



INTERIOR BOARD OF INDIAN APPEALS

Charlene J. Ramirez and Cheryl Morningstar v.  
Acting Great Plains Regional Director, Bureau of Indian Affairs

62 IBIA 271 (03/18/2016)



# 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

CHARLENE J. RAMIREZ and	)	Order Affirming Decision in Part,
CHERYL MORNINGSTAR,	)	Remanding in Part, and Dismissing
Appellants,	)	Appeal in Part
	)	
v.	)	
	)	Docket No. IBIA 14-056
ACTING GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	March 18, 2016

Charlene J. Ramirez (Ramirez) and Cheryl Morningstar (collectively, Appellants) appeal to the Board of Indian Appeals (Board) from a January 7, 2014, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), responding to longstanding complaints by Ramirez regarding BIA’s management of several tracts of land on the Fort Berthold Reservation in which Appellants own both fee and trust interests. Appellants contend that for years BIA has been improperly leasing Appellants’ fee interests in several Indian allotments, and owes them compensation accordingly. Appellants also sought to have one tract, Fort Berthold Allotment 1798, in which they own a majority interest in fee, removed from a BIA range unit. And finally, Appellants have been seeking to have BIA complete several fee-to-trust or trust-to-fee applications, with respect to the allotments, in order to consolidate their ownership interests in the allotments to either all-fee or all-trust.

The Regional Director concluded that BIA has not been leasing Appellants’ fee interests and that BIA does not owe Appellants an accounting or compensation for its leasing practices. With respect to the removal of Allotment 1798 from the range unit, the Regional Director found that BIA has not received a properly completed request. The Regional Director did agree with Appellants, however, that their requests for fee-to-trust and trust-to-fee transactions had not received proper attention, and he ordered that matter to be transferred from BIA’s Fort Berthold agency office to BIA’s regional office.

While this appeal has been pending, the parties have either completed or made progress on many of Appellants’ fee-to-trust and trust-to-fee transactions, and some apparently await further action by Appellants. To the extent Appellants sought action-

prompting relief from the Board regarding these transactions, we conclude that no further relief is appropriate at this time, and we dismiss this portion of the appeal.

With respect to the removal of Allotment 1798 from the range unit, BIA now argues that the issuance of fee patents to Appellants for their previous trust interests in Allotment 1798 has rendered their request for removal of the land from the range unit moot. We disagree. The issuance of fee patents may have rendered Appellants' request moot, in their capacity as trust owners, but Appellants continue to contend that the allotment should be removed from the range unit, the fee ownership of the allotment now exceeds 95%, and there is evidence in the record that the two remaining trust owners—Appellants' nephew and niece—also wish to have the allotment removed from the range unit. We conclude that it is appropriate to remand this issue to the Regional Director for further investigation and action by BIA, consultation with the remaining trust owners, and issuance of a new decision whether to remove the allotment from the range unit.

That leaves the crux of Appellants' appeal: their contention that BIA has been leasing out their fee interests, as evidenced by the fact that leases approved by BIA encompass the entire acreage of a tract, but does not ensure that fee owners are compensated. *See* Notice of Appeal, Jan. 24, 2014, at 1. Appellants argue that BIA owes them compensation for allowing lessees to use their fee interests. *Id.* at 1, 6-9. In addition, Appellants contend that when BIA approves leases for trust interests in allotments, it should condition that approval on a requirement that fee interests must be covered by a separate agreement. *Id.* at 2.

With respect to these claims, we affirm the Regional Director's decision. The Regional Director correctly explained both BIA's authority, and the limits on that authority, as prescribed by regulation, regarding the leasing of Indian lands that include fee interests. The record supports the Regional Director's conclusion that BIA has not been approving leases that grant rights to fee interests. Because the land is owned in undivided shares in the whole parcel, leases—whether by trust owners or fee owners—understandably and necessarily grant certain rights in the whole. But it does not follow that by doing so, the leases approved by BIA granted rights to fee interests, or infringed upon the rights of Appellants as fee interest owners. In the present case, the record indicates that the leases approved by BIA, for interests held in trust, were limited to authorizing, and charging for, use of the land in proportion to the percentage of ownership held by the Indian trust owners, and did not exclude use of the land by the fee owners. The Regional Director was correct in stating that, under BIA's regulations, BIA has no authority to collect rent on behalf of fee owners, nor is BIA permitted to withhold its approval of a lease by the trust owners until the lessee enters into a corresponding lease with the fee owners. Accordingly, the Regional Director correctly concluded that Appellants are not entitled to compensation from BIA.

## Background

The tracts at issue in this case are Fort Berthold Allotments 278A, M321A, 1019, 1798, and 1907.<sup>1</sup> The tracts were originally owned, in whole or in part, by Appellants' mother, Annie Carlson (Annie), whose interests were held in trust when she died in 1981. The probate of her estate resulted in her ownership passing both in fee and in trust to her heirs. Two tracts in particular, Allotments 1798 and M278A, have served as the primary focus of the controversy.

### I. Allotment 1798 – BIA Grazing Permits for Range Unit 101

Allotment 1798 consists of 231.26 acres, and was owned in full by Annie. When she died, her surviving spouse, Philip Carlson (Philip), a non-Indian, inherited an approximately 87% interest (0.86614579) in her estate, including Allotment 1798, and his interest was patented to him in fee. *See* Patent No. 33-87-0055, May 26, 1987 (AR at 206); Title Status Report, Tract 1798, Appendix A (AR at 282-83). Annie and Philip's three children, Appellants and their sister (now deceased) (all members of the Fort Berthold Tribe), each inherited equal shares in the remaining 13% (0.13385421) of Annie's estate, including Allotment 1798, and their interests remained in trust. *See* Title Status Report (AR at 282-83). Philip deeded his interest to Appellants and their sister, but those interests remained in fee, resulting in Appellants' ownership of both fee and trust interests in Allotment No. 1798, with a sizeable majority of the ownership held in fee.

Allotment 1798 apparently has been included in a BIA range unit on the Fort Berthold Reservation since prior to 1981, and BIA has granted grazing permits for the range unit, thereby authorizing the permittees to use the allotment. The permits do not limit use by acreage, i.e., permittees may use the entire 231.26 acres, but the number of livestock permitted—expressed in Animal Unit Months (AUMs)<sup>2</sup>—has been determined in

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<sup>1</sup> As explained in the Regional Director's decision, the property at issue includes both surface and mineral estates, but Appellants' ownership consists of identical interests in both estates with respect to each tract. Letter from Regional Director to Ramirez, Jan. 7, 2014, at 2 n.2 (Decision) (Administrative Record (AR) at 77).\*

\* The Regional Director's administrative record for this appeal was provided to the Board in electronic form, in a single Adobe PDF® document consisting of 1252 pages of scanned documents, and a table of contents. The Board's citations refer to the page numbers in the PDF document.

<sup>2</sup> An AUM means "the amount of forage required to sustain one cow or one cow with one calf for one month." 25 C.F.R. § 166.4.

proportion to the trust interest ownership, and BIA has charged accordingly. *See* AR at 212-16 (permits for 1999–2010 period, and range permit data for 2001 and 2006). For example, in 2006, a range permit data sheet includes a legal description for Allotment 1798, with the notation “LESSNONINDIAN,” and the next column is the trust interest expressed in an acreage-equivalency figure, stated as 31.26 acres. *See* AR at 216 (Range Permit Data, July 27, 2006).<sup>3</sup> BIA included 9.4 AUMs in the permit, based on the trust-acreage-equivalency figure. *Id.* And based on a rental rate of \$8.50/AUM, BIA calculated the rent for Allotment 1798 to be \$79.90. *Id.* Appellants, as owners of trust interests, apparently received their respective shares of the amount collected by BIA.

In February 2007, apparently based on records that Ramirez provided to the Office of the Special Trustee for American Indians (OST), an OST Fiduciary Trust Officer (Trust Officer) prepared a set of calculations to estimate the rental value of Appellants’ fee interests in Allotment 1798 for the period 1982–2007. The Trust Officer calculated the total, including attributed interest, as \$10,841.74,<sup>4</sup> and in a memorandum to the Special Trustee, referred to that as the amount “owed to the Carlson family.” Memorandum from Fiduciary Trust Officer to Special Trustee, Feb. 16, 2007 (AR at 57). The Trust Officer did not explain the legal basis for suggesting that this amount was owed to the fee owners, nor did she expressly identify who she believed owed that amount to the family.

In March 2007, the Special Trustee wrote to Appellant Ramirez to follow up on the work done by the Trust Officer. With respect to “the loss of income on the fee interests not being leased,” the Special Trustee stated that he did not believe that BIA had authority to compensate Appellants. Letter from Special Trustee to Ramirez, Mar. 27, 2007, at 1. (AR at 143). To the contrary, the Special Trustee found the law “very clear” that BIA had no obligation or authority to lease “fee land,” and characterized the Trust Officer’s efforts as estimating “what might have been received had [Appellants’] interests been leased.” *Id.* The Special Trustee advised Ramirez that he was asking BIA to let her know the status of

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<sup>3</sup> There appears to be a slight discrepancy in the record with respect to the fee-versus-trust ownership of Allotment 1798. If Philip inherited a 0.86614579 interest in fee, and Appellants and their sister collectively inherited the remaining 0.13385421, the trust acreage-equivalency figure would be 30.96 (and the figure for the fee interest would be 200.30).

<sup>4</sup> For 2006, the Trust Officer divided the total acreage (231.26) by the number of AUMs per acre (3.34) to calculate the total AUMs for Allotment 1798 (69.24), which she multiplied by the grazing rate (\$8.50) to arrive at the total grazing rental value of Allotment 1798, i.e., for both trust and fee interests. She then multiplied the total by the fraction of fee ownership (0.87) to determine that \$512.21 was “owed” for the fee interests for that year. AR at 60.

leasing and to assist her in contacting the lessee of the trust interest “so that you can negotiate a lease on the fee interest with the lessee.” *Id.* The Special Trustee also suggested that Appellants might have a claim against the lessee, depending on the lessee’s actual use of the tract. *Id.*

Ramirez responded to the Special Trustee, expressing her disappointment with his letter, and characterizing the Trust Officer’s work as “determining that compensation was due my family for 26 years of mistakes on the part of BIA.” Letter from Ramirez to Special Trustee, Apr. 15, 2007, at 1 (AR at 556). According to Ramirez, BIA leased out the entire tract, and the lessee “gets the benefit of using the entire 200 plus acres while paying only a fraction of the cost to lease it.” *Id.* at 1. Ramirez complained that she and the other family members were not regularly notified about who was leasing the land, and had asked that the land not be leased out, but they knew it was being leased because of the small yearly payments they received. *Id.* at 2 (unnumbered).

In the Fall of 2007, the Regional Director wrote to Ramirez in response to correspondence from her concerning reimbursement, stating that BIA was barred from leasing fee lands and from collecting rent on behalf of fee owners. Letter from Regional Director to Ramirez, Sept. 25, 2007, at 1 (AR at 139). The Regional Director advised Ramirez that she could have her “land” removed from the current permit “with majority consent,” and could also “negotiate with the current permittee on the fee portion of this tract to modify the number of animals and/or season of use.” *Id.* at 1.

In the years following, Appellant Ramirez wrote letters to various BIA officials about the leasing of Allotment 1798. In one letter, she stated that she had attempted to work with BIA’s Fort Berthold Agency “by asking that they lease the trust undivided interest in the trust portion and refer interested persons to us for the leasing of the non-trust interest, or referring interested parties to us [s]o we can lease the land directly.” Letter from Ramirez to Gidner, Mar. 4, 2008, at 1-2 (AR at 347-48).

But in another letter, Ramirez contended that BIA had been “leasing out fee interest land from my family despite our clear direction not to do so,” stating, as an example, that BIA leased out the 231 acres of Allotment 1798, even though “[t]here are only 29.9 acres of trust land in this allotment.” Letter from Ramirez to Regional Director, Feb. 20, 2011, at 1 (AR at 225). According to Ramirez, OST had “determined that over \$10,000 was owed to my family for non-payment of grazing leases on this land.” *Id.*

In April 2011, Appellant Ramirez submitted a form to BIA requesting the removal of Allotment 1798 from the range unit. *See* AR at 236-37. The form that is included in BIA’s administrative record is not signed, and refers to an accompanying letter dated April 26, 2011. The accompanying letter is “signed” with the typewritten names of

Appellants, Shantall LaFournaise, and Joseph LaFournaise, each name appears to have been initialed, and the letter states that “we are requesting this land be removed from range units on Fort Berthold.”<sup>5</sup> *Id.* at 236. The letter states that the allotment consists of 231.26 acres, “only 29.9 of which are trust,” with the remaining ownership held by the four in fee. Ramirez sent a follow-up letter to BIA in 2012, asserting that she had completed the application and obtained all necessary signatures of the four owners. Letter from Ramirez to Clifford, June 29, 2012 (AR at 51). According to that letter, BIA had confirmed in a telephone call that the application had been received and submitted to the Superintendent in time to meet a deadline at the end of May to remove the allotment from the range unit. *Id.* BIA did not remove the allotment from the range unit.

After additional correspondence, in 2013, Appellant Ramirez sought to force action or a decision by BIA on her claims that BIA was improperly leasing out the fee interests owned by herself and other members of the family, and owed them compensation. Ramirez asserted that OST staff had determined that “BIA owed” her family \$10,000 for leasing out Allotment 1798, complaining that despite a request that it not do so, BIA “continue[d] to lease out 201.264 acres of patent fee land” in that allotment. Letter from Ramirez to Acting Superintendent, May 18, 2013, at 1 (AR at 134). Ramirez’s letter references the correspondence requesting removal of Allotment 1798 from the range unit, which she contended had been ignored. *Id.* at 4.

The Superintendent of the Fort Berthold Agency (Superintendent) responded, stating that BIA could not address the issue of compensation, and also stating that BIA had no authority over fee interests. According to the Superintendent, “it is the lessee’s responsibility to ensure that the fee interest owners receive their share of any income due to any leasing activities.” Letter from Superintendent to Ramirez, July 8, 2013,<sup>6</sup> at 1 (AR at 131). The Superintendent also found that Ramirez’s request to withdraw Allotment 1798 from the range unit was not completed properly. *Id.*

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<sup>5</sup> Shantall LaFournaise and Joseph LaFournaise are the children of Appellants’ deceased sister, and apparently inherited or were devised her interests in equal shares. *See* Title Status Report (AR at 282-83).

<sup>6</sup> The Superintendent’s decision that initially was sent to Appellant was undated. *See* Notice of Appeal, July 10, 2013 (AR at 943) (notice of appeal from undated Superintendent’s decision). The record contains two copies of the Superintendent’s decision, with identical text, one which is undated (AR at 947-948), and one which is dated July 8, 2013 (AR at 131-132). Each contains a separate certified mail tracking number, and it appears that the undated decision was issued on July 5, 2013. *See Ramirez v. Great Plains Regional Director*, 57 IBIA 218, 218 (2013) (Regional Director reported that the Superintendent had issued a decision on July 5, 2013).

Ramirez appealed to the Regional Director, reiterating her contention that OST had determined that money was owed to Ramirez and her family based on “BIA’s continuing practice of leasing out of fee patent land contained in allotment 1798,” by leasing the entire 231.26 acres, while “paying for only the 30 trust acreage.” Notice of Appeal, July 10, 2013 at 2 (AR at 943, 944). As explained in more detail below, the Regional Director responded with his January 7, 2014, decision, in which he rejected Appellants’ argument that BIA was improperly leasing their fee interests and owed them compensation.

## II. Allotment 278A – Oil and Gas Lease with Spotted Hawk Development

Allotment 278A consists of 320 acres. Appellants’ mother owned a 20% interest in the allotment, and thus Philip inherited a 17.323% interest in fee ( $.20 \times 0.86614579$ ), which Appellants contend is now owed by themselves, Shantall, and Joseph. Appellants and their sister inherited equal one-third shares of the remaining 2.677% ( $.20 \times 0.13385421$ ).

In 2008, the Superintendent approved an Oil and Gas Mining Lease for Allotment M278A,<sup>7</sup> between the Indian trust landowners and Spotted Hawk Development, LLC (Spotted Hawk). Oil and Gas Mining Lease, Contract No. 7420A42018, Approved Nov. 4, 2008 (Lease) (AR at 64-66). The lease granted Spotted Hawk an “exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits . . . in or under” Allotment 278A. *Id.* The lease provides for a “cash bonus of \$800.00 per acre, paid to the payee designated by [BIA],” *id.* at 64, and the land is described as containing 320 acres. The lease also provides for payment of a royalty and of an annual rent of \$3.00 per acre. Multiplying the \$800 per acre cash bonus times 320 acres would total \$256,000. Similarly, the annual rent multiplied by 320 acres would total \$960.

On November 18, 2008, BIA issued an invoice to Spotted Hawk for the bonus and the first year’s rent. The amount invoiced for the bonus was \$211,653.34, and the amount invoiced for rent was \$793.70. Payment Invoice, Nov. 18, 2008 (BIA Supplementary Documents, Jan. 15, 2016, at 3). Thus, both amounts appear to reflect a pro-rata calculation of the bonus and rent owed to the owners of trust interests based on the percentage of trust ownership in the 320-acre tract.<sup>8</sup>

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<sup>7</sup> The “M” prefix refers to the mineral estate.

<sup>8</sup> For example, subtracting the 17.323% that passed in fee to Philip (and assuming, as appears to be the case, that there is no other fee ownership in the allotment), the trust interests would total 82.677%. Multiplying 320 acres  $\times$  \$800/acre  $\times$  .82677 = \$211,653.

In 2009, Appellant Ramirez submitted a complaint to the Office of Inspector General (OIG),<sup>9</sup> concerning the “remaining” payment for the lease with Spotted Hawk and the fee interests in Allotment 278A. In the complaint, Ramirez stated that she had contacted a representative of Spotted Hawk, Delvin Foote, “and informed him that he would have to do a separate lease directly with my family,” and that he had “indicated there would be no problem.” E-mail to HHS OIG, Apr. 30, 2009 (AR at 231). Ramirez stated that she had called BIA “and they said they had also informed Mr. Foote that he would need to [] have a separate contract for the fee patent land.” *Id.* According to Ramirez, she tried contacting Foote, but he didn’t respond, and when she contacted another Spotted Hawk representative, that representative “indicated the BIA sent invoices for the entire 320 acres” and that Spotted Hawk had “paid \$800 an[] acre.” *Id.* That representative, too, apparently did not respond to further inquiries from Appellants. *Id.*; *see also* Letter from Ramirez to Foote, Apr. 22, 2011, at 1 (AR 232) (“Since I was unable to get any phone calls [to] you returned, I contacted Joyce McEwen at the Company listed in the BIA payment record. Ms. McEwen indicated [that] Spotted Hawk . . . was billed for the entire \$256,000 . . . for the entire 320 acre tract. . . . [E]ventually she offered to draw up a contract with my family, but she never followed through.”). Appellant threatened Spotted Hawk with legal action, but the record does not indicate that she pursued such recourse. *See id.*; *see also* Letter from Ramirez to Spotted Hawk, June 3, 2013 (AR at 968). Ramirez continued to complain to BIA, arguing that Spotted Hawk had never paid for the “55 acres of fee patent land we own in the allotment of 320 acres.”<sup>10</sup> Letter from Ramirez to Superintendent, May 18, 2013, at 2 (AR at 134). The lease with Spotted Hawk apparently expired after a 5-year term beginning in 2008. Decision at 5 n.6.

As noted earlier, in 2013, Ramirez sought to force action by BIA on her various complaints, eventually resulting in a decision by the Superintendent in July 2013, followed by her appeal to the Regional Director.<sup>11</sup> In her appeal, after setting out her complaints

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<sup>9</sup> The OIG complaint consists of an email that apparently was sent by Ramirez to the OIG of the Department of Health and Human Services. *See* AR at 231. It is unclear whether the complaint was routed elsewhere or whether Ramirez received a response.

<sup>10</sup> Although the ownership is in the form of undivided interests in the whole, the Carlson family’s fee ownership, *see supra* at 277, expressed in “acreage equivalency,” totals approximately 55 acres (320 acres x 0.17323 = 55.43).

<sup>11</sup> Appellant Ramirez initially filed an appeal with the Board, under 25 C.F.R. § 2.8 (appeal from inaction of official), from BIA’s alleged failure to respond to a May 18, 2013, letter she had sent to both the Superintendent and the Regional Director. When the Superintendent issued a decision, the Board dismissed the § 2.8 appeal as moot. *See Ramirez*, 57 IBIA at 218.

about BIA's actions regarding Allotments 1798 and M278A, Ramirez noted that, in contrast, two other companies, QEP Energy Company and Kodiak Oil Company, had "followed up" and been "very compliant" in establishing separate agreements for the fee interests in certain parcels they were leasing. Notice of Appeal, July 10, 2013, at 3. According to Ramirez, "it was only Spotted Hawk and persons leasing out [A]llotment 1798 that did not make any effort to enter into separate agreements for the leasing out of undivided interest in the fee patent lands." *Id.* In a subsequent letter, apparently referring to the Spotted Hawk lease, Ramirez argued that BIA's "lack of action has cost my family at least \$51,000 in revenue by leasing out fee patent land for which you have no[] authority to do." Letter from Ramirez to Superintendent, July 30, 2013 at 1 (AR at 122).

### III. Regional Director's Decision

The Regional Director rejected Ramirez's contentions that BIA had been improperly leasing her fee interests in the various allotments and that BIA owed her compensation. The Regional Director stated that "BIA lacks authority to ensure that undivided fee interests are concurrently leased with the undivided trust interests," and concluded that BIA had no responsibility to compensate Ramirez "when a lessee fail[ed] to provide [Ramirez] with a share of the lease proceeds for those fee interests." Decision at 1. The Regional Director explained that BIA has no trust responsibility to the owners of fee interests, and is prohibited from "leasing non-trust lands" and collecting rent on behalf of fee owners. *Id.* at 4.<sup>12</sup> The Regional Director rejected Ramirez's argument that BIA's approval of a lease or permit on Indian land containing undivided fee interests is "tacit approval for the lessee/permittee to take possession of the non-trust property." *Id.* at 5. The Regional Director stated that it is the responsibility of a lessee or permittee who acquires BIA approval of a lease or permit for the trust portion of the Indian land "to concurrently seek consent from the owners [of] the undivided fee interests." *Id.* The Regional Director quoted Board precedent stating that "[t]he failure of the lessees to contact [the fee interest owners] and make arrangements with them for payment of their share of the lease rentals is not the responsibility of BIA." *Id.* at 6 (quoting *Quiver v. Deputy Assistant Secretary—Indian Affairs (Operations)*, 13 IBIA 344, 355 (1985)). For this reason, the Regional Director rejected Ramirez's claims that she is owed compensation. The Regional Director

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<sup>12</sup> The Regional Director took issue with Ramirez's assertion that BIA was leasing out lands, explaining that BIA is not the "lessor" of Indian lands and is not a party to the leases. *Id.* at 4. That is correct for leases, although we understand Ramirez's contentions as directed at BIA's *approval* of leases, without which leases by the trust owners of the allotments would not be valid. In addition, BIA does grant, and not merely approve, permits for grazing on range units containing, in whole or in part, individually owned Indian land. See 25 C.F.R. § 166.217(c).

also disputed Ramirez's contention that OST had found that BIA owed her compensation for the non-leasing of the fee interests in Allotment 1798. *Id.* at 6. And in response to an argument by Ramirez that BIA owes her compensation because its practices reduced her share of proceeds from the *Cobell* settlement,<sup>13</sup> the Regional Director stated that claims or alleged losses relating to fee ownership interests were outside the scope of the *Cobell* proceedings, and thus would have had no effect on claims arising under *Cobell* or the settlement. *Id.* at 7.

The Regional Director also found that Ramirez's request to remove Allotment 1798 from the range units was not properly executed, and that Ramirez's interest only represented one-third of the trust ownership interests, whereas removal of Indian land from a range unit requires written consent of a majority of the trust ownership. *Id.* at 5. The Regional Director did concede, however, that the Fort Berthold Agency had not completed Ramirez's repeated requests for fee-to-trust and trust-to-fee transactions in certain allotments, and he ordered that those matters be transferred to the regional office. *Id.* at 7.

#### IV. Appellants' Appeal to the Board

On appeal to the Board from the Regional Director's decision, Appellants argue that because the lease for Allotment M278A with Spotted Hawk encompasses and grants access to the entire 320-acre tract, it constitutes "passive permission on the part of the BIA for the lessee to trespass on fee patent acreage." Notice of Appeal, Jan. 24, 2014, at 2. Appellants contend that a simple statement from BIA "before the BIA finalizes any lease," that fee interests need to be covered by a separate agreement, "would clearly solve this problem." *Id.* Appellants suggest that BIA's approval of a lease that encompasses the entire acreage of an allotment allows possession of the entire acreage, and interferes with the fee owners' ability to obtain cooperation from lessees, because they have an approved lease from BIA to use the entire acreage. *Id.* Appellants reiterate their contention that the OST Trust Officer "determined . . . that . . . BIA owed my family \$10,841.74" for its leasing practices, with respect to Allotment 1798. *Id.* at 4. Appellants also contend that BIA lost the properly executed forms they had submitted to remove Allotment 1798 from the range unit.

As relief, Appellants request compensation for the 5-year oil and gas lease to Spotted Hawk for Allotment 278A, compensation for the grazing permits issued for Allotment 1798 from 1981 to the present, and compensation for BIA's actions regarding fee ownership interests on the theory that they reduced Appellants' share of the *Cobell*

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<sup>13</sup> 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.

settlement. *Id.* at 8-9. Appellants reiterate their request for removal of Allotment 1798 from the range unit, and for action on the fee-to-trust and trust-to-fee transactions.

In addition to the arguments contained in their notice of appeal, Appellants filed an opening brief. The Regional Director filed an answer brief. Appellants did not file a reply brief.

After briefing on the merits was concluded, the Board solicited a status report from the Regional Director on the fee-to-trust and trust-to-fee transactions, solicited additional information from the Regional Director on several questions posed by the Board, and allowed responses from Appellants. *See* Order, Oct. 26, 2015. The Regional Director filed a status report and responses, and moved to supplement the record. *See* Status Report and Response to Request for Additional Information and Motion to Supplement Record, Jan. 15, 2016.<sup>14</sup> Appellants did not file a response to the Regional Director's submission.

## Discussion<sup>15</sup>

### I. BIA's Leasing Practices

We affirm the Regional Director's decision to the extent he concluded that BIA leasing practices in this case did not constitute leasing, or approving leases granting rights in, Appellants' fee ownership interests in the allotments. BIA's regulations plainly state that BIA "will not lease any fee interest in Indian land, nor will [BIA] collect rent on behalf of any fee owners." 25 C.F.R. § 162.102(c). And however beneficial it might be to the fee owners for BIA to condition the leasing of trust interests on a lease having been obtained from the fee interest owners, BIA's regulation expressly preclude it from imposing such a condition. *Id.*

Although we affirm the Regional Director's decision, in one respect we conclude that he understated the practical effect of BIA's approval of a lease of Indian lands. Under BIA's leasing regulations, a lease grants "a right to possess Indian land," and "Indian land" means "any *tract* in which *any interest* in the surface estate is owned by a tribe or individual

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<sup>14</sup> The Board grants the Regional Director's motion to supplement the record.

<sup>15</sup> As an initial matter, we agree with the Regional Director that to the extent Appellants are seeking money damages, the Board lacks jurisdiction over those claims, and dismisses them accordingly. *See Oswald v. Northwest Regional Director*, 42 IBIA 90, 90 (2005). But because Appellants' underlying contention is that BIA has been improperly leasing their fee interests, and the Regional Director addressed that contention, we review the Regional Director's decision on the merits with respect to Appellants' underlying contention.

Indian in trust or restricted status and includes both individually owned Indian land and tribal land.” 25 C.F.R. § 162.003 (definitions of “lease” and “Indian land”) (emphases added). Thus, a “tract” of land, with respect to the surface estate, that is owned in both trust and fee undivided interests is “Indian land,” within the meaning of the definition, and as noted a lease grants the lessee a “right to possess Indian land.” In that respect, we disagree with the Regional Director that a lease of Indian land is not tacit approval for the lessee to “take possession of the non-trust property.” Decision at 5. When ownership is held in undivided interests, there is no separate “trust” and “non-trust” acreage; the lessee necessarily takes possession of “Indian land” that includes both trust and nontrust property. But that possession, standing alone, does not infringe upon the rights of co-owners of fee interests, e.g., when it does not exclude fee owners from leasing and being compensated for their undivided interests in the same land.

In the present case, the record supports the Regional Director’s conclusion that BIA has not been improperly approving leases that infringe upon Appellants’ rights as owners of fee interests in the allotments. Both the permit for Allotment 1798, and the lease for Allotment M278A, undoubtedly grant a possessory interest in the whole, in certain respects, just as the Indian trust owners have a possessory interest in the whole by virtue of their ownership of undivided interests in the whole. See *Quiver*, 13 IBIA at 351 (“unity of possession means that each tenant has an equal right to possession”). But the grazing permits only granted rights of consumptive use in proportion to the trust ownership of Allotment 1798, and did not purport to prevent Appellants, as owners of fee interests, from entering into their own agreement with BIA’s permittee, or their own lessee,<sup>16</sup> for the remaining carrying capacity of the allotment for livestock grazing. Moreover, as suggested by the Special Trustee, if a permittee used the tract in excess of rights proportional to the trust interest, the fee owners may well have a claim against the permittee. Where, as here, BIA does not purport to have granted, or authorized, an exclusive possessory grazing right to Allotment 1798; incorporated AUMs in the permit in proportion to the trust interests; and did not seek to charge for the fee interests, we agree with the Regional Director that Appellants have not shown that BIA engaged in improper leasing practices or owes them compensation.<sup>17</sup>

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<sup>16</sup> Although BIA repeatedly suggested to Appellants that they could strike their own deal with the trust owners’ lessee, the fact that BIA’s regulations divorce BIA from any involvement with the fee interest owners arguably suggests that—at least where BIA has already approved a lease for the trust interests—BIA would not object to the fee owners entering into a lease with a different lessee, so long as the fee owners’ lease did not interfere with the rights of the trust owners.

<sup>17</sup> As the Board recognized in *Quiver*, if one co-tenant uses or develops the entire property and receives full value for that use or development, there is a duty to account to the other

(continued...)

Similarly, the lease for Allotment M278A granted rights that encompassed the entire 320 acres included in the tract. But because the trust owners only have a right to grant a leasehold with respect to their own property interests, the lease could not grant Spotted Hawk any rights in the fee interests owned in the allotment. The actual language of the lease states that the lessors (i.e., the trust owners) are granting Spotted Hawk an “exclusive right” to drill, etc., and develop the mineral estate. Although the lease might have been worded more clearly, we construe the language to mean that the trust owners are granting an exclusive right *with respect to their trust interests*. The record indicates that this is how both BIA and Appellants interpreted the lease. BIA’s invoice to Spotted Hawk billed it only for the bonus and rent in proportion to the trust ownership, and not for the full ownership of the entire tract. And after the lease by the trust owners was approved by BIA, Appellants sought a separate agreement with Spotted Hawk, and understood BIA to have advised Spotted Hawk that it must negotiate separately with the fee interest owners. *See supra* at 278. According to Ramirez’s correspondence, the representatives of Spotted Hawk agreed to enter into a separate agreement, but then failed to do so. Whatever claims Appellants may have against Spotted Hawk, they have not shown that BIA acted improperly in approving the lease, or that BIA owes Appellants compensation based on Spotted Hawk’s failure to obtain the consent of the fee owners before taking possession of the property.<sup>18</sup>

## II. Removal of Allotment 1798 from BIA’s Range Unit

In reporting on the status of the various fee-to-trust and trust-to-fee transactions, the Regional Director advised the Board that BIA has completed requests from Appellants to issue fee patents to them for the interests that they held in trust for Allotments 1019 and 1798. Regional Director’s Status Report at 2. Each Appellant held a trust ownership interest of 0.044618, *see* AR at 283, and thus an additional 0.089236 interest is now owned in fee. Adding that to the 0.86614579 interest inherited by Philip in fee, the fee ownership of Allotment 1798 now totals 95.5%.

Because Appellants no longer own any trust interests in Allotment 1798, the Regional Director contends that their request to remove the allotment from the range unit is moot. Regional Director’s Status Report at 5. The Regional Director also advises that

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(...continued)

cotenants for their shares of the return. 13 IBIA at 352. As was the case in *Quiver*, that did not occur here.

<sup>18</sup> Without deciding whether Appellants’ *Cobell*-related claim for compensation might be barred under the terms of the *Cobell* settlement, we agree with the Regional Director that the *Cobell* litigation involved claims regarding trust property, not fee interests.

BIA will adjust the grazing permits to reflect the change in the trust ownership of Allotment 1798.

We agree that the issuance of fee patents to Appellants moots their request, *as trust owners*, for the removal of Allotment 1798 from BIA's range unit. But we are not convinced that the controversy has been rendered moot. First, we do not construe Appellants' request for the removal of the allotment from the range unit as limited to a request in their capacity as trust owners.<sup>19</sup> More importantly, however, the record indicates that all of the trust owners at one time may have requested removal of the allotment from the range unit. Whether the properly executed forms were never submitted, or whether—as Appellants contend—BIA lost the forms, we are not convinced that the matter is moot. While the record does not support an order requiring BIA to remove the allotment from the range unit, we conclude that it is appropriate to remand the matter with instructions for BIA to consult with the owners of Allotment 1798 and make a determination on whether to remove it from the range unit.

### III. Fee-to-trust and Trust-to-fee Transactions

The Regional Director reports that fee patents were issued to Appellants for their trust interests in Fort Berthold allotments 1019 and 1798. Regional Director's Status Report at 2. The Regional Director also reports that the fee-to-trust acquisition requests by Appellants for their fee interests in Allotment 278A have progressed, and that both Appellants are working on completing certain documents for BIA. *Id.* at 2-4. The Regional Director also states that Appellants have not submitted applications for fee-to-trust conveyances for their interests in Allotments 1907 and 321A, and that Ramirez has stated that she will address these at a later date. *Id.* at 5.

Appellants did not respond to the Regional Director's status report. We conclude that, to the extent Appellants intended through this appeal to seek an order from the Board for BIA to take action on the various fee-to-trust and trust-to-fee transactions, no further relief is appropriate. Thus, we dismiss the appeal with respect to these claims.

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<sup>19</sup> We express no opinion on whether, and if so to what extent, owners of fee interests in an allotment, in this case exceeding 95%, have legal standing with respect to a decision by BIA whether to include the allotment in a range unit. Regardless of their legal standing, BIA is not precluded from considering their views, which could be relevant to determining what is in the best interest of the trust interest owners.

## 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 affirms in part the Regional Director's January 7, 2014, decision, remands the issue of the removal of Allotment 1798 from the range unit, and dismisses the appeal in remaining part.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Robert E. Hall  
Administrative Judge