INTERIOR BOARD OF INDIAN APPEALS

James Cantrell, Janice Stand Funk, James Gilmore, Tammy Gilmore Springer, and Joanna Stand v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

62 IBIA 70 (12/31/2015)

Related Board case:
62 IBIA 61

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

JAMES CANTRELL, JANICE STAND FUNK, JAMES GILMORE, TAMMY GILMORE SPRINGER, AND JOANNA STAND,	)	Order Affirming Decision in Part, Dismissing Appeal in Part, Vacating Decision in Part, and Remanding
Appellants,	)	
v.	)	Docket No. IBIA 14-048 (Accounting and Protective Measures Appeal)
ACTING EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	December 31, 2015

James Cantrell, Janice Stand Funk, James Gilmore, Tammy Gilmore Springer, and Joanna Stand (Appellants), members of the Quapaw Tribe of Oklahoma, appealed to the Board of Indian Appeals (Board) from a December 27, 2013, decision of the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The decision was issued in response to appeals brought by Appellants from two decisions of BIA's Miami Agency Superintendent (Superintendent), regarding Appellants' demands for "accountings" from BIA (1) of the "restricted Indian ownership" in the surface of property underlying two "chat"[1] piles located in northeastern Oklahoma, including a request for a description of the chain of title from allotment of the land to the present; (2) of the "restricted Indian ownership" in the chat in the two piles (referred to as the Sooner chat pile and the Ottawa chat pile), including a request for confirmation that ownership of chat, as personalty severed from the mineral estate, does not run with the land; and (3) of the quantity and value of chat removed from the piles by Appellants' non-Indian co-owner, the Estate of Joseph E. Mountford (Estate), and the Estate's contractor, Bingham Sand &

[1] "Chat" refers to the gravel-like waste material generated from milling operations to recover lead and zinc from metal-bearing ore in the Tri-State Mining District of Southwest Missouri, Southeast Kansas, and Northeast Oklahoma. *See* 40 C.F.R. § 278.1(b); U.S. Environmental Protection Agency (EPA) Final Rule, 72 Fed. Reg. 39331, 39334 (July 18, 2007) (Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as "Chat").

Gravel, Inc. (Bingham).[2] Appellants also sought "confirmation" from BIA that the Estate and Bingham could not lawfully remove chat that is co-owned by Appellants without BIA's approval, and asked BIA to stop the Estate and Bingham from removing chat from the two piles until they obtained a contract with the Indian owners and approval of the contract by BIA.

The Regional Director provided Appellants with a summary of Appellants' ownership interests in the land on which the Sooner pile is located; stated that the land on which the Ottawa pile is located is not, and has never been, held in restricted fee ownership; and concluded that Appellants had not shown error in BIA's surface ownership figures. The Regional Director also provided Appellants with a summary of Appellants' ownership interests in the chat in the Sooner and Ottawa piles, apparently based on BIA's title records for the present-day ownership of the Indian allotments from which the chat originated, similarly concluding that Appellants had not shown error in BIA's figures.

With respect to the chat already removed by Bingham under contract with the Estate, the Regional Director stated that the Superintendent was presently working with Bingham on issues relating to an "accounting analysis" of the chat sold by Bingham, and he remanded that issue to the Superintendent to continue the work. Letter from Regional Director to Appellants, Dec. 27, 2013, at 6-7 (unnumbered) (Decision) (Administrative Record (AR) 64). Neither the Superintendent nor the Regional Director addressed the merits of Appellants' demand that BIA take action to halt further removal of chat by Bingham, nor did either address the legality of Bingham's removal operations in the absence of BIA approval. Instead, the Regional Director asserted that the Superintendent's decision regarding Appellants' request that BIA evict Bingham is the subject of a separate pending appeal.

Additionally, both the Regional Director and the Superintendent relied, in part, on pending litigation against the United States in the U.S. Court of Federal Claims, for money damages, as justification to refrain from further addressing Appellants' demands because, both concluded, the issues raised by Appellants' demands were subsumed by issues raised in the claims court actions. Finally, the Regional Director suggested that the *Cobell v. Salazar* settlement may have barred Appellants from seeking any accountings from BIA.

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[2] In a related appeal, which we also decide today, Appellants challenge a decision by the Regional Director regarding their demand that BIA accept into Individual Indian Money accounts certain proceeds from the sale of chat from the Sooner chat pile by Bingham, which Bingham has placed in escrow. *See Cantrell v. Eastern Oklahoma Regional Director*, 62 IBIA 61 (2015) (Escrowed Funds Appeal).

In this appeal, Appellants ask the Board to enter final determinations "on matters of law and policy," including (1) a determination that BIA is legally obligated to provide Appellants with an accounting of the quantity and value of chat removed from the Sooner and Ottawa piles; (2) an order for BIA to take appropriate actions to end Bingham's ongoing chat removal operations; and (3) an order for BIA to recover the value of the chat that has been removed by Bingham, including trespass damages. Opening Brief (Br.), June 30, 2014, at 2.

We affirm the Decision with respect to the surface ownership information provided to Appellants for the land on which the Sooner pile is located. Appellants do not dispute the ownership figures provided by BIA, and they are not entitled, under BIA's land title regulations, 25 C.F.R. Part 150 (Land Records and Title Documents), to the type of open-ended "accounting" they seek, at least in the absence of exhausting their remedies under Part 150. BIA's title status records are presumptively valid, and if Appellants believe they have reason to question the accuracy of BIA's official ownership records, they may pursue the administrative remedies available to them, under the Freedom of Information Act, to obtain the underlying documentation for review and evaluation, as permitted by Part 150.

We dismiss the appeal with respect to Appellants' request for an accounting of the surface ownership of the land on which the Ottawa chat pile is located because Appellants do not assert that they have an ownership interest in that land. Appellants suggest that the Regional Director erred in concluding that the land under the Ottawa pile is unrestricted, but they do not contend that they hold any restricted ownership interest in that land, or that they are heirs of the allottee, and they fail to identify how they are injured by the Regional Director's determination that the land is owned in unrestricted fee.

We vacate the Decision with respect to BIA's apparent determinations regarding Appellants' ownership interests in the chat. Unlike BIA's determination of surface ownership, which is based on official title status reports, maintained under 25 C.F.R. Part 150, we cannot determine, on this record, under what authority, if any, BIA purports to maintain "ownership" records of chat. The record contains several spreadsheets that appear to show chat ownership based on current ownership of the land from which the chat originated. But Appellants contend, and BIA does not disagree, that chat is personal property, not real property, and that as personalty, the ownership of chat does not run with the land. As such, the present-day ownership of chat would not necessarily correspond to the present-day ownership of the allotments from which the chat originated. Moreover, it is not apparent on this record what basis, if any, BIA has in making present-day ownership "determinations" for chat in the Sooner and Ottawa piles. No BIA regulation appears to directly govern such determinations, and it is simply unclear on what basis—statutory, regulatory, or contractual—BIA has jurisdiction over Indian-owned chat. *Cf. Enapay Alliance, LLC v. Eastern Oklahoma Regional Director*, 62 IBIA 17 (2015) (vacating and

remanding decision in which Regional Director concluded that Indian-owned chat is restricted against alienation). BIA may well have information that is relevant to determining Appellants' ownership of the chat, but unless and until the record is more fully developed to support BIA's conclusions, to explain the nature of BIA's involvement, and to identify the specific source of BIA's underlying authority and obligations, we conclude that this portion of the decision must be set aside and the matter remanded for further consideration.

We also vacate the Decision with respect to the Regional Director's failure to address, on the merits, Appellants' request that BIA take action to stop Bingham's chat removal operations on the Sooner and Ottawa chat piles. It is not apparent from the record, nor does the Regional Director explain, what "separate appeal" is pending to address Appellants' request concerning Bingham's activities. Appellants apparently contend that the Estate and Bingham are not entitled to remove chat from the piles without consent by the Indian co-owners (and the approval of BIA). As relevant to the Sooner pile, Appellants also contend that Bingham is trespassing on restricted property if it does not obtain a lease (again, with BIA approval) of the restricted surface interests in the allotment on which the chat pile is located. Appellants' allegations that Bingham is trespassing were sufficient to warrant a response from BIA on the merits, either agreeing (and presumably taking some action) or disagreeing, but in either case explaining the basis for its decision. The issues regarding the relative rights of Indian and non-Indian co-tenants of the land on which the chat piles are located, and co-owners of the chat itself, have been the subject of a decade-long dispute. It is time for BIA to develop a full administrative record—legal and factual—and to squarely respond, on the merits, to Appellants' long-standing requests that BIA intervene against the non-Indian co-owner and its contractor, Bingham.

Factual Background and Summary of the Evidence

I. Land Ownership

A. Mary Whitebird Allotment (Location of Sooner Chat Pile)

1. The Sooner chat pile is located, in whole or in part, on land that was originally allotted in restricted fee to Mary Whitebird, Quapaw Allottee No. 28/25.[3]

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[3] According to Appellants, the land on which the Sooner chat pile is located is more particularly described as the S1/2 of the N1/2 of the NW1/4, the S1/2 of the NW1/4 and the N1/2 of the SW1/4, all in Section 16, Township 29 North, Range 23 East of the Indian Meridian, Ottawa County, Oklahoma. Statement of Reasons, June 24, 2013, at 13 (2013 SOR) (AR 47).

2. BIA's title records show that Appellants Stand, Stand Funk, and Cantrell hold a collective 7.5% restricted fee ownership interest in the Mary Whitebird allotment. Tract/Owner/Address/Interest Report for Mary Whitebird Allotment, Tract ID 920 28, Apr. 2, 2009 (enclosure to Letter from Yocham to Superintendent, Jan. 12, 2011) (AR 25); Title Status Report, Land Area 920, Tract 28, Apr. 11, 2008 (TSR Tract 28) (AR Privileged Documents 4).

3. BIA's title records show that two-thirds of the Mary Whitebird allotment is owned in unrestricted fee, and that one-third of the allotment is owned in restricted fee. TSR Tract 28.

4. The Estate claims to own the unrestricted fee interest in the Mary Whitebird allotment, which the Estate apparently calculates at approximately 63%. AR 5 (legal memorandum and title documents compiled for the Estate); *cf.* AR 4(f) (BIA spreadsheet).

5. Appellants contend that the ownership figures for the Mary Whitebird allotment "are not at issue in this appeal," although they "reserve the right" to challenge the accuracy of the ownership figures "following the receipt of a detailed accounting." Opening Br. at 4 n.3.

B. Brotherton Allotment (Location of Ottawa Chat Pile)

1. According to Appellants, the Ottawa chat pile is located on land that was originally allotted to Ethel Mae Crawfish Brotherton (Brotherton).[4] Opening Br. at 5.

2. The Regional Director does not identify Brotherton as the allottee of the land on which the Ottawa pile is located, nor is the identity of the allottee apparent from the record. According to the Regional Director, the land on which the Ottawa pile is located was allotted to a "non-restricted" Quapaw, and was never owned in restricted status. Decision at 5 (unnumbered).

3. Appellants contend that the "heirs" of Brotherton requested information about her allotment, and that they "were informed" that no allotment file

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[4] Appellants state that the land on which the Ottawa chat pile is located is more particularly described as the S1/2 of the NW1/4 of the NE1/4, the SW1/4 of the NE1/4, the NW1/4 of the SE1/4, the N1/2 of the SW1/4 of the SE1/4, E1/2 of the SE1/4 of the NW1/4, E1/4 of the NE1/4 of the SW1/4 all, in Section 17, Township 29 North, Range 23 East of the Indian Meridian, Ottawa County, Oklahoma. 2013 SOR at 13.

exists. Opening Br. at 5 n.5; Letter from Williams to Superintendent, Feb. 6, 2013, at 2 (AR 32). Appellants do not identify the "heirs" of Brotherton to which they refer. Appellants do not contend that they are heirs of Brotherton.[5]

II. Chat Ownership and Use

A. Generally

1. Appellants own undivided interests in "co-mingled" chat that was collected in the Sooner chat pile and the Ottawa chat pile.

2. "Co-mingled" chat refers to chat that was generated from mining activities on more than one tract of land and collected at a central location for processing or reprocessing.[6]

3. Apparently beginning in the 1930s, BIA approved contracts between mining company-lessees of individually owned Quapaw restricted lands and sub-lessee remilling companies, which allowed the removal of chat from multiple allotments and collection at a single location for retreatment to extract additional minerals. *See, e.g*. AR 30, Ex. C1; *see also B.H. v. Gold Fields Mining Corp*., 506 F. Supp. 2d 792, 794-95 (N.D. Okla. 2007) (describing remilling contracts).

4. Under the retreatment contracts, the chat and other material removed from allotments was allocated to the respective tracts of origin for purposes of determining the landowners' proportionate royalties from minerals extracted. AR 30, Ex. C1.

5. Similarly, under the retreatment contracts, the chat resulting from the retreatment operations was allocated to each tract from which the material had been removed, based on weight, and the mining company agreed to store the chat free of charge to the landowners, "with the right and privilege at all times to the landowner to enter and remove same." *Id*.

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[5] Two Appellants are the heirs of Harry Crawfish, and state that they dispute the Regional Director's assertion that Brotherton's allotment was never owned in restricted status and currently is owned in fee, *see* Opening Br. at 5 n.5, but they do not contend that they are heirs of Brotherton.

[6] The term "co-mingled" is also sometimes used to refer to chat that is co-owned in undivided interests by both Indians and non-Indians. *See* Notice of Appeal, Jan. 8, 2014, at 4.

6. The record does not indicate whether Indian chat owners removed, or otherwise contracted for the sale of their chat, from the centralized piles, nor does it indicate whether BIA would have been involved in such sales.[7]

7. Appellants contend, and the Regional Director does not dispute, that as a product of the mining process, chat is personal property, or "personalty," severed from the real property mineral estate.

8. BIA's regulations governing lead and zinc mining on Quapaw lands are currently codified at 25 C.F.R. Part 215. The regulations do not directly address the use or sale of chat.[8] No party contends that any Quapaw mining contracts or leases are currently in effect.

9. Appellants contend, and the Regional Director agrees, that their ownership interest in the chat in the Sooner and Ottawa piles is restricted against alienation without approval by BIA.

10. The record does not document the legal or policy basis for the parties' position that Indian-owned chat is restricted against alienation by the Indian owners without BIA approval. Neither Appellants nor the Regional Director identify the underlying authority upon which the position is based. *See, e.g.*, Opening Br. at 7 ("It is well-established—under appropriate law and by longstanding practice of the BIA—that contracts for the removal and sale of restricted Indian chat must be approved by the BIA." (citing an August 23, 2001, memorandum from BIA's Director of Trust Responsibilities, which asserts that it is BIA's view that chat is restricted, but which cites no authority)). Neither Appellants nor BIA have cited any statute or regulation which, by its terms, states that chat is restricted against alienation or requires BIA approval for sales by Indian owners of chat.

11. In 2002, a BIA Acting Field Representative, Miami Agency, took the position that it is not practical to partition chat, and that because chat is co-owned by Indians and non-Indians in undivided shares, and no material can be moved without

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[7] There is some evidence in the record indicating that prior to the 1930s, Indian owners sold their own chat, but that evidence does not indicate whether or to what extent BIA was involved in such sales. *See* 1924 Engineering Report (Ex. C to Answer Br. of Interested Parties, Apr. 14, 2011) (AR 29).

[8] The regulations designate several forms prescribed by the Secretary, *see* 25 C.F.R. § 215.19, including a lease form, but the forms are not published and are not included in the record.

moving Indian and non-Indian-owned chat, "all of the interest holders should enter into agreements simultaneously in order for the pile to be divided equitably." Letter from Acting Field Representative to Bingham, Jan. 21, 2002 (AR 47). Appellants rely on this letter as a statement of BIA policy. *See* Notice of Appeal at 6.

B. Environmental Regulation of Chat

1. Chat contains hazardous substances to which environmental liability may attach. EPA has promulgated regulations governing the use of chat. *See* 40 C.F.R. Part 278. EPA's regulations authorize and impose criteria, including certification and recordkeeping requirements, for the use of chat in transportation construction projects carried out, in whole or in part, using Federal funds. 40 C.F.R. §§ 278.2 - 278.4. EPA's certification requirements are not applicable to "chat used under the jurisdiction of the U.S. Department of the Interior, Bureau of Indian Affairs." *Id.* § 278.4(a).

2. EPA's regulations do not require Federal approval for the sale of chat, either by Indian or non-Indian owners.

3. EPA and the Department of the Interior have entered into a Memorandum of Understanding (MOU) under which BIA agreed to review and, as appropriate, approve chat sales agreements entered into by Indian chat owners when a sufficient number of owners agree to the sale. AR 2. BIA's approval of such sales is part of a framework under which chat owners may be afforded protection against liability that might otherwise attach as a consequence of the release of hazardous substances from chat.

4. The MOU does not purport to render invalid unapproved Indian chat sales,[9] but such sales do not obtain liability protection that would otherwise attach if the sales were approved and related documents were executed.

C. Sooner Chat Pile

1. The Sooner chat pile consists of chat that originated from four Quapaw allotments: Mary Whitebird; Harry Crawfish; Eudora Whitebird; and James Whitebird.

2. BIA's records indicate that the ownership of the Sooner chat pile, based on the tonnage of material originally contributed from each allotment, was allocated

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[9] The MOU does not characterize Indian-owned chat as "restricted."

as follows: Mary Whitebird (64.11%); Harry Crawfish (8.46%); Eudora Whitebird (11.39%); and Joseph Whitebird (16.04%). Spreadsheet (undated) (AR 4(f)).

3. The Regional Director relied on BIA's real property ownership records for each of the four allotments from which the Sooner chat originated as evidence of the present-day individual Indian ownership interests in the Sooner chat pile. *See* AR Privileged Documents 4 (Title Status Reports, certified on April 11, 2008); *see also, e.g.,* Decision at 4 (unnumbered) ("Appellants' undivided ownership of the Mary Whitebird Allotment and portion of the Sooner Pile is as follows"). Based on those records, the Regional Director concluded that all five Appellants own a fractional interest in the Sooner pile.

4. Since approximately 2002, the Estate has entered into contracts with Bingham for the removal and sale of chat from the Sooner pile. The contracts do not purport to bind the Indian co-owners of the chat, and state that Bingham "shall be responsible to the remaining owners of undivided interests for their percentage at such price as may be negotiated between [Bingham] and the remaining owners." *See, e.g*. Agreement for Purchase and Removal of Chat, Jan. 10, 2002 (AR 3).

5. Appellants have not consented to the sale of chat from the Sooner pile to Bingham, and Bingham has not operated under a BIA-approved contract.[10]

6. Neither Bingham nor the Estate asserts a right of exclusive use or control over the chat piles, and Bingham is on record as stating that Appellants and other Indian owners are free to sell their interests in the chat to third parties at whatever price Appellants can negotiate with third parties. *See., e.g.*, Bingham and Weatherford Answer, Apr. 14, 2011, at 2 (AR 29); *Quapaw Tribal Remediation Authority v. Acting Eastern Oklahoma Regional Director*, 61 IBIA 55, 63 (2015).

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[10] For chat that it has removed from the Sooner pile, Bingham has been escrowing a portion of the sales proceeds, based on the percentage of Indian ownership multiplied by the royalty rate per ton agreed to in its contracts with the Estate. Bingham has paid the escrowed amounts directly to the Indian owners upon request, on the condition that the Indian owners sign release and indemnification agreements. Some Appellants have signed the agreements and been paid from the escrowed funds, but Appellants contend that the agreements are impermissible and invalid.

D. Ottawa Chat Pile

1. The Ottawa chat pile apparently consists of chat that originated from three allotments: Ethel Mae Crawfish Brotherton; Harry Crawfish; and SinTahHahHah Track.

2. BIA's records indicate that the ownership of the Ottawa chat pile, based on the tonnage of material originally contributed from each allotment, was allocated to Harry Crawfish (14.985%) and to SinTahHahHah Track (8.778%). Spreadsheet of ownership of Ottawa chat pile (undated) (AR 64). It appears that the remaining portion of chat originated on the Ethel Mae Crawfish Brotherton allotment.

3. BIA records indicate that Bingham or the Estate currently holds a 76.237% unrestricted fee ownership interest in the chat in the Ottawa chat pile. *Id*.

4. BIA's records indicate, apparently based on current ownership interests in the allotments from which chat in the Ottawa chat pile originated, that Appellants Gilmore Springer and Gilmore each own a fractional interest in the Ottawa chat pile, based on the ownership originally allocated to the owner(s) of the Harry Crawfish allotment. *Id*.

Appellants' Requests for an Accounting and For Other Relief from BIA

Beginning in 2005, Appellants Gilmore and Gilmore Springer, and several individuals not parties to this appeal, asked BIA to halt sales of chat from the Sooner pile by the Estate and Bingham, arguing that the Estate as a co-tenant was "ignor[ing] its legal responsibilities to its restricted co-owners." Letter from Ward to Woodcock, Nov. 30, 2005, at 2 (Ex. B to Notice of Appeal). The letter asked for a "full and complete accounting for all chat removed from the Sooner chat pile since October 6, 1997." *Id*. at 3.[11] The letter also requested a report from BIA on the proceeds received by the Estate and

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[11] Appellants identified October 6, 1997 as the date that the "Secretary of the Interior imposed a moratorium on sales of restricted Quapaw chat." *Id*. Appellants have provided the Board with a copy of an August 23, 2001, memorandum from BIA's Director of the Office of Trust Responsibilities to the Regional Director, which refers to an "attached" memorandum signed by the Assistant Secretary – Indian Affairs that rescinded an October 6, 1997, BIA moratorium on the sale of chat from Indian lands in northeastern Oklahoma. *See* Opening Br., Ex. A. Neither Appellants nor the Regional Director provided the Board with copies of the referenced memorandum from the Assistant Secretary or the BIA moratorium document.

Bingham from the removal and sale of chat from the Sooner pile. Finally, the letter asked for a determination by BIA on "the legality of the sale of portions of the restricted land and chat associated with" the Sooner pile to non-Indians, asking for a report on the issuance of the original fee patent and chain-of-title documents. *Id*.

Subsequently, Appellants submitted demands for action to BIA pursuant to 25 C.F.R. § 2.8 (Appeal from inaction of official), which ultimately resulted in the issuance of two decisions by the Superintendent, one dated May 6, 2013, and another dated May 30, 2013. The Superintendent provided some ownership figures to Appellants, but declined to address several issues raised by Appellants, concluding that the issues were subsumed by claims being asserted in litigation against the United States in Federal claims court.

On appeal to the Regional Director, Appellants reiterated their requests for an accounting, for BIA to set forth legal or policy positions on several issues, and for BIA to evict Bingham from the Sooner and Ottawa piles and to pursue trespass damages and other relief against Bingham for chat that it has removed.

In deciding Appellants' appeal, the Regional Director provided additional figures for Appellants' ownership interest in the land and the chat, which he referred to as "BIA's accounting" of their ownership. Decision at 4-5 (unnumbered). The Regional Director agreed with the Superintendent that the issues raised by Appellants were subsumed by the issues they were raising in their claims court actions. He also concluded that the Superintendent was working with Bingham on the issues related to an "accounting analysis" of the chat sold by Bingham, and remanded that issue to the Superintendent to continue that work, with directions for the Superintendent to decide appropriate issues to the extent Appellants can establish that they had opted out of the *Cobell v. Salazar* Asset Management Settlement. *Id*. at 6-7 (unnumbered); *see Cobell v. Salazar*, No. 1:96CV01285-JR (D.D.C.) (Class Action Settlement Agreement, Dec. 7, 2009); Pub. L. No. 111-291, Title I, 124 Stat. 3064, Dec. 8, 2010.

Discussion

In this appeal, Appellants challenge the Regional Director's decision as incomplete or nonresponsive, and ask the Board to enter final determinations "on matters of law and policy," including (1) a determination that BIA is legally obligated to provide Appellants with an accounting of the quantity and value of chat removed from the Sooner and Ottawa piles; (2) an order for BIA to take appropriate actions to end Bingham's ongoing chat removal operations; and (3) an order for BIA to recover the value of the chat that has been removed by Bingham, including trespass damages. Opening Br. at 2. Although Appellants do not dispute the surface ownership information provided by BIA, they complain that BIA ignored their requests to dispute assertions made by the Estate in state court litigation

against Appellants, *see* Notice of Appeal at 5, and contend that they are owed a more complete accounting for that ownership. We divide Appellants' arguments into those pertaining to the surface ownership of the land on which the chat piles are located, those pertaining to ownership of the chat, and those pertaining to Appellants' requests that BIA take action against Bingham.

I. Surface Ownership

Appellants acknowledge that they "generally agreed to the accuracy of the surface ownership percentages calculated by the BIA," Notice of Appeal at 5, but they contend that BIA has "ignored" their requests to "dispute" ownership documents apparently submitted by the Estate in state court litigation by the Estate against one or more Appellants. *Id*. In that litigation, according to Appellants, the Estate claims 100% ownership of the surface lands on which the Sooner pile is located. *Id*.

Appellants do not identify a source for the alleged obligation of BIA to "dispute" factual allegations made by the Estate in state court litigation against Appellants. We thus reject Appellants' request that the Board "require the corrective actions that are necessary to clarify this issue." *Id*.

Appellants also contend that the summary information set forth by the Regional Director "does not amount to a complete 'accounting' concerning BIA management of [Appellants'] land." Opening Br. at 20. Appellants argue that "[n]o documentation supporting the transactions through which ownership interests were removed from restricted status was given." *Id*.

With respect to the surface ownership of land in which Appellants claim ownership, we conclude that it was sufficient for BIA to identify that ownership, as reflected in BIA's official title records, and the record contains copies of BIA title status reports that support the Regional Director's figures. Under 25 C.F.R. Part 150, an Indian owner of trust or restricted real property is entitled to a title status report, which reflects BIA's official record of title for such real property. Beyond that, Part 150 expresses a BIA policy of transparency for title records, thus signaling that Indian landowners are entitled, through the Freedom of Information Act, to request additional title documents—including probate documents—that are maintained by BIA as part of the official chain of title for ownership records.[12] But

[12] Consistent with that policy, BIA's administrative record for this appeal includes documents listing the owners of the allotments implicated by this appeal, and their respective ownership interests, but the record does not include the underlying documents that would be necessary to show the chain of title for each Appellants' ownership interest.

Part 150, standing alone, does not create an obligation on the part of BIA to provide the type of open-ended "accounting" of real property title that Appellants apparently demanded in this case. Thus, we affirm the Decision with respect to the Regional Director's response to Appellants' requests for ownership information concerning surface lands.

With respect to the ownership of the surface on which the Ottawa pile is located, we dismiss the appeal because Appellants do not contend that they own a restricted interest in that surface acreage, or that they are entitled to do so as heirs of Brotherton. Thus, on this issue, Appellants have not established that they have standing because they do not claim to have any legally protected interest that was adversely affected by the Regional Director's decision regarding their request for an "accounting" of the ownership of the Brotherton allotment.[13]

II. Chat Ownership and Management

Appellants also contend that they are entitled to an "accounting" from BIA concerning Federal management of what they refer to as their "restricted chat," including an accounting of their ownership and of amounts of chat removed from the piles. *See* Opening Br. at 15, 17.[14] Appellants contend that the summary information set forth by the Regional Director "does not amount to a complete 'accounting' concerning BIA management of [Appellants'] . . . chat." *Id*. at 20. Appellants argue that "[n]o documentation supporting the transactions through which ownership interests were removed from restricted status was given, nor was any supporting evidence given concerning the amount of chat removed or a description of how such calculations were made." *Id*. "With respect to chat, [Appellants] are requesting an accounting of chat which will reflect their ownership, the support for the

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[13] Even assuming they could show standing, Appellants' bare allegations that present-day ownership of the Brotherton allotment is in doubt arguably would be insufficient to meet their burden to demonstrate error in the Regional Director's decision.

[14] Appellants sometimes refer to the Indian-owned chat as "Indian trust chat," *see* Opening Br. at 17, but Appellants cite no authority to support the proposition that title to chat was vested in the United States to be held in trust for the Indian owners. It appears that title to the land from which the chat originated apparently was, at least in some cases, owned in restricted fee by Indians, and in other cases may have been owned by an Indian allottee in unrestricted fee, whether as a consequence of the original patent issued for the allotment or as a consequence of the expiration of restrictions for certain allottees. In many contexts, the distinction between title that is held in trust by the United States, and title that is held in restricted fee, is not relevant, but in some contexts it may be.

calculation of that ownership, and the overall amount of chat that has been removed from the Sooner and Ottawa Chat Piles." *Id*. at 20 n.20.[15]

The Regional Director contends that Appellants have identified no Federal statute or regulation that requires BIA to provide responses to the questions asked by Appellants, and have identified no Federal statute or regulation that requires BIA to account to Appellants for their ownership of the chat or the quantity of chat removed from the Sooner and Ottawa piles where, as here, the chat has not been removed and sold pursuant to contracts approved by BIA. Regional Director's Answer Br., Aug. 29, 2014, at 6-7.

In reply, Appellants contend that "specific laws and regulations give the BIA comprehensive and elaborate control over restricted Indian chat." Appellants' Reply Br., Sept. 17, 2014, at 1. Appellants argue that Federal fiduciary obligations attach when BIA exercises elaborate control over Indian resources, and that BIA "cannot[]dispute that laws and regulations governing Quapaw mining and chat create more than a 'bare' trust." *Id*. at 5. Appellants apparently rely primarily, if not solely, on BIA's Quapaw mining regulations and EPA's chat rule. *See id*. at 5 n.1 (citing 25 C.F.R. Part 215 and 40 C.F.R. Part 278).[16]

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[15] Appellants expressly disclaim any intent, in these proceedings or the proceedings before the Regional Director, to challenge ownership determinations that were made through Departmental Indian probate proceedings. Opening Br. at 20 n.20.

In making several arguments, Appellants allude to "information" which they contend casts doubt on the Regional Director's decision or raises questions about BIA's past actions regarding chat. *See, e.g.*, Notice of Appeal at 5-6 (a "review of the information available . . . indicates that BIA allowed" title to chat to run with the land; a "review of documents under which the BIA removed restrictions from the surface" do not reflect that the chat "was removed" from restricted status, thus creating a "cloud" on the Estate's ownership); Opening Br. at 4 n.3 (referring to "information available to" Appellants). But Appellants do not identify the information to which they allude or provide it to the Board. Appellants similarly assert that BIA "recently" recalculated the Indian ownership of chat in a way that "appear[s] to significantly affect restricted title to chat," *id*. at 6, but Appellants do not identify the documents upon which they rely, nor do they explain whose ownership purportedly was affected.

[16] Elsewhere, Appellants contend that BIA "exercises comprehensive and elaborate control over Quapaw chat under a number of Federal laws and regulations," Appellants' Reply Br. at 9, but Appellants provide no citations to such laws and regulations. The only regulation that Appellants have identified, or that the Board has been able to identify, under which BIA may have exercised authority over chat, is the BIA regulation governing mining on Quapaw lands. The regulations that were in place when mining took place are not in the record, nor are the leases between the allottees and the mining companies. It remains

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Appellants construe the EPA-DOI MOU as having "confirmed" a requirement of Federal approval of chat sales whenever "restricted" Indian ownership is present. *Id*. at 5.

Although we are not persuaded that BIA owed *more* of an "accounting" to Appellants, with respect to the Indian-owned chat, we are persuaded by Appellants' arguments that the Regional Director's decision is flawed. Appellants contend, and the Regional Director does not disagree, that chat is personalty, and that ownership of chat does not run with the land. While ownership of the chat was originally allocated to the tracts from which it originated, its status of personalty would mean, as Appellants contend, that subsequent ownership would not necessarily correspond to subsequent ownership of the realty from which the chat originated. But the Regional Director's decision appears to simply assume, with no explanation, that present-day ownership of the chat is identical to present-day ownership of the allotments from which the chat originated. Moreover, the Regional Director's figures for chat ownership—what he characterized as BIA's "accounting"—do not appear to be derived from any official recordkeeping system for chat *as personalty*, in contrast to BIA's official title status reports for trust and restricted realty. The record contains spreadsheets purporting to show chat ownership, but such spreadsheets would not appear to be entitled to the same presumption of validity that is given to a title status report for realty. And the record in this case, as was true in *Enapay Alliance*, is not sufficient even to support the position of both BIA and Appellants that chat is restricted against alienation when sold by an Indian owner.[17]

Whether or not BIA may have maintained information or records that are relevant to determining Indian ownership of the chat on the Sooner and Ottawa piles, we conclude that the Regional Director's purported "accounting" of that ownership must be vacated and the matter remanded for further consideration and development of a more complete record.

(…continued)
unclear under what statutory or regulatory restriction Indian chat owners were or are unable to sell chat without BIA approval. The Board recently remanded this issue to BIA. *See Enapay Alliance*, 62 IBIA 17.

[17] Based on the retreatment contracts that are in the record, it appears that BIA's approval was required before a mining company lessee could dispose of chat generated from its mining activities, e.g., through a sale to a remilling company. But it is not apparent that similar conditions attached to disposition of chat by the Indian owners. On the other hand, we emphasize that the record is incomplete, and thus we express no view on the ultimate issue of whether, and if so under what circumstances, Indian-owned chat is restricted.

III. Accounting For Chat Removed by Bingham

Appellants seek an accounting from BIA for the amount and value of chat removed from the piles by Bingham.[18] Whether or not BIA has any duty to Appellants with respect to chat that Bingham has removed would seem dependent upon resolving the more fundamental question of whether Indian-owned chat is restricted against alienation, or otherwise subject to BIA's jurisdiction, and if so, identifying the specific source(s) of BIA's authority, or otherwise determining the nature and extent of BIA or Departmental involvement in or control over Indian-owned chat. Until those questions are answered, we have no basis to determine the nature or scope of any duty that BIA may have toward Appellants. As relevant to the Regional Director's decision, we have no basis to set aside his decision to remand to the Superintendent, for further proceedings, the issue of conducting an accounting analysis with Bingham with respect to chat it has removed.[19] Whether Bingham, or BIA, or both, owe an accounting to Appellants, with respect to chat that has been removed, is an issue that the Superintendent may address as part of that remand.

IV. Eviction of Bingham from the Sooner and Ottawa piles

Appellants contend that the Regional Director erred in asserting that the Superintendent's decision on their request to evict Bingham from the Sooner and Ottawa piles is a matter pending in a separate appeal, and on that basis declining to address that request further. Opening Br. at 23. According to Appellants, their request that BIA take action to terminate Bingham's operations "is directly at issue in *this* appeal." *Id*. Appellants contend that BIA has taken inconsistent positions, first asserting (correctly, in Appellants'

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[18] Appellants acknowledge that proceeds received by Bingham from its sales of chat "have been exclusively under Bingham's control." Opening Br. at 9 n.7.

[19] The Regional Director contends that as members of the *Cobell v. Salazar* Trust Funds Accounting Settlement, Appellants are not entitled to an accounting for any trust funds prior to the effective date of the settlement. Regional Director's Answer Br. at 7. In addition, apparently in reference to management of the Indian-owned chat, the Regional Director asserts that Appellants provided no documentation that they have withdrawn from the *Cobell* Asset Management Class Settlement. *Id*. But it is not apparent that Appellants' requests are limited to matters pre-dating the settlement, and the Regional Director's own record contains documentation that Appellants opted out of the Asset Management Class Settlement. Thus to the extent, if any, that the *Cobell* settlement is relevant, the Regional Director has not explained how it operates as a complete bar to Appellants' requests. In further proceedings, however, the Regional Director may further address this issue, as appropriate.

view) that the Estate and Bingham may not remove chat from the Sooner or Ottawa piles without consent of the Indian co-owners, but later (incorrectly, in Appellants' view) acquiescing in removal operations by Bingham by failing to stop Bingham. *Id*.[20]

Appellants request a ruling from the Board (1) "that [F]ederally approved contracts are required before a third party—including a fee co-owner—may allow the removal and sale of chat in which restricted interests are present"; and (2) "that Bingham's operations are—and have been—improper, and direct [BIA] to take action against Bingham to immediately terminate its ongoing operations," and to pursue trespass damages for past conduct. Opening Br. at 27.

The Regional Director's answer brief does not respond to, or dispute, Appellants' contention that their challenge to the Superintendent's decision, as failing to properly respond or to take action to evict Bingham from the premises, is directly at issue in this appeal. *See generally* Regional Director's Answer Br. Nor is it apparent from the record what separate "pending appeal" the Regional Director was referring to in deciding not to address this request in the Decision.

Appellants' allegations to BIA that Bingham is trespassing, whether on the surface or with respect to the chat, or both, were sufficient to warrant a response from BIA on the merits, either agreeing (and presumably taking some action) or disagreeing, but in either case explaining the basis for its decision. The issues regarding the relative rights of Indian and non-Indian co-tenants of the land on which the chat piles are located, and of the chat itself, have been the subject of a decade-long dispute. It is time for BIA to develop a full administrative record—legal and factual—and to squarely respond, on the merits, to Appellants' long-standing requests that BIA intervene against the non-Indian co-owner and its contractor, Bingham.[21]

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[20] Appellants rely on *United States v. LaMotte*, 256 F. 5 (8th Cir.), aff'd, 254 U.S. 570 (1921), in which the court held that a non-Indian co-owner of an allotment could not enter into a lease purporting to grant use and control to the co-owned lands, to the exclusion of the Indian owners, without BIA approval.

[21] It is apparent that BIA has sought on numerous occasions to encourage Appellants to negotiate an agreement with Bingham, since Bingham already has a contract with the non-Indian majority owner of the chat, and it is also apparent that in doing so, BIA has sought to avoid squarely addressing what Appellants themselves once recognized as the "complicated legal issues" associated with the co-tenancy of the chat. Letter from Ward to Woodcock, Nov. 30, 2005. But it is also apparent that Appellants are unequivocally opposed to cooperating with Bingham or the Estate in any respect, and if, as Appellants contend, Indian-owned chat is restricted against alienation by the Indian owners without

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Conclusion

For the reasons discussed above, and 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 December 27, 2013, decision in part, vacates it in part, dismisses the appeal in part, and remands the matter for further proceedings consistent with this decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

(…continued)
BIA approval, BIA's obligation to address the legality of Bingham's activities, on the merits, would appear to be unavoidable.