



INTERIOR BOARD OF INDIAN APPEALS

Sylvester Poler v. Midwest Regional Director, Bureau of Indian Affairs

56 IBIA 6 (10/19/2012)



United States Department of the Interior

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

SYLVESTER POLER,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	Docket No. IBIA 10-132
MIDWEST REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	October 19, 2012

Sylvester Poler (Appellant) appealed to the Board of Indian Appeals (Board) from a July 8, 2010, decision by the Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director affirmed the Great Lakes Agency Acting Superintendent’s (Superintendent) denial of Appellant’s application to partition a parcel of land (Allotment) in which Appellant owns an interest.¹ The Superintendent summarily denied the application because, while it was pending, the Lac du Flambeau Band of Lake Superior Chippewa Indians (Tribe), which holds a majority interest in the Allotment, notified BIA that it was exercising its statutory authority, *see* 25 U.S.C. § 2204(a), to purchase Appellant’s interest without his consent. The Superintendent treated this fact as dispositive and gave no other reason for denying Appellant’s partition application.

We vacate the Regional Director’s decision because it mischaracterizes the Superintendent’s decision as an exercise of her discretion and as based upon multiple justifications, neither of which characterization is evident in the Superintendent’s decision or in the record. And the Regional Director also appears to accept the Superintendent’s presumption, which we reject, that the Tribe’s purchase initiative mandated denial of the partition application. The Tribe’s purchase initiative undoubtedly became an additional factor that BIA was required to consider in deciding whether to grant or deny Appellant’s partition application, but the Tribe’s action did not automatically displace Appellant’s application or divest BIA of discretion to continue to give it consideration. It is not apparent that the Regional Director understood this; it is clear that the Superintendent did

¹ The land at issue is Lac du Flambeau Allotment No. 432 7G99, which consists of Government Lot 1 and the SE¼NE¼, Section 13, Township 40 North, Range 5 East, Fourth Principal Meridian, Vilas County, Wisconsin, containing 73.60 acres, more or less.

not. Thus, we vacate the Regional Director's decision and remand the matter for further consideration.

Background

I. Statutory and Regulatory Framework

A. Partition

Appellant's partition request is governed by 25 U.S.C. § 483,² which grants the Secretary of the Interior discretion to approve conveyances of interests in Indian trust land. *See also* 25 C.F.R. § 152.33(b). BIA must consider partition applications even when not all co-owners consent to partition. *Sampson*, 483 F.Supp. at 244. In deciding whether to approve a partition application, BIA will consider whether partition is feasible, equitable, and beneficial to all co-owners of the undivided trust interests in the allotment. *Gray v. Acting Aberdeen Area Director*, 33 IBIA 26, 28 (1998); *see also Sampson*, 483 F.Supp. at 244; *Davis v. Acting Aberdeen Area Director*, 27 IBIA 281, 286 (1995).

B. § 2204(a) Forced Sale

The Indian Land Consolidation Act (ILCA) authorizes tribes to purchase undivided interests in tracts of land located within the boundaries of their reservations or over which they otherwise have jurisdiction. 25 U.S.C. § 2204(a). A tribe must pay at least fair market value for land interests it purchases under this section. *Id.* § 2204(a)(1). A tribe may purchase interests from consenting owners, but to purchase an entire parcel the tribe must have the consent of owners whose interests amount to at least 50% of all the undivided interests in the parcel. *Id.* § 2204(a)(1) & (2). Any undivided interests in the tract that the purchasing tribe already owns count toward the 50% mark. *Id.* § 2204(a)(2)(B). Unless a tribe has an approved land consolidation plan, purchases under

² “Statutory authority for the partitioning of allotments is found at 25 U.S.C. § 378 (for tribes that [voted to reject] the 1934 Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*) and § 483 (for tribes that [voted to accept] the IRA).” *Gray v. Great Plains Regional Director*, 52 IBIA 166, 171 n.4 (2010); *see also Sampson v. Andrus*, 483 F.Supp. 240, 242 (1980). Both the Tribe and Appellant's tribe (Sokaogon Chippewa Community) voted in 1935 to accept the IRA. *See Haas, Ten Years of Tribal Government under I.R.A.*, at 20 (1947) (<http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf>) (copy added to appeal record).

this section must be approved by the Secretary of the Interior (i.e., BIA, exercising the Secretary's delegated authority). *Id.* § 2204(b)(3).³

II. Factual Background

Appellant owns a 25% undivided interest in the Allotment; the Tribe owns the remaining 75% undivided interest. In April 2005, Appellant submitted an application to partition the Allotment. Administrative Record (AR) 1. The Tribe initially indicated that it was not willing to partition the Allotment, but it nonetheless engaged in (ultimately unsuccessful) negotiations with Appellant. AR 2 Tab MM (Tribe's refusal to agree to partition request); *see, e.g.*, AR 2 Tab P at 2-5 (record of negotiations). Over the next 3 years Appellant submitted to BIA several different proposals for partitioning the Allotment.

In October 2008, Appellant asked BIA to make a decision on his partition application. *See* AR 2 Tab Q. BIA, in turn, asked Appellant to provide a summary of his negotiations with the Tribe and a precise plan for the partition (because Appellant had submitted several different proposals). *Id.* Appellant submitted those documents in January 2009 and identified his preferred option as "Preliminary Plat No. 4." AR 2 Tab P. The Tribe did not respond to the Superintendent's request for comment and BIA proceeded with environmental review of the proposal. AR 2 Tabs O, M; *see generally* AR 4 (NEPA documents).

On July 16, 2009, before the environmental review was complete, the Tribe submitted two Tribal Council resolutions to BIA. AR 2 Tab J. One resolution opposed partition of the Allotment, citing environmental and management concerns. Resolution No. 57(09) (AR 2 Tab J(i)). The other resolution invoked the Tribe's authority under § 2204(a) to purchase Appellant's 25% interest in the Allotment without his consent. Resolution No. 56(09) (AR 2 Tab J(ii)).

The Superintendent sought guidance from the Field Solicitor on how to proceed with the competing partition application and tribal purchase resolution. AR 2 Tab H. The Field Solicitor's Office advised the Superintendent that the Tribe's proposed purchase properly fell under 25 U.S.C. § 2204(a) and that this particular proposed purchase would

³ In addition, if an individual Indian co-owner has been in actual use and possession of the land for at least the 3 years preceding the purchase request, then that individual has a right to match the tribe's offer and purchase the interest instead. *Id.* § 2204(b)(1). That provision is not at issue in this case.

further the policy goals of ILCA. Letter from Field Solicitor to Superintendent (Field Solicitor's Letter), Apr. 5, 2010, at 1-2 (AR 2 Tab E). The Field Solicitor concluded:

Because the same tract of land is involved in both the request for partition and the Tribe's statutory right to purchase, [BIA] is required to act on the resolution to process a forced sale even though the partition request has been pending for some time. Thus, [BIA] should deny the request to partition and process the Tribe's request to initiate a forced sale under 25 U.S.C. § 2204(a).

Id. at 3.

One week later, the Superintendent denied the partition application. Letter from Superintendent to Appellant, Apr. 12, 2010 (Superintendent's Decision) (AR 2 Tab A(i)). She stated: "Because the Tribe has asserted its right to force a sale . . . , your request to partition is denied." *Id.* at 2. The Superintendent gave no other reason for the decision. Appellant appealed to the Regional Director. Notice of Appeal to Regional Director, Apr. 26, 2010 (AR Supplemental Document 2).⁴

The Regional Director affirmed the Superintendent's decision. Regional Director's (RD) Decision at 1, 12.⁵ The Regional Director noted that approval of partition applications is committed to BIA's discretion and that, while 100% co-owner consent is not required, the interests of all co-owners must be taken into account. *Id.* at 6-7, 11. The Regional Director also stated, however, that the Tribe's purchase request imposed on BIA a "responsibility to halt the application for partition." *Id.* at 10. The Regional Director characterized the Superintendent's decision as "exercise[ing] her discretionary authority and decid[ing] to accept the [Tribe's] resolutions rejecting the partition and acquiring your interest pursuant to" § 2204(a). *Id.* at 11. The Regional Director explained the Superintendent's decision as follows:

It is evident that you presented different options for partitioning the [Allotment] and had a preference to a specific proposed lot. However, when advised that your preferred lot would require a payment to offset the value

⁴ The administrative record includes seven "Supplemental Documents not included in the administrative record compiled by the Great Lakes Agency," located in front of the table of contents.

⁵ The Regional Director's decision was undated, but the administrative record's table of contents indicates that it was issued on July 8, 2010, and certified mail receipts indicate that it was sent out on July 9, 2010.

the [Tribe] would lose, nothing in the AR reveals that you offered to pay the difference.⁶ *This is why the [Superintendent] was unable to proceed with the partition.* You were never able to come to a conclusion to any resolution of a division of the [Allotment] with the majority co-owner, the [Tribe]. Likewise, upon receipt of the [Tribe's] two resolutions, the *[Superintendent] denied your application for partition based on these factors and the [Tribe's] decision to purchase the property pursuant to the authority at 25 U.S.C. § 2204.* For these reasons, we affirm the . . . Superintendent's decision to deny your Application for Partition of Indian Land.

RD Decision at 12 (emphases added).

Appellant appealed the Regional Director's decision to the Board. Appellant filed a notice of appeal with a statement of reasons, followed by a supplement to the statement of reasons, which the Board accepted. Appellant did not file an opening brief within the allotted time, even after the Board extended the deadline. *See* Order Granting Appellant Extension for Opening Brief, Oct. 8, 2010. The Regional Director filed a brief responding to the arguments in the statement of reasons. Appellant filed a combined opening brief and reply brief on June 18, 2012.⁷

Discussion

I. Standard of Review

The decision to grant or deny a request for partition is committed to BIA's discretion. 25 U.S.C. § 483; *Sampson*, 483 F.Supp. at 244. "The proper role for the

⁶ It is evident that in her decision, the Regional Director mistakenly treated one of Appellant's earlier proposals as his final proposal. The Regional Director's discussion of the disparity in value that would result from Appellant's partition proposal indicates that she was focusing on Preliminary Plat No. 1, instead of Preliminary Plat No. 4, which is the final proposal submitted by Appellant, and for which the disparity in value was much smaller. *Compare* RD Decision at 11, *with* Letter from BIA to Appellant, Feb. 28, 2006 (AR 2 Tab GG).

⁷ Even considering it as only a reply brief, this document was filed more than 18 months after the deadline for filing a reply and Appellant failed to seek an extension of time or leave to file this document so late. *See* 43 C.F.R. §§ 4.310 & 4.311 (appellant may file reply to answer brief within 15 days of receipt of answer brief); Regional Director's Answer Brief (filed Dec. 21, 2010). The June 18 filing was therefore untimely, but we need not rely on it in vacating the Regional Director's decision.

Board in reviewing BIA's discretionary actions is to determine whether BIA followed or considered all legal prerequisites in the exercise of its discretionary authority and whether the decision is supported by the record and adequately explained." *Heirs of Mose Daniels v. Eastern Oklahoma Regional Director*, 55 IBIA 139, 143 (2012). In contrast to the Board's limited review of discretionary decisions, we review legal determinations and the sufficiency of evidence *de novo*. *Matt v. Rocky Mountain Regional Director*, 53 IBIA 259, 265 (2011). "If the administrative record fails to support the decision, we will not substitute our judgment for the Regional Director's but will vacate his decision and remand the matter for further proceedings." *Id.*

II. Merits

The Superintendent denied the partition application based solely on the Tribe's resolution to exercise authority granted to it by § 2204(a) to purchase Appellant's interest in the Allotment. The Regional Director's decision provided more detailed background information, and more discussion, than did the Superintendent's, but it is evident that the Regional Director did not purport to exercise her own discretion in reviewing the matter.⁸ Instead, she limited her analysis to characterizing the *Superintendent's* decision and indicating her agreement with it. In reviewing the Superintendent's decision, the Regional Director read into it additional reasons and justifications for the denial that were not evident in that decision or the record. Because the Regional Director's characterization of the Superintendent's decision is not supported by the administrative record, we vacate the Regional Director's decision and remand it for further consideration. And to the extent that the Regional Director affirmed the Superintendent's determination that the submission of a § 2204(a) purchase request required BIA to deny Appellant's partition request, we disagree and hold that the submission of the § 2204(a) request alone was not sufficient grounds for summary denial of the partition application.

Faced with the two mutually exclusive requests, the Superintendent sought guidance from the Field Solicitor. The Field Solicitor advised her that the Tribe had properly invoked § 2204(a). The Field Solicitor also stated that the Tribe's use of § 2204(a) would be consistent with the policy goals underlying ILCA, and concluded by advising the Superintendent that the Tribe could operate as "the driving force," that BIA was "required to act" on the Tribe's § 2204(a) request, and "[t]hus, [BIA] should deny [Appellant's] request." Field Solicitor's Letter at 2-3 (AR 2 Tab E). It is not entirely clear from the Field

⁸ Even assuming that the Regional Director intended her decision to be an exercise of the Regional Director's own discretion, we would vacate and remand because it is unclear to what extent that exercise of discretion was influenced by a mistaken belief that the Tribe's purchase initiative required BIA to summarily deny the partition application.

Solicitor's letter whether the advice, ultimately, was intended as policy advice or as a legal directive. But the Superintendent appears to have understood her "options" as limited to one: denying Appellant's request. And the sole justification for that denial was that the Tribe had submitted a § 2204(a) request for a forced purchase from Appellant of his interest.

In reviewing the Superintendent's decision, the Regional Director attributed to the Superintendent several additional justifications for the denial. Aside from the § 2204(a) request, the Regional Director stated that the Superintendent had denied the partition application because: (1) Appellant had failed to negotiate an equitable division of the land with the Tribe; (2) Appellant had not offered to pay the Tribe for the difference in value between the land he would receive and the actual value of his interest; and (3) the Tribe unequivocally opposed partition of the Allotment. RD Decision at 12. The Regional Director described the Superintendent's decision as an "exercise[of] her discretionary authority." RD Decision at 11. But the Regional Director's characterizations of the Superintendent's decision are not supported by the record.

First, the three additional reasons the Regional Director cited for the denial are not found in the Superintendent's decision itself. The decision mentions only the Tribe's § 2204(a) request as the reason for the denial. *See* Superintendent's Decision at 2. The reliance on the Tribe's request appears to follow from the Field Solicitor's advice, which also did not identify any other reason to deny the partition application. The Superintendent's decision, along with the Field Solicitor's Letter, indicate that the partition application was denied solely because the Tribe had submitted the § 2204(a) request. And, contrary to the Regional Director's characterization, it does not appear that the Superintendent understood that she had discretion in her decision making.

Although not entirely clear, the Regional Director also appears to have accepted the Superintendent's presumption that the Tribe's § 2204(a) submission *required* BIA to summarily deny the partition application. *See* RD Decision at 10 ("Once the [Tribe] passed Resolution No. 56(09), [BIA] had a responsibility to halt the application for partition.") and 11 ("Based on the AR, and the rationale for the Agency's decision . . . we believe that the [] Superintendent's decision is correct."). To the extent that was the Regional Director's understanding, we conclude otherwise. Nothing in the regulations or case law mandates that a partition request be summarily denied upon receipt of a competing § 2204(a) request. Once the Tribe submitted its resolution to initiate a § 2204(a) purchase, even though it had the requisite consent and Appellant could not invoke § 2204(b)(1), the Tribe still had to be prepared to pay fair market value and the transaction still had to be approved by BIA. At a minimum, BIA still had the discretion to consider both matters simultaneously, and was not required to deny the partition application

outright.⁹ Thus, the Tribe's initiation of a § 2204(a) purchase was not an adequate basis for summarily denying Appellant's partition application.

Because the Regional Director's decision was not supported by the record, and because the § 2204(a) request was not a sufficient reason to summarily deny the partition application, we must vacate the Regional Director's decision and remand the matter to her for further consideration.

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 July 8, 2010, decision and remands the matter for further consideration.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Debora G. Luther
Administrative Judge

⁹ Because BIA summarily denied Appellant's partition application based upon the Tribe's resolution to initiate a tribal purchase, we need not address whether or to what extent BIA has discretion to disapprove a § 2204(a) purchase when all of the § 2204(a) & (b) requirements are otherwise fulfilled, or the precise relationship between § 483 and § 2204 under the facts of this case.