



INTERIOR BOARD OF INDIAN APPEALS

Marlene S. Soper, et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs

29 IBIA 182 (05/03/1996)

Judicial review of this case:

Reversed and remanded, *Soper v. U.S. Department of the Interior*, No. CIV-96-864 L
(W.D. Okla. Sept. 9, 1997)



United States Department of the Interior

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

MARLENE S. SOPER, et al.,	:	Order Affirming Decision
Appellants	:	
	:	
v.	:	
	:	Docket No. IBIA 95-134-A
ACTING ANADARKO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	May 3, 1996

This is an appeal from a June 7, 1995, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), approving the partition of surface interests in Comanche Allotment 2333. Appellants are Marlene S. Soper, Linda K. Mullen Thompson, Gerald Lee Mullen, Ronald D. Mullen, William S. Mullen, Jr., Donna Jean Mullen Churchwell, Michael W. Mullen, and Charlene Mullen, each of whom owns an undivided 1/20 interest in the allotment. For the reasons discussed below, the Board affirms the Area Director's decision. 1/

Comanche Allotment 2333 contains 159.03 acres and is located in Comanche County, Oklahoma. In July 1993, Carol Ann Mullen Hall, owner of an 11/20 interest, filed a petition for partition with the Superintendent, Anadarko Agency, BIA. Subsequently, Jack Mullen, owner of a 1/20 interest, also requested partition. Appellants' views were sought with respect to both requests. In both cases, appellants stated that they opposed partition.

In order to determine whether an equitable partition was feasible, the Superintendent requested an appraisal of the allotment. The appraisal was completed in October 1994 and showed that an equitable division of the allotment, based upon value rather than acreage, would give Carol 141.53 acres, Jack 0.78125 acres, and appellants 16.718 acres. On December 28, 1994, the Superintendent approved partition of the allotment on the basis of the appraisal.

Appellants appealed to the Area Director, who affirmed the partition on June 7, 1995. The Area Director's decision states in part:

For years this tract of land has been the source of much disagreement among the owners, and it is believed in its present state agreement will never be reach concerning administration

1/ Both the Area Director and appellants seek expedited consideration of this appeal. In light of concerns raised by the Area Director, expedited consideration is granted.

or management. The petitioners express that approval of this transaction will help foster agreement. Subsequently, pursuant to the application and upon receipt of Appraisal, the Superintendent, Anadarko Agency found in accordance with [the] Act of May 18, 1916 (39 Stat. 127; 25 U.S.C. 378; 25 CFR 152.33(a)) that subject allotment was capable of partition in kind to the advantage of the heirs. Where partitioning is advisable, land is divided on the basis of value, not acreage, thereby insuring an equitable division even though parts of the lands are of different value and character.

(Area Director's Decision at 1-2).

Appellants' principal argument on appeal is that BIA should have encouraged a voluntary partition agreement among the heirs rather than impose an involuntary partition upon them. They contend that they were "entitled to view 'vital' partition information and the opportunity to negotiate an agreement among the parties before their property rights are affected by an involuntary partition" (Appellants' Opening Brief at 7). They also fault BIA for failing to act upon a settlement offer which they made to Carol and Jack after the Superintendent issued his decision. Appellants' requested relief in this matter is that the Board vacate the Area Director's decision and remand the matter "for a voluntary proceeding pursuant to 25 CFR § 152.33(b)" (Id. at 12). 2/

Appellants became aware in July 1993, if not before, that Carol had requested partition. At that time, appellants stated unequivocally that they were opposed to partition. They again opposed partition after Jack filed his request. The record shows that appellants and their attorney were in contact with the Agency during the 1 1/2-year period in which the partition requests were pending. The record does not show, however, that appellants expressed any interest in negotiating a partition agreement at any time prior to the Superintendent's December 28, 1994, partition decision.

This case clearly differs from Romo v. Acting Phoenix Area Director, 18 IBIA 16 (1989), upon which appellants rely. In Romo, a BIA Superintendent had approved a partition request made by a minority owner, even though the owner of a 1/2 interest had made counter proposals, and even though the minority owner had agreed to consider those proposals. The Phoenix Area Director reversed the Superintendent's decision, in part because the possibilities for negotiation between the landowners had not been exhausted. The Board affirmed the Area Director's decision.

Here, the Superintendent had no reason to believe that a negotiated partition was possible. To the contrary, all indications were that appellants were intractably opposed to any partition. Thus, it was not

2/ Appellants moved to supplement the record on two occasions. The Board accepts the documents submitted with appellants' first motion. Although these documents are not properly part of the record for the Area Director's decision because they were generated after that decision was issued, the Board accepts them as exhibits to appellants' opening brief. The Board rejects as untimely the documents submitted with appellants' second motion to supplement the record.

unreasonable for the Superintendent to proceed with the partition on the basis of the requests made by Carol and Jack, in the belief that the landowners would not be able to agree.

After the Superintendent issued his decision, appellants made a settlement offer to Carol and Jack. In a January 13, 1995, letter, they proposed "to give Carol Mullen approximately 80.00 acres and Jack Mullen 7.00 acres of the 159.00 acres with the remaining acreage to be left in an undivided interests [sic]." Carol and Jack evidently did not respond.

In their brief in this appeal, appellants contend that there was room for negotiation because Carol's original partition request sought only 80.15 acres, rather than the 141.53 acres she was awarded under the BIA partition. Appellants suggest that it was BIA's responsibility to consider this settlement offer.

Appellants made their offer to Carol and Jack. It was entirely up to Carol and Jack to decide whether they wished to consider settlement through a negotiated partition. ^{3/} Absent such agreement on their part, the Area Director properly proceeded to decide the appeal before him on its merits.

Appellants also contend that the partition will result in revenue loss to all the landowners. Their only support for this contention, however, is a bare speculation that leases will be lost. Appellants do not explain why they believe partition will result in the loss of leases.

There are, or have been, an agricultural lease and a business lease on Allotment 2333. Following partition, the agricultural lease will fall into Carol's share of the allotment, and the business lease will be split between Carol's share and appellants' share. Appellants offer no reason to believe that this split would cause the present lessees to give up their leases and/or make it more difficult to negotiate new leases.

As the Board stated in Romo, and more recently in Davis v. Acting Aberdeen Area Director, 27 IBIA 281 (1995), BIA decisions concerning partition of allotments are based on the exercise of discretionary authority. Thus, the Board's role here is to determine whether BIA has given proper consideration to all legal prerequisites to the exercise of discretion. If it has, and if there is support for its decision in the record, the Board will not substitute its judgment for BIA's. The Board finds no legal error here and further finds that BIA has provided ample support for its decision.

An appellant who challenges a BIA discretionary decision bears the burden of showing that the official did not properly exercise discretion. Evans v. Sacramento Area Director, 28 IBIA 124 (1995), and cases cited therein. Appellants have not made such a showing here.

^{3/} Even if the parties had agreed to settle, BIA would not be bound by the parties' agreement if it found the agreement unfair to one or more of the landowners.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's June 7, 1995, decision is affirmed.

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge