



## INTERIOR BOARD OF INDIAN APPEALS

Richard James Aitson v. Southern Plains Regional Director, Bureau of Indian Affairs

59 IBIA 240 (11/17/2014)



# 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

RICHARD JAMES AITSON,	)	Order Vacating Decision and
Appellant,	)	Remanding
	)	
v.	)	
	)	Docket No. IBIA 12-062
SOUTHERN PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	November 17, 2014

Richard James Aitson (Appellant) appealed to the Board of Indian Appeals (Board) from a December 2, 2011, decision (Decision) of the Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director upheld a decision by BIA’s Anadarko Agency Acting Superintendent (Superintendent) to approve the partition of A-HO (S1762-D) Kiowa Allotment (Allotment), as requested by Mary Mechelle Aitson-Roessler (Aitson-Roessler).<sup>1</sup> Appellant, a co-owner of the Allotment and a cousin of Aitson-Roessler, objects because the partition would grant Aitson-Roessler full ownership of a parcel that contains a house and arbor that were built by the parties’ great-grandfather on their great-grandmother’s allotment. Appellant contends that the property on which the house and arbor are located cannot be equitably divided and is not susceptible to partition, that BIA failed to consider his proposal under which both parties<sup>2</sup> would retain their ownership of the house and arbor, and that at the very least the matter must be remanded for additional consideration because BIA’s findings and analysis are deficient.

We do not agree with Appellant that the presence of the house and arbor, even if they are of personal, historical, and cultural significance to both parties, necessarily means that the land cannot be partitioned, or that such a partition necessarily would be inequitable or not in the best interest of the landowners. But we do agree with Appellant that BIA failed to articulate its reasoning for concluding that the partition would be in the best

---

<sup>1</sup> The Superintendent approved Aitson-Roessler’s partition petition on October 29, 2009, and then issued a formal decision, with appeal rights, on November 4, 2009. *See* Administrative Record (AR) Tabs 27 and 28.

<sup>2</sup> For purposes of this decision, we use the term “parties” to refer to Appellant and Aitson-Roessler.

interest of the landowners, and it is unclear what, if any, meaningful consideration BIA gave to Appellant's objection and proposal. Therefore, although we review BIA partition decisions under the deferential standard afforded when BIA exercises its discretion, we nevertheless conclude that the Decision must be vacated and the matter remanded for further consideration.

### Background

The Allotment consists of 40 acres in Kiowa County, Oklahoma, and was the allotment of the parties' great-grandmother. Letter from Regional Director to Aitson-Roessler, June 12, 2006, Enclosure (Title Status Report) (AR Tab 5). Appellant owns an undivided 1/9 interest in the Allotment, and Aitson-Roessler owns a collective 8/9 present and future interest.<sup>3</sup> *Id.* The house and arbor are located on the southwest corner of the Allotment, and were built around 1913 by the parties' great-grandparents. *See* Statement of Reasons, Jan. 7, 2010, at 3 (AR Tab 34). The parties agree that the house and arbor served as a gathering place for the family, and for occasions hosted by the family, including religious meetings. *Id.*;<sup>4</sup> Petition for Partition (Petition), June 23, 2006, at 1 (unnumbered) (AR Tab 6). Aitson-Roessler originally owned a minority interest in the Allotment, but over time purchased or through gifts obtained additional interests from other family members. Petition at 1 (unnumbered). Appellant declined to sell his interest to Aitson-Roessler.

The parties have been in conflict for many years over the control and maintenance of the house and arbor. *See, e.g.*, Petition for Injunctive Relief, Mar. 10, 2006 (AR Tab 1); Petition for Ouster and Contribution, May 24, 2006 (AR Tab 4). It is undisputed that the house and arbor have fallen into a serious state of disrepair. Both parties contend that they are interested in restoring the house and arbor. *See* Petition at 1 (unnumbered); Request for Temporary Restraining Order, Mar. 1, 2006, at 5 (AR Tab 1). Both contend that the house and arbor have personal and historical significance to them. Petition at 1 (unnumbered); Letter from Brown to Tippeconnie, Feb. 19, 2007, at 1-2 (Objections) (AR Tab 13). Appellant also contends that the structures have cultural and historical significance to the Kiowa Tribe. Objections at 2.

---

<sup>3</sup> Aitson-Roessler owns a 13/18 present possessory interest and a 3/18 remainder interest. The remainder interest is subject to a 3/18 life estate interest held by Aitson-Roessler's mother, Mary A. Rector Aitson. *See* AR Tab 5.

<sup>4</sup> Appellant refers to the arbor as a "prayer arbor," but the evidence indicates that it was used for a broad range of family-related purposes (e.g., cooking and eating in the heat of summer, visiting, etc.), in addition to family-hosted church meetings.

In 2006, after Appellant had filed several suits against Aitson-Roessler seeking to gain control of the house and arbor, Aitson-Roessler filed a petition with BIA to partition the Allotment. Petition at 1-2 (unnumbered).<sup>5</sup> In the petition, Aitson-Roessler described the significance of the house and arbor to her and her mother, and contended that she and her mother had been maintaining the grounds and performing other upkeep since 1991, without any assistance from Appellant. *Id.*<sup>6</sup> On October 17, 2006, Aitson-Roessler submitted a partition plan for the Allotment, under which it would be divided into two tracts. Tract I consists of 35 acres, including the land on which the house and arbor are located, and Tract II consists of the remaining 5 acres. Under the proposed plan, Tract I would be conveyed to Aitson-Roessler, and Tract II would be conveyed to Appellant. Partition Plan, Oct. 17, 2006, at 2-3 (AR Tab 48). A Land Resource Committee composed of BIA agency staff reviewed and recommended approval of Aitson-Roessler's proposed partition. Land Resource Committee Recommendation, Jan. 19, 2007 (AR Tab 9). No narrative or other reasoning is included in the Committee's recommendation. *See id.*

Appellant objected to the recommendation as having been made without his knowledge, and filed formal written objections. Recorded Telephone Message, Feb. 16, 2007 (AR Tab 12); Objections at 1. Appellant argued that the house and arbor had personal, cultural and historical significance, and that partitioning the property as proposed by Aitson-Roessler would deny him access to them, making the partition impermissible and inequitable. Objections at 1-2. Appellant argued that the only equitable form of partition would be to exclude granting either party full ownership and control of the house and arbor. *Id.* at 2-3.

The Superintendent sought advice from the Solicitor's Office, which advised her to provide a copy of Appellant's objections to Aitson-Roessler for a response and to exercise the Superintendent's discretion "based upon the best interests of the Indians." Letter from Field Solicitor to Superintendent, Feb. 27, 2007, at 2 (AR Tab 14); *see* Decision at 2 (AR Tab 49); *see also* Letter from Superintendent to Aitson-Roessler, Mar. 14, 2007, at 1

---

<sup>5</sup> The suits were filed in the Court of Indian Offenses. *See* 25 C.F.R. Part 11. The first suit was dismissed, and the second suit apparently was stayed, pending resolution of Aitson-Roessler's partition request.

<sup>6</sup> Prior to 1991, the house apparently was occupied by Patricia Aitson, Aitson-Roessler's cousin and Appellant's half-sister, who moved into the house around 1984 and took care of their grandparents until both died in 1987, and by Aitson-Roessler's brother and sister-in-law. Letter from Aitson-Roessler to Board, Apr. 29, 2012, at 1-2 (unnumbered). Both Patricia and Aitson-Roessler's brother at one time owned an interest in the Allotment, but conveyed their interests to Aitson-Roessler. Petition at 1 (unnumbered).

(transmitting Appellant's objections for response) (AR Tab 15). Aitson-Roessler responded by recounting the history of the conflict between herself and Appellant, and concluded by stating that she "cannot rehabilitate the property until [she is] the sole owner." Letter from Aitson-Roessler to Superintendent at 4 (undated) (unnumbered) (Tab 20). Aitson-Roessler renewed her request that BIA partition the Allotment as she had proposed. *Id.*

The Superintendent convened a meeting to discuss the proposed partition. *See* Notice of Meeting on Petition-to-Partition Applications, Apr. 1, 2008 (AR Tab 48). It is unclear who attended. Notes from the meeting do not mention the parties, and are cursory in nature.<sup>7</sup> An appraisal was conducted and approved by the Office of the Special Trustee. Appraisal Review Report (Appraisal), June 8, 2009, at 2 (AR Tab 23). The appraisal valued Tract I at \$39,800, including the improvements, and Tract II at \$12,500. Appraisal at 4. The Superintendent also contacted the Kiowa Cultural Preservation Authority (Authority), of the Kiowa Tribe, "requesting assistance . . . with written confirmation if the [Allotment] has historical and cultural significance to the Kiowa Indian Tribe of Oklahoma." Letter from Superintendent to Eskew, Sept. 17, 2009 (AR Tab 25). In response, the Authority stated that "the Kiowa Tribe of Oklahoma does not have the above referenced property listed as having historical or cultural significance, at this time." Letter from Authority to Superintendent, Oct. 1, 2009 (AR Tab 26). The Superintendent also contacted the Southern Plains Regional Office Regional Archeologist, who noted that there are no records of the property in the State Historic Preservation Office or the National Register of Historic Places. Email from Worthington to Anderson, Oct. 15, 2009 (AR Tab 54).

On November 4, 2009, the Superintendent issued her decision notifying the parties that she was approving Aitson-Roessler's petition. The Superintendent's decision is addressed to Appellant, recites that Aitson-Roessler and her mother had petitioned for the Allotment to be partitioned, and states that "[w]here partitionment is advisable, it has been determined that the following division is equal to the interest held by you." Superintendent's Decision, Nov. 4, 2009, at 1 (AR Tab 28). The Superintendent recited the legal descriptions of Tracts I and II and their respective appraised values. *Id.* Without mentioning the house and arbor, or Appellant's objections, the Superintendent stated that she was approving the partition "based upon equity as shown [in the appraised values]." *Id.* at 2. An earlier intra-office memorandum transmitting the partition application to the Superintendent for approval apparently enclosed various documents generated during the

---

<sup>7</sup> It appears that the notice may have been posted and/or sent to the landowners, but the record is not clear to whom or how it was distributed.

process,<sup>8</sup> but did not include any separate analysis of the partition or Appellant's objections, stating only: "In light of the long-range best interest of the Indian owners, the circumstances appear to be clearly justified to warrant approval." Memorandum from Realty Officer to Superintendent, Oct. 20, 2009 (AR Tab 27).

Appellant appealed the Superintendent's decision to the Regional Director, arguing, among other things, that the decision was arbitrary and capricious because it failed to address his objections or his alternative proposal for partition. Statement of Reasons, Jan. 7, 2010, at 3-4 (AR Tab 34).<sup>9</sup> Appellant contended that he had identified several factors that weighed against partitioning the land as requested, and that the loss of access to the house and arbor would cause immeasurable damage to him. *Id.* at 1-2.

On December 2, 2011, the Regional Director upheld the Superintendent's decision to approve the partition. Decision of the Regional Director, Dec. 2, 2011 (AR Tab 49). The Regional Director acknowledged the personal significance that the house and arbor have to the parties, but, responding to the contention that the structures hold "historical and cultural value," the Regional Director found that "no documentation could be secured to support this claim." *Id.* at 3.

In response to Appellant's suggestion that the Superintendent had disregarded his objections, the Regional Director described the various actions taken by the Superintendent, including soliciting a response to those objections from Aitson-Roessler, holding a pre-partition meeting, and requesting information on the cultural and historical value of the property. *Id.* at 4. The Regional Director noted that Appellant had presented an alternative proposal to exclude the house and arbor from the partition so that the parties could share access to the house and arbor, but also noted that Aitson-Roessler had "refused [Appellant's] proposal." *Id.* at 3.

The Regional Director stated that "[w]here partitioning is advisable, land is divided on the basis of value, not acreage, thereby [e]nsuring an equitable division even though parts of the lands are of different value and character." *Id.* at 3. "In this case as in other

---

<sup>8</sup> The memorandum identifies 23 "supporting" documents as "attached," but none of the documents is included in the administrative record with the memorandum. Whether or not some or all of the documents may be found elsewhere in the record, BIA is reminded that in compiling an administrative record, BIA should take care to ensure that it includes all enclosures and attachments and that the enclosures and attachments that accompanied a primary document *are kept together in the record with the primary document*. *Walker v. Great Plains Regional Director*, 57 IBIA 167, 170 n.5 (2013).

<sup>9</sup> Appellant also made various procedural and evidentiary challenges. *Id.* at 1-2.

partitions,” he continued, “we rely upon” the appraisal when making the determination regarding “proposed divisions, land values and tract equity.” *Id.* After summarizing the process undertaken by the Superintendent in considering the partition, and finding that the Superintendent had “acted on” Appellant’s proposal by presenting it to Aitson-Roessler for her response and to the Solicitor’s office for its review and guidance, the Regional Director stated that the “Superintendent determined [it] was in the best interest of the landowners to approve the partition.” *Id.* at 4. “Therefore,” he concluded, “based upon the records, and in accordance with . . . 25 U.S.C. § 378[] that the subject [A]lotment is ‘capable of partition to the advantage of the heirs,’ I hereby sustain the Superintendent’s decision.” *Id.*

Appellant appealed the Decision to the Board. The Regional Director, Aitson-Roessler, and Mary Rector Aitson filed answer briefs,<sup>10</sup> and Appellant filed a reply brief. Appellant challenges the sufficiency of the evidence to support the decision and argues that it was arbitrary and capricious for the Regional Director to reject Appellant’s alternative partition plan without addressing it in the decision. Notice of Appeal, Jan. 6, 2012, at 2 (AR Tab 50). As relief, Appellant contends that the property containing the house and arbor should be awarded to him or “[a]t the very least,” that the matter be remanded to the Regional Director “to take evidence and consult with both parties” in order to decide who should get the house and arbor. Reply Brief (Br.) at 7.

In his answer brief, the Regional Director argues that the Superintendent consulted with the parties and attempted an amicable resolution before deciding to partition the property. Regional Director’s Answer Br. at 4. The Regional Director states that his decision “noted” that the Superintendent held a pre-partition meeting “and that the Appellant’s objection was taken seriously by the Agency.” *Id.* The Regional Director defends the partition decision as “reasonable” because based on the economic valuation of Tracts I and II, Appellant receives an equitable portion of the property. *Id.*

### **Applicable Law and Standard of Review**

The Secretary of the Interior (Secretary), acting here through BIA, is authorized to partition trust or restricted land. 25 C.F.R. §152.33(b). The regulation defines “trust

---

<sup>10</sup> All three respondents object to new evidence submitted by Appellant on appeal in the form of several letters from third parties arguing that the house and arbor hold cultural and historical significance to the Kiowa Tribe, and some of which support awarding Appellant the structures. We agree that this evidence is not properly before the Board, nor would it be relevant to our evaluation of *BIA*’s discretionary decision, based on the record that was before BIA. But because we are vacating the Decision and remanding the case, BIA must consider the letters as part of the record on remand.

land” to mean “land or any interest therein held in trust by the United States for an individual Indian.” 25 C.F.R. § 152.1. An owner with an inherited interest in an allotment may apply to the Secretary for partition of his or her trust land, and the Secretary “may issue new patents or deeds to the heirs for the portions set aside for them if [she] finds that the trust lands are susceptible to partition.” *Gray v. Great Plains Regional Director*, 52 IBIA 166, 171 (2010); 25 C.F.R. § 152.33(b). The statutory authority for a partition vests in the Secretary of the Interior the authority to partition inherited trust land if the Secretary finds that the land is “capable of partition to the advantage of the heirs.” 25 U.S.C. § 378.

The partition of an allotment involves the exercise of discretion by BIA. *Gray*, 52 IBIA at 171; *Weasel v. Acting Rocky Mountain Regional Director*, 51 IBIA 189, 192-93 (2010). In reviewing BIA discretionary decisions, the Board does not substitute its judgment for that of BIA. The Board’s responsibility is to ensure that BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, and has explained the rationale and factual basis for its decision. *Gray*, 52 IBIA 166 at 172; *Weasel*, 51 IBIA at 193; *First National Bank v. Acting Great Plains Regional Director*, 39 IBIA 229, 230 (2004). The Board reviews questions of law and sufficiency of the evidence to support a BIA decision *de novo*. *Gray*, 52 IBIA 166 at 172; *Spang v. Acting Rocky Mountain Regional Director*, 52 IBIA 143, 149 (2010). An appellant bears the burden to demonstrate that BIA abused its discretion or committed error, or that BIA’s decision is not supported by substantial evidence. *Gray*, 52 IBIA 166 at 172; *Spang*, 52 IBIA at 149; *Weasel*, 51 IBIA at 193.

### Discussion

As an initial matter, we address Appellant’s argument that the Allotment is not susceptible to partition. We do not agree that the presence of personally or historically significant structures on Indian trust land necessarily means that the land is not susceptible to partition by BIA, or that a partition that results in the ownership of those structures passing to one owner necessarily means that the partition would be inequitable or not in the best interest of the landowners. In the proceedings below, Appellant relied in part on a proposed partition rule published by BIA, which would have required BIA to consider whether a parcel to be partitioned contains “sites of particular cultural, historical, or other significance to more than one owner, that would make it inequitable to partition those sites and convey them to a single owner.” Proposed Rule, Indian Trust Management Reform, 71 Fed. Reg. 45174, 45223 (Aug. 8, 2006) (proposed § 152.505(b)(4)). As Appellant acknowledged, that proposed rule was not finalized, *see* 73 Fed. Reg. 67256, 67257 (Nov. 13, 2008), but even the language of the proposed rule would have done no more than require BIA to *consider* whether the presence of such sites would make a partition

inequitable. Thus, to the extent Appellant contends that the partition is precluded as a matter of law, we reject that argument.<sup>11</sup>

We next address Appellant's argument that the Decision failed to give adequate consideration to Appellant's objections or failed to articulate BIA's reasoning for its conclusion that the partition is in the best interest of the landowners. We agree with Appellant that the Decision is deficient because it erroneously characterizes the Superintendent's decision as having found that the partition is in the best interest of the parties, and because neither decision provides BIA's reasoning for such a finding, assuming one could be inferred. Nor is it apparent that either the Superintendent or the Regional Director gave substantive consideration to Appellant's objections.

In deciding whether to grant a request to partition individually owned Indian trust lands, BIA must ensure that it considers the interests of all of the landowners. *Laducer v. Acting Great Plains Regional Director*, 48 IBIA 294, 300 (2009). Unanimous consent is not required—no owner has “veto” authority over a partition—but the views of both proponents and opponents of a partition proposal must be considered by BIA. *Id.* BIA must exercise its independent judgment in considering the evidence and the respective parties' positions on whether a partition is advisable, equitable, and in the best interest of the landowners, and must articulate at least some basis for its decision.

In the present case, the Regional Director declared that the Superintendent made a finding that the partition is in the best interests of the landowners, and the Regional Director appears to defer to the Superintendent as having “taken seriously” Appellant's objections. Regional Director's Answer Br. at 4. But the Superintendent's decision made no such finding, and completely ignored Appellant's objections. The “supporting documents” on which the Superintendent relied, e.g., internal recommendations, were similarly conclusory in nature and lacking in analysis. The Land Resource Committee's recommendation is reflected only by a vote by its membership, with no explanation. The internal memorandum to the Superintendent recommending approval asserts, as if it is a given, that the partition is in the best interest of the parties. *See* Memorandum from Realty Officer to Superintendent, Oct. 20, 2009 (AR Tab 27) (“In light of the long-range best

---

<sup>11</sup> It is possible that Appellant abandoned this argument during the appeal. In his notice of appeal, Appellant disputes that the property containing the house and arbor are susceptible to partition, but in his reply brief he suggests that he should be awarded the tract that contains the structures. Reply Br. at 7. Thus, it appears that Appellant at least impliedly concedes that awarding full ownership to one party or the other of the portion of the Allotment on which the house and arbor are located would not be inequitable per se.

interest of the Indian owners. . .”). We do not question that as a procedural matter the Superintendent took Appellant’s objections seriously by convening meetings and by soliciting Aitson-Roessler’s response, but it is not apparent, as a substantive matter, whether or how the Superintendent exercised her own judgment in evaluating the parties’ respective positions and the evidence in the record to reach even an implied conclusion that the partition is in the parties’ best interests.

The Regional Director provided a recitation of the controversy, and acknowledged Appellant’s counterproposal, but he did not purport to conduct a *de novo* review in order to exercise his own discretion to reach a decision.<sup>12</sup> Instead, the Decision appears to defer, at least in part, to the Superintendent’s (deficient) decision. Rather than addressing Appellant’s counterproposal in any meaningful respect, the Regional Director treated the fact that the Superintendent had presented it to Aitson-Roessler for “her consideration” as having “acted on” that counterproposal. The Regional Director seemingly treated Aitson-Roessler’s objection as dispositive. *See* Decision at 3-4 (Aitson-Roessler “refused your proposal”). It may have been dispositive as an indication that the parties were unable to amicably resolve the dispute, but it did not mean that BIA was relieved of its responsibility to at least consider Appellant’s objections, including his proposal and, based on BIA’s own judgment and exercise of discretion, accept or reject it.

The Regional Director asserted that “[w]here partitioning is advisable,” the equities of a partition may be determined on the basis of economic valuation, and there is no dispute by the parties that as a matter of pure economic valuation, the partition is equitable. *See id.* at 3. But we are not convinced that the *ability* to partition land into economically equitable units *necessarily* makes a partition itself equitable or in the best interest of the landowners. BIA retains considerable discretion in making such a determination, and the exercise of that discretion requires consideration of the evidence and arguments presented by the parties, and a decision that reflects such consideration and articulates BIA’s reasoning. In this case, the Decision falls short in that respect.

There may be sound reasons, based on the evidence in the record, for BIA to conclude that granting Aitson-Roessler’s partition request is advisable and in the best

---

<sup>12</sup> Unlike the Board, a BIA regional director is delegated the same discretionary decision making authority as a BIA superintendent, and thus in an administrative appeal within BIA a regional director has flexibility not afforded to the Board to cure deficiencies in discretionary decisions made by a superintendent by exercising the regional director’s own discretionary authority. But in such cases, the regional director should make clear that he is either supplementing the superintendent’s decision or substituting his own judgment, and must set forth his reasoning accordingly.

interest of the landowners. Or there may be sound reasons, also based on the evidence, for BIA to conclude otherwise. It is not for the Board to weigh the evidence or the respective positions of the parties, or to supply reasoning that is absent from a discretionary decision of BIA. When we find such a decision lacking in articulating a rational connection between the facts presented and the decision reached, we must vacate and remand to BIA for further consideration.

As a procedural matter, however, we are not convinced that there is any basis for us to require BIA on remand, as Appellant would have us do, to take more evidence from the parties or engage in further consultation with them. Appellant has had ample opportunity to present his objections to Aitson-Roessler's proposal and to present evidence that he contends BIA must consider. Thus, although nothing precludes BIA, in the exercise of its discretion, from accepting additional evidence or consulting with both parties on remand, BIA is not required to do so, and may issue a new decision based on the existing record, including the record developed in this appeal.

### 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 the Decision and remands the matter to the Regional Director for further consideration and issuance of a new decision.

I concur:

\_\_\_\_\_  
// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\_\_\_\_\_  
//original signed  
Thomas A. Blaser  
Administrative Judge