



## INTERIOR BOARD OF INDIAN APPEALS

Helen Dorene Goodwin v. Pacific Regional Director, Bureau of Indian Affairs

60 IBIA 46 (02/27/2015)



# 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

HELEN DORENE GOODWIN,	)	Order Vacating Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 12-104
PACIFIC REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	February 27, 2015

Helen Dorene Goodwin (Appellant) appealed to the Board of Indian Appeals (Board) from an April 4, 2012, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director vacated a March 18, 2009, notice issued to Elizabeth Laiwa (Laiwa) by BIA’s Central California Agency Superintendent (Superintendent) directing Laiwa to cease and desist her unauthorized occupation of Round Valley Allotment 445 (RV-445)<sup>1</sup> and to remove all personal property from the allotment (Notice). The Regional Director remanded the matter back to the Superintendent with the instruction to take no further action to evict Ms. Laiwa from the allotment.<sup>2</sup> Appellant challenges the Regional Director’s decision to allow Laiwa, who owns an approximately 5% interest in the undivided ownership of the allotment, to continue her unauthorized use of RV-445 without consent from the other co-owners and without paying fair market rental for the use of the land.

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<sup>1</sup> The home site occupied by Laiwa is a 1-acre portion of RV-445, which is located in Section 1, Township 22 North, Range 13 West, Mount Diablo Base and Meridian. The allotment is within the Round Valley Reservation in Mendocino County, near Covelo, California.

<sup>2</sup> This dispute was the subject of a previous appeal brought by the same Appellant in which the Board affirmed the Regional Director’s determination that the applicable regulations did not require the immediate eviction of Laiwa, a fractional co-owner of the allotment, as a consequence of the decision vacating Laiwa’s residential lease on the grounds that it lacked the requisite landowner consent. *See Goodwin v. Pacific Regional Director*, 44 IBIA 25 (2006).

The Board vacates the decision of the Regional Director, with the instruction that the Superintendent's March 18, 2009 Notice be given effect and implemented. BIA has a duty to protect the interests of all Indian co-owners of trust or restricted land, which it can only do by requiring that an owner of a fractional interest in an allotment receive the consent of co-owners prior to taking possession, or remaining in possession where consent was not obtained, and by insisting that fair market rental or some other negotiated compensation is paid unless expressly waived. Laiwa and BIA have had over a decade to resolve Laiwa's continuing trespass on RV-445. Co-owners of the allotment have repeatedly expressed opposition to Laiwa's unauthorized use and Appellant has repeatedly sought to compel BIA to take those actions which it is obligated to perform by statute and regulation. BIA has failed to do so. The Regional Director's decision provides no reasonable basis for setting aside the Superintendent's decision, or to believe that once again punting the matter back to the Superintendent will somehow allow BIA to resolve the trespass under the circumstances. Moreover, it is ultimately not the responsibility of BIA or the Round Valley Housing Authority to acquire the consent of RV-445 co-owners to a lease; that responsibility falls squarely on the party seeking to use or occupy trust or restricted Indian land.

### **Regulatory Background**

The Decision appealed from was issued on April 4, 2012, and so we cite to the law in effect at that time.<sup>3</sup> An Indian landowner who holds 100% of the interests in a parcel of trust or restricted land may take possession without a lease. 25 C.F.R. § 162.104(a) (2011). However, an owner of a fractional interest in land "must obtain a lease of the other trust and restricted interests in the tract . . . unless the Indian co-owners have given the landowner's permission to take or continue in possession without a lease." *Id.* § 162.104(b). The 2000 amendments to the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.*, established a sliding scale<sup>4</sup> for the percentage of ownership interest

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<sup>3</sup> The regulations governing leasing of Indian trust and restricted land were substantially revised in 2012; the revised regulations became effective January 4, 2013. *See* 77 Fed. Reg. 72440 (Dec. 5, 2012). The regulations, as revised, now include a dedicated subpart on residential leases. *See* 25 C.F.R. Part 162, Subpart C.

<sup>4</sup> For fractionated land with 5 or fewer owners, the consent of 90% of the ownership interest is required; for land with more than 5 but fewer than 11 individual owners, consent of 80% of the interest is required; for land with 10 to 19 landowners, the consent of 60% of the ownership interest is needed; and for land with 20 or more individual owners, consent of the majority of the interests is required for approval of a lease by BIA.

25 U.S.C. § 2218(b)(1). Prior to amendments in 2004, the consent requirement for 5 or  
(continued...)

required for consent to leases of trust or restricted lands based on the number of owners of a fractionated parcel. *See* 25 U.S.C. § 2218. The consent requirement is determined by the number of landowners and their interests identified in BIA records at the time the application is submitted to BIA. *Id.* § 2218(b)(2)(A).

If a lease is required, and a person “other than an Indian landowner of the tract” takes possession without a lease, BIA “will treat the unauthorized use as a trespass.” 25 C.F.R. § 162.106(a). “Trespass” is defined as “an unauthorized possession, occupancy or use of Indian land.” *Id.* § 162.101. Unless BIA is aware that a party in possession without authorization is engaged in negotiations to obtain a lease, BIA “will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.” *Id.* § 162.106(a).

BIA may help negotiate a lease or, in certain circumstances, grant a lease on the landowners’ behalf. *Id.* § 162.107(a). In doing so, BIA “will obtain a fair annual rental and attempt to ensure . . . that the use of the land is consistent with the landowners’ wishes.” *Id.* Once leased, BIA “will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions.” *Id.* § 162.108(a). BIA is further committed to take “immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.” *Id.* § 162.108(b).

### **Factual and Procedural Background**

The Board has a long history with RV-445 and the controversy surrounding the use and occupancy of a part of that allotment by Laiwa and her family. Appellant owns an approximately 14% undivided interest, and Laiwa owns an approximately 5% undivided interest, in RV-445. Decision at 1 (Administrative Record (AR) Exhibit (Ex.) B). On January 25, 2002, Laiwa requested a residential lease for a 1-acre portion of the approximately 10.16 acre allotment. Decision of the Regional Director, Oct. 12, 2004, at 1 (2004 Decision) (AR Tab 38). Laiwa was informed, in a letter dated the same day, of BIA procedures for acquiring a lease, including the responsibility of the lessee to gather signed consents from allotment landowners and the need to pay a rental fee. *Id.*; *see also* Letter from Superintendent to Laiwa, Jan. 25, 2002 (Administrative Record, Docket No. IBIA 05-27-A, submitted Jan. 6, 2004 (2004 AR), Tab 1). Laiwa submitted signed

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(...continued)

fewer owners was 100%. *See* Pub. L. No. 108-374, § 6(a)(10), 118 Stat. 1804 (Oct. 27, 2004).

consent forms for six owners in a letter dated March 5, 2003.<sup>5</sup> 2004 Decision at 2. Two of the six consenting owners withdrew their consent to Laiwa's lease in letters dated June 10, 2003. *Id.* BIA sent letters dated June 2, 2003, along with a draft lease and consent form, to those landowners who were not among the consents provided by Laiwa. *See* Letters from Superintendent to Landowners, June 2, 2003 (2004 AR Tab 13).

In a letter dated June 6, 2003, Appellant and RV-445 co-owner Rita Tugman informed BIA that they did not accept the terms of the proposed lease agreement.<sup>6</sup> Letter from Appellant and Tugman to Superintendent, June 6, 2003 (2004 AR Tab 8). Appellant and Tugman also apprised BIA that, “[a]ccording to 25 U.S.C. [§ 2218] . . . [t]he minimum consent requirement [is] 60% if there are between 11 and 19 owners. We as 41.65% landowners of the said 10.16 acres . . . do not agree to the current lease terms.” *Id.* By June 13, 2003, three other co-owners informed BIA in writing that they did not consent to the lease. *See* Letter from Swearinger to Superintendent, June 10, 2003 (2004 AR Tab 13); Letter from Pete to Superintendent, June 10, 2003 (AR Tab 13); Patereau Denial of Consent to Lease, June 6, 2003 (2004 AR Tab 13).

On July 24, 2003, the Superintendent proposed to issue a lease for Laiwa to occupy a 1-acre parcel of the allotment “[t]o build a home and maintain a residence” for a term of 50 years in exchange for the nominal rental payment of \$1. Residential Lease, July 24,

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<sup>5</sup> A review of the six landowner consent forms, *see* 2004 AR Tab 13, indicates that four were witnessed by Laiwa and one by Eunice Swearinger, both of whom own an interest in the allotment, and therefore could not serve as one of the two required witnesses according to the instructions provided by BIA. *See* Letter from Superintendent to Downs, June 2, 2003 at 1 (unnumbered) (2004 AR Tab 13). This letter was sent to landowners who had not provided consent. *Id.* It is unclear from the record whether Laiwa was informed of BIA's witness requirements.

<sup>6</sup> According to the 2004 Administrative Record, Appellant contacted BIA sometime in mid- to late-May to state her intent to appeal BIA's decision to lease the 1-acre lot and also complained that construction had begun on the site despite the absence of an approved lease and without her permission. *See* Contact Sheet, June 5, 2003 (2004 AR Tab 7) (BIA realty staff member explaining that “Ms. Goodwin . . . telephoned me nearly two weeks ago”). Appellant participated in a telephone conference, called at her request, with BIA staff, the President of the Round Valley Indian Tribes, and Tribal Housing Authority staff on June 19, 2003. Letter from Superintendent to Oliver, President, June 25, 2003 (2004 AR Tab 10). During the call, BIA explained that a former BIA Realty employee mistakenly authorized construction and Indian Health Services had completed installation of a well before BIA discovered the error and ordered a work stoppage on the housing project. *Id.* at 1 (unnumbered).

2003, at 1 (AR Tab 39); *see also* 2004 Decision at 3. The Superintendent did not notify the other landowners of RV-445 of the decision to issue the lease until December 5, 2003. 2004 Decision at 3. Four co-owners submitted written objections to the lease and one unsigned letter objecting to the lease was also received by BIA. *Id.*

Ms. Laiwa entered into an agreement with the Round Valley Housing Authority (RVHA) and, with funding from the BIA Homeownership Improvement Program (HIP) and assistance from the RVHA, purchased and installed a modular home on the 1-acre lot identified in the approved lease. *See* Laiwa's Answer Brief (Br.), Nov. 30, 2012, at 3. It is unclear from the record when Laiwa effectively took possession of the property, however, statements made by Appellant indicate that the construction was near completion by the time co-owners were informed of the lease, *see* Notice of Appeal, Dec. 19, 2003, at 2 (2004 AR Tab 20), and that Laiwa was in possession of the parcel by July 14, 2004, when Appellant informed Round Valley Tribal Police that Ms. Laiwa's daughter was building a structure on RV-445 outside of the area considered by the lease, which was then under appeal.<sup>7</sup> Letter from Appellant to Duke, Tribal Police, July 14, 2004 (AR Tab 27).

Appellant appealed to the Regional Director and, on October 12, 2004, the Regional Director vacated the Superintendent's issuance of the lease. 2004 Decision at 5. The Regional Director concluded that, because RV-445 was owned by 19 individuals, the Superintendent was required by statute to obtain the consent of at least 60% of the

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<sup>7</sup> Laiwa's daughter reportedly stated that she had permission from her mother to build on the allotment and was using the well installed for Laiwa's home. AR Tab 27. The Regional Director confirmed, based on a September 2005 BIA site visit, that the daughter was occupying a "substandard facility" adjacent to Ms. Laiwa's home, that she had been advised that both she and Ms. Laiwa, her mother, needed a lease, and that the daughter indicated that it was her intent to remain on the property to care for her mother. Status Report from Regional Director to Board, Oct. 25, 2006 (October 2006 Status Report) (AR Tab 21). As Appellant noted at the time, and repeated in subsequent calls for action from BIA, the daughter was not a co-owner and was therefore in trespass and subject to immediate eviction. *See* Letter from Rhod, Counsel for Appellant, to Superintendent, RHVA Exec. Dir., and RV Tribal Police, Dec. 7, 2004 (AR Tab 27); *see also* 25 C.F.R. §§ 162.106(a), 162.108(b). While acknowledging both Ms. Laiwa's unauthorized possession of the allotment and her daughter's trespass, the Regional Director stated, without explanation, that: "Accordingly, no action was taken by the Superintendent to seek removal of either Ms. Laiwa or her daughter." October 2006 Status Report. Ms. Laiwa's daughter subsequently moved another motor home onto RV-445 near her mother's home, again, without apparent authorization. *See* Letter from Appellant's Counsel to Acting Regional Director, Nov. 2, 2006, at 2 (unnumbered) (AR Tab 20).

undivided interests held by landowners, rather than a simple majority. *Id.* at 4. Moreover, the Regional Director determined that the Superintendent inappropriately consented on behalf of landowners whose whereabouts were incorrectly determined to be unknown despite any evidence of an attempt to locate them, and for landowners who signed certified mail receipts but did not return forms indicating they consented or did not consent to the lease. *Id.* The Regional Director also determined that the Superintendent lacked the authority to grant a lease for a term in excess of the 2-year limitation for leases consented to on behalf of undetermined heirs of the two deceased landowners of RV-445. *Id.*

However, because the Regional Director found that Laiwa's presence on the property had not adversely affected the interests of the other co-owners, and because "Appellant [had] not advanced any reason that would compel [BIA] to order Mrs. Laiwa to vacate the premises," the Regional Director allowed Laiwa to remain in her home pending further action by the Superintendent. *Id.* at 5. The Regional Director remanded the matter to the Superintendent to: (1) locate additional landowners to obtain their consent and document efforts to locate them; (2) send notices to landowners whose whereabouts were known but who failed to respond to prior consent requests; (3) obtain an appraisal of fair market rent and ascertain whether any landowners would waive payment of rent; and (4) determine whether Laiwa was capable of paying rent. *Id.*

Appellant agreed with the Regional Director's decision to vacate the lease but appealed that part of the 2004 Decision that determined BIA was not required to order Laiwa to vacate the premises. *Goodwin*, 44 IBIA at 27. The Board clarified, in an order dated July 27, 2005, that the sole issue to be decided was whether, based on the record, the Regional Director erred in not directing the Superintendent to order Laiwa to vacate the premises while the Superintendent was reconsidering the matter. *Goodwin*, No. 05-27-A (July 27, 2005) (Order Authorizing Superintendent to Comply with Non-Appealed Portion of the Regional Director's Decision) at 1 (July 27, 2005 Order) (AR Tab 35). The Board affirmed the Regional Director's decision not to issue an immediate eviction order against Laiwa and concluded that 25 C.F.R. § 162.106(a) provided "some discretion as to whether to treat Laiwa's unauthorized use as a trespass requiring immediate action to recover possession." *Goodwin*, 44 IBIA at 30.

During the pendency of the appeal to the Board,<sup>8</sup> on February 14, 2006, the Superintendent ordered an appraisal of the 1-acre parcel of land requested by Laiwa.

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<sup>8</sup> After determining the scope of the appeal, the Board, *sua sponte*, authorized the Superintendent "to comply with the instructions and affirmative actions directed by the Regional Director's decision, including issuance of a new determination on Ms. Laiwa's request for a residential lease." July 27, 2005 Order at 2.

Request for Appraisal, Feb. 14, 2006 (AR Tab 28). The Superintendent also mailed a new proposed lease, a “Consent to Lease” form, and a “Waiver of Appraisal” form to each of the landowners. Letter from Superintendent to Landowners, Apr. 14, 2006 (AR Tab 26). The proposed lease was for a term of 2 years with an option to renew for 25 years. *Id.* at 1 (unnumbered). The consent form allowed landowners to indicate their consent or non-consent to the lease of the 1-acre parcel, while the appraisal waiver informed landowners that, unless they waived the appraisal and agreed to payment of a nominal lease fee (set at \$1 in the lease), an appraisal would be conducted to establish the annual rental fee and they would each be paid based on their interest ownership. *See e.g.* Consent to Residential Lease Contract, Apr. 28, 2006 (Patereau Response) (AR Tab 26); Waiver of Appraisal, Apr. 30, 2006 (Pete Response) (AR Tab 26). The letter to landowners requested a response within 15 days of receipt of the letter, proposed lease, and related forms. Letter from Superintendent to Landowners at 1 (unnumbered) (AR Tab 26). Although the Administrative Record does not appear to include a summary of landowner responses, the record does indicate that BIA received written responses denying consent and requiring appraisal and payment of the fair rental value from three landowners whose combined interest ownership constituted 42.387% of the total undivided interests of RV-445. *See* Patereau Response (AR Tab 26); Consent to Residential Lease Contract, Apr. 19, 2006 (Tugman Response) (AR Tab 26); Letter from Appellant’s Counsel to BIA, Apr. 21, 2006 (AR Tab 25) (collectively Consent Forms); *see also* Title Status Report, Apr. 3, 2006, at 2 (AR Tab 26). These three responses alone effectively blocked Laiwa’s pending lease application.

The appraisal requested in February was provided in May 2006, and established the fair market rental for the 1-acre parcel, land only, at \$118 per month. Memorandum from Regional Appraiser to Superintendent, May 31, 2006, at 1 (AR Tab 24). The appraisal report, which provided the monthly fair market rental value, was sent by certified mail to RV-445 landowners for their “information and consideration” with reference to three lease applications that were under consideration. Letter from Superintendent to Trust Landowner of RV-445, Oct. 19, 2006, at 1 (AR Tab 22). No response from landowners was requested. *Id.*

After repeated written requests by Appellant for action by the Superintendent and Regional Director, three requests by Appellant for a written status report from the Regional Director, *see e.g.* Request for Status Report, Mar. 29, 2006 (AR Tab 27),<sup>9</sup> and the Board’s Order for Status Report, *see Goodwin*, No. 05-27-A (Aug. 18, 2006), the Superintendent ultimately issued a notice to Laiwa on March 18, 2009, ordering her to

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<sup>9</sup> *See also* Request for Status Report, June 27, 2008 (AR Tab 15); Request for Status Report, Mar. 10, 2009 (AR Tab 14).

cease and desist her use of RV-445. Notice at 1 (AR Tab 13). The Superintendent advised Ms. Laiwa that “[b]ecause the proper number of consents have not been obtained . . . we are ceasing to process your lease application.” *Id.* BIA also closed Laiwa’s pending lease application file. *Id.* The notice concluded that Laiwa was “in trespass on the allotment . . . [and] [s]uch trespass includes the placement and . . . current use and occupation of a modular building on RV-445, with related improvements.” *Id.* The Superintendent ordered her to cease her use of the land immediately and remove her personal property from the premises within 30 days. *Id.*

Laiwa timely appealed to the Regional Director, challenging the Superintendent’s conclusion that as a landowner, she could be in trespass on her own property. Notice of Appeal, Apr. 22, 2009, at 1 (AR Tab 12). Laiwa also argued that the Superintendent had failed to comply with the Regional Director’s instructions to locate additional landowner consents for her lease, and that BIA had violated its trust responsibilities to her and should be estopped from evicting her due to her reliance on the previously granted lease in constructing her home on the property. Statement of Reasons, May 22, 2009, at 2 (AR Tab 11). After further delay, which prompted Appellant’s filing of two appeals from official inaction pursuant to 25 C.F.R. § 2.8,<sup>10</sup> and an appeal by Appellant from BIA inaction to the Board,<sup>11</sup> the Regional Director issued a decision on April 4, 2012. *See* Decision (AR Ex. B). The Decision responded to both Ms. Laiwa’s appeal of the Superintendent’s Notice directing Laiwa to vacate RV-445 and remove all personal property, and Appellant’s appeals from official inaction, and serves as the basis of the instant appeal.

The Regional Director first found that the Superintendent failed to comply with the instructions in the Regional Director’s 2004 Decision, and noted that the record was “void of any indication that any efforts [by the Superintendent] were made to obtain consents to a lease” between December 2006 and March 2009. Decision at 2. The Regional Director concluded that Appellant’s claim that 75% of the owners did not approve of the lease was not supported by the record, *id.* at 3, and that the number of owners of RV-445 had increased to 25, thus reducing the requisite consent requirement to the majority of the landowners, *id.* at 5. Although acknowledging that allowing Laiwa’s continued occupation without a lease would be adverse to Appellant, the Regional Director found that there was no evidence that Laiwa had committed waste on the property, *id.* at 4, and that Appellant had “not advanced any evidence that she has suffered a significant loss of rental income from the property or that she [had] not been able to access or use the other nine acres of the

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<sup>10</sup> *See* Notice of Appeal, Aug. 31, 2011 (AR Tab 5); Notice of Appeal, Feb. 7, 2012 (AR Tab 3).

<sup>11</sup> *See Goodwin v. Pacific Regional Director*, 55 IBIA 8 (2012).

allotment,” *id.* at 5. Finally, the Regional Director concluded that BIA was not required to evict Laiwa from the premises pending further BIA efforts to secure the requisite consents for her lease. *Id.* at 4.

The Regional Director vacated the Superintendent’s notice to Ms. Laiwa “to cease her occupation of the home located on RV-445,” and ordered the Superintendent to “take no further actions to evict Appellant Laiwa from her home based simply on the unfounded request of Appellant Goodwin.” *Id.* at 5. The decision directed the Superintendent to “conduct an evaluation of the current circumstances, including, but not limited to, meaningful contact with the landowners and the Round Valley Indian Housing Authority,” and noted that Laiwa must pay fair market rent to the co-owners of RV-445 absent a waiver of payment. *Id.* at 5-6. The Regional Director based the decision on a finding that “the Superintendent did not adequately pursue any of the actions as previously set out by this office and concurred in by the IBIA.” *Id.* at 5. Appellant filed an Opening Brief and a Reply Brief, and Laiwa filed an Answer Brief. The Regional Director did not file a brief.

### Standard of Review

The Board exercises *de novo* review over questions of law and sufficiency of the evidence. *Dobbins v. Acting Eastern Oklahoma Regional Director*, 59 IBIA 79, 87 (2014); *see also Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 104 (2009). Conversely, the Board reviews a BIA discretionary decision to determine whether it is in accordance with applicable law, is supported by the evidence, and is not arbitrary and capricious. *Dobbins*, 59 IBIA at 87; *Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 264 (2013). An appellant bears the burden of showing error in a Regional Director’s decision. *Los Alamos Self Storage v. Southwest Regional Director*, 60 IBIA 1, 9 (2015); *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011).

### Discussion

Appellant alleges generally that BIA has failed to follow the regulations at 25 C.F.R. Part 162 governing the leasing of Indian trust and restricted land, and the statutory mandates of the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.*, by permitting, to the detriment of the landowners, one co-owner’s near decade-long unauthorized use and possession of an Indian allotment without co-owner consent or compensation. Opening Br., Oct. 29, 2012, at 1. Specifically, Appellant challenges the legal basis of the Regional Director’s statement that “BIA is not required to treat [Ms. Laiwa’s] unauthorized use as a trespass,” and is therefore “not required to evict her from the property.” *Id.* at 6 (quoting Decision at 4). Appellant also challenges the Regional Director’s legal authority to remand this matter back to the Superintendent and to vacate the Superintendent’s notice to Laiwa to cease her unauthorized possession of the property and directing the Superintendent to

take no further action to evict Ms. Laiwa. *Id.* Appellant recognizes in both of the latter allegations that the Regional Director may have the authority to remand the matter and to vacate the decision of her subordinate, but challenges whether such discretionary actions were warranted under the circumstances. *Id.*

Appellant disputes a number of the factual findings advanced by the Regional Director to support her decision. *Id.* at 7. These factual findings will be addressed, where relevant, in our decision. Finally, Appellant does not expressly appeal matters related to the appraisal of fair rental value or the calculation of damages, *see id.* at 6-7, but addresses both matters at substantial length in her briefs. Because Appellant's appeal to the Regional Director was made pursuant to 25 C.F.R. § 2.8 and alleged official inaction in acting upon Laiwa's appeal of the Superintendent's Notice, and Laiwa, in her appeal to the Regional Director, did not challenge the appraisal methodology or calculation of damages, neither matter was properly before the Regional Director, nor was either matter addressed in the Regional Director's Decision. For that reason, they are also outside the scope of the Board's review on this appeal. 43 C.F.R. § 4.318; *see Wallowing Bull-C'Hair v. Rocky Mountain Regional Director*, 49 IBIA 120, 124 (2009) ("Unless manifest error or injustice is evident, the Board is limited in its review to those issues raised before the Regional Director and does not consider arguments raised for the first time on appeal to the Board.").

Ms. Laiwa chose to file an answer brief defending her right to remain on the allotment, without being subject to eviction, and without paying trespass damages or, apparently, any rent for her possession of RV-445. Answer Br. at 2. Laiwa argues that the Regional Director correctly found that she was not a trespasser and should not be evicted from the allotment. *Id.* Laiwa also agrees with that part of the Decision wherein the Regional Director concludes that the Superintendent did not carry out prior instructions to resolve the lease consent problem and directs the Superintendent on remand to conduct an evaluation of the current circumstances and engage in meaningful contact with RV-445 landowners and the RVHA. *Id.* Finally, Laiwa contends that, under the circumstances of this case, any assessment of rent or damages against her would constitute a manifest injustice. *Id.*

We vacate the decision of the Regional Director because, under the circumstances, it was an abuse of discretion for the Regional Director to vacate the issuance of the Superintendent's Notice requiring Ms. Laiwa to end her unauthorized use and possession of RV-445 without the consent of the landowners. The combined record from the appeal of the Regional Director's 2004 Decision and the appeal now under review demonstrates without question that Laiwa failed to obtain the necessary percentage of landowner consent to allow BIA to approve a lease, despite the more than ample time allowed by BIA to do so. Because the owners of more than 40% of the undivided interests of the allotment remained

opposed to the lease from 2003 to the date of the Superintendent's 2009 Notice, and the consent of at least 60% of the allotment interests was required for lease approval, it was unreasonable for the Regional Director to vacate the issuance of the Superintendent's Notice for the reasons provided.

The Regional Director also erred by stating that, on remand, the consent of only a simple majority of the interests would be sufficient for BIA to approve a lease because the number of owners had increased with time. As established by statute, the consent requirement is determined by the number of interest owners at the time a lease application is submitted to BIA, which in this case was 2005. The number of landowners and interests owned at the time of the Regional Director's review was not the proper standard to use when deciding whether to uphold or vacate the Superintendent's Notice.

Finally, many of the reasons advanced by the Regional Director for vacating the Superintendent's Notice are not legally sound, are contradicted in the record, and improperly impose criteria that heighten the bar for landowners opposed to a co-owner's intended use of their jointly-held property.

I. It was an Abuse of Discretion to Vacate the Superintendent's Notice to Laiwa to Cease the Unauthorized Use of the Allotment and Remove Personal Property

While BIA erred in issuing a lease to Laiwa in July 2003 without sufficient landowner consent, BIA recognized the error and vacated the decision to issue the lease in October 2004. Decision at 2. Laiwa did not appeal that decision. *See* July 27, 2005 Order. Following *vacatur* of that lease, Laiwa was put on notice that the applicable regulations required that she obtain the consent of at least 60% of the ownership interests in RV-445 before BIA could issue a valid residential lease.<sup>12</sup> Letter from Superintendent to Laiwa, Nov. 23, 2005 (AR Tab 32).

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<sup>12</sup> Laiwa was also informed when she first applied for a residential lease in 2002 that she was responsible for obtaining the written consent of allotment owners and that she would be required to pay a lease fee based on fair market rental unless co-owners waived compensation or negotiated a different payment. *See* Letter from Superintendent to Laiwa, Jan. 25, 2002 (2004 AR Tab 1); *see id.* "Procedures for Securing Bureau Lease Pursuant to 25 CFR 162" (attachment); *see also* Letter from Superintendent to Laiwa, Dec. 18, 2002, at 1 (unnumbered) (2004 AR Tab 4) (advising Laiwa that she needed to obtain the consent of other landowners besides her family; providing title information report and instructions on completing consent forms; and furnishing a draft lease "to show to all the landowners ahead of time what portion of the land you are leasing, what you are leasing it for and for how long and how much you plan to pay, if you will").

Laiwa subsequently submitted a second lease application, *see* Request to Lease, Oct. 24, 2005 (AR Tab 31), and BIA informed her that “your lease application has been accepted as though it is the first time you are applying for a lease,” Letter from Superintendent to Laiwa, Jan. 13, 2006 (AR Tab 30). BIA requested an appraisal of the rental value of the 1-acre lot, land only, on Feb. 14, 2006. AR Tab 28. In April 2006, BIA mailed to all RV-445 landowners a draft lease proposed by Laiwa that was for a 2-year term with an option to renew for a 25-year term. Letter from Superintendent to Landowners at 1 (unnumbered) (AR Tab 26). The initial two-year term was explained as allowing for open probate matters to be adjudicated. *Id.* In the letter, the Superintendent noted that there were at that time 16 landowners<sup>13</sup> listed on the Title Status Report (TSR) for RV-445 and that the minimum consent requirement for the lease was 60% of all undivided interests. *Id.* Although a full report on the outcome of BIA’s effort to obtain landowner consent for the lease terms proposed by Laiwa was not provided, the record shows that at least three landowners, collectively controlling over 42% of all undivided interests, expressly stated they did not consent to the lease and did not waive compensation. *See* Consent Forms (AR Tabs 25, 26).

From the record, it appears that at no time has Laiwa controlled the consent of more than 12.4% (which includes her 5% interest) of the undivided interests of RV-445 for her use of the land for a home site.<sup>14</sup> In contrast, Appellant and one other co-owner who together own more than 41.6% of the undivided interests in the allotment, have been on record since June 2003 as opposing lease terms proposed by Laiwa. Their opposition to the second lease proposal was confirmed in writing in 2006. Other co-owners also expressed their opposition, in writing, to any residential use of the allotment prior to BIA’s issuance of the lease in 2003. The Tribe and the RHVA were also fully aware of the need for Ms. Laiwa to negotiate a new lease and of the applicable consent requirement. *See* Letter from Superintendent to Barney, President Round Valley Indian Tribes, Oct. 21,

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<sup>13</sup> The TSR provided in the same tab of the Administrative Record indicates that three interest owners were deceased and, presumably, their estates were among those to be adjudicated.

<sup>14</sup> The Regional Director stated that she found no support in the record for Appellant’s argument that “approximately 75% of the owners do not approve of Ms. Laiwa’s continued occupation.” Decision at 3. The source of the information appears to be an attachment to the Regional Director’s 2004 Decision. *See* Round Valley Allotment No. 445, Ownership/Consent List (2004 Consent List) (AR Tab 38); *see also* Opening Br. at 26 n.27. The list provides that approximately 12.4% of “interests owned” were held by “Consenting Landlords” while 74.8% of the interests owned were held by “NonConsenting Landlords.” 2004 Consent List. The remaining roughly 13% of ownership interests were held by “Deceased Landowners.” *Id.*

2005 (AR Tab 34) (RHVA on letter distribution list); Letter from Superintendent to Laiwa, Jan. 13, 2006 (AR Tab 30) (showing that the President of the Round Valley Indian Tribes was copied on the letter).

It is unclear what additional efforts the Regional Director expected of the Superintendent, or why she thought a different outcome could be accomplished through “meaningful contact with the landowners and the [RHVA],” as directed in the Decision. Decision at 5. Moreover, once again remanding the matter compounds what appears to be the inappropriate shifting of the burden for obtaining landowner consent from the lease applicant to BIA. That responsibility remains with the lease applicant, with BIA bearing the responsibility for ensuring that the required landowner consent has been obtained. *See Moses v. Acting Portland Regional Director*, 24 IBIA 233, 240 (1993) (“BIA is not required, however, to negotiate a lease . . . merely because some co-owners desire such a lease. Any such negotiations are the responsibility of those co-owners.”). Under these circumstances, where the minimum consent requirement was 60% of the undivided ownership interests and landowners controlling over 40% of the total undivided interests remained adamant in their opposition to the lease, the Superintendent correctly determined that no lease would be forthcoming and Ms. Laiwa’s unauthorized possession should end. The Regional Director’s decision to vacate the Superintendent’s Notice was therefore unreasonable and not supported by the record.

## II. Removal of a Co-owner in Unauthorized Possession of Allotted Land is Not Mandatory but May Be an Appropriate Remedy Under the Circumstances

The Department of the Interior has long acknowledged the need to balance the interests of all co-owners of trust or restricted land, and the difficulty of doing so.<sup>15</sup> While the Department’s regulations allow a co-owner to use all or part of the allotment with the permission of the other co-owners, and to do so without payment if expressly waived, absent permission of all co-owners, a lease is required to ensure sufficient co-owner consent has been obtained. In the regulatory revisions approved in 2012, the Department again

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<sup>15</sup> *See, e.g.*, Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 65 Fed. Reg. 43874, 43881 (proposed July 14, 2000) (noting that “[t]he BIA recognizes the unique burdens placed on potential users of fractionated land” and requesting comment on the proposal that the owner of a fractionated interest of less than 100% must obtain a lease from all co-owners prior to taking possession); 66 Fed. Reg. 7079, 7081 (Jan. 22, 2001) (explaining that the proposal to require a lease from other co-owners prior to taking possession by a fractional co-owner (i.e. “owner’s use”) was retained because, “[t]his provision is necessary to ensure protection for, and to foster cooperation and negotiation among, all Indian co-owners”).

rejected “owner’s use” proposals that would allow use by a fractional co-owner without consent, explaining that it was required to do so “because one co-owner does not have the right to exclude the others without their consent.” 77 Fed. Reg. 72440, 72444 (Dec. 5, 2012) (to be codified at 25 C.F.R. Part 162). Where permission has not been unanimously accorded, the Board has emphasized that BIA’s duty flows to all co-owners. *See Moses*, 24 IBIA at 238 (“In leasing individually owned trust or restricted property, BIA’s responsibility is to all the co-owners, not to a group of them.”).

The Regional Director held that because Laiwa is a landowner, “BIA is *not* required to treat her unauthorized use as a trespass, thus we are not required to evict her from the property.” Decision at 4. Ms. Laiwa also contends that BIA has no duty to treat her as a trespasser because she is a landowner and, moreover, because she entered the property under a BIA-approved lease. Laiwa’s Answer Br. at 4-7. Laiwa argues that Appellant has failed to carry her burden to demonstrate that BIA has a duty to evict her from the property. *Id.* at 7-9. Instead, Laiwa maintains that the regulations and the Board’s 2006 *Goodwin* decision recognize that BIA has discretion over whether to evict a landowner in possession of property without a lease. *Id.*

The Regional Director and Laiwa both read the Board’s decision in the prior appeal too broadly. First, our review was limited to the narrow question of whether the Regional Director erred by not directing the Superintendent to order Ms. Laiwa to vacate the allotment “while the Superintendent was reconsidering the matter.” *Goodwin*, 44 IBIA at 27. We did not conclude, as the Regional Director and Laiwa would have it, that Ms. Laiwa’s status as a co-owner of the allotment allows BIA to disregard her continued unauthorized use and possession of the allotment or that BIA is not required, under the appropriate circumstances, to evict her from the property. Instead, we expressly found that, “under the circumstances of this case” the regulations “did not *require* . . . the *immediate* eviction of Laiwa . . .” *Id.* at 30 (emphases added). Rather, we acknowledged that because the regulations make special provision for co-owners, the Regional Director “retained *some* discretion as to whether to treat Laiwa’s unauthorized use as a trespass requiring immediate action to recover possession.” *Id.* (emphasis added). The exercise of discretion could as readily lead to eviction, when warranted, which we clearly signaled in finding that “[t]he Regional Director reasonably concluded that the Superintendent would be in the best position to decide . . . whether to exercise immediate trespass remedies against Laiwa.” *Id.*; *see also Goodwin*, No. 05-27-A, (Aug. 18, 2006) (Order for Status Report) (AR Tab 23) (ordering status report to determine whether a live controversy existed and noting that “if Ms. Laiwa has not been able to obtain the necessary owner consent for a new lease, and BIA has initiated trespass proceedings, . . . this appeal may be moot”).

The Regional Director directed the Superintendent to “take no further actions to evict . . . Laiwa . . . based simply on the unfounded request of [Appellant].” Decision at 5.

Other than for the obvious reason that no action should be taken based simply on an unfounded request, it is unclear why the Regional Director finds that the two bases for eviction consistently advanced by Appellant—lack of co-owner consent and lack of payment of fair annual rental or any other compensation for Laiwa’s use of the land—are insufficient as a basis for removal, or eviction, of an unauthorized co-owner in possession, or are somehow unfounded. Both are amply supported by the Administrative Record. Although Ms. Laiwa took possession upon issuance of what she may have believed at the time was a valid lease, the decision to issue the lease was vacated due to the failure to obtain the required minimum consent. The Superintendent lacked the authority to issue the 2003 lease, and this *ultra vires* action neither bound BIA to perpetuate its error nor granted rights to Ms. Laiwa that were not authorized by law. See *Stovall v. Billings Area Director*, 31 IBIA 41, 42 (1997), and cases cited therein. Absent an approved lease, Ms. Laiwa is not entitled to continue to reside on the allotment. See *DeNobrega v. Acting Northwest Regional Director*, 40 IBIA 233, 233 (2005) (affirming Regional Director’s decision that issuance of lease without required consents was not valid). While Ms. Laiwa subsequently reapplied for a lease, the Superintendent could not approve it due to the lack of consent of 60% or more of the ownership interests. Notice at 1. An unapproved lease confers no rights, see *Brooks v. Muskogee Area Director*, 25 IBIA 31, 35 (1993), and Ms. Laiwa has known that she must obtain consent of at least 60% of the undivided ownership interests in RV-445 since at least 2004 when she was informed of the Regional Director’s decision vacating issuance of the 2003 lease for insufficient consent.

Because BIA owes a duty to act in the best interest of all co-owners, we do not adopt, or find necessary for our decision, Appellant’s argument that 25 C.F.R. § 162.108 creates “an independent obligation to remove unauthorized occupants” regardless of their status as co-owners and would “require the BIA to immediately evict Ms. Laiwa.” See Opening Br. at 21. However, we are also not convinced by the Regional Director’s explanation that no eviction actions should be taken because Appellant has not demonstrated a “significant loss of rental income” or been deprived of access to or use of the remaining acreage of the allotment. See Decision at 5. We can find no support in law for the contention that a co-owner’s loss of rental income must be “significant” before it is actionable, or for the proposition that one (or any number of co-owners) may take possession or make whatever use he wishes of land held jointly, without the consent of other co-owners, as long as he leaves some degree of access to some other part of the property. We agree with Appellant that the reasons advanced by the Regional Director for allowing continued unauthorized possession have no legal significance. See Opening Br. at 24. The Regional Director failed to articulate a reasonable basis for proscribing eviction under the circumstances. Allowing Ms. Laiwa to continue her unauthorized use of the allotment, which was approaching 9 years at the time of the Decision, would “swallow the rule” that landowners owning less than 100% of the property must secure a lease before taking possession. *Id.* at 19.

### III. The Regional Director Erred in Directing the Superintendent to Consider Leasing with a Reduced Consent Requirement Based on 2012 Ownership Records

At least in part, the Regional Director supported the decision to vacate the Superintendent's Notice on the increase in the number of landowners of RV-445 following the Superintendent's 2009 decision. Decision at 5 ("Based on the present fact that the number of owners has increased, . . . if there are 20 or more owners, the Superintendent could approve a lease by obtaining a simple majority of the interests."). This reasoning is contrary to law. As established by statute, the mandatory consent required for lease approval is determined by BIA records identifying the landowners, their respective interest ownership, and the number of interest owners, at the time a lease is submitted to BIA for approval, which in this case was 2005. 25 U.S.C. § 2218(b)(2). At that time, the total number of landowners identified in BIA records for RV-445 was 19—the same as when Laiwa first applied for a lease—which required the consent of landowners controlling at least 60% of the interests in the allotment. The Regional Director's argument suggests that BIA can adopt a "rolling" consent requirement whereby unauthorized possession of trust or restricted Indian land will be tolerated until that time that, through fractionation or the death of non-consenting landowners, the consent requirement is, finally, met. This is contrary to the plain language of 25 U.S.C. § 2218(b)(2). Moreover, such a practice would undermine the certainty accorded to lessor and lessee alike that the consent requirement for a lease application will not change during the pendency of BIA's (or the Board's) deliberation.

### IV. The Regional Director was Not Required to Address Appellant's Arguments Regarding the Appraisal and Basis for Determining Fair Market Rent on Appeal

The Regional Director found that "the Superintendent is obligated to see that [] Laiwa must pay fair market rents to all of the landowners unless any owner submits a written waiver of payment." Decision at 5-6. Appellant argues that the Decision fails to address properly the total rent owed for Laiwa's trespass on the property because it does not adequately account for the duration of Laiwa's occupation. Opening Br. at 27-28. Appellant states that the Decision "breaches [BIA's] legal duty [to collect rent] by failing to provide any meaningful direction or timelines to the Superintendent regarding rents due the landowners." *Id.* at 28. Moreover, Appellant makes numerous objections to the use of the 2006 appraisal as a means for calculating fair market rent. *See* Opening Br. at 29-35. Laiwa, in turn, argues that any assessment of rent or damages against her would constitute

a manifest injustice due to her reliance on BIA's approval of the 2003 lease in moving onto the property and building her home.<sup>16</sup> Laiwa's Answer Br. at 9-10.

Without deciding the appraisal and rental calculation issues raised by Appellant, the Board acknowledges that landowners are entitled to receive fair market rent for the use of their property unless they negotiate a lower rate. 25 C.F.R. § 162.107(a). In the context of this appeal, however, we find that it was permissible for the Regional Director to direct the Superintendent to address the calculation of fair market rent in the first instance. Until BIA determines the scope and calculation of the rent owed, the merits of the parties' arguments are not ripe for review by this Board on appeal. *See Goodwin*, 44 IBIA at 29 n.9 (noting that because the Superintendent's appraisal was not a matter before the Regional Director, it was not ripe for our review); *see also Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 237 (2008). At this time, there is nothing in the record for the Board to consider other than the review of the appraisal report, which simply provides, without elaboration or any documentation, the appraiser's opinion of the market value of the property and the monthly rental value of the property. *See Review of Appraisal Report*, May 31, 2006 (AR Tab 24). Moreover, neither Laiwa's appeal of the Superintendent's Notice nor Appellant's § 2.8 appeals from official inaction squarely raised the appraisal and rent calculation issues before the Regional Director. For that reason, they are also not now before the Board.<sup>17</sup>

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<sup>16</sup> Appellant argues that Ms. Laiwa's response challenging that part of the Regional Director's Decision requiring the payment of fair rental value to all co-owners unless waived, is not properly before the Board because the Regional Director's determination that some rent is owed was not appealed. Reply Br. at 10. We agree that Ms. Laiwa cannot now raise issues on appeal before the Board that were not before the Regional Director. 43 C.F.R. § 4.318. While Laiwa argued in her appeal to the Regional Director that she could not be evicted because she is a co-owner and because she relied on BIA's action in issuing a lease in 2003, she did not argue that she should not be required to pay rent or that the appraised fair market rental value was in error. *See Statement of Reasons*, May 22, 2009 (AR Tab 11). Similarly, Appellant's § 2.8 appeal of official inaction did not raise these matters to the Regional Director by virtue of being part of an appeal of inaction; rather, the appeal of inaction prompted, and was resolved by, the Regional Director's decision.

<sup>17</sup> We observe, however, that to the extent Appellant believes that Ms. Laiwa should be charged rent for the use of her home in addition to the rental of the land, the record does not support such a finding. As we noted in *Smartlowit*, "a house located on trust land cannot simply be presumed to be trust property . . . ." 50 IBIA at 108. Ultimately, there must be clear evidence that the house is held in trust by the United States on behalf of an

(continued...)

## Conclusion

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 vacates the decision of the Regional Director, which has the effect of reinstating the Superintendent's 2009 Cease and Desist Notice.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

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(...continued)

individual Indian or the RV-445 landowners in order for BIA to exercise jurisdiction to assess and collect rent for its use separate from the trust land.