



INTERIOR BOARD OF INDIAN APPEALS

Martin F. Walker v. Great Plains Regional Director, Bureau of Indian Affairs

57 IBIA 167 (06/28/2013)



United States Department of the Interior

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

MARTIN F. WALKER,)	Order Vacating Decisions and
Appellant,)	Remanding
)	
v.)	
)	
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
APPEALS,)	
Appellee.)	
_____)	Docket Nos. IBIA 11-106
)	11-149
MARTIN F. WALKER,)	
Appellant,)	
)	
v.)	
)	
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	June 28, 2013

Appellant Martin F. Walker appeals to the Board of Indian Appeals (Board) from two related decisions. The first appeal, Docket No. IBIA 11-106, is from a March 9, 2011, decision (Partition Decision) by the Great Plains Regional Director, Bureau of Indian Affairs (BIA), to partition Allotment 2089 on the Standing Rock Reservation in which Appellant owns an undivided interest and which was part of Range Unit 70 (RU70).¹ The second appeal, Docket No. IBIA 11-149, is from a July 18, 2011, decision (Removal Decision) by the Acting Great Plains Regional Director, BIA, that affirmed an action by the Standing Rock Agency (Agency) to remove Allotment 2089 from RU70 prior to issuing a

¹ Appellant has been the permittee for RU70 since in or about 1993.

grazing permit for RU70 for the 2010-2015 grazing season. We vacate both decisions and remand them to the Regional Director.²

Upon receiving notice of the pending partition petition, Appellant submitted objections to the Regional Director. Although the Regional Director acknowledged those objections and said that he would consider them, he never addressed them in his Partition Decision, and nothing in the record indicates that the objections were given any consideration. We therefore vacate and remand the Partition Decision so that the Regional Director may consider Appellant's objections, and issue a new decision that addresses his concerns.

In addition, the Agency removed Allotment 2089 from RU70 without notifying the owners of the Allotment, and without ever issuing a written decision. The effect of removing the Allotment from the range unit was to deny the owners of the Allotment the rental income they would have received from the permittee of RU70, and BIA did not independently put the Allotment up for bid or lease to take effect upon the expiration of the existing grazing permit for RU70. The Regional Director denied Appellant's appeal of the Agency action without offering any explanation for the removal action or for BIA's failure to notify the landowners of the removal action. BIA's action effectively deprived the landowners of income, i.e., the rental income that ordinarily flowed from the inclusion of the Allotment in RU70. We therefore vacate the Removal Decision and remand the matter to the Regional Director for further consideration consistent with this order.

Background

Allotment 2089 consists of 320 acres of grazing land on the Standing Rock Sioux Reservation in North Dakota. When BIA received the partition application at issue here from Kenneth Gullickson (Gullickson), there were 14 fractional owners of undivided trust interests in Allotment 2089, plus 1 non-Indian life estate holder. *See* Title Status Report (TSR) for Allotment 2089, July 28, 2009 (11-106 AR Tab 14 at 237-41³). According to the TSR, Gullickson held a 1/3 undivided interest in the allotment, Appellant held a 1/6 undivided interest, and the remaining owners, including the Standing Rock Sioux Tribe (Tribe), held the remaining interests in small, fractionated shares. *Id.*

² Because both decisions were issued under the authority of the Regional Director, we will refer to both deciding officials as "Regional Director."

³ The administrative record for Docket No. IBIA 11-106 was provided as a PDF file on a CD-ROM. Notations of page numbers in citations to the record correspond to the pages of the PDF file.

Allotment 2089 has been a part of RU70 since approximately 1993 and, at all times since then, Appellant has held a grazing permit for RU70 pursuant to the Tribe's allocation of that range unit to him. Appellant Affidavit (Aff.), Jan. 2, 2012, ¶ 3 (Opening Brief (Br.), Attach.); 2010-2015 Grazing Permit & 2004-2009 Grazing Permit (11-149 AR Tabs 10, 11). Prior to becoming part of RU70, Allotment 2089 was part of RU130, for which Appellant's mother held the grazing permit for approximately 40 years. Appellant Aff. ¶ 4; *Gullickson v. Aberdeen Area Director*, 26 IBIA 62, 63-64 (1994). To assist his ranching operations, Appellant installed range improvements on Allotment 2089, including fencing, an electric water pump, and corrals. *See, e.g.*, Removable Range Improvements Records Form (11-149 AR Tab 10).

There is a long history of disputes between Gullickson and Appellant over the use of Allotment 2089. *See, e.g.*, Declaration (Decl.) of Robert Demery, Oct. 18, 2011, ¶ 8 (Response to Order for Clarification, Oct. 18, 2011, Attach.); Appellant Aff. ¶¶ 24-26 & Exs. 2A-2O. Appellant alleges that Gullickson repeatedly grazed cattle on Allotment 2089 without a permit and removed and erected fencing that interfered with and prevented Appellant from using the Allotment as part of his range unit. Opening Br. at 5. Evidence in the record and submitted with Appellant's opening brief supports these claims and shows that Gullickson apparently repeatedly ignored BIA-issued notices of trespass. *See, e.g.*, Appellant Aff., Exs. 2A-2O.

Gullickson apparently sought exclusive use of one third of Allotment 2089 as soon as he gained his interest in it in 1992, and he applied for partition soon thereafter. *See Gullickson*, 26 IBIA at 62, 65. On June 18, 2007, BIA's Standing Rock Agency Superintendent (Superintendent) approved a partition petition from Gullickson, and Appellant appealed that decision. Appellant Aff., Exs. 2H, 2I. In a letter dated July 25, 2007, the Superintendent rescinded the June 2007 decision and issued a new decision approving the partition. *Id.*, Ex. 2J. Appellant again appealed, and the Regional Director vacated the July 2007 decision on April 2, 2009. *Id.*, Exs. 2K, 2O.

Gullickson then submitted another partition petition. 2009 Partition Petition, May 27, 2009 (11-106 AR Tab 5 at 91). In his petition, Gullickson requested a full interest in the northern third of the Allotment (Northern Portion), which would leave the remaining co-owners with undivided interests the southern two-thirds (Southern Portion) of the Allotment. *See, e.g.*, Plat Map (11-106 AR Tab 6 at 103). Appraisals of Allotment as a whole and of the Northern and Southern portions of the Allotment were obtained in October 2009 from a private appraisal firm. Appraisals, Oct. 27, 2009 (11-106 AR Tab 14). The Northern Portion was appraised at \$365 per acre for a total appraised value of \$38,800; the Southern Portion was appraised at \$410 per acre for a total appraised value of \$87,600. The appraisals assumed that both portions were part of a range unit. The appraisal for the Southern Portion did not address any infestation of leafy spurge or weeds,

it identified Appellant as the only permittee, and it asserted that a “road curves up into the tract for approximately one-half mile” providing good access to the land. Appraisal for Southern Portion at 22 (11-106 AR Tab 14 at 202). The appraisal for the Southern Portion did not otherwise comment on the road. The appraisal for the Northern Portion commented that access to the property was available through the Southern Portion. Appraisal of Northern Portion at 22 (11-106 AR Tab 14 at 272)

On August 26, 2010, BIA addressed a letter to Gullickson that acknowledged receipt of his latest partition petition for Allotment 2089. *See* Notice (11-106 AR Tab 11 at 127). A copy of the Notice went to Gullickson’s co-owners, including Appellant. The notice, which did not address the landowners until the second page, informed them of Gullickson’s request to partition the Allotment, provided the legal descriptions for the two proposed tracts (i.e., for Gullickson’s portion and the portion remaining in Allotment 2089), and set forth the increased interests that the remaining owners would then have in the remainder of Allotment 2089, i.e., the Southern Portion.⁴ Enclosed with the notice was a tract map that showed the “parent” tract as well as the proposed partition of the “parent” tract. The notice advised the landowners that if they did not object to the partition they should sign and return to BIA several enclosed forms.⁵ If a landowner did object to the partition, BIA asked that he or she notify BIA in writing within 30 days, and their comments would “be reviewed and considered.” *Id.* at 2. The notice did not inform the landowners that appraisals had been completed nor did the notice inform the landowners of the respective appraised values of the two parcels. The Tribe, which owns a small (1/24) interest in the Allotment, and one additional owner (with an approximate 1/168 interest) consented to the partition; one person, Appellant, objected to the partition. The remaining owners did not respond.⁶

⁴ It appears that BIA erred in typing the ownership interests: The denominator should have been 1536, not 1539. The erroneous new ownership shares were corrected in the Partition Decision, where Appellant’s interest was shown to be ¼ or 25%, which would be his correct ownership percentage if the partition is approved.

⁵ Neither the tract map nor the forms appear in the record *with the notice*. *See* 11-106 AR Tab 11. BIA is reminded that, in compiling the administrative record for an appeal, it should take care to ensure that the record includes enclosures *and* the enclosures should be kept together in the record with the primary document, i.e., the document with which they were enclosed.

⁶ According to the record, the notices sent to at least two owners—Rochelle Stretches and Justin Stretches—were returned to BIA by the Post Office as undeliverable or unclaimed. The record does not reflect whether further efforts were made to locate these owners and re-send notice of the proposed partition.

Appellant argued that the partition was not equitable because parts of the Southern Portion are infested with leafy spurge, lost to an existing road, affected by “another lease across the road,”⁷ and suitable in some parts for cropland and in other parts for grazing. Appellant also argued that he was not served copies of the appraisals, and that the partition would affect his ranching operation because of the range improvements he had made to Allotment 2089. Letter from Appellant to Regional Director, Oct. 5, 2010 (Objection Letter) (11-106 AR Tab 9 at 114). The record does not reflect any attempt by BIA to consult with Appellant concerning his objections to the partition proposal.

On March 9, 2011, the Regional Director issued the Partition Decision, approving the proposed partition of Allotment 2089. Under the Partition Decision, Gullickson would receive a 100% interest in the Northern Portion of the Allotment (106.66 acres) and the remaining co-owners, including Appellant, would retain undivided interests in the Southern Portion (213.34 acres). Partition Decision at 1-2.

The Partition Decision was supported by a signed but undated “Results Summary and Findings Report” (Results and Findings) in which the Regional Director concurred with the recommendation of the Regional Realty Officer to approve the partition. Results and Findings (11-106 AR Tab 5 at 85). The Results and Findings determined that the proposed partition was reasonable, feasible, equitable, and beneficial to all interested parties. *Id.* at 87. It found that the partition would permit Gullickson to “utilize his acreage to its fullest extent” and would “alleviate the squabbles and bickering” between Gullickson and Appellant. *Id.* It also noted that Gullickson had attempted to have the land partitioned “many times,” and had invested substantial time, energy, and money in effecting a partition. *Id.* at 87-88. It found that the Southern Portion was appraised at \$45 more per acre than the Northern Portion (\$410/acre compared to \$365/acre), and that Gullickson had acknowledged and accepted that difference. *Id.* at 88; *see also* Statement of Understanding, Nov. 30, 2010 (11-106 AR Tab 5 at 90).

The Results and Findings also recited Appellant’s objections to the partition, but did not address or respond to them. Results and Findings at 88. Finally, it noted that Allotment 2089 had been the subject of four appeals to the Board, and stated that each had involved Appellant and Gullickson.⁸ *Id.* at 89. It did not otherwise make any mention of

⁷ Nothing in Appellant’s Objection Letter, the record, or the parties’ briefs explains this reference to “another lease.”

⁸ This finding is factually inaccurate. Gullickson has brought four appeals to the Board, *none* of which involve Appellant and only one of which concerned Allotment 2089. The first appeal related to the denial of a loan to Gullickson. *Gullickson v. Acting Aberdeen Area Director*, 21 IBIA 170 (1992). The second appeal objected to Robert White Twin’s sale of
(continued...)

any disputes between Gullickson and Appellant. The Results and Findings concluded that approval of the partition would satisfy “two separate issues”: It would aid in the consolidation of fractionated land interests and it would “eliminate the countless complaints and arguments between” Gullickson and Appellant. *Id.*

Meanwhile, on September 7, 2010, Agency employees had removed Allotment 2089 from RU70 “because [according to the Agency’s Land Operations Officer] a decision on whether to partition Allotment 2089 was pending,” and because the grazing permit for RU70 was set to expire on October 31. Demery Decl. ¶¶ 5, 7. In addition, a 20-year history of disputes concerning the Allotment “factored into the decision” to remove it from RU70. *Id.* ¶ 8. The Allotment apparently was removed from RU70’s entry in BIA’s Trust Asset and Accounting Management System (TAAMS) on September 7. *See* Intra-Bureau Email, June 3, 2011 (11-149 AR Tab 3). The Regional Director explained that the Agency’s removal action was “made on September 7, 2010 and was to be effect[ive] at the expiration of the grazing permit on October 31, 2010.” Answer Br. at 3-4. None of the owners of Allotment 2089 were notified that BIA had removed, or was considering removing, the Allotment from RU70, and thus exclude it from a new grazing permit for RU70. *See* Intra-Bureau Emails and Unsent Draft Notice Letter (11-149 AR Tab 3).⁹

The Tribe allocated¹⁰ RU70 to Appellant, as it apparently had done in the past, and BIA thereby issued Appellant a grazing permit for the 2010-2015 season for RU70. The

(...continued)

an undivided interest in Allotment 3723 to the Tribe. *Gullickson v. Aberdeen Area Director*, 24 IBIA 247 (1993). The third objected to BIA’s continued inclusion of Allotment 2089 in (former) RU130, when Appellant’s mother held the permit. *Gullickson*, 26 IBIA at 62. And the fourth appeal concerned utility rights-of-way across Allotments 2076, 3108, and 3794. *Gullickson v. Great Plains Regional Director*, 38 IBIA 90 (2002).

⁹ Nothing in the record informs us of the amount of income generated for the landowners through the permitting of the Allotment as part of RU70.

¹⁰ An “allocation” is “the apportionment [by tribes] of grazing privileges without competition to tribal members.” 25 C.F.R. § 166.4 (definition of “allocation”). As we explained in *Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 144 (2007) (footnote omitted),

Federal law specifically delegates to the tribes the right to determine grazing allocations on tribally-owned or controlled land and on individually-owned Indian land without oversight by BIA, *compare* 25 C.F.R. §§ 166.217-.218 (2005) *with* 25 C.F.R. § 166.10 (2000), while BIA’s role is “essentially a ministerial one” of issuing the grazing permits.

land schedule included with Appellant's new grazing permit listed Allotment 2089 as one of the parcels included in RU70.¹¹ *See* 11-149 AR Tab 10; Demery Decl. ¶ 9. Also included was a form entitled "Removable Range Improvement Records." This form identified the improvements made by Appellant *on* RU70, which were all located on Allotment 2089. *See* 11-149 AR Tab 10. BIA approved the form without any suggestion that Allotment 2089 was not part of Appellant's permit. The Agency's Land Operations Officer, Robert Demery, averred, however, that the fee invoice, contract status report, and grazing permit each omitted the acreage and rental amount for Allotment 2089. Demery Decl. ¶ 12 & Attachs.

After noticing that the invoice amount was less than the previous year's rental for RU70, Appellant inquired with BIA, and he then learned that Allotment 2089 had been removed from RU70. Opening Br. at 6. He immediately appealed the Agency's removal "decision" on January 5, 2011, noting, among other things, his ownership interest in the Allotment.¹² Notice of Appeal to Regional Director (11-149 AR Tab 9). Appellant also signed the 2010-2015 grazing permit, the Superintendent approved it, and Appellant paid the fees. *See* 2010-2015 Permit (11-149 AR Tab 10). The Regional Director issued the Removal Decision on July 18, 2011, denying Appellant's appeal. He found that Appellant's arguments were unsupported and erroneous, but the Regional Director did not explain why Allotment 2089 had been removed from RU70.

Appellant appealed both the Removal Decision and the Partition Decision to the Board and, on Appellant's motion, the Board consolidated the appeals. Order Consolidating Appeals, Aug. 9, 2011. The Board requested clarification from the Regional Director on the process by which Allotment 2089 purportedly had been removed from RU70, and the Regional Director responded by submitting a declaration from the Agency's Land Operations Officer and supporting documents. Order for Clarification, Sept. 19, 2011; Demery Decl.

¹¹ Appellant claims that the land schedule was not included with his permit package. *See* Appellant Aff. ¶ 11; Notice of Appeal at 2. But the record includes a copy of the land schedule with the 2010-2015 permit documents. *See* 11-149 AR Tab 10. None of these documents states that Allotment 2089 was removed from RU70.

¹² No Agency-level written decision was ever issued pursuant to 25 C.F.R. § 2.7(a) to inform interested parties that Allotment 2089 had been removed from RU70 and, therefore, would not be included in a lease for RU70. The failure to issue a written decision extends the time for an appellant to file an appeal, but would not affect the decision's validity. *See* 25 C.F.R. § 2.7(b).

Appellant filed opening and reply briefs. The Regional Director filed an answer brief. The Board granted a motion from the Regional Director for leave to issue a 1-year lease for the Southern Portion of the Allotment, to be issued no later than May 31, 2012. Order Granting Regional Director's Motion, Feb. 27, 2012.

Discussion

Appellant objects to the Removal and Partition Decisions and, in doing so, appeals in both his capacity as an owner of Allotment 2089 and as the longstanding permittee of RU70, which has, until the 2010-2015 permit season, always included Allotment 2089. We need not determine what rights, if any, Appellant has for objecting to either decision in his capacity as a permittee because we conclude that, as an owner of Allotment 2089, he was entitled to notice of the withdrawal of Allotment 2089 from RU70 and, as to the Partition Decision, he was entitled to a response from the Regional Director to his arguments in opposition to the partition. Therefore, we must remand these matters to the Regional Director for further consideration consistent with this order. We express no opinion on the ultimate reasons articulated by BIA for either of its decisions.

I. Partition of Allotment 2089 (Docket No. IBIA 11-106)

We vacate the Partition Decision because the Regional Director failed to address the issues raised in Appellant's Objection Letter before he approved the partition. Although we vacate and remand on these grounds, we briefly address several of Appellant's other arguments.

A. Regulatory Structure and Internal Requirements for Partitions

Partitions of allotments on the Standing Rock Sioux Reservation are authorized by 25 U.S.C. § 483,¹³ which grants the Secretary of the Interior (or BIA by delegation) discretion to approve conveyances of interests in Indian trust land. *See also* 25 C.F.R. § 152.33(b). An appellant challenging a partition decision bears the burden of proving that

¹³ Partitions of trust land under the jurisdiction of tribes that voted not to reject the terms of the Indian Reorganization Act (IRA) are authorized by 25 U.S.C. § 483. *Poler v. Midwest Regional Director*, 56 IBIA 6, 7 (2012). For land under the jurisdiction of tribes that rejected application of the IRA, partitions of allotments are authorized by 25 U.S.C. § 378. *Id.* Allotment 2089 is under the jurisdiction of the Tribe, whose members voted not to reject the IRA on October 27, 1934. *See Haas, Ten Years of Tribal Government under I.R.A.*, at 18 (1947) (<http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf>) (excerpt added to record).

the BIA official issuing the decision failed to properly exercise his discretion. *Gray v. Great Plains Regional Director*, 52 IBIA 166, 171 (2010). BIA must consider the interests of all landowners when exercising its discretion to approve a partition petition, not just those of the petitioner, but the unanimous consent of all the landowners is not required. *Laducer v. Acting Great Plains Regional Director*, 48 IBIA 294, 300 (2009).

B. Appellant's Objections

Appellant apparently was the only landowner to submit objections to the proposed partition of Allotment 2089. Appellant's Objection Letter listed several concerns: He argued that the proposal was not equitable to all of the owners because it failed to take into consideration the acreage lost in the Southern Portion to a road, the existence of "another lease across the road,"¹⁴ the apparent infestation of leafy spurge in the southeast quarter of the Allotment, and the fact that some portions of the Allotment were suitable for cropland and other portions suitable only for grazing. *See* Objection Letter. He also complained that he had never received copies of the appraisals. *Id.*¹⁵

Upon receiving the Objection Letter, BIA informed Appellant that his comments would "be considered in the decision making process." Letter from Acting Deputy Regional Director - Trust Services to Appellant, Nov. 15, 2010 (11-106 AR Tab 8). We cannot find, either from the Results and Findings or from the record, that any consideration was given to Appellant's objections.¹⁶

Even though unanimous consent from the landowners is not required to approve a partition, BIA must consider all of the landowners' interests before approving a partition. *Laducer*, 48 IBIA at 300. Mere assurance that an objector's concerns will be considered is insufficient. The decision approving the partition must address those concerns, or the record must otherwise show that the Regional Director considered the concerns prior to approving the partition. *Cf. Laducer*, 48 IBIA at 296 (Regional Director remanded partition decision to Superintendent with instructions to consider the objections of a co-

¹⁴ Appellant did not explain what "other lease" he was referring to or how it was relevant.

¹⁵ As the permittee of RU70, Appellant also argued that the partition would affect his ranching operation because he had installed range improvements on Allotment 2089. He did not explain, e.g., where on the Allotment his range improvements were located or how the partition would affect his access to the improvements.

¹⁶ Nothing in the appraisals show that the concerns raised by Appellant, e.g., infestation of leafy spurge and loss of use of the area where the road is located, were considered by the appraiser or that they were not relevant to the value of the Allotment.

owner). We therefore vacate the Partition Decision and remand the matter to the Regional Director for issuance of a new decision that demonstrates that Appellant's concerns have been considered.

C. Other Contentions

Although we vacate the Partition Decision for the reasons stated above, we briefly address additional issues presented by this appeal. Appellant raises claims related to the type of notice he received, service of documents, the contents of the appraisals, and the grounds underlying the partition. We discuss each issue in turn.

Appellant argues that the Partition Decision was in error because Gullickson did not notify Appellant of the petition and seek Appellant's approval. Opening Br. at 7. Nothing in the regulations requires that the petitioner personally contact his co-owners regarding a proposed partition, and the notice sent by BIA to Appellant was sufficient.

Appellant also argues that BIA erred in not providing him copies of the appraisals or the Statement of Understanding. *Id.* We cannot determine whether Appellant requested a copy of these documents from BIA. In any event, Appellant cites no law that requires BIA to provide copies of these documents in the absence of a request, although it would be a sound practice for BIA, at a minimum, to inform the landowners that appraisals were performed and are available for inspection.¹⁷

Next, Appellant complains that the appraisals were out of date by the time the partition was approved and that the appraisals made several incorrect statements. Opening Br. at 7-8. As to the age of the appraisals, an appraiser with the Office of the Special Trustee (OST) in 2010 explained that the 1-year expiration set forth in the appraisals is "only a rule of thumb and . . . there is no change in land values yet this year." Documentation of Meeting with Geoff Oliver, OST Appraiser, Nov. 26, 2010 (11-106 AR Tab 7 at 109). However, on remand, BIA should revisit this issue inasmuch as the appraisals are now nearly 4 years old.

The appraisals each stated that the land was part of a range unit, which Appellant argues is untrue. *See, e.g.*, Appraisal of Southern Portion at 9, 22 (11-106 AR Tab 14 at 189, 202). As a result of our decision, the Allotment is returned to RU70. However, if the landowners have informed BIA that they no longer want the land included in a range unit,

¹⁷ The Statement of Understanding appears to be relevant only to Gullickson because it simply reflects his acknowledgment that the acreage he would receive in the requested Northern Portion has a lower appraised value per acre than the Southern Portion.

BIA must determine whether this change would affect the appraised value of the land. Appellant also argues that it was not proper for the appraisal of the Northern Portion to conclude that Gullickson could access it via the Southern Portion. On remand, the Regional Director must address this issue as well before issuing a new decision.

Finally, Appellant argues that neither the history of disputes over Allotment 2089, nor Gullickson's past, failed partition petitions amount to proper grounds for approving the partition. Opening Br. at 1, 2-4, 7, 9-10. Disputes among landowners—regardless of alleged fault—are not an impermissible consideration for BIA in approving a partition. In this case, however, the Regional Director appears to have given weight to the mistaken assertion that there were four appeals to the Board involving both Gullickson and Appellant. We cannot determine to what extent this mistake of fact may have affected the exercise of BIA's discretion both with respect to whether to grant the partition application and whether to grant the application *as requested*, i.e., with the Northern and Southern Portions described in the Partition Decision. And it is not entirely clear what relevance Gullickson's past efforts at partitioning the Allotment have with respect to his current application. Again, the Regional Director should consider and address these issues before rendering a new decision.

II. Removal of Allotment 2089 from RU70 (Docket No. IBIA 11-149)

We conclude that the Regional Director erred in removing the Allotment from RU70 without, at a minimum, providing notice to the landowners prior to making a decision whether to remove the Allotment, without providing them with an opportunity to respond, and without further consulting with them as appropriate. Therefore, we vacate the Removal Decision.¹⁸

At the outset, we observe that the appeal in Docket No. IBIA 11-149 comes to the Board in an unusual procedural posture. Without giving any notice to the landowners or rendering a written decision, BIA withdrew Allotment 2089 from RU70 and did not have a lease or grazing permit in place for the Allotment following the expiration of Appellant's grazing permit on October 31, 2010. Thus, Appellant—who learned of BIA's action only because he was allocated RU70 by the Tribe for the new, 2010-2015 grazing season and discovered that the Allotment was not part of his new permit—was put in the position of appealing BIA's removal action without the benefit of a written decision that spelled out the reason(s) for the removal. And while the Regional Director responded to the arguments raised by Appellant against the withdrawal of Allotment 2089, he failed to respond to

¹⁸ Given our disposition of this appeal, we need not reach Appellant's remaining arguments concerning the Removal Decision.

Appellant's assertion that he "ha[d] received no explanation why [A]llotment 2089 [was] removed [from RU70]." *See* Notice of Appeal to Regional Director (11-106 AR Tab 5). That is, the Regional Director neither responded to Appellant's claim that he had not been informed of the withdrawal nor did the Regional Director provide an explanation for the withdrawal or indicate any plans for leasing the Allotment for the benefit of the owners. In fact, once the Board received both the Regional Director's Removal Decision and the administrative record, the Board was compelled to seek clarification from the Regional Director concerning the removal of the Allotment, given the absence of a written decision memorializing the removal of the Allotment from RU70 and the absence of any articulated reason(s) for the decision. In response, the Regional Director proffered the declaration of his Regional Land Operations Officer to explain the decision to remove the Allotment.

BIA's regulations provide that the Indian landowners are "primarily responsible for granting permits on their Indian land with the assistance and approval of . . . BIA, except where otherwise provided by law." 25 C.F.R. § 166.216. In practice, at least on certain reservations, BIA has assumed much of the responsibility for managing individually owned Indian lands that are suitable for use as rangelands. Doing so puts individually owned trust lands to use and produces income for the owners where, through fractionated ownership or for other reasons, the lands might otherwise be unproductive. As explained in earlier regulations, "[t]he conservation, development, and effective utilization of the range resource requires consolidation of small individual and tribal ownerships and the organization of the total range area into management units." 25 C.F.R. § 166.5 (2000).

"Range units" are an example of BIA's consolidation of individual and tribal trust lands into "management units." On behalf of the owners of the individually owned lands in the range units, BIA then grants grazing permits for range units to ranchers. When BIA "creates" a range unit, it has an express obligation to consult with "the Indian landowners." 25 C.F.R. § 166.302. And, just as BIA has a duty to consult with the landowners when it *creates* a range unit, it necessarily has some duty, at a minimum, to give notice and provide an opportunity for input when it decides to exclude a tract that it previously managed as part of a range unit, at least if its action could cause some injury to the landowners, e.g., by depriving the owners of lease income or the opportunity to lease their land. Without notice to the landowners, they have no way of knowing that the land may suddenly be removed from productivity and any income ordinarily realized may be lost.

Here, it appears that Allotment 2089 had been included in one range unit or another for over 50 years and presumably has been earning income consistently during those years for the landowners. Given this history, it is understandable that the owners, such as Appellant, have relied on BIA to manage the Allotment for the production of income. And, as both an owner and the permittee for the Allotment, Appellant realized either his commensurate share of the grazing rental rate paid by him to use Allotment 2089 or

realized a reduction in the amount of his rental rate commensurate with his ownership interest in the Allotment. Thus, we conclude that, at a minimum, BIA owed a duty to the landowners, including Appellant in this case, to inform them that BIA intended to remove Allotment 2089 from RU70, explain the reason(s) for its removal, and provide them with an opportunity to respond.¹⁹

Appellant argues that BIA was required to follow 25 C.F.R. §§ 166.227-.228 to effect the removal of the Allotment from RU70. Specifically, under § 166.227(a)(5), trust land may be withdrawn from an *existing permit* based on BIA's "determin[ation] that removal . . . is appropriate [and] with the written approval of the owners of the majority interest of the Indian land." Appellant maintains, and BIA concedes, that Allotment 2089 was withdrawn from RU70 on September 7, 2010, during the prior permit term.²⁰ See Opening Br. at 6; Demery Decl. ¶ 5 ("Allotment 2089 was withdrawn from Range Unit 70 on September 7, 2010"). Therefore, according to Appellant, BIA was required to obtain the written consent of a majority interest in the Allotment in accordance with 25 C.F.R. § 166.227(a)(5). The difficulty with Appellant's argument is that while the decision may have been made during the prior permit period and BIA's records changed accordingly, the change had no consequence for the existing permit, either for the landowners or for Appellant as the permittee because the decision was not enforced during the term of his permit. Therefore, even though the withdrawal may have been reflected in BIA's records as

¹⁹ BIA argues that because the previous grazing permit for RU70 was expiring, the composition of RU70 for the new permit properly is characterized as "creating" a range unit without the Allotment, and thus did not trigger any duty toward the Allotment's owners. That distinction may assist BIA in avoiding the *express* consultation duty in § 166.302 with respect to Allotment 2089 *and* the notice and consent requirements of §§ 166.227-.228, but it misses the point. If BIA has managed Indian lands, and then decides to return primary responsibility to the landowners, or create a situation that possibly could put the landowners at a distinct disadvantage, the landowners are entitled to notice and an opportunity to be heard.

²⁰ Although it is not a matter of dispute between the parties, the record nevertheless does not contain a document that confirms that Appellant held grazing privileges for the 2009-2010 grazing season. Instead, the table of contents for the administrative record for the Removal Decision asserts that "[t]he [2004-2009 grazing] permit was later modified to extend the term for 1 year." Any such modification or extension should be in writing and a copy should have been included in the administrative record.

of September 7, 2010, during the prior permit term, the land was not removed from that permit, which expired on October 31, 2010.²¹

We conclude that if BIA is authorized to remove land from an existing permit where “appropriate,” *see* § 166.227(a)(5), it stands to reason that it may withdraw land from a range unit upon the expiration of a grazing permit and prior to issuing a new grazing permit. But what is also clear is that BIA may *not* do so without giving notice to the landowners who will be affected by the withdrawal and providing them with an opportunity to be heard. And if an objection is received, BIA must address it and, as appropriate, consult with the objecting landowner. Therefore, we vacate the Removal Decision and remand this matter.

The effect of our decision is to return Allotment 2089 in its entirety to RU70. Because the Tribe allocated RU70 to a tribal member (Appellant), the return of the Allotment to the range unit presumptively triggers the ministerial obligation in BIA to offer to modify the permit for RU70 to include Allotment 2089. However—and given the unusual posture of this case created by BIA when it placed the Removal Decision into immediate effect and failed to include the Allotment in the permit for RU70—the Allotment’s owners may well have proposed an alternate lease or arrangement for their Allotment other than to include it in the range unit and in the permit for the range unit. If so, BIA must give due consideration to any such proposal, if the requisite consent is present. *See, e.g.*, 25 U.S.C. § 2218(b).²²

²¹ Appellant did not argue that Allotment 2089 was included in his 2010-2015 grazing permit, albeit inadvertently, thus requiring BIA to comply with 25 C.F.R. §§ 166.227-.228. BIA asserts that it included the plat map and land schedule for RU70—both of which show Allotment 2089 as part of RU70—with Appellant’s grazing permit for the 2010-2015 term, *see* Demery Decl. ¶ 9, and, while Appellant avers that the land schedule was not included with his permit, he does not aver that the plat map was not included and it appears that he was not otherwise aware that Allotment 2089 had been withdrawn from RU70 until sometime after December 11, 2010 (after the new permit documents were sent to him) when he inquired about the decrease in his grazing permit fee. The Superintendent’s approval of the Removable Range Improvements form, which arguably was incorporated by reference in the new permit, expressly identified *all* improvements for RU70 as located on Allotment 2089. Nevertheless, we decline to consider whether Allotment 2089 could have been determined to have been included in the new permit because Appellant did not make this argument and thus waived it.

²² Pursuant to § 2218, where there are between 11 and 19 owners of an allotment of trust land, ownership of 60% (or more) of the land must be in favor of the proposed lease or
(continued...)

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 vacates both the March 9, 2011, Partition Decision and the July 18, 2011, Removal Decision and remands both matters to the Regional Director for further consideration consistent with our decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

(...continued)
arrangement; if there are 20 or more owners, BIA must determine whether owners of a majority of the interests in the land favor the lease or arrangement proffered by the owners.