



INTERIOR BOARD OF INDIAN APPEALS

Ritha Romo v. Acting Phoenix Area Director, Bureau of Indian Affairs

18 IBIA 16 (10/05/1989)

Clarified:

27 IBIA 281



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

RITHA ROMO

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-58-A

Decided October 5, 1989

Appeal from a decision declining to partition inherited interests in an Indian trust allotment.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Allotments: Generally

In reviewing a decision of the Bureau of Indian Affairs concerning whether land held in Indian trust or restricted status should be partitioned, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Ritha Romo, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Ritha Romo seeks review of a May 22, 1987, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (BIA; appellee), reversing a decision of the Fort Yuma Agency Superintendent (Superintendent) concerning her request to partition Fort Yuma Allotment No. 320. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On November 14, 1984, appellant, a Quechan Indian, filed an application to partition Indian land with the Superintendent. The allotment which appellant wished to have partitioned was the Emma Hart Allotment No. 320, located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 24, T. 16 S., R. 22 E., San Bernardino Base and Meridian, Imperial County, California, containing 10 acres more or less.

At the time she requested partitioning, appellant owned a relatively small undivided interest in the allotment. Although appellant did not then live on the property, she apparently indicated that she wanted to partition her interest so she could build a home on land she alone owned.

With the assistance of the Superintendent, appellant contacted at least some of the other persons owning undivided interests in Allotment No. 320 in an effort to buy their interests. Several owners sold their interests to appellant. 1/

By letter dated January 6, 1987, the Superintendent informed the owners of Allotment No. 320 that he intended to partition a one-half acre parcel of which appellant would be the sole beneficial owner. He further indicated that appellant would own no part of the remaining 9.5 acres of the allotment, which would be owned only by the other interest holders.

By letter dated January 20, 1987, Phoebe Chavez (Chavez), who owns a 1/2 interest in Allotment No. 320, appealed this decision to appellee. In addition to her appeal, Chavez indicated that she wanted to present two alternative proposals to appellant. Chavez proposed to: (1) buy appellant's total interest in the allotment, or (2) exchange other land she owned for appellant's interest in the allotment. When the Superintendent informed appellant of Chavez's proposals, appellant indicated she was interested in the proposals, but needed more details.

By letter dated February 5, 1987, Chavez presented her arguments on appeal:

1. My family wants to consolidate all ownership interests and put the land to efficient use instead of just letting it stay idle and covered with weeds and brush.
2. My family has recently been approached by a farmer who expressed a strong interest in leasing the land for agricultural purposes. However, because of the numerous ownership interests, we were unable to reach an agreement on the lease.
3. The property involved belonged to my Grandfather and has been in our family for more than 75 years. My family wishes to purchase other tribal members' interests in the land. Negotiations are currently being conducted. If purchase agreements cannot be reached, my family will try to work an exchange of the tribal members' interests for other property.

1/ In addition, on June 19, 1989, the Board received a statement from another landowner indicating his agreement to sell his interest in the allotment to appellant.

4. I am opposed to homes being built on the land. One of the persons who will benefit from the partition plans to build a house on the land. The land is better suited for agricultural purposes and construction of homes will depreciate its value.

5. Other tribal property is more suitable for construction of homes. The Tribe has built houses on other property and plans to expand construction in that area.

6. Assignment of some of the allotments by the BIA was arbitrary and without evidence of right.

(Letter at 1) .

Appellee granted Chavez's appeal by letter dated May 22, 1987, finding that the Superintendent's decision to partition the allotment was premature because when Chavez made an offer to appellant, appellant agreed to consider it. Accordingly, appellee stated that "[a]s long as there are avenues opened for negotiation, the Secretary should not use his extraordinary powers to intervene" (Letter at 1). Appellee also noted that the letters notifying other landowners of the proposed partitioning were procedurally insufficient and face-to-face discussions should have been held. If such discussions were not possible, appellee indicated that the other owners should at least have been given a meaningful chance for written input. Finally, he concluded that the administrative record was inadequate to support the decision to partition and commented that the "Superintendent's file should also include his reasoning for determining the lines of partitionment and the reasons he determined those lines to be in the best interest of the owners" (Letter at 1).

Appellant appealed this decision to the Washington, D.C., BIA office by letter dated June 1, 1987. On September 17, 1987, she responded to the points raised in Chavez's appeal, arguing: (1) several years had passed since she began the proceedings to partition and Chavez had never contacted her, even after she visited Chavez's home and spoke with Chavez's daughter in November 1984; (2) there were no further avenues for negotiation because the two options for land exchanges proposed by Chavez were unsuitable since one property was at or near Chavez's homesite and the other was agricultural land whose value far exceeded the value of her interest in Allotment No. 320; (3) none of Chavez's appeal documents had been served on her and she had, therefore, no opportunity to respond to Chavez's arguments before appellee issued his decision; (4) Chavez had made no attempt to consolidate her interests in the allotment; (5) an agricultural lease for this property was highly unlikely; (6) Chavez's opposition to the building of a house should not be sufficient; and (7) Chavez's comment in her last reason for appeal was unclear.

The appeal was still pending before the Washington, D.C., BIA office on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. See 54 FR 6478 and 6483 (Feb. 10, 1989). The appeal was

transferred to the Board for consideration under the new appeals procedures on May 16, 1989. By notice of docketing dated May 18, 1989, all parties were given an opportunity to present additional arguments in this appeal. No statements were received.

Discussion and Conclusions

Authority to partition lands held in Indian trust or restricted status arises from 25 U.S.C. § 378 (1982), which states in pertinent part: "If the Secretary of the Interior shall find that any inherited trust allotment or allotments are capable of partition to the advantage of the heirs, he may cause such lands to be partitioned among them. " Pursuant to this statutory authority, regulations have been promulgated in 25 CFR 152.33(b), relating to the partitioning of allotments upon the request of one or more of the heirs:

Heirs of a deceased allottee may make written application, in the form approved by the Secretary, for partition of their trust or restricted land. If the Secretary finds the trust land susceptible of partition, he may issue new patents or deeds to the heirs for the portions set aside for them.

In exercising this discretionary authority to partition, BIA must ensure that the interests of all landowners are considered, not just those of the landowner requesting the partition.

In this case, appellee concluded, in essence, that the decision to partition was not a proper exercise of the Superintendent's discretion for two reasons. First the decision was premature because the possibility for negotiations between the parties had not been exhausted. 2/ Second, he determined that the record created by the Superintendent was not sufficient to support the decision to partition.

[1] In reviewing appellee's decision concerning the Superintendent's exercise of his discretion, it is not the Board's function to substitute its judgment for that of appellee. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion. Here, appellee committed no legal error, but instead properly exercised his review responsibility in determining that the Superintendent's decision to partition Allotment No. 320 was both premature and not supported by the administrative record.

2/ Although appellant later indicated that the land exchange proposals made by Chavez were not acceptable for the reasons mentioned in text, supra, there is no indication that Chavez would not be interested in making other offers, or in repeating her offer to buy appellant's interest in the allotment.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 22, 1987, decision of the Acting Phoenix Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge