



INTERIOR BOARD OF INDIAN APPEALS

Donald M. Gray v. Great Plains Regional Director, Bureau of Indian Affairs

52 IBIA 166 (10/21/2010)



## 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

DONALD M. GRAY,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 09-12-A
GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	October 21, 2010

Donald M. Gray (Appellant) has appealed the September 11, 2008, decision of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), determining that the prior partition of land owned by Appellant and his six brothers, which was approved by the Superintendent of the Cheyenne River Agency, BIA (Superintendent), on December 9, 1996, addressed only the surface interests and that, therefore, a new petition for partition would have to be submitted in order for BIA to partition the subsurface (mineral) interests, which have additional owners. In so doing, the Regional Director rejected Appellant's claim that the November 18, 1996, petition for partition approved by the Superintendent included the mineral interests as well as the surface interests in the affected tracts. Appellant challenges the Regional Director's conclusions that the November 1996 petition for partition did not include the subsurface interests and that a new partition petition for the mineral interests had to be filed before those interests could be partitioned.

Appellant has not met his burden of proving either an error of law or an abuse of BIA's exercise of its discretion in its determination that the prior partition of land owned by Appellant and his brothers included only the surface of the land and that a new petition for partition of the mineral interests would have to be submitted in order for BIA to partition the subsurface interest. We therefore affirm the Regional Director's decision.

## Background

Appellant and his six brothers inherited the trust and fee estate left by their father Oscar P. Gray (Oscar), an enrolled member of the Cheyenne River Sioux Tribe (Tribe), upon the 1995 death of their non-Indian mother, Evelyn, who had held a life estate in those lands. The lands consisted of 4,620 acres of trust land and 1,120 acres of fee land on the Cheyenne River Indian Reservation in South Dakota, with each brother holding an undivided one-seventh interest in those lands. On March 15, 1996, five of Appellant's brothers (Daniel, Delaine, Patrick, Gerald, and Richard) filed Applications to Partition Land with the Superintendent, seeking sole ownership of specified tracts of the inherited trust lands. *See* Administrative Record (AR), Tab 6. In response to Question 15, each of the 5 brothers indicated that he wanted to reserve 100% of the mineral rights in the entire estate. Exhibit B included with the applications stated that the applicants requested the partition because "an undivided one-seventh is of no use to me. I am actively engaged in ranching and the [partition] proposal submitted<sup>1</sup>] would allow me to have an undivided interest in [a] block of the land and a viable unit for the purpose of raising cattle." AR, Tab 6, Exh. B.

Upon receipt of the applications, BIA requested an appraisal to determine whether the partition was fair and equitable. The appraisal report valued the land based solely on its use for crops (\$180/acre) and for pasture (\$109/acre), and did not address the mineral values of the land. AR, Tab 10, Attachment to Amended Partition Agreement. After receiving the appraisal report, Appellant and his brothers engaged in further negotiations which culminated in the August 9, 1996, submission of an amended partition agreement, to which only John disagreed. AR, Tab 10. The settlement agreement modified the March 1996 applications by adding a \$17,638 cash payment to the two tracts of land Appellant would receive, which would equalize the value of his share of the fee and trust land in Oscar's estate.

On September 11, 1996, as required by the applicable regulations, BIA forwarded the amended petitions to John, the remaining owner of the lands at issue, and solicited his opinion on the partition. AR, Tab 12. John responded by letter dated September 14,

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<sup>1</sup> The partition proposal was included as Exhibit A to the applications. According to the cover letter accompanying the applications, the proposal reflected discussions and negotiations among the brothers in an attempt to generate a partition that would be fair to all seven of them. Appellant and his brother John did not agree with the proposal — Appellant, who was not a rancher, wanted a cash payment to equalize the value of his smaller share of the land while John wanted different land from that apportioned to him.

1996, objecting to the partition agreement because it did not give him the lands he wanted. AR, Tab 13.

On November 18, 1996, Appellant and his five brothers submitted a joint Petition for Partition of Inherited Indian Land (Form 5-5414) to the Superintendent. AR, Tab 21. This form did not contain any questions about mineral interests and the attached exhibit delineating the division of the land was also silent as to the subsurface estate. The Superintendent approved the joint petition on December 9, 1996. AR, Tab 23; *see also* AR, Tab 21.

John appealed the Superintendent's decision to the Acting Aberdeen Area Director, who, on March 13, 1997, denied the appeal and affirmed the Superintendent. John then appealed the Area Director's decision to the Board of Indian Appeals (Board), which affirmed the Area Director on September 28, 1998. *See Gray v. Acting Aberdeen Area Director*, 33 IBIA 26 (1998). On April 22, 1999, John gave his written consent to the partition. AR, Tab 53.

Trust patents for the partitioned tracts were issued on June 23, 1999. AR, Tab 62. Each patent explicitly stated that only the surface estate of the described land had been partitioned and patented. By letter to the Superintendent dated July 29, 1999, Appellant thanked him for processing "the recently completed Gray land partition." AR, Tab 63. Referring to the two patents that he had received, Appellant stated that he knew that his father owned the subsurface (i.e., mineral) rights to the land for one parcel and may have owned all or a portion of the subsurface rights to the other parcel. Appellant "request[ed] that the sub-surface rights pertaining to the land covered by Petition for Partition of Inherited Indian Land approved [by the Superintendent] be partitioned to the current owners of the surface rights." *Id.* Appellant continued, "[i]f the sub-surface rights to the land covered by [the two patents that Appellant received] are owned by other than myself and six brothers please advise me as to the names of the owners." *Id.*

The Superintendent responded on August 25, 1999, stating that BIA did not have all of the mineral status title reports (TSRs) on file because the Land Titles and Records Office had not separated the subsurface owners from the surface owners for all the completed land conveyances. AR, Tab 64. He indicated that he would request the mineral TSRs for Appellant's tracts (2243 and X1217-C<sup>2</sup>), which he would then forward on to Appellant. In response to Appellant's follow-up inquiries, the Superintendent advised

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<sup>2</sup> Although the Superintendent denominated the second tract as X1217-B in his response, the trust patent for that tract contains a hand-written correction identifying the tract as X1217-C. *See* AR, Tab 62.

Appellant on October 20, 1999, that he had not received a response to his request for the mineral TSRs but that once those reports were received, he would proceed with Appellant's partition request. AR, Tab 67.

By letter dated February 3, 2000, the Superintendent informed Appellant that he had received the TSRs for Appellant's tracts, and that those TSRs had identified the Gray brothers as the owners of all the mineral interest in tract 2243 and half of the mineral interest in tract X1217-C and James Claymore, Jr., as the owner of the other half of the minerals in tract X1217-C. AR, Tab 68. The Superintendent indicated that he would request the mineral TSRs for all the surface tracts partitioned to the brothers, upon receipt of which he would ask for mineral appraisals. He added that once the appraisals were completed, he would send a partition plan to the other brothers advising them that if they agreed to the plan, the subsurface interests would be partitioned to the current owners of the surface rights.

After hearing nothing further from BIA for several years, Appellant contacted the Cheyenne Agency telephonically on January 25, 2007, and then with a letter dated January 29, 2007. In the letter, Appellant asserted that the approved partition petition covered both the surface and subsurface interests in the land and that, therefore, another partition plan, as referenced in the Superintendent's February 2000 letter, would be redundant, time consuming, and unnecessary. AR, Tab 70. He asked the Agency to confirm the mineral ownership of his trust tracts, to correct the official BIA land title records, and to obtain amended trust patents that included both the surface and subsurface rights in the partitioned lands.<sup>3</sup>

When the Agency failed to respond, Appellant contacted the Regional Director by letter dated November 26, 2007, asking him to help finalize the partitioning of the subsurface rights to his trust land. AR, Tab 73. Appellant averred that he and his brothers should not be asked to do anything further to advance the mineral interest partition because the terms of the approved partition petition included all interests in the trust land and should be sufficient to initiate the partitioning of the mineral rights, the regulations did not require a separate action for the subsurface rights, and BIA possessed "all necessary requests,

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<sup>3</sup> Appellant also sent a letter, dated January 22, 2007, to the Office of the Special Trustee for American Indians (OST) asking that office to correct BIA's land title records and to take action to obtain amended trust patents. AR, Tab 71. OST responded by letter dated October 18, 2007, advising that it, in conjunction with BIA staff, was continuing to research the issue and would inform Appellant of its findings. AR, Tab 72. No further communications from OST to Appellant appear in the record.

approvals, and land interest data necessary to partition the [mineral] rights.” *Id.* Appellant acknowledged that Oscar had only owned a fraction of the mineral interests in some of the tracts but contended that none of those tracts was included in the partition petition and that, therefore, the subsurface rights to the affected tracts should be partitioned in the same manner as the previously partitioned surface rights.

On May 13, 2008, the Deputy Regional Director - Trust Services (Deputy) responded to Appellant’s November 2007 letter. AR, Tab 79. The Deputy informed Appellant that since the mineral owners differed from the surface owners, a new application for partition had to be submitted to the Agency. The Deputy also noted that the Tribe owned some of the mineral interests in the tracts Oscar had owned and therefore had to be contacted to consent to the mineral partition. The Deputy also noted that since Appellant wanted to have all the mineral rights in the two tracts he owned, Appellant would have to negotiate with the other mineral owners of the tracts involved in the 1999 surface partition, including the Tribe, before partition of the mineral interests could be approved.

By letter dated July 14, 2008, Appellant asked the Regional Director to review the Deputy’s decision. AR, Tab 80. Appellant stated that, contrary to the Deputy’s assertion, Appellant had only requested the mineral interests his father had owned, not all of the mineral interests, in the tracts Appellant now owned. Appellant asserted that the applicable regulation, 25 C.F.R. § 152.33(b), neither segregated the surface from the subsurface interests nor required a separate application for each. He also contended that the partition petition he and his brothers had signed and the Superintendent had approved, Form 5-5414, which was the form approved by the Secretary, included both the surface and subsurface interests and thus that a new petition for the mineral interests was not required. Appellant further denied that any mineral interests other than those owned by his father were affected by the partition request and averred that since he and his brothers had already consented to the partition, no additional consents from the Tribe or the other mineral interest owners were necessary. Finally, Appellant noted that failing to include the mineral interests in the partitioning of his father’s trust estate had impaired his estate planning and increased fractionation contrary to the goals of the American Indian Probate Reform Act.

The Regional Director issued his decision on September 11, 2008. AR, Tab 81. In rejecting Appellant’s claim that the November 1996 petition for partition included the mineral interests and that the mineral interests therefore should have been partitioned at the same time as the surface, the Regional Director noted that, although BIA is required to contact all landowners for input into a proposed partition, the Superintendent had contacted only the surface owners, and not the additional mineral interest owners, prior to approving the original petition and that, absent input from the mineral owners, the Superintendent could not have determined whether the subsurface interests were capable of

partition to the advantage of all the landowners. The Regional Director further pointed out that the partition applications submitted on March 15, 1996, by five of Appellant's brothers had specifically reserved their mineral interests and that the additional agreement reached by Appellant and his five brothers amending the March 1996 petitions did not address the mineral interests, both of which, according to the Regional Director, undermined Appellant's claim that the original petition included the subsurface as well as the surface interests. The Regional Director therefore concluded that, if Appellant or his brothers wanted to partition their subsurface interests, they would have to file a new petition, upon receipt of which BIA would be required to provide adequate notice to all subsurface landowners, including the Tribe, and then make a determination as to whether the subsurface interests are capable of partition to the benefit of all the landowners.

Appellant appealed the Regional Director's decision to the Board and filed both an opening brief and a reply brief in addition to his notice of appeal. The Regional Director has filed an answer brief and the matter is now ready for review.

## 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. *Weasel v. Acting Rocky Mountain Regional Director*, 51 IBIA 189, 192 (2010); *Laducer v. Acting Great Plains Regional Director*, 48 IBIA 294, 299 (2009); *Davis v. Acting Aberdeen Area Director*, 27 IBIA 281, 285 (1995).<sup>4</sup> The partition of an allotment involves the exercise of discretion by BIA. *Weasel*, 51 IBIA at 192-93; *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. *Weasel*, 51 IBIA at 193; *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

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<sup>4</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 seq.*) and § 483 (for tribes that did adopt the IRA).

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. *Weasel*, 51 IBIA at 193; *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.

On the other hand, to the extent an appellant raises a question of law, the Board reviews that issue de novo. *Spang v. Acting Rocky Mountain Regional Director*, 52 IBIA 143, 149 (2010); *Emm v. Western Regional Director*, 50 IBIA 311, 316 (2009); *Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 104 (2009); *State of South Dakota and County of Charles Mix v. Acting Great Plains Regional Director*, 49 IBIA 129, 141 (2009). In addition, we review de novo the sufficiency of evidence to support a BIA decision. *Spang*, 52 IBIA at 149; *Emm*, 50 IBIA at 316; *Smartlowit*, 50 IBIA at 104. An appellant bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Spang*, 52 IBIA at 149; *Emm*, 50 IBIA at 316; *Smartlowit*, 50 IBIA at 104; *State of South Dakota and County of Charles Mix*, 49 IBIA at 141.

Applying these standards here, we conclude that, to the extent Appellant raises legal issues, he has not shown that the Regional Director's decision was in error or not supported by substantial evidence. Nor has Appellant demonstrated that the Regional Director failed to properly exercise his discretion as to matters falling within his discretionary authority. Accordingly, we affirm the Regional Director's determinations that the approved partition petition did not include the mineral interests in the partitioned tracts and that Appellant, therefore, was required to submit a new petition requesting the partition of the subsurface interests in the tracts.<sup>5</sup>

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<sup>5</sup> In his answer brief the Regional Director argues that the appeal should be dismissed based on *res judicata* because Appellant had participated in John's 1998 appeal of the Area Director's decision affirming the Superintendent's approval of the partition petition. The Regional Director contends that Appellant should have raised his objection to the partitioning of only the surface estate at that point and that his failure to do so precludes him from now challenging the approved partition. The critical flaw with the Regional Director's position, however, stems from the fact that it was not until the trust patents issued in 1999, *after* the Board's decision rejecting John's appeal was issued, that Appellant purportedly learned that BIA did not consider the approved partition as sufficient to partition the mineral rights. Thus, according to Appellant, he had no reason to raise his arguments while John's appeal was pending because he had no cause to believe that the partition did not include the mineral rights. We therefore deny the Regional Director's request that we dismiss the appeal on *res judicata* grounds.

## Analysis

Appellant argues that the approved November 1996 partition petition, submitted on Form 5-5414, controls because that form was approved by the Secretary in accordance with 25 C.F.R. § 152.33(b) for use in partitioning trust and restricted estates, the definitions of which, set out at 25 C.F.R. §152.1(c) and (d), encompass lands and any interest in lands and thus include both surface and subsurface interests. He asserts that the form (AR, Tab 21) does not differentiate between surface and subsurface interests and therefore incorporates both interests, citing for support the last paragraph of the form before the signature lines which states that the petitioners “expressly relinquish all interests which they may have in all of the described lands, except such part thereof as may be set apart to them respectively, on the partition thereof, as hereinbefore set forth.” He therefore maintains that a partition requested on Form 5-5414 includes both the surface and subsurface rights and that BIA failed to properly interpret the scope of the petition and thus erred in partitioning only the surface estate. According to Appellant, the five partition petitions submitted in March 1996, in which five of Appellant’s brothers reserved 100% of their mineral interests, do not reflect the petitioners’ intent because the forms utilized were not forms approved by the Secretary and were ambiguous in that there was no explanation of the meaning of the question addressing the reservation of mineral rights (Question 15) and because the Superintendent did not sign and date the forms. We find none of these arguments persuasive.

Although Appellant claims that the March 1996 forms were ambiguous, we find no ambiguity in Question 15 which clearly states: “(I) (We) wish to reserve (NONE) (50%) (100%) of all mineral rights.” AR, Tab 6. All five of the brothers submitting these petitions circled 100%. Appellant has not explained how that question was amenable to misinterpretation. The brothers’ intent to reserve the mineral interests is further supported by Exhibit B to the March 1996 petitions which states that the brothers requested the partition in order to gain an undivided interest in a block of land for cattle raising, which is clearly a surface use. Furthermore, the appraisal conducted to determine the value of the land for partition purposes, which was based on the March 1996 petitions, valued only the surface of the lands. This appraisal was used to determine whether the values of the partitioned tracts were equivalent. In fact, Appellant used this appraisal to calculate the amount of the cash payment he wished to receive to equalize the value of his share of the partitioned land. Neither the amended partition petition reflecting the settlement of Appellant’s objections to the original partition divisions nor the November 1996 partition petition explicitly referred to mineral rights or indicated that the petitioners now sought the mineral interests as well as the surface of the partitioned tracts.

Additionally, if BIA had interpreted the petition as including both the surface and subsurface interests and had approved the partition of both those interests, its approval of the petition would have been improper. It is undisputed that the ownership of the minerals differs from the ownership of the surface, that BIA notified only the surface owners of the affected tracts of the partition petition,<sup>6</sup> and that no appraisal of the mineral interests was conducted. Absent such consultation with all the mineral owners and the preparation of an appraisal of the mineral interests, BIA was incapable of determining whether the lands were susceptible to partition to the benefit of all the interest owners. *See* 54 BIAM 2.3.2 (54 BIAM 203.02 (1984 REISSUE))(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); 54 BIAM 2.3.3 (54 BIAM 203.03A (1984 REISSUE)) (requiring meaningful consultation and discussion of various partition options with the owners); *see also Weasel*, 51 IBIA at 195 and n.11. We therefore conclude that Appellant has not shown that BIA erred in interpreting the partition petition as encompassing only the surface of the partitioned tracts.

Appellant also objects to the Regional Director's requirement that, if Appellant and/or his brothers want to partition their subsurface interests, they must file a new partition petition. Appellant maintains that such a petition is unnecessary because the November 1996 petition adequately presents the petitioners' partition request for the mineral interests in the tracts and that BIA, therefore, should simply process that petition for partitioning the mineral interests in the tracts. We disagree. Not only is it far from certain that the November 1996 partition petition included the mineral rights, but, although that petition was signed by Appellant and five of his brothers, only Appellant has challenged the fact that the issued trust patents encompassed only the surface of the partitioned tracts. Thus, it is unclear whether any of Appellant's brothers, none of whom participated in this appeal in any capacity, also seek partition of the mineral interests of the tracts. Absent any indication that the brothers join in the request to partition the subsurface interests, BIA cannot properly use the 1996 petition as the basis for determining whether to partition the subsurface interests in the tracts. Appellant thus has not shown that the Regional Director committed any error of law or abused his discretion by requiring Appellant, and any other surface owner desiring the partition of the mineral interests in the partitioned tracts, to file a new partition petition.<sup>7</sup> The filing of a new partition application will trigger BIA's obligations to provide adequate notice to all subsurface landowners of any

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<sup>6</sup> The only non-petitioner surface owner required to be notified of the partition petition was John.

<sup>7</sup> Any other arguments raised by Appellant which have not been specifically addressed in this decision have also been carefully considered and rejected.

tract subject to the partition request, including the Tribe if it holds a mineral interest in an affected tract, to obtain an appraisal of the affected mineral interests, and to then make a determination as to whether the subsurface interests are capable of partition to the benefit of all the landowners.

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 Regional Director's 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.