



INTERIOR BOARD OF INDIAN APPEALS

Curtis Laducer v. Acting Great Plains Regional Director, Bureau of Indian Affairs

48 IBIA 294 (02/20/2009)



United States Department of the Interior

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

CURTIS LADUCER,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 07-87-A
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	February 20, 2009

Appellant Curtis Laducer, pro se (Appellant), appeals a January 31, 2007, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director affirmed an October 12, 2006, decision of the Acting Superintendent (Superintendent) of the Turtle Mountain Agency, BIA, that approved the petition of Darrell P. Laducer to partition 5.625 acres of the approximately 65-acre Turtle Mountain Allotment No. 304-5142 (Joseph M. Laducer Allotment or Allotment).¹

The partition of an allotment is a decision committed to the discretion of BIA, and the Board will not substitute its judgment for that of BIA but will limit its review to ensuring that BIA properly considered all legal prerequisites to the exercise of that discretion. Appellant has not met his burden of proving error in BIA's exercise of its discretion, and we affirm the Regional Director's decision approving the partition of the allotment.

Background

The Allotment consists of approximately 65 acres described as the NW¹/₄SW¹/₄SW¹/₄, SW¹/₄NW¹/₄SW¹/₄, E¹/₂NW¹/₄NW¹/₄SW¹/₄, E¹/₂W¹/₂SW¹/₄ sec. 27, T. 162 N., R. 70 W., 5th Principal Meridian (PM), Rolette County, North Dakota, within the Turtle Mountain

¹ Although various documents, including the Regional Director's decision, refer to this Allotment as the Ambrose Wallett Allotment, the partition application and the Superintendent's decision identify the allotment as the Joseph M. Laducer Allotment.

Reservation. Thirteen persons, including Appellant and Darrell P. Laducer (Darrell), currently hold varying undivided interests in the Allotment. *See* Administrative Record (AR), Tab 5. Under 25 U.S.C. § 378, the Secretary may partition any inherited trust allotment if he determines that the allotment is capable of partition to the advantage of the heirs. Darrell began the process for partitioning the Allotment in 1999 when he requested a legal description for a provided metes and bounds description of a 5.83-acre parcel within that Allotment. *See* AR, Tab 1. On November 16, 2004, in accordance with 25 C.F.R. § 152.33(b), Darrell filed a formal petition for partition of the Joseph M. Laducer Allotment.² *See* AR, Tab 2.

The record contains a notice dated May 20, 2005, signed by the Superintendent, informing the co-owners of the Allotment of Darrell's partition petition, and advising them that Darrell had proposed dividing the approximately 5.781 acres encompassing the SW¹/₄NW¹/₄SW¹/₄SW¹/₄, W¹/₂SE¹/₄NW¹/₄SW¹/₄SW¹/₄, S¹/₂NW¹/₄NW¹/₄SW¹/₄SW¹/₄, SE¹/₄NE¹/₄NW¹/₄SW¹/₄SW¹/₄, W¹/₂W¹/₂W¹/₂E¹/₂SE¹/₄NW¹/₄SW¹/₄SW¹/₄ sec. 27, T. 162 N., R. 70 W., 5th PM, Rolette County, North Dakota, out of the Allotment, and leaving the remaining 59.219 acres in undivided interest.³ *See* AR, Tab 6. The Superintendent attached to the notice a copy of the petition for partition and a tract map showing the proposed division and requested that the owners either signify their concurrence with the petition by signing the form where indicated or otherwise respond to the petition within 30 days of receipt of the notice.⁴ By letter dated June 1, 2005, the Superintendent requested that Darrell send certified copies of the forms for partition to each of the landowners for their consent and that he forward all partition documents to the Turtle Mountain Agency for further processing after the time for responding to the petition had passed.⁵ *See* AR, Tab 3. Rather than sending certified letters to the other owners with the

² Section 152.33(b) allows the heirs of a deceased allottee to “make written application, in the form approved by the Secretary, for partition of their trust . . . land.”

³ The Superintendent also requested and received an appraisal for the Allotment and the partition parcel. *See* AR, Tab 4.

⁴ The copy of the notice found at AR, Tab 6, does not include the enumerated attachments.

⁵ Although a heading on the May 20 notice states “CERTIFIED MAIL - RETURN RECEIPT REQUESTED,” it is not addressed to the owners individually and it is unclear whether the Superintendent (or the Turtle Mountain Agency) actually sent the notice to the owners or whether the June 1 letter left it to Darrell to do so. In any event, the record does not contain any signed return receipt cards for the May 20 notice.

partition forms, it appears that Darrell personally requested the owners' signatures on the partition documents. *See* Notice of Appeal at 1.

After receiving the consent of 11 of the 13 co-owners, representing 86 percent of the ownership of the Allotment, the Superintendent approved the partition petition on November 29, 2005. *See* AR, Tab 7. By certified letter dated December 1, 2005, the Superintendent advised the co-owners of that approval, provided them with a copy of the completed partition and plat map showing the division, and advised them of their right to appeal the approval to the Regional Director. *See id.*

Appellant, who owns a 13-percent interest in the Allotment and has a home site adjacent to Darrell's proposed partition acreage, appealed the approval, asserting that he did not agree with the partition because Darrell would be receiving too much of the frontage of the Allotment. He alleged that, contrary to the maps, Darrell had previously orally agreed to extend the boundary further into the field and stated his willingness to work with Darrell based on the oral agreement. AR, Tab 9.

By memorandum dated February 7, 2006, the Regional Director remanded the appeal back to the Superintendent. AR, Tab 10. In so doing, he first noted that 10 of the 13 owners had signed the petition, that 2 owners (Appellant and Sylvester J. Dion) had received the petition but had not responded so the Superintendent had signed the petitions on their behalfs, and that the case file contained no evidence that 1 owner (Corey J. Laducer) had received the petition or that the Superintendent had approved the petition for him.⁶ AR, Tab 10. The Regional Director also pointed out that the legal description on the partition plan did not match the submitted map and that the aliquot part described as the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ actually embraced the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$. *Id.* He therefore remanded the appeal to the Superintendent for further research into Appellant's objections and for issuance of a new decision, stating that

the Superintendent may approve the partition without the consent of all; however the objections of Curtis Laducer must first be addressed. The new decision can include a different legal description or remain the same; however consultation with Curtis and Darrell Laducer is required in an attempt to come to a consensus.

⁶ The Superintendent had identified Corey J. Laducer as one of the owners approving the partition. *See* AR, Tab 8.

Id. He added that the new partition decision, with rights to appeal, had to be sent to all the land owners via certified mail. *Id.*⁷

On remand, the Superintendent and other BIA staff met separately with Appellant and his father Clifford Laducer and with Darrell (*see* AR, Tab 24, Note to File), reviewed the case file, and conducted an onsite inspection of the land. After completing his investigation, the Superintendent responded to the Regional Director in an April 21, 2006, memorandum, stating his determinations that there was no need to extend the line between Darrell's and Appellant's home sites further east into the field because the line between both home sites was basically evenly divided, that there was adequate space between both co-owners' homes for privacy, and that there was access for the remaining owners. He therefore concluded that the land was susceptible to partition and that the partition was fair, equitable, and feasible to all owners and should be approved.⁸ *See* AR, Tab 11. By certified letter dated June 9, 2006, the Superintendent advised Appellant of BIA's decision to approve the partition because there was adequate space between both co-owners for privacy, there was access for the remaining owners, the land was susceptible to partition, and the partition was fair, equitable, and feasible to all owners. *See* AR, Tab 12.

On June 30, 2006, Appellant again appealed to the Regional Director. In addition to disagreeing with the partition because Darrell would be receiving a lot of the frontage — despite their purported agreement that the boundary would extend further into the field — Appellant also requested that the new, corrected land description be circulated for the co-owners to re-sign and that the property be equally divided and run in strips. Appellant further averred that the property was part of a field access road he had been cutting as part of his father's lawn, that he had not received two letters from BIA regarding the partition until the partition approval letter was sent to him, and that Darrell had told him prior to seeking the partition that the land would include only Darrell's home site. Appellant stated that he would agree to sign a new partition if Darrell reduced the frontage by 10 to 20 feet and changed the land description. *See* AR, Tab 13.

By memorandum dated September 21, 2006, the Regional Director remanded the appeal back to the Superintendent to redetermine the jagged east boundary of the partitioned area so it formed a straight line, explaining that a straight line would facilitate

⁷ The Regional Director also ordered supplementation of the case file with a partition petition signed either by Corey J. Laducer or by the Superintendent on his behalf. *Id.*

⁸ The Superintendent also corrected the description and appended a signed partition petition form for Corey Laducer.

future management of the Allotment, prevent boundary disputes, and simplify any further subdivision of the Allotment. *See* AR, Tab 15. The Regional Director instructed the Superintendent to issue a new decision straightening the east boundary and describing both the revised partitioned tract and the remaining land, and to provide maps clearly identifying the partitioned and the remaining land. The Regional Director further stated that, as long as the acreage of the modified tract was less than the 5.78 acres previously approved by the co-owners, new consent forms would not be needed. *Id.*

By certified letter dated October 12, 2006, the Superintendent informed Appellant that BIA had modified the legal description of the proposed partition to remove the original knob and straighten its east boundary. He restated his prior conclusions that there was adequate space between the co-owners for privacy, that there would be access for remaining owners, that the land was susceptible to partition, and that the partition was fair, equitable, and feasible to all owners. Accordingly, he approved the partition as redrawn. The Superintendent also provided a new tract map showing the revised partition, which now encompassed 5.625 acres described as the SW¹/₄NW¹/₄SW¹/₄SW¹/₄, S¹/₂NW¹/₄NW¹/₄SW¹/₄SW¹/₄, SW¹/₄NE¹/₄NW¹/₄SW¹/₄SW¹/₄, W¹/₂SE¹/₄NW¹/₄SW¹/₄SW¹/₄ sec. 27, T. 162 N., R. 70 W., 5th PM, Rolette County, North Dakota, and added that the remaining 59.375 acres would continue in undivided interest. *See* AR, Tab 16. Appellant and his father appealed this decision to the Regional Director, essentially repeating verbatim the arguments set out in the appeal of the Superintendent's June 9, 2006, partition approval decision. *See* AR, Tab 17.

In his January 31, 2007, decision affirming the Superintendent's decision, the Regional Director addressed each of the issues raised by Appellant. *See* AR, Tab 18. As to the request that a new land description be signed by all the co-owners, the Regional Director acknowledged that there was a typographical error in the written notice of the proposed partition, but noted that the map enclosed with the May 20, 2005, notice clearly showed the location of Darrell's proposed 5.78-acre tract and that the erroneous description had subsequently been corrected to conform to the map. In any event, he pointed out that the newly revised legal description for the partitioned parcel, which had been sent to all the co-owners, reduced the included acreage to a square containing 5.625 acres which made the land much more manageable for future partitionments and other uses.

The Regional Director rejected Appellant's complaint concerning the amount of frontage, stating that the Superintendent and BIA staff had thoroughly reviewed the case file, conducted an onsite inspection of the land, and had determined that there was no need to extend the line further east into the field because the line between the home sites was basically evenly divided and that the partition was fair, equitable, and allowed adequate privacy and access for all land owners. The Regional Director discounted Appellant's claim

that the land was part of his father's lawn, because his father had no recorded lease for the land, which therefore remained undivided land for all the co-owners.

As to Appellant's alleged failure to receive two BIA letters relating to the partition, the Regional Director stated that the May 20, 2005, certified letter with the request for partition was sent to all the landowners⁹ and that the return receipt card for Appellant's copy of the December 1, 2005, letter approving the partition had been signed on December 6, 2005, by Austin Laducer. The Regional Director further observed that Appellant must have received the October 12, 2006, letter regarding the Superintendent's decision to approve the partition because he had appealed that decision. The Regional Director also pointed out that a refusal to accept a certified letter did not negate formal notice. Finally, the Regional Director stated that, despite Appellant's insistence that the partition was only supposed to include Darrell's home site, all the other land owners had approved the partition and that the applicable regulation, 25 C.F.R. § 152.33, did not require 100 percent consent to the partition. The Regional Director accordingly affirmed the Superintendent's decision to approve the partition.

Appellant timely appealed the Regional Director's decision to this Board. *See* AR, Tab 19.

Discussion

In accordance with 25 U.S.C. § 378, “[i]f 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” The applicable regulation, 25 C.F.R. § 152.33(b), authorizes an heir of a deceased allottee to “make written application, in the form approved by the Secretary, for partition of [his/her] trust . . . land,” and the Secretary may issue new patents or deeds to the heirs for the portions set aside for them if he finds that the trust lands are susceptible to partition. *Davis v. Acting Aberdeen Area Director*, 27 IBIA 281, 285 (1995). The partition of an allotment involves the exercise of discretion by BIA. *Stone v. Portland Area Director*, 36 IBIA 132, 133 (2001); *Davis*, 27 IBIA at 286; *Romo v. Acting Aberdeen Area Director*, 18 IBIA 16, 19 (1989). When a BIA decision is based on the exercise of discretion, the appellant challenging the decision bears the burden of proving that the BIA official issuing the

⁹ The record does not contain any signed return receipt cards for this letter. *See* n.5, *supra*. The record does, however, contain the return receipt cards for the Superintendent's December 1, 2005, decision.

decision failed to properly exercise that discretion. *Stone*, 36 IBIA at 133; *Blackfeet National Bank v. Director, Office of Economic Development*, 34 IBLA 240, 241 (2000); *Evans v. Sacramento Area Director*, 28 IBIA 124, 127 (1995). In reviewing BIA discretionary decisions, the Board does not substitute its judgment for that of BIA; rather its responsibility is to ensure that BIA gave proper consideration to all legal prerequisites to the exercise of that discretion. *Stone*, 36 IBIA at 133-34; *Davis*, 27 IBIA at 286; *Romo*, 18 IBIA at 19. Simple disagreement with BIA's reasoning or a general allegation of error is not enough to sustain an appellant's burden. See *Shawano County, Wisconsin, Board of Supervisors and Town of Red Springs, Wisconsin v. Midwest Regional Director*, 40 IBIA 241, 248 (2005); *Stone*, 36 IBIA at 134.

Although BIA must ensure that, when exercising its discretionary authority to partition, it considers the interests of all landowners, not just those of the landowner requesting partition, the unanimous consent of all landowners is not required before a partition may be approved. *Stone*, 36 IBIA at 134; *Davis*, 27 IBIA at 286; see also *Gray v. Acting Aberdeen Area Director*, 33 IBIA 26, 27 (1998); *Romo*, 18 IBIA at 19. Applying these standards here, we find that Appellant has not met his burden of showing that BIA failed to properly exercise its discretion in deciding to approve Darrell's petition to partition the Allotment.

In his Notice of Appeal, Appellant again focuses on his continuing opposition to Darrell's receipt of more frontage than he had purportedly agreed to request in prior discussions with Appellant. Appellant identifies seven specific reasons for his appeal, which we address seriatim. First, Appellant avers that, rather than sending certified letters with the partition forms to the other land owners, Darrell personally requested the owners' signatures on the partition documents.¹⁰ He also elaborates on the discussions he had with Darrell over the boundaries of the partitioned parcel and Darrell's ultimate placement of fencing stakes outside the allegedly agreed upon boundaries.¹¹ Appellant has not, however,

¹⁰ Appellant also requests a copy of his father's concurrence in the partition. A copy is in the Administrative Record, which has been available to Appellant. In addition, in its Answer Brief, BIA states that Appellant may obtain a copy of that document and the rest of the record at the Turtle Mountain Agency. Appellee's Brief at 8 n.1.

¹¹ Appellant renews his request that a new land description be circulated for the co-owners to re-sign. The Regional Director rejected this request because (1) the original map included with the partition petition containing the erroneous land description had accurately depicted the requested land, (2) the typographical error in the original land

(continued...)

provided any documentary evidence verifying the existence of the purported gentlemen's agreement, nor has he shown that BIA abused its discretion by failing to give that alleged agreement determinative effect in setting the boundaries of the partitioned parcel. The record demonstrates that BIA comprehensively reviewed the case file, conducted an onsite inspection of the property, and met both with Appellant and his father and with Darrell before reaching its conclusion that the partition was fair and equitable and allowed adequate privacy and access for all landowners. Appellant's disagreement with that conclusion does not undermine the validity of BIA's exercise of its discretion in approving the partition.

Appellant's second argument addresses ownership of the property affected by the partition petition. Appellant asserts that his sister and her husband purchased his grandmother's original trailer home and that his grandmother had stated that whoever bought the trailer also owned the property upon which it sat. Appellant purchased the home from his sister and brother-in-law. But Appellant admits that he does not have documents showing the claimed ownership interests. BIA states that it has no records evidencing the ownership nor does it have any recorded leases for the property. *See* Appellee's Brief at 9. Absent approved and recorded leases, or at least some documentation to support claims of a possessory interest, BIA cannot be faulted for failing to give any weight to Appellant's claim that the partition affected some individual ownership claim distinct from his fractional interest in the Allotment as a whole.

Appellant next reiterates his disagreement with the amount of frontage and his belief that Darrell should receive more of the field. BIA, however, specifically considered the frontage question in making its determination. *See* AR, Tabs 11 and 12. Although Appellant clearly disagrees with this determination, he has presented no evidence undermining BIA's consideration of this issue. On appeal to the Board, Appellant requests that the property be divided equally and that it run in strips, giving everyone the same amount of field and frontage. Appellant did not, however, file a petition with BIA for partition, and thus he cannot show error in BIA's exercise of its discretion based on BIA's failure to consider a competing partition proposal. Appellant further asserts that Darrell

¹¹(...continued)

description had subsequently been corrected with notice of that correction provided to the owners, and (3) the ultimately approved partitioned parcel, the legal description and map of which had been provided to the land owners, had contained less acreage than that originally requested. We conclude that the owners were adequately apprised of the true location of both the applied for and approved partitioned tract and find no error in the Regional Director's determination that new co-owner signatures were not required.

should no longer have any say over the rest of the land outside the partitioned area. The Regional Director did not specifically address this issue, but it is not clear that this would constitute an argument against the partition. However, to avoid any future issue, the petition for partition originally approved on November 29, 2005, will, once it is final, divest Darrell of an ownership interest in the remaining acreage. *See* AR, Tab 7. It necessarily follows that Darrell will retain no say as an owner over the remaining acreage.

Appellant's fourth argument avers that a survey of the affected land indicated that Darrell's portion was off by nine feet. Appellant questions how the partition can be considered fair and equitable when the land was not equally divided. He also asserts, as his fifth argument, that his father has a lease for a 2.5-acre home site that includes the area he has been mowing as part of his father's lawn which is now included in Darrell's partitioned parcel. Appellant has not provided any such lease and BIA states that it has no record of any lease for Appellant's father for property adjacent to Darrell's partition parcel. *See* Appellee's Brief at 9. The record clearly demonstrates that BIA investigated Appellant's concerns about the division of the property, including conducting an onsite inspection, and ultimately decided to partition the property as adjusted. Appellant has not shown error in this exercise of BIA's discretion.

Appellant's sixth argument focuses on his alleged failure to receive two letters of communication from the Superintendent, specifically the May 20, 2005, certified notice and the December 1, 2005, certified letter. While there is no return receipt card for the May 20 notice in the case file, Appellant clearly had notice of that letter's contents and the attached partition petition because he admits that Darrell personally brought the petition to him and his father for their signatures. Since he had actual notice, he cannot show prejudice from any failure to receive that letter via certified mail.¹² Appellant admits that the return receipt card for the December 1, 2005, letter was signed by his nephew on December 6, 2005. *See* AR, Tab 8. Not only did that receipt constitute constructive notice to Appellant, but Appellant's filing of an appeal of that letter demonstrates that he had actual notice of the letter. *See* AR, Tab 9. Therefore, not only is Appellant's claim that he did not receive these certified communications questionable, but any purported lack of receipt clearly did not adversely impact his right to appeal since he has repeatedly exercised that right.

Appellant's further claim that no one has taken the time to look at his situation is clearly belied by the record. Not only did the Regional Supervisor twice remand the

¹² Clearly it was advisable for BIA to confirm receipt of the May 20 notice. But the regulations do not require that it be sent by certified mail.

Superintendent's decisions in order to address Appellant's concerns, but the record also documents several meetings between BIA staff and Appellant to discuss Appellant's concerns. *See* AR, Tab 24, Note to File. In actuality, Appellant objects not to BIA's failure to look at the situation from his perspective, but to BIA's failure to accede to his position. This mere disagreement with BIA does not establish error in BIA's exercise of its discretion to partition the Allotment.

Finally, Appellant identifies several typographical errors in various BIA documents. In response, BIA states that these errors will be noted and corrected in any future correspondence. *See* Appellee's Brief at 11. Such typographical errors, however, do not establish error in BIA's exercise of its discretion to partition the Allotment.

Since Appellant has not met his burden of proving error in BIA's exercise of its discretion, we affirm the Regional Director's decision approving the partition of the Allotment.

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 decision of the Regional Director.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.