# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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| WESTERN REFINING SOUTHWEST, INC. and WESTERN REFINING PIPELINE, LLC, Appellants, | ) | Order Affirming Decision in Part, Reversing in Part, and Remanding |
| v. | ) | Docket No. IBIA 14-101 |
| ACTING NAVAJO REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee. | ) | May 4, 2016 |

In *Adakai v. Acting Navajo Regional Director*, 56 IBIA 104 (2013), we concluded that it was arbitrary and capricious for the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to rely on a life tenant to achieve the required majority consent to grant Western Refining Southwest, Inc., an unqualified 20-year renewed right-of-way (ROW), across Navajo Allotment No. 2073 (Allotment). On remand, in an April 8, 2014, decision (Decision), the Regional Director denied the renewed ROW in its entirety for lack of sufficient landowner consent.

On appeal, Western Refining Southwest, Inc. and Western Refining Pipeline, LLC (collectively, Western) contend that the Board of Indian Appeals (Board), in *Adakai*, and the Regional Director, on remand, erred because the deeds creating life estates in the Allotment reserved for the life tenants the authority to encumber the land beyond their lifetimes with an unqualified 20-year ROW. Western also contends that the purported withdrawal of consent by one life tenant, Tom Morgan, following the Board's decision in *Adakai*, was invalid, and that even if sufficient consent for an *unqualified* 20-year ROW was lacking, the Regional Director erred in failing to grant a *qualified* ROW based on consent obtained from the life tenants.

We disagree with Western that the deeds creating the life estates reserved for the life tenants the authority to consent to an ROW extending beyond their lifetimes. But we are persuaded that the Board's previous order vacating the Regional Director's initial approval of the ROW, on grounds unrelated to the sufficiency of consent for an ROW encumbering present possessory interests, should not be construed to have permitted Tom Morgan to revoke his previous consent to the ROW without returning the consideration he accepted for that consent. Thus, we conclude that there was sufficient landowner consent to support



EXHIBIT 1

the Regional Director's grant of an ROW for 20 years, or the life of Morgan or of the other life tenant, Mary Tom, whichever is the shortest period, and the Regional Director erred by not confirming the ROW grant to that extent, as requested in the alternative by Western. On the other hand, because the owners of a majority of the future interests in the Allotment did not consent to the ROW renewal, the Regional Director did not err in refusing to issue an unqualified 20-year renewal.

## Background

### I. Statutory and Regulatory Framework

The Secretary of the Interior (Secretary) has the authority to grant oil pipeline ROWs across allotted trust lands. 25 U.S.C. § 321. The Secretary's authority is delegated to BIA. 25 C.F.R. Part 169. BIA may renew "[ROWs] over and across individually owned lands without the consent of the individual Indian owners when . . . [t]he land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant." *Id.* § 169.3(c)(2); *see id.* § 169.19 (Renewal of ROW Grants); *see also* 25 U.S.C. § 324 (Consent of Individual Owners). Landowners must receive not less than fair market value for the rights granted, plus severance damages, if any, unless properly waived. 25 C.F.R. § 169.12.

### II. BIA's Initial Approval of the ROW and the Board's *Adakai* Decision

Western submitted an application for a 20-year renewal of an ROW for an existing oil pipeline across 43 Navajo allotments, including the Allotment, on June 22, 2009. Application for Grant of ROW (*Adakai* Administrative Record (AR) 129);[1] *see id.* (existing ROW due to expire in 2010). Western provided BIA with consent forms signed by eight landowners of the Allotment to accept Western's offer of $40 per rod of pipeline.[2] Consent Forms (*Adakai* AR 317-18, 320, 322-24, 328, 341). BIA calculated that the consenting landowners owned a total of 60.26% of the Allotment. ROW Consent Percentage Calculation (*Adakai* AR 305). In calculating that consent, BIA included the consent of

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[1] The administrative record in this case incorporates the administrative record before the Board in *Adakai*, 56 IBIA 104. We refer to that portion of the record as the "*Adakai* Administrative Record," or "*Adakai* AR." The *Adakai* AR is organized by tabs and each page is also Bates-stamped with an "ADAK" prefix and a page number. We cite to the Bates number without the prefix.

[2] A rod is a unit of length equal to 16.5 feet. The ROW crosses 2,746 feet of the Allotment and covers fewer than 4 acres of the 160-acre allotment.

Tom Morgan (Morgan), who holds a 42.5% life estate interest in the Allotment.[3] *See id.*; *see also* Consent Form, Aug. 25, 2008, (*Adakai* AR 341), *Adakai* Answer Brief (Br.), Mar. 24, 2011, at 6 n.4.[4]

The Office of the Special Trustee for American Indians (OST) commissioned an appraisal of the fair market value of the ROW renewal. *See* Summary Appraisal Report, Feb. 16, 2009 (*Adakai* AR 288). The appraiser concluded that the fair market value of the 20-year ROW on the Allotment was $2650. *Id.* at 291; *see also* Letter from Jones to Bradley, Nov. 2, 2009 (*Adakai* AR 160) (BIA approval of appraisal). Western's offer totaled $6656.40, approximately 2.5 times the appraised value for the ROW. BIA notified the owners of the Allotment of the appraised fair market value, Western's offer, and the owner's respective share of proceeds based on his or her ownership interest. Notice Letters, Mar. 8, 2010 (*Adakai* AR 141-59). While noting that Western's offer exceeded the appraised fair market value, BIA advised the landowners that they had a right to object to the offer if they believed that the amount was not sufficient. *Id.* Morgan consented to the ROW and accepted his share of compensation from Western.

The Acting Regional Realty Officer recommended approval of Western's renewal application, stating that a majority of landowner interests had consented to the ROW on each of the allotments at issue. Recommendation Memo, July 29, 2010 (*Adakai* AR 127-128). The Regional Director granted a 20-year renewal of the ROW. Grant of Easement, Aug. 2, 2010 (*Adakai* AR 123) (Grant of Easement); *see also* Notices of Decision, Sept. 3, 2010 (*Adakai* AR 28-119) (notices to landowners).

Patrick Adakai (Adakai), who owns a 0.0038461 (0.38461%) interest in the Allotment, and who did not consent, appealed the Grant of Easement to the Board. *Adakai* Notice of Appeal, Sept. 9, 2010. Adakai contended that consents obtained from other landowners were flawed, and that the amount of compensation was inadequate. *Adakai* Opening Br., Jan. 5, 2011, at 1-4; *Adakai* Statement of Reasons at 2-3. In responding to Adakai's arguments, the Regional Director asserted that the record contained sufficient evidence of landowner consent for BIA to grant the ROW renewal. *Adakai* Answer Br., Mar. 24, 2011, at 6-9. In discussing Morgan's consent, which was necessary to achieve majority consent, the Regional Director stated that Morgan had "conveyed his undivided interest in the allotment to his eight (8) children but retained his authority and the income from the land holdings for the remainder of his life." *Id.* at 6 n.4. The Regional Director

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[3] In 2008, when Morgan's consent was obtained, he was 80 years old. *Adakai*, 56 IBIA at 109 n.7.

[4] We identify the briefs filed with the Board in the prior proceedings, in *Adakai*, 56 IBIA 104, by the prefix, "*Adakai*."

also defended the amount of compensation offered and paid by Western. *Id.* at 9-10. Morgan did not appeal from the Grant of Easement.

We resolved Adakai's appeal on a single issue, which we raised *sua sponte*: the sufficiency of the owner consent relied upon by BIA in granting the ROW renewal. *See Adakai*, 56 IBIA at 104, 108. We concluded that it was arbitrary and capricious for the Regional Director, relying on Morgan's consent to achieve the required majority, and in the absence of consent from the remaindermen, to grant an unqualified 20-year ROW. *Id.* at 109. We also concluded, however, that Adakai lacked standing to challenge the validity of the consents obtained from other landowners, including Morgan. *Id.* at 110. We declined to address Adakai's argument regarding the sufficiency of compensation, leaving that issue for further consideration by the Regional Director on remand. *Id.*

In reaching our conclusion that it was arbitrary and capricious for BIA to rely on Morgan's consent to grant an unqualified 20-year ROW, we cited the general principal that "[a] person holding an estate less than fee simple may create an easement only within the terms of his or her estate." *Id.* at 108 (citing 25 Am. Jur. 2d Easements and Licenses § 11 (2012)). We construed Morgan's life estate as limiting his authority to grant consent to the ROW for the duration of his life. *Id.* at 108-09. We noted that the Regional Director had asserted that Morgan, in reserving a life estate, had "retained his authority," possibly contending that Morgan could encumber the estate beyond the duration of his life. *Id.* at 108 n.6. But the Regional Director provided no support for that contention and the instrument creating Morgan's life estate was not in the record. *Id.*

## III. Proceedings on Remand from *Adakai*

On remand, the Regional Director sought to comply with the Board's order using a collaborative approach.[5] Letter from Regional Director to Adakai, Apr. 8, 2013 (AR 170).

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[5] The Regional Director also provided the Allotment owners an opportunity to provide any evidence or argument regarding the fair market value of land on the Allotment. Letter from Regional Director to Landowners, Nov. 15, 2013 (AR 58-107). In response to a November 27, 2013, letter from Tom Morgan and Lawrence Morgan, *see* AR 47, the Regional Director invited the two to meet with the Office of Appraisal Services to discuss the appraisal process. Letter from Regional Director to Tom Morgan and Lawrence Morgan, Jan. 14, 2014 (AR 17). No one attended the proposed meeting. *See* Letter from Regional Director to Frank Adakai, *et al.*, Feb. 20, 2014 (AR 9). Further correspondence between the Regional Director and the landowners followed, but no evidence or further argument was submitted to BIA from the landowners on the valuation issue. *See* Email from Patrick Adakai to Sharon Pinto, *et al.*, Mar. 9, 2014 (AR 4); Email from Patrick Adakai to Sharon Pinto, *et al.*, Mar. 7, 2014 (AR 5); Letter from Regional Director to

(continued...)

BIA officials met with Adakai and certain other concerned individuals on April 30, 2013, and May 17, 2013, and with Western, other landowners, and interested members of the public, on May 31, 2013, and June 17, 2013.[6] These meetings typically lasted longer than 5 hours. AR 149.

During this time, the Regional Director provided Western with an updated Title Status Report for the Allotment and notified Western of the need to obtain consents from remaindermen interest owners as well as other current interest owners. AR 163. The Regional Director identified Morgan and Mary Tom (Tom) as owners of life estate interests in the Allotment. Letter from Regional Director to Bloom, Aug. 26, 2013, at 1 (AR 150).[7] Both Morgan and Tom purported to withdraw their consent to the ROW through a letter dated July 28, 2013. Letter from Morgan and Tom, July 26, 2013 (AR 158). Neither returned the compensation that they had accepted from Western for their previous consent, and Tom subsequently again consented to the ROW. *See* Consent to Grant, Oct. 23, 2013 (AR 113).

Western invited the Allotment's life tenants and remaindermen to a meeting on October 23, 2013. Letter from Bloom to Interest Owners, Oct. 7, 2013 (AR 118-45). Tom and two of her four remaindermen attended the meeting. *See* Letter from Bloom to Regional Director, Oct. 30, 2013 (AR 110); Letter from Bloom to Regional Director, Nov. 22, 2013 (AR 56). Those two remaindermen granted their consent at the meeting. AR 110 at 2 (unnumbered). Morgan and his remaindermen did not attend the meeting. *See* AR 56, 110. The Regional Director also invited Morgan's remaindermen to an

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Patrick Adakai, Mar. 6, 2014 (AR 7); Email from Patrick Adakai to Sharon Pinto, *et al.*, Feb. 24, 2014 (AR 8).

[6] *See* Email from Patrick Adakai to Ryan Hunter, *et al.*, May 1, 2013 (AR 169); Letter from Patrick Adakai to Regional Director, May 10, 2013, at 1 (AR 168); Email from Patrick Adakai to Ryan Hunter, *et al.*, May 11, 2013 (AR 167); Email from Patrick Adakai to Ryan Hunter, *et al.*, May 19, 2013 (AR 166); Email from Patrick Adakai to Ryan Hunter, *et al.*, May 24, 2013 (AR 165); Letter from Regional Director to Leonard Bloom, June 7, 2013 (AR 163); Letter from Regional Director to Frank Adakai, Aug. 30, 2013 (AR 149).

[7] Tom holds a 14.16% life estate and consented to the ROW in 2008. At that time her interest was counted as a full interest, rather than as a life estate, because the deed creating her life tenancy had not yet been approved and recorded. *See* Mary Tom Gift Deed, Nov. 16, 2007, at 1 (AR 187, Ex. B), Title Status Report (*Adakai* AR 342). Thus, although the Board in *Adakai* only focused on Morgan's consent, it subsequently became clear that Tom, as a life tenant, was similarly situated to Morgan.

informational meeting regarding the ROW. *See* Letter from Regional Director to Remaindermen, Nov. 25, 2013 (AR 49-55).

Western eventually offered additional compensation to the remaindermen, and four of Morgan's eight remaindermen accepted and consented. Letter from Bloom to Morgan Remaindermen, Dec. 26, 2013 (AR 31-39); Remainderman Consent, Jan. 17, 2014 (AR 25) (Dugan Morgan Consent); Remainderman Consent, Jan. 9, 2014 (AR 24) (Wilbert Ray Morgan Consent); Remainderman Consent, Jan. 9, 2014 (AR 23) (Philbert Morgan Consent); Remainderman Consent, Jan. 9, 2014 (AR 22) (Bertina Rae Morgan Consent).

On March 7, 2014, Western notified the Regional Director of its "good faith efforts" to obtain consents from the interest owners in the Allotment. Letter from Bloom to Regional Director, at 1 (AR 6). Western reported that Tom had consented to the renewal of the ROW, as had three of her remaindermen; the fourth was deceased. *Id.* at 2. Although Morgan had submitted a letter revoking his prior consent, *see* AR 158, Western contended that Morgan's attempted revocation was invalid. As noted, four of Morgan's eight remaindermen consented. AR 6 at 2.

At the outset of the remand proceedings, Western also submitted to BIA copies of the gift deeds through which Morgan and Tom reserved their life estates. Western argued that the deeds, which were not in the *Adakai* appeal record, showed that contrary to the Board's decision, Morgan and Tom did have authority to consent to a 20-year unqualified ROW, accepting full compensation for the ROW without regard to their remaindermen. Letter from Sheridan to Regional Director, July 16, 2013 (AR 187). Western contended that the Board, in light of the language of the deeds, had erred in finding that the life tenants lacked authority to encumber an estate beyond their life terms. *Id.* at 1-2. In the alternative, Western contended that the Regional Director should modify the Grant of Easement for the Allotment to limit the term to 20 years, or the life of Morgan or Tom, whichever is the shortest period. *Id.* at 1. Western also argued that none of the consenting landowners had appealed from BIA's original Grant of Easement, that the Board had held that Adakai lacked standing to challenge other landowners' consents, and thus the consents previously obtained, e.g., Morgan's, could not be revoked. *Id.* at 11.

Issuing her decision on remand, the Regional Director concluded that Western had not obtained consent to the ROW renewal from a majority of the interests in the Allotment and therefore she denied the renewal. Decision, Apr. 8, 2014, at 3 (AR 1). In reaching that conclusion, she noted that Morgan had informed BIA that he had withdrawn his consent, while also noting that Western had advised BIA that Morgan had not returned the compensation he received for his consent. *Id.* at 3 & n.3.

On appeal to the Board, Western filed a statement of reasons, opening brief, and reply brief. The Regional Director filed an answer brief. Four individuals with ownership

interests in the Allotment, identifying themselves as the Diné Bí Kéyah Task Force Committee (Task Force), and purporting to represent all of the owners of the Allotment, filed an answer brief.[8] Western moved to strike the Task Force's answer brief on the ground that the Task Force lacks standing to represent all of the landowners. Alternatively, Western filed a reply to the Task Force's brief.

## Standard and Scope of Review

The Board reviews a regional director's decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Adakai*, 56 IBIA at 107. We do not substitute our judgment for that of BIA with respect to the exercise of BIA's discretionary authority. *Darren Rose v. Acting Pacific Regional Director*, 62 IBIA 330, 334 (2016). The Board reviews legal determinations and the sufficiency of evidence to support a BIA decision *de novo*. *Id.* The appellant bears the burden of proving that BIA's decision was erroneous or not supported by substantial evidence. *Id.* The normal scope of review for an appeal does not preclude the Board from exercising the authority of the Secretary to correct manifest error or injustice. 43 C.F.R. § 4.318.

## Discussion

We affirm the Regional Director's decision in part, to the extent that she denied Western an unqualified 20-year ROW. We reject Western's argument that the language of the deeds creating Morgan's and Tom's life estates reserved to them the right to encumber the remainder estates with an unqualified 20-year ROW. Therefore, sufficient consent of the remaindermen is necessary to grant an unqualified 20-year ROW.

But we also reverse the Regional Director's decision in part, holding, on further consideration, that the initial Grant of Easement was valid and enforceable for the duration of the life tenancies. We agree with Western that our order of vacatur in *Adakai*, which was based on an issue we raised *sua sponte*, and without soliciting briefing from interested parties, need not and should not have been applied more broadly than the context required. Morgan and the other owners who originally consented to the ROW did not appeal from the Grant of Easement. And in *Adakai* we did not purport to set aside or invalidate Morgan's consent, nor did we question the ROW to the extent the duration was consistent

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[8] Patrick and Frank Adakai own full (i.e., present and future) interests in the allotment; Lawrence and Anselm Morgan own future interests as remaindermen to Morgan's life tenancy.

with the authority of the life tenants whose consent formed a majority.[9] Whether or not an order of vacatur ordinarily and presumptively might completely "undo" a BIA action to grant or approve an ROW, thus allowing landowners to revoke previously granted consent before new BIA action is taken, we conclude that in the context of this case, Morgan could not effectively revoke his consent, at least when he failed to return the consideration he accepted for that consent.

I. Task Force Brief

As an initial matter, we address Appellant's motion to strike the Task Force's answer brief. The Task Force purports to represent "the entire landowners of [the Allotment]," Task Force Br., July 30, 2014, at 1, and apparently seeks to negotiate with Western on behalf of the landowners. But nothing in the brief or accompanying exhibits is sufficient to establish that the Task Force—a committee of four individuals—is authorized to represent any landowners other than the committee members themselves, and possibly one other individual, Selfina Garcia.[10] Thus, we grant Western's motion to strike to the extent that the Task Force purports to represent individuals other than its four members, and possibly Garcia. We also agree with Western that much of the substance of the Task Force's brief is irrelevant to the issues that are relevant to this appeal and the Decision.

II. The Authority of Life Tenants Morgan and Tom

In *Adakai*, we stated the general rule that "the owner of property whose interest is limited by the duration of his or her life may only grant, or give consent to, [an ROW] for the duration of his or her life." 56 IBIA at 108. We concluded, based on that general rule and the record before the Board, that the life estate holders of the Allotment lacked the authority to consent to the ROW renewal for a "fixed *and unqualified*" duration of 20 years. *Id.* at 109.

Western contends that the Board erred in vacating the Grant of Easement, based on the general rule regarding life estates, because the specific deeds involved in the present

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[9] In *Adakai*, we noted that, while the grant renewing the ROW, the appraisal, and the consent forms described the ROW as 60 feet in width, the environmental assessment (EA) described the ROW as 40 feet in width. 56 IBIA at 105 n.2. On remand, Western agreed to have the ROW renewal limited to 40 feet in width, thus mooting this issue with respect to a potential deficiency in the EA. AR 6 at 2.

[10] Attached to the brief is a letter from Garcia asserting that the Task Force represents 20 landowners, as evidenced by a sheet containing 20 signatures. Task Force Br., Exhibit 16. The sheet containing the signatures is simply entitled "Sign In Sheet," with no authorizing language whatsoever. *Id.*

case—admittedly not before the Board in *Adakai*—reserved for the life tenants the right to encumber the estate beyond the duration of their lives. Notice of Appeal and Statement of Reasons, May 7, 2014, (SOR) at 10. Western argues that a grantor, in reserving a life estate, may either expressly or impliedly reserve the right to encumber the estate beyond his or her lifetime. *Id.* at 18-19. Western argues that the deeds by which Morgan and Tom created their life estates retained, for each of them, "the power to give effective consent to an unqualified 20-year term of renewal." *Id.* at 10, 17-20. Western also contends that it was error for the Board in *Adakai* to raise the issue of life interest owner consent and to vacate the Grant of Easement, *sua sponte*, without first affording Western an opportunity to address the issue, and that the Grant of Easement was valid at least for the duration of the lives of Morgan and Tom.

In support of its interpretation of Morgan's and Tom's deeds, Western relies on several cases in which courts concluded that the instrument creating a life estate controlled the authority of the life tenant, and in each case had granted or reserved to the life tenant authority to convey or encumber the estate that was not limited to his or her lifetime. *See* SOR at 19-20 (citing *Ray v. Frick Co.*, 57 S.E. 2d 890 (W. Va. 1950); *Hall v. Wardwell*, 46 S.E.2d 556 (N.C. 1948); *Wilson v. Singleton*, 103 N.E.2d 72 (Ill. 1951)); Supplemental Opening Br., June 30, 2014, at 5 (citing *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359 (Tex. Ct. App. 2003); *Click v. Crocker*, 1987 Tenn. App. LEXIS 2869 (Aug. 18, 1987); *Givens v. Givens*, 387 S.W.2d 851 (Ky. Ct. App. 1965)).

We do not dispute the general proposition that an instrument creating a life estate can grant or reserve to the life tenant the authority to encumber or dispose of an estate in a manner not limited to the duration of the life tenant. *See* SOR at 18-19. But we disagree with Western's interpretation of the deeds creating the life estates of Morgan and Tom, and we find the cases relied upon by Western distinguishable.

The two deeds creating life estates for the Allotment contain identical language granting Morgan's and Tom's "entire undivided interest," while providing that a "Life Estate is to be reserved for the Grantor for all income including surface, subsurface leases and any other sources." Tom Morgan Gift Deed, Aug. 28, 2003, at 1 (AR 187, Ex. A); Mary Tom Gift Deed, Nov. 16, 2007, at 1 (AR 187, Ex. B). Western interprets this provision as "impliedly reserv[ing] unto [Morgan and Tom] the authority to consent to [an ROW] for a fixed term that might extend beyond their lifetimes." SOR at 19. Western states that the "purpose" of the life estate is to receive income from the property. *Id.* (emphasis omitted). It reasons that if the life estate holders do not have an "unqualified" power to consent to leases and ROWs, the life estate holders cannot fulfill this "purpose." *Id.* For, Western states, if the consent of remaindermen were required to renew a 20-year ROW, the life estate holders cannot be assured of receiving "all income" from the property. *Id.*

We disagree. While the language in the deeds undoubtedly reserves to Morgan and Tom the authority to encumber their interests in the Allotment during their lifetimes, and to collect "all income" from such encumbrances, that language is insufficient, in our view, to impliedly reserve the authority to encumber the estate beyond their lifetimes and collect "all income" attributable to what would otherwise be the value of the remainder interests. As Western interprets the deed language, Morgan and Tom reserved for themselves the authority to effectively extinguish any value in the named grantees' future interests by leasing, e.g., for a 50-year term—or even by selling outright—their interests during their lifetimes, and collecting the combined value of the present possessory and future interests as "income." We are not convinced that the language of the deeds is sufficient to carry the meaning ascribed to it by Western.

The cases relied on by Western are distinguishable. In each case, the instrument creating the life estate either granted or reserved to the life tenant more than the right to "income." For example, in *Wilson*, the life tenant had "full power to sell this real estate" and "need not account to anyone for the sale price." 103 N.E.2d at 73. In *Ray*, the life tenant reserved "the exclusive right during his lifetime to use, lease, develop, manage, improve or operate all of the property," including "the exclusive right during his lifetime to sell, grant and convey all of the property comprising the trust estate." 57 S.E.2d at 892. *See also Steger*, 134 S.W.3d at 373-74 (instrument granted life tenant authority to manage, control, and lease property "*for all purposes*" and make leases "*of whatever nature*"; additional language divided royalties on oil production that "*continued*" after the life tenant's death, thus presuming that the property would be subject to leases continuing beyond the life tenant's lifetime); *Click*, 1987 Tenn. App. LEXIS 2869, at *4-9 (will created a life tenancy with an *inter vivos* power of consumption, granting life tenant the power to sell or lease, but not to give away or devise the property). In each case relied on by Western, the language of the instrument creating the life tenancy, whether expressly, or when viewed in its entirety, evidenced a clear intent by the grantor to authorize the life tenant to encumber the estate beyond the duration of the life tenancy, at least in certain respects.

The language in the Morgan and Tom deeds allows the life tenants to receive "all income" from their interests in the Allotment from "any . . . source" in a "life estate." The any-source language relates to the source of the income, not the nature of the encumbrance generally. We are not convinced that language reserving a right to income from any source is sufficient to reserve the broad authority that Western contends is present here. While the deeds grant Morgan and Tom the authority to lease their interests in the Allotment for income, the deeds contain no language that expressly or impliedly reserved, for the life tenants, the authority to grant an interest beyond their lifetimes.[11] Having examined the

[11] Even to the extent that Morgan's and Tom's reservation of the right to execute subsurface leases may have impliedly reserved to them the authority to execute mineral leases that

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Tom Morgan and Mary Tom gift deeds, we conclude that our statements in *Adakai* remain correct.[12] Morgan and Tom lack authority to consent to an ROW for a duration beyond their lifetimes. We reaffirm our conclusion in *Adakai* that it was arbitrary and capricious for the Regional Director, relying on Morgan's consent for his 42.5% life estate interest to achieve majority consent, to grant an ROW "for a fixed *and unqualified* duration of 20 years." 56 IBIA at 109.

III. Morgan's Withdrawal of Consent

Western next contends that an allottee may only withdraw consent to an ROW before the approving official "sign[s] the [ROW] document." SOR at 12. According to Western, the Board in *Adakai* only vacated the Regional Director's decision giving notice of the Grant of Easement, but did not vacate the Grant of Easement itself, and thus Morgan had no right to revoke his consent on remand because the Grant of Easement was not set aside by the Board. SOR at 11; *see also* Supplemental Opening Br. at 6-7. Western adds that Morgan's attempted revocation of consent was invalid because he never perfected that revocation by returning the compensation he received for granting consent. Supplemental Opening Br. at 7.

We have explained that a landowner may withdraw their consent to an ROW before it is approved by BIA. *Nemont Telephone Cooperative, Inc. v. Acting Rocky Mountain Regional Director*, 55 IBIA 75, 82 (2012). And ordinarily, an order vacating BIA's approval of or granting an ROW may reopen the right of landowners to revoke their prior consent,

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encroached upon the corpus, it does not follow that they intended to reserve authority to destroy the value of the corpus for the remaindermen, i.e., by entering into a long-term mineral lease in which the full value is paid to the life tenant. The language reserving to themselves "all income" from surface and subsurface leases, and other sources, is simply not analogous to the authority at issue in *Click* or *Givens*, in which the life tenants had the authority to permanently convey the entire interest to another party.

[12] For the first time in its reply brief, Western argues that "[p]erhaps the best evidence" that Morgan intended his life estate to reserve for himself full authority to encumber the remainder interest is the fact that Morgan retained "100% of the compensation for his share of the full 20-year term renewal, even after the Board said in *Adakai* that he could not consent to a full 20-year term." Reply Br., Aug. 20, 2014, at 4. As a general rule, the Board does not consider arguments raised for the first time in a reply brief. *See, e.g.*, *Hunter v. Acting Navajo Regional Director*, 40 IBIA 61, 68 n.5 (2004). In any case, landowners are free to accept compensation that is above fair market value for ROWs, and we are not convinced that Morgan's unwillingness to return the compensation to Western was indicative of his understanding of his intent when he executed the deed.

because when a BIA decision is vacated, and absent any qualifying language, it is set aside as though it never issued. But context is still important, and the circumstances of this case lead us to conclude that Morgan did not have a right to revoke his consent without at least returning the consideration he accepted.[13]

In *Adakai*, we vacated the Regional Director's approval of the ROW on the grounds that there was insufficient landowner consent to grant an *unqualified* 20 year ROW. We did not find that Morgan's consent was invalid, and indeed, we held that the appellant in that case, Adakai, lacked standing to assert the interests of other landowners. Thus, with respect to the consents obtained, we did not question the validity of the ROW for the duration of Morgan's lifetime.[14] Instead, we concluded that BIA's action to grant an unqualified ROW was arbitrary and capricious. And as Western correctly notes, we resolved *Adakai* on a ground not squarely raised by appellant Adakai, without providing interested parties such as Western an opportunity to brief the issue, and possibly convince the Board, if not to reach a different conclusion, to tailor our order to vacate the grant of easement only in part.

In that context, and considering that Morgan did not return the consideration he received when he granted consent, we are persuaded that Morgan's attempt to revoke his consent was without effect. Thus, his original consent to the ROW, which supported the grant of a qualified ROW, is still effective. *See* Consent Form, Aug. 25, 2008, (*Adakai* AR 341). Because there was sufficient consent to support the Grant of Easement, as qualified, we reverse the Regional Director's decision in part and reinstate the Grant of Easement to the extent consistent with the authority of the life tenants to consent.

## IV. Consent Requirements

BIA may renew "[ROWs] over and across individually owned lands without the consent of the individual Indian owners when . . . [t]he land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant." 25 C.F.R. § 169.19, incorporating *id.* § 169.3(c)(2). Western suggests that the Board in *Adakai*, and the Regional Director on remand, required Western to obtain the consent of

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[13] We are not convinced by Western's attempt to distinguish between the Regional Director's action approving the Grant of Easement and the notice of decision she issued for that action. The notice may have triggered the appeal period, *see* 25 C.F.R. § 2.7, but it was the underlying action that the Board reviewed in *Adakai*, and upon which we issued our order in that case.

[14] We did raise the issue of environmental compliance, but as noted *supra* note 9, that issue was rendered moot by Western's agreement to have the ROW limited to a 40-foot width.

*all* remaindermen, not simply a majority interest. SOR at 21-22. Western also argues that it is "unworkable and unjust" to require a party applying for an ROW to receive the consent of remaindermen who may be difficult to identify and locate. *Id.* at 23. The Regional Director likewise expresses uncertainty regarding how remaindermen consent is to be counted, but concludes that regardless of how remaindermen consent is tallied, there was insufficient consent to grant the ROW renewal to Appellant. Answer Br., July 31, 2014, at 4-5.

Both Western and the Regional Director overcomplicate the tallying of consents. The life tenants hold only a present interest in the Allotment and BIA may not rely upon their consent in granting an ROW that extends beyond the life tenants' lifetimes. Remaindermen hold a vested future interest in the Allotment, and therefore may consent to ROW's for the period following the life tenants' lifetimes. In our view, the consenting life tenants must be included in the tally of present interests, the consenting remaindermen must be included in the tally of future interests, and those holding full (i.e., present and future) interest in the Allotment must be included in the tallies of both the present and future interests. If the majority of present interest owners in the Allotment consent, but the majority of future interest owners do not consent, then the Regional Director may grant an ROW for the lifetimes of the life tenants. If both a majority of the present and future interest owners consent, then the Regional Director could grant an ROW for an unqualified period of time. The presence of multiple owners of fractional interests, as well as both present and future interest owners, undoubtedly may complicate Western's ability to obtain the necessary consent. But it does not follow that we may excuse the law's requirement for majority consent with respect to both the present and future estates.

Morgan and Tom, life tenants, and six other landowners in the Allotment granted their consent to the renewed ROW. *See* ROW Consent Percentage Calculation (*Adakai* AR 305). These individuals hold a present interest in the Allotment totaling 60.26%. Thus, a majority of the present interests consented to the ROW renewal, and we conclude that it was within the Regional Director's discretion and authority to grant a qualified ROW for 20 years, i.e., for a term to 20 years, or the life of Morgan or Tom, whichever is the shortest period. Although we refrained in *Adakai* from addressing the issues of environmental compliance and the sufficiency of compensation, leaving those for the remand, the first issue was rendered moot, *see supra* note 9. As to the second issue, the record provides no basis for us to invalidate the Grant of Easement on the ground that the compensation paid by Western was below fair market value. Adakai did not produce such evidence in the prior appeal, nor did the landowners on remand, after being provided an opportunity to do so. *See supra* note 5.

With respect to an ROW for a duration beyond the lifetimes of the life tenants, Tom's three living remaindermen consented to the renewal, and her fourth remaindermen is deceased. Summing the interests of Tom's three surviving remaindermen, the four

consenting remaindermen of Morgan, and the six other consenting landowners, 35.47% of those holding a future interest in the Allotment consent to the ROW renewal.[15] Even if we include the interest of Tom's deceased remainderman, the total consenting future interests in the Allotment totals only 39.01%. Thus, there remains insufficient consent to permit BIA to grant an unqualified 20 year ROW, and we affirm the Regional Director's denial of the ROW in that respect.

## 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 April 8, 2014, decision in part, reverses it in part, and remands. On remand, the Regional Director shall modify the Grant of Easement, as applied to the Allotment, to limit it to a 40-foot width, as agreed to by Western.

I concur:

Steven K. Linscheid
Chief Administrative Judge

Thomas A. Blaser
Administrative Judge

[15] Remainderman Consent, Jan. 9, 2014 (AR 22) (Consent of Bertina Rae Morgan, Tom Morgan remainderman); Remainderman Consent, Jan. 9, 2014 (AR 23) (Consent of Philbert Morgan, Tom Morgan remainderman); Remainderman Consent, Jan. 9, 2014 (AR 24) (Consent of Wilbert Ray Morgan, Tom Morgan remainderman); Remainderman Consent, Jan. 17, 2014 (AR 25) (Consent of Dugan Morgan, Tom Morgan remainderman); Consent to Grant, Oct. 23, 2013 (AR 113) (Mary Tom Consent); Remainderman Consent, Oct. 23, 2013 (AR 114) (Consent of Travis Tom, Mary Tom remainderman); Remainderman Consent, Oct. 23, 2013 (AR 115) (Consent of Karen Yazzie, Mary Tom remainderman); Remainderman Consent, Oct. 24, 2013 (AR 116) (Consent of Roderick Martinez, Mary Tom remainderman).

**Western Refining Southwest, Inc. and Western Refining Pipeline, LLC v. Acting Navajo Regional Director, Bureau of Indian Affairs**
**Docket No. IBIA 14-101**
**Order Affirming Decision in Part, Reversing in Part, and Remanding**
**Issued May 4, 2016**
**63 IBIA 41**

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