INTERIOR BOARD OF INDIAN APPEALS

Alda Bighorn and Ernest C. Bighorn, Jr. v. Rocky Mountain Regional Director, Bureau of Indian Affairs

64 IBIA 94 (04/04/2017)
Individual Indian mineral owners may execute leases for the development of oil and gas resources on their trust or restricted lands, subject to approval by the Bureau of Indian Affairs (BIA). As a general rule, such leases must be advertised for bid, but at the request of Indian mineral owners, BIA may negotiate leases on their behalf, if BIA decides it is in the best interests of the Indian mineral owners to do so. 25 C.F.R. § 212.20(b).

Assignments of leases must be approved by BIA, and must also be approved by Indian mineral owners if the lease requires mineral owner approval. Id. § 211.53(a); see id. § 212.53.

Alda Bighorn and Ernest C. Bighorn, Jr. (Appellants) are owners of undivided interests in trust allotments on the Fort Peck Indian Reservation and, along with other co-owners, asked BIA to negotiate oil and gas leases for their mineral interests. Appellants, and other mineral co-owners, also executed acceptance-of-lessee forms, which recited the proposed bonus amount, rental and royalty rate, and initial lease term for each lease. But after BIA had approved leases as proposed by Appellants, and subsequent assignments of the leases by the lessees, Appellants began to question whether BIA had complied with its regulations governing oil and gas leases and assignments. Appellants’ concerns were also apparently heightened by the lack of active mineral development on their allotments. Eventually, Appellants asked BIA to declare the leases and assignments invalid, and to either advertise the lands as available for mineral leasing or, if requested by the mineral owners, assist them in pursuing new leases.

BIA’s Fort Peck Agency Superintendent (Superintendent) rejected Appellants’ request to declare the leases invalid, and the Rocky Mountain Regional Director (Regional Director) affirmed the Superintendent’s decision.
We affirm the Regional Director’s decision because Appellants have not met their burden to demonstrate that the leases were invalid, or that BIA should have declared them so. Appellants raise a variety of arguments in claiming that the leases were not properly executed, or that BIA did not properly follow its regulations. Although we do not discount several potentially troubling questions that Appellants raise about what, if any, meaningful review BIA conducted of the leases before approving them, it does not follow that BIA erred in refusing to declare the leases invalid.

Background

I. BIA’s Oil and Gas Leasing Regulations

Part 212 of Title 25 of the Code of Federal Regulations governs leases for the development of oil and gas resources on individual Indian trust or restricted lands. 25 C.F.R. § 212.1. Section 212.1(a) provides that the regulations “are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development.” With exceptions not relevant here, BIA does not execute oil and gas leases on behalf of the Indian mineral owners. See id. § 212.21(a). The owners-lessees must execute the leases themselves, but BIA must approve an executed lease in order for it to become valid. See id. §§ 212.20, 212.21.

BIA’s regulations provide that

Indian mineral owners may request the Secretary to prepare, advertise and negotiate mineral leases on their behalf. Leases for minerals shall be advertised for bids as prescribed in this section unless one or more of the Indian mineral owners of a tract sought for lease request the Secretary to negotiate for a lease on their behalf without advertising. Unless the Secretary decides that negotiation of a mineral lease is in the best interests of the Indian mineral owners, he shall use [the advertisement-for-bid] procedure for leasing.

Id. § 212.20(b) (emphasis added). When determining whether negotiation is in a mineral owner’s best interest, the Secretary “shall consider any relevant factor,” including economic considerations, the probable financial effect on the Indian mineral owner, the leasability of the land concerned, marketability, and potential environmental, social, and cultural effects. Id. § 212.3 (definition of “In the best interest of the Indian mineral owner”).
The regulations also address assignments of mineral leases. As relevant here:

Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary. *The Indian mineral owner must also consent if approval of the Indian mineral owner is required in the lease.* If consent is not required, then the Secretary shall notify the Indian mineral owner of the proposed assignment.

*Id.* § 211.53(a) (incorporated by reference in § 212.53) (emphasis added).

II. Mineral Owner Requests for Negotiation of Leases

Of the 14 leases at issue in this appeal, 1 lease was issued pursuant to an advertisement for bids and lease sale. *See* Contract No. 14-20-0256-0825, Approved Sept. 8, 2009 (Oil and Gas Lease, Allotment No. M955, Sale 7/2008) (Administrative Record (AR) 16). The remaining 13 leases were negotiated. *See, e.g.*, Contract No. 14-20-0256-2049, Approved Oct. 19, 2011 (Oil and Gas Lease, Allotment No. M2760) (AR 16).

For the 13 negotiated leases, the record shows that between June 2010 and January 2012, Appellants and several other co-owners of allotments that are subject to the leases sent letters to the Superintendent, asking BIA to “negotiate and enter into” oil and gas leases for tracts in which they owned an undivided interest. *See* Memorandum from Superintendent to Regional Director, Apr. 14, 2015 (AR 31) (attaching negotiation-request letters from allottees); *see also* Email from Boxer to Schiff, July 14, 2015 (AR 38) (attaching same). The letters are identical in form and vary only in the proposed bonus for the respective tract of land. For example, with respect to Allotment No. M2760, Appellant Alda Bighorn sent a letter to the Superintendent that reads as follows:

I, the undersigned Allottee, would like the Agency to negotiate and enter into an oil and gas lease with Fort Peck Energy Company, LLC for my interest in the following Allotment at $250.00 per acre:

<table>
<thead>
<tr>
<th>Allotment No.</th>
<th>M2760</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Allottee:</td>
<td>Ernest Bighorn</td>
</tr>
<tr>
<td>Land Description:</td>
<td>[legal description]</td>
</tr>
<tr>
<td>Containing</td>
<td>130.00 Acres</td>
</tr>
</tbody>
</table>

It is my understanding that any such lease would be on a BIA lease form and under terms and conditions approved by the Agency.

Sincerely,

[signature]
[typed name]
Letter from Alda Bighorn to Superintendent, Sept. 1, 2011 (AR 31, 38); see also Letter from Ernest C. Bighorn, Jr., to Superintendent, Aug. 30, 2011 (request to negotiate lease for Allotment No. M70-A) (AR 31). The bonus requested in the letters ranges from a low of $50.00 per acre to a high of $250.00 per acre. See generally Negotiation-Request Letters (AR 31, 38).

Between July 2010 and March 2012, the Superintendent approved 13 oil and gas leases for which negotiation-request letters had been submitted to BIA by an owner. See generally Lease Contracts (AR 16). In each case, the lease terms included the bonus amount specified in the letter asking BIA to negotiate and enter into a lease on the requester’s behalf. See id.

III. Mineral Owner Acceptance Forms

On the signature page of most of the leases, the line for the signature of the lessor states, “PLEASE SEE ATTACHED CONSENT(S),” while in the remaining leases the line is left blank. Compare Contract No. 14-20-0256-1497, Approved Aug. 1, 2011 (Oil and Gas Lease, Allotment No. M70) with Contract No. 14-20-0256-0937, Approved July 8, 2010 (Oil and Gas Lease, Allotment No. M1014). As evidence of Indian mineral owner consent to the leases, the record contains forms for each lease titled, “ACCEPTANCE OF LESSOR TO BE ATTACHED TO OIL AND GAS MINING LEASE” (Acceptance-of-Lessor form). Each Acceptance-of-Lessor form identifies the name and address of the individual landowner who completed the form, and states in relevant part as follows:

The undersigned, who owns an undivided [specified fraction] trust interest in this lease, hereby accepts [specified amount] as (his)(her) share of the bonus of [total bonus amount] bid by [Lessee] . . . for an oil and gas lease on the land described below, subject to all of the conditions contained in the standard oil and gas lease form, approved by the Bureau of Indian Affairs . . . such lease having been offered for competitive bidding at the regular public sale of oil and gas mining leases on ___________ at the Fort Peck Agency in accordance with the regulation contained in [25 C.F.R. Part 212] . . . and to be effective upon the approval thereof by the Secretary of the Interior or his authorized representative.

. . .

(Allotment Name) (Tribe) (Allotment Number)

. . .

(Legal Land Description)
Lease Terms: Bonus [specified amount] per net mineral acre, Rental $3.00 per net mineral acre, Term 5 years, [specified percentage] royalty.\[1\]

[Additional terms applicable if the land, rental, or royalty interest is divided]

See, e.g., Acceptance-of-Lessor form for Allotment No. M2760, Aug. 31, 2011 (executed by Ernest C. Bighorn, Jr.) (AR16); Acceptance-of-Lessor form for Allotment No. M2760, Sept. 1, 2011 (executed by Alda Bighorn) (AR16). In each case, the execution of the form by signature of the allottee/lessor is acknowledged either by two witnesses or by a Notary Public. In most cases, the line on the form for the date of public lease sale is left blank; on some forms it is filled in with a “0” with a line crossing it. Compare Acceptance-of-Lessor forms for Allotment No. M2760 with Acceptance-of-Lessor form for Allotment No. M1850, Nov. 17, 2010 (executed by James A. Bighorn) (AR 16). For Allotment No. M955—the one lease issued on the basis of bids from an advertised lease sale—the Acceptance-of-Lessor forms include the date that the lease was advertised for sale. See generally Acceptance of Lessor forms for Allotment No. M955 (AR 58).

IV. Assignments of the Leases

Each lease is on a BIA form containing standardized mineral leasing terms, one of which prohibits assignments of the lease, or any interest therein, “except with the approval of the Secretary of the Interior.” See, e.g., Oil and Gas Lease, Allotment No. M2760 ¶ 2.H. (“ASSIGNMENT OF LEASE”) (AR 16). None of the leases at issue in this appeal contain language that requires the approval of the Indian mineral owners for assignments.

Each of the leases in the record was subsequently assigned, in whole or in part, by the original lessee, and each assignment was approved by the Superintendent. See, e.g., Assignment of Mining Lease, Sept. 4, 2012 (assignment of partial interest in the lease for Allotment No. M2760, from Fort Peck Energy Co. to Samson Oil and Gas USA Montana Inc., approved by Superintendent on Sept. 18, 2012) (AR 16).

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\[1\] The Acceptance-of-Lessor form for Allotment No. M1014 does not include information for the royalty or rental rates or the lease term. Acceptance-of-Lessor form for Allotment No. M1014, June 7, 2010 (executed by Alphius Bighorn, Jr.) (AR 51). The signatory of this form owns a majority interest in the allotment and did not participate in this appeal.
V. Appellants’ Request for BIA to Declare the Leases and Assignments Invalid, and BIA’s Decisions

The current controversy over the leases apparently began sometime in 2011, when Appellants and other members of the “Bighorn family” met with the Manager of Fort Peck Energy, the original lessee for most of the leases. That meeting, and a conversation with the Fort Peck Tribes’ Director of Minerals, prompted concern by Appellants that Fort Peck Energy had misled the Bighorn family to believe that drilling would occur on their lands after the leases were entered into, and that the oil company-lessees were profiting from assignments to which the landowners had not consented. Letter from Appellants to Superintendent, July 30, 2012, at 1 (AR 37).

In a letter to the Superintendent, Appellants stated that after they signed the leases, Fort Peck Energy concluded that it did not need the larger spacing unit anticipated when it “lobbied” the Bighorn family to sign the consent-to-lease forms, “deviated from [its] initial plans,” and decided to drill on fee land elsewhere in the leased area. Id. Appellants stated that, at the meeting referenced above, the Fort Peck Energy Manager gave them a copy of an Oil and Gas Mining Lease form and discussed the lease provision concerning assignments, with which, they contended, they were not familiar. Id. at 1-2. Appellants asked the Superintendent to answer a list of questions, including why the Indian mineral owners had not been given an opportunity to “consent/acknowledge” any of the lease assignments, and who is responsible for looking after the interests of Indian mineral owners for oil and gas leases. Id. at 3. Appellants expressed concern that the Superintendent had failed to negotiate what was best for the Indian mineral owners, and asked for further documentation and explanations. Id. at 4.

The Superintendent provided a written response to each of the questions presented by Appellants. Letter from Superintendent to Appellants, Sept. 12, 2012 (AR 37). She responded that the leases in question did not require landowner consent for assignments, but also noted the Secretary’s obligation, in such cases, to notify Indian mineral owners of proposed assignments. Id. at 1 (unnumbered). The Superintendent stated that BIA was now requiring “all companies to give notice to the mineral owners when they are doing an assignment.” Id. She further stated that lease assignments “are advantageous to the mineral owner” and that when a lessee is able to share the cost of mineral exploration and production, “there is a better chance that exploration and production can actually be accomplished.” Id. The Superintendent also stated that if a drilling plan is not incorporated in a lease, the lessee has no obligation to drill. Id. at 2 (unnumbered). With respect to Appellants’ question about who is responsible for looking after the Indian mineral owners’ interests, the Superintendent stated that any type of lease “may be approved by [the] Superintendent, when the landowner consents in writing and it is determined the lease is in the best interest of the landowner.” Id.
Appellants then raised additional concerns, including questions about preventing drainage from active wells near their allotments, mineral activity on their lands, at what point in lease execution an Indian mineral owner signs and when the lease becomes binding, and whether the lease assignment forms include a place for the mineral owners to sign. Letter from Appellants to Superintendent, Oct. 22, 2012 (AR 1).

The Superintendent responded that there was no drilling, proposed drilling, or well bores affecting any of the minerals in which Appellants owned an interest. Letter from Superintendent to Appellants, Nov. 6, 2012, at 1 (unnumbered) (AR 2). The Superintendent also advised Appellants that when an Indian mineral owner signs a consent-to-lease form, which is submitted to BIA by the lessee along with the lease, and the lease is approved by BIA, the lease becomes binding. Id. at 2 (unnumbered). In response to a question about options for leasing, the Superintendent stated: “A mineral owner may negotiate the terms and conditions of an oil and gas lease on[] their own or they may have it advertised to the highest bidder. Mineral owners may contact our office to discuss any terms of a contract.” Id.

In October 2014, Appellants sent a letter to the Superintendent in which they identified 14 allotments, and asked him to declare “all oil and gas leases” on those allotments invalid. See Letter from Appellants to Superintendent, Oct. 20, 2014, at 1 (Oct. 20 Letter) (AR 14). Leases on those allotments included the 13 negotiated leases and the 1 lease issued pursuant to an advertised lease sale. Compare AR 14 (list of allotment numbers) with AR 16 (copies of the 14 leases and related assignments). Appellants asserted that the leasing and assignment procedures had not conformed to BIA’s oil and gas leasing regulations, and that both the leases and assignments were invalid. Oct. 20 Letter at 2. Appellants expressed concern that the lessees had not pursued “active and meaningful mineral development” on their lands, and they asked that the lands be advertised as available for leasing after BIA declared the existing leases invalid. Id.

The Superintendent responded by stating, without explanation, that “all the leases are a valid contract once signed by the Superintendent,” and by enclosing copies of the leases, assignments, landowner consent forms, and a communication from the Agency to the Regional Office requesting a drainage review by the Bureau of Land Management (BLM). Letter from Superintendent to Alda Bighorn, Nov. 20, 2014 (AR 16). In a subsequent exchange of correspondence, the Superintendent stated that BIA had reviewed the landowner consent forms for the leases and determined that it had received consents covering a majority of the interests owned in the subject allotments, that the leases had been approved by BIA, and that once approved, the leases were valid. Letter from Superintendent to Alda Bighorn, Dec. 30, 2014 (December 2014 Decision) (AR 20).
Appellants appealed the Superintendent’s December 2014 Decision to the Regional Director. See Notice of Appeal, Jan. 30, 2015 (AR 20). Appellants argued that they “firmly believe[d]” that the leases and subsequent assignments were not in conformity with regulatory requirements and were invalid. Id. at 1. In a cover letter to the co-owners of nine of the allotments subject to mineral leases, Appellants stated that the reason they had requested cancellation was primarily because of their concern that their minerals were being drained by drilling near the allotments, and that no active or meaningful development had occurred on their allotments. Letter from Appellants to Allottees, Jan. 29, 2015 (AR 19). Two other mineral owners filed answers in support of Appellants’ appeal, requesting “cancellation” of several of the leases at issue. See Answers of Danna Fast Horse-Burns and Lydia (Fast Horse) Hyde, Mar. 9, 2015 (AR 28). Neither of those individuals apparently had executed an Acceptance-of-Lessor form for any of the leases.

After receiving the administrative record from the Superintendent, the Regional Director noted that the leases at issue are identified as negotiated leases, and that “[o]ne individual owning any trust interest in the tract can make a request to the Superintendent for negotiations as opposed to advertisement.” Letter from Regional Director to Superintendent, Apr. 16, 2015 (AR 33). The Regional Director asked the Superintendent to “provide documentation for the negotiation of the tracts for lease involved in [the] appeal.” Id. It is not clear from the record whether the Superintendent responded to the request, although the record contains copies of a negotiation-request letter from an Indian mineral owner for each of the 13 negotiated leases, see AR 31, and copies of Indian mineral owner-executed Acceptance-of-Lessor forms for each of the leases, see AR 45-58 (copies of lease documents by allotment number). The record also contains tabulations for each lease indicating the level of consent obtained from owners of interests in each allotment. See AR 45-48.

The Regional Director rejected Appellants’ arguments in that appeal and upheld the Superintendent’s determination that the leases and subsequent assignments were valid. Decision, Aug. 17, 2015 (AR 39). In their statement of reasons, Appellants put forth several arguments for finding the leases and/or assignments invalid, which we organize into

2 BIA’s referral of the drainage concern to BLM is not further addressed in the Regional Director’s decision, nor have Appellants explained how their concern, even if supported with evidence, would provide a basis to declare the leases invalid. And although Appellants have filed with the Board various correspondence regarding their efforts to obtain drainage reports from BIA and BLM, the Board lacks jurisdiction over appeals from Freedom of Information Act decisions or delays in responding to FOIA requests. Descendants and Heirs of Tulalip Allottee Behall/Katrina Jim v. Northwest Regional Director, 53 IBIA 131, 132 (2011).
three categories: (1) documentation of compliance with leasing procedures; (2) sufficiency of completed lease forms and mineral owner signatures; and (3) eligibility of assignees for assignments. ³

First, Appellants argued that the Superintendent failed to follow the mineral leasing regulations laid down in 25 C.F.R. § 212.20, which require the advertisement of mineral tracts for lease unless the Secretary determines that negotiating a lease is in the best interest of the Indian mineral owners. Statement of Reasons, Feb. 12, 2015 (SOR), at 2-3 (AR 25). According to Appellants, the Superintendent failed to provide documentation to show that a “best interest” determination was made to permit negotiating instead of advertising the leases. Id. at 3 (citing factors identified in 25 C.F.R. § 212.3 (definition of “In the best interest of the Indian mineral owner”)). Since there is no documentation to show that the required procedures were followed, Appellants concluded, the leases should be declared invalid. Id.

The Regional Director responded, without elaboration, that BIA “does not advertise tracts of land that already have oil and gas leases on them.” Decision at 1 (unnumbered). He also stated that Appellants provided no evidence to show that the leasing regulations regarding advertisement were not followed. Id.

Next, Appellants argued that the oil company-lessees did not file the “lease[s] in completed form, signed by the Indian mineral owner(s),” as required by 25 C.F.R. § 212.20(b)(5) for successful bidders. SOR at 3. Appellants argued that the Acceptance-of-Lessor forms only constitute the Indian mineral owners’ acceptance of his or her share of the bonus, but not the lease itself, and cannot serve as valid execution of the lease. Id. at 4-5. The Acceptance-of-Lessor forms, they argued, contain only a “scintilla of information regarding purported lease terms,” and contradict the “negotiated lease” designation on some of the leases because the forms recite that the lease was offered for competitive bidding. Id. at 4. “Since the leases have not been properly executed by the Indian mineral owner,” they concluded, “the leases should be deemed as invalid.” Id. at 5.⁴ Because the leases are invalid, they argued, so too are the lease assignments. Id. at 6-7.

³ Appellants organize their statement of reasons into seven statements, and the Regional Director responded to each, although the correspondence of the latter’s response to the substance of Appellants’ specific argument was not always apparent. To facilitate review, we have summarized Appellants’ arguments and the Regional Director’s responses.

⁴ Appellants also argued that BIA was not authorized to execute the leases on behalf of the Indian mineral owners, see SOR at 5 (citing 25 C.F.R. § 212.21(a)), but it is undisputed that the Superintendent did not purport to do so for any of the leases at issue in this case.
In response, the Regional Director stated that Appellants signed letters asking BIA “to negotiate and enter into an oil and gas lease” and the Superintendent “did as you requested when he negotiated a lease on your behalf.” Decision at 2 (unnumbered). Because Appellants asked the Superintendent to negotiate a lease, he explained, there was no advertised lease sale, and the “[b]idding regulations do not apply to the negotiated lease process.” Id. The Regional Director concluded that the Superintendent acted on Appellants’ request to negotiate a lease and that Appellants “provide no documentation that shows how the negotiated leases are not valid.” Id.

Finally, Appellants challenged the validity of the leases and lease assignments on the basis of the alleged ineligibility of the lessees and assignees to hold leases under a regulation requiring the filing of corporate qualifications by potential lessees. SOR at 6-7; see 25 C.F.R. § 212.23 (incorporating by reference § 211.23). With the exception of Fort Worth Operating Company, Appellants argued, the lessees and assignees are not eligible to hold leases and assignments. SOR at 6-7. They argued that the corporate documentation required by BIA had not been provided to Appellants, and that the status in good standing, with the Montana Secretary of State, of both Fort Peck Energy and Samson, was revoked or became inactive in 2013. Id.

The Regional Director responded that the BIA Handbook on which Appellants rely is an aid utilized by BIA, and that Appellants failed to provide evidence to support their assertions that the companies are not eligible for assignments. Decision at 2 (unnumbered).

Discussion

I. Standard of Review

Whether the Regional Director properly declined to declare a lease invalid can raise issues of both law and fact. As relevant to the arguments raised on appeal, which present either legal issues or sufficiency-of-evidence issues, the Board reviews questions of law and challenges to the sufficiency of the evidence to support a BIA decision de novo. See Goodwin v. Pacific Regional Director, 60 IBIA 46, 54 (2015); Bernard v. Acting Great Plains Regional Director, 46 IBIA 28, 35 (2007), aff’d, Bernard v. U.S. Dept. of the Interior, No. CIV 08-1019, 2011 U.S. Dist. LEXIS 58842 (D.S.D. June 1, 2011), denial of motion to alter judgment aff’d, 674 F.3d 904 (8th Cir. 2012). However, the burden rests with Appellants to show error in BIA’s decision. See Goodwin, 60 IBIA at 54; Dumbeck v. Acting Great Plains Regional Director, 47 IBIA 39, 46 (2008) (the appellant bears the burden to establish that the “circumstances are present and warrant setting aside a completed conveyance of an interest in Indian real property held in trust” (citing Bernard, 46 IBIA at 37 n.11)).
II. Arguments on Appeal

On appeal, Appellants raise substantially the same challenges to the Regional Director’s decision as they did to the Superintendent’s decision. Among other arguments, Appellants contend that the Regional Director referred to “best business practices,” but failed to explain why he concluded that the Superintendent’s actions and decisions comport with best business practices. Opening Brief (Br.), Feb. 17, 2016, at 4-5. According to Appellants, the requirements of Part 212 are best business practices, and were not followed by the Superintendent. Id. at 1. Appellants explained how the Superintendent had not complied with the regulations in their appeal before the Regional Director, and now reiterate those arguments and offer additional examples. Id. at 4. For instance, Appellants contend that the leases are identified as “negotiated leases,” but the record contains no evidence of negotiations, and that no meaningful record exists to support BIA’s determination that negotiation of the leases was in the mineral owners’ best interests. See id. at 4-5.

III. Analysis

While the appeal raises some potentially troubling issues regarding how BIA handled, and documented, the lease negotiation and consent procedures for the leases at issue in this appeal, we are not convinced that Appellants have demonstrated, on this record, that the Regional Director erred in refusing to declare the leases invalid.

A. Advertisement vs. Negotiation

Appellants maintain that BIA did not adhere to the regulations in Part 212 governing mineral leasing of individually owned Indian lands. In their appeal to the Board, Appellants argue that BIA did not exercise “best business practices” and cite, as an example, to the lack of documentation of negotiations by the Superintendent in securing mineral leases on their behalf. Opening Br. at 4-5. They argue that, had BIA properly negotiated with potential lessees, “there would have been a record of a negotiation session for each lease,” and that the absence of a “meaningful record” of negotiations is grounds for invalidating the leases. Id.

As a preliminary issue, Appellants have not specified whether they seek a declaration that the leases are “void ab initio,” and thus of no legal effect, or are “voidable,” and thus capable of being either avoided or confirmed. See Bernard, 46 IBIA at 35-36 (explaining the “significant” distinction between these two forms of relief); 17 Am. Jur. 2d Contracts § 9 (2017). To the extent Appellants argue that a failure by BIA to document its actions in negotiating the leases, or to determine that the lease terms requested by the Indian mineral owners were in their best interests, render the leases void ab initio, we are not convinced.
Although framed in terms of BIA’s compliance with a regulatory requirement, see 25 C.F.R. § 212.20(b), Appellants’ argument that BIA failed to make and document a best interest determination fundamentally raises a question of whether BIA met its trust responsibility to the Indian mineral owners. Appellants identify no authority for declaring a lease void ab initio based on allegations of breach of trust, and we can find none. See Bernard, 46 IBIA at 36 (finding “no authority for declaring a gift deed null and void based on allegations of breach of trust”). A best interest determination is a discretionary BIA decision, see Cox v. Acting Muskogee Area Director, 35 IBIA 43, 46 (2000), and we have not held that BIA’s failure to make or document such a determination is equivalent to a technical defect in the form of the lease itself, which would render the lease void ab initio. See Bernard, 46 IBIA at 36. In Bernard, we concluded that, “[a]t best,” allegations that BIA breached its trust responsibility—“if true, and if based on fraud or undue influence”—would render a conveyance of an interest in Indian land voidable. See id. Thus, to the extent Appellants seek a declaration that the leases are void ab initio, we affirm the Regional Director’s decision without reaching the merits of the breach of trust argument.

Even were we to assume that BIA did breach its trust responsibility, and construe Appellant’s argument as a suggestion that the leases are voidable and should be rescinded, Appellants do not allege acts of fraudulent inducement or undue influence by BIA, and we are not persuaded that the Board could provide such relief. See id. at 37 n.11. Further, even if we were to assume that the leases are otherwise voidable, a lease approved by BIA may remain valid despite a breach of BIA’s trust obligations to the mineral owners, as in the case of a lease to a bona fide purchaser, that is, one who acquires the lease for value, without notice of the breach of trust. See Restatement 2d of Trusts § 284 (Bona Fide Purchaser) (1959); Restatement 3d of Trusts § 108 (Limitation on Third-Party Liability) (2012). On the present record, Appellants have not alleged specific misconduct by the lessees, and have not provided a legal and factual basis for the relief sought.

Before turning to Appellants’ next argument, we note that the regulations do not expressly require that a best interest determination regarding mineral lease negotiation be made in writing, and for that reason it is not beyond dispute that BIA failed to make a best interest determination. Compare 25 C.F.R. § 212.20(b) with id. § 162.214 (requiring a written best interest determination for agricultural leases). That is not to say, however, that BIA should not have documented its actions as a matter of best practice. And the record does not include any documentation to indicate how the Indian mineral owners who sent the negotiation-request letters to BIA arrived at the proposed per-acre figure for a bonus. Nor does the record include any documentation showing whether or how BIA determined that the bonus amount proposed in each letter, for each respective allotment, was an appropriate bonus for that allotment, and in the best interest of the Indian mineral owners.
It is troubling that there is nothing in the record, other than the approved leases, to indicate that BIA made a determination that negotiation of the leases, for the terms requested by the mineral owners, was in their best interests, instead of advertising the tracts for lease sale. We are not suggesting that there is evidence that any of the bonuses were too low—Appellants have produced no such evidence, nor is there any in the record. But as trustee, BIA is obligated to make a best interest determination, which should be documented in the record, and a violation of this requirement could, in certain circumstances, render a mineral lease voidable by the Indian mineral owners.

However, for the reasons discussed above, the absence of documentation of BIA’s determination that negotiating the leases was in the mineral owners’ best interests, and of BIA’s review of the bonus terms requested by the mineral owners, does not suffice to show that the Regional Director erred in declining to declare the leases invalid, or that the Board could grant the relief sought.

B. Execution and Consent

Appellants next argue that “[e]very lease lacks the signature of the mineral owner” on the lease signature page, and that the inclusion of the phrase “PLEASE SEE ATTACHED CONSENT(S)” in the blank provided for the lessor’s signature should not be accepted by BIA as a substitute for an “actual signature.” SOR at 4; see also Opening Br. at 2-3 (discussing consent in the context of other Indian property transactions). Appellants also argue that the signature of an owner on the Acceptance-of-Lessor form only signifies the owner’s consent to accept the bonus payment, but does not extend to acceptance of the lease itself. SOR at 4.

The record does not support the determination sought by Appellants—a decision, as a matter of law, that the execution of the Acceptance-of-Lessor forms by the Indian mineral owners did not constitute valid execution of the leases themselves, rendering the leases void ab initio. The use of separate forms to record individual owner consent to the terms of the lease is a practical expedient where, as here, there are multiple owners of a single tract, and

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5 Nor are we suggesting that Appellants, and the co-owners of the allotments at issue, would have received better terms had the tracts been part of an advertised lease sale, or even that their tracts would have received a bid matching the advertised minimum bonus amount. The only lease issued pursuant to an advertisement for bids and lease sale indicates a bonus amount of $44.83 per acre, which is less than the lowest amount negotiated by the Superintendent at the mineral owners’ request, and a royalty rate of 16 2/3% which is the minimum allowed under the regulations. See Oil and Gas Lease, Allotment No. M955 (AR 58); see also 25 C.F.R. § 212.41(b).
the Acceptance-of-Lessor forms are expressly intended to be incorporated into the leases. See, e.g., Acceptance-of-Lessor form for Allotment No. M70 (title states that the form is to be attached to the lease); see also Oil and Gas Lease, Allotment No. M70, at 4 (referring to “attached consent”). The forms provided in the record are all signed by the individual lessor and either witnessed or notarized, and with the exception of the form for Allotment No. M1014, see supra at 98, n.1, the forms all include the key lease terms for bonus amount, royalty rate, rental rate, and lease duration, see, e.g., Acceptance-of-Lessor form for Allotment No. M70. Moreover, none of the leases implicated a majority ownership interest owned by either or both Appellants, and the record is not sufficient to support a conclusion that the other Indian mineral owners—none of whom challenged the sufficiency or validity of their consent to the leases—were unaware of, and did not consent to, the additional terms contained in BIA’s standard lease forms.

But even if Appellants have failed to demonstrate that the leases are necessarily invalid, BIA’s apparent failure to require evidence that the Indian mineral owners had been provided with complete copies of proposed leases before they signed an Acceptance-of-Lessor form is troubling, and could, in an appropriate case, place the validity of leasing transactions in doubt.

C. Corporate Documentation

On appeal, Appellants do not argue that the documentation in the administrative record is insufficient to meet the corporate qualifications requirements for lessees found in 25 C.F.R. § 212.23, and thus we do not consider that issue. Appellants purport to “incorporate by reference” all previously raised arguments, but their burden is to demonstrate why the Regional Director’s decision was incorrect. In this case, the Regional Director relied on certain evidence that was produced and added to the record after Appellants argued that there was “no documentation” to show that the companies qualified as lessees or assignees. It was Appellants’ burden, on appeal, to explain why that evidence was or allegedly remained insufficient, which they did not do.

D. Validity of the Assignments

The leasing regulations expressly require the consent of Indian mineral owners to assignments only when a lease itself requires such consent. 25 C.F.R. § 212.53 (applying § 211.53, which provides that “[t]he Indian mineral owner must also consent if approval of the Indian mineral owner is required in the lease”). None of the 14 leases for which Appellants seek to have assignments declared invalid require consent of the Indian mineral owners for assignments. Thus, BIA’s approval was sufficient to render the assignments valid. See Birdbear v. Acting Great Plains Regional Director, 56 IBIA 87, 90 n.4 (2012) (approval of assignments by BIA was not error where leases did not require Indian mineral owners’ consent).
owner consent). And the record provides at least some basis for the Superintendent’s approval of the assignments as being in the best interest of the Indian mineral owners. See Letter from Superintendent to Appellants, Sept. 12, 2012, at 1 (unnumbered) (AR 37). The Superintendent explained to Appellants that assignments are a means by which a lessor may bring in additional capital for development of a lease, which Appellants do not dispute. See id. While Appellants suggest that the original lessee is profiting from making assignments, at the expense of the Indian mineral owners, Appellants do not, on this record, meet their burden to show that the Superintendent’s approval was invalid, or even necessarily improper.

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 August 17, 2015, decision.

I concur:

// original signed _____________________________  // original signed _____________________________
Robert E. Hall                             Thomas A. Blaser
Administrative Judge                        Chief Administrative Judge