



INTERIOR BOARD OF INDIAN APPEALS

Paul Spicer v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

50 IBIA 328 (11/16/2009)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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PAUL SPICER,	)	Order Vacating Decisions and
Appellant,	)	Dismissing Appeals as Moot
	)	
v.	)	
	)	Docket Nos. IBIA 08-129-A
EASTERN OKLAHOMA REGIONAL	)	08-130-A
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	November 16, 2009

Paul Spicer (Appellant), individually and as Chief of the Seneca-Cayuga Tribe of Oklahoma (Tribe), appealed to the Board of Indian Affairs from two decisions by the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), related to a tribal leadership dispute. In the first decision, dated July 11, 2008, the Regional Director declined to recognize as valid a tribal court temporary restraining order (TRO) that had been granted to Appellant against his tribal opponents. In relevant part, the TRO declared a June 7, 2008, General Council<sup>1</sup> meeting of the Tribe (at which LeRoy Howard allegedly was elected Chief) to be invalid, and prohibited Howard from holding himself out as Chief until further order by the court, or until an annual election held by mail-in ballot was officially certified and Appellant “tenders his resignation and causes Howard to be sworn in.”<sup>2</sup> The Regional Director’s second decision, dated July 31, 2008, recognized Howard as Chief of the Tribe on an interim basis for 6 months or until the Tribe internally resolved the dispute over the election. We refer to this decision as the “recognition decision.”

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<sup>1</sup> The Tribe’s General Council consists of all members of the Tribe 18 years of age or older. Constitution and By-Laws of the Seneca-Cayuga Tribe of Oklahoma, Art. IV. It appears that the tribal court was established by the Tribe’s Business Committee, which consists of elected officers and Council members. *Id.*, Art. VI.

<sup>2</sup> TRO, *Chief Paul Spicer v. Dolly Pewitt*, No. 2007-CIV-01 (Dist. Ct. Seneca-Cayuga Tribe of Oklahoma, July 9, 2008). The introduction to the court’s order recites July 9, 2008, as the date of consideration and presumably of issuance, although above the judge’s signature, the order recites June 23, 2008, as the date “so ordered.” The parties refer to the order as having been issued on July 9, 2008.

Following expiration of the 6-month period, the Regional Director moved to dismiss this appeal as moot. Appellant objects to dismissal, arguing that the appeal is not moot because the Regional Director's decisions enabled the Howard faction to take control of the Tribe.

We agree that these appeals are moot. It is well-settled that under the appeals regulations applicable to BIA actions, any effectiveness of the Regional Director's decisions was automatically stayed (as Appellant recognizes), *see* 25 C.F.R. § 2.6, when Appellant appealed to the Board. Neither the Regional Director nor Howard sought to have the Board place either decision into effect during the 6-month period that the recognition decision could have been effective by its own terms. If tribal members misrepresented the Regional Director's decisions as effective when they were not, Appellant's remedy lies in a forum other than this Board. The July 11, 2008, decision was not, by its terms, limited in duration, but it also did not purport to take any action necessary for government-to-government relations with the Tribe. To the extent that the decision's only apparent valid justification would have been to serve as a predicate for, and effectively part of, the July 31, 2008, recognition decision, we conclude that the July 11 decision is also moot. Because neither decision had any legal force or effect during the relevant 6-month period, our adjudication of the merits of those decisions would be a hypothetical exercise, and we conclude that these appeals are moot. Although the fact that neither decision was ever effective should sufficiently resolve this matter, for the sake of clarity the Board vacates the two decisions.

### **Background**

The details of the tribal dispute leading up to the Regional Director's decisions are not relevant to our disposition of these appeals, but a brief summary provides some context. In March of 2008, Appellant, who had been elected to a 2-year term as Chief in June of 2007, announced his intent to resign, and arranged to include the remainder of his term in a regular annual election of officers held by mail-in ballot. In a General Council meeting held on June 7, 2008, the Council purported to accept Appellant's resignation, effective immediately, and to elect Howard to fill the position of Chief, pending certification of the regular election, the votes of which were also counted on June 7.

In the months prior to the General Council meeting, the tribal court, whose jurisdiction was itself disputed, had issued several orders to prohibit the General Council from meeting, although the court did not prohibit the Tribe from conducting the regular election. Howard garnered the most votes in the mail-in regular election, but controversy ensued over the certification of the election. By then, however, Howard had already been

sworn in pursuant to the General Council's action in the June 7 meeting. Subsequently, the tribal court issued the TRO declaring the General Council's actions, including its special election of Howard, to be null and void, and prohibiting Howard from holding himself out as Chief of the Tribe until further order of the court or until the regular election was officially certified, and Appellant tendered his resignation and swore in Howard as Chief.

Each faction sought to have BIA side with it: the Howard faction sought to be recognized as the tribal government, and Appellant transmitted the TRO to the Regional Director as evidence he was still Chief. On July 11, 2008, without providing any justification for issuing a decision, e.g., as an action necessary to BIA's government-to-government relationship with the Tribe,<sup>3</sup> the Regional Director issued the decision stating that the tribal court had lacked jurisdiction to issue the TRO (or prior orders leading up to it), and that BIA would not recognize the court's order. Appellant appealed that decision to the Board.

On July 31, 2008, the Regional Director issued her second decision, this time directly addressing the tribal leadership issue. In this second decision, the Regional Director recited as justification for her decision the need to engage in negotiations with the Tribe for a fiscal year 2009 annual funding agreement for the Tribe's Indian Self-Determination Act contract with BIA. The Regional Director also stated that other pending transactions might require action. Turning to the leadership dispute, the Regional Director concluded that BIA would recognize Howard as Chief. By its terms, the recognition decision was characterized as interim and limited to the 6-month period commencing with the date of the decision — i.e., from July 31, 2008, until January 31, 2009. Appellant also appealed that decision to the Board.

Appellant and the Regional Director filed briefs on the merits. Neither the Regional Director nor Howard asked the Board to have the Regional Director's decisions made effective, and Appellant did not bring to the Board's attention any purported actions by BIA to implement those decisions.

On January 30, 2009, at the expiration of the 6-month period, the Regional Director issued a letter to Howard stating that the recognition decision would expire by its own terms on January 31, 2009, and that in the absence of any need to issue a new decision for government-to-government purposes, BIA would not do so. The Regional Director

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<sup>3</sup> There is some evidence that each faction sought BIA's intervention in order to either gain or maintain the upper hand in private business dealings with a bank which held tribal deposits, and which was threatening an interpleader action.

then moved to dismiss this appeal as moot. Appellant filed a brief in opposition to the motion, and the Tribe filed a brief in support.<sup>4</sup>

### Discussion

Under the regulations applicable to BIA administrative decisions, a BIA decision is automatically stayed during the period for filing an appeal, *see* 25 C.F.R. § 2.6(a) & (b), and the automatic stay continues once an appeal is filed with the Board, *see* 43 C.F.R. § 4.314(a). The Board has the authority to place a Regional Director's decision into immediate effect, *see* 25 C.F.R. § 2.6(a), but unless and until it is made effective, the decision has no legal effect, and no legal consequences may flow from it. *See Picayune Rancheria of the Chukchansi Indians v. Acting Pacific Regional Director*, 48 IBIA 241, 244 (2009) (legal consequences flow if decision is allowed to become final and effective); *Quantum Entertainment, Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178, 208 (2007) (BIA decision was of no force or effect because it was appealed to the Board), *remanded in part on other grounds, Quantum Entertainment Ltd. v. U.S. Department of the Interior*, Civ. No. 07-1295 (D.D.C. Feb. 19, 2009); *Nomee v. Acting Billings Area Director*, 18 IBIA 87, 87 n.2 (1989) (Board order to stay BIA decision was for clarification only).

During the 6-month time period in which the Regional Director's recognition decision, by its own terms, could have been made effective by the Board, neither the Regional Director nor Howard sought to have the Board do so. Thus, it remained, in legal

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<sup>4</sup> The Howard faction, in the name of the Tribe, sought leave to file an amicus brief, but the Board denied the Tribe's request because in substance the Tribe was seeking to file an untimely answer brief, and stated no good cause for being allowed to do so. In response to the Regional Director's motion to dismiss the appeals as moot, the Tribe filed a voluminous brief "in support of the motion to dismiss" that effectively argues the merits, and Appellant moved to strike the brief as outside the scope of permissible briefing. The Board agrees that the Tribe's brief largely, if not entirely, seeks to argue the merits, and to insert new arguments or facts, rather than respond to the limited issue raised by the Regional Director's motion to dismiss. The Board does not rely on the Tribe's brief in deciding that these appeals are moot.

effect, a nullity.<sup>5</sup> And now that it has expired by its own terms without having become effective, Appellant's appeal from the decision is moot.

Appellant acknowledges that the effect of section 2.6 is to render the Regional Director's recognition decision without effect, *see* Appellant's Opposition to Appellee's Motion to Dismiss, at 7, but Appellant nevertheless seeks an adjudication by the Board on the merits to obtain vindication related to actions taken by tribal members after the decision was issued. If, as Appellant contends, the Howard faction took actions based on the Regional Director's recognition decision, or even misrepresented to third parties that her decision was effective, that conduct cannot be attributable to the decision actually being in effect — it was not. *Cf. Quantum Entertainment*, 44 IBIA at 208 n.25 (entity that acted on Regional Director's legally ineffective decision assumed the attendant risks). Appellant's complaints against other tribal members are not within the scope of this appeal, and his recourse against them, if any, lies with tribal mechanisms, and not with the Board.<sup>6</sup>

The Regional Director's July 11, 2008, decision, announcing that BIA would not recognize the tribal court's TRO as valid, was not by its terms limited in duration. But neither was it issued with any stated justification. At best, the only apparent justification for issuing the decision emerged in the July 31, 2008, recognition decision, which relies in part on the July 11 decision, thus making it a predicate for the recognition decision. When the recognition decision lapsed by its own terms, any justification for the predicate lapsed as

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<sup>5</sup> Not only was the decision without legal effect, but the Board has long held that once an appeal is filed with the Board, BIA loses jurisdiction over the matter. *Bullcreek v. Western Regional Director*, 39 IBIA 100, 101 (2003), and cases cited therein. Thus, we agree with Appellant that, to the extent the Regional Director's January 31, 2009, letter to Howard, which included appeal rights, purported to be a decision, it was issued without authority. The Regional Director had no jurisdiction to "declare" her prior decision as having expired, any more than she would have had authority to place it into effect. *See Hammerberg v. Acting Portland Area Director*, 24 IBIA 78, 78-79 (1993) (Area Director's reconsideration decision, made while an appeal was pending, was of no force or effect); *Wallace v. Aberdeen Area Director*, 26 IBIA 150, 153 (1994) (Area Director did not have authority to place his own decision into effect).

<sup>6</sup> Of course, the Regional Director's recognition decision, if made effective, would have been for the limited purpose of government-to-government relations with the Tribe, and the dispute between Appellant and Howard would still have been subject to final resolution of the of Tribe through tribal mechanisms. *See Poe v. Pacific Regional Director*, 43 IBIA 105, 113 (2006).

well. Thus, viewing the July 11, 2008, decision as an integral part of the recognition decision, we conclude that the appeal from that decision is also moot.<sup>7</sup>

Our confirmation that the Regional Director's decisions were without effect should be sufficient to end the matter. In several cases, however, in which the issue of whether a BIA decision has become moot is disputed, or the parties otherwise appear to desire to attach continuing significance to an admittedly moot decision, the Board has included in its order of dismissal an order vacating the underlying decision, to make it clear that the underlying decision had and has no force or effect. *See, e.g., Cloverdale Rancheria of Pomo Indians of California v. Pacific Regional Director*, 48 IBIA 308, 309, 312 (2009); *Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 275-76 (2005). We conclude that such action is appropriate by the Board in the present case to ensure that all parties fully understand that in granting the Regional Director's motion to dismiss this appeal as moot, no legal consequences may be deemed to have flowed from that decision.

### 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 Regional Director's decisions of July 11, 2008, and July 31, 2008, and dismisses these appeals as moot.<sup>8</sup>

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge

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<sup>7</sup> On the other hand, if we were to conclude that the appeal from the July 11 decision is not moot, we would summarily vacate it because, standing alone, it contains no factual or legal justification for its issuance. *See Parker v. Southern Plains Regional Director*, 45 IBIA 310, 322-23 (2007) (vacating a BIA decision intruding into tribal affairs that was issued without any factual or legal justification).

<sup>8</sup> On September 4, 2009, the Board received from the Regional Director a "Notice of Election" results, which encloses a letter from Howard, as Chief, to the Miami Agency Superintendent, BIA, informing BIA of the results of a tribal election held on June 6, 2009, in which Howard was elected Chief (and Appellant did not run for office). We need not consider whether the 2009 tribal election would otherwise render these appeals moot, and thus we have not solicited responses to the Regional Director's filing.