



INTERIOR BOARD OF INDIAN APPEALS

Dean Black Weasel v. Acting Rocky Mountain Regional Director,  
Bureau of Indian Affairs

51 IBIA 189 (03/31/2010)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

DEAN BLACK WEASEL,	)	Order Vacating Decision and Remanding
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 08-106-A
ACTING ROCKY MOUNTAIN	)	
REGIONAL DIRECTOR, BUREAU	)	
OF INDIAN AFFAIRS,	)	
Appellee.	)	March 31, 2010

Dean Black Weasel (Appellant) has appealed the May 16, 2008, decision of the Acting Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which affirmed the November 6, 2006, decision of the Superintendent, Blackfeet Agency, BIA, denying Appellant’s application to partition Blackfeet Allotment No. 985, Sparks Blackweasel (Allotment 985 or Allotment).<sup>1</sup> In so doing, the Regional Director asserted that partition would not be feasible because it would divide the property into uneconomic or otherwise undesirable units.

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. We find that the Regional Director failed to give proper consideration to all the legal prerequisites to the exercise of his discretion to partition the Allotment and thus has not properly exercised that discretion. We therefore vacate the Regional Director’s decision and remand the partition application to him for further review and a new decision.

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<sup>1</sup> Allotment 985 is described as follows: Lot 2, SE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 30, T. 33 N., R. 9 W.; Lot 1, NE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 31, T. 32 N., R. 11 W.; NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 24; N $\frac{1}{2}$ NE $\frac{1}{4}$  sec. 25, T. 32 N., R. 12 W.; NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 13, T. 35 N., R. 14 W., Principal Meridian (PM), Glacier County, Montana, containing 402.210 acres more or less.

## Background

Allotment 985 was originally allotted to Sparks Blackweasel, and consists of several noncontiguous parcels. A portion of the Allotment within sec. 25, T. 32 N., R. 14 W., PM, contains a right-of-way for U.S. Highway 212; no record of legal access exists for the remainder of the Allotment. The Allotment is subject to a grazing permit, an agricultural lease, and two homesite leases, including one held by Appellant.<sup>2</sup> See Regional Director Decision at 1; see also Administrative Record (AR) 18. In January 2001, Appellant, who owns an undivided .050154321 share (5%) of the Allotment, requested partition of the Allotment, apparently seeking sole ownership of at least the .918 acres in the NE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> sec. 24, T. 32 N., R. 14 W., PM, on which his homesite lease and Housing and Urban Development (HUD) house are located.<sup>3</sup> See AR 4, Letter from Appellant to Regional Director, July 7, 2003. Upon receipt of the request, BIA sent letters to the 27 individuals then holding undivided ownership interests in the Allotment,<sup>4</sup> seeking their consent to the partition. See AR 1. The record includes forms signed by 26 landowners consenting to the partition. Two of these owners, however, died before the Superintendent issued a decision. A third apparently conveyed her interest to the Blackfeet Tribe. See AR 1, 8.

In his November 6, 2006, decision (AR 8), the Superintendent determined that it would not be feasible to partition the Allotment because partition would result in splitting the land into uneconomic and otherwise undesirable units and because, as a general rule, it would be impractical to partition a tract of grazing or timber land. Citing the rural location of the homesite and the small undivided interests of the 27 owners, including the fact that 7 landowners own only .839 acres,<sup>5</sup> the Superintendent found that (1) it would be impossible or impractical to partition the entire Allotment based upon substantially equal values; (2) partition of the Allotment land, which had been surveyed based on the rectangular survey system, could not be done based on that system but would require an

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<sup>2</sup> The homesite lease apparently was originally issued to Appellant's father in 1973 by the other heirs of Sparks Blackweasel and the Blackfeet Indian Housing Authority; Appellant asserts that he obtained his interest when his father reassigned the lease to him due to his father's failing health. See AR 4.

<sup>3</sup> The Administrative Record does not contain a copy of the petition for partition.

<sup>4</sup> Since that time, two of the co-owners have died and their estates are now in probate.

<sup>5</sup> The references to "acreage" ownership refer only to the acreage equivalency for comparison purposes. The actual ownership, of course, is in undivided shares of the entire Allotment.

extensive and expensive cadastral survey by the Bureau of Land Management (BLM), which could take years to complete;<sup>6</sup> (3) if the land were divided by cadastral survey, the owners of the small parcels would not have sufficient acreage for a right-of-way to ensure access to their property; and (4) the execution of gift deeds or land sales might be required to effectuate the partition. The Superintendent therefore concluded that BIA could not proceed with the partition. He did, however, recommend that Appellant seek title to the land through purchase or gift deeds.<sup>7</sup>

Appellant appealed the Superintendent's decision to the Regional Director. *See* AR 9. Appellant asserted that (1) the entire 402.210-acre Allotment was capable of being divided to the advantage of the heirs; (2) the requested partition would give each landowner a valuable and useable economic interest in the land; (3) the necessary rights-of-way could be granted as part of the partition transaction; and (4) the refusal to grant the partition effectively denied the owners the right to a useful economic interest in the land and forced them to continue to accept relatively small amounts of leasing income. He contended that, by denying the request because of the grazing permit, BIA was improperly elevating its subjective values over those of the actual landowners. He further pointed out that the fact that not all of the landowners consented to the partition was insufficient to preclude partition and opined that the partition would not create uneconomic units because the economic advantages of individual ownership of a single tract would outweigh any economic benefit derived from lease income. He also averred that he had been informed that one-acre tracts on the Blackfeet Reservation were fetching \$5,000 to \$10,000 and more. In short, Appellant maintained that BIA was effectively denying individual Indian landowners the right to use their land as they saw fit, and violating its trust responsibility to allow Indian landowners to determine the beneficial use of their land.

In his decision, the Regional Director noted that the Superintendent had the discretion to approve or disapprove a partition application, and that, in accordance with 25 C.F.R. § 152.33, if he found trust land susceptible to partition, he could issue new patents or deeds to the heirs for the portions set aside for them. He explained that most of the 27 individual landowners of Allotment 985 had inherited small interests in the

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<sup>6</sup> The Superintendent also noted BLM's policy of not doing partition/cadastral surveys with more than seven landowners.

<sup>7</sup> By letter dated July 7, 2003, Appellant expressed an interest in exchanging .918 acres of what may be a separate 7.90-acre tract he owned for the land where his homesite lease and HUD house are located. *See* AR 4. The record contains no further information about such an exchange.

Allotment — 7 landowners owned an undivided 5/1296 interest (0.3858%), which would equate to 1.55 acres; 4 individuals owned an undivided 65/5184 interest (1.253%), which would equate to 5.04 acres; and 4 individuals owned an undivided 1/48 interest (2.083%), which would equate to 8.38 acres; with a few other landowners owning larger interests equaling 3.97% (approximately 15.96 acres), 5.02% (approximately 20.17 acres), 8.33% (approximately 33.50 acres), and 17.86% (approximately 71.83 acres) — and that the partition therefore would create small units lacking access.

The Regional Director discounted Appellant’s assertion that one-acre parcels on the Blackfeet Indian Reservation had sold for \$5,000-\$10,000 because no support for that claim had been submitted. He denied Appellant’s contention that the Superintendent had violated his trust responsibilities, pointing out that BIA has the trust responsibility to ensure that the land is equitably divided among the landowners, that this trust responsibility extended to all the Indian landowners, and that this trust responsibility did not require BIA to approve a partition that would benefit one landowner but would be detrimental to the interest of the other landowners. The Regional Director concluded that Appellant had failed to meet his burden of demonstrating that the Superintendent’s decision was arbitrary and capricious. He therefore affirmed the Superintendent’s decision on the ground that the partition would not be feasible because it would result in the division of the Allotment into uneconomic or otherwise undesirable units.

Appellant appealed the Regional Director’s decision to the Board, filing both a Notice of Appeal and an Opening Brief. The Regional Director did not file an Answer Brief.

## Discussion

### Legal Framework and Standard of Review

In accordance with 25 C.F.R. § 152.33(b), an heir of a deceased allottee may “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. *Laducer v. Acting Great Plains Regional Director*, 48 IBIA 294, 299 (2009); *Davis v. Acting Aberdeen Area Director*, 27 IBIA 281, 285 (1995).<sup>8</sup> The partition of an allotment involves the exercise of

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<sup>8</sup> Statutory authority for the partitioning of allotments is found at 25 U.S.C. § 378 (for tribes that did not adopt the 1934 Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et* (continued...))

discretion by BIA. *Laducer*, 48 IBIA at 299; *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 decision failed to properly exercise that discretion. *Laducer*, 48 IBIA at 299-300; *Stone*, 36 IBIA at 133; *Blackfeet National Bank v. Director, Office of Economic Development*, 34 IBIA 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. *Laducer*, 48 IBIA at 300; *Stone*, 36 IBIA at 133-34; *Davis*, 27 IBIA at 286; *Romo*, 18 IBIA at 19. Nor does the Board review BIA policy considerations in partition cases. *Stone*, 36 IBIA at 134; *Davis*, 27 IBIA at 286.

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. *Laducer*, 48 IBIA at 300; *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; *see also Sampson v. Andrus*, 483 F. Supp. 240, 242, 243 (D.S.D. 1980). BIA's trust responsibility does not require BIA to approve a partition that benefits one co-owner but is detrimental to the interests of the other co-owners. *Davis*, 27 IBIA at 286. Applying these standards here, we find that the Regional Director failed to give proper consideration to all the legal prerequisites to the exercise of his discretion to partition the Allotment and thus has not properly exercised that discretion. We therefore vacate the Regional Director's decision and remand the partition application to him for further review.

## Analysis

Appellant contends that BIA<sup>9</sup> abused its discretion and acted arbitrarily and capriciously in denying his petition. Specifically he challenges five aspects of BIA's decision.

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<sup>8</sup>(...continued)  
*seq.*) and § 483 (for tribes that did adopt the IRA).

<sup>9</sup> Appellant actually avers that the *Superintendent* abused his discretion in denying the partition petition; the appeal, however, is from the Regional Director's decision, not the Superintendent's decision. We have considered Appellant's arguments to the extent they relate to the Regional Director's decision.

First, he avers that BIA erroneously concluded that approving the partition would result in uneconomic or otherwise undesirable units, and contends that individual ownership of a single tract would be economically advantageous, that one-acre tracts on the Reservation are being sold for \$5,000 to \$10,000 or more, that BIA's policy of restricting the use of individually owned trust land to grazing use deprives the landowners the right to use their land as they see fit, and that denying the right to partition land for residential use violates BIA's trust responsibility.<sup>10</sup> Second, he maintains that in determining that partition would be detrimental to the interests of the other landowners, BIA improperly substituted its judgment for that of the co-owners, all but one of whom (and the heirs of the two interests in probate) had consented to the partition. Third, he denies that access problems support the refusal to grant the partition, and asserts that all the consenting co-owners would agree to grant access across their parcels to any other parcel and that BIA could make the granting of access a condition of the partition. Fourth, he maintains that the true reason for the rejection is BIA's concern that it would have to pay for the extensive and costly survey necessary to partition the Allotment, a factor which, he submits, is not relevant to the question of whether a request for partition should be approved. Finally, Appellant objects to BIA's failure to prepare a "paper partition" of the Allotment to show the co-owners what their parcels might look like, to have an appraisal done of the Allotment or the proposed partition units, and to discuss the possible differences in value with the landowners, as outlined in the BIA Manual at 54 BIAM 2.3.3.

We find several critical flaws in BIA's consideration of Appellant's request for partition. First, although 25 C.F.R. § 152.33(b), allows an heir of a deceased allottee to "make written application, in the form approved by the Secretary, for partition of [his/her] trust . . . land," the administrative record does not contain any written request for partition, much less one on a form approved by the Secretary. Thus, it is not clear exactly what and how much specific land Appellant wants to obtain via partition. Nor is it clear whether Appellant alone seeks partition or whether other or all the undivided interest owners also want to obtain individual land through partition. BIA has treated the petition as if it requests partition of the entire Allotment into proportionate individual parcels, apparently under the belief that it is required to do so; BIA, however, has the authority to partition only a part of an allotment if that is what the petitioner requests. *See Laducer*, 48 IBIA at 294, 301-302 (BIA approved a petition to partition 5.625 acres of a 65-acre allotment into sole ownership, leaving the rest of the allotment in undivided ownership among the remaining co-owners). Since BIA did not consider the possibility of simply partitioning out the land sought by Appellant (whatever specific land that is) and leaving the rest of the

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<sup>10</sup> Appellant's assertion to the contrary notwithstanding, he has no *right* to partition; rather, the decision on whether to grant a petition for partition falls within BIA's discretion.

Allotment in undivided ownership, we cannot conclude that it properly exercised its discretion in this case.

Even if BIA had been correct in assuming that it was required to partition the entire Allotment, we would nevertheless be constrained to conclude that BIA committed reversible procedural error by failing to follow the directives in the BIA Manual, 54 BIAM 2.3.3 (54 BIAM 203.03A (1984 REISSUE)), when it did not consult with the owners about what a possible partition might look like. While provisions appearing only in the BIA Manual, and not in published regulations, cannot be enforced against parties outside BIA, they may be enforced against BIA. *Tohatchi Special Education and Training Center, Inc., v. Navajo Area Director*, 25 IBIA 259, 260 (1994); *Kaw Nation v. Anadarko Area Director*, 24 IBIA 21, 26 n.9 (1993); *Robles v. Sacramento Area Director*, 23 IBIA 276, 278 (1993); *Carter v. Billings Area Director*, 20 IBIA 195, 203 (1991). The record does not show that any meaningful consultation took place or that BIA discussed various partition options with the owners or advised them to work among themselves to develop possible options. These failures to follow the BIA Manual fatally undermine BIA's exercise of discretion here.

Although Appellant maintains that BIA's denial of the partition application improperly substitutes BIA's judgment for that of the consenting co-owners, it is *BIA* that has the discretion to decide whether to grant a request for partition. And, while whether the co-owners consent to the partition is a factor to be considered, just as the refusal of co-owners to consent does not mandate denial of a petition for partition, the agreement of most of those owners does not require BIA to grant the partition or demonstrate that BIA improperly exercised its discretion in refusing to do so. Nevertheless, both the Regional Director and the Superintendent merely made conclusory statements that the partition would result in uneconomic and otherwise undesirable units and would be detrimental to the interests of the co-owners without providing any actual analysis explaining why a partition of this Allotment would be detrimental to the owners.<sup>11</sup> The Regional Director's and the Superintendent's failures to provide any economic support for their statements or to compare the value of the land for leasing (which generates \$398/year for the use of 70.59

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<sup>11</sup> BIA's general policy is to approve a partition only if it is advantageous to all concerned and will not split the land into uneconomic or otherwise undesirable units. See 54 BIAM 2.3.2 (54 BIAM 203.02 (1984 REISSUE)). The Manual states that it is not feasible to partition property "when it will result in splitting the land into uneconomic or otherwise undesirable units." *Id.* (emphasis added). The Superintendent and Regional Director simply repeated this language without analyzing or explaining why a partition of Allotment 985 necessarily would have such a result.

acres of the 402 acres in the Allotment and thus returns between \$1.54 and \$71 per year to the interest owners) with its potential value to the landowners if the land were to be divided into individual units, coupled with the lack of a proposed partition in the record confirming the Regional Director's apparent assumption that the Allotment would have to be divided into 27 parcels in sizes reflecting the undivided ownership interests, further undercut BIA's exercise of discretion in this matter.

The record also does not support BIA's reliance on access problems as a reason to reject partition. The access issue stems from BIA's unexplained presumption that partition would necessarily require dividing the Allotment into 27 parcels corresponding in size to the co-owners' undivided interests. The lack both of a description of the possible forms of partition and of consultation with the co-owners about potential access further compromises BIA's exercise of its discretion (and prevents the Board from evaluating the access issue).

Similarly, while the record does not support Appellant's claim that the *primary* reason for the denial stems from BIA's reluctance to commit the funds necessary to pay for an extensive and costly survey, the Superintendent's decision suggests that it was a factor in his decision. Under 25 C.F.R. § 152.33, however, the Secretary may issue either a patent (which would require a cadastral survey) *or* a deed (which does not require such a survey). *See* BIAM 2.3.3A (54 BIAM 203.03A (1984 REISSUE)) ("In the event the land cannot be partitioned by legal subdivisions of the section or aliquot parts thereof, it will be necessary to effect the partition by execution of deeds."); 25 C.F.R. § 152.33 ("Secretary . . . may issue new patents *or* deeds" (emphasis added)). Therefore, BIA's failure to consider the deed alternative undermines any weight BIA may have given to this factor.

### **Conclusion**

We find that the Regional Director failed to give proper consideration to all the legal prerequisites to the exercise of his discretion whether to partition the Allotment and thus has not properly exercised that discretion. We therefore vacate the Regional Director's decision and remand the partition application to him for further review and a new decision.

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 vacates the Regional Director's decision and remands the matter to him for further review and a new decision.

I concur:

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// original signed  
Sara B. Greenberg  
Administrative Judge\*

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.