



## INTERIOR BOARD OF INDIAN APPEALS

Diana Midthun Jones v. Rocky Mountain Regional Director, Bureau of Indian Affairs

54 IBIA 40 (9/13/2011)

Related Board case:

48 IBIA 282

43 IBIA 258



# 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

DIANA MIDTHUN JONES,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 07-062-1
ROCKY MOUNTAIN REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	September 13, 2011

## Introduction

In this appeal, we must decide whether the Bureau of Indian Affairs (BIA) correctly calculated the amount of payment owed to an Indian owner of Fort Peck Allotment 1388 (Allotment), from lease rental payments for “accreted pastureland” that were deposited into an escrow fund pursuant to two leases spanning 1981 - 1991. This appeal initially was brought by Cynthia Hamilton Midthun (Midthun), now deceased, who owned an interest in the Allotment during the lease periods. The case has been pursued by Diana Midthun Jones (Appellant), who is Midthun’s daughter and an heir, and who is entitled to a share of any additional payments that would be due to Midthun and her co-owners if BIA shortchanged them.

On a fundamental principle of law argued by Appellant — that ownership of accreted land vests automatically in the owner of the land to which it attaches — we agree with Appellant. And we also agree with Appellant that BIA’s determination of the payments owed to the landowners for accreted acreage must be based on the amount of accreted acreage that existed during the two lease terms, and not at some later period. But on the facts of this case, we conclude that BIA’s decision is supported by the evidence from the relevant time period, even though some of that evidence only came to light years later. In deciding this case, we will endeavor to provide Appellant with the thorough explanation to which she is due, and will also attempt to clarify certain issues of law that may have become clouded by statements made by BIA over the course of this prolonged dispute.

The Allotment is bordered on its southeast corner by the Missouri River. It is a bedrock rule that when a parcel of land is bordered by a river, and more land is added to the

parcel by accretion,<sup>1</sup> ownership of the accreted land automatically vests in the parcel's owner(s) by operation of law.<sup>2</sup> There are two leases at issue in this case, and both recited the acreage for "accreted pastureland" in the Allotment as consisting of 18.00 acres, but also required that lease payments for that acreage be deposited into an escrow account called the Missouri River Accretion Account (Accretion Account). In 2006, after BIA had received a cadastral survey from the Bureau of Land Management (BLM)<sup>3</sup> that measured the accreted acreage for the Allotment as consisting of 7.96 acres, the BIA Rocky Mountain Regional Director (Regional Director) decided that the landowners were entitled to the escrowed funds based on rent for 7.96 acres. See Administrative Record (AR)<sup>4</sup> Tab 13, Letter from Regional Director to Midthun, Dec. 7, 2006 (2006 Decision). In *Midthun v. Acting Rocky*

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<sup>1</sup> The term "accretion" refers to "the gradual and imperceptible addition of soil or other material by the natural processes of water-borne sedimentation or by the action of currents against shores and banks, . . . the washing up of sand, silt or soil so as to form firm ground." Glossary of BLM Surveying and Mapping Terms (Bureau of Land Management 1980) (BLM Glossary) (definition of "accretion"); see *Bear v. United States*, 611 F. Supp. 589, 593 n.2 (D. Neb. 1985). Reliction is "[t]he gradual and imperceptible recession of water resulting in an uncovering of land once submerged." BLM Glossary (definition of "reliction"). For purposes of this decision, we use the term accretion to encompass both processes. See *Bear*, 611 F. Supp. at 593 n.2 ("law relating to accretions applies in all its features to relictions").

<sup>2</sup> See *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 147 (8th Cir. 1970); see also BLM Glossary (definition of "riparian boundaries"). The rule has been described as the "movable freehold" doctrine. See Black's Law Dictionary 690 (8th ed. 2004).

<sup>3</sup> BLM is the official surveyor of Indian lands. See 25 U.S.C. § 176; *Estate of Joseph Baumann*, 43 IBIA 127, 140 (2006).

<sup>4</sup> The administrative record as originally submitted by the Regional Director, and received by the Board on August 6, 2010, consists of one binder with documents tabbed 1-25 and a second set of untabbed documents comprising a portion of the record returned to BIA by the Board following earlier proceedings in this matter. That record is designated as "AR" in this decision. The Board subsequently determined that the record was incomplete and ordered the Regional Director to submit the remainder of the record, which was received on July 8, 2011, and which consists of one binder with documents tabbed 1-64, and a second binder with documents tabbed 65-123. The supplemental record is designated as "Supp. AR" in this decision.

*Mountain Regional Director*, 48 IBIA 282 (2009) (*Midthun II*),<sup>5</sup> we vacated the 2006 Decision, finding that it was not adequately explained or supported by the record.

On March 3, 2010, the Regional Director reaffirmed his earlier decision that the landowners are entitled to rent for 7.96 acres of accreted land (plus accrued interest), and rejected Appellant's position that they are entitled to the rent for 18 acres. See AR Tab 4, Memorandum from Regional Director to Board, Mar. 3, 2010 (Supplemental Decision). The Regional Director's position is that the 18-acre figure was only an estimate, which BIA included in the leases to allow BIA to collect in escrow funds for accreted acreage that had yet to be measured. BIA takes the position that BLM's determination that 7.96 acres accreted to the Allotment is the actual measurement of the accreted land for which the landowners are entitled to rent (plus interest).

Appellant contends that the landowners are — and always were — entitled to the full amount of rent collected for the 18 acres of accreted pastureland recited in the leases, that the 18-acre figure was not an estimate, and that BLM's survey is irrelevant. Appellant contends that BIA's creation of the Accretion Account was a mistake, and was based on BIA's erroneous belief that ownership of accreted lands must await the completion of a survey, when in fact ownership of accreted lands vests automatically as a matter of law.

Ultimately, this appeal raises two issues, the first of which we largely addressed in *Midthun II*, and the second of which goes to the heart of Appellant's contention that BIA has fundamentally misunderstood the law of ownership of accreted lands, and that its reliance on BLM's survey for determining how much to pay the landowners is based on that misunderstanding.

The first issue is whether the leases, as a matter of contract law, gave the landowners a right to receive the full amount of rent paid for 18 acres of accreted land, regardless of the actual amount of accreted acreage. Our answer is "no." The leases unambiguously directed that payments for the accreted acreage be deposited into the Accretion Account. The leases were silent on the ultimate disposition of the escrowed funds. See *Midthun II*, 48 IBIA at 289-90. Neither the leases themselves, nor the extrinsic evidence in the record, demonstrates that the parties intended the landowners to have a right to the full amount paid into the Accretion Account for the 18 acres of accreted pastureland recited in the

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<sup>5</sup> In an earlier appeal brought by Midthun pursuant to 25 C.F.R. § 2.8 (appeal from inaction of official), the Board remanded the matter with instructions for the Regional Director to issue a decision on the merits of the dispute. See *Midthun v. Rocky Mountain Regional Director*, 43 IBIA 258 (2006) (*Midthun I*).

leases, regardless of the actual amount of accreted acreage. Instead, we construe the leases as giving the landowners a right to that portion of the escrowed funds attributable to rent paid for the actual amount of accreted acreage that existed during the terms of the leases.

Second, having resolved the first issue by deciding that the actual amount of accreted acreage controls the disbursement of the escrowed funds, the next question is, did BIA pay Midthun her share of rent for accreted lands based on the actual acreage of those lands during the terms of the leases? We conclude that it did. Two BLM surveys, one of which was completed by the BLM surveyor in 1986 and approved in 1990, the other of which was completed by the surveyor in 2004 and approved in 2006, and both of which officially determined that 7.96 acres had accreted to the Allotment, are the most reliable evidence of the actual amount of accreted acreage during the two lease terms. BLM's determinations support the Regional Director's decision that the landowners are entitled to payment from the Accretion Account based on 7.96 acres of accreted pastureland, which was the basis for his payment to Midthun of her share.

Although Appellant contends that the 18 acres recited in the leases for "accreted pastureland" was based on an accurate measurement by BIA, the record does not support that contention. With respect to the second lease, it is contradicted by the contemporaneous BLM surveys. With respect to the first lease, BLM's survey conducted in 1986 is still relatively contemporaneous. In addition, a hand-drawn map on the first lease conflicts with the 18-acre figure recited in the leases, and depicts an area of land closer to the 7.96 acres measured by BLM. Thus, although we fully agree with Appellant that ownership of accreted acreage vests automatically as a matter of law, and is not dependent upon completion of a survey, the evidence does not support a finding that the accreted acreage for the Allotment ever consisted of 18 acres during the terms of the two leases.

## **Background**

### **I. The Allotment and the Leases**

Allotment 1388 was allotted to Harvey Hamilton in 1913. The portion of the original allotment that is now referred to as Allotment 1388 consists of 19.54 acres.<sup>6</sup> The Missouri River forms the southeast boundary of the Allotment. The first lease at issue

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<sup>6</sup> Original Allotment 1388 included additional acreage. The 19.54-acre portion is described as Lot 6, sec. 1, Township 26 North, Range 46 East, Montana Meridian, Montana. *See* Patent No. 373231 (Dec. 19, 1913), cancelled and replaced by Patent No. 654314 (Nov. 21, 1918) (copies from BLM General Land Office Records website added to appeal record).

(Lease No. 4214) was for the period from January 1, 1981, to December 31, 1985, and the second lease (Lease No. 7099-91) was for the period from January 1, 1987, to December 31, 1991. Each lease identified Allotment 1388 as containing “37.54 acres, more or less,” even though the landowner consent forms for Lease No. 4214 recite the Allotment as consisting of 19.54 acres, which is the acreage for Lot 6 reflected in the original patent.<sup>7</sup> Although the leases were for a single use — pastureland — each divided the acreage recited into 19.54 acres of “pastureland” and 18.00 acres of “accreted pastureland.”

The origin of the 18-acre figure recited in the leases for “accreted pastureland” is uncertain. The record contains no documentation external to the leases themselves that supports that figure. A “Location Sheet” attached to Lease No. 4214 states that it was “[p]lanned by George Ricker,” and refers to “Photo No. ZV-6HH-36,” *see* AR Tab 20, but the record contains no photographs. As noted in *Midthun II*, Appellant contends that Ricker accurately determined the 18-acre figure using a planimeter and aerial surveys.<sup>8</sup> *See Midthun II*, 48 IBIA at 290; *see also* Letter from Elmer Midthun to Board, at 2, Mar. 17, 2010;<sup>9</sup> Supp. AR Tab 91, Letter from Midthun to Board at 2, Aug. 19, 2005. The reference in Lease No. 4214 to a photograph is consistent with Appellant’s contention that BIA used an aerial survey in preparing the leases, although as we noted in *Midthun II*, that contention is not necessarily inconsistent with BIA’s position that the 18-acre figure was still only an estimate. *See Midthun II*, 48 IBIA at 290.

A hand-drawn map on the Location Sheet for Lease No. 4214 shows the location of the Allotment and also includes boundaries for “Accret[ed] Pasture,” which the map describes as consisting of “18 ac.” But, as we discuss later in this decision, the map does not depict an area consisting of 18 acres, but instead depicts an area closer to the 7.96-acre measurement in the BLM surveys.

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<sup>7</sup> The record does not include the landowner consent forms for the second lease.

<sup>8</sup> A “planimeter” is defined as “an instrument for measuring the area of a plane figure by tracing its boundary line.” *See* <http://www.merriam-webster.com/dictionary/planimeter>; *see also* Supp. AR Tab 91, Letter from Midthun to Board at 2, Aug. 19, 2005 (same).

<sup>9</sup> Elmer Midthun is Midthun’s surviving spouse and Appellant’s father, who supported Midthun’s position through correspondence with BIA and to the Board. Elmer was not a beneficiary of Midthun’s trust personalty and thus did not have standing to appeal from the Regional Director’s decision, but Appellant has incorporated all prior arguments made by both of her parents through the course of the various proceedings in this matter.

Each of the leases attached an “Ownership and Payment Schedule,” which lists each of the individual landowners of the Allotment, and also lists “Missouri River Accretion” as a “Landowner.” The Ownership and Payment Schedule provides for the full distribution to the individual landowners of all of the rent attributable to the 19.54 acres of pastureland. Rent collected for the accreted acreage was to be paid to “Missouri River Accretion” as the “landowner.”<sup>10</sup>

## II. Correspondence Between Midthun and BIA, the BLM Surveys, and the Regional Director’s 2006 Decision

In 1989, Midthun first inquired of BIA about the purpose of the Accretion Account. *See* Supp. AR Tab 123, Letter from Midthun to BIA’s Fort Peck Agency (Agency), Nov. 15, 1989; *see also* Supp. AR Tab 122, Letter from Midthun to Agency, Mar. 27, 1990 (“Don’t we owners of the original 19.54 acres also own the accreted 18 acres as a matter of law?”). On April 10, 1990, the Agency Superintendent (Superintendent) responded that a cadastral survey was required “to properly provide a legal description and to identify ownership of the accret[ed] lands.” Supp. AR Tab 121. The Superintendent indicated that BLM would conduct the survey and that pending completion of the survey, the lease payments deposited into the Accretion Account would remain in escrow. *See id.*

As it turned out, on the very day that the Superintendent was writing to Midthun to inform her that a survey by BLM “would be” required, the Chief Cadastral Surveyor for the Montana State Office of BLM approved a plat map for a survey of the Allotment. *See* AR Tab 18, Plat Map, Doc. No. 206 28256, Apr. 10, 1990 (1990 Survey).<sup>11</sup> The actual survey

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<sup>10</sup> The Ownership and Payment Schedule for the first lease, No. 4214, identifies the amount of \$3.00 next to the Accretion Account, but that appears to be a typographical error because \$3.00 is the rental rate per acre for that lease, and the remainder of the rent for the accreted pastureland ( $\$3.00 \times 18.00 \text{ acres} = \$54.00$ ) is not accounted for on the Ownership and Payment Schedule. A separate Journal Voucher in the record confirms that rental payments made for the accreted pastureland for Lease No. 4214 were in fact deposited into the Accretion Account. *See* AR Tab 12. The per-acre rental rate for the second lease, No. 7099-01, was \$5.50 per acre. For that lease, the Ownership and Payment Schedule clearly provides that \$99.00 is to be paid annually to “Missouri River Accretion” ( $18.00 \text{ acres} \times \$5.50/\text{acre} = \$99.00$ ).

<sup>11</sup> As explained on BLM’s web site, “[s]urveying is the art and science of measuring the land to locate the limits of an owner’s interest therein.” *See* <http://www.glorerecords.blm.gov/> (copy of web page added to record). A survey plat “is the graphic drawing of boundaries involved with a particular survey project, and contains the official acreage to be used in the legal description.” *Id.*

work had been conducted between May 15, 1986, and June 12, 1986, the period in between the two lease terms. The plat map measures the amount of accreted acreage attached to the Allotment as consisting of 7.96 acres.

In 1999, Midthun again wrote to BIA, and the parties exchanged additional correspondence. Midthun expressed frustration to BIA that a survey apparently had not been completed, pressed BIA for a better explanation for why the Accretion Account even existed, and took issue with statements by BIA that a survey was needed for BIA to determine “ownership” of the accreted lands. Neither Midthun nor, apparently, BIA, was aware of the 1990 Survey.

In 2004, after further correspondence, the Superintendent informed Midthun that a plat map had recently been provided to BIA from BLM, which indicated that 7.96 acres had accreted to the Allotment. *See* Supp. AR Tab 111, Letter from Superintendent to Midthun, Aug. 26, 2004. The Superintendent did not provide the date of the survey, but reported that the 7.96 acres of accreted acreage increased the total acreage of the Allotment to 27.5 acres (19.54 + 7.96). *Id.* The Superintendent indicated that BIA was still in the process of obtaining the lease files and conducting research into the matter. *Id.*

Between 2004 and 2006, BLM completed additional survey work. On April 5, 2006, another plat map, which included the Allotment, was approved by BLM. *See* AR Tab 14, Plat Map, Doc. No. 206 39721 (Apr. 5, 2006) (2006 Survey). The 2006 Survey work was begun on October 5, 2004, and completed on February 8, 2006. The plat map for the 2006 Survey also shows the accreted acreage for the Allotment as consisting of 7.96 acres.<sup>12</sup>

Meanwhile, in *Midthun I*, Midthun sought to force BIA to issue a decision on the merits of her claim that she was owed rent for her ownership interest in 18 acres of accreted land. Midthun continued to make clear her position that surveys conducted years after the

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<sup>12</sup> The 1990 Survey initially designated the accreted acreage for the Allotment as a new “Lot 8,” but BLM subsequently re-designated that acreage as “Lot 16.” BIA title records now show the Allotment as consisting of (the original) Lot 6 and (the accreted) Lot 16. *See* Plat Map, Sept. 5, 1990 (enclosed with original of the Supplemental Decision received by Board on March 8, 2010); AR Tab 2, Title Status Report for Allotment 1388, Aug. 4, 2010.

lease terms had expired would be of little or no relevance to determining the amount of accreted acreage during the lease terms, and that the 18-acre figure should control:

My husband checked with [BLM] here and was assured by experts in cadastral surveying that a survey made in 2005 would determine specific acreage when run, but would not be able to ascertain it for a prior time such as calendar years 1984 through 1988, anymore than that survey could predict future acreage in calendar years 2007 through 2011.

. . . Frankly, I doubt that the BIA hopes to come up with relevant time periods which are in the past. Instead, the BIA misconception is that landowners become eligible to receive rent generated within the perimeters of surveyed lots and subdivisions of sections only following the completion of BLM surveys which supposedly determine ownership in the sense of creating it as distinguished from merely changing a movable freehold.

. . . .

. . . [BLM] surveys will NOT create ownership.

Supp. AR Tab 82, Letter from Midthun to Board, at 2, Apr. 11, 2006.

On December 7, 2006, following the Board's decision in *Midthun I* directing BIA to issue a decision on the merits of Midthun's request for payment from the Accretion Account, the Regional Director issued a decision announcing to Midthun that it was BIA's decision "to cause any funds due to you to be paid to you." AR Tab 13. The Regional Director referred Midthun to an August 4, 2005, status report that BIA had submitted to the Board in *Midthun I* to explain the justification for the Accretion Account. *Id.* at 1; *see* AR Tab 15, Memorandum from Regional Director to Board, Aug. 4, 2005 (2005 Status Report). In the 2005 Status Report, the Regional Director had explained that the purpose for conducting surveys of allotments bordered by the Missouri River, including the Allotment, was "to determine the amount of acreage in each tract to apply the appropriate lease rental value to each tract." 2005 Status Report at 2. The status report also asserted, in general terms, that allotments along the Missouri River could vary in acreage by as much as a 50 percent increase (by accretion) or a 50 percent decrease (by erosion) during the course of a 5-year lease. *Id.* And finally, the status report stated — erroneously — that BIA had "not yet received the first completed set of plats and fieldnotes on this matter." *Id.* at 3.

The 2006 Decision contained no discussion of the leases and no discussion of any surveys. It did not even identify the amount of funds to which BIA had concluded Midthun was entitled, stating only that BIA had made a request to the Office of the Special Trustee (OST) "to make disbursement of funds that you are owed upon receipt of the limited financial source documents which this office hand delivered to [OST]." AR Tab 13,

at 2. Only through related documentation in the record was it possible to determine that the amount of payment that BIA directed OST to make was based on multiplying 7.96 acres by the per-acre rental rates, *see supra* note 10, and paying Midthun her share based on her fractional ownership in the Allotment.<sup>13</sup>

### III. *Midthun II*

In *Midthun II*, we vacated the 2006 Decision, finding that it failed to comply with our instructions to the Regional Director in *Midthun I* to, among other things, “explain the legal and factual basis for BIA’s interpretation of the lease payment provisions relevant to the Accretion Account,” explain “the relevance of present-day surveys,” and respond to the arguments raised by Midthun. *Midthun II*, 48 IBIA at 282, 287, 292. We concluded that the Regional Director’s cryptic decision was not adequately explained and was insufficiently supported by the record.

On the other hand, in *Midthun II*, we rejected Midthun’s argument that the leases gave the landowners an unambiguous contractual right to payment for 18 acres of accreted pastureland, *see id.* at 289-90. We formulated what appeared to us to be a plausible interpretation of the leases that would support BIA’s position that the recitation of 18 acres of accreted pastureland was only intended as an estimate. But we found the evidentiary record insufficient to support BIA’s conclusion that the actual accreted acreage was 7.96 acres during the relevant time period, particularly when it appeared, at least to Midthun and to the Board, that the BLM survey data was from 2004 — many years after the leases had expired. *See* Supp. AR Tab 56, at 2 (Opening Brief in *Midthun II*); *Midthun II*, 48 IBIA at 290.<sup>14</sup> We also found, however, that the record was insufficient for us to reach a conclusion in favor of Midthun that the actual acreage was 18 acres. *See Midthun II*, 48 IBIA at 291-92. We remanded the matter for a new or supplemental decision.

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<sup>13</sup> The Ownership and Payment Schedules on the leases shows the landowners’ respective ownership shares.

<sup>14</sup> A pleading filed by Midthun’s brother also reflected a common understanding that the Superintendent’s statement in 2004 that he had “recently” received a plat map meant that the survey data was also from that time period. *See* Supp. AR Tab 58, Letter from Harold P. Hamilton to Board, at 1-2, Mar. 8, 2007 (“There is no necessary relationship between 7.96 acres and the actual acreage in leases having terms prior to 2004.”).

#### IV. Regional Director's Supplemental Decision and Appellant's Objection

On March 3, 2010, the Regional Director issued the Supplemental Decision in which he reaffirmed his conclusion that Midthun was only entitled to payment for 7.96 acres for accreted pastureland. The Regional Director explained that to determine what lands had accreted to allotments located along the Missouri River, BIA had requested boundary surveys from BLM, and that “[b]y utilizing the updated survey data, [BIA] is able to accurately determine the actual lease rental payment owed for the ‘accreted’ acreage.” AR Tab 4, Supplemental Decision at 3. The Regional Director explained that the Agency had established the Accretion Account for depositing agricultural lease rental monies collected for estimated “accreted” acreage for allotments along the Missouri River. According to the Regional Director, although it appeared that the Agency had not sought legal review for the lease payment provisions inserted in the leases, the arrangement “was likely a decision by the Superintendent, at that time, in an attempt to ensure that lease rental payments would be available for distribution to Indian beneficiaries at a later date when accreted acreage was accurately accounted for.” *Id.* at 2. By collecting and escrowing rental monies for “accreted” land, BIA intended to ensure that the Indian owners would be compensated for the use of their property, and, by including accreted land in the lease, to allow the lessee to use that land without committing trespass. *See id.*

Specific to this case, the Supplemental Decision reiterated the position that the Agency had estimated the accreted acreage for the Allotment to be 18 acres, collected rent based on that estimate, and deposited it in the Accretion Account because the actual accreted acreage had not been determined. *Id.* at 3. The Regional Director stated that “it was discovered that a survey of this tract had been completed in 1990” by BLM, *id.* at 4, which described the accreted acreage for the Allotment as containing 7.96 acres, *see id.* at 3. Based on that BLM survey and measurement, BIA determined that the rent due to the landowners from the Accretion Account should be based on that amount of accreted acreage.

Appellant objected to<sup>15</sup> the Supplemental Decision, reiterating and reasserting arguments made by Midthun that the Accretion Account should never have been created

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<sup>15</sup> Procedurally, this matter comes before the Board as an objection because in *Midthun II* we retained jurisdiction over the case, while remanding the matter to the Regional Director for issuance of a new or supplemental decision. We permitted objections to be filed with the Board once the Regional Director's decision was issued. The difference between an objection and an appeal is not material in this case.

and that the landowners should have been paid for 18 acres of accreted pastureland without delay.

### Standard of Review

We review the Regional Director's Supplemental Decision de novo because it does not involve an exercise of BIA's discretion or expertise. Instead, the issues raised in this appeal include issues of law, e.g., the correct interpretation of the leases, and issues of the sufficiency of evidence, all of which we review de novo. *See Taylor Drilling Corp. v. Eastern Oklahoma Regional Director*, 53 IBIA 15, 19 (2011).

### Discussion

#### I. Introduction

Unfortunately, three factors have contributed to the protracted nature of this dispute. First, there is no contemporaneous documentation — or at least none that has been located by BIA — explaining why the Accretion Account was created, why the two leases for the Allotment segregated “pastureland” from “accreted pastureland” (even though the per-acre rental rate was the same within each lease), or where the 18-acre figure for “accreted pastureland” originated. Second, there was a lengthy gap between the completion of BLM's 1990 Survey and BIA's use of the survey data to reach a decision in 2006 concerning the disposition of rent held for the two leases in the Accretion Account. Third, in its explanations of the purpose of the Accretion Account, and the purpose of the BLM surveys that were and apparently still are being conducted for Fort Peck allotments along the Missouri River, BIA has yet to squarely address the relevance of surveys that may be completed years after lease terms have expired in determining rent due to owners of accreted lands during the lease terms. Because BIA did not file briefs, either in *Midthun II* or in response to Appellant's objection to the Supplemental Decision, we do not know for certain how BIA interprets the leases, and whether or not, as Appellant contends, BIA misunderstands the law of ownership of accreted lands. We begin by addressing this latter point.

We agree with Appellant on the “movable freehold” doctrine, *see supra* at 40-41 & note 2, and agree that ownership in accreted lands vests automatically in the owners of the parcel to which the lands accrete. Whether or not BIA understood this principle, BIA's explanations to Appellant were confusing at best, and its actions cast further doubt on whether it understood the law. It appears that the Superintendent made several good faith attempts to explain BIA's efforts to resolve the issue of entitlement to funds in the Accretion Account, but in so doing, he stated that a survey was required “to identify ownership of the

accret[ed] land,” *see* Supp. AR Tab 121, and that a “legal decision” and surveys by BLM were necessary “to determine ownership of the accretion,” *see* AR Tab 17, Letter from Superintendent to Midthun, Dec. 14, 2004. If “ownership” is understood to mean the amount of accreted acreage that is established by the cadastral survey as the official acreage of record owned by the riparian landowners, the statement was correct. But if BIA meant, as a legal principle, that the ownership of accreted acreage does not “vest” in the riparian owners until a survey is completed, that was incorrect. Moreover, none of BIA’s explanations addressed the relationship between the landowners’ right to rent for the accreted pastureland that existed during the lease terms, and the official acreage of record determined through BLM surveys, which might be conducted years later.

Whatever BIA meant in its explanations to Midthun, the creation of the Accretion Account and the leases themselves were, in fact, consistent with the moveable freehold doctrine.<sup>16</sup> BIA evidently attempted to include in the leases a category of land to which ownership attached automatically, but which had yet to be quantified. Thus, the Ownership and Payment schedules attached to the leases designated the Accretion Account as the “owner” for the rent paid for the 18 acres of “accreted pastureland,” not because the *ownership* of accreted land was uncertain as a matter of law, but because the *amount* of accreted land actually owned by the lessor-owners was uncertain. Until the actual acreage of the accreted land could be determined by appropriate measurement, the precise extent of ownership that attached to any given allotment could not be determined. The problem, of course, is that a measurement taken years later may be of little or no probative value for determining the amount of accreted acreage during the lease terms, and the relative rights of the parties to the escrowed funds. But that inquiry is fact-driven, while the legal principle embodied in the movable freehold doctrine remains constant: ownership of accreted land vests automatically in the owner(s) of the property to which it attaches.

We now address the two issues on which we resolve this appeal: First, did the leases give the landowners a right to receive the full amount of rent paid for 18 acres of accreted land regardless of the actual amount of accreted acreage? As we explain, we answer that question “no.” Second, if the landowners are only entitled to payment from the Accretion Account for the actual amount of accreted acreage during the lease terms, is the Regional Director’s payment to Midthun, based on the 7.96 acres of accreted land measured in the BLM surveys, supported by the record? We answer that question “yes.”

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<sup>16</sup> This is not to suggest that BIA’s approach made practical sense. Nothing would have precluded the parties from negotiating a lease that allowed a lessee to use the entire allotment, including any accreted acreage, and to negotiate a fair price for that use based on acceptable business practices, without creating the problems illustrated by the leases in the present case.

## II. Interpretation of the Leases

The leases both recited the figure of “18 acres” for “accreted pastureland” included in the lands being leased in the Allotment. To the extent that Appellant contends that this language creates a right in the landowners, as a matter of contract law, to all of the rent paid for that acreage, we disagree.

As we concluded in *Midthum II*, the leases are, on their face, silent as to who ultimately is entitled to the rent paid for the accreted acreage. The only “owner” for the accreted acreage, as identified on the Ownership and Payment Schedules, is the “Accretion Account.” The Ownership and Payment Schedule for each lease only directs the payments for the 19.54 acres of “pastureland” to the landowners, consistent with the official acreage of record at the time and the landowner consent forms.

In *Midthum II*, we left open the possibility that additional extrinsic evidence might indicate that the parties did, in fact, intend that the owners receive the full payments made for the 18 acres of accreted pastureland recited in the lease, notwithstanding the creation of the escrow fund. But no such evidence has been produced by Appellant and no such evidence is in BIA’s record. While we understand Appellant’s argument that creation of the Accretion Account was a mistake, we must still determine the rights of the parties under the leases as drafted, which includes the Ownership and Payment Schedules as an intrinsic part of the leases. In the absence of any extrinsic evidence that the parties intended that the landowners would have an absolute right to receive payment for 18 acres of accreted land, we conclude that the leases, reasonably interpreted, only gave the landowners a right to receive rental for the actual amount of accreted acreage. Construing the leases in that way is consistent with the creation of the Accretion Account as an escrow fund and consistent with the structure of the leases. It also ensures that the lessee ultimately paid for, and the landowners received rent for, acreage that actually existed and could be used.

## III. Amount of Accreted Acreage During the Lease Terms

The next question, then, is whether the evidence supports the Regional Director’s decision, for purposes of distributing proceeds from the Accretion Account, to rely on BLM’s determination that the amount of accreted acreage is 7.96 acres.

We again confirm our agreement with Appellant that accretion, by its very nature, means that acreage can vary from year to year, and that ownership of that acreage attaches as a matter of law, regardless of whether the acreage is measured. But the fact remains that for purposes of determining the landowners’ entitlement to proceeds from the Accretion Account, some factual finding of the amount of acreage must be made for the relevant time period, even if it was not measured in each and every year within the lease terms.

Knowing what we now know — that BLM had conducted survey work for the Allotment in 1986, even before Midthun first inquired about the Accretion Account — it is exceedingly unfortunate that this dispute was not clearly addressed by BIA many years ago, and the relevant information brought to light. But based on the record, the weight of the evidence supports a finding that the Allotment did not in fact consist of 18 acres of accreted land either in 1981 or in any year encompassed within the two lease terms. Instead, the evidence supports a finding that the accreted land consisted of 7.96 acres during the terms of the two leases, for purposes of determining the landowners' entitlement to the rent from the Accretion Account.

The 1990 BLM Survey data, collected in 1986, is relatively contemporaneous with both leases. Lease No. 4214 expired on December 31, 1985, and the 1990 Survey work was conducted between May 15, 1986, and June 12, 1986. Thus, certainly in relation to the latter part of the 1981-1985 term for the first lease, the 1990 Survey data is strong evidence that the accreted acreage consisted of 7.96 acres, at least at the end of the term. And although it might be argued that for each year that is more remote from a BLM survey, the data becomes less reliable for determining the actual accreted acreage between 1981 and 1985, we have no evidence, beyond the recitation in the lease, to support a finding that the accreted acreage ever consisted of 18 acres during the term of the first lease.<sup>17</sup> Thus, for the first lease, we conclude that the Regional Director's use of the 7.96-acre figure for purposes of payments made from the Accretion Account is supported by the record.

The term for the second lease, 1987-1991, was — as it turns out — bookended by two BLM surveys, the 1990 Survey (conducted in 1986) and a 2006 survey (conducted in 2004), both of which officially measure the accreted acreage for the Allotment as consisting of 7.96 acres. In the absence of any evidence that the accreted acreage increased, and then eroded, during the term of the second lease, the BLM surveys are sufficient evidence to support the Regional Director's determination that the accreted acreage for the Allotment, for purposes of determining the owners' entitlement to payments from the Accretion Account, consisted of 7.96 acres for the second lease.

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<sup>17</sup> We emphasize here that the amount of “actual” accreted acreage for purposes of entitlement to proceeds in a lease is not to be equated with the official acreage of record to be used in the legal description. A cadastral survey by BLM determines the official acreage of record for Federal lands, including Indian trust lands.

But at least for purposes of this decision, in which we are construing rights under a lease, the official acreage of record, established at a later time, would not preclude consideration of unofficial measurement data if necessary to effectuate the intent of parties to a lease.

Although the leases recite a figure of 18 acres for the accreted acreage, the drawing of the accreted acreage on the Location Sheet attached to the first lease does not support that figure. The drawing on the Location Sheet attached to Lease No. 4214 may well be based on an aerial photograph, as argued by Appellant, although we have no way to determine from the record how accurate a depiction it might be. Even assuming a fair degree of accuracy in depicting the approximate extent and boundaries of the accreted acreage based on an aerial photograph, the accreted area depicted on the Location Sheet appears to enclose far fewer than 18 acres.<sup>18</sup> Instead, the drawing appears to be much more consistent with the 1990 Survey's measurement of 7.96 acres. In fact, the boundaries drawn on the Location Map are remarkably similar, in scale and relative size, both to the Allotment (i.e., original Lot 6) and to the 1990 Survey plat.<sup>19</sup>

It is true that the Regional Director's 2005 Status Report stated, in general terms, that allotments along the Missouri River might vary considerably in acreage, either by accretion or erosion, during a 5-year lease term. *See supra* at 47. But in the present case, there is no evidence in the record that the accreted acreage for the Allotment varied that dramatically during the lease terms. On the contrary, the acreage appears to have been relatively stable during the second lease, and we have no information to suggest that the same was not true during the first lease. The discrepancy on the face of the Location Sheet between the recited acreage and the depicted acreage only reinforces our conclusion that the

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<sup>18</sup> The common boundary shared by the original allotment and the accreted land is 4.3 chains (283.8 feet) in length, as measured in the 1990 BLM survey. AR Tab 18; *see* BLM Glossary (definition of "chain"). That measurement is fixed and is independent of any accretion. Using that fixed measurement as a scale for calculating the length of the other three boundaries for the accreted land as depicted on the drawing on the Location Sheet, or using the scale on the Location Sheet itself, the result is that the accreted area depicted in the drawing appears to contain somewhere between 8 and 11 acres. Although it is possible that the accreted area in 1981 was slightly larger than it was when BLM measured it in 1986, we do not find the drawing sufficiently reliable to reach that conclusion, particularly in light of the clear discrepancy between the area depicted and the "18 ac" label attached to that area on the Location Sheet.

<sup>19</sup> Although the record does not include contemporaneous documentation to explain why BIA used the 18-acre figure, it would have made sense for BIA, as trustee, to overestimate the acreage to avoid the risk of collecting too little rent for the landowners. Thus, even if BIA used aerial photographs and a planimeter at the time the first lease was prepared, it does not necessarily follow that the 18-acre figure recited in the leases was intended to state an accurate measurement instead of an inflated estimate.

Regional Director did not err in this case in relying on the 7.96-acre measurement in the BLM surveys.

### Conclusion

We understand Appellant's conviction that the landowners were entitled to all of the rent paid for 18 acres of "accreted pastureland." But after reviewing the Regional Director's Supplemental Decision, and based on a more complete record, we conclude that the evidence in the record, including the Location Sheet itself, supports BIA's explanation that the 18-acre figure was an estimate. We further conclude that BLM's surveys provide reliable evidence that the actual amount of acreage that had accreted to and was part of the Allotment during the relevant time period consisted of 7.96 acres, and not 18 acres.

We agree with Appellant, however, that the relevant time period for determining the amount of accreted acreage is the time when the leases were in effect. If not for the fact that BLM's 1990 survey was conducted mid-way between the two leases, and the fact that the Location Sheet on the first lease does not, itself, depict 18 acres, and the drawing is actually consistent with the 1990 survey data, we might well have reached a different result. Thus, when BIA determines the amount of payment due to the Indian owners of allotments along the Missouri River from funds that have been escrowed in the Accretion Account, BIA's determination must be based on (1) a close examination of the leases and lease language; and (2) if the lease language is the same as the leases involved in this case, an evidentiary record to support a finding regarding the actual amount of accreted acreage during the lease terms. BIA may not simply assume that the official acreage of record, if it is determined through a BLM survey that is conducted years after a lease has expired, represents the actual accreted acreage that existed during a lease term. And of course, when BIA decides to distribute funds from the Accretion Account, it must provide proper notice of the decision to interested parties and include appeal rights.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's March 3, 2010, Supplemental Decision.

I concur:

          // original signed            
Steven K. Linscheid  
Chief Administrative Judge

          // original signed            
Debora G. Luther  
Administrative Judge