INTERIOR BOARD OF INDIAN APPEALS

Gary Grenier v. Great Plains Regional Director, Bureau of Indian Affairs

66 IBIA 7 (10/29/2018)

Complaint filed, *Grenier v. U. S. Dep't of the Interior*, No. 3:18-cv-00247-DLH-ARS (D.N.D.)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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GARY GRENIER, Appellant, v. GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Order Affirming Decision Docket No. IBIA 16-088 October 29, 2018

Gary Grenier (Appellant or Grenier) appealed to the Board of Indian Appeals (Board) from a May 19, 2016, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which determined that Appellant had trespassed on Indian land. Specifically, the Decision affirmed the portion of the Turtle Mountain Agency Acting Superintendent's (Superintendent) March 5, 2015, decision that found Appellant had extracted gravel and other minerals without a lease approved by BIA, and vacated and remanded for further consideration the Superintendent's assessment of damages, penalties, and costs.

Appellant does not dispute that he removed gravel and other minerals from the land. Appellant argues that he executed a lease for agricultural and mining purposes with the "overwhelming majority owner of the Tract," the Superintendent "acquiesced and assented" to the lease, and thus Appellant did not commit trespass. Opening Brief (Br.), Sept. 15, 2016, at 3, 13. In the alternative, Appellant argues, BIA should hold the landowner liable for any trespass damages because she initially consented to a lease, she has retained the consideration paid for it, and she has used the lack of approval of the lease to her advantage. In addition, Appellant argues that the Decision should be reversed because BIA committed procedural errors in conducting the trespass proceedings to Appellant's detriment.

We affirm the Decision. The Regional Director correctly determined that the purported lease is void *ab initio* because it was not approved in writing by BIA. The landowner's conduct does not absolve Appellant of liability. Nor does Appellant demonstrate that the Regional Director's decision should be reversed based on alleged procedural errors. And no party alleges that the Regional Director erred in vacating and remanding the Superintendent's assessment of damages, penalties, and costs.

Background

I. The "Lease"

The purported lease at issue was entered into between Appellant and Carol J. Delorme (Carol) in March of 2010 for Turtle Mountain Off-Reservation Tract 5065 and Tract M5065 (collectively, the Property).[1] During the time of the alleged trespass, Carol was the sole owner of the surface estate, which she held in restricted status. *See* Decision at 15. With respect to the mineral estate, Carol owned a 10/12 interest in restricted status. Title Status Report, Tract M5065, May 10, 2010, at 2 (Administrative Record (AR) A3). Carol also owned a 1/12 remainder interest, which was subject to a 1/12 interest life estate held by Rose Ann Trottier (Rose Ann). *Id.* Hollie Delorme (Hollie) owned the remaining 1/12 interest in restricted status. *Id.* Carol, Rose Ann, and Hollie are all Indian land or Indian mineral owners.[2] *Id.* at 1-2. According to Appellant, for nearly 30 years prior to the disputed lease and alleged trespass at issue, Appellant farmed Tract 5065 based on permission from Carol. *See, e.g.*, Notice of Appeal and Statement of Reasons to Regional Director, Apr. 3, 2015, at 1, 3 (NOA & SOR to Regional Director) (AR B1).

On March 18, 2010, Appellant and Carol executed the purported lease of the Property for an initial period of 10 years, beginning January 1, 2010, for "commercial and agricultural" purposes. Lease of Real Estate, Mar. 18, 2010, at 1 (Lease) (AR A12). The Lease called for payment of $45,000 at the time of execution and included an option to renew for an additional 10-year period for $100. *Id.* It is undisputed that Appellant paid Carol the consideration for the initial term of the Lease. *See* NOA & SOR to Regional Director, Exhibit (Ex.) C (check payments) (AR B1). In addition to farming provisions, the Lease provided that Appellant "may develop and remove (without compensation to the Landlord) any or all oil, gas or minerals (i.e., including gravel and clay) concerning the real

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[1] Tract 5065 is a surface estate; the "M" prefix refers to the mineral estate. The legal descriptions of Tract 5065 and Tract M5065 (also known as the Melvin Delorme Allotment), located in Rolette County, North Dakota, are included in the Decision. *See* Decision, May 19, 2016, at 1 n.2.

[2] For reasons discussed *infra*, we need not decide whether Appellant obtained sufficient owner consent for a lease of the Property.

Carol subsequently conveyed 1/2 of all her surface and mineral interests in the Property to Rose Ann, Hollie, and four other individuals, including her son Melvin Delorme Jr. (Melvin), in restricted status. She conveyed the remaining 1/2 of her surface and mineral interests to Melvin in trust or restricted status, reserving a life estate interest in those interests. *See* Decision at 15; Title Status Report, Tract 5065, Nov. 20, 2014, at 2 (AR B12); Title Status Report, Oct. 15, 2014, Tract M5065, at 2 (AR B12).

property subject to this lease." Lease at 2. The Lease also stated that the "Landlord shall convey the premises to the Tenant within her last will and testament." *Id.* The Lease contains an undated signature, apparently by Hollie. *Id.* at 3. The Lease was not signed by Rose Ann and it contains no mention of approval by BIA or the signature of a BIA official.

Appellant alleges that "[d]uring the process of the lease formation," the Superintendent[3] "indicated" to him that he had received the Lease and that it was valid. Opening Br. at 3; *see also* NOA & SOR to Regional Director at 2. In 2012, in response to a request for any Lease-related documents that Appellant had filed with BIA's Turtle Mountain Agency, the Superintendent acknowledged that he had received a copy of the Lease but stated that "[n]othing was ever officially filed with our office." Email from Morin to Nilsen, Mar. 5, 2012 (AR A10). The Superintendent also stated, "Since this was a direct lease with the landowner, we were not a party to the agreement." *Id.*

II. Proceedings Before the Superintendent

Soon after Appellant began mining operations on the Property in 2010, BIA received several inquiries voicing concern, including from the Turtle Mountain Band of Chippewa Indians (Tribe). *See, e.g.*, Letter from Tribal Chairman to Superintendent, May 26, 2010 (AR A5). The Superintendent then contacted Carol, informing her that a review of BIA's records showed that she was not the sole owner of the Property and was required to have a lease or permit approved by BIA. Letter from Superintendent to Carol, May 13, 2010 (AR A4). The Superintendent offered Carol assistance with developing a lease and a reclamation plan under 25 C.F.R. Part 216, and stated that "the company doing the excavating of gravel is in trespass." *Id.*

On December 12, 2011, Carol, through counsel, issued a Notice to Cease and Desist to Appellant, Pinky's Aggregates, Inc., and VLP Development, LLP (VLP),[4] with respect to any activities being conducted on the Property, and filed a complaint against them in Tribal Court to set aside the Lease and for other relief. *See* NOA & SOR to Regional Director, Ex. F (Letter from Vondall-Rieke to Grenier et al., Dec. 12, 2011) and Ex. G (Complaint, Dec. 12, 2011) (AR B1). On June 11, 2012, the Superintendent wrote

[3] During events relevant to this appeal, more than one person occupied the position of Superintendent, and more than one person occupied the position of Regional Director; we refer to them all as "Superintendent" or "Regional Director," respectively.

[4] Appellant had a gravel lease with Pinky's Aggregates. *See* Gravel Lease, Mar. 30, 2010 (AR A41). VLP supplied gravel from the Property to the Tribe for a Federally funded road maintenance project, in which BIA was not involved. *See* Email Correspondence, Jan. 10, 2012 (AR A9); Standard Form of Agreement, Mar. 29, 2010 (AR A41).

to Carol and stated that he could not "enforce any reclamation activities" on the Property because Carol still only had a "direct lease."[5] Letter from Superintendent to Carol, June 11, 2012 (AR A20).

On August 22, 2012, the Superintendent wrote to Appellant, apparently for the first time, and advised that Rose Ann and Hollie had contacted BIA and objected in writing to Appellant's "direct lease" with Carol. Letter from Superintendent to Appellant, Aug. 22, 2012 (AR A24); *see also* Statements of Hollie and Rose Ann, Aug. 20, 2012 (AR A23). The Superintendent stated that he had reviewed the Lease and that it appeared "void *ab initio* because it was never approved by [BIA]." AR A24 (citing 25 C.F.R. §§ 162.104 and 212.20). Appellant was instructed to cease and desist all activities on the Property, and was given 10 days to "provide further documentation as to why we should honor your lease." *Id.* Appellant was advised that if he failed to respond, BIA would proceed with trespass action under 25 C.F.R. Part 166 Subpart I (Trespass), §§ 166.800–.819. *Id.*

Appellant, through counsel, and the Superintendent discussed the regulatory processes for acquiring an agricultural lease and a mining lease. *See* Letter from Superintendent to Appellant, Sept. 26, 2012 (AR A30). In response to an inquiry from the Superintendent whether Carol would be willing to engage in settlement negotiations, Carol advised that she wanted "no part" of a lease and wanted "damages." Letter from Superintendent to Carol, Sept. 26, 2012 (AR A30); Letter from Carol to Superintendent, Sept. 26, 2012 (AR A31). While BIA began surveying the Property to determine the volume of the gravel removed, Email from Carpenter to Superintendent, Feb. 14, 2013, at 2 (AR A37), Appellant made a settlement offer, Letter from Appellant to Superintendent, Aug. 16, 2013 (AR A39).

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[5] The Tribal Court dismissed Pinky's Aggregates and VLP as parties, made an initial determination that the Lease was presumed valid until proven otherwise, and ordered Carol not to interfere with Appellant's operations unless approved by Court order. NOA & SOR to Regional Director, Ex. H (Order, *Delorme v. Grenier*, Case No. 11-10146/INJ 12-1023, at 3 (Turtle Mountain Tribal Ct. Aug. 20, 2012)) (AR B1). The Tribal Court did not hold a hearing on Carol's claim to set aside the Lease based on diminished capacity, fraud, or duress, because she took an interlocutory appeal to the Tribal Court of Appeals, which agreed with Grenier that the Tribal Court lacked subject matter jurisdiction. The Tribal Court of Appeals reasoned that Carol had "asked the lower court to rescind a Department of Interior lease with Grenier—relief that is not available through a tribal forum." NOA & SOR to Regional Director, Ex. I (Order, *Delorme v. Grenier*, TMAC-12-016, at 5 (Turtle Mountain Tribal Ct. of Appeals June 7, 2013)).

The Superintendent issued a notice of trespass to Appellant on September 11, 2013. Notice of Trespass, Sept. 11, 2013 (AR A40); *see also* 25 C.F.R. § 166.803. The notice stated that Appellant had mined gravel and other materials[6] without a valid lease or permit approved by BIA, and that BIA had met with Carol to discuss settlement but that she was not interested in negotiating a lease. Notice of Trespass at 1 (unnumbered). Appellant was ordered, within 10 days of receipt, to either (1) provide BIA with a lease consistent with BIA's regulations, (2) show cause why he should not be found in trespass, or (3) request an extension of time to respond to the notice. *Id.* The notice advised that, if Appellant failed to cure the alleged violation, damages may be assessed against him and at that time he would be given an opportunity to provide documentation of any payments he made to the owners of the Property. *Id.*

Appellant, through counsel, timely responded to the notice of trespass, asserting that he had not mined or been present on the Property since the Superintendent first advised him that "issues existed with the lease." Letter from Carlson to Superintendent, Sept. 18, 2013, at 1 (unnumbered) (AR A41); *see also* Opening Br. at 5 (Appellant asserts that he has abided by the Superintendent's August 22, 2012, cease and desist letter). Appellant proposed to either "bring the lease into compliance with [BIA's] regulations," or "remove the [unearthed gravel that had been paid for by] third parties, and rescind the lease which would allow [Appellant] to sue [Carol] to recover the monies she has been paid and [for] damages . . . ." Letter from Carlson to Superintendent at 2 (unnumbered). Appellant subsequently appealed the notice of trespass to the Regional Director. Appeal from Notice of Trespass, Dec. 18, 2013 (AR A42). The Regional Director dismissed the appeal, reasoning that pursuant to § 166.803(c) the notice of trespass was not an appealable decision. Decision on Appeal from Notice of Trespass, Jan. 10, 2014, at 1-2 (AR A43). Appellant then filed a lawsuit against Carol in Federal court, which is stayed. *See* Complaint, *Grenier v. Delorme*, No. 4:14-cv-39 (D.N.D. Apr. 10, 2014) (AR A44).

On March 5, 2015, the Superintendent assessed Appellant damages in the amount of $231,205.50, based on an estimated 51,379 cubic yards of gravel and other material removed, with an appraised minimum value of $1.50 per loose cubic yard, plus a penalty of double the value, citing 25 C.F.R. § 166.812(a).[7] Superintendent's Decision, Mar. 5,

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[6] Based on documents supplied by Appellant, he mined gravel, sand, black dirt, pit run, and clay. *See* AR 41.

[7] The Turtle Mountain Agency considered several different estimates of the volume of gravel and other materials removed from the Property. In addition to the initial estimate discussed *supra*, BIA considered tonnage data from Appellant; a survey by Northern Engineering and Consulting, Inc., under a contract with Kris Delorme; a survey by the Bureau of Land Management (BLM); and a survey by Uintah Engineering & Land Survey

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2015, at 2 (unnumbered) (AR A51). The Superintendent further directed Appellant "to reclaim the disturbed area" by June 30, 2015, and advised Appellant that he could appeal the decision. *Id.*

III. Proceedings Before the Regional Director

Appellant appealed to the Regional Director, arguing that he had a valid lease. *See* NOA & SOR to Regional Director at 1. Appellant argued that he satisfied the agricultural and mineral leasing regulations by obtaining a lease with Carol as the "overwhelming majority" owner of the Property and by submitting it to the Superintendent. *Id.* at 3-4. According to Appellant, the Superintendent "indicated to [Appellant] that his office had received the Lease and that [Appellant] had a valid lease with [Carol] for farming and mining gravel on the property."[8] *Id.* at 2. "Relying on these assertions," Appellant argued, he paid Carol full consideration for the Lease, which payments Carol retained. *Id.* Appellant contended that Carol wrongly refused to seek BIA approval of the Lease and thus should be held responsible for any trespass damages. *Id.* at 4. Appellant also stated that he "will be making an estoppel argument as his actions were taken in reliance upon [the Superintendent's] initial approval of the Lease." *Id.* And Appellant argued that the validity of the Lease had been "fully and fairly litigated through the Tribal Courts." *Id.* Further, Appellant asserted that he was denied due process because he was not allowed to appeal from the Superintendent's notice of trespass. *See id.* at 5. He also objected that he was not afforded an opportunity to participate in BIA's assessment of trespass damages, nor provided the underlying data, and therefore challenged the assessment. *Id.*

On May 19, 2016, the Regional Director issued the Decision that is the subject of the instant appeal. The Decision addressed each of Appellant's arguments and affirmed the Superintendent's findings that the Lease was void *ab initio* as an agricultural or mineral lease, and that Appellant was in trespass. Decision at 14-17. The Regional Director found that the Lease was never approved by BIA and did not meet other regulatory requirements, payment of consideration did not render the Lease valid, and Carol "was within her right to

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(Uintah) under a contract with BIA. *See, e.g.*, Surveys (AR A48). The 51,379 cubic yards estimate that the Superintendent used was derived from both BLM's estimate and Uintah's estimate. Superintendent's Decision at 2 (unnumbered). The $1.50 per loose cubic yard valuation was based on an appraisal by BLM. *See* Mineral Materials Appraisal, Dec. 5, 2014, at 4 (unnumbered) (AR A48).

[8] In Appellant's Federal court complaint, he described the Superintendent's purported approval of the Lease as follows: The Superintendent "stamped the Lease in [Appellant's] presence, and did not express any concerns about the Lease." Complaint at 2.

revoke or 'repudiate' any consent she may have given to Appellant in the unapproved lease." *Id.* at 14-15. The Regional Director found no evidence that the Superintendent told Appellant the Lease was valid and stated that, even if the Superintendent had done so, BIA would not be bound by the alleged representation. *Id.* at 15; Regional Director's Answer Br., Oct. 19, 2016, at 7-8. The Regional Director also reiterated that the Superintendent's notice of trespass was not appealable pursuant to 25 C.F.R. § 166.803(c). Decision at 16.

The Regional Director vacated in major part the Superintendent's assessment of damages, penalties, and costs against Appellant. *Id.* at 18. Specifically, the Regional Director found that the Superintendent's finding of the volume of materials removed was not adequately supported or explained, and that neither the interested parties nor BLM were given an opportunity to review and comment on all the data. *Id.* While the Regional Director found that the Superintendent "correctly charged BLM's recommended gravel royalty of $1.50 for each cubic yard removed from the property," he reversed the Superintendent's determination to assess a penalty of double the value. *Id.* In addition, the Regional Director noted that the Superintendent's assessment did not include an appraisal of damages to the land and enforcement costs under 25 C.F.R. § 166.815 and § 166.816, respectively. *See id.* at 18-19. He instructed the Superintendent on remand to consult with the current landowners regarding reclamation of the Property, and if necessary to obtain a reclamation plan from BLM with estimated costs for the work. *Id.* at 19. The Superintendent would then issue a new decision using revised volumetric information and the $1.50 per cubic yard valuation, and include "any reclamation and enforcement costs, identifying each element of actual injury and loss and calculating the costs of repair or restoration or the amount of loss." *See id.* The Regional Director also advised that, "[i]f reclamation is necessary, and Appellant desires to bear the costs of reclamation and perform the work himself," the Superintendent could allow Appellant to perform the work in compliance with the reclamation plan and with appropriate monitoring. *Id.*

Appellant appealed to the Board and included arguments in his notice of appeal. He also filed an opening brief. The Regional Director and Carol each filed an answer, and Appellant filed a consolidated reply.

Standard of Review

The Board exercises *de novo* review over questions of law and the sufficiency of the evidence to support a BIA decision. *Rose v. Acting Pacific Regional Director*, 62 IBIA 330, 334 (2016); *Wing v. Rocky Mountain Regional Director*, 60 IBIA 297, 301 (2015). The Board will not substitute its judgment for that of BIA but will review a regional director's decision to determine whether it comports with the law, is supported by the administrative record, and is not arbitrary or capricious. *Wing*, 60 IBIA at 301; *Goodwin v. Pacific*

Regional Director, 60 IBIA 46, 54 (2015). An appellant bears the burden of proving error in BIA's decision. *Rose*, 62 IBIA at 334.

Discussion

Appellant's arguments on appeal fall into three general categories: (1) the Regional Director's determinations that the Lease is void *ab initio* and that Appellant trespassed on the Property are legally erroneous; (2) Carol should be held liable for any damages assessed; and (3) BIA acted inappropriately in conducting the trespass proceedings. We consider these arguments in turn and reject them.

I. The Regional Director's Determinations That the Lease Is Void *Ab Initio* and That Appellant Committed Trespass Are Supported by Federal Law

Appellant argues that the Decision is erroneous because, as a matter of law, the Lease is not void *ab initio* and he did not trespass on the Property. *See* Opening Br. at 10-17. First, Appellant argues that the Lease was with the "overwhelming majority owner," and the Superintendent "acquiesced and assented to" the Lease, making the Lease valid and precluding a finding of trespass. *Id.* at 3, 13-15. Next, Appellant argues that the Regional Director can "determine that the Lease fails pursuant to [BIA's] regulations, but cannot invalidate the Lease as a whole," and that BIA "exceeded its jurisdiction" by finding that the Lease is void *ab initio*. *Id.* at 15. According to Appellant, "[s]tate law still applies to the Lease, as it is a valid contract," and "[t]he validity of the Lease as a whole was already addressed and determined by the Tribal Courts."[9] *Id.* Appellant argues that he is still entitled to relief based on the "contract" from a Federal, state, or tribal court. *See id.* at 17. Appellant also argues that, even assuming the Lease is invalid, he did not intend to commit trespass and thus cannot be held liable for it. *Id.* For the following reasons, we affirm the Regional Director's determinations that the Lease is void *ab initio* and that Appellant committed trespass.

Appellant's arguments that he was not in trespass on the Property because he had a lease, which BIA orally or otherwise approved, are without merit. An Indian landowner who holds 100% of the interests in a parcel of trust or restricted land may take possession without a lease. 25 C.F.R. § 162.104(a) (2009).[10] But "[a]ny other person or legal entity"

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[9] Appellant notes that the Tribal Court of Appeals stated that it lacked jurisdiction over the "rescission" of a lease of trust property, whereas BIA concluded that there never was a valid lease subject to rescission. Opening Br. at 16.

[10] We cite, as does the Regional Director's decision, to the regulations governing agricultural leases that were in effect at the time that Appellant and Carol executed the

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must obtain a lease before taking possession. *Id.* § 162.104(d). Appellant held no ownership interest in the Property and was required to have a lease. *See id.*; *Hartman v. Acting Great Plains Regional Director*, 50 IBIA 138, 147 (2009); *Delorme v. Acting Great Plains Regional Director*, 46 IBIA 107, 109 (2007). Further, leases of Indian trust or restricted lands must be approved by BIA. *See* 25 U.S.C. §§ 415 (Leases of restricted lands), 3715 (Leasing of Indian agricultural lands), 396 (Leases of allotted lands for mining purposes), 2218 (Approval of leases, rights-of-way, and sales of natural resources); *see also* 25 C.F.R. Part 162, Subpart B (Agricultural Leases), and Part 212 (Leasing of Allotted Lands for Mineral Development).

As the Regional Director concluded, consent of a majority landowner "is not a substitute for the requirement to obtain an approved lease."[11] Answer Br. at 8 (quoting *Rose v. Acting Pacific Regional Director*, 62 IBIA 330, 338 (2016)); *see also Thomson v. Acting Pacific Regional Director*, 40 IBIA 36, 38 (2004). The Regional Director also correctly concluded that, prior to BIA approval of the Lease, Carol could withdraw her consent to it. *See Kehler v. Rocky Mountain Regional Director*, 56 IBIA 279, 283 (2013); *see also Adcox v. Acting Alaska Regional Director*, 61 IBIA 34, 38 n.6 (2015) (rejecting the assertion that an Indian landowner's acceptance of consideration renders an agreement to convey restricted land irrevocable); *Shelbourn v. Acting Great Plains Regional Director*, 54 IBIA 75, 79 (2011) ("It is well established that unless and until the lease is approved, any terms offered or even agreed-upon by BIA (and landowners) may be withdrawn, and the prospective lessee

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Lease and the alleged trespass occurred. In 2012, the Department of the Interior (Department) promulgated new regulations, effective January 4, 2013, addressing non-agricultural surface leasing of Indian land. Final Rule, Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440, 72440 (Dec. 5, 2012). The Department stated that the amendments "do[] not affect Subpart B, Agricultural Leases," but relocate and make "[m]inor edits . . . to the General Provision section to delete redundancies and clarify that they now apply only to agricultural leases." *Id.* The mineral leasing regulations, 25 C.F.R. Part 212, and trespass regulations, 25 C.F.R. Part 166, Subpart I, were not amended.

[11] The owner consent requirement may differ depending on the type of lease at issue and number of fractional interest owners. *See* 25 U.S.C. §§ 2218 (providing, for non-agricultural leases, a sliding scale based on the number of owners; if there are 5 or fewer owners, the applicable percentage is at least 90% of the undivided interest), 3715 (majority ownership interest required for agricultural leases); 25 C.F.R. § 162.207(c). The 25 C.F.R. Part 212 regulations have not been amended to reflect the applicable percentages in 25 U.S.C. § 2218(b). In this case, we need not determine whether Appellant had adequate owner consent to a lease.

obtains no legally protected interest in the interim."). And, dispositive for this case, we agree that BIA never approved the Lease. Appellant argues that certain BIA conduct shows that it "acquiesced and assented" to the Lease, Opening Br. at 13-14, but BIA approval of a lease must be in writing, *see, e.g.*, *Shelbourn*, 54 IBIA at 80; *Thomson*, 40 IBIA at 38; *Larsen v. Acting Pacific Regional Director*, 39 IBIA 202, 209 (2003); *Jackson v. Portland Area Director*, 35 IBIA 197, 200 (2000). It is undisputed that BIA did not give written approval here. Because BIA did not approve the Lease, it is void *ab initio*. *See, e.g.*, *Jackson*, 35 IBIA at 200; *Brooks v. Muskogee Area Director*, 25 IBIA 31, 34 (1993); *Smith v. Acting Billings Area Director*, 17 IBIA 231, 235 (1989).

Appellant's assertion that he relied on an alleged representation by the Superintendent concerning the validity of the Lease, and BIA's delay in ordering that he cease his mining activities for approximately 2 years after the Superintendent became aware of the unapproved Lease, appears to suggest that Appellant is invoking estoppel to prevent BIA from finding that the Lease is invalid or enforcing the trespass regulations. Appellant has produced no evidence—not even his own affidavit or declaration—that the Superintendent orally or otherwise approved the Lease. Moreover, estoppel is extremely difficult, if not impossible, to establish against the Government. *Emm v. Western Regional Director*, 50 IBIA 311, 318 (2009). The traditional elements of estoppel are: (1) whether BIA knew the true facts; (2) whether BIA either intended that its conduct be acted upon or acted in such a way that Appellant had a right to believe it was so intended; (3) whether Appellant was ignorant of the true facts; and (4) whether Appellant reasonably relied on BIA's conduct to his detriment. *Id.* Even were we to assume that the first two elements are met, Appellant cannot establish estoppel under the third element because he was responsible for familiarizing himself with the regulations governing his activities on Indian land, including the requirement that a lease must be approved in writing. *See, e.g.*, *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 212-13 (2006); *Jackson*, 35 IBIA at 201. Appellant cannot claim ignorance of the fact that he lacked a properly approved lease. Further, even if we were to assume that the Superintendent gave Appellant erroneous or *ultra vires* advice, it would not grant Appellant rights not authorized by law or inconsistent with the regulations. *See Lambert v. Rocky Mountain Regional Director*, 43 IBIA 121, 125 (2006); *Flynn*, 42 IBIA at 213; *Scott v. Acting Albuquerque Area Director*, 29 IBIA 61, 69 (1996). Thus, Appellant was responsible for complying with the applicable regulations and was not relieved of that responsibility by representations allegedly made by the Superintendent or through BIA's delay in addressing his trespass. *See Flynn*, 42 IBIA at 212-13.

Here, as asserted by the Regional Director, the Superintendent could not have approved the Lease because it failed to comply with the leasing regulations. *See* Answer Br. at 6-7; Decision at 15. Among other requirements, before approving an agricultural lease, BIA "must determine in writing that the lease is in the best interest of the Indian

landowners," 25 C.F.R. § 162.214(a), and ensure that the lease provides for the payment of a "fair annual rental" at the beginning of the lease term, unless a lesser amount is permitted, *id.* § 162.222(a). And mineral leases must be advertised for bids "[u]nless the Secretary decides that negotiation . . . is in the best interests of the Indian mineral owners," *id.* § 212.20(b), and include the minimum royalty rate or an alternative rate that is determined to be in the best interest of the Indian mineral owner, *id.* § 212.43. None of these requirements was met.[12]

Appellant's contention that the Regional Director overstepped his authority in declaring the Lease void *ab initio* for lack of approval is misplaced. Whether or not Appellant may have a remedy against Carol in a different forum is irrelevant to the Regional Director's authority to declare the Lease invalid as a matter of Federal law. *See DuBray v. Acting Aberdeen Area Director*, 30 IBIA 64, 68 (1996). As we explained in *DuBray*, "The Department owes a trust responsibility to the owner of trust land," which "includes ensuring that trust land is not conveyed in violation of relevant statutes and regulations." *Id.* In fact, apart from declaring the Lease void *ab initio*, the Regional Director properly expressed "no opinion regarding what remedies [Appellant] may or may not have . . . in another forum."[13] Answer Br. at 9.

Because Appellant had no lease, his activities on the Property were unauthorized. Unauthorized possession, occupancy, or use of Indian land is trespass. *Id.* §§ 162.101 (definition of "trespass"), 162.106, 166.800. We reject Appellant's contention that, under "hornbook law" of trespass, BIA must show he "intend[ed] to enter the land without consent" of a landowner, but that he had Carol's consent and thus did not commit trespass. Opening Br. at 17; Reply Br. at 2. While consent may form a complete defense to trespass under state law, that is not applicable to Indian trust lands where the United States acts as trustee and where a prospective lessee must obtain BIA approval and landowner consent. As noted, one clear problem with Appellant's contention is that the United States as trustee did not give its authorization.[14] In *Thomson*, we explained that the ability of individual

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[12] Even more troubling, the Lease called for Carol to devise her ownership to Appellant. Lease at 2.

[13] In addition, we note that the Board is not a court of general jurisdiction and lacks authority to award damages against a landowner. *Brurud v. Eastern Oklahoma Regional Director*, 39 IBIA 51, 55-56 (2003).

[14] We also note that BIA will "[i]nvestigate accidental, willful, and/or incidental trespass on Indian agricultural land." 25 C.F.R. § 166.801(a). There is no dispute that the Property is Indian agricultural land and thus is subject to the trespass regulations in 25 C.F.R. §§ 166.800–.819. *See* 25 C.F.R. § 162.106(b). Section 166.800 states in relevant part:

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Indians to lease trust property is constrained by Federal law and subject to approval by the Secretary, and that trespass cases involving state law or non-Indian Federal lands were not relevant. *Thomson*, 40 IBIA at 38-39. It is undisputed that Appellant extracted gravel and other minerals from the Property without a lease approved in writing by BIA. Thus, even if Appellant believed he had sufficient landowner consent, BIA was authorized to take enforcement action against him.[15]

II. Appellant Is Not Absolved of Liability for Trespass Based on Carol's Conduct

Appellant argues that Carol should be held responsible for any trespass damages because she initially consented to, and accepted the consideration paid for, the Lease, and has taken advantage of the lack of written BIA approval by seeking to have the Lease declared invalid. *See* Opening Br. at 17-21; Reply Br. at 4, 6-7. It is well-settled that "[t]here is no statutory or regulatory exemption from liability for trespass based on either the fault or liability of others. All who bear responsibility for the trespass are jointly and severally liable . . . ." *Tubit Enterprises, Inc. v. Pacific Regional Director*, 53 IBIA 183, 190 (2011). In *Tubit Enterprises*, the Board noted that "any claim that [an a]ppellant might have against other potentially liable parties for contribution is a separate matter, and not a defense to [the a]ppellant's own liability." *Id.* Further, the Board has rejected the notion that an Indian landowner must have clean hands in order to seek a declaration that a purported lease was invalid for lack of BIA approval. *See DuBray*, 30 IBIA at 68. Therefore, we reject Appellant's assertion that based on Carol's conduct he should be

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(…continued)
"Under this part, trespass is any unauthorized occupancy, use of, or action on Indian agricultural lands." 25 C.F.R. § 166.800.

[15] For the first time in his reply brief, Appellant argues that the regulations "specifically forbid" the trespass action against him because at all times relevant "negotiations between himself, Carol, and the BIA were ongoing," and "[o]nce it was clear no negotiations would be continuing, [Appellant] stopped entering the Tract." Reply Br. at 5-7 (citing 25 C.F.R. § 162.106). The Board ordinarily will not consider arguments raised for the first time on appeal to the Board that could have been, but were not, raised to the deciding official, much less arguments first raised in a reply brief. *See* 43 C.F.R. § 4.318 (Scope of review); *Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296, 304 (2013); *Aloha Lumber Corp. v. Alaska Regional Director*, 41 IBIA 147, 161 (2005). We therefore decline to consider the argument. We note, however, that the Board has previously rejected the argument. *See Rose*, 62 IBIA at 338 n.18 (holding that § 162.106 "does not prohibit BIA from taking action against trespass in any circumstance; it merely leaves such action to the discretion of BIA if BIA concludes that negotiations are underway").

absolved of responsibility, in whole or in part, for trespass damages.[16] *See* Opening Br. at 22.

Nor do we find convincing Appellant's contention that Carol "defaulted" during Appellant's appeal to the Regional Director by failing to file an answer brief and that, as a result, "the decision should have assessed the trespass damages to Carol." *Id.* at 21. The filing of an answer is discretionary, not mandatory. *See* 25 C.F.R. § 2.11; *French v. Aberdeen Area Director*, 22 IBIA 211, 214 (1992).

III. The Alleged Procedural Errors by BIA Do Not Support Reversal of the Decision

Appellant also raises several procedural objections. First, Appellant argues that the Regional Director's trespass determination was premature because Appellant had not yet had an opportunity to appeal the determination that the Lease is invalid. Opening Br. at 11-12. Next, Appellant contends that the Regional Director "set numerous deadlines" for a decision, which he "simply ignored, not to mention the deadlines set in [BIA's] regulations." *Id.* at 21; *see* 25 C.F.R. § 2.19(a) (a regional director shall decide an appeal within 60 days after all time for pleadings has expired). In addition, Appellant complains that he did not receive the administrative record prior to filing his opening brief in this appeal. Opening Br. at 2, 20. Finally, Appellant argues that BIA improperly participated in "*ex parte* communications" with Carol, which "demonstrates the BIA's desire to assist Carol with improperly repudiating the Lease." *Id.* at 6-8. We address these arguments in turn.

BIA was not required to first issue a decision regarding the validity of the Lease, with appeal instructions, before issuing a trespass decision and assessing damages.[17] The absence of authorization is an element of trespass itself, *see supra*, and the Superintendent's notice of trespass expressly afforded Appellant an opportunity to demonstrate that he did not commit trespass because he had a valid lease, *see* Notice of Trespass; *see also* 25 C.F.R. § 166.804 (instructing the recipient of a trespass notice to explain in writing why the notice is in error); *Tubit Enterprises*, 53 IBIA at 189 (finding that, because the appellant *did not dispute* that it lacked consent from the Indian landowners or approval from BIA to remove trees from trust land, it could not "reasonably be disputed" that the appellant committed

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[16] As discussed *infra*, on remand the Superintendent should consider the payments that Appellant paid to Carol for the Lease, and which she has retained, in determining any trespass damages yet owed.

[17] For the sake of argument, we will assume, without deciding, that Appellant would have standing to appeal from a decision that the Lease is invalid, in the absence of an adverse trespass determination.

trespass). Moreover, following the Superintendent's trespass decision, Appellant had ample opportunity to demonstrate to the Regional Director (and to the Board on appeal) that he had a valid lease and thus was not in trespass.[18] *See* 25 C.F.R. § 2.21(a) (providing that a BIA reviewing official may consider any information available, whether part of the record or not).

Appellant's remedy for any delay by the Regional Director in issuing a decision was to bring an "inaction" appeal to the Board under 25 C.F.R. § 2.8 (Appeal from inaction of official). *See Strom v. Northwest Regional Director*, 44 IBIA 153, 163 n.14 (2007). Appellant did not do so, and any delay in issuing the Decision does not absolve Appellant of liability for trespass. *See id.*

With respect to BIA's production of the administrative record, Appellant elected to file his opening brief and "proceed with this Appeal relying on the facts previously submitted to the Regional Director and those found in the [Decision]." Opening Br. at 2; *see id.* at 20.[19] Appellant could have, but did not, request an extension of time to file his opening brief, until after he received the record. *See* 43 C.F.R. § 4.310(d). In addition, Appellant received the record prior to filing his reply and raised no objection there.

Turning to Appellant's final allegation, regarding "*ex parte* communications," unlike appeals pending before the Board, *see* 43 C.F.R. § 4.27(b), there is no express prohibition on such communications in administrative proceedings before BIA. *See Jenkins v. Western Regional Director*, 42 IBIA 106, 110 n.8 (2006). All of the *ex parte* communications cited by Appellant occurred prior to the Superintendent's decision. *See* Opening Br. at 6-8. In one of these communications, Appellant states in his reply brief, the Superintendent "again castigated *Carol*" for failure to obtain an approved lease. Reply Br. at 5 (emphasis added). None of the cited communications occurred during Appellant's appeal to the Regional Director from the Superintendent's decision.[20] We find neither a specific allegation, nor

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[18] To the extent that Appellant contends he was entitled to appeal from the Superintendent's notice of trespass, he errs. *See Miller v. Rocky Mountain Regional Director*, 39 IBIA 57, 59-60 (2003).

[19] To the extent that Appellant's opening brief also raised an objection concerning documents requested from BIA through the Freedom of Information Act (FOIA), the Board has no jurisdiction over FOIA requests. *Drew v. Acting Northwest Regional Director*, 56 IBIA 132, 144 n.15 (2013).

[20] Nor does Appellant allege that the Regional Director violated 25 C.F.R. § 2.21(b), which imposes a notice and opportunity-to-comment requirement when the official

(continued…)

evidence in the record, of bias or prejudice on the part of the Regional Director who issued the Decision that is being appealed. Further, Appellant has been afforded a full opportunity to present his views and have them considered by the Board prior to a final Departmental determination. In our *de novo* review of the purported lease, and based on the arguments submitted to the Board, we have concluded that the Regional Director is correct that the Lease is void *ab initio* and that Appellant committed trespass, and we are unconvinced that the alleged procedural errors warrant vacating or reversing the Decision.

IV. No Party Alleges Error in the Regional Director's Remand for Further Consideration of Damages, Penalties, and Costs

The Regional Director vacated the Superintendent's finding that Appellant is liable for trespass damages totaling $231,205.50, and remanded with instructions on the assessment of damages, penalties, and costs under 25 C.F.R. Part 166, Subpart I.[21] *See* Decision at 17-19. Appellant does not challenge this portion of the Decision, including the Regional Director's instructions to the Superintendent on remand. Appellant argues only that Carol should be held liable for all or a portion of the damages and that, after Appellant ceased his use of the Property, Carol's son Melvin removed gravel from the Property without a lease, which Appellant fears will be attributed to Appellant in the assessment of trespass damages. Opening Br. at 10; *see id.* at 20.

As we explained *supra*, liability for trespass is joint and several, meaning that Carol's conduct does not absolve Appellant of liability for trespass. But on remand, BIA must consider the extent to which Appellant has, in effect, paid trespass damages, based on the consideration that Appellant paid for the Lease and which Carol has retained. *See Koontz v. Northwest Regional Director*, 55 IBIA 177, 177 (2012) (affirming BIA's assessment of timber trespass damages against the appellant, which deducted the funds received from the appellant for his purchase of the timber). Further, in his Decision, the Regional Director noted that he was informed that Melvin sold a quantity of loose gravel from the Property to

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(…continued)
deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal.

[21] Subsection 162.106(b) provides that, where a trespass involves Indian agricultural land, in addition to taking action to recover possession and pursuing any additional remedies available under applicable law, BIA "will also assess civil penalties and costs under part 166, subpart I, of this chapter."

another party. Decision at 19 n.35. Appellant's concern that BIA will assess him damages for the gravel sold by Melvin is speculative and not yet ripe for review.[22]

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 May 19, 2016, decision, which affirmed the Superintendent's determination that Appellant had committed trespass, vacated the Superintendent's assessment of trespass damages, penalties, and costs, and remanded the matter to the Superintendent with instructions.[23]

I concur:

// original signed
Mary P. Thorstenson
Administrative Judge

//original signed
Thomas A. Blaser
Chief Administrative Judge

[22] We strongly caution all Indian owners of the Property that the Board has clearly held that "the regulations do not exclude Indian owners from the definition of trespass, nor do they divest BIA of authority to take action against such trespass." *Rose*, 62 IBIA at 337 n.16; *see also Koontz*, 55 IBIA at 186 (noting that "landowners may be held liable even where they have not personally conducted the harvest but have worked with others to conduct the harvest").

[23] Appellant requested oral argument for this appeal. The Board has authority to grant oral argument but has rarely done so. *See Alturas Indian Rancheria v. Pacific Regional Director*, 54 IBIA 15, 17 n.4 (2011). The Board finds this appeal suitable for resolution without oral argument.