



## INTERIOR BOARD OF INDIAN APPEALS

Anna Chapman Smartlowit v. Northwest Regional Director, Bureau of Indian Affairs

50 IBIA 98 (08/06/2009)



# 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

ANNA CHAPMAN SMARTLOWIT,	)	Order Affirming Decision in Part,
Appellant,	)	Vacating in Part, and Remanding
	)	
	)	
v.	)	Docket No. IBIA 08-24-A
	)	
NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	August 6, 2009

Anna Chapman Smartlowit (Appellant) has appealed the October 9, 2007, decision of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), determining that (1) following the September 20, 2000, death of her husband, Peter Smartlowit (Peter), Appellant was required to obtain a lease for her residential use of a 5-acre portion (Homesite)<sup>1</sup> of Yakama Allotment No. 926 (Allotment)<sup>2</sup> and (2) beginning on the date of Peter’s death, Appellant, who inherited one-half undivided interest in the Allotment, owed the pro rata rental value of the house located on the property to Peter’s six children, who collectively inherited the other one-half undivided interest in the Allotment. Appellant concedes that she is required to have a lease, and is liable for rent, after July 11, 2006, when an Order Determining Heirs was issued in Peter’s Indian trust estate. She contends, however, that the obligation in BIA’s leasing regulations for an “Indian landowner” to obtain a lease does not apply to undetermined heirs because they are not yet “landowners,” and therefore no lease was required, nor rent due, for the period between Peter’s death in 2000 and issuance of the probate order in 2006.

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<sup>1</sup> The parcel at issue is described as the “North 330 feet of the West 660 feet o[f] the Southeast Quarter of the Northwest Quarter of Section 18, Township 12 North, Range 18 East, [Willamette Meridian (W.M.), Washington], containing 5 acres, more or less.” Letter from Acting Superintendent (Superintendent), Yakama Agency, BIA, to Appellant, Oct. 30, 2006. Administrative Record (AR) 12.

<sup>2</sup> The Allotment consists of a total of 80 acres.

We affirm the Regional Director's conclusion that Appellant did not have an unqualified right, as she contends, to occupy the Homesite prior to the determination of Peter's heirs. Appellant is wrong that an undetermined heir is not an "Indian *landowner*" under the leasing regulations, because ownership vests on the date of death, even if heirship is adjudicated later. But even if she were not an Indian landowner under the regulations, *see* 25 C.F.R. Part 162, Subpart F, she would still be required to obtain a lease as an "other person," to whom the obligation to have a lease attaches under another subsection of those same regulations. Because Appellant does not contend that she had permission from her co-owners to occupy the Homesite rent-free, we affirm the Regional Director's conclusion that Appellant is liable to them, beginning on the date of Peter's death, for their share of the rental value of the trust property that she continued to occupy. Appellant's status as an Indian landowner of the Homesite means that BIA has some discretion and is not *required* to treat her unauthorized use as a trespass and take action to recover possession; it does not mean that she is not technically in trespass, within the meaning of the regulations, or that she is not liable for rent.

However, we vacate the portion of the Regional Director's decision impliedly finding that BIA has jurisdiction over the house located on the Homesite, and therefore has authority to demand rent for, and require and grant a lease for, the house as trust property pursuant to BIA's leasing regulations. The record includes allegations and evidence suggesting that title to the house may not be held by BIA as part of its trust ownership of the Allotment, and the record is insufficient for the Board to make a determination one way or the other regarding the trust or non-trust status of the ownership of the house. Unless BIA provides additional explanation and evidence to support a conclusion that the house is held in trust by the United States as part of the trust land, so that BIA's regulations for leasing Indian land apply to the house, BIA's jurisdiction is limited to assessing the rental value of the 5 acres of land constituting the Homesite, excluding the rental value of the house.

### **Statutory and Regulatory Background**

With limited exception, a lease<sup>3</sup> is required before taking possession of Indian lands. 25 C.F.R. § 162.104; *Goodwin v. Pacific Regional Director*, 44 IBIA 25, 29 (2006). Unlike an Indian landowner who owns 100% of the trust or restricted interests in a tract and may

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<sup>3</sup> The regulations define a *lease* as "a written agreement between Indian landowners and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of Indian land for a specified purpose and duration." 25 C.F.R. § 162.101.

take possession of the tract without a lease, 25 C.F.R. § 162.104(a), “[a]n 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 the landowner’s permission to take or continue in possession without a lease.” *Id.* § 162.104(b). In addition, “[a]ny other person” — i.e., not otherwise described in section 162.104 — “must obtain a lease . . . before taking possession.” *Id.* § 162.104(d). Possession of Indian land without a required lease by a party other than an Indian landowner of the tract “will” be treated as a trespass, and, unless the party using the land without authorization is engaged in negotiations with the Indian landowners to obtain a lease, BIA “will” take action to recover possession on the Indian landowners’ behalf and to pursue any additional remedies available under applicable law. *Id.* § 162.106.

While section 162.104 governs who is required to *obtain* a lease for Indian land, sections 162.601 and 162.602 govern who has authority to *grant* the lease. Section 162.601 defines the circumstances under which the Secretary (i.e., BIA) may grant leases of individually owned Indian land, and section 162.602 governs grants of leases by landowners or their representatives. Relevant to arguments raised in this appeal, BIA has the statutory and regulatory authority to grant nonagricultural leases on individually owned trust or restricted allotments of deceased Indians on behalf of the undetermined heirs of a decedent’s estate. 25 U.S.C. §§ 380 and 2218(c); 25 U.S.C. § 162.601(a)(3). In addition, section 162.601(a)(4) authorizes BIA to grant leases on individually owned lands on behalf of heirs or devisees who have not been able to agree upon a lease during a specified 3-month period “*provided that the land is not in use by any of the heirs or devisees*” (emphasis added). With limited exceptions, the Secretary will not grant or approve a lease for nonagricultural lands for less than the present fair annual rental of the land. 25 C.F.R. § 162.604(b).<sup>4</sup>

### Factual and Procedural Background

Appellant, who married Peter on January 7, 1999, lived with him in a house on the Homesite beginning in 1995. Peter died intestate on September 20, 2000, survived by Appellant and his six children from his first marriage. Appellant continued to live on the Homesite after his death, and, in response to a dispute between Appellant and Elkay

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<sup>4</sup> The exceptions to this directive include, *inter alia*, leases granted by an adult owner of trust or restricted land (and approved by the Secretary) to members of the owner’s immediate family with or without rental consideration (subsection (b)(1)) and leases granted or approved by the Secretary at less that fair annual rental when such action would be in the best interest of the landowners (subsection (b)(3)).

Lamebull (Elkay), one of Peter's daughters, the Yakama Tribal Court issued an order on July 2, 2003, allowing Appellant to continue to reside in the home with her son and another individual. AR 1. Appellant did not enter into a residential lease for her continued use of the Homesite, nor did she pay any rental for that use.

In October of 2003, Elkay visited the Yakama Agency (Agency) office complaining about the condition of the house located on the Homesite and wanting to know if BIA could do anything about the house, "since it's on trust land." AR 2. The next documentation in the record concerning BIA's involvement is a November 11, 2005, letter from the Superintendent to Appellant, stating that BIA had received a complaint from one of the potential landowners of the Allotment about the use of their land, which the letter describes as a 1-acre area. The Superintendent advised Appellant that she needed to contact the Agency regarding a residential lease for the Homesite. AR 3. He also indicated that BIA would order an appraisal to determine the fair rental amount due for "the unit." *Id.* In an undated follow-up letter responding to a telephone call from Appellant, the Superintendent informed her that she and Peter's children from his previous marriage were probable heirs to Peter's estate; stated — incorrectly — that Peter had not held the full undivided interest in the tract but shared the undivided interest in "the allotment" with the children from his previous marriage;<sup>5</sup> and noted that the Yakama Tribal Court Order allowing her to stay in the house had contained no statement concerning the payment of rent. AR 4.

On July 11, 2006, an Order Determining Heirs was issued in Peter's trust property probate. *Estate of Peter Smartlowit*, Probate No. NW-124-0318. AR 7. In the order, the administrative law judge (ALJ) determined that Appellant inherited a one-half interest in Peter's trust estate and each of Peter's six children held a one-twelfth interest in that estate. Appellant continued to reside at the Homesite.<sup>6</sup> Documents in the record indicate that Appellant informed BIA that she was interested in pursuing a conveyance by purchase or

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<sup>5</sup> The Title Status Report included with BIA's inventory for Peter's trust estate indicates that Peter held 100% ownership in the Allotment. As we note later, however, Elkay contends that Peter and his children shared ownership of the house during his lifetime.

<sup>6</sup> The record contains a letter from Elkay to the ALJ, dated July 20, 2006, purporting to "appeal" the probate and asserting, *inter alia*, that Appellant should have to pay back rent for the 6 years that she had been living on the property and that if Appellant refused to cooperate with BIA and obtain a lease, she should be removed from the house so that either one of the other heirs or someone willing to pay rent could move into the house. *See* AR 8. No ruling on or other response from the ALJ to this "appeal" appears in the record.

land exchange and that she was willing to convey all her other lands in exchange for the house and tract on the Allotment. AR 10, 11.

By letter dated October 30, 2006, the Superintendent informed Appellant that she needed to immediately enter into a lease agreement for the Homesite portion of the Allotment, which the letter noted “includes a residence.” AR 12. The letter stated that she could be assessed damages and subjected to increased costs if she did not contact the Yakama Nation Trust Real Estate Services to begin the lease process. *Id.* Appellant, now represented by counsel, responded by letter dated November 9, 2006, declining the request for a lease application. AR 13. Appellant stated that BIA had no authority to lease the property without the consent of the heirs, including herself, and that any attempt to assess damages against her for trespass would amount to a gross violation of BIA’s fiduciary trust responsibility to her.

On January 23, 2007, BIA completed a restricted appraisal report determining the fair annual rental for the residential use of the house on the Allotment. AR 14.<sup>7</sup> The report concluded that, based on a direct comparison with rental rates paid for similar properties, the estimated fair annual rental for 100% of the interest in the house was \$660 per month, or \$7,920 per year, as of July 27, 2006.

In anticipation of issuing a residential lease to Appellant, BIA sent “Acceptance of Lessor” forms for the Allotment to Peter’s six children as the heirs to a collective one-half interest in the Allotment. *See* AR 16-21. The acceptance forms described the property to be leased as the heirs’ one-half interest in the 5-acre Homesite, and proposed \$330/month rent for that one-half interest. Only two heirs returned the forms, both of whom refused to sign the acceptance. Elkay refused to sign because she wanted Appellant both to pay the full amount of the \$660 monthly rental, not just the \$330 per month reflecting Appellant’s ownership of a one-half interest in the allotment, and to pay back rent for the 7 years she had occupied the property (AR 20); Renee Elwell, another one of Peter’s daughters, similarly refused to sign because of the omission of back rent and because the rental amount was inadequate (AR 21).

By letter dated April 30, 2007, Appellant agreed to lease the Homesite and asked BIA to forward a copy of the proposed lease terms and conditions to her so she and BIA could discuss the lease. AR 23. She also informed BIA that she was interested in entering

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<sup>7</sup> The restricted appraisal report described the appraised property as the “NE4NW4SE4NW4, Sec. 18, T. 12 N., R. 18 E., W.M., WA., containing 1.00 acre, more or less.”

into an agricultural lease and asked for information about the time involved in obtaining such a lease.

On May 10, 2007, the Superintendent issued his decision assessing Appellant \$31,680 for her occupancy of the Homesite for the past 7 years and the current year (2007).<sup>8</sup> AR 24. He also advised her that, pursuant to 25 C.F.R. §§ 166.800 - 166.819 (trespass on Indian agricultural lands), she had to immediately cease her use of the Allotment and that, if she did not do so, she could be subject to additional penalties, damages, and costs. He added that BIA would refuse to issue Appellant a permit or lease for any other use, development, or occupancy of trust land until the matter was resolved.

Appellant appealed the Superintendent's decision to the Regional Director, asserting that she was not in trespass on the Allotment from her husband's death until the determination of heirs because she was not required to obtain a residential lease for the Allotment during the period when the heirs to the property were undetermined and that the Superintendent, therefore, had no regulatory authority to evict her from the Homesite. AR 27. She asked that the Regional Director (1) vacate the assessment of occupancy for the period from September 2000 through July 2006 and remand the issue for a revised calculation at fair annual rental for a period of 1 year and (2) declare null and void the Superintendent's order demanding that she cease her residential use of the Allotment and allow her to remain on the Homesite until she could arrange a move from the area.

The Regional Director issued his decision on October 9, 2007. AR 28. As an initial matter, he determined that Appellant was not in trespass because she had resided on the property first as Peter's spouse and, after his death, as a probable heir/co-owner of the property. He therefore concluded that she was not required to cease her use of the residence on the Allotment.

The Regional Director, however, rejected her claim that she was not required to obtain a residential lease until the determination of heirs was made. He reasoned that BIA had the authority to issue leases on behalf of undetermined heirs of a deceased landowner and that Appellant's right to inherit an undivided one-half interest in the property did not give her the right to occupy the property without paying rent to the estate on behalf of the remaining heirs. He also stated that the demand to enter into a lease and pay rent "would

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<sup>8</sup> He calculated the \$31,680 assessment using the rental rate established in the restricted appraisal report: \$7,920 annual rent multiplied by 8 years, or \$63,360, minus Appellant's 50% ownership interest.

harmonize with” the Tribal Court’s determination to allow her to remain in the house, concluding that BIA “cannot find a reason not to charge” Appellant rent. AR 20 at 5.

Finally, in response to Appellant’s challenge to the Superintendent’s “assessment of occupancy” for the Allotment for the period from 2000 to 2007, the Regional Director determined that Appellant was responsible, under the applicable regulations, for paying (and the co-owners were entitled to receive) fair annual rent for the Homesite for the entire period. He concluded, however, that the Superintendent had erroneously relied on the appraised value of the property as of July 27, 2006, in his calculation of the rent due for the earlier time periods and therefore the matter had to be remanded for recalculation of fair rental value prior to 2006. The Regional Director found that this determination did not conflict with the Tribal Court order because the order was silent as to the payment of rent, adding that, in any event, since the property was trust land, the Superintendent, not the Tribal Court, had the responsibility for managing and overseeing the property.

The Regional Director further concluded that, to remain on the property, Appellant was required to enter into a lease and pay rent, noting that the co-owners could either negotiate such a lease among themselves or, if negotiations were unsuccessful, BIA could grant a lease for the property. The Regional Director therefore vacated the Superintendent’s decision and remanded the matter to BIA for further resolution of the case. In so doing, he directed the Superintendent to (1) grant Appellant a residential lease for \$330 per month rent; (2) determine the amount of back rent due for the period from September 20, 2000, to July 26, 2006, based on the fair annual rent during that time period; (3) charge Appellant \$330 per month rent for the period from July 26, 2006; and (4) recalculate the total rent owed from September 20, 2000, through the present.

This appeal followed.

### **Standard of Review**

The only issues raised on appeal by Appellant are questions of law over which the Board exercises de novo review. *See, e.g., Rosebud Indian Land and Grazing Association and its Members v. Acting Great Plains Regional Director*, 50 IBIA 46, 52 (2009); *State of South Dakota and County of Charles Mix v. Acting Great Plains Regional Director*, 49 IBIA 129, 141 (2009). In addition, we review de novo the sufficiency of evidence to support a BIA decision. An appellant, of course, bears the burden of proving that BIA’s decision was in error or not supported by substantial evidence. *State of South Dakota and County of Charles Mix*, 49 IBIA at 141.

## Discussion

Appellant raises two issues on appeal: (1) whether she was required to obtain a residential lease for use of the house on a trust Allotment owned by her deceased husband while the heirs of the Allotment remained undetermined; and (2) whether the Superintendent is allowed to assess her for back rent for the 6 years that she occupied the home from the date of her husband's death until the heirs were determined by the ALJ. Appellant does not challenge the Regional Director's determination that she is required to enter into a residential lease and pay fair annual rent for the period beginning July 11, 2006, the date the heirs were determined.

Appellant maintains that she was not required to obtain a residential lease from BIA for use of the Allotment from the date of her husband's death until the heirs were finally determined because she was not an Indian "landowner" subject to the leasing requirement of 25 C.F.R. § 162.104(b) prior to the that determination. She bases her argument on the statutory and regulatory distinction between the ability of Indian "owners" to negotiate leases for themselves and the authority of the Secretary to grant leases on behalf of undetermined heirs. *Compare* 25 U.S.C. § 415(a) and 25 C.F.R. § 162.602 (leases by Indian "owners") *with* 25 U.S.C. § 415a and 25 C.F.R. § 162.601(a)(3) (leases by the Secretary on behalf of undetermined heirs). Appellant contends that this dichotomy in leasing authority necessarily means that undetermined heirs are not yet "Indian landowners" within the meaning of 25 C.F.R. § 162.104(b) and thus need not obtain leases to occupy Indian lands. This conclusion, she submits, also negates BIA's authority to require her to pay back rent for the period between her husband's death and the determination of heirs because she was not required to have a lease during that time period and, according to Appellant, BIA can only find trespass and assess trespass damages against Appellant if a lease is required.<sup>9</sup> We disagree.

The difference in the statutory and regulatory provisions addresses who can grant leases, not who is an "Indian landowner" for purposes of when a person occupying Indian land must obtain a lease. The statutes and regulations giving authority to the Secretary are designed to allow leases to be granted while probate proceeds so that the heirs do not lose

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<sup>9</sup> Appellant also claims that the exceptions to the requirement that fair annual rental be paid for a lease found in 25 C.F.R. § 162.604(b)(1) support her assertion that undetermined heirs need not obtain a lease or pay rent. Not only are the exceptions to the payment of fair annual rental, which presuppose the existence of a lease, irrelevant to the question of whether a lease is necessary, but she also has not shown that she qualifies for any of those exceptions.

income from their property during the pendency of the probate. The Secretary's authority, in relation to the authority of Indian owners, for purposes of *granting* leases, is simply not relevant or informative in interpreting the provisions of the regulations imposing the requirement on a party to *obtain* a lease. While there is some intuitive logic to Appellant's argument, because undetermined heirs are not yet *known* with certainty to be "owners," we nonetheless reject her argument that the term "Indian landowner" in section 162.104(b) must be so narrowly construed. When a person dies intestate, title vests in his or her heirs on the date of death, not the date of the probate order. *Estate of Ada Thompson*, 38 IBIA 164, 165 (2002); *Estates of Sam A. Simeon and Stephen (Steven) Aloysius Simeon*, 15 IBIA 135, 138 (1987); see *Estate of Rena Marie Edge*, 7 IBIA 53, 59 n.9 (1978). Appellant therefore was an owner of an undivided one-half interest in Peter's trust estate as of the date of his death in September 2000, and, as an Indian landowner, was required to obtain a lease for her use of her co-owners' interests in the Allotment, unless they had given her permission to continue her use without a lease.

Appellant's constrained reading of subsection 162.104(b) would not, even if accepted, have relieved her of the obligation to obtain a lease during the period when Peter's heirs were undetermined. If Appellant were not an "Indian landowner" under subsection 162.104(b), it would not follow that she did not need a lease. Instead, the catch-all provision contained in subsection 162.104(d) would apply: "*Any other person . . . must obtain a lease under these regulations before taking possession*" (emphasis added). Moreover, if Appellant were not an "Indian landowner" under section 162.104, then neither would she have been an Indian landowner under section 162.106, and BIA arguably would have had little or no discretion to allow her to remain on the property in the absence of negotiations with the other landowners. Subsection 162.106(a) provides that if possession of Indian land is taken without a lease by a party other than an Indian landowner, BIA "will" treat the unauthorized use as a trespass and "will take action to recover possession." In contrast, the Board has recognized that if possession is taken by an Indian landowner without a required lease, BIA retains some discretion, and is not required to seek immediate eviction. See *Goodwin*, 44 IBIA at 25 (BIA was not required to take immediate eviction action against an individual in unauthorized possession of trust property in which she owned an interest).

Although we affirm the Regional Director's decision with respect to the applicability of the law to the trust land at issue in this case, i.e., the Homesite occupied by Appellant, we must vacate the portion of his decision that assumed, or impliedly found — but without any discussion or acknowledgment of the issue — that the house located on the Homesite was trust property to which the trust land leasing regulations apply. BIA's jurisdiction over the house under BIA's leasing regulations necessarily depends on its status as part of the

trust land on which it is located. *See* 25 C.F.R. §§ 162.102 (regulations apply to Indian land owned by an individual Indian or tribe in trust or restricted status) and 162.101 (definition of “Indian land” as a tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status). But there is insufficient evidence in the record to support such a determination, and because the issue goes to the heart of BIA’s jurisdiction and authority to grant or approve a lease for the house, and to demand rent for the house, we address the issue *sua sponte*, even though it was not raised by any party.

In *Olson v. Portland Area Director*, 31 IBIA 44, 51 (1997), the Board noted that “there have been and continue to be questions concerning the status of particular houses built on trust property.” In that case, BIA first prepared and executed a lease that expressly covered a house located on trust land, then declined to be further involved in leasing the house, without stating the reasons. The occupant and the Indian landowner then executed a lease for the “house and yard,” which was not approved by BIA, but which BIA “recognized” as a lease for “personal property.” At one point, BIA noted that it “could not affirm ownership of the house,” in essence admitting “that it did not know if the house was trust real property, trust personal property, or non-trust property.” *Id.* at 45-47, 51. As the Board stated, “BIA either had authority to lease this house or it did not, based on whether the house was or was not trust real property.” *Id.* at 51.<sup>10</sup> In other Board cases, the status of a house located on trust land was determined by the terms of a lease. *See, e.g., Hardy v. Midwest Regional Director*, 46 IBIA 47, 54-55 (2007) (house became part of the leasehold interest of the lessee, rather than personalty); *Nix v. Acting Sacramento Area Director*, 18 IBIA 387, 390 (1990) (ownership of buildings vested in permittee, but if disposition of buildings not made within the allowable period after termination of permit, “ownership of said buildings shall merge with the land”); *Rhead v. Acting Portland Area Director*, 18 IBIA 257, 258 (1990) (lease provided that permanent improvements would be considered removable personal property). In *Estate of Arnold Ross*, 5 IBIA 277, 279 (1976), the Board found, with no discussion, “the two-bedroom frame house on post foundation, with composition roof[,] . . . constructed under the Housing Improvement Program, [and located on the decedent’s trust property,] to be non-trust personal property.”

In a recently enacted amendment to the American Indian Probate Reform Act, Congress provided rules applicable to the descent and devise of “covered permanent

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<sup>10</sup> In *Olson*, BIA sought trespass damages against the occupants of the house. The occupants had not appealed a prior finding of trespass, instead moving off the property. But when BIA sought to collect damages, they appealed, and the Board reversed BIA’s decision, concluding that the assessment of damages against the appellants would constitute a manifest injustice.

improvements” attached to trust or restricted land that is included in the estate of an Indian decedent. *See* 25 U.S.C.A. §§ 2206(a)[second](2)<sup>11</sup> and 2206(b)(2)(h)(1)(B)[\*] (West Supp. 2009).<sup>12</sup> The amendment stated, however, that the provisions “apply to a covered permanent improvement — (i) even though that covered permanent improvement is not held in trust; and (ii) without altering or otherwise affecting the non-trust status of such a covered permanent improvement.” *Id.* § 2206(a)[second](2)(C). We need not decide in this case the precise implications of this language because it is sufficient to illustrate the fact that a house located on trust land cannot simply be presumed to be trust property, as BIA apparently did in the present case.

The administrative record includes conflicting allegations regarding the ownership of the house, but no records of actual ownership. In Elkay’s 2006 “appeal” to the ALJ, she asserted that ownership of the house had been shared by her mother (Peter’s first wife), Peter, and their children, which suggests that ownership of and title to the house may have been separate from the ownership of the trust land on which it was located. There is, however, no evidence in the record to support Elkay’s assertion. But neither is there evidence to show that the house is held in trust by the United States, and the valuation of Peter’s trust estate seems to suggest that BIA did not consider it so because, in 2003, BIA valued the Allotment, consisting of 80 acres, at \$24,000. *See* Title Status Report (TSR), dated Nov. 13, 2003, AR 6 at 8. The TSR does not separately identify or appraise the 5-acre homesite portion of the Allotment, and does not indicate whether the appraised value of the trust property includes the value of the house (i.e., as part of the trust estate). BIA’s appraisal of the rental value of the house alone, however, in 2006, was for nearly \$8,000 *per year rental value*, which seems inconsistent with construing the \$24,000 valuation for the entire Allotment as including the value of the house.<sup>13</sup> We also note that the Tribal Court issued an order allowing Appellant to continue to reside in the house, which suggests that the Tribal Court may have believed it had jurisdiction over the house as non-trust property, even though it would not have had jurisdiction over the land. Before BIA may require a

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<sup>11</sup> Congress enacted two paragraphs “(2)” in subsection 2206(a).

<sup>12</sup> A “covered permanent improvement” is defined under the statute as “a permanent improvement (including an interest [therein]) that is (i) included in [a decedent’s] estate . . . ; and (ii) attached to a parcel of trust or restricted land that is also, in whole or in part, included in [the decedent’s] estate.” 25 U.S.C. § 2206(a)[second](2)(A).

<sup>13</sup> Of course, if the house is not part of the trust estate, then the valuation for purposes of a Homesite lease for the trust property should value the land in the absence of value attributable to the house.

[\*So in original Board decision. Should be 2206(h)(1)(B).]

lease for the house, and seek the rental value for past use of the house, BIA must first determine that the house is part of the trust land to which the BIA leasing regulations apply.

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 decision in part, vacates it in part, and remands the matter for further proceedings consistent with this decision.

I concur:

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// original signed  
Sara B. Greenberg  
Administrative Judge\*

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.