. 25, 2000, *Hartman v. Hartman*. No mention is made of any leasehold on Allotment No. 316A in the Amended Judgment. On December 30, 2005, a Second Amended Judgment was entered in *Hartman v. Hartman* following Sheri’s relocation to California with Luke.⁵ The judgment made changes to the parties’ visitation with their son, but continued to repose custody of Luke with Sheri. The Second Amended Judgment did not mention any leasehold on Allotment No. 316A.

Although it is not entirely clear, it appears that Kerry has resided continuously on Allotment No. 316A since 2000, and he claims that he has a lease to reside there. The record does not contain a copy of any lease between Kerry and FBHA or the owners of Allotment No. 316A, nor has Kerry separately provided the Board with a copy of any such lease or sublease. At best, Kerry was “in the process of getting a sublease” from FBHA in

⁵ See also Order Denying Motion for Change of Custody in *Hartman v. Hartman* (Dec. 29, 2005) (allowing Luke to remain in California with his mother with no change in custody arrangement).

2005. See letter from Vance Gillette, Esq., to BIA, Aug. 3, 2005 (Administrative Record (AR) Tab 56).⁶

By letter dated August 16, 2000, Della requested the Superintendent, Fort Berthold Agency, BIA, to provide her with an application for a gift deed. She stated that she “want[ed] to gift deed my [land] to an heir in [Allotment No. 316A n]amed Lukas James Hartman.” AR Tab 3. According to Kerry, Della was Luke’s great-aunt. AR Tab 97 (letter dated Oct. 14, 2002).⁷ Kerry submitted a gift deed application executed by Della to BIA in October 2001. In January 2002, BIA advised Rachel of Della’s gift deed application. BIA informed her that “Federal regulations [require] fifty-one (51%) of the other owners [in the allotment to] consent to the land transaction. Your interest in this [a]llotment is over the required 51%.” AR Tab 10.⁸ Rachel responded and stated that she objected to the proposed gift transaction. Apart from a letter in October 2002, in which Kerry requested an update on the status of the gift deed application, it appears from the record that no further action occurred with respect to the gift deed application until 2005 when Kerry began sending letters to BIA demanding that BIA take action with respect to the gift deed.

⁶ The record contains an unsigned and undated Answer in the record for FBHA that bears the caption of *Hartman Family Trust v. Green Tree Servicing LLC*, No. CV-2003-___ (Fort Berthold Tribal District Court). It is unclear whether this document was signed and filed in the tribal court. In any event, according to this document, FBHA admits that it holds the lease for the 2.5-acre land on which Kerry resides and purports to admit that it subleased its leasehold to Kerry on an unspecified date. Because this pleading is not dated or signed, and bears no evidence of being filed with the tribal court, we do not find this document to be credible evidence concerning the existence of a lease between FBHA and Kerry.

⁷ Based on an heirship chart in the record, it appears that Della inherited her interest in Allotment No. 316A from Chauncey Grant, who was the paternal half-brother of Benedict Grant who was the maternal half-brother of Luke’s grandmother, Rachel. It appears that Chauncey may have been Della’s brother, also known as Cecil Grant. There is no apparent blood relationship between Della and Luke, nor is there any evidence showing that they had ever met. In this connection, we note that at all times relevant to this appeal, it appears that Della resided in Montana, while Luke resided in California and North Dakota.

⁸ It appears that BIA’s calculation of Rachel’s interest in Allotment No. 316A was erroneous. According to the Title Status Reports in the record, Rachel owned 44% of the allotment.

On February 28, 2001, Kerry asserts that he established the Kerry Hartman Family Trust. The corpus of the trust consists of “the residence, including basement, garage and the barn located in McLean County, [on Allotment No. 316A], including Bureau of Indian Affairs Lease No. 97-99-22 consisting of 2.5 acres.” AR Tab 7 (Art. IA). The beneficiary of the trust is Luke, and Kerry is the trustee until Luke turns 30 years of age or until Luke earns a bachelors degree or other comparable 4-year degree.⁹

On February 25, 2003, Sheri wrote to the Office of Trust Responsibilities within the Department of the Interior to obtain assistance in removing Kerry from Allotment No. 316A. According to her letter, she claimed that she first requested BIA to remove Kerry from the land 2 years earlier, and that she had been persistent since that time but had not received any response from BIA. The record contains numerous letters and petitions subsequent to Sheri’s February 25 letter from various members of her family demanding that BIA remove Kerry from Allotment No. 316A. *See, e.g.*, AR Tabs 19, 23, 31, 33-35, 37.

By letter dated July 11, 2005, BIA notified Kerry that he was in trespass on Allotment No. 316A.¹⁰ BIA ordered Kerry to remove the mobile home, deck, outbuildings, air conditioner, and personal property within 30 days. BIA further notified him that 17 round bales of hay that were cut on the property belonged to the owners, and that he would be billed for the hay cutting.¹¹ By letters dated July 27, 2005, and August 3, 2005, Kerry responded to BIA’s notice. In the July 27 letter, Kerry claimed that he was entitled to live on the land because he had a lease with the housing authority to reside on the land, because Luke owned an interest in the land as a result of a gift deed by Della of her interest in Allotment No. 316A, and because Kerry “is raising the boy at the home in question.” AR Tab 49. In the August 3 letter, Kerry claimed to have “legal custody” of Luke and claimed to be “in the process of getting a sublease from [the housing authority].” AR Tab 56. He requested reconsideration of the decision to vacate.

⁹ In the event Luke fails to reach age 30 or satisfy the educational requirements of the trust, the trust property is to be distributed to Krystal Hartman or, if she predeceases Luke, then to Jaime Hartman.

¹⁰ The July 11 letter did not provide appeal rights.

¹¹ By letter dated August 1, 2005, BIA billed Kerry \$306 for cutting 17 round hay bales.

In a letter dated August 22, 2005, FBHA wrote to BIA to request cancellation of its lease for Allotment No. 316A. On September 20, 2005, and pursuant to FBHA's request, BIA canceled FBHA's lease. By letter dated September 21, 2005, BIA sent a second trespass notice to Kerry, ordering him to remove his property from the allotment within 5 days of receipt. The letter provided him with appeal rights in accordance with 25 C.F.R. § 166.804. On October 12, 2005, Kerry responded to the second trespass notice and requested that it be withdrawn on the grounds that (1) the property to be removed did not belong to Kerry but was held in trust for Luke; (2) he was awaiting a decision from BIA on the gift deed application from Della; and (3) the cancellation of the lease with FBHA was "under dispute." AR Tab 91.

On October 18, 2005, the Superintendent issued his final decision in response to Kerry's October 12 objections to the second trespass notice. He declined to withdraw the trespass notice but provided Kerry with 30 days to remove himself and the mobile home, deck, outbuildings, air conditioner, and personal possessions. He explained that regardless of whether the property belonged to a family trust for Luke's benefit, there was no authority for Kerry or for Luke to reside on the allotment or store their possessions there. He further explained that 72% of the landowners had written to BIA and demanded the removal of Kerry and the property from the allotment.

On November 2, 2005, the Regional Director received Kerry's appeal from the Superintendent's October 18 decision. Kerry claimed that Della had executed a gift deed in 2001 of her interest in Allotment No. 316A to Luke; that the loan for the purchase of the mobile home was secured by "the allotment;" that Kerry was given the mobile home and the lease of the land in the course of the divorce proceedings between Sheri and Kerry; that Kerry placed the mobile home into a family trust for Luke's benefit; that Kerry had a lease with Della to live on the allotment; and that removal of the mobile home would destroy it because the mobile home is affixed to the land. Based on these arguments, Kerry asserted that he was entitled to reside in the mobile home on the allotment.

In January 2006, during the pendency of Kerry's appeal before the Regional Director, a BIA staff member phoned Della concerning her gift deed application to Luke. According to the staff member's memorandum of their conversation, Della acknowledged that she knew the Hartmans were no longer married; noted that she was not really related to Luke; and stated that she no longer was interested in giving her interest in Allotment No. 316A to Luke. Della subsequently sent two letters confirming that she no longer wanted to convey her interest to Luke. In her first letter, written to Bryant Fox (Bryant), who is one of the owners of Allotment No. 316A, Della wrote, "I will not sign the gift deed

or will it [sic] to Lucas Hartman.” AR Tab 136. The second letter, which was dated March 20, 2006, and sent to the Board during the pendency of *Hartman I*, stated in its entirety, “I am not signing the gift deed. I am not from that tribe or [f]amily.” It was signed “Della M. Gallineaux Austin.” Below Della’s signature, she wrote, “I’m sick.” AR Tab 145.¹² Della subsequently passed away in July 2006. *In the Matter of the Estate of Della Marie Austin*, Case No. P000044805IP (Dept. of Int. Mar. 16, 2009).

By decision issued November 22, 2006, the Regional Director rejected Appellant’s arguments. The Regional Director concluded that not only did Kerry lack standing to pursue any claims on Luke’s behalf since Sheri has full custody of Luke, but that BIA could no longer approve a gift deed where the grantor had changed her mind about giving her interest away.¹³ With respect to Kerry’s remaining arguments, the Regional Director determined that BIA had no record of any approved leases for the allotment with Kerry and/or with Sheri. To the extent that Kerry argued that he was awarded the mobile home and a lease to live on the allotment in the couple’s divorce settlement, the Regional Director pointed out that, regardless of any language in a divorce decree, Kerry did not have a lease approved by BIA that authorized him to reside on the allotment. The Regional Director also determined that BIA was unaware of any encumbrance on the allotment to secure the loan for the mobile home. Finally, the Regional Director observed that, notwithstanding Kerry’s arguments to the contrary, the mobile home is a manufactured home that was moved onto the property and, therefore, it can be moved off of the property and remain in a private trust for Luke.

This appeal followed. In addition to briefing the merits of the appeal, the Board requested briefing from the parties on the issue of Kerry’s standing to represent Luke in this action, to which the parties responded. Apart from addressing his standing to prosecute this appeal on Luke’s behalf, Kerry did not file a brief on the merits.¹⁴ The Regional Director filed an answer brief. The Board also received a letter from Karen Fox (Karen),

¹² The Board transmitted Della’s letter to the Regional Director for his consideration. Notice of Transmittal of Document, Mar. 29, 2009, *Hartman I*.

¹³ The Regional Director also noted that in light of Della’s small ownership interest — approximately 5% — Kerry still would not have authority to reside on the allotment even if the gift deed were approved.

¹⁴ Instead of filing a merits brief, Kerry moved for a stay, which the Board denied on April 3, 2007.

dated February 15, 2007, and from Ryan Fox, dated February 20, 2007; Sheri, along with Bryant, Teri Fox, Scott Schmaltz, and Dean M. Fox, joined in the letter submitted to the Board by Karen.¹⁵ Several additional letters were received from owners of record for Allotment No. 316A.¹⁶ Appellant submitted a reply brief.¹⁷

Discussion

I. Standard of Review

Appellant bears the burden of showing error in the Regional Director's decision. *Tafoya v. Acting Southwest Regional Director*, 46 IBIA 197, 200 (2008). We will review the Regional Director's decision to determine whether it comports with the law, is supported by the evidence, and is not arbitrary or capricious. *Iron Eyes v. Acting Great Plains Regional Director*, 49 IBIA 64, 69 (2009); *Hardy v. Midwest Regional Director*, 46 IBIA 47, 53 (2007).

¹⁵ These individuals are among the 17 owners of Allotment No. 316A.

¹⁶ None of these additional letters included any indication that they were served on Kerry or any other interested parties. Therefore, they have not been considered in the course of the Board's decision in this matter. The parties previously were advised that any submission to the Board must be served on all interested parties, that a certificate of service must be provided to the Board to show that service had been effected, and that any submission received by the Board that did not include a certificate of service would be disregarded. *See* Pre-Docketing Notice and Order Concerning Service, dated Dec. 28, 2006; Notice of Docketing and Order Setting Briefing Schedule, dated Feb. 6, 2007; and Order Concerning Letter by Dean Fox, dated Apr. 20, 2007; *see also* 43 C.F.R. § 4.27(b).

¹⁷ BIA requested the Board to impose an appeal bond on Kerry. After briefing on the need for a bond and the amount of the bond, the Board issued an order on October 1, 2007, requiring Appellant to post a bond in the amount of \$6,891.48. *See* Order Granting Motions for Appeal Bond, entered July 6, 2007; Order Setting Amount of Appeal Bond, Oct. 1, 2007. Kerry posted the required bond, which expired in November 2008. In May 2009, the Regional Director submitted a request to the Board to require the posting of an additional bond. Because we have now issued our decision, the request for the posting of a new bond is denied as moot.

2. Della's Gift Deed Application to Luke¹⁸

We affirm the Regional Director's decision to deny approval of Della's gift deed application. Della changed her mind prior to the execution of the deed of conveyance, and the Regional Director could not then override Della's wishes and approve a transaction that she no longer wanted.

It is well-established that a conveyance of Indian trust property, whether by sale, by gift, or by exchange, must be in accordance with Federal law and with the approval of the Secretary of the Interior or his designee. *Dumbeck v. Acting Great Plains Regional Director*, 47 IBIA 39, 45 (2008). It is similarly well established that BIA lacks authority to approve a gift deed application if the grantor withdraws consent to the transaction before a gift deed has been executed and approved by BIA. See *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 304 (2007); *Estate of Sandra Kay Bouttier LaBuff Heavy Gun*, 43 IBIA 143, 149 (2006).

Della communicated on three occasions in 2006 — once by phone to BIA and then in writing to both BIA and the Board — that she no longer wanted to give her interest in Allotment No. 316A to Luke. Although Appellant argues that Della's letters do not specifically mention Allotment No. 316A, we are not persuaded by this argument. Della specifically mentioned Luke in her first letter, and Appellant does not inform us of any other gift deed application by Della to Luke. As to the second letter, in which Della stated

¹⁸ Although we reach the merits of Kerry's claim that the Regional Director erred in declining to approve the gift deed application from Della to Luke, we note that whether Kerry has standing to appeal the Regional Director's decision on Luke's behalf is open to question. Under the laws of the State of North Dakota and according to the record, Sheri has legal and physical custody of Luke. See *Dickson v. Dickson*, 568 N.W.2d 284, 286, 287 (1997), *overruled on other grounds, Jarvis v. Jarvis*, 584 N.W.2d 84 (1998); *but see Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 17 (2004) (“[I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing.”). It is unclear whether Kerry's prosecution of this appeal on Luke's behalf would have an adverse effect on Luke.

Kerry recently provided the Board with documents suggesting that he may currently have physical and legal custody of Luke. These documents were not served on the other parties to this appeal, even after Kerry was given the opportunity to do so, for which reason the Board declines to consider them further except to note that any change in custody in 2009 would not operate retroactively to give Kerry standing to represent Luke's interests at the time this appeal was filed in December 2006.

that she will not sign “the gift deed,” the record does not contain, and Kerry does not inform us of, any other gift deed application submitted by Della for approval by BIA. Therefore, we agree with the Regional Director that Della had changed her mind about giving her interest in Allotment No. 316A to Luke, and that he consequently lacked authority to take further action with respect to the gift deed application. Appellant does not cite to us any authority — nor are we aware of any authority — for the Regional Director to approve a gift deed application over the objections of the grantor. Therefore, we affirm the Regional Director’s decision to decline to approve the gift deed application from Della to Luke of her 5% interest in Allotment No. 316A.¹⁹

3. Trespass

We affirm the Regional Director’s decision to charge Appellant Kerry with trespass. Kerry is not an owner of Allotment No. 316A, and he does not have a lease or any other right to reside on the allotment.

It is well established — and none of the parties dispute — that a lease is required for Kerry to reside on Allotment No. 316A. *See* 25 U.S.C. § 415(a); 25 C.F.R. § 162.104(d); *Delorme v. Acting Great Plains Regional Director*, 46 IBIA 107, 109 (2007). In addition, leases of Indian trust lands, including residential leases, must be approved by BIA. *See* 25 U.S.C. §§ 415(a), 2218; *see also* 25 C.F.R. § 162.107. Unauthorized occupancy of Indian trust land is trespass. 25 C.F.R. §§ 161.101 (definition of “trespass”), and 161.623.

Kerry argues that he has a valid lease because (1) BIA had no authority to terminate the lease with FBHA on behalf of Della, who was one of the owners who signed the lease, (2) the home is permanently affixed to the land, (3) the FBHA required the lease to remain in effect as long as the leasehold or any improvements thereon are encumbered as security

¹⁹ In addition, we note that in November 2000, as part of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201 *et seq.*, Congress prescribed new rules governing the conveyance of Indian trust lands. In particular, conveyances may not be approved where the grantor has not first been provided with an estimate of value of the land that is the subject of the conveyance. 25 U.S.C. § 2216(b)(1)(A). The estimate of value can be waived, but only where the transaction is between certain family members who are Indian (spouses, siblings, lineal ancestors or descendants, collateral heirs) and where the waiver is in writing. *Id.* § 2216(b)(1)(B). Nothing in the record reflects that Della was provided with an estimate of the value of her interest in Allotment No. 316A or establishes that Della otherwise was aware of the value of her interest or would have given her interest to Luke regardless of the value. *See, e.g., LeCompte v. Acting Great Plains Regional Director*, 45 IBIA 135, 145-47 (2007).

for a loan to HUD or its successors, and (4) Kerry was awarded “lease interests” in his divorce from Sheri. We reject these arguments, which are both legally and factually unsupported.

First, Kerry lacks standing to assert Della’s rights as a landowner or the rights of her estate. *See Wadena v. Midwest Regional Director*, 47 IBIA 21, 27 (2008) (Appellant lacks standing to assert the rights of third parties). Kerry does not purport to be related to Della or to be an heir to any part of her estate, nor does he otherwise assert that he has any basis for asserting rights on behalf of her estate. Moreover, to the extent that Kerry objects to the cancellation of the lease with FBHA, neither Kerry or Luke were parties to that lease, for which reason they lack standing to object to the lease cancellation.

Second, Kerry offers no support, and we know of none, for his assertion that, by having a house “affixed” to the land, he gains occupancy rights. To the extent that Kerry means to assert rights to the land by adverse possession, his claim fails. Adverse possession cannot be asserted against trust lands. *See Bitonti v. Alaska Regional Director*, 43 IBIA 205, 216 n.14 (2006).

Third, and notwithstanding Section 3 of Lease No. 97-99-22,²⁰ there is no evidence of any loan with HUD or its successor. Lease No. 97-99-22 at Sec. 3, AR Tab 1. Instead, the evidence is to the contrary: The record contains a letter from HUD that states that “HUD has no financial interests in connection with this lease [No. 97-99-22].” Letter from HUD to BIA, Sept. 13, 2005, at 1 (AR Tab 73).²¹ Kerry claims that “the land is . . . encumbered . . . to pay off the house,” Notice of Appeal at 2, but he has not produced any evidence in support of this assertion nor does the record support the existence of any encumbrance on the leasehold.²²

²⁰ Section 3 states that the “lease may not be terminated by either or both parties during [its 25-year] term . . . if and so long as the lease and/or any improvements on the leased premises, or any interest therein are mortgaged, or pledged or encumbered as security for any loan to HUD or its successors. . . .”

²¹ The letter explains that the lease was written on a form that contained outdated language relating to HUD’s potential interest in the subject lease. HUD explained that this language resulted from an Indian housing program that is no longer in existence and did not exist during the time the subject lease was in effect.

²² At best, it appears that Kerry may have financed the mobile home with a private bank, Garrison State Bank and Trust, which holds the title to the mobile home. But, any encumbrance on behalf of a private lender is not a loan by HUD or its successors within the meaning of Section 3 of Lease No. 97-99-22 and, therefore, does not bar or proscribe the cancellation of Lease No. 97-99-22.

Finally, we reject Kerry's argument that he was awarded the lease interests by the State court in his divorce from Sheri. The court clearly stated, "that it had no jurisdiction over the ownership or leasing of [Allotment No. 316A] and that it could not order that it be conveyed to a non-enrolled Indian." Order Amending Judgment at 1, Sept. 20, 2000, *Hartman v. Hartman*. Nothing in the record suggests that the State court ever purported to award Kerry any occupancy rights on Allotment No. 316A.

It is clear that Kerry wants to remain on the land, and he asserts that the mobile home that he was awarded in the divorce action cannot be removed from the land without causing severe damage. Assuming that to be the case, his remedy lies either in convincing the owners of the land to lease the property to him, subject to BIA's approval, or in seeking a modification of the property settlement in his divorce proceeding. But, the existence of the house on trust property does not entitle Kerry to reside on the land.²³ He is in trespass on Allotment No. 316A. Accordingly, we affirm the Regional Director's decision finding Kerry to be in trespass and demanding his removal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the November 22, 2006, decision of the Acting Great Plains Regional Director.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Sara B. Greenberg
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.

²³ Even if we were to determine that Luke is a tribal member and a part owner of the allotment, he would not be entitled to reside on the allotment without an approved lease. See 25 C.F.R. § 162.104(b) ("An Indian landowner of a fractional interest in a tract must obtain a lease of the other trust and restricted interests in the tract, under these regulations, unless the Indian co-owners have given . . . permission to take or continue in possession without a lease."); see also *Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 105-06 (2009) (a spouse, who inherited a 50% ownership interest in an Indian allotment, is required to obtain a lease from her stepchildren, who inherited the remaining 50% interest, in order to continue to reside on the allotment after the death of her husband).