



INTERIOR BOARD OF INDIAN APPEALS

Lou Stone v. Portland Area Director, Bureau of Indian Affairs

36 IBIA 132 (04/27/2001)

Related Board case:
33 IBIA 84



United States Department of the Interior

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

LOU STONE,
Appellant

v.

PORTLAND AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

: Order Affirming Decision
:
:
:
: Docket No. IBIA 99-102-A
:
:
: April 27, 2001

Appellant Lou Stone (Lou) seeks review of a July 8, 1999, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), partitioning Colville Allotment H-365, Mary Marchand (allotment), between Lou and his brother, Fred Stone (Fred). Lou and Fred each own an undivided 1/2 interest in the allotment. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Apparently sometime in November 1994, Fred submitted a written request to BIA asking that the allotment be partitioned so that he and Lou would each own the full interest in a portion of the allotment. Upon inquiry from BIA, Lou, who was living on the allotment and had made improvements to the property, indicated that he was not interested in partitioning the allotment on the basis of equal value. Lou and Fred were not able to agree on a division of the allotment or to a buy-out by one of the brothers.

Although BIA obtained an appraisal of the allotment in 1996, it apparently did nothing further in regard to Fred's request. Consequently, on June 24, 1997, Fred initiated proceedings under 25 C.F.R. § 2.8, which provides procedures for forcing action by a BIA official. On November 15, 1997, the Superintendent, Colville Indian Agency, BIA (Superintendent), wrote to Lou and Fred, requesting their input on three options for partitioning the allotment. After receiving responses from both brothers and requesting advice from the Office of the Solicitor, the Superintendent issued a decision on February 18, 1998, in which he partitioned the allotment according to "substantially equal values." Feb. 18, 1998, Letter at 1. This division gave approximately 19.91 acres and the improvements to Lou, and approximately 59.90 acres to Fred.

Both Lou and Fred appealed this decision to the Area Director. By letter of October 19, 1998, the Area Director noted several problems with the Superintendent's decision, including the fact that he could not tell if the Superintendent used correct computations in determining

the value of the two portions of the allotment. The Area Director asked the Superintendent for additional information so that he could issue a decision.

The Area Director informed Lou and Fred that they could appeal his October 19, 1998, letter to the Board. Lou appealed. Although it noted that the Area Director had properly notified Lou and Fred of their right to appeal, the Board dismissed Lou's appeal without prejudice as premature in view of the fact that the Area Director had not concluded his review of the Superintendent's decision. 33 IBIA 84 (1998).

On July 8, 1999, the Area Director issued the decision now under review. He noted that he could decide not to partition the allotment, but concluded that this was not in the best interest of the co-owners for several reasons. He therefore exercised his authority under 25 C.F.R. § 152.33 ^{1/} to partition the allotment on the basis of substantially equal value. He found that such a division would give Lou approximately 5 acres, which included his home site and improvements, and had a value of approximately \$95,000; and would give Fred approximately 74.81 acres of undeveloped land with an approximate value of \$89,800.

Lou appealed from this decision. Lou, Fred, and the Area Director filed briefs on appeal.

As the appellant, Lou has the burden of proving the error in the decision from which he is appealing. The partition of an allotment involves the exercise of discretion by BIA. Davis v. Acting Aberdeen Area Director, 27 IBIA 281, 286 (1995); Romo v. Acting Phoenix Area Director, 18 IBIA 16, 19 (1989). When a BIA decision is based on the exercise of discretion, an appellant challenging the decision bears the burden of proving that the BIA official did not properly exercise discretion. See, e.g., Blackfeet National Bank v. Director, Office of Economic Development, 34 IBIA 240 (2000), Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director, 25 IBIA 236 (1994). In reviewing BIA discretionary decisions, the Board does

^{1/} Section 152.33 provides in pertinent part:

“(b) *Application for partition.* 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 lands susceptible of partition, he may issue new patents or deeds to the heirs for the portions set aside to them. * * *”

Because the Confederated Tribes of the Colville Reservation rejected the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq., partitions of Colville allotments are governed by 25 U.S.C. § 378. Section 378 provides in 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, regardless of their competency, patents in fee to be issued to the competent heirs for their shares and trust patents to be issued to the incompetent heirs for the lands respectively or jointly set apart to them * * *.”

not substitute its judgment for that of BIA. Rather, its responsibility is to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Davis.

Lou's main opposition to this partition is based on the fact that it was "forced," *i.e.*, the Area Director ordered the partition even though Lou did not agree. The Board has previously held that the consent of all co-owners is not required to partition a trust allotment. Davis.

Lou devotes most of his opening brief to general allegations of bias, impropriety, and conflict of interest on the part of BIA, and of "sibling disputes" (Appellant's Opening Brief at 4) between himself and Fred. However, he does not tie any of these allegations to the specific facts of this case. General allegations such as Lou raises do not carry his burden of proof.

Lou also argues in his opening brief that the Portland Area and/or the Colville Agency has a policy against "forced partitions." The Board has previously declined to consider policy arguments in a partition case because of its limited review authority over BIA discretionary decisions. Davis. Even if the Board were to consider this argument, it concludes that BIA "policy" in partition cases is set out in 25 C.F.R. § 152.33.

In his reply brief, Lou changes from arguing that BIA has a policy against "forced partitions" to arguing that the Colville Business Council has such a policy which it has expressed in a tribal resolution. The probable reason why Lou did not raise this argument earlier is that the resolution was not passed until November 18, 1999, long after the BIA decisions in this matter, after Lou filed his opening brief with the Board, and also after Lou became a member of the Business Council.

The Board has consistently held that it is not required to consider matters raised for the first time in a reply brief. *See, e.g., Cermak v. Acting Minneapolis Area Director*, 32 IBIA 77, 80 (1998), and cases cited there. Here, out of respect for tribal sovereignty, the Board allowed opposing parties an opportunity to respond to Lou's reliance on the tribal resolution. After considering Lou's argument and the responses filed by Fred and the Area Director, the Board concludes that the resolution has no affect on the decision here. BIA owes a trust responsibility in this matter to the individual Indian landowners, not to the tribe. *Cf. Moses v. Acting Portland Area Director*, 24 IBIA 233, 238 (1993) (In leasing individually owned trust land, BIA's trust responsibility is to the individual landowners, not to the tribe). Although BIA is not precluded from considering a position expressed by the tribe, any such position is only one of many factors that BIA must consider in deciding how to exercise its trust responsibility.

The Board concludes that Lou has failed to carry his burden of proving that the Area Director failed properly to exercise his discretion in deciding to partition this allotment. Blackfeet National Bank, supra; OK Tank Trucks, Inc. v. Muskogee Area Director, 33 IBIA 119 (1999).

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 Portland Area Director's July 8, 1999, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge