No. 23-3864

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HALVERSON, as Personal Representative of the fee estate of Jack Halverson,

Plaintiff–Appellant,

v.

DEBRA HAALAND, Secretary of the Interior,

Defendant–Appellee.

Appeal from the United States District Court for the District of Montana,
Billings Division
Civil Case No. 1:22-cv-00076-SPW
Honorable Magistrate Susan P. Waters

PLAINTIFF-APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1361, because it was a mandamus action to compel an officer of the United States to perform his/her duty. In addition, jurisdiction was also conferred by 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States a defendant), and 28 U.S.C. § 1347 (partition action involving United States).

The Ninth Circuit Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

On October 30, 2023, the District Court issued its Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting defendant's Motion to Enter Final Judgment (ER-5-14), and the Clerk of Court filed a Judgment that same day ER-4. This constituted a final judgment in this case disposing of all claims. The Appellant filed a timely Notice of Appeal on November 28, 2023. ER-110-112.

STATEMENT OF ISSUES

Did the District Court err when it failed to grant the Estate of Jack Halverson's ("Estate") first Motion for Partial Summary Judgment (Docs. 13 and 14) and second Motion for Partial Summary Judgment (Docs. 48 and 50), either of which would have required the Bureau of Indian Affairs ("BIA") to comply with the settlement agreement it reached with the Estate by (1) recording a deed partitioning and conveying 690.54 acres in allotment 1809 from the United States

as trust holder to the Estate in trust, and (2) recording a fee patent deed conveying that same 690.54 acres from the United States as trust holder of the Estate of Jack Halverson to Jack's heir.

STATEMENT OF THE CASE

A. The Partition Action and Settlement.

Jack Halverson ("Jack") was an enrolled member of the Crow Tribe until his death in 2019. [1] ER-36. He inherited certain trust land on the Crow Reservation adjacent to a parcel known as "Allotment 1809" from his mother, and also purchased fractional interests in Allotment 1809. ER-36-37. Over time, Jack came to own an 86.42% interest in Allotment 1809. ER-37.

In 2015, Jack filed a Petition for Partition of Allotment 1809 with the Bureau of Indian Affairs ("BIA"). ER-37, ER-80-88. He did so pursuant to 25 U.S.C. § 378, which grants the BIA the authority to partition allotments and issue patents or deeds for the portions of the allotments set aside for the petitioner. ER-37. By this Petition, Jack sought to partition the property and obtain a severed interest in his share of these trust lands. ER-37-38.

[1] Jack Halverson died in 2019 in the midst of the events which are part of this dispute. The Tribal Probate Judge independently determined that he owned an 86.42% interest in Allotment 1809. (Doc. 64-1, p. 8). Jack's Estate was substituted for Jack following his death, and the Estate was the Plaintiff in the District Court. The Plaintiff is referred to as "Jack" or the "Estate" in this Brief.

More specifically, Jack's Petition for Partition sought partition of his 86.42% interest in Allotment 1809 "containing 799 acres". ER 80. Jack sought to partition the property into two blocks – a west block that would contain Jack's severed, partitioned acres and an east block that would contain the joint interests of all other owners, including the lone fee interest. ER-80-86. This was illustrated in a map attached to the Petition. ER-86.

As part of the partition process, the BIA required Jack to obtain a federally-approved surveyor's Certificate of Survey ("COS"). ER-37, ER-94-96. He did so and the BIA conceded that the "Certificate of Survey #3637, BIA document No. 202 43614 controls the partition of [Halverson's] majority interest." Doc. 20, p. 3. The COS included a diagram of the proposed partition, and very detailed legal descriptions and boundaries for both Jack's acres and the acres of the remaining property owners after the partition. ER-94-96. Consistent with Jack's Petition, the COS divided the approximately 799 acres and established one parcel which was Jack's interest and contained 690.54 acres (86.42% of Allotment 1809) and another parcel which was the common interest of the remaining landowners and contained the remaining 108.52 acres (13.58% of Allotment 1809), leaving the entire small fee estate within the 108.52 acres. ER-96.

The BIA separately appraised the two parcels to be severed. ER-89-92. The Estate's 690.54 severed acres appraised at $600.00 per acre, while the 108.52 acres

in the remainder held by the other landowners as cotenants appraised at $1,375.00 per acre. ER-89, ER-91. Susan Messerley, The Regional Director for the BIA's Rocky Mountain Region, testified that Jack's requested partition was in the best interests of both Jack and the other owners. ER-59.

Initially, the BIA denied Jack's Petition to partition Allotment 1809 on the grounds that he had purchased his interest in 1809 from other trust holders, rather than acquiring them as an heir. ER-38. Unbeknownst to Jack and his Estate, there was a 1981 U.S. Solicitor's Directive which allowed partition of allotments acquired by purchase, and this Directive was contained in the BIA's file pertaining to Jack's Petition. ER-38, ER-108-109. In 2021, the Estate learned of the existence of this directive and received a copy of the 1981 Directive from the BIA. ER-38. Shortly thereafter, the BIA agreed to grant Jack's Petition for Partition and settle the case. ER-38.

To implement the settlement, the parties filed a Joint Notice of Settlement and Verified Declaration of Partition of Allotment 1809 (the "VSA"). ER-103-107. There, the parties made the following representations to the Administrative Law Judge:

1. That this matter has settled "with the Regional Director/BIA declaring that it shall grant the partition of Allotment 1809";

2. that the Regional Director and BIA "declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted", and

> 3. that all documents to complete the partition are being filed and would be recorded as follows:
>
> a. all documents needed to complete the partition and conveyances of title shall be delivered by the Regional Director to counsel for the Estate of Jack J. Halverson for review and approval by January 15, 2022;
>
> b. on or before January 17, 2022, all documents necessary to complete partition and convey title for the majority interest in Allotment 1809 to the Estate of Jack Halverson, shall be recorded by the agency and conformed copies shall be provided by email to counsel for the Estate;
>
> c. on or before January 20, 2022 all documents necessary to convey and/or distribute title from the Estate of Jack J. Halverson to his heir shall be completed and recorded by the agency, conformed copies shall be provided by email to counsel for the Estate.

ER-103-104.

The representations made by the BIA in the Joint Notice of Settlement were not mere representations of its legal counsel. The Joint Notice of Settlement was verified and sworn to by Messerly. Specifically, she stated:

> I, Susan Messerly, a Rocky Mountain Regional Director, verify and swear under penalty of perjury that the declarations made in paragraphs 2, 3 and 4 above are true and correct, and I have express authority to enter into this agreement and so verify and swear.

ER-105.

The actions required to implement VSA were straightforward. The BIA had to (1) prepare a deed to convey title to the Estate of Jack J. Halverson of the 690.54 acres delineated in the BIA-required COS, and (2) prepare documents necessary to distribute the title of that same 690.54 acres from the Estate of Jack J. Halverson to his heir. ER-104.

Critically, the BIA has admitted in this case that the Estate is entitled to 690.54 acres. This admission was noted by the District Court in its Order denying the BIA's Motion to Dismiss:

> Because Defendant agrees that Plaintiff is entitled to 690.54 acres, the Court does not need to consider Plaintiff's allegation that Defendant determined he was entitled to only 652.21 acres.

ER-49.

Additionally, the VSA in Section 3b made mention of a "majority interest in Allotment 1809". ER-104. The BIA understood that Jack's interest (the 690.54 acres) was the "majority" interest in the 799 acres being partitioned by the VSA and the remaining 108.52 acres was the minority interest. Ms. Salway, a Realty Specialist with the BIA, testified:

> Q. Okay, sure. The settlement agreement called for BIA to prepare two deeds, correct?
>
> A. Yes.
>
> Q. BIA agreed to prepare a deed from the United States in trust to Jack Halverson's estate first. Correct?
>
> A. I am not understanding that.

Q. That's fine. When you look at Jack's application for partition, he applied to separate all of what he owned, correct, from the 799?

A. Yes.

Q. He's the majority owner of 799 acres, correct?

A. Yes.

Q. You know the equivalent acreage for his majority interest is 690.54, correct?

A. It could be.

Q. Let's look at the Certificate of Survey,if you don't mind, looking at the back page, the third page of Exhibit 2.

A. Yes, 690.54 acres.

Q. That's Jack's -- that's Jack acreage in 799 total acres, correct?

A. Yes.

Q. And the rest of Allotment 1809 is 108 acres, correct?

A. Yes.

Q. 108.52 to be exact.

A. Yes.

Q. Okay. We're going to talk about the majority interest and the minority interest. You understand those two terms, right?

A. Yes.

Q. The minority interest is the 108.54 acres -- 52 acres, correct?

A. Yes.

Q. And Jack's majority interest is 690.54,correct?

A. Yes.

Q. The equivalent acreages to everyone should remain the same before and after partition. True?

A. With the acreage that you just had?

Q. Yes.

A. Yes.

ER-71.

Despite (1) the BIA-ordered COS precisely delineating the 690.54 acres that Jack was entitled to receive in trust in the partition and (2) the Joint Notice of Settlement setting forth the clear steps required to implement the partition, the BIA failed to do what it promised. Instead, the BIA filed an incorrect trust deed on January 18, 2021, which neither named the United States as grantor nor conveyed Jack's entire 690.54 acres. ER-100-102.

With respect to the first deed (the Trust deed), the BIA's deed did not partition the property at all, because it left the land "undivided"-- still in common ownership and conveyed only "13/162" or 55.41 acres of Jack's 690.54 acres:

An undivided 13/162 Trust interest in and to the following described land:

SURFACE ONLY: Lot 3, Lot 4, S½NW¼, N½SW¼, SW¼SW¼, of Sec. 3, Lot 1, Lot 2, Lot 3, S½NE¼, SE¼, SE¼NW¼, of Sec. 4, T. 2 S., R. 27 E., containing 690.54 acres, more or less. (METES AND BOUNDS: Certificate of Survey No. 202 43614: Located in the NW¼SE¼ of Section 3 Labeled Tract A containing 11.48 acres.)

ER-100. On its face, the purported grant of "690.54 acres" is modified by the "undivided" fraction "13/162" -- undisputedly less than 690.54 acres. Id. In a

subsequent deposition, BIA representatives admitted the deed conveyed only 55.41 acres ER-60-67 and ER-69; ER-76-79 and ER-93.

The second deed (the fee deed) – the one which was to convey the partitioned interest from the Estate to Jack's heir – could have been sufficient to accomplish a conveyance to Jack's heir, but BIA admits it did not file a fee deed that conveyed the required 690.54 acres to the Estate prior to the litigation. Doc. 20, p. 4.

The Estate provided the BIA with corrected deeds – deeds which would allow both the transfer of the 690.54 acres in trust to Jack's Estate and the transfer of those same acres to his heir. ER-15-17 (the fee deed), ER-18-19 (the trust deed). When the BIA refused to approve and file these deeds, the Estate filed its claim in Federal Court.

B. <u>The Mandamus Action and Summary Judgment Rulings</u>.

On July 20, 2022, the Estate commenced a mandamus action. Doc. 1. It sought to compel the BIA to comply with the VSA by filing corrected deeds (ER-15-17 and ER-18-19) to accomplish what had been agreed to.

In response, the BIA filed a Motion to Dismiss, arguing that the Court lacked subject matter jurisdiction. Doc. 17 and 18. That Motion was denied, (ER-36), and the BIA has not appealed the denial of this Motion. Three statements in the District Court's Opinion are particularly notable.

First, the Court held that the "Defendant exercised her discretionary authority under the partition statute, 25 U.S.C § 378, to 'cause' Plaintiff's land to be partitioned and new deeds to be issued". ER-54. Thus, the Court concluded the BIA was authorized by statute to do what it promised to do in the VSA.

Second, the Court determined that, because "Defendant exercised her discretion to partition Plaintiff's land and issue new deeds, Defendant is thus bound to deal fairly with Plaintiff", and that the failure to do so "gives rise to a breach of trust action". ER-54. This recognizes the BIA's trust obligations to the Estate.

Third, as noted above, the Court found that the BIA had admitted that it has the obligation to convey 690.54 acres to Jack's Estate. ER-49.

Shortly before the BIA filed its Motion to Dismiss, the Estate filed a Motion for Partial Summary Judgment, seeking two very specific orders. Doc. 13. It sought an order to enforce the settlement by requiring the BIA to (1) "record a deed partitioning and conveying 690.54 acres in allotment 1809 from the United States as trust holder to the Estate of Jack Halverson in trust", and (2) "record a fee patent deed conveying 690.54 acres from the United States as trust holder of the Estate of Jack Halverson to Jack's heir". Doc. 13.

The BIA did not dispute the Estate's request for the second deed conveying a fee patent interest for the Estate's share to Jack's heir. ER-35. It did, however,

dispute the Estate's request to have a corrected trust deed filed which conveyed the 690.54 acres. ER-25.

In opposition to the Estate's first Motion for Summary Judgment, on November 23, 2022, the BIA submitted the Declaration from Marilyn Salway. ER-97-99. While the Motion for Summary Judgment was pending, the Estate took the depositions of Salway on January 10, 2023 (ER-70) and Messerly on February 1, 2023. ER-57. In those depositions Salway and Messerly admitted facts which both supported the Estate's claims and were contradictory to Salway's Declaration. Doc. 49.

The contradictory testimony proffered by the BIA went to the heart of the Estate's claim. As noted above, the Court found that the BIA had acknowledged its obligation to convey 690.54 acres to Jack's Estate. ER-49. In her Declaration, Salway stated that the deeds filed by the BIA conveyed 690.54 acres to the Estate.

> Exhibit 5 is a deed filed on January 18, 2022, conveying 690.54 acres of Allotment 1809 to the Estate of Jack Halverson.

ER-98. But in depositions, both Messerly and Salway were asked to examine the deed filed by the BIA and calculate the acreage that was actually conveyed. Both independently calculated that only 55.41 acres were transferred by the deed. ER-60-67 and ER-69; ER-76-79 and ER-93.

The Estate promptly brought this issue to the Court's attention through a Motion to Strike the portions of Salway's Declaration and the BIA's Statement of

Undisputed Facts in which the BIA had, contrary to the deposition testimony, claimed the deed it filed actually conveyed 690.54 acres to the Estate. Docs. 31, 32. In its Motion and Brief, the Estate set forth in detail how the deposition testimony of Salway and Messerly contradicted the key allegations in Salway's Declaration. Id.

Without ruling on the Motion to Strike, the District Court issued an Order granting in part and denying in part the Estate's Motion for Partial Summary Judgment. ER-20-35. It denied the motion to the extent it sought an order that the BIA must record a deed partitioning and conveying 690.54 acres in allotment 1809 from the United States as trust holder to the Estate of Jack Halverson in trust. ER-35. It granted that portion of the Motion to the extent it sought an order that the BIA must record a fee patent deed conveying 690.54 acres from the United States as trust holder of the Estate of Jack Halverson to Jack's heir. ER-35.

The BIA had not filed a cross-motion for summary judgment. In light of the Court's order, and based on the Court's grant of the first Motion as to the fee deed, the Estate filed a second Motion for Partial Summary Judgment, (Doc. 48), together with a detailed Statement of Undisputed Facts (Doc. 49), and an expert report of Dan Boers, the Surveyor who prepared the COS with the input and approval of the BIA. (Doc 51). There it set forth the undisputed evidence, including evidence learned in the depositions of Salway and Messerly, that the BIA

had agreed to partition Allotment 1809 and that this required the transfer of 690.54 acres from the United States as trust holder to the Estate of Jack Halverson in trust. Id. In response, the BIA filed a Motion to Enter Final Judgment, based on the Court's Order with respect to the Estate's first Motion for Summary Judgment. (Doc. 52).

On October 30, 2023, the Court issued an Order denying the Estate's second Motion for Summary Judgment and Granting the BIA's Motion to Enter Judgment. ER-5-14. The District Court ruled that it had disposed of the issue whether the Estate was entitled to receive 690.54 acres through a partition in its Order on the first Motion for Summary Judgment. ER-8-9. It characterized the second Motion for Summary Judgment as a Motion for reconsideration, took the Estate to task for what the Court characterized as an attempt to re-litigate the first motion with "newly discovered evidence," and declined to consider the deposition testimony of Salway and Messerly. ER-9-13. The Court then denied the Estate's Motion to Strike the Declaration of Salway as moot. ER-14.

This appeal followed.

SUMMARY OF ARGUMENT

Jack Halverson filed a Petition for Partition in which he very explicitly asked that his 86.42% interest in the 799 acres in Allotment 1809 be partitioned.

This is equal to 609.54 acres. It is undisputed – and the District Court so found – that the Estate was entitled to receive 690.54 acres of Allotment 1809.

By definition, a partition is the severance of the cotenants' interests in real property, such that the severing party receives independent control over his or her severed parcel. The Estate and the BIA entered into a binding settlement agreement by which the BIA unequivocally stated: "the Regional Director and BIA…declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted." The BIA then agreed to create and file two deeds – one to convey Jack's partitioned interest (which was 690.54 acres in allotment 1809) from the United States as trust holder to the Estate of Jack Halverson in trust, and a second to convey that same 690.54 acres from the United States as trust holder of the Estate of Jack Halverson to Jack's heir. Simple enough.

The BIA did not do what it promised to do; that being a partitioned conveyance of 690.54 acres to the Estate. Depending on which BIA testimony or argument one believes, the critical first deed either conveyed to the Estate 55.41 acres or an unpartitioned 94.45% interest in the 690.54 acres. Neither accomplished what the BIA promised to do.

The District Court erroneously denied the Estate's first Motion for Summary Judgment which sought enforcement of the settlement agreement by requiring that

BIA to (1) record a deed partitioning and conveying 690.54 acres in allotment 1809 from the United States as trust holder to the Estate of Jack Halverson in trust, and (2) record a fee patent deed conveying 690.54 acres from the United States as trust holder of the Estate of Jack Halverson to Jack's heir. The District Court's Order was in error because it did not partition the property conveyed to the Estate at all, leaving the Estate in a cotenancy, and it did not convey the 690.54 acres which the Court found the Estate was entitled to receive.

The Estate respectfully requests that the Court reverse the District Court's Orders (ER-5-14 and ER-20-35) and enter an order that the BIA is directed to file and record the deeds (ER-15-17 and ER-18-19) necessary to correct the improper deeds filed by the BIA. Additionally, the case should be remanded to the District Court for an award of attorneys' fees as is required in a mandamus action. 28 U.S.C. § 2412 (d)(1)(A).

ARGUMENT

A. The District Court Erred When it Denied the Estate's First Motion for Summary Judgment Because the Undisputed Facts Entitled the Estate to Mandamus Relief.

The District Court denied the Estate's first Motion for Summary Judgment. The denial of a motion for summary judgment is reviewed *de novo*. *Bliesner v. Communication Workers of America*, 464 F.3d 910, 913 (9th Cir. 2006) (citation omitted) *cert. denied* 551 U.S. 1144 (2007).

In a nutshell, the Estate's Motion asked the Court to require the BIA to issue the two deeds that it promised to issue in the VSA. The BIA is part of the Department of Interior and has statutory authority to partition trust allotments among the owners of such allotment. 25 U.S.C. §378. Since 1981, it has been the position of the United States that such partitions may occur whether the owner's share of his allotment was inherited or purchased ER-108-109. In its Order denying the BIA's Motion to Dismiss, the District Court confirmed this authority, finding that the "Defendant exercised her discretionary authority under the partition statute, 25 U.S.C § 378, to 'cause' Plaintiff's land to be partitioned and new deeds to be issued". ER-54.

Jack Halverson was a member of the Crow Tribe. As such, the BIA's duty to grant his request to partition Allotment 1809 and to comply with the terms of the VSA was not a garden-variety legal duty – it was a fiduciary duty grounded in the trust relationship between the United States and tribal members.

> The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship. "[A] fiduciary relationship necessarily arises when the Government assumes ... elaborate control over forests and property belonging to Indians." *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1983).

Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

The BIA's obligations pursuant to the VSA, like most settlement agreements, are best understood in the context of the dispute that was settled; in this case, the settlement of a Petition for Partition. A partition action is a means by which cotenants may sever their respective interests and exercise independent control over the resulting parcels. *Davis v. Acting Aberdeen Area Director, BIA*, 27 IBIA 281, 285, 1995 WL 23577; *Kravik v. Lewis,* 213 Mont. 448, 454, 691 P. 2d 1373 (1984). In the Partition action filed by Jack (and later continued by his Estate) he sought to partition his 86% interest in the 799 acres which comprised Allotment 1809 from the interests of the other cotenants. ER-80-88. He did not ask for a partial partition, such that he and some other cotenant might continue to jointly own some portion of the property.

As in any partition action, the parties need to precisely delineate the real property being partitioned so that deeds with correct legal descriptions could eventually be recorded. To that end, the BIA required Jack to obtain a federally-approved surveyor's Certificate of Survey ("COS"). ER-94-96. He did so, and it delineated a parcel which was Jack's interest containing 690.54 acres. ER-96. None of this was in dispute.

It is undisputed that the BIA and the Estate then entered into a settlement agreement. The parties filed a Joint Notice of Settlement and Verified Declaration of Partition of Allotment 1809 in which they represented that the matter was settled

and it specifically stated that "the Regional Director/BIA . . . shall grant the partition of Allotment 1809." ER-103. Messerly swore under penalty of perjury that the following statements are true and correct.

1. that the Regional Director and BIA "declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted", and that "all documents to complete the partition are being filed and would be recorded",

2. that the BIA would submit the required documents to the Estate's counsel for "review and approval", and

3. that the BIA would then record "all documents necessary to complete partition and convey title for the majority interest in Allotment 1809 to the Estate of Jack Halverson" and provide the Estate's counsel with conformed copies.

ER-105. Again, none of this is disputed.

The partition which Jack (and later the Estate) sought was the partition of Jack's interest from the interest of the other cotenants. It is undisputed that the BIA agreed (and the Court so found) that the Estate "is entitled to 690.54 acres". ER-49. The 690.54 acres to be partitioned and deeded to the Estate in trust is that property delineated in the COS which the BIA required Jack to obtain. ER-96. Thus, the terms of the VSA and what it required the BIA to do cannot be reasonably disputed.

In its first Motion for Summary Judgment, the Estate asked the Court to simply enforce the plain terms of the VSA by requiring it to issue the deeds needed

to accomplish the agreed-upon partition. A valid settlement agreement is enforceable like any other binding contract. *Hinderman v. Krivor*, 2010 MT 230 ¶21, 358 Mont. 111, 244 P.3d 306 (citation omitted). "[A] party to a settlement agreement is bound if he or she has manifested assent to the agreement's terms and has not manifested an intent not to be bound by that assent." *Lockhead v. Weinstein*, 2003 MT 360, ¶12, 319 Mont. 62, 81 P.3d 1284. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties". Mont. Code Ann. § 28-3-201; *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 400, 849 P.2d 1039, 1042-1043 (1993) (applying Mont. Code Ann. § 28-3-201 to enforce a settlement agreement).

In the instant case, the fact that the BIA "approved and granted" the Estate's Petition to Partition Allotment 1809 is undisputed. As noted above, that Petition sought partition of Jack's 86% of the 799 acres in Allotment 1809. The Estate's interest was 690.54 acres and neither this fact, nor the legal description for the 690.54 acres to be deeded to the Estate in trust was disputed.

The fact that the BIA agreed to record "all documents necessary to complete partition and convey title for the majority interest in Allotment 1809 to the Estate of Jack Halverson" in not disputed.

Finally, the fact that the deed the BIA filed failed to partition the property and convey sole ownership of 690.54 acres to the Estate in trust is not disputed. The deeds filed on January 18, 2021, neither named the United States as grantor nor conveyed Jack's entire 690.54 acres. The first deed did not partition the property at all, because it leaves the land "undivided"-- still in common ownership and conveys only "13/162" or 55.41 acres of Jack's 690.54 acres:

An undivided 13/162 Trust interest in and to the following described land:

SURFACE ONLY: Lot 3, Lot 4, S½NW¼, N½SW¼, SW¼SW¼, of Sec. 3, Lot 1, Lot 2, Lot 3, S½NE¼, SE¼, SE¼NW¼, of Sec. 4, T. 2 S., R. 27 E., containing 690.54 acres, more or less. (METES AND BOUNDS: Certificate of Survey No. 202 43614: Located in the NW¼SE¼ of Section 3 Labeled Tract A containing 11.48 acres.)

On its face, the deed did not convey what the BIA promised to convey.

Based on the undisputed facts, the Estate was entitled to summary judgment; specifically, an order enforcing the VSA to (1) record a deed partitioning and conveying 690.54 acres in allotment 1809 from the United States as trust holder to the Estate of Jack Halverson in trust, and (2) record a fee patent deed conveying 690.54 acres from the United States as trust holder of the Estate of Jack Halverson to Jack's heir. Having declared in the VSA "that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted", (ER-103) the District Court should have held the BIA to its trust responsibilities and require it to do what was necessary to implement the partition which it approved.

B. The District Court Erred When it Misconstrued the VSA and Allowed the BIA to Skirt its Fiduciary Obligations.

In opposition to the Estate's first Motion for Summary Judgment, the BIA submitted the Declaration of Salway in which she represented that the deed filed by the BIA in fact conveyed 690.54 acres to the Estate.

> Exhibit 5 is a deed filed on January 18, 2022, conveying 690.54 acres of Allotment 1809 to the Estate of Jack Halverson.

ER-98. This statement is significant for at least two reasons.

First, it is an implicit admission that the BIA was required to file a deed which conveyed 690.54 acres of Allotment 1809 to the Estate. As noted above, in denying the BIA's Motion to Dismiss, the Court found that the BIA had admitted that it has the obligation to convey 690.54 acres to Jack's Estate. ER-49.

Second, despite this admission, the BIA argued in its Brief that it was not obligated to file a deed which conveyed exclusive title in the 690.54 acres to the Estate. Doc. 19, pp 11-13. It claims the VSA only required it to file a deed by which the Estate and one of the other cotenants would have a joint interest in the 690.54 acres. Id. More specifically, the BIA took the position that its obligation in the VSA to "covey title for the *majority* interest in Allotment 1809 to the Estate of Jack Halverson" did not mean that it had to file a deed which in fact partitioned Jack's interest (690.54 acres) from the 799 acres in Allotment 1809. Rather, the BIA argued, the VSA only required it to file a deed which gave the Estate a

majority interest in the 690.54 acres such that the Estate had a 94.45% in the 690.54 acres and another co-tenant had the remaining interest. Id. Regrettably, the District Court adopted this argument. ER-20-35.

The BIA's position, as adopted by the Court, cannot be reconciled with the plain language of the VSA or the BIA's trust obligations to the Estate. It is undisputed that Jack's Petition for Partition sought the partition of his 86% interest in Allotment 1809 "containing 799 acres". ER-80. An 86% interest is obviously the majority interest in Allotment 1809 and it is this majority interest which Jack asked to have partitioned from the interest of the cotenants.

The BIA's position, as adopted by the Court, undermines the basic meaning of the term "partition" and the purpose of a partition action. In *Kravik v. Lewis,* 213 Mont. at 453-54, 691 P. 2d at 1375-76, one of the parties to the partition action claimed the partition was unfair because she was not allowed to retain an undivided one-third interest in the property. The Montana Supreme Court rejected this argument, holding:

> This argument sounds discordant in a partition proceeding. Such an action has been traditionally recognized as a means by which cotenants, unwilling and incapable of managing property jointly, sever their interests and exercise independent control over the resulting parcels.

Kravik, 213 Mont. at 454, 691 P. 2d at 1376. Simply put, partition is meaningless unless it ends the contenancy.

It is undisputed that the VSA stated: "Regional Director and BIA . . . declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted". ER-103. This means that the BIA agreed to grant the Estate what its asked for – a partition of Allotment 1809 such that the Estate would have exclusive title to the 690.54 acres.

But instead of requiring the BIA to issue deeds that actually accomplished a partition, the District Court at the BIA's urging, seized on the words "majority interest" in Paragraph 3b of the VSA, and construed those words to mean that the Estate was entitled to only a majority, undivided interest in 690.54 acres (652.22 acres) rather than a majority interest in Allotment 1809 (690.54 acres).

This interpretation renders the language granting the Petition superfluous. The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other. Mont. Code Ann. §28-3-202, M.C.A.; *City of Austin, Texas v. Decker Coal Co.*, 701 F.2d 420, 426 (5th Cir. 1983) (interpreting Montana Law); *Edward v. Prince*, 221 Mont. 272, 275, 719 P.2d 422, 424 (1986). A contract should not be dissected with certain words and phrases considered in isolation. *Rumph v. Dale Edwards, Inc.*, 183 Mont. 359, 367-368, 600 P.2d 163, 167-168 (1979).

Moreover, in her deposition, Realty Specialist Salway testified that she understood the terms majority interest and minority interest in the context of the

VSA and the two deeds the BIA was required to prepare. She testified that majority interest meant Jack's 690.54 acres in Allotment 1809 and the remaining 108.52 was the minority interest. ER-71. This testimony directly contradicts the position taken by the BIA in opposition to the Estate's first Motion for Summary Judgment.

The BIA cannot simultaneously state in the VSA that the Estate's Petition for Partition -- which sought 86% of 799 acres in Allotment 1809 (690.54 acres) – is "as a matter of law and fact . . . proper and is approved and granted", but that the language promising to prepare and file "all documents necessary to complete partition and convey tile for the *majority* interest in Allotment 1809" should be construed to mean that it was only required to file deeds to convey to the Estate a fraction of the 690.54 acres leaving those acres in cotenancy. The *majority* referenced in the VSA was obviously the majority of the 799 acres in Allotment 1809, not the majority of the Estate's partitioned share. The only way to meaningfully reconcile the VSA contractual provisions specifically approving and granting the Petition with the obligation to convey "a majority interest in Allotment 1809" to the Estate is to deed the Estate its partitioned interest in the 690.54 acres.

The District Court's erroneous conclusion that the term "majority interest" as used in the VSA meant a majority of the 690.54 acres, rather than a majority of

the 799 acres, stems from its application of *Quiver v. Deputy Assistant of Indian Affs*., 13 IBIA 344, 353 (1985) to this case. In its Order denying the BIA's Motion to Dismiss, the Court considered whether the Quiet Title Act, 28 U.S.C. § 2409a preempted the Estate's ability to assert an action for mandamus. ER-44-51. As part of that analysis, it cited *Quiver* for the proposition that contenants own an undivided fractional interest in the parcel at issue and no cotenant has a right to exclusive possession of any part. ER-48-49. While this may be true as a general proposition, it has no application to the meaning of a settlement agreement in the context of a partition action.

Quiver involved a dispute as to whether the BIA was required to force cotenant tribal members who had leased certain property to share lease proceeds with non-tribal members. 13 IBIA at 350. It held that (1) the BIA owed no trust responsibility to the non-member contenants to ensure they received a share of lease payments, and (2) that because the tribal member cotenants owned an undivided interest in the property it allowed them to use all of the property, albeit with a duty to account to the other cotenants. 13 IBIA at 351-53.

The general principles as to ownership by cotenants discussed in *Quiver* have no application to this case. Unlike the non-member cotenant in *Quiver*, the BIA owed the Estate a fiduciary duty. The issue in the instant case is not how to share revenues from property held by cotenants; rather, the issue is whether the

BIA met its trust obligations to the Estate when it promised to partition Allotment 1809 using the COS which the BIA concedes is controlling, but then failed to record a trust deed giving the Estate a partitioned, exclusive interest in the 690.54 acres.

When the Court ruled on the first Motion for Summary Judgment, it stated without further analysis that *Quiver* dictated that the term "majority interest" meant the majority percentage of an undivided interest in the 690.54 acres. ER-23-24. As discussed above, the use of the term "majority interest" in the VSA has to mean the majority of the 799 acres which is what the Estate requested in the Petition. To construe the terms as the District Court did renders the provision in the VSA that "[t]he Regional Director and BIA . . . declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted" meaningless.

The District Court also raised a concern that the partition would impact certain fee lands. ER-30-35. In the Petition which the BIA "approved and granted" the fee lands were to remain with their owner in the 108.52 acres. ER-84. The controlling COS placed those fee lands within the same 108.52 acres. ER-96. The District Court relied on *Gray v. Acting Aberdeen Area Director, BIA*, 33 IBIA 26 (1998) to support its decision that the BIA had complied with its duties under the VSA. In *Gray,* heirs holding the land in question sought partition of both fee

and trust land in a parcel. Despite one parties' objection that the BIA might not have jurisdiction to grant partition where fee land was implicated, the Board approved the partition. The Board concluded that the BIA properly exercised its trust obligations by approving the partition, despite the potential for issues in partitioning the fee lands. *Gray* at 28.

It bears repeating that the District Court, in denying the BIA's Motion to Dismiss, held that the "Defendant [BIA] exercised her discretionary authority under the partition statute, 25 U.S.C § 378, to 'cause' Plaintiff's land to be partitioned and new deeds to be issued". ER-54. Thus, the Court had already concluded the BIA was authorized by statute to do what it promised to do in the VSA. Moreover, the Court determined the BIA was bound to deal fairly with the Estate and it admitted its obligation to convey 690.54 acres to the Estate. Doc. 40.

Here, the fee land remains in Allotment 1809, but in the remainder. The District Court should not have allowed the BIA to abrogate its obligations to convey 690.54 acres to the Estate, based on unspecified potential issues that might be raised by a minority fee owner who would have retained her entire interest in the parcel which remained after the partition.

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C. The District Court Erred When it Refused to Grant the Estate's Motion to Strike, and to Consider the Second Motion for Summary Judgment. [2]

The Estate filed its first Motion for Summary Judgment in November of 2022. In response to the Estate's Motion, the BIA submitted a Declaration from Salway in which she stated that "Exhibit 5 [the deed that was to convey Jack's partitioned interest] is a deed filed on January 18, 2022, conveying 690.54 acres of Allotment 1809 to the Estate of Jack Halverson". Doc. 20.1, ¶ 7.

The Estate did not and does not believe this is a true statement, because the deed does not convey 690.54 acres to the Estate. While its first Motion for Summary Judgment was pending, it deposed Messerly and Salway and, among other things, addressed this topic. Both Salway and Messerly calculated that the deed which Salway said conveyed 690.54 acres actually conveyed only 55.41 acres. ER-60-67 and ER-69; ER-76-79 and ER-93.

The Estate promptly brought this critical inaccuracy to the Court's attention while the first Motion for Summary Judgment was pending by filing a Motion to Strike the inaccurate statements in Salway's Declaration and the Statements of Undisputed Fact supposedly supported by the Declaration. Docs. 31 and 32. The

[2] If the Court reverses the District Court with respect to the Estate's first Motion for Summary Judgment, it need not reach the issues addressed in this section. If it does, the standard of review for a Motion to for Summary Judgment is *de novo*. *Bliesner*, 464 F.3d at 913.

Court did not address this issue or rule on the Motion to Strike before it denied in part the Estate's first Motion for Summary Judgment, critically deciding that, by filing the deed referenced in Salway's Declaration, the BIA had complied with its obligation under the VSA.

It is well-settled that a party cannot avoid summary judgment by taking contradictory fact positions in a declaration and in depositions. Courts more typically address such contradictions when a party seeks to use an affidavit to contradict prior deposition testimony. Under the "sham affidavit rule," a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony. *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012)(citation omitted). In order to trigger the sham affidavit rule, the Court must make a factual determination that the contradiction is a sham and that the inconsistency between the deposition testimony and the subsequent affidavit justifies striking the affidavit. Id. (citation omitted).

Here, the deposition followed the declaration, but the rule should apply with equal force. The BIA made representations about the key deed in this case that were not true. This should have caused the Court to grant the Motion to Strike, disregard the Declaration and conclude that the BIA had admitted that the critical deed only conveyed 55.41 acres.

In response to the Estate's first Motion for Summary Judgment, the BIA did not file a cross motion for summary judgment or seek judgment in its favor in its briefs. The Court's failure to even consider the Motion to Strike left the Estate in an odd predicament. The Court had made a ruling based on admittedly inaccurate evidence which the Estate had brought to the Court's attention in its Motion to Strike. And that evidence went to the heart of the issue – whether the BIA had issued a proper deed. The Estate firmly believed it had presented the Court with sufficient facts to grant its first Motion for Summary Judgment in its entirety. When the Court did not do so, it properly filed a second Motion which included both facts raised by the Motion to Strike and additional facts learned in the depositions of Salway and Messerly.

Instead of considering the facts, the District Court concluded that the second Motion was a motion for reconsideration and refused to consider it on the merits. ER-9-13. The Court was correct that the second Motion was based on the same legal arguments and sought a portion of the same relief as that sought in the first Motion (an order that the BIA issue a corrected deed conveying 690.54 acres from the United States to the Estate in trust). But it should not have given the motion the short shrift, where the Estate had raised an issue as to the veracity of the BIA's statements as to the critical deed in the case. What the District Court characterized as "newly discovered evidence" were the facts as to the critical deed which the

Estate had raised in its Motion to Strike, and additional deposition testimony which buttressed the key point that the deed filed by the BIA neither partitioned the Estate's interest nor conveyed 690.54 acres to the Estate.

As a general proposition, cases are to be decided on the merits whenever it is reasonably possible. *Eitel v. McCool*, 782 F. 2d 1470, 1472 (9th Cir. 1986). Under the unique procedural circumstances of this case, the District Court should have considered the second Motion for Summary Judgment on the merits and, for the same reason the first Motion should have been granted, it should have granted the second Motion for Summary Judgment.

CONCLUSION

The BIA owed Jack Halverson and his Estate a solemn fiduciary duty. *Cobell v. Norton,* 240 F.3d at 1086. This duty and the fact that the BIA had admitted that it had the obligation to convey 690.54 acres to Jack's Estate was recognized by the District Court early in this case, but then the Court did not apply the BIA's trust responsibility to this case by requiring it to do what it promised by giving the Estate the land everyone acknowledges he is entitled to receive.

Neither Jack nor his Estate have ever asked the BIA or the District Court for one thing that they were not entitled to receive. The Estate now asks this Court to reverse the District Court, grant the Estate the land it is entitled to and enter an order that the BIA is directed to file and record the deeds (ER-15-17 and ER-18-

19) necessary to correct the improper deeds filed by the BIA. Additionally, the case should be remanded to the District Court for an award of attorneys' fees as is required for a mandamus action. 28 U.S.C. § 2412 (d)(1)(A).

DATED this 15th day of April, 2024.

CRIST, KROGH, ALKE & NORD, PLLC

By: /s/ John G. Crist
John G. Crist

Attorneys for Plaintiff - Appellant

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6

James Halverson, as Personal Representative of the Fee Estate of Jack Halverson is not aware of any related cases.

DATED this 15th day of April, 2024.

CRIST, KROGH, ALKE & NORD, PLLC

By: /s/ John G. Crist
John G. Crist

Attorneys for Plaintiff - Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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