



## INTERIOR BOARD OF INDIAN APPEALS

Susan Fredericks, John Fredericks III, Casey Fredericks, Mary Malee Fredericks, and  
Shawn Fredericks v. Great Plains Regional Director, Bureau of Indian Affairs

63 IBIA 274 (07/28/2016)



# 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

SUSAN FREDERICKS, JOHN	)	Order Affirming Decision
FREDERICKS III, CASEY	)	
FREDERICKS, MARY MALEE	)	
FREDERICKS, AND SHAWN	)	
FREDERICKS,	)	
Appellants,	)	
	)	
v.	)	Docket No. IBIA 15-074
	)	
GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	July 28, 2016

Susan Fredericks, John Fredericks III, Casey Fredericks, Mary Malee Fredericks, and Shawn Fredericks (collectively, Appellants) each hold an undivided 1/7 remainder interest in a number of trust allotments they propose to lease to Casey Fredericks. Judy Fredericks holds a full life estate without regard to waste in the trust property subject to the proposed lease, entitling her to the full use and enjoyment of that property during her lifetime. Appellants sought approval from the Bureau of Indian Affairs (BIA) to lease the property to Casey Fredericks without the consent of the life tenant, which approval was denied by BIA on the ground that the proposed lease lacked the consent of the holder of the life estate. We affirm the Regional Director’s decision because Appellants, as remaindermen, are vested with a present fixed right of future enjoyment of the property, but have no authority to lease the lands during the life estate holder’s lifetime, without her consent.

## Background

This case concerns ten tracts of land (the Allotments)<sup>1</sup> located on the Fort Berthold Reservation. Appellants each received a 1/7 remainder interest in the Allotments, *see* Title Status Reports, July 30, 2013 (AR 0), through the probate of the estate of their late father,

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<sup>1</sup> The legal descriptions for these properties appear in the Superintendent’s March 28, 2014, decision. *See* Superintendent’s Decision at 1 (Administrative Record (AR) 3).

John Fredericks, Jr., *see* Decision in Probate P000047582IP, June 20, 2009, at 4-5 (Probate Decision) (AR 6). Appellants, who received remainder interests in the Allotments, are five of the seven children of John Fredericks, Jr. Through the same probate proceeding, Judy Fredericks, wife of the decedent, received a full life estate without regard to waste in all of the decedent's trust property, including the Allotments.<sup>2</sup> Probate Decision at 4.

On November 18, 2013, Appellants submitted an agricultural lease to BIA for approval. Draft Lease (AR 2). The lease was signed by Appellants and purported to lease the Allotments to Casey Fredericks, one of the Appellants, for a term of 5 years. *Id.* at 1-2, 4-5. The Acting Superintendent of BIA's Fort Berthold Agency (Superintendent) issued his decision declining to approve Appellants' proposed lease on March 28, 2014. Superintendent's Decision. He stated that Appellants sought approval of the lease under the authority of the American Indian Agricultural Resource Management Act of 1993 (AIARMA), 25 U.S.C. § 3701 *et seq.*, as amended. *Id.* at 2. Specifically, he explained, Appellants asserted that 25 U.S.C. § 3715(c)(2)(A)-(B) authorized owners of a majority interest in any trust or restricted land to enter into agricultural leases, and that the Superintendent should therefore approve the proposed lease as they had met the necessary consent requirement. *Id.* The Superintendent found that neither the applicable Indian leasing statutes, including AIARMA, nor the regulations found in 25 C.F.R. Part 162, subpart B, directly addressed the consent requirements for life estate holders or those holding a remainder interest in granting agricultural leases. *Id.* at 2. Relying on general principles of property law, he concluded that Appellants had not met the consent requirements of AIARMA because those holding only a remainder interest held no "current possessory control" over the Allotments and could not approve a lease until the life estate had been extinguished. *Id.* at 3.

Appellants appealed the Superintendent's decision to the Great Plains Regional Director (Regional Director). *See* Notice of Appeal, Apr. 24, 2014 (AR 4); Statement of Reasons, May 15, 2014 (AR 5). They contended that they are "landowners," as defined by AIARMA, 25 U.S.C. § 3703(13), controlling a majority interest in the lands at issue, and were therefore authorized pursuant to § 3715(c)(2) of that statute to enter into an agricultural lease of their land. Statement of Reasons at 2-3. Furthermore, they argued, while the life tenant may have a "special interest" in the right to receive income derived from trust land, a life tenant is not an Indian landowner under AIARMA, and does not have the right to lease, or prevent the remaindermen from leasing, the Allotments. *Id.* at 3.

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<sup>2</sup> We affirmed the probate judge's distribution of John Fredericks, Jr.'s estate in accordance with the provisions for intestate succession under the American Indian Probate Reform Act of 2004 (AIPRA), codified at 25 U.S.C. § 2201 *et seq.* *See Estate of John Fredericks, Jr.*, 57 IBIA 204 (2013).

The Regional Director issued his decision on March 10, 2015, affirming the Superintendent's decision. Decision (AR 12). The Regional Director explained that both the life estate and the remainder interests were created in accordance with the intestate succession provisions of AIPRA, specifically 25 U.S.C. § 2206. *Id.* at 2. Citing BIA regulations regarding life estates, 25 C.F.R. § 179.202, he stated that the holder of a life estate without regard to waste may cause lawful depletion or benefit from the lawful depletion of estate resources. *Id.* at 2. Therefore, he reasoned, the life estate holder's right of use must include the right to consent to such use of the property. *Id.* Looking to common law principles of property law, the Regional Director also determined that "when all of the trust or restricted interests in a tract are subject to a single life estate, the life tenant may lease the land without the consent of the owners of the remainder interests for the duration of the life estate." *Id.* at 4. In response to Appellants' arguments regarding the authority of interest owners under AIARMA, the Regional Director stated that the statute "did not specifically address the situation of life estates and remainder interests" and therefore it was necessary to look to common law interpretations of life estates. *Id.* at 3. According to the Regional Director, only interest owners "vested with the authority to consent to the agricultural uses of their land" would be counted toward the majority of interests required by the law to enter into a lease. *Id.* The consent of a life tenant holding a full life estate without regard to waste, he concluded, "is always required for an agricultural lease," and would satisfy the majority interest consent requirement of AIARMA. *Id.*

Appellants appealed the Regional Director's decision to the Board of Indian Appeals (Board), and filed an opening brief in which they present various arguments in support of their contention that, as remainder interest owners, AIARMA grants Appellants the right to enter into a lease of the Allotments without the consent of the life tenant. The Regional Director filed an answer brief, and Appellants filed a reply. Judy Fredericks also filed a brief in opposition to the appeal.

### **Standard of Review**

We review questions of law, including interpretations of statutes and regulations, *de novo*. *Black Weasel v. Rocky Mountain Regional Director*, 59 IBIA 258, 261 (2014). The appellant bears the burden of demonstrating error in BIA's decision. *Id.*

### **Discussion**

We affirm the Regional Director's decision. Because the statutes and regulations governing agricultural leasing do not address the consent requirements for a holder of a life estate or remainder interest in leasing trust property for agricultural use, we apply general principles of property law concerning the corresponding rights and authority of the life tenant and holders of a remainder interest. *See Adakai v. Acting Navajo Regional Director*,

56 IBIA 104, 108 (2013) (stating that because the regulations do not address the effect of consent by the holder of a life estate, we apply general principles of property law). It is well established that the holder of a full life estate without regard to waste, and not the holders of remainder interests, has the authority to use and benefit from the life estate during the life estate holder's lifetime. *See, e.g.*, 51 Am. Jur. 2d *Life Tenants and Remaindermen* § 34 (2015) ("The owner of a possessory life estate, i.e., the life tenant, has a right to exclusive, undisturbed possession of the land, as well as use of the property to the exclusion of the remainderman . . . .").

Upon the death of her husband, Judy Fredericks was awarded a "life estate without regard to waste" in the Allotments and other trust property in her husband's estate pursuant to the intestate succession provisions of AIPRA, 25 U.S.C. § 2206(a)(2)(A)(i). *See Estate of Fredericks*, 57 IBIA at 209. AIPRA defines a "life estate without regard to waste" to mean that the holder of the life estate "is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." 25 U.S.C. § 2201(10). BIA's regulations define a "life estate" as "an interest in property held for only the duration of a designated person's life. A life estate may be created by a conveyance document or by operation of law." 25 C.F.R. § 179.2. "A life estate terminates upon relinquishment or upon the death of the measuring life." *Id.* § 179.4. The holder of a life estate without regard to waste "may cause lawful depletion or benefit from the lawful depletion of the resources." *Id.* § 179.202. And while the life tenant has full possessory control of the estate and of the income it generates during his or her lifetime, to the exclusion of any holders of remainder interests, *see id.* § 179.201, the life tenant may not prejudice the interests of the remaindermen by causing, or allowing, damage to the property, either through negligence or malicious act, *id.* § 179.202. We conclude that to realize the benefits conveyed by the life estate, a life tenant must have the authority to decide what use, if any, will be made of the estate and by whom, and this authority necessarily includes the right to consent to, or withhold consent from, any lease or permit concerning the estate's resources during their tenancy.

The general principles of property law provide that a life estate is "a present interest that terminates on the death of an individual whose life serves as the governing life." Restatement (Third) of Prop.: Wills and Other Donative Transfers § 24.5 (2003). A life estate holder "has the power to create any interest in land which includes any or all of the rights, privileges, powers and immunities which constitute the estate for life," but the life estate holder cannot convey any "right, privilege, power or immunity" greater than he or she holds. Restatement (First) of Prop. § 124 (1936). Remaindermen holding indefeasibly vested remainders are "certain to acquire a present interest *sometime in the future* and will be entitled to retain the interest permanently." Black's Law Dictionary 1483 (10th ed. 2014) (emphasis added). The holder of a remainder interest, also termed a "present

fixed right of future enjoyment,” *id.*, acquires authority over the property held in a life estate only upon expiration of the life tenancy.

Though our previous decisions have not specifically addressed the significance, or sufficiency, of a life estate holder’s consent to the execution of an agricultural lease, we have acknowledged the authority of the life tenant in determining the use of that estate during their lifetime. In *Adakai*, the Board explained that a “person holding an estate less than fee simple may create an easement *only within the terms of his or her estate*,” beyond which, “[t]he holder of a life estate cannot bind, nor consent on behalf of, the owner of a remainder interest because that interest is not within the terms of a life interest.” 56 IBIA at 108-09 (emphasis added); *see also* Restatement (Third) of Prop.: Servitudes § 2.5 (2000). Thus, as a general rule, when a life tenant seeks to commit the estate to a use that would exceed the duration of the life tenancy, the life tenant must obtain the consent of the majority of remainder interests, because their future interests would be implicated for the period that extends beyond the expiration of the life estate. *See Western Refining Southwest, Inc. v. Acting Navajo Regional Director*, 63 IBIA 41, 53 (2016) (“Remaindermen hold a vested future interest in the [trust property], and therefore may consent to [its use] *for the period following the life tenants’ lifetimes*.” (emphasis added)). The Board also clarified that BIA could approve, with the consent of the life tenant alone, a long-term grant (in that case, a 20-year right of way), as long as the term was qualified by the duration of the life estate and would terminate upon its expiration. *Id.* at 47-48.

We also addressed the relative authority of life estate holders and remaindermen in *Enemy Hunter v. Acting Rocky Mountain Regional Director*, 51 IBIA 322 (2010). Appellants misinterpret the import of our holding, mistakenly concluding that “the consent of both the life tenant and remaindermen are required for a valid lease.” Opening Brief (Br.), June 30, 2015, at 17. When we decided *Enemy Hunter*, the regulations governing agricultural and grazing leases on trust property required that, “where a life estate and remainder interest are both owned in trust or restricted status, the life estate and the remainder interest must both be leased under these regulations, unless the lease is for less than one year in duration.” *Enemy Hunter*, 51 IBIA at 326 (alterations omitted) (quoting 25 C.F.R. § 162.102(b) (2010)). We applied this regulation to conclude that BIA had not erred in informing the appellant that remaindermen consent was necessary for appellant to execute a 5 year lease of his life estate interest. *Id.* at 322. BIA’s regulations at that time merely required that for leases greater than 1 year—leases possibly extending beyond the life estate holder’s tenancy—the consent of both the life tenant and the remaindermen was necessary. The life

tenant's authority to lease the estate for periods of less than 1 year without seeking the consent of the remaindermen was not in dispute.<sup>3</sup>

Appellants ground their legal argument on AIARMA, 25 U.S.C. § 3715(c)(2)(A):

The owners of a majority interest in any trust or restricted land are authorized to enter into an agricultural lease of the surface interest of a trust or restricted allotment, and such lease shall be binding upon the owners of the minority interest in such land if the terms of the lease provide such minority interests with not less than fair market value for such land.

*See* Opening Br. at 8-10. Appellants contend that the remaindermen fall within AIARMA's definition of "Indian landowner" and thus they have the right to lease the Allotments. *Id.* at 10. AIARMA defines "Indian landowner" as an Indian or Indian tribe that "owns such Indian land, or . . . is the beneficiary of the trust under which such Indian land is held by the United States." 25 U.S.C. § 3703(13). While we do not dispute that Appellants, as holders of remainder interests in trust land, are beneficiaries of the trust under which the trust property is held, this does not give them the authority to enter into a lease of the Allotments based upon their consent alone. Appellants hold no present possessory interest in the Allotments, and therefore cannot authorize a lease for the present use of the Allotments.

The regulations governing agricultural leases provide that "[a]n agricultural lease must be executed by individuals having the necessary capacity and authority to bind the tenant under applicable law." 25 C.F.R. § 162.220(b). It is this capacity, and authority, that Appellants, as holders of a future possessory interest, lack. *See* 51 Am. Jur. 2d *Life Tenants and Remaindermen* § 1 ("A 'remainder' is an estate that only takes effect in possession immediately after the expiration of the prior estate created at the same time and by the same instrument."). And nothing in the statutes or regulations cited by Appellants grant to them a greater, or different, legal interest in the Allotments than was distributed to them, by operation of law, in the probate of their father's estate. They received then, and still retain, a vested right in the future enjoyment of their respective shares of the trust property now held in a full life estate without regard to waste, created by the same operation of law, to the benefit of the life tenant, Judy Fredericks. Appellants' ability to

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<sup>3</sup> The regulation that governed the outcome in *Enemy Hunter* was amended as part of the revision of the Indian leasing regulations in 2012 to clarify that the holder of a life estate has the authority to lease trust property for the duration of the life estate, without the consent of remaindermen. *See* 25 C.F.R. § 162.004(b)(1) (2013).

exercise their rights of ownership will become effective with the expiration of the life tenancy.

Here, life estate holder Judy Fredericks owns a 100% undivided present possessory interest in the Allotments and therefore has the right to grant or withhold her consent to any use, or lease, of the Allotments. Appellants, as remaindermen, hold no right to the present use and enjoyment of the Allotments and therefore no authority to lease the Allotments without the consent of the life tenant. The Superintendent correctly determined that he lacked authority under the applicable law to approve Appellants' purported lease of the Allotments to Casey Fredericks, and Appellants have failed to show that the Regional Director erred in affirming the Superintendent's denial of the lease.

### **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 the Regional Director's March 10, 2015 decision.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge