



## INTERIOR BOARD OF INDIAN APPEALS

Davin and Susan French v. Acting Great Plains Regional Director, Bureau of Indian Affairs

63 IBIA 304 (08/31/2016)



# 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

DAVIN AND SUSAN FRENCH,	)	Order Affirming Decision in 15-060
Appellants,	)	and Vacating and Remanding Decision
	)	in 15-061
v.	)	
	)	Docket Nos. IBIA 15-060
ACTING GREAT PLAINS REGIONAL	)	15-061
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	August 31, 2016

An Indian tribe may assign tribal land for the use of its members and without the approval of the Bureau of Indian Affairs (BIA). Such land assignment contracts or agreements are made in accordance with tribal law and custom, and are governed by tribal, not Federal, law. Tribes may also lease land to members and non-members, subject to approval of BIA. BIA-approved leases of Indian land are governed by the regulations in 25 C.F.R. Part 162. Where a lease is required, unauthorized use of Indian land will be treated as a trespass by BIA, unless BIA has reason to believe the party in possession is negotiating with the Indian landowner to obtain a lease.

Davin and Susan French (Appellants) appealed to the Board of Indian Appeals (Board) from two decisions, dated December 18, 2014, of the BIA Acting Great Plains Regional Director (Regional Director), affirming the Winnebago Agency Acting Superintendent's (Superintendent) determination that Appellants trespassed on two separate tracts of tribal land on the Omaha Indian Reservation and assessment of damages and penalties for same. Because both of the Regional Director's decisions involve Appellants and concern similar issues, the Board consolidates these appeals for the purpose of our decision.

The primary issue before the Board is whether Appellants are liable for trespassing on tribal tract T 29N-2 by removing alfalfa bales from the tract, and on tribal tract T 3083 by grazing cattle, without a BIA-approved lease or authorization.<sup>1</sup> In both cases,

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<sup>1</sup> Tribal tract T 29N-2 is described as the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 33, T. 25 N., R. 8 E., and tribal tract T 3083 is described as the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 3, T. 25 N., R. 9 E. Each

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Appellants contend that they had negotiated leases over a period of years with the landowner, the Omaha Tribe of Nebraska (Tribe), and were using the land with the Tribe's authorization. We affirm the Regional Director's decision in Docket No. IBIA 15-060 because the Tribe had granted a lease of tribal tract T 29N-2 to another party, which BIA had approved shortly before the trespass, and Appellants failed to show that they had the lessee's, the Tribe's, or BIA's consent to enter the tract when they had the standing alfalfa crop mowed and baled or when they removed the bales. However, we vacate the Regional Director's decision in Docket No. IBIA 15-061, because BIA failed to address Appellants' argument that Appellants were negotiating a lease with the Tribe for continued use of tribal tract T 3083, that the Tribe's Council had consented to and accepted payment for use of the tract during the period at issue, and that Appellants were assured that a written lease from the Tribe was forthcoming for the tract. Further, Appellants complied fully with BIA's instructions by removing their livestock from tract T 3083 within the 5-day time frame specified in BIA's notice of trespass. Thus, we remand the matter to the Regional Director for further consideration.

### Regulatory Framework

Tribes may grant leases of tribally-owned agricultural land, subject to BIA's approval. 25 C.F.R. § 162.207(a). An agricultural lease "means a written agreement between Indian landowners and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of Indian land, for a specified purpose and duration." *Id.* § 162.101. Following approval by BIA, agricultural leases must be recorded in the BIA Land Titles and Records Office with jurisdiction over the land. *Id.* § 162.217(a). If an agricultural lease is required, and individuals use Indian land without a lease, the unauthorized use is a "trespass." *Id.* §§ 162.101, 162.106(a). Unless BIA believes "that the party in possession is engaged in negotiations with the Indian landowners to obtain an agricultural lease," BIA will act to recover possession of the land, and pursue any additional available remedies, including trespass damages, costs, and penalties. *Id.* §§ 162.106; *see also id.* Part 166, Subpart I–Trespass. When BIA has reason to believe a trespass has occurred, BIA will issue a notice of trespass to the alleged trespasser, with instructions including the corrective actions to be taken and the time frame for taking those actions. *Id.* § 166.803. The trespasser can either comply with the corrective actions or explain in writing why the trespass notice is in error. *Id.* § 166.804. If the trespasser fails to take the specified corrective action, BIA may seize, impound, sell or dispose of unauthorized livestock or

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property is in the Sixth Principal Meridian, Thurston County, Nebraska, and embraces 40.00 acres, more or less.

other property involved in the trespass, and assess penalties, damages, and costs, as appropriate. *Id.* §166.806.

A tribe may also authorize the use of its land by tribal members and wholly owned tribal corporations under tribal law, without BIA approval, and the Federal regulations found in 25 C.F.R. Part 162 do not apply. *See id.* § 162.006(b)(1)(vii) (providing that Part 162 does not apply to “[t]ribal land assignments, and similar instruments authorizing use of tribal land . . . which are covered by . . . tribal laws.”). As relevant here, tribal land assignments are “contract[s] or agreement[s] that convey[] to tribal members . . . any rights for the use of tribal lands, assigned by an Indian tribe in accordance with tribal laws or customs.” *Id.* § 162.003 (definition of tribal land assignment). Enforcement of such agreements are also a matter of tribal, rather than Federal, law.

### **Background**

These appeals stem from alleged incidents of trespass committed by Appellants on two tracts of tribal agricultural land in June 2014, and the imposition of damages and penalties by the Superintendent following issuance of notices of trespass, in accordance with BIA regulations. *See* 25 C.F.R. §§ 166.800 to 166.819. In both cases, BIA was aware, before issuing the notices of trespass, that Appellants claimed to have negotiated leases with the Tribe for agricultural use of the tracts, but that Appellants did not hold BIA-approved leases for either tract.<sup>2</sup> *See* BIA Narrative of T-29-N-2, entry for June 24, 2014 (T 29N-2 AR 7, Tab 2<sup>3</sup>); BIA Narrative of T-3083, entry for June 9, 2014 (T 3083 AR 7, Tab 2).

In a June 11, 2014, letter to the Tribe’s Chairman concerning inspections conducted by BIA Natural Resources personnel on four parcels of tribal land, including T 3083, the Superintendent reported that individuals were observed using the tracts without leases approved by BIA. Letter from Superintendent to Tribe, June 11, 2014, at 1-2 (unnumbered) (T 3083 AR 7, Tab 4). The Superintendent informed the Chairman that

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<sup>2</sup> The record indicates that Susan French is a member of the Omaha Tribe, and Appellants contend generally that their agreements with the Tribe concerning use of the tracts were made under tribal, not Federal law. Statement of Reasons, July 31, 2014, at 2-3 (unnumbered) (T 29N-2 SOR) (T 29N-2 Administrative Record (AR) 3). Each administrative record in this consolidated appeal is identified by the tract number to which it refers. Therefore, the record in Docket No. IBIA 15-060, which relates to a trespass decision on tract T 29N-2, is identified as T 29N-2 AR, and the record in IBIA 15-061 is identified as T 3083 AR. References to documents within a record are to the enumerated tab location.

<sup>3</sup> In this case, AR 7 in the administrative record is further divided internally by tabs.

BIA had contacted Appellant Davin French on June 9, 2014, regarding ownership of livestock on T 3083 and that Appellant acknowledged ownership and stated that the Omaha Tribal Realty Officer and Doran Morris, Jr.<sup>4</sup> had given verbal permission to use the land without first obtaining an approved lease. *Id.* at 2 (unnumbered). The Superintendent advised the Chairman of the potential loss of revenue for the Tribe from not leasing the tracts at market rates, and presented three options for the Chairman's consideration: leasing the tracts pursuant to Federal regulations and subject to a BIA Plan of Conservation Operations; pursuing unauthorized users for trespass and removing their livestock under BIA trespass regulations; or continuing to allow tribal members to use the Tribe's land without a BIA-approved lease. *Id.* While discouraging the third option due to the potential loss of income, the Superintendent acknowledged the Tribe's authority to authorize use of tribal lands by tribal members. *Id.* The Superintendent requested a written response from the Tribe on how to proceed concerning these tracts, *id.* at 3 (unnumbered), but the record does not indicate that a response was provided.

On June 6, 2014, the BIA Winnebago Agency received a tribal resolution approving a lease negotiated by the Tribe's Realty Department with Omaha Nation Farm for tribal tract T 29N-2, with a term of 3 years and annual rental payments of \$8,000. Resolution No. 14-79, Omaha Tribe of Nebraska, May 16, 2014 (T 29N-2 AR 7, Tab 3). BIA approved the lease on June 9, 2014. Lease No. 141873-14-17, June 9, 2014 (T 29N-2 AR 7, Tab 3).<sup>5</sup> The record does not indicate whether BIA informed Appellants of its approval of the lease of T 29N-2.

On June 20, 2014, the lessee of T 29N-2, reported that someone had mowed and baled the standing alfalfa field on T 29N-2. Email from Superintendent, June 20, 2014 (T 29N-2 AR 7, Tab 6). The BIA Natural Resources Officer (NRO) confirmed through an on-site visit that 58 large round bales were present on the tract. Email from BIA NRO to Superintendent, June 20, 2014 (T 29N-2 AR 7, Tab 6). On a follow-up visit 3 days later, BIA employees confirmed that the bales had been removed, probably on June 20 or June 21, 2014. Field Notes, June 23, 2014 (T 29N-2 AR 7, Tab 7). BIA Soil Conservationist Jason McCauley also noted that, "This is [the] 2nd year for [the] alfalfa."<sup>6</sup>

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<sup>4</sup> Mr. Morris, also referred to as DJ Morris, is identified elsewhere as the Vice Chairman of the Tribe's Council. *See* BIA Narrative of T-3083, entry for June 26, 2014.

<sup>5</sup> While the lease was granted by decision of the Tribe's Council on May 16, 2014, and approved by BIA on June 9, 2014, the lease term was recited as beginning March 1, 2014, and ending February 28, 2017. *Id.* at 1 (unnumbered).

<sup>6</sup> Alfalfa is a perennial forage legume typically used for livestock feed. It may be harvested the year following seeding, after the plants have been established, and in most climates may  
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Concerning tribal tract T 3083, Appellant Davin French spoke with BIA Soil Conservationist McCauley on June 9, 2014, and reported that he was pasturing 24 pairs of cattle on T 3083 and that he had received verbal permission from council member DJ Morris to use the tract and that the Tribe's Realty Officer was sending him a lease. Field Notes, June 9, 2014 (T 3083 AR 7, Tab 3). On June 24, 2014, Appellant Susan French sent a text message to McCauley questioning BIA's involvement in the French's arrangements with the Tribe for use of tribal land. Text message from Susan French to Jason McCauley (T 3083 AR 7, Tab 5). Concerning tract T 3083, Appellant stated, "they [the Tribe] have cashed our check this year for our pasture so that is leased." *Id.* Appellant stated that "[w]e have paid for that hay piece<sup>7</sup> for three years now and Savin [sic] has met with the council 3 plus times and this last time they made a deal[,] shook his hand and voted on it to give him a five year lease." *Id.* Appellant also stated, "[t]he alfalfa is ours[,] we planted it and have paid for the ground the last three years." *Id.*

The Superintendent and BIA staff met with the Tribe's Realty Officer and Omaha Council Vice Chairman Morris on June 26, 2016. The handwritten notes from that meeting, which were taken by BIA Realty Officer Monica Flores, are unclear but indicate that Soil Conservationist McCauley provided a review of his observations regarding the two tracts. Notes from June 26, 2014, Meeting (T 3083 AR 7, Tab 7). Under the heading "Jason – T-29N-2 review" is the statement, "Davin was promised this lease and Davin paid." *Id.* Elsewhere in the meeting record is the notation, "DJ Morris – Wants to re[s]cind all offers w/ Davin & Susan[] & [f]or them to remove cattle." *Id.*

On that same day, McCauley and other BIA employees carried out a follow-up inspection of the pasture on tract T 3083. Field Notes, June 26, 2014 (T 3083 AR 7, Tab 6). Appellants were also on site inspecting their livestock. *Id.* McCauley recorded that they counted roughly 20 cow-calf pairs, a bull, and a donkey, milling about in the pasture. *Id.* The field notes also record that "it did appear that the musk thistles had been treated. Mrs. French did mention it was fertilized." *Id.* The field notes also include the statement, "Mr. and Mrs. French claim to have made a payment, but do not have approved lease . . . . I encouraged them to bring up any supporting documentation they may have." *Id.*

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be cut 3 to 4 times a year. Alfalfa normally lives for 4 to 8 years, and its nitrogen-fixing qualities make it ideal for use in a rotational farming system. *See, e.g.*, Alfalfa, Wikipedia, <https://en.wikipedia.org/wiki/Alfalfa> (last accessed Aug. 30, 2016). A copy of the Wikipedia article has been added to the record.

<sup>7</sup> Appellant was presumably referring to tract T 29N-2.

On June 27, 2014, Appellants came to the BIA Winnebago Agency Office to discuss livestock grazing on T 3083 and the status of T 29N-2. BIA Narrative of T-3083, entry for June 27, 2014. At the beginning of the meeting, Appellants provided BIA with a packet of documents concerning their use of the two tracts. *Id.* Soil Conservationist McCauley accepted the documents and made copies, and the materials were date stamped. *Id.* McCauley then served the notices of trespass on Appellants. *Id.* See also Receipt of Notice of Agricultural Trespass, June 27, 2014 (T 3083 AR 1). Appellants declined to sign the receipt acknowledging service of the notices of trespass, but reportedly took pictures of the notices before leaving the meeting. See Letter from Superintendent to Tribe's Chairman, June 27, 2014 (T 3083 AR 7, Tab 11). Following the meeting, BIA mailed the notices to Appellants. See *id.* The notices informed Appellants that removing 58 bales from T 29N-2 and grazing livestock on T 3083, without an approved lease or authorization from BIA, constituted trespass, as outlined in 25 C.F.R. § 166.800. See Notice of Agricultural Trespass, June 24, 2014 (T 29N-2 Notice) (T 29N-2 AR 1); Notice of Agricultural Trespass, June 27, 2014 (T 3083 Notice) (T 3083 AR 1). Appellants were advised that they had 5 days from receipt of the notices to address the trespass violations<sup>8</sup> or the Winnebago Agency would pursue adverse action against Appellants, which could include seizing the livestock and assessment of penalties and costs associated with remedying the trespass. T 29N-2 Notice at 1 (unnumbered); T 3083 Notice at 1 (unnumbered). The notices also recommended that Appellants contact BIA to discuss these matters. T 29N-2 Notice at 2 (unnumbered); T 3083 Notice at 2 (unnumbered).

In a chronology prepared by Appellants and provided to BIA at the June 27 meeting, Appellants acknowledged that they arranged for the mowing of the alfalfa field on T 29N-2 on June 10, 2014, and baling of the alfalfa on June 13, 2014. Leases with the Omaha Tribe (Appellants' Chronology), entries for June 10 and June 13, 2014 (T 29N-2 AR 7, Tab 12). Appellants also acknowledged that they moved the bales off the tract on June 21, 2014. *Id.*, entry for June 21, 2014. The supplemental information provided by Appellants at the June 27 meeting also included copies of cancelled checks purportedly representing lease payments to the Tribe for T 29N-2<sup>9</sup> and for the pasture lease on tract

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<sup>8</sup> The notice of trespass for T 29N-2 explained that removal of the bales without an approved lease or authorization from BIA constituted trespass, but did not identify any corrective action. See T 29N-2 Notice at 1 (unnumbered). Rather, the notice advised Appellants that they had 5 days "to address the trespass violation" and warned that it was "imperative" that they contact the BIA Branch of Natural Resources to discuss the matter. *Id.* at 1-2 (unnumbered).

<sup>9</sup> See Check No. 1712, from Davin French to Tribe, May 31, 2013, with notation "2012 Rent" and Check No. 1713, same, with notation "2013 Rent" (T 29N-2 AR 7, Tab 12).

T 3083.<sup>10</sup> Appellants also included invoices for what appear to be fertilizer purchases from 2012 and 2013 and a May 2012 check for disking, apparently related to preparation of tract T 29N-2 for planting alfalfa.<sup>11</sup>

In documentation provided to BIA on November 20, 2014, Appellants supplied copies of additional receipts, cancelled checks, and U.S. Department of Agriculture (USDA), Farm Service Agency documents in support of their claims. (T 3903 AR 8). Appellants included copies of checks made out to the Tribe in 2011, 2012, 2013, and 2014, each bearing a notation indicating the check was for “pasture rent,” along with copies of the bank cancellation stamps indicating that each check had been deposited by the Tribe.<sup>12</sup>

According to BIA, Appellants did not respond verbally or in writing within the 5-day time frame provided in the notices of trespass. Superintendent’s T 29N-2 Trespass Decision, July 10, 2014, at 1 (unnumbered) (T 29N-2 AR 2); Superintendent’s T 3083 Trespass Decision, July 11, 2014, at 1-2 (unnumbered) (T 3083 AR 2). The Superintendent assessed the value of the 58 bales of alfalfa at \$110/ton, estimated that each bale weighed one ton, and determined that the total value of the 58 bales was \$6,380. Superintendent’s T 29N-2 Trespass Decision at 1 (unnumbered). Adding a penalty of twice the value of the products illegally removed, as authorized by 25 C.F.R. § 166.812(a), the total trespass assessment plus penalties came to \$19,140. *Id.* Trespass damages and penalties were also assessed for the use of tract T 3083. The Superintendent valued the forage consumed by Appellants’ livestock “observed on the property from June 9, 2014 until July 2, 2014,” at \$468.13, and added a penalty of twice that value, to arrive at a total assessment of value plus penalties of \$1,404.39. Superintendent’s T 3083 Trespass Decision at 1 (unnumbered). Both trespass decisions, including the invoices for payment of the trespass damages and penalties, were served on Appellants on July 21, 2014. Return of Service, Thurston County Sheriff’s Office, July 21, 2014 (T 29N-2 AR 7, Tab 16).

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<sup>10</sup> See Check No. 2184 from Davin French to Tribe, May 1, 2014, with notation “pasture rent” (T 3083 AR 7, Tab 8).

<sup>11</sup> See Pender Grain, Inc., receipts dated May 18, 2012, and Oct. 30, 2013, and Check No. 1220 from Davin French to Brad Burhoop, May 22, 2012, with notation “disking” (T 29N-2 AR 7, Tab 12).

<sup>12</sup> See Check Nos. 748, 1126, 1570, and 2184, from Davin French to Tribe (T 3083 AR 8). See also Receipt, from Appellants, Mar. 1, 2013, (T 3083 AR 8). The receipt was signed by Joseph Harlan, who was the Tribe’s Realty Officer during the period relevant to this appeal.

Appellants appealed to the Regional Director, disputing the finding that they were trespassing on the tracts. Notice of Appeal, July 30, 2012 (T 3083 AR 3); Notice of Appeal, July 31, 2014 (T 29N-2 AR 3). Appellants argued that in 2011, the Tribe's Council agreed that they could lease T 29N-2 for a period of five years, and that the Tribe accepted and cashed Appellants' rent checks in 2012 and 2013. Statement of Reasons, July 31, 2014, at 1 (unnumbered) (T 29N-2 SOR) (T 29N-2 AR 3). Appellants explained that they were informed that their lease for T 29N-2 had been rescinded on April 25, 2014. *Id.* at 2 (unnumbered) (citing to Letter from Tribe's Director of Land Management to Appellants, April 25, 2014, enclosed with their appeal to the Regional Director (T 29N-2 AR 3)). But, they maintained, the Tribe's letter confirmed that a lease existed and that, "at the very least, [Appellants] would get to finish harvesting this year's crop." *Id.* Appellants included with their appeal copies of USDA Farm Service Agency contracts for tract T 29N-2 that identified Appellant Davin French as the producer and were signed by the Tribe. T 29N-2 SOR, Direct and Counter-Cyclical Program (DCP) Contract, Program Years 2012 and 2013. (T 29N-2 AR 3).

Appellants also contended that they had leased T 3083 since 2011, had paid their rent every year to the Tribe, and that the Tribe accepted and cashed their rent check in May 2014, which covered the period of the trespass. Statement of Reasons, July 30, 2014, at 1 (unnumbered) (T 3083 SOR) (T 3083 AR 3). Appellants again asserted that they received permission from the Vice Chairman of the Tribe's Council to pasture their cows on T 3083. *Id.* at 2 (unnumbered). They stated that Appellant Susan French is an "enrolled Omaha" and that at "no time did we ever break any Tribal Laws." *Id.* According to Appellants, the Tribe's Realty Officer assured them they would receive written leases, but they were never provided. T 29N-2 SOR at 1 (unnumbered); T 3083 SOR at 1 (unnumbered).

After considering the arguments raised by Appellants, the Regional Director affirmed the Superintendent's decisions. Regional Director's Decision, December 18, 2014, at 2-3 (T 29N-2 Decision) (T 29N-2 AR 8); Regional Director's Decision, December 18, 2014, at 2-3 (T 3083 Decision) (T 3083 AR 9). The Regional Director acknowledged that Appellants had made verbal arrangements with members of the Tribe's Council regarding these tracts of land in the past. T 29N-2 Decision at 3; T 3083 Decision at 2. But he concluded that Appellants were trespassing because no BIA-approved and recorded leases existed between the Tribe and Appellants that authorized Appellants use of the property. T 29N-2 Decision at 2-3; T 3083 Decision at 2-3. Appellants then appealed the Decisions to the Board.

### **Scope of Review**

The Board reviews BIA decisions to determine whether they comport with the law, are not arbitrary and capricious, and are supported by substantial evidence. *Western*

*Refining Southwest Inc. v. Acting Navajo Regional Director*, 63 IBIA 41, 47 (2016); *Rose v. Acting Pacific Regional Director*, 62 IBIA 330, 334 (2016). The Board applies a *de novo* standard when reviewing questions of law and the sufficiency of the evidence. *Rose*, 62 IBIA at 334. Appellants bear the burden of showing error in the Regional Director's Decisions. *Id.* Mere disagreement with the Decisions is insufficient to meet Appellants' burden of proof. *Kelley v. Eastern Oklahoma Regional Director*, 54 IBIA 26, 30 (2011).

### Discussion

In their appeals, Appellants argue that they paid rent to the Tribe for several years for use of the tribal tracts, and that BIA was aware of their use. 15-060 Opening Brief (Br.), Apr. 14, 2015, at 1 (unnumbered); 15-061 Opening Br., Apr. 14, 2015. In particular, Appellants claim BIA knew the alfalfa field had been planted and farmed by Appellants, but had not notified them of any trespass issue in prior years. 15-060 Opening Br. at 1. Appellants also claim that USDA Farm Service Agency records signed by the Tribe show that Appellants were the operators of the tract, with the consent of the Tribe. *Id.* Appellants contend that the record indicates that "Mr. Morris was the one who ordered the livestock to be removed" from tract T 3083, and that "this is not a decision that can be made by one tribal council member." 15-061 Opening Br. at 1 (unnumbered). Finally, Appellants dispute the finding of trespass and assessment of damages and penalty on tribal tract T 3083 because, they claim, they "removed the livestock right away," and informed the Superintendent they had done so. *Id.*

Appellants concede that they did not have a written lease agreement approved by BIA, but argue that they had the Tribe's consent, and that "[t]he tribe is the responsible party for taking the documents to the BIA office." T 29N-2 SOR, at 2 (unnumbered). Appellants rely on their previous use of T 29N-2 and their payments to the Tribe to argue that they were not trespassing. 15-060 Opening Br. at 1 (unnumbered).

We agree with the Regional Director that while this may show that Appellants and members of the Tribe's Council had an informal agreement concerning T 29N-2 in the past, they did not have an agricultural lease permitting them to use the tribal tract under Federal regulations. At the time of the trespass, tract T 29N-2 was held by a lease granted by the Tribe to Omaha Nation Farm for a period of 3 years, which was approved by BIA on June 9, 2014. Lease No. 141873-14-17. BIA approval of the lease placed use of the tract squarely under Federal regulations. And, in a meeting with BIA, the manager of Omaha Nation Farm made clear that he had not approved Appellants' removal of the alfalfa bales. BIA Meeting Notes, June 23, 2014 (T 29N-2 AR 7, Tab 8). Appellants have failed to show they had the necessary authority to remove the alfalfa bales from the tract, and

therefore fail to meet their burden to prove the Regional Director erred in finding they had committed trespass in so doing.<sup>13</sup>

But we reach a different conclusion regarding tribal tract T 3083. BIA's agricultural leasing regulations require it to act if possession of Indian land is taken by a non-landowner, unless that party is engaged in negotiations to obtain an agricultural lease. 25 C.F.R. § 162.106(a). Neither the Superintendent's Trespass Decisions nor the Regional Director's Decisions appear to discuss this consideration. The approval by BIA of a lease to Omaha Nation Farm for tract T 29N-2 effectively dispels any argument that Appellants were negotiating for a lease of that tract at the time of the trespass. In contrast, there was no recorded lease or permit granted by the Tribe and approved by BIA for the use of T 3083 at the time Appellants were cited for trespass. Hence, we find more significant Appellants' argument that in June 2014, they were in the process of negotiating a lease of T 3083 with the Tribe.

Appellants provided evidence of their May 2014 rental payment for the use of T 3083. Check No. 2184 from Appellant Davin French to Tribe, May 1, 2014 (T 3083 AR 7, Tab 8). And the administrative record includes a June 11, 2014, letter from the Superintendent to the Tribe's chairman referencing tract T 3083, and requesting a written response on how to handle tribal member use of the Tribe's land without a BIA approved lease or permit. Letter from Superintendent to Tribe, June 11, 2014, at 1-2 (unnumbered)

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<sup>13</sup> As noted above, BIA assessed the value of the alfalfa bales at \$6,380, and added double that amount in penalties, for a total invoiced amount of \$19,140 for the trespass. According to the trespass regulations, the proceeds recovered from Appellants' trespass may be distributed to:

- (1) Repair damages of the Indian agricultural land and property;
- (2) Reimburse the affected parties, including the permittee for loss due to the trespass, as negotiated and provided in the permit; and
- (3) Reimburse for costs associated with the enforcement of this subpart.

25 C.F.R. § 166.818(b). The regulations further provide that "[i]f any money is left over after the distribution of the proceeds described in paragraph (b) of this section, [BIA] will return it to the trespasser . . . ." 25 C.F.R. § 166.818(c). The Superintendent's Trespass Decision and invoice did not identify any need for or cost to repair damages to T 29N-2, or reimbursement to BIA for costs associated with enforcement. *See* Superintendent's T 29N-2 Trespass Decision (T 29N-2 AR 2). It is not apparent from the record that the current lessee had incurred any agricultural costs related to the standing alfalfa crop which had been planted prior to the beginning of the lease period, or that the presence of the bales before their removal occasioned any loss, or cost, to the lessee. However, any such losses would be reimbursed before returning the remaining proceeds to Appellants.

(T 3083 AR 7, Tab 4). In concluding his letter, the Superintendent stated, “[o]nce the Winnebago Agency has received your written response we shall pursue accordingly.” *Id.* at 3 (unnumbered). The record does not include a written reply from the Tribe. In their appeal from the Superintendent’s decision, Appellants claimed they were negotiating with the Tribe, had paid rent in May 2014 for the use of T 3083, which the Tribe had accepted, and had received assurances from the Vice-Chairman of the Tribe’s Council and the Tribe’s Realty Officer that they could continue using the tract for pasturing their livestock while they waited for a signed lease from the Tribe. *See* T 3083 SOR at 1 (unnumbered). In that context, it was an error for the Regional Director to fail to address Appellants’ claim and explain why the evidence of negotiations with the landowner, recognized as a consideration against a finding of trespass in § 162.106(a), did not apply in this instance.

Appellants also challenged the assessment of damages and penalty on the grounds that they had removed their livestock within the 5-day time frame provided in the Superintendent’s notice of trespass, and had informed the Superintendent on July 2, 2014, that they had complied. *See id.*; 15-061 Opening Br. at 1. The Regional Director’s Decision does not address this claim; however, we note that the calculation of damages provided in the Superintendent’s Trespass Decision is based on the livestock “observed on the property from June 9, 2014 until July 2, 2014.” Superintendent’s T 3083 Trespass Decision at 1 (unnumbered). This would at least suggest that Appellants had timely complied with the notice of trespass and raises a question concerning the basis for assessing damages and penalties against Appellants. The regulations governing trespass on Indian land lay down a two-step process, beginning with the issuance of a notice of trespass, *see* 25 C.F.R. § 166.803, that is followed, if appropriate, by a decision concerning trespass damages, *see id.* § 166.806. *See O’Connor v. Rocky Mountain Regional Director*, 54 IBIA 308, 314 & n.13 (2012). BIA may assess penalties, damages, and costs, “[i]f the trespasser fails to take the corrective action” specified in the notice of trespass. 25 C.F.R. § 166.806. Once notified by BIA that they were to remove their livestock, Appellants did so, and apparently within the time frame provided by BIA. While Appellants’ use of tract T 3083 was not authorized by BIA, Appellants contend that it was authorized by the Tribe, and provide evidence—including a signed receipt for rent payment—and argumentation in support of their position. Assuming that Appellants’ use was authorized under tribal law, the basis for collecting “the value of the products illegally used” and a penalty of double that value, as provided under 25 C.F.R. § 166.812(a), is unclear at best. For these reasons, we vacate the Regional Director’s Decision regarding T 3083 and remand for further consideration in light of this decision.

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 December 18, 2014, decision in Docket No. IBIA 15-060 finding Appellants were liable for trespass when they removed alfalfa bales on tribal tract T 29N-2 when that tract was

held by a BIA-approved lease to another party. However, we vacate and remand for further consideration the Regional Director's December 18, 2014, decision in Docket No. IBIA 15-061 finding Appellants liable for trespass on tribal tract T 3083, because the Regional Director failed to consider Appellants' argument and evidence that they were negotiating a lease for the pasture, and were not liable for damages or penalties because they had complied fully with the conditions laid down in BIA's notice of trespass.

I concur:

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Robert E. Hall  
Administrative Judge

          //original signed            
Steven K. Linscheid  
Chief Administrative Judge