INTERIOR BOARD OF INDIAN APPEALS

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

67 IBIA 130 (08/04/2020)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUSAN FREDERICKS, JOHN FREDERICKS III, CASEY FREDERICKS, SHAWN FREDERICKS, and MARY MALEE FREDERICKS, Appellants,	)	Order Affirming Decision
	)	Docket No. IBIA 17-066
v.	)	
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	August 4, 2020

Appellants in this case, Susan Fredericks, John Fredericks III, Casey Fredericks, Shawn Fredericks, and Mary Malee Fredericks, are children of John Fredericks, Jr. (Decedent), who died owning trust or restricted property on the Fort Berthold Indian Reservation, including a 1/1 interest in Allotment No. M1029A-A[1] (Allotment). Appellants appealed to the Board of Indian Appeals (Board) from a February 15, 2017, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), concerning a lease, Contract No. 301 7420A49654 (Lease), to produce oil and gas from the Allotment that was executed after Decedent's death and before his heirs were determined.[2] Pursuant to the probate of Decedent's trust or restricted property estate, Appellants each hold an undivided 1/7 remainder interest in the Allotment. Decedent's surviving spouse, Judy Fredericks (Judy), holds a full life estate without regard

[1] The "M" prefix refers to the mineral estate.

[2] Appellants have also filed in the U.S. Court of Federal Claims a breach of trust case contesting actions taken by BIA regarding the lands and assets in Decedent's estate, including BIA's actions concerning the Lease at issue. That case has been stayed pending exhaustion of administrative remedies. *See Fredericks v. United States*, No. 14-296L, 125 Fed. Cl. 404, 2016 U.S. Claims LEXIS 110 (Feb. 24, 2016).

to waste[3] in the Allotment. In the Decision from which Appellants brought this appeal, the Regional Director concluded that the Lease was properly executed by BIA's Acting Fort Berthold Agency Superintendent (Superintendent) pursuant to the Fort Berthold Mineral Leasing Act (FBMLA)[4] on behalf of a deceased owner whose heirs had not yet been determined. The Regional Director further concluded that Judy, as the holder of a life estate without regard to waste in the Allotment, is entitled to receive all the income (including bonuses, royalties, and rent) accruing from the Lease until her death.[5] On appeal, Appellants argue that the Lease was executed by Judy, rather than the Superintendent, and is therefore invalid. Appellants also maintain that the distribution of Lease income is governed solely by the FBMLA, and that the remaindermen are the only "owners" of the Allotment under the FBMLA and thus entitled to all past and any future income.

We affirm the Decision. The Regional Director's finding that the Lease was executed by the Superintendent in accordance with the FBMLA is supported in the record, which includes an acceptance-of-lessor form signed by the Superintendent on behalf of Decedent's estate as the lessor. Judy's signature on the Lease is surplusage because it was neither required nor sufficient to execute a lease on behalf of Decedent's unprobated estate under the FBMLA. Nor do Appellants show error in the Regional Director's conclusion that Judy is entitled to receive all the income accruing from the Lease until the termination of her life estate. FBMLA § 1(a)(2)(C) calls for the distribution of proceeds from a lease "in accordance with the interest owned by each owner" of the land that is subject to the lease. As the holder of a life estate, Judy has a limited ownership interest in the Allotment. Further, Decedent died intestate and Judy's life estate "without regard to waste" (and Appellants' remainder interests) was created by operation of law, the American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. § 2201 *et seq*. AIPRA provides that the holder of a life estate without regard to waste "is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." *Id.* § 2201(10). Thus, the FBMLA and AIPRA work in concert to require that Judy be

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[3] In general, "waste" is "[p]ermanent harm to real property committed by a tenant (for life or for years) to the prejudice of the heir, the reversioner, or the remainderman." Black's Law Dictionary 1824 (10th ed. 2014).

[4] Pub. L. No. 105-188, 112 Stat. 620 (1998), 25 U.S.C. § 396 note (Leases of Certain Allotted Lands).

[5] Judy has filed in the Court of Federal Claims a lawsuit seeking payment of funds being held by the Department of the Interior's (Department) Office of Special Trustee for American Indians (OST) that have accrued from lands in Decedent's estate since his death. *Fredericks v. United States*, No. 16-1695-C. That case has also been stayed pending resolution of this appeal.

given all the income generated from the Allotment and the Lease during her lifetime. The remaindermen have a fixed right of future enjoyment of the Allotment and are entitled to receive any Lease income that accrues after Judy's death.

Legal Framework

I. Execution and Approval of Leases, and Distribution of Proceeds, under the FBMLA

The FBMLA is entitled "An Act [t]o permit the mineral leasing of Indian land located within the Fort Berthold Indian Reservation in any case in which there is consent from a majority interest in the parcel of land under consideration for lease." The FBMLA amended the Mineral Leasing Act of 1909, codified at 25 U.S.C. § 396, which had been interpreted as requiring the Secretary of the Interior (Secretary) to secure the consent of all owners holding an undivided interest in a parcel of land that would be the subject of a mineral lease. *See* S. Rep. No. 105-205, at 1, 4, 7 (1998). As relevant here, the FBMLA provides:

> SECTION 1. LEASES OF ALLOTTED LANDS OF THE FORT BERTHOLD INDIAN RESERVATION.
>
> (a) IN GENERAL.—
>
> . . .
>
> (2) EFFECT OF APPROVAL BY SECRETARY OF THE INTERIOR.—
>
> (A) IN GENERAL.—The Secretary may approve any mineral lease or agreement that affects individually owned Indian land, if—
>
> (i) the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease or agreement (*including any interest covered by a lease or agreement executed by the Secretary under paragraph (3)*) consent to the lease or agreement; and
>
> (ii) the Secretary determines that approving the lease or agreement *is in the best interest of the Indian owners of the Indian land*.
>
> . . .
>
> (C) DISTRIBUTION OF PROCEEDS.—The proceeds derived from a lease or agreement that is approved by the Secretary under subparagraph (A) shall be distributed to *all owners of the Indian land that is subject to the lease or agreement in accordance with the interest owned by each such owner*.

> (3) EXECUTION OF LEASE OR AGREEMENT BY THE SECRETARY.—The Secretary may execute a mineral lease or agreement that affects individually owned Indian land on behalf of an Indian owner if—
>
> > (A) *that owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined*;
> >
> > . . .
>
> (4) PUBLIC AUCTION OR ADVERTISED SALE NOT REQUIRED.—It shall not be a requirement for the approval or execution of a lease or agreement under this subsection that the lease or agreement be offered for sale through a public auction or advertised sale. . . . .

Emphases added.

Regulations concerning "Leasing of Allotted Lands for Mineral Development," 25 C.F.R. Part 212, were promulgated under the Mineral Leasing Act of 1909 and other laws prior to enactment of the FBMLA. *See* Final Rule, 61 Fed. Reg. 35634, 35634 (July 8, 1996). Like the FBMLA, the regulations provide that the Secretary may execute a mineral lease on behalf of the unprobated estate of a deceased owner. *See* 25 C.F.R. § 212.21(a). However, FBMLA § 1(a)(4), quoted above, supersedes a requirement in § 212.21(a) that such a lease must have been offered for sale only through public auction or advertised sale and instead allows the lease to be negotiated. *See* S. Rep. No. 105-205, at 7.

II. Administration of Life Estates Created under AIPRA

AIPRA was enacted as a set of amendments to the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2201 *et seq*. AIPRA established a uniform Federal probate code for Indian trust estates in support of a policy to stem the further fractionation of undivided ownership interests in Indian trust or restricted lands upon the death of current interest holders, and to promote consolidation of Indian lands. AIPRA, Pub. L. No. 108-374, § 2, 118 Stat. 1773, 1773-74 (2004). As relevant to this appeal, AIPRA provides that "[i]f the decedent is survived by 1 or more eligible heirs . . . the surviving spouse shall receive 1/3 of the trust personalty of the decedent and a *life estate without regard to waste* in the interests in trust or restricted lands of the decedent." 25 U.S.C. § 2206(a)(2)(A)(i) (emphasis added). "Without regard to waste" means that the life tenant "is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." *Id.* § 2201(10).

Part 179 of 25 C.F.R. "contains the authorities, policies, and procedures governing the administration of life estates and future interests in trust and restricted property by the

Secretary of the Interior." 25 C.F.R. § 179.1[6]; *see also* 25 C.F.R. § 212.21(c) ("If an owner is a life tenant, the procedures set forth in 25 CFR part 179 (Life Estates and Future Interests), shall apply."). As explained further *infra*, a "life estate" is a limited ownership interest that lasts for the duration of a designated person's life, here, Judy as the heir who received the life estate. *See* 25 C.F.R. § 179.2; *Estate of Patricia Marie Manahan*, 62 IBIA 150, 153 (2016). Upon the death of the life estate heir, the life estate will terminate and the land interest will pass as a "remainder" interest; it will not become part of the probate estate of the life estate heir. *See* 25 C.F.R. § 179.4; *Estate of Manahan*, 62 IBIA at 153.

The Part 179 regulations were amended, effective December 15, 2008, after the enactment of AIPRA. *See* Final Rule, 73 Fed. Reg. 67256, 67286 (Nov. 13, 2008). The preamble to the final rule explains:

> [T]he existing part 179 required all life tenants to ensure that they did not diminish the estates of the remaindermen in their pursuit of rents and profits. . . .
>
> [C]hange to part 179 is necessary to reflect the AIPRA sections establishing that life estates created by operation of law under AIPRA will be determined "without regard to waste," meaning that the life estate holder is entitled to the receipt of all income, including bonuses and royalties, from such land, to the exclusion of remaindermen. *See* 25 U.S.C. 2201(10), 2205, 2206(a)(2). These amendments comply with the provisions of AIPRA with respect to life estates created by operation of law under AIPRA after June 20, 2006. There is no change with respect to life estates created before June 20, 2006, or life estates created by conveyance documents on or after June 20, 2006.

Id. at 67272; *see also Fredericks*, 125 Fed. Cl. at 415 ("Prior to the amendment, a life tenant would be paid interest on the proceeds from a mineral lease, with the principal, *i.e.*, the proceeds themselves, going to the remaindermen." (citing 25 C.F.R. § 179.4(c) (2006))).

The law to be applied to life estates created by operation of law for an individual who died on or after June 20, 2006,[7] is AIPRA. 25 C.F.R. § 179.3. Like AIPRA, the

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[6] Unless otherwise noted, all references are to the current version of 25 C.F.R. Part 179.

[7] That is the date on which most of AIPRA's provisions became effective, including those that govern intestate succession. *See* 25 U.S.C. § 2206 note (Effective and Applicability Provisions – 2004 Acts); Secretary's Certification of Notice for AIPRA, 70 Fed. Reg. 37107 (June 28, 2005).

Part 179 regulations define "life estate without regard to waste" to mean that the holder of the life estate interest in land "is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." *Id.* § 179.2; *see* 73 Fed. Reg. at 67262 ("AIPRA established the definition [of 'without regard to waste'] and the Department is bound by its applicability."). Subpart C of Part 179 describes how the Secretary distributes principal and income to the holder of a life estate without regard to waste under AIPRA.[8] Specifically, 25 C.F.R. § 179.201 provides that "[t]he Secretary must distribute all income, including bonuses and royalties," to the holder of a life estate without regard to waste, "to the exclusion of any holders of remainder interests." Section 179.202 of 25 C.F.R. provides that the holder of a life estate without regard to waste "may cause lawful depletion or benefit from the lawful depletion of the resources," but "may not cause or allow damage to the trust property through culpable negligence or an affirmative act of malicious destruction that causes damage to the prejudice of the holders of remainder interests."

Background

I. The Probate of Decedent's Trust Estate

Decedent died on December 27, 2006, owning among other property a 1/1 interest in the 160-acre trust Allotment,[9] and his trust or restricted estate was distributed pursuant to AIPRA's rules of intestate succession. On July 11, 2013, the Board affirmed the denial of a request by Appellants for a rehearing of Decedent's probate, *see Estate of John Fredericks, Jr.*, 57 IBIA 204 (2013), and on that date the probate judge's original probate decision issued on June 20, 2009, became final for the Department. Decedent's surviving spouse, Judy, received a full life estate without regard to waste in the Allotment (and in all other trust or restricted land interests in which Decedent's undivided ownership interest was 5% or more). *See* 25 U.S.C. § 2206(a)(2)(A)(i). Appellants, as children of Decedent, each received a 1/7 remainder interest in the Allotment (and in the other life estate properties).[10]

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[8] Subpart B of Part 179 describes how the Secretary distributes principal and income to the holder of a life estate not created under AIPRA.

[9] In a decision with appeal rights issued on August 11, 2016, the Regional Director confirmed that BIA's inventory of Decedent's estate correctly included a 1/1 interest in Allotment No. M1029A-A. That decision was not appealed to the Board.

[10] Decedent had nine biological children, two of whom were determined not to be heirs under AIPRA because they were adopted by other families. Decedent's oldest surviving child, Susan, received all the less-than-5% land interests under AIPRA's "single heir rule." With respect to Decedent's trust personalty, Judy received 1/3 of the funds in Decedent's

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In *Estate of Fredericks*, as pertinent to the instant appeal, we declined to consider arguments that Appellants had not first raised to the probate judge with their petition for rehearing. These included arguments that life estates created under AIPRA do not include mineral interests and that income generated from the mineral interests after a decedent's death should be added to the decedent's estate and distributed as personalty.[11] *See* 57 IBIA at 208. In addition, we found that the probate judge correctly determined that several issues raised by Appellants concerning leases of lands in Decedent's estate that were executed after his death and that are subject to Judy's life estate—including the instant Lease—were outside the scope of the probate proceedings. We explained:

> Here, the [probate judge] determined that Judy receives a 'life estate without regard to waste,' a direct quote from 25 U.S.C. § 2206(a)(2[I])(A)(i). We agree with the [probate judge] that matters pertaining to the validity of leases, the distribution of rental and other income generated by leases, and related matters—in short, the meaning of 'life estate without regard to waste, *as administered*—falls outside the jurisdiction of the Department's probate judges.

Id. at 209. In particular, during their appeal to the Board from the denial of rehearing, Appellants submitted the Lease at issue here and sought an order from the Board declaring the Lease invalid and requiring distribution of the Lease income in accordance with the FBMLA. *Id.* at 209 n.13. We advised Appellants that they must first exhaust their administrative remedies within BIA prior to seeking review from the Board. *Id.* (citing 25 C.F.R. Part 2). As explained *infra*, Appellants have done so, giving rise to the instant appeal.[12]

(…continued)
Individual Indian Money (IIM) account at the time of death, and each of Decedent's seven children received a 2/21 share of the IIM account date-of-death balance.

[11] But we also noted that, even were we to consider such arguments, we would reject them. We explained that "'AIPRA governs the descent and distribution of mineral rights to the same extent as other property rights.'" 57 IBIA at 208 n.11 (quoting 73 Fed. Reg. at 67264). We also explained that a decedent's estate is fixed at the time of death and, therefore, even if minerals extracted under a lease approved after Decedent's death could be considered trust personalty as Appellants contended, the minerals would attach to the allotments themselves and the income generated would not be added to the estate. *Id.* (citing *Estate of Samuel R. Boyd*, 43 IBIA 11, 23 (2006)). To the extent that Appellants raise those arguments in this appeal, we reject them for the foregoing reasons.

[12] In a separate appeal, the Board affirmed a BIA decision denying Appellants' request for approval of a surface lease, submitted on November 18, 2013, without Judy's consent as the
(continued…)

II. The Oil and Gas Lease

During the pendency of the probate proceedings, the Lease at issue was entered into between Kodiak Oil & Gas (USA), Inc. (Kodiak) as lessee[13] and, purportedly, the "Heir(s) of Allotment 1029A-A, The Estate of John Frederick's [sic] Jr., deceased" as lessor. Lease at 1 (Administrative Record (AR) 3 at 32[14]). The Lease covers the 160-acre Allotment and is for a 5-year primary term and a secondary term that endures "as much longer thereafter as oil and/or gas is produced in paying quantities from said land." Lease at 1. While the primary term has expired, Appellant's and the Regional Director's briefs on appeal state that the Lease is continuing in its secondary term based on production. *See* Regional Director's Answer Brief (Br.), June 21, 2017, at 5; Appellant's Opening Br., May 18, 2017, at 5. The Lease specifies payment of a bonus of $300, a rental of $2.50 per acre per annum, and a royalty of 18%. Lease at 1-2. The Lease was signed by Judy for the "Estate of John Fredericks, Jr. deceased" and by Kodiak, witnessed by two witnesses, and notarized on February 4, 2008. *Id.* at 4. The Superintendent approved the Lease with his signature on April 23, 2008. *Id.* On that same April 23, 2008, date, the Superintendent also signed before two witnesses a form entitled "ACCEPTANCE OF LESSOR TO BE ATTACHED TO OIL AND GAS MINING LEASE" (Acceptance-of-Lessor form) on behalf of "John Fredericks Jr. (Estate)." Acceptance-of-Lessor Form (AR 3 at 36). The Acceptance-of-Lessor form recites the bonus amount, rental rate, royalty rate, and duration of the lease, and states that it "shall be attached to the formal lease contract, when signed by the lessee, and become a part thereof, with the same effect and in lieu of my signature thereon." *Id.* Following the Superintendent's signature is a citation to "25 CFR 212.21(a)(b)(c)." *Id.* The Lease was assigned Contract No. 301 7420A49654 in the Department's Trust Asset and Accounting Management System (TAAMS).[15] The complete copy of the Lease in the

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life tenant. *See Fredericks v. Great Plains Regional Director*, 63 IBIA 274, 275, 280 (2016) (*Fredericks I*).

[13] According to information provided to the Board on appeal, RimRock Oil & Gas Williston Resources, LLC (RimRock) and Peregrine Petroleum Partners Ltd. (Peregrine) are the current lessees by assignment, with RimRock holding a 60% interest and Peregrine holding a 40% interest in the Lease.

[14] Tab 3 of the administrative record includes a compilation of documents that are not consecutively paginated. When citing to a document within Tab 3 for the first time, we cite to the location of the first page of the document within the compilation.

[15] TAAMS is an electronic information system that, among other things, "establishes, tracks and manages various contracts, such as surface area, mineral, rights of way and range; [and] automates invoicing, collections and revenue distributions using captured payment information." *See* http://www.doi.gov/ost/Trust_IT/taams.cfm (copy added to record).

administrative record is stamped "Image of Recorded Lease in TAAMS" and includes the Acceptance-of-Lessor form as "Page 5 of 6." AR 3 at 32, 36. Page 6 is a "Formal Routing Slip for Leasing Documents," which identifies the "document date" as April 23, 2008, and states that the document was received and recorded at the BIA Land Titles and Records Office on August 13, 2009, and scanned on August 17, 2009. AR 3 at 37.

As previously noted, in our July 11, 2013, decision in *Estate of Fredericks*, we declined to consider Appellants' request to invalidate the Lease and require distribution of the income pursuant to the FBMLA. On July 23, 2013, Appellants made a request to BIA to: (1) declare the Lease invalid and "segregate" all income from the Lease to ensure that the alleged rights of the remaindermen to "all bonus, royalty, and other income is protected," and (2) distribute the proceeds from the Lease to the remaindermen as the "owners" of the Allotment pursuant to the FBMLA or, in the alternative, "segregate any amounts deposited until all administrative and judicial proceedings have been completed." Request to Segregate Lease Income and Distribute According to the Ft. Berthold Mineral Leasing Act, July 23, 2013, at 7 (Request to Segregate and Distribute) (AR 6). Appellants attached a copy of our decision in *Estate of Fredericks* and a copy of the Lease, excluding the Acceptance-of-Lessor form. Appellants re-submitted their original request on June 2, 2014, and asked for a status report. Letter from Appellants' Counsel to Superintendent, June 2, 2014 (AR 5). On June 7, 2016, Appellants filed a 25 C.F.R. § 2.8[16] demand for action on their original request with both the Superintendent and the Regional Director. Letter from Appellants' Counsel to Superintendent and Regional Director, June 7, 2016 (AR 4). On February 15, 2017, the Regional Director issued the Decision in response to Appellants' July 23, 2013, letter. Letter from Regional Director to Appellants' Counsel, Feb. 15, 2017 (Decision) (AR 3 at 1).

III. The Regional Director's Decision

In his Decision, the Regional Director found that the FBMLA governs mineral leasing of allotted lands on the Fort Berthold Reservation. Decision at 3. He agreed with Appellants that BIA (and not Judy) had authority under the FBMLA to grant consent to a mineral lease of the Allotment after Decedent's death and before his heirs were determined. *See id.* at 2-3.

The Regional Director found that the Superintendent granted consent to the Lease by signing the Acceptance-of-Lessor form on April 23, 2008. *See id.* at 2. The Regional Director treated Judy's signature as surplusage. *See id.* The Regional Director explained

[16] Section 2.8 provides procedures under which a person may make the inaction of a BIA official the subject of an appeal to the next official in the appeal process.

that, "pursuant to the FBMLA, the Secretary may execute a mineral lease on individually owned Indian land if the owner is deceased and the heirs are undetermined. We find such to be the intent of the Acting Superintendent's execution of the Acceptance of Lessor form." *Id.* at 3. The Regional Director noted that Appellants' copy of the Lease did not contain the Acceptance-of-Lessor form, which he described as "commonly utilized to document consent for oil and gas leases on the Fort Berthold Indian Reservation," and enclosed a copy of the executed form for Appellants. *Id.* at 2. The Regional Director found that it was error for the Superintendent to cite "25 C.F.R. §§ 212.21(a)(b)(c)"[17] as authority to execute the Lease but found that error to be harmless because the Superintendent possessed the authority to execute the Lease under the FBMLA. *Id.* at 3. The Regional Director further found that the Superintendent approved the Lease by signing the lease form "on the same date that he provided his consent on behalf of the estate, being April 23, 2008." *Id.* Thus, the Regional Director concluded that the Superintendent both executed and approved the Lease in accordance with BIA's authority under the FBMLA, and the Regional Director denied Appellants' request to declare the Lease invalid. *See id.* at 3-4.

Next, the Regional Director declined Appellants' request to segregate and distribute all past and any future Lease income to the remaindermen as the alleged only "owners" of the Allotment. *See id.* at 4. The Regional Director disagreed with Appellants' interpretation that life tenants are excluded from the FBMLA's requirement that proceeds from a BIA-approved lease must be distributed to "all owners of the Indian land . . . in accordance with the interest owned by each such owner." FBMLA § 1(a)(2)(C); Decision at 3. He found that the term "owner" is a "commonly understood term, including the variations of ownership rights resulting from life estates, joint tenancies, tenancies in common, etc." *Id.* at 4. He also found that while the FBMLA is "silent in regards to the rights and authority of a life tenant and holders of a remainder interest," "Subpart C of 25 CFR Part 179 specifically addresses life estates created under AIPRA" and "provides that the Secretary must distribute all income, including bonuses and royalties, to the life estate holder to the exclusion of any holders of remainder interests."[18] *Id.* at 3. He

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[17] As we explained *supra* at 133, subsection 212.21(a) provides that the Secretary may execute a mineral lease on behalf of a deceased owner whose heirs or devisees have not been determined, provided that the mineral interest was offered for sale through public auction or advertised sale. The Lease at issue was negotiated, which the FBMLA permits. *See* FBMLA § 1(a)(4). Subsection 212.21(b) concerns execution of leases on behalf of minors or persons who are incompetent by reason of mental incapacity. Subsection 212.21(c) is applicable to an Indian mineral owner who is a life tenant.

[18] The Regional Director found that, unlike *Fredericks I*, in which we relied on general principles of property law to resolve an issue concerning the rights of Judy as a life tenant

(continued…)

concluded that, upon the exhaustion of all administrative and judicial proceedings, Judy was entitled to all income accruing from the Lease during her lifetime. *Id.* at 4.

Appellants appealed to the Board and filed an opening brief. The Regional Director and Judy each filed answer briefs,[19] and Appellants filed a combined reply. Upon taking the case under consideration, by orders dated April 1, 2020, and May 7, 2020, the Board added RimRock and Peregrine as interested parties and allowed each an opportunity to file an answer brief no later than May 27, 2020, and June 8, 2020, respectively. On July 27, 2020, the Board received from RimRock and Peregrine a Motion for Leave to File Joint Answer and Lessees' Joint Answer. Though the motion states that attorneys for all other parties were contacted and do not object to the motion, on July 30, 2020, the Board received an objection from counsel for Appellants.[20] A request for extension of time must be filed within the time originally allowed for filing. 43 C.F.R. § 4.310(d)(2). The Board denies the motion as untimely and gives no consideration to the answer brief filed by RimRock and Peregrine.

Standard of Review

The Board exercises *de novo* review over questions of law and the sufficiency of evidence to support a BIA decision. *Bighorn v. Rocky Mountain Regional Director*, 64 IBIA 94, 103 (2017); *Fredericks I*, 63 IBIA at 276. Ultimately, it is Appellants' burden to show that the Regional Director's decision was in error or not supported by substantial evidence. *See Bighorn*, 64 IBIA at 103; *Fredericks I*, 63 IBIA at 276; *Gooday v. Southern Plains Regional Director*, 38 IBIA 166, 170 (2002).

(…continued)
and Appellants as remaindermen to consent to a lease, here the statutory and regulatory framework provide guidance on the distribution of income from the Lease. *See* Decision at 3. In *Fredericks I*, Appellants appealed from a BIA decision declining to approve a surface lease granted by Appellants to Casey Fredericks without Judy's consent. We found that the statutes and regulations governing agricultural leasing did not address the consent requirements for a holder of a life estate or remainder interest. 63 IBIA at 276. Based on general principles of property law, we concluded that as the holder of a life estate, Judy "owns a 100% undivided present possessory interest in the [a]llotments and therefore has the right to grant or withhold her consent to any use, or lease, of the [a]llotments" during her lifetime. *Id.* at 280.

[19] The Regional Director also requested that the Board expedite its consideration of this appeal, which the Board denied by order of July 20, 2017.

[20] Counsel for Appellants does not deny that he had initially advised counsel for RimRock and Peregrine that his clients had no objection to the motion.

Discussion

On appeal, Appellants maintain that the Lease is invalid and that the FBMLA requires that any income from the Lease be paid to the remaindermen as the only "owners" of the Allotment. We consider these arguments in turn and reject them.

I. Validity of the Lease

Appellants argue that the Lease is invalid for two reasons.[21] First, we address Appellants' argument that Judy executed the Lease and the Superintendent only approved it, and therefore the Lease is void *ab initio*. Opening Br. at 7, 10.

A. Execution of the Lease

Appellants and the Regional Director agree that the Superintendent, and not Judy, had authority to execute the Lease on behalf of Decedent's unprobated estate. *See id.* at 8; Regional Director's Answer Br. at 8 (stating that the FBMLA "authorizes the Secretary to consent on behalf of a decedent pending final determination of heirs"). Appellants dispute the Regional Director's position that the Acceptance-of-Lessor form is sufficient evidence of the Superintendent's execution of the Lease. Opening Br. at 9-10. Appellants argue that, while the Lease form contains a stamp showing that it was recorded in the LTRO on August 13, 2009, the Acceptance-of-Lessor form does not. *Id.* at 10. Appellants also argue that the Acceptance-of-Lessor form "indicates only that the BIA 'accepts' the bonus paid by the lessee." *Id.* We reject Appellants' arguments concerning the sufficiency of the evidence to support the Regional Director's finding that the Superintendent executed the Lease pursuant to the FBMLA.

[21] None of the parties has addressed Appellants' standing. As explained *infra*, Judy's life estate without regard to waste entitles her to all the income generated from the Allotment during her lifetime. Because the Lease is in its secondary term and may continue based on production after Judy's death, Appellants' rights as remaindermen are potentially implicated. *Cf. Fredericks I*, 63 IBIA at 278 ("[A]s a general rule, when a life tenant seeks to commit the estate to a use that would exceed the duration of the life tenancy, the life tenant must obtain the consent of the [requisite percentage] of remainder interests, because their future interests would be implicated for the period that extends beyond the expiration of the life estate."). On appeal, however, Appellants do not object to the terms of the Lease for the period that may extend beyond the expiration of the life estate. Because Appellants' standing was not raised by the parties as an issue, and questions of standing and the merits appear intertwined, we proceed to decide the appeal on the merits.

We have held that nothing in the FBMLA or 25 C.F.R. Part 212 requires that a negotiated lease be prepared on a standard form. *Gooday*, 38 IBIA at 173 (construing the FBMLA as amended by Pub. L. No. 106-67, 113 Stat. 979 (1999), to apply to certain Indian lands in Oklahoma). In *Gooday*, the Board affirmed BIA's issuance of an oil and gas lease on behalf of the undetermined heirs of a decedent's estate. There, the superintendent first "signed a document accepting the bonus" amount and several days later "granted a lease . . . citing as authority the [FBMLA] as amended on October 6, 1999." *Id.* at 169. We have also specifically recognized acceptance-of-lessor forms as sufficient evidence of a lessor's execution of a lease. For example, in *Helton Oil Company v. Anadarko Area Director*, 25 IBIA 225, 225 (1994), the Board dismissed the appeal after the parties reached a settlement that was evidenced by a negotiated oil and gas lease approved by BIA and accompanied by acceptance-of-lessor forms signed by the individual owners. Most recently, in *Bighorn* we rejected the argument that a signed acceptance-of-lessor form can only constitute acceptance of the bonus and cannot serve as valid execution of a lease. Affirming the regional director's decision declining to declare several oil and gas leases invalid, we noted that the acceptance-of-lessor forms in dispute were signed by the individual Indian lessors; witnessed or notarized; included the bonus amount, royalty rate, rental rate, and lease duration; and were expressly intended to be incorporated into the standard form leases that BIA approved. 64 IBIA at 107.

Here, the Lease is a standard form oil and gas lease and includes an acceptance-of-lessor form. The Decision states and Appellants do not dispute that acceptance-of-lessor forms are "commonly utilized to document consent for oil and gas leases on the Fort Berthold Indian Reservation."[22] Decision at 2. The Acceptance-of-Lessor form identifies the lessor as "John Fredericks Jr. (Estate)" and the Superintendent signed the form on behalf of "John Fredericks Jr. Estate." The Superintendent cited "25 C.F.R. § 212.21(a)(b)(c)" as authority, which was not completely incorrect inasmuch as § 212.21(a) authorizes the Superintendent to execute a lease on behalf of the undetermined heirs of a decedent's estate under conditions more onerous than the FBMLA; the FBMLA

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[22] *Bighorn* involved allotments on the Fort Peck Indian Reservation, and *Helton* involved land on the Pawnee Indian Reservation, and thus BIA's use of acceptance-of-lessor forms is clearly not limited to the Fort Berthold Reservation. *See also* BIA, *Fluid Mineral Estate Procedural Handbook* 89 (July 2012) ("Please instruct the owners to sign the Lease or Acceptance of Lessor form exactly as we have shown their name on the attached ownership sheet.") (https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/52-IAM-XH_Fluid_Mineral_Estate_Procedural_HB_OIMT.pdf (excerpt added to record)).
Of course, there would have been no need for the Superintendent to have executed the Acceptance-of-Lessor form in this case had he, rather than Judy, executed the standard form lease as the lessor on behalf of Decedent's undetermined heirs.

does not require that the mineral interest have been offered for sale through public auction or advertised sale. *See* FBMLA § 1(a)(4). And, to the extent there was error in citing the regulation, it was harmless because the Regional Director's decision clarified that the Lease was executed pursuant to FBMLA § 1(a)(3)(A). *See* Decision at 2-3. The Acceptance-of-Lessor form includes the bonus amount, royalty rate, rental rate, and lease duration, and states that it is to be attached to and become a part of the Lease. On the same day that the Superintendent executed the Lease by signing the Acceptance-of-Lessor form, he separately approved the Lease by signing the standard form lease. *See* Lease at 4. The Acceptance-of-Lessor form is attached to the standard form lease in TAAMS and thus the absence of a recording stamp on the Acceptance-of-Lessor form does not, contrary to Appellants' assertion, show that the LTRO "refus[ed] to record" that form. *See* Opening Br. at 10. Therefore, we affirm the Regional Director's conclusion that the Superintendent executed the Lease in accordance with the FBMLA. Judy's signature on the standard form lease on behalf of Decedent's estate is surplusage because it was neither required nor sufficient to execute a lease on behalf of Decedent's unprobated estate under the FBMLA.[23]

B. Alleged Breach of Trust

Second, Appellants maintain that, even if the Superintendent properly executed the Lease on behalf of the unprobated estate of a deceased owner, the Superintendent's approval of the Lease would violate BIA's trust responsibility and render the Lease invalid unless he intended the remaindermen to receive all the income from the Lease. *See* Opening Br. at 11; Request to Segregate and Distribute at 6. FBMLA § 1(a)(2)(A) provides that the Secretary may approve a mineral lease that affects individually owned Indian land if there is sufficient consent to the lease and the Secretary has determined that approving the lease or agreement is "in the best interest" of the Indian owners. That determination is governed by 25 C.F.R. § 212.3 (definition of "In the best interest of the Indian mineral owner"). *See* 25 C.F.R. § 212.1(a); S. Rep. No. 105-205, at 6.

Appellants argue that "an oil and gas lease can never be in the heirs' best interest unless the heirs receive the financial benefits of the lease." Opening Br. at 13. Though Appellants purport not to challenge the probate decision, which is final for the Department, they dispute that Judy is an "heir" and an "owner" of an interest in the Allotment. *See id*.

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[23] In light of our decision, we need not reach Judy's argument that the Lease would be enforceable even in the absence of execution by the Superintendent based on the fact that her life estate vested on the date of Decedent's death and she consented to the Lease. *See Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 99, 106 (2009) (holding that ownership vests on the date of death, not on the date that heirship is adjudicated); Judy's Answer Br., June 12, 2017, at 6.

Importantly, Appellants do not otherwise dispute that the terms of the Lease approved by the Superintendent were in the best interest of the undetermined heirs to the Allotment—they do not complain about the bonus amount, royalty rate, or rental rate. *See Gooday*, 38 IBIA at 172-73 (appellant failed to demonstrate that a lease was not in the best interest of the undetermined heirs where there was no showing, *inter alia*, that any serious potential lessee would offer superior lease terms). Further, the Regional Director argues—and Appellants do not dispute—that absent BIA's execution and approval of the Lease while Decedent's probate remained pending, *none* of the then-undetermined heirs would receive royalties from production during that time, including "allocated production proceeds under a BIA-approved Communitization Agreement." Regional Director's Answer Br. at 5; *see Smartlowit*, 50 IBIA at 105-06 (explaining that leasing statutes and regulations "are designed to allow leases to be granted while probate proceeds so that the heirs do not lose income from their property during the pendency of the probate").

As we explain *infra* with regard to the distribution of proceeds from the Lease, the argument that Judy is not an heir or owner of the Allotment is incorrect. She was previously determined pursuant to AIPRA to be an heir to a life estate in the Allotment, which made her an interest owner. And as the holder of a life estate "without regard to waste" under AIPRA, she is entitled to receive all the income, including bonuses and royalties, from the Allotment during her lifetime. Thus, Appellants fail to show that BIA did not properly consider whether approval of the Lease was in the best interest of Decedent's undetermined heirs.[24] Accordingly, we affirm the Regional Director's decision declining to invalidate the Lease.

II. Distribution of Lease Income

Appellants assert that the FBMLA entitles the remaindermen, as "owners" of the Allotment, to all proceeds from the Lease. Opening Br. at 12. FBMLA § 1(a)(2)(C) provides that "[t]he proceeds derived from a lease or agreement that is approved by the Secretary under [§ 1(a)(2)(A)] shall be distributed to all owners of the Indian land that is

[24] Furthermore, we have held that an allegation that BIA breached its trust responsibility by failing to make an appropriate best interest determination, even if true, would at most render a conveyance of an interest in Indian land voidable, rather than void *ab initio*. *Bighorn*, 64 IBIA at 105 (citing *Bernard v. Acting Great Plains Regional Director*, 46 IBIA 28, 35 (2007)). In *Bighorn*, we also explained that "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." *Id.* Here, we need not reach that issue because we are unpersuaded by Appellants' argument that BIA's approval of the Lease was contrary to the undetermined heirs' best interest.

subject to the lease or agreement in accordance with the interest owned by each such owner." According to Appellants, "[t]he 'owners' in this case as contemplated by the FBMLA are the decedents [sic] eligible heirs, i.e., his seven children." Opening Br. at 17. Appellants contend that the term "owner" in the FBMLA corresponds to the definition of "eligible heirs" in AIPRA, 25 U.S.C. § 2201(9), which includes certain children of a decedent and does not include a surviving spouse. *See* Opening Br. at 17. Appellants further contend that "beneficial title" to trust property subject to a life estate is in the remaindermen, not in the life tenant. *Id.* at 12 (citing *Estate of Ella Sarah Case Barnes*, 17 IBIA 72 (1989)).

In addition, Appellants argue that the requirement of the FBMLA to distribute lease proceeds to the owners in accordance with the owners' interests "is irreconcilable with" the distribution of any proceeds to a life tenant. *Id.* at 14. Appellants rely on the absence of an explicit reference to any "limited owner, life estate, or similar interest" in the FBMLA. *Id.* at 13. They also argue that "[a]t common law, the owner of a life estate had no right to the proceeds of mineral interests and Congress is presumed to legislate with knowledge of the common law." *Id.* Finally, Appellants argue that the distribution of proceeds from the Lease is governed by FBMLA § 1(a)(2)(C) and not the meaning of a life estate "without regard to waste" created by operation of law under AIPRA. *See id.* at 18-19. Appellants contend that application of AIPRA's provisions and the 25 C.F.R. Part 179 regulations governing the administration of life estates and future interests would be contrary to the FBMLA and provisions in ILCA and the AIPRA amendments stating that they do not amend or modify the FBMLA. *Id.* at 22 (citing 25 U.S.C. § 2206(g)(2); § 2218(f)&(g)).

For the following reasons, we reject these arguments.[25] Judy is an owner and heir of the Allotment, and the plain language of the FBMLA and AIPRA work in tandem to guarantee her all the proceeds from the Lease during the term of her life estate.

A. "Owners" under the FBMLA

The language of FBMLA § 1(a)(2)(C) is unambiguous that proceeds shall be distributed to "*all owners* of the Indian land that is subject to the lease or agreement *in accordance with the interest owned by each such owner*." Emphases added. Judy and the remaindermen are "owners" of the Allotment within the meaning of the FBMLA. As the

[25] In addition, to the extent that Appellants' arguments raise a challenge to Federal statute(s) or regulation(s), rather than our interpretation of them, the Board lacks jurisdiction to consider such a challenge. *See Estate of Roland Dean DeRoche*, 53 IBIA 114, 115-16 (2011); *Northern Natural Gas v. Minneapolis Area Director*, 15 IBIA 124, 126 & n.3 (1987).

Regional Director found, "owners" is "a commonly understood term, including the variations of ownership rights resulting from life estates." Decision at 4. While the FBMLA recognizes that ownership of Indian lands is oftentimes fractionated, it provides no definition of "owner" different from the ordinary meaning of the term. *See* FBMLA § 1(a)(1)(B) ("The term 'individually owned Indian land' means Indian land that is owned by 1 or more individuals."). The 25 C.F.R. Part 212 regulations generally define "Indian mineral owner" as including "*any individual Indian* or Alaska Native *who owns mineral interests*," title to which is held in trust by the United States or subject to restrictions against alienation. *See* 25 C.F.R. § 212.3 (emphases added). At the same time, § 212.21(c) specifically refers to an "owner" who "is a life tenant," and thus they are not mutually exclusive as Appellants contend. Rather, a "life estate" is a limited *ownership* interest for the lifetime of an individual. *See* 25 C.F.R. § 179.2 ("*Life estate* means an interest in property held for only the duration of a designated person's life."); *Estate of Buckley Melton Hoaglin*, 66 IBIA 26, 34 (2018) ("A 'life estate' is a limited ownership interest . . . ."); *Estate of Elsie Yvonne Deloria James Roberts*, 62 IBIA 267, 268 n.4 (2016) (same); *Estate of Manahan*, 62 IBIA at 153 (same); Black's Law Dictionary 664-65 (10th ed. 2014) ("estate" is a "real estate interest that may become possessory, the ownership being measured in terms of duration"; "life estate" is an "estate held only for the duration of a specified person's life, usu[ally] the possessor's"). As previously noted, *see supra* note 18, in *Fredericks I*, we rejected Appellants' argument that that only they as remaindermen were "owners" who were authorized to enter into an agricultural lease under the American Indian Agricultural Resource Management Act (AIRMA), 25 U.S.C. § 3715(c)(2)(A). 63 IBIA at 279. Applying general principles of property law, we held that Judy "*owns* a 100% undivided present possessory interest" in the allotments in which she inherited a full life tenancy and must consent to any lease. *Id.* at 280 (emphasis added). Hence, we conclude that Judy is an "owner" of the Allotment.

In addition, with respect to Appellants' argument that the only "owners" under the FBMLA are "eligible heirs" under AIPRA, Appellants improperly conflate the definition of eligible heirs with the determination of heirs under AIPRA, including surviving spouses, more broadly. *See* 25 U.S.C. §§ 2201(9) (definition of "eligible heirs"), 2206(a)(2)(A) (AIPRA's rule of intestate succession for surviving spouse); *see also Fredericks*, 125 Fed. Cl. at 409 (referring to Judy as an "heir" to the Allotment).

Appellants also confuse beneficial ownership with title ownership. Appellants rely on *Estate of Barnes* for the proposition that they enjoy "beneficial title," but the Board only held that "title" to property subject to a life estate was in the remaindermen. 17 IBIA at 76. The Board was responding to—and rejected—an argument that the inheritance of a life estate in trust or restricted property by a non-Indian would result in the property being "ceded away from the reservation." *Id.*; *see also Estate of Harold Arthur Mathews, Sr.*, 65 IBIA 61, 62 n.7 (2017) ("The devise of a life estate in trust or restricted property to a

non-Indian does not, standing alone, remove the property from trust or restricted status."). As a life estate holder, Judy has what is sometimes referred to as beneficial ownership. Attached to Appellants' opening brief as Exhibit C is a "List of Real Property Assets" for Casey Fredericks issued by OST. The exhibit explains that three different "ownership classifications" are used to track ownership of real property: "'title' only," "'beneficial' only," and "'title & beneficial.'" Opening Br., Exhibit C at 8. "A beneficial only account holder receives trust income derived from encumbrance activity. *Beneficial ownership reverts to the title owner/remaindermen upon the beneficial owner's death*." *Id.* (emphasis added). "A title only account holder does not receive trust income derived from encumbrance activity." *Id.* Casey is presently listed as having only "title" ownership and not beneficial ownership in the Allotment.[26] *Id.* at 2. Appellants, as remaindermen, own a future interest in the Allotment, which they cannot enjoy until it becomes a present possessory interest upon Judy's death. *Cf. Fredericks I*, 63 IBIA at 279 (Appellants have "a vested right in the future enjoyment of their respective shares of the trust property."). Judy, as the holder of a life estate, owns a present possessory interest in the Allotment. *Cf. id.* at 280.

B. Distribution of Proceeds under the FBMLA and AIPRA

With respect to distribution of proceeds "in accordance with the interest owned by each . . . owner," as stated by FBMLA § 1(a)(2)(C), that is determined by AIPRA and 25 C.F.R. Part 179, not the FBMLA or general principles of property law as Appellants contend. Pursuant to AIPRA, Judy as the holder of a life estate "without regard to waste" is "entitled to the receipt of all income, including bonuses and royalties, from [the] land to the exclusion of the remaindermen." 25 U.S.C. § 2201(10); *see* 25 C.F.R. § 179.2 (same definition of "Life estate without regard to waste"); *Fredericks*, 125 Fed. Cl. at 415. In addition, for life estates created under AIPRA, Subpart C of 25 C.F.R. Part 179 provides that "[t]he Secretary must distribute all income, including bonuses and royalties, to the life estate holder to the exclusion of any holders of remainder interests." 25 C.F.R. § 179.201. The regulations further explain that the holder of a life estate without regard to waste may cause or benefit from lawful depletion of the resources. *Id.* § 179.202.

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[26] This is not to be confused with our reference to the remaindermen as "beneficiaries" in *Fredericks I*. *See* 63 IBIA at 279. In that case, we applied the definition of "Indian landowner" in AIARMA, which defines "Indian landowner" differently depending on whether the land is owned by an Indian or Indian tribe subject to restrictions against alienation or held in trust by the United States. *See* 25 U.S.C. §§ 3703(9) (definition of "Indian land"), 3703(13) (definition of "Indian landowner"). In *Fredericks I*, the property at issue was held in trust, *see* 63 IBIA at 279, and all the Indian owners of such property are defined in AIRMA as "beneficiar[ies] of the trust under which such Indian land is held by the United States," 25 U.S.C. § 3703(13)(B).

AIPRA defines the ownership interest of a life tenant and 25 C.F.R. Part 179 sets forth how the Secretary distributes proceeds to a holder of a life estate created by operation of law under AIPRA. The FBMLA simply directs BIA to distribute the proceeds according to the ownership interests held by each owner (including those of any non-consenting owners). *See* FBMLA § 1(a)(2)(B) & (C). AIPRA and Part 179 do not conflict with, amend, or modify the FBMLA by specifying the extent of the ownership interest of a life tenant. Therefore, Appellants' argument that provisions of ILCA, § 2218(f)&(g),[27] and AIPRA, 25 U.S.C. § 2206(g)(2),[28] prevent any application of AIPRA that would amend or modify the FBMLA, and thus the distribution of proceeds from the Lease must be governed by Appellants' interpretation of the FBMLA, is in error.[29]

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[27] Subsection 2218(f) states that "[n]othing in this section shall be construed to amend or modify the provisions of [the FBMLA,] Public Law 105-188 (25 USC 396 note) . . . or any other Act that provides specific standards for the percentage of ownership interest that must approve a lease or agreement on a specified reservation." Subsection 2218(g) provides that "[n]othing in this chapter [25 U.S.C. §§ 2201-2221] shall be construed to supersede, repeal, or modify any general or specific statute authorizing the grant or approval of any type of land use transaction involving fractional interests in trust or restricted land."

[28] Subsection 2206(g)(2) provides in part that "[n]othing in this chapter amends or otherwise affects the application of [certain specified laws not including the FBMLA], or any other Federal law that pertains specifically to . . . trust or restricted land located on 1 or more specific Indian reservations that are expressly identified in such law."

[29] We note that another provision of ILCA, 25 U.S.C. § 2218(e), concerning the distribution of proceeds derived from a lease or agreement approved by the Secretary under ILCA, states that the proceeds "shall be distributed to all owners of undivided interest in the allotted land covered under the lease or agreement," and that the amount of the proceeds distributed to each owner "shall be determined in accordance with . . . the undivided interest in the allotted land covered under the lease or agreement that is owned by that owner." The obvious similarity between this language and FBMLA § 1(a)(2)(C) further supports the Regional Director's conclusion that AIPRA, which amended ILCA, speaks where the FBMLA is silent on the distribution of income to the holder of a life estate and the holder of a remainder interest created under AIPRA.

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, and for the reasons discussed in this decision, the Board affirms the Regional Director's February 15, 2017, decision.

I concur:

// original signed
Thomas A. Blaser
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge[30]

[30] Administrative Judge Kenneth A. Dalton took no part in the consideration or decision of this appeal.