



## INTERIOR BOARD OF INDIAN APPEALS

Glenda Deborah (Hamilton) Lopez, Thomas A. Hamilton, Mary Rose Hamilton, and  
Delmar G. Hamilton v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

61 IBIA 136 (07/29/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
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ARLINGTON, VA 22203

GLEND A DEBORAH (HAMILTON)	)	Order Reversing Decision
LOPEZ, THOMAS A. HAMILTON,	)	
MARY ROSE HAMILTON, AND	)	
DELMAR G. HAMILTON,	)	
Appellants,	)	
	)	Docket No. IBIA 13-030
v.	)	
	)	
ACTING SOUTHERN PLAINS	)	
REGIONAL DIRECTOR, BUREAU	)	
OF INDIAN AFFAIRS,	)	
Appellee.	)	July 29, 2015

Glenda Deborah (Hamilton) Lopez, Thomas A. Hamilton, Mary Rose Hamilton, and Delmar G. Hamilton, who are siblings (Appellants), appealed to the Board of Indian Appeals (Board) from an October 1, 2012, decision (Decision) of the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director upheld a decision and action by BIA’s Anadarko Agency Superintendent (Superintendent) to restrict Appellants’ respective Individual Indian Money (IIM) accounts<sup>1</sup> to satisfy a purported debt to the Government.

The Regional Director’s decision to uphold the restrictions on Appellants’ IIM accounts is related to earlier decisions and actions by BIA to cancel, as void, a 5-year agricultural lease of three tracts, Kiowa 1717-B/C/D (Lily Maunkee), and to refund the lessee, from BIA funds, a pro-rata share of the first-year’s rent.<sup>2</sup> The lease was approved by the Superintendent days before the close of probate for the estate of Appellants’ father, Glen (Maunkee) Hamilton (Glen), who owned interests in the tracts. Once Appellants were

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<sup>1</sup> An IIM account is an interest-bearing account that is managed by the Department of the Interior (Department) on behalf of a person who has money or other assets held for them in trust by the Federal government.

<sup>2</sup> We discuss the lease, and its cancellation, which was not appealed, only as relevant to the specific decision on appeal to restrict Appellants’ IIM accounts.

determined to be the heirs of Glen's interests in the tracts, Appellants appealed the lease approval. Several months later, the Regional Director vacated the Superintendent's approval of the lease for the remainder of its term on the grounds that BIA lacked authority to approve the lease for a term of more than 2 years because all of the trust or restricted ownership interests in Kiowa 1717-C were owned by Glen, and were still in probate at the time of lease approval. *See* 25 C.F.R. § 162.229(c) (maximum term for lease of land wholly owned by a decedent whose heirs are not yet determined). On November 10, 2011, the Superintendent decided to restrict Appellants' respective IIM accounts through an encumbrance of approximately \$81 per account, for the purpose of recouping Appellants' shares of the amount to be refunded to the lessee.<sup>3</sup> On November 25, 2011, BIA refunded the lessee. Appellants invoked their appeal rights, and, after a hearing, a final written decision by the Superintendent, and the Regional Director's decision upholding the restriction, Appellants appealed to the Board.

We reverse the Regional Director's decision. We need not reach the question of whether BIA had authority to restrict Appellants' accounts. Assuming, without deciding, that BIA's action to refund the lessee from its own funds resulted in Appellants owing a debt to the Government as the Regional Director concluded, BIA was not required to collect from Appellants on the debt, and it was an abuse of discretion for BIA to restrict Appellants' accounts under the circumstances of this case.

### **Background**

As we explained, the challenged Decision to restrict Appellants' respective IIM accounts stems from the Regional Director's termination of an agricultural lease on Kiowa 1717-B/C/D. *See* Letter from Regional Director to Lopez, June 28, 2011, at 1 (Administrative Record (AR) Tab 8). In August 2010, during the probate of Glen's estate, BIA advertised the three tracts for lease as a combined unit. On December 7, 2010, the Superintendent approved the lease to the sole bidder, Ryan Jennings, in the amount of \$1,400 per year for a 5-year period. Lease No. 53381 (Lease) (AR Tab 3). The lease commenced according to its terms on January 1, 2011,<sup>4</sup> and was to expire on December 31, 2015. *Id.* at 1. At the time the lease was awarded to Jennings, the tracts were apparently

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<sup>3</sup> The other two tracts were owned in part by Maxell DeNomic/deNomic/Denomic (Max). Max did not appeal to the Regional Director from the Superintendent's decision to recoup Max's share of the amount refunded to the lessee, and did not join Appellants in this appeal. It is unclear whether Max's account is currently restricted.

<sup>4</sup> An agricultural lease may be made effective on a future date by agreement, 25 C.F.R. § 162.215, and BIA's approval is effective immediately notwithstanding any appeal that may be filed under 25 C.F.R. Part 2, *id.* § 162.216.

being farmed by one Ronnie Woodard, for \$2,400 per year, under an October 2009 lease agreement with Max and Appellants, who then claimed to be the “legal heirs” to the tracts. Lease Agreement, Oct. 16, 2009 (Statement of Reasons, Mar. 26, 2012, Exhibit (Ex.)) (AR Tab 28).<sup>5</sup> Woodard was aware that BIA was holding a lease auction but did not submit any bid to BIA, and Appellants’ lease to Woodard was never approved by BIA.<sup>6</sup> Memorandum from Komardley to Deputy Superintendent, Jan. 5, 2011 (AR Tab 5).

Meanwhile, in the probate of Glen’s trust or restricted property, on November 18, 2010, an Indian Probate Judge issued an Order Determining Heirs and Decree of Distribution (Order Determining Heirs). Order Determining Heirs, Probate No. P000079384IP, Nov. 18, 2010, at 1-2 (copy added to appeal record). A Notice attached to the Order Determining Heirs instructed that the order would not become final for the Department until 30 days from the date of its issuance, i.e., December 18, 2010, to allow for the filing of any petitions for rehearing, and advised that no distribution of estate property was permitted until at least 45 days after issuance of the Order Determining Heirs. Thus, when BIA approved the lease to Jennings on December 7, 2010, Glen’s heirs had not been determined. *See Emm*, 50 IBIA at 317 n.15; *Gooday v. Southern Plains Regional Director*, 38 IBIA 166, 170 (2002). And, in general, BIA has authority to approve a lease on behalf of undetermined heirs and devisees of deceased Indian owners. 25 C.F.R. § 162.209(a)(3).

Jennings paid the first year’s rent to BIA, and on December 14, 2010, BIA deposited the funds into Max’s IIM account and the estate IIM account of Glen. Decision at 4;<sup>7</sup> *see also* Schedule of Payments and Lessors Share at 1-4 (AR Tab 3). On December 20, 2010, after the Order Determining Heirs became final for the Department, Appellants and Max appealed to the Regional Director from the Superintendent’s decision to approve the lease to Jennings. First Notice of Appeal to Regional Director, Dec. 20, 2010 (AR Tab 4).

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<sup>5</sup> Max had apparently inherited interests in Kiowa 1717-B and 1717-D from a relative who predeceased Glen. *See* Lease Agreement, Oct. 16, 2009.

<sup>6</sup> Because, as detailed *infra*, Woodard lacked a valid lease, we do not consider Appellants’ argument against the restriction that, as a result of the Superintendent’s approval of the lease to Jennings instead of Woodard, BIA deprived Appellants of \$1,000 per annum in lease rent. Moreover, to the extent that Appellants may be seeking compensation from BIA, the Board lacks authority to award damages. *Emm v. Western Regional Director*, 50 IBIA 311, 320 n.19 (2009).

<sup>7</sup> The Decision incorrectly states that the rent was deposited into the IIM accounts on December 14, 2011.

Appellants and Max argued that they had a more lucrative lease with Woodard,<sup>8</sup> that the lease to Jennings should be cancelled before its commencement, and that Jennings should be fully refunded. *Id.* Having received no written response from BIA, Appellants and Max submitted a second notice of appeal on January 6, 2011, reiterating these arguments. Second Notice of Appeal to Regional Director, Jan. 6, 2011 (AR Tab 6). Instead, according to BIA, Glen's estate IIM account was closed on January 13, 2011, and the annual rent from Kiowa 1717-B/C/D in the estate account was distributed to Appellants as his heirs. Decision at 4.

On June 28, 2011, approximately 6 months after the commencement of the lease to Jennings, the Regional Director "vacat[ed]" the Superintendent's decision to approve the lease. Lease Cancellation Decision at 1. The Regional Director found that the lease was "for the most part . . . in accordance with the current regulatory process," but concluded that BIA "lacked the necessary authority to approve the lease for a five [ ] year term because one of the tracts leased . . . was in 100% estate status." *Id.* at 3. The Regional Director quoted the pertinent regulation, which provides that "[w]here all of the trust or restricted interests in a tract are owned by a deceased Indian whose heirs and devisees have not yet been determined, the maximum [lease] term may not exceed two years." *Id.* at 2 (quoting 25 C.F.R. § 162.229(c)). The Regional Director noted that both a BIA Realty Specialist and a BIA Lease Compliance Officer recommended that the lease be modified and its term reduced to 2 years. *Id.* Instead, the Regional Director cancelled the lease entirely, and remanded the matter to the Superintendent "to complete the cancellation process." *Id.* at 3.

BIA's Anadarko Agency instructed Jennings to vacate the premises, which he did on or before August 30, 2011, and Jennings in turn demanded a refund for the remaining 4 months of the annual rental.<sup>9</sup> At this point, the Superintendent advised the landowners that they "would be responsible for the reimbursement of funds."<sup>10</sup> Letter from Superintendent to Landowners, Sept. 22, 2011 (AR Tab 12). The landowners objected, arguing that one or more of the Appellants had tried to return U.S. Treasury checks that

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<sup>8</sup> Appellants and Max enclosed a new lease with Woodard, dated December 19, 2010, for \$2,400 per year, in which Appellants referred to themselves as the "legal heirs and new land owners." Lease Agreement, Dec. 19, 2010 (AR Tab 4, Ex.).

<sup>9</sup> Memorandum from Beckwith to Superintendent, Sept. 30, 2011 (AR Tab 16); Letter from Jennings to Regional Director, Sept. 16, 2011 (AR Tab 11); Email from Beckwith to Aitkens, Aug. 30, 2011, 10:16 am (AR Tab 10).

<sup>10</sup> Contrary to the Regional Director's decision to cancel the lease entirely, the Superintendent alternatively recommended to the landowners that they allow the lease to continue until the end of the first year, to avoid any refund to the lessee. AR Tab 12.

they received from BIA, through the distribution of Glen's estate, containing the lease money, but were instructed by the Anadarko Agency to cash the checks. Letter from Landowners to Superintendent, Sept. 26, 2011, at 1-2 (unnumbered) (AR Tab 13).

On November 10, 2011, the Superintendent notified the landowners that Jennings would receive a rental refund for the last 4 months of 2011. Letter from Superintendent to Lopez, Nov. 10, 2011, at 1 (unnumbered) (AR Tab 18). The Superintendent requested that Appellants each remit \$81.12 to BIA, and explained that their IIM accounts would be restricted 5 days after the notice was mailed, until the "debt" was satisfied. *Id.* The letter advised the landowners that they had a right to a post-deprivation hearing on the matter pursuant to 25 C.F.R. § 115.600 *et seq.*<sup>11</sup> *Id.* at 1-2 (unnumbered). Appellants requested a hearing. *See* Returned Forms (AR Tab 20).<sup>12</sup> In the meantime, on November 25, 2011, BIA reimbursed Jennings \$466.64 from BIA funds. Transaction Log, Dec. 13, 2011 (AR Tab 22).

The hearing was held at the Anadarko Agency on January 10, 2012. Although the Superintendent had advised Appellants that the hearing would be recorded, the hearing was not recorded, and there is no transcript of the hearing. *See* Letter from Superintendent to Lopez, Dec. 28, 2011 (AR Tab 21); *see also* 25 C.F.R. §§ 115.613-.614 (recording requirements). The only record of the hearing is a memorandum to the Superintendent from the BIA Lease Compliance Officer who conducted the hearing. *See* Hearing Memorandum, Jan. 11, 2012 (AR Tab 23). The memo recounts that Appellants<sup>13</sup> expressed frustration with what they viewed as BIA favoritism toward the lessee. *Id.* at 1-2 (unnumbered). According to the memo, the compliance officer responded that BIA had a "responsibility to enforce the contract on both sides; in this case it would be rental repayment" by the landowners. *Id.* at 2 (unnumbered).

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<sup>11</sup> The hearing is referred to as a "post-deprivation" hearing because it is held after the restriction is imposed. Based on the arguments and evidence presented at the hearing, the restriction may be removed or retained in BIA's final written decision. *See* 25 C.F.R. § 115.616(a).

<sup>12</sup> Max was instructed to pay \$142.16 based on his ownership interest in the tracts, and he returned a form indicating that he elected to pay and declined a hearing. AR Tab 20.

<sup>13</sup> The hearing was apparently attended by Mary Hamilton, Glenda Hamilton, and Max. Hearing Memorandum at 1 (unnumbered). It is unclear why Max attended.

The compliance officer also noted that Appellants submitted a written statement.<sup>14</sup> *Id.* In their statement, Appellants argued, *inter alia*, that the lease was invalid from its start. Statement of Landowners at 2 (unnumbered). Appellants also repeated that they “did not cash the Jennings lease checks and took them back to the Agency to return them. We were told to hold on to them. After the [lease cancellation] was final, we were told to go ahead and cash them . . . as [Jennings] had been on the land for 6 months.” *Id.*

The compliance officer recommended that the Superintendent proceed to collect the funds from Appellants, and the memo is marked “concur” by the Superintendent. Hearing Memorandum at 2 (unnumbered).

On January 20, 2012, the Superintendent affirmed the restriction on Appellants’ IIM accounts. Superintendent’s Post-Hearing Decision, Jan. 20, 2012, at 1 (unnumbered) (AR Tab 24). The Superintendent remarked, without further discussion, that during the hearing one or more of the Appellants complained about financial hardship,<sup>15</sup> and that Appellants “felt it was the fault of the Anadarko Agency for not collecting the U.S. Treasury checks issued beforehand.” *Id.* As grounds for the decision, the Superintendent explained that Appellants had received annual rent, the lease was cancelled, and under 25 C.F.R. § 115.601(b)(4), BIA may restrict an IIM account through an encumbrance if BIA caused an “administrative error” that resulted in a deposit into the account. *Id.*

Appellants appealed to the Regional Director. Notice of Appeal to Regional Director, Feb. 17, 2012 (AR Tab 25). Appellants objected that the Superintendent’s initial decision was that they owed a “debt,” whereas his final decision was that BIA had caused an “administrative error.” Statement of Reasons, Mar. 26, 2012, at 5, 7 (AR Tab 28). Appellants argued that this was not a case of administrative error under § 115.601(b)(4); that there was no “proof of debts owed to the United States pursuant to § 115.104,” as required by § 115.601(b)(5); and that in *Miller v. Anadarko Area Director*, 26 IBIA 97 (1994), the Board questioned whether BIA would have authority to restrict an IIM account for the benefit of an outside party such as Jennings. *Id.* at 5-6. Appellants also argued that, even if BIA had authority to restrict their accounts, it was an abuse of discretion for BIA to

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<sup>14</sup> Although the compliance officer’s memo refers to the written statement as an attachment, it is not included with the memo in the administrative record. The written statement is attached to Appellants’ March 26, 2012, Statement of Reasons to the Regional Director, as Exhibit H (Statement of Landowners, Jan. 10, 2012) (AR Tab 28). We remind BIA that it is important to submit a complete and properly organized administrative record, in which attachments are kept together with the primary document to which they were attached.

<sup>15</sup> The Superintendent’s decision was separately addressed to Mary, Glenda, and Max, and each decision states that “you” claimed that the repayment would cause “you” hardship.

do so. *Id.* at 4-6. They asserted that BIA was attempting to recover on a claim made by the lessee and caused by BIA, and that “BIA has conducted itself as if it owed a duty to Mr. Jennings and not the Indian landowners.” *Id.* at 5.

In his Decision, the Regional Director affirmed, with modifications, the Superintendent’s decision. Decision, Oct. 1, 2012 (AR Tab 31). The Regional Director found that the restriction on Appellants’ IIM accounts was authorized under 25 C.F.R. § 115.104, which allows IIM funds to be applied against “delinquent claims of indebtedness to the United States or any of its agencies or to the tribe of which the individual is a member”; the debt amounts were slightly miscalculated;<sup>16</sup> and the Anadarko Agency erred in not recording the hearing. *Id.* at 4-6. However, the Regional Director otherwise affirmed the Superintendent’s decision to encumber Appellants’ IIM accounts as a proper exercise of discretion. *Id.* at 5. In doing so, the Regional Director specifically found that “Mary Hamilton stated the IIM hold and repayment of the rental would cause her undue hardship,” but she failed to support her claim. *Id.* at 4.

Appellants appealed to the Board, pro se. Notice of Intent to Appeal, Oct. 29, 2012 (AR Tab 32). Appellants filed an opening brief, in which they argued that BIA breached its trust responsibilities, denied them due process, and failed to provide a sufficient written justification for the encumbrance. Opening Brief, received Feb. 4, 2013, at 1-4 (unnumbered). The Regional Director did not file an answer brief, and he instead “advised” the Solicitor’s Office that BIA “will not request [the Solicitor’s Office] to represent [BIA] in this matter.” Letter from Regional Director to Board, Feb. 19, 2013.

### Discussion

In *Miller*, we declined to decide whether BIA had authority to place a hold on an IIM account for the benefit of an outside entity, in part because the parties to the appeal had not addressed the issue. *Miller*, 26 IBIA at 104. Here as well, BIA has not briefed its authority to impose the restriction—either on behalf of Jennings as may have been the case initially, or on behalf of the Government. And, under the circumstances of this case, we are not inclined to delay these proceedings for further briefing. We conclude that, even if BIA had authority to restrict Appellants’ IIM accounts, it was an abuse of discretion to do so.

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<sup>16</sup> While the Superintendent placed an encumbrance on Appellants’ respective IIM accounts in the amount of \$81.12, the Regional Director determined that each Appellant’s share of the debt was \$81.08. *See* Decision at 4; Regional Director’s Calculations (AR Tab 30). The Regional Director made a corresponding \$0.16 increase in Max’s share, from \$142.16 to \$142.32, and instructed the Superintendent to ensure that the IIM accounts were encumbered for the correct amounts. Decision at 4.

First, whatever authority or duty BIA may have had to refund the lessee from its own funds, was a separate matter and distinct from whether BIA should have restricted Appellant's IIM accounts to reimburse itself. BIA incorrectly believed that, as a matter of its lease enforcement responsibilities, it had equivalent duties to refund the lessee and to collect reimbursement from Appellants. As a result, BIA conflated its initial decision to refund Jennings using BIA funds (which we do not review in this appeal) with the issue of whether to restrict Appellants' accounts, which should have been evaluated in light of BIA's trust responsibilities to Appellants. Second, BIA apparently overlooked its longstanding policy against restricting an IIM account where the funds that provided the basis for the restriction are no longer in the account. Third, the record does not show that BIA adequately considered possible undue financial hardship to Appellants, as required by its regulations. In addition, BIA apparently did not consider other equitable factors that weighed against restricting the accounts. Thus, we conclude that BIA has not justified the restriction on Appellants' IIM accounts, and we reverse the Decision.

## I. Statutory and Regulatory Framework

The Secretary of the Interior (Secretary) has discretion to approve or disapprove payment of a debt or claim from the proceeds of trust property. *Miller*, 26 IBIA at 101-02 (discussing 25 U.S.C. § 410); *see also* 25 C.F.R. § 115.104 (IIM account “[f]unds of individuals *may* be applied . . . against delinquent claims of indebtedness to the United States or any of its agencies . . . .” (emphasis added)). BIA has the delegated authority of the Secretary to restrict an IIM account through an encumbrance, among other circumstances, if it is provided with proof of “debts owed to the United States” pursuant to § 115.104. 25 C.F.R. § 115.601(b)(5). BIA’s discretion “is not unfettered” and is “bound by the trust responsibility of the United States toward the Indians for whom the funds are held.” *Miller*, 26 IBIA at 102. Further, the IIM account holder is entitled to due process, including a post-deprivation hearing. *See id.* (citing *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983)); 25 C.F.R. § 115.600 *et seq.* (Hearing Process for Restricting an IIM Account).

If a hearing is requested, the hearing must be recorded for appellate review. 25 C.F.R. §§ 115.613-.614. After the hearing, BIA must issue a final written decision that includes the conclusion to remove or retain the restriction on the IIM account; a “detailed justification for the . . . encumbrance of the IIM account, where applicable”; and any provision to allow for distributions to the account holder because of an “undue financial hardship created by the encumbrance, if applicable.” *Id.* § 115.616(a)-(b), (d).

## II. BIA Failed to Consider Its Trust Responsibilities to Appellants

BIA justified its initial decision to restrict Appellants' IIM accounts on the grounds that "in any case of lease cancellation it is [BIA's] responsibility to enforce the contract on both sides; in this case it would be rental repayment." Hearing Memorandum at 2 (unnumbered). The contention that BIA is enforcing the lease is not fitting because, now, BIA is seeking to reimburse *itself* from Appellants' IIM account funds. Moreover, to the extent that BIA initially sought reimbursement from Appellants on behalf of Jennings, we have consistently held that BIA has a duty to the Indian landowners to assist them in the enforcement of a lessee's obligations under the lease. *See, e.g., High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 45 (2013). BIA's leasing regulations do not purport to create any duty of BIA to a lessee.<sup>17</sup> *See id.* Thus, to the extent that BIA has ever defended the encumbrance as an instrument to enforce the lease *against the landowners*, BIA was mistaken.

And because BIA explicitly considered its duty in the decision to refund Jennings using Agency funds on par with the separate question of whether to restrict Appellants' IIM accounts, BIA could not have properly considered its trust responsibilities to Appellants in its decision to restrict their accounts. BIA, as Appellants' trustee, failed to give Appellants the additional consideration to which they were legally entitled as holders of IIM account trust funds. *See Miller*, 26 IBIA at 102.

## III. BIA Did Not Consider Its Policy Against Restricting an IIM Account Where the Overpayment Was Withdrawn

Consistent with the Government's role as trustee for individual Indians, we have long held that BIA may waive use of IIM account funds to satisfy claims of indebtedness. *See United States v. Acting Aberdeen Area Director*, 9 IBIA 151, 154-55 (1982). In this case, BIA apparently overlooked its policy against encumbering IIM accounts where the original overpayment to the account was withdrawn before the restriction was imposed.

That was also the situation in *Miller*, where the Board discussed a distinction, drawn by the Department and the Comptroller General, between an attempt to recover an overpayment where the overpayment still existed in the IIM account, which was deemed proper, and an attempt to recover an overpayment from other funds in an IIM account after

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<sup>17</sup> The leasing regulations provide in relevant part that BIA "will . . . assist landowners in the enforcement of payment obligations that run directly to them. . . . [BIA] will [also] ensure that tenants comply with the operating requirements in their . . . leases." 25 C.F.R. § 162.108.

the original overpayment had been withdrawn, which was deemed improper. *Miller*, 26 IBIA at 104 (citing Comptroller General’s Decision B-219235, 65 Comp. Gen. 533 (1986)). The Board explained that the Comptroller General’s decision was based on a BIA policy announced in 1960, which, as the Comptroller General described it, “was that distribution under a legal [but erroneous] probate order should stand, and recoveries of overpayments could only be effected through transfers of funds remaining in IIM accounts from the original distributions.” *Id.* (quoting 65 Comp. Gen. at 538). The Board noted that it had applied the BIA policy by analogy in *Robinson v. Acting Billings Area Director*, a case in which, after a probate distribution order, BIA made an error in its title records and consequently overpaid lease income into the appellant’s IIM account. *See id.* (citing *Robinson*, 20 IBIA 168, 173-75 (1991)). In *Miller* itself, like the present case, the Board considered a BIA decision to restrict an IIM account in the context of a rent reimbursement claim. *Miller*, 26 IBIA at 103. Relevant to the present case, the Board stated that “[i]f a policy similar to the 1960 policy were applied here, . . . recovery from [the] IIM account would not be deemed appropriate because none of the funds now in the account are derived from the overpayment.” *Id.* at 104-05.

As we previously explained, the portion of Jennings’s payment for the first year’s rent due on Glen’s interests in the leased tracts was initially deposited into the estate IIM account. After the close of probate, BIA distributed the rent funds to Appellants by Treasury checks. It is undisputed that Appellants sought to return the checks, but BIA instructed Appellants to cash them. *See* First Notice of Appeal to Regional Director (AR Tab 4); Letter from Landowners to Superintendent at 2 (unnumbered) (AR Tab 13); Statement of Landowners at 2 (unnumbered) (AR Tab 28, Ex. H). BIA subsequently decided to restrict Appellants’ IIM accounts. Although the record does not show the final disposition of the rental money, Appellants’ contention that BIA instructed them to cash the checks suggests that the rental money was not in Appellants’ IIM accounts when BIA encumbered them. It follows that any money currently in Appellants’ IIM accounts would have accrued independent of the cancelled lease. And if a policy similar to the 1960 policy were applied to the facts of this case, Appellants’ IIM account funds would not be subject to repayment of a debt to the lessee or BIA arising out of the lease.

#### IV. The Record Does Not Support That BIA Considered Possible Undue Financial Hardship on Appellants, and Other Equitable Considerations Weigh Against Encumbering Appellants’ IIM Accounts

BIA’s regulations expressly required it to consider “information showing how an encumbrance may create an undue financial hardship.” 25 C.F.R. § 115.609; *see also id.* § 115.616(d). In addition, in the Board’s review of decisions approving or disapproving payment of a debt or claim from trust property, we have also considered other equitable factors. *See Robinson*, 20 IBIA at 174-75 (taking into account violations of the appellant’s

due process rights, the length of time the account has been subject to the hold, and the financial hardships caused by the hold); *Acting Aberdeen Area Director*, 9 IBIA at 156 (affirming decisions to deny use of IIM funds to satisfy judgments where BIA considered the funds available, the basic necessities of the individuals involved, and the interests of the United States in collecting the judgment amounts).

In this case, BIA failed to record the post-deprivation hearing held to consider Appellants' challenge to the restrictions, and thus it is unclear whether the present record, including the Decision, fairly reflects Appellants' testimony regarding undue financial hardship. Although we have held that the existence of a due process violation does not mean that an appellant is entitled, as a matter of law, to retain an overpayment into an IIM account, *Robinson*, 20 IBIA at 171, we have also found that the violation may weigh on the side of the equities against recovering the overpayment, *see id.* at 174-75.

Further, whether or not the purported debt to the Government and/or the restriction has created an undue hardship for Appellants, the amount at stake for the Government is small. The purported debt owed by Appellants to BIA is \$81.08 each, for an aggregate debt of \$324.32. Decision at 4. The record is devoid of any explanation as to why BIA apparently believes the United States has a significant interest in collecting the small amount at stake, and we find no reason to think that it does. In addition, the purported debt to the Government was created by BIA despite efforts by Appellants to avoid it. Although the merits of BIA's decision to cancel the lease are not at issue in this appeal, there is no dispute among the parties to this appeal that BIA could have voided the lease immediately and refunded the lessee in full, as Appellants had requested. Instead, BIA elected to cancel the lease mid-year and refund the lessee from its own funds, resulting in the purported debt.

BIA's mistake in approving the lease for 5 years, and its subsequent choices, led to the creation of the purported debt to the Government. In conjunction with the potential hardship to Appellants and the small amount at stake for the Government, equity supports lifting the restrictions.

For all of the foregoing reasons, we find that BIA may not recover the overpayment by the lessee to Appellants and that BIA must immediately remove the restrictions on Appellant's IIM accounts.

### **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 reverses the Regional Director's

October 1, 2012, decision. The Regional Director shall immediately release the restrictions on Appellants' respective IIM accounts.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Robert E. Hall  
Administrative Judge