



INTERIOR BOARD OF INDIAN APPEALS

Governor Leslie Wandrie-Harjo v. Southern Plains Regional Director,
Bureau of Indian Affairs

54 IBIA 167 (12/06/2011)

Denying Reconsideration of:

54 IBIA 117

Related Board cases:

53 IBIA 121

54 IBIA 276

54 IBIA 332

59 IBIA 1

59 IBIA 36

59 IBIA 39

59 IBIA 97

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United States Department of the Interior

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GOVERNOR LESLIE WANDRIE-)	Order Denying Reconsideration
HARJO,)	
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-015-1
SOUTHERN PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	December 6, 2011

On October 19, 2011, the Board of Indian Appeals (Board) summarily dismissed two appeals, for lack of standing, from an August 23, 2011, decision (Decision) of the Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which the Regional Director purported to “withdraw” his earlier January 6, 2011, decision that the Board had previously vacated. *See Bighorse v. Southern Plains Regional Director*, 54 IBIA 117 (*Bighorse*) (dismissing appeals by Amber J. Bighorse, Cheyenne and Arapaho Tribal Council, and Governor Leslie Wandrie-Harjo); *see also Wandrie-Harjo v. Southern Plains Regional Director*, 53 IBIA 121 (2011) (*Wandrie-Harjo*) (vacating January 6 decision). The Board reasoned that none of the appellants had been adversely affected by the Regional Director’s action because, as Appellant Leslie Wandrie-Harjo had correctly observed, there was nothing for the Regional Director to withdraw. *See Bighorse*, 54 IBIA at 118. And because the Decision took no other action than to purportedly withdraw a nullity, i.e., took no other action that might adversely have affected the appellants, we dismissed the appeals, instead of purporting to “vacate” a Decision that could have no effect, while observing that the end result is the same. *See id.* at 118 n.3.

Appellant Leslie Wandrie-Harjo, as Governor of the Cheyenne and Arapaho Tribes of Oklahoma (Tribe),¹ seeks reconsideration of the Board’s dismissal of her appeal. Reconsideration of a Board decision will be granted only in extraordinary circumstances.

¹ This case involves a tribal government dispute. The Board’s caption of the case and reference to the official capacity in which Wandrie-Harjo filed her appeal and her petition for reconsideration, shall not be construed as expressing any views on the merits of the underlying dispute or on Wandrie-Harjo’s status.

See 43 C.F.R. § 4.315(a). We address each of Wandrie-Harjo's arguments, but conclude that her petition does not meet the standard for reconsideration.

First, Wandrie-Harjo argues that we erred in finding that she was not adversely affected by the Decision because, she contends, it did more than simply withdraw the January 6 decision, and constituted an affirmative decision by the Regional Director to withdraw from involvement in the tribal dispute. According to Wandrie-Harjo, that decision to withdraw from involvement is what has caused her injury. We considered and rejected this argument, *see* 54 IBIA at 118 n.3, and we are not convinced that we either misunderstood Wandrie-Harjo's argument or that we otherwise erred.²

Second, Wandrie-Harjo argues that the Board misinterpreted the thrust of her appeal, which she contends was not intended to challenge the Regional Director's action to withdraw the January 6 decision (i.e., to withdraw the decision that the Board had already vacated at Wandrie-Harjo's request). Instead, she states that her appeal was intended to seek review of the Regional Director's failure to take some affirmative action in the Decision to address and decide the merits of the tribal dispute, i.e., decide whom BIA will recognize as Governor of the Tribe, for government-to-government purposes. It was this failure to act, by the Regional Director, that Wandrie-Harjo contends she sought to appeal in seeking review of the Decision.

² Wandrie-Harjo argues that her interpretation of the Decision coupled with our dismissal of her appeal "suggests the BIA's withdrawal from this matter is reasonable." Petition for Reconsideration (Petition) at 5. But we rejected Wandrie-Harjo's interpretation as reading too much into the Decision, and now she reads too much into the Board's decision as well.

We note that Wandrie-Harjo's assertion that BIA has decided to withdraw from involvement in the tribal dispute is contradicted by several decisions relating to the tribal dispute that the Regional Director has issued and which are on appeal to the Board. *See Third Legislature of the Cheyenne and Arapaho Tribes v. Acting Southern Plains Regional Director*, Docket No. IBIA 11-151 (appeal from July 21, 2011, decision regarding a P.L. 93-638 proposal to contract Housing Improvement Program functions); *Amber J. Bighorse, Cheyenne and Arapaho Tribal Council, and Governor Janice Prairie Chief-Boswell v. Acting Southern Plains Regional Director*, Docket Nos. IBIA 12-020 (Bighorse and Tribal Council) and 12-021 (Prairie Chief-Boswell) (appeals from September 1, 2011, decision regarding tribal court). Indeed, Wandrie-Harjo concedes as much in noting the Regional Director's decision, now on appeal, to recognize the tribal court that Wandrie-Harjo contends is the legitimate tribal court. *See* Petition at 3 n.1.

In effect, Wandrie-Harjo characterizes her appeal as an appeal from inaction under 25 C.F.R. § 2.8. Wandrie-Harjo argues that when the Board vacated the January 6 decision, we imposed a mandate on the Regional Director to decide which individuals BIA would recognize as the Tribe's representatives for government-to-government purposes. And when the Decision failed to decide whom BIA would recognize as Governor of the Tribe, Appellant was injured and was entitled to appeal to the Board. Appellant errs in her understanding of the effect of our decision in *Wandrie-Harjo*, and of the result she would obtain even if we were to construe her appeal as challenging the Regional Director's inaction.

In *Wandrie-Harjo*, we vacated the January 6 decision because it was not supported by the administrative record, and our directive to the Regional Director was that he ensure that any decision issued on remand be supported by the record. We did not order him to issue a tribal recognition decision, and thus the failure of the Decision to do so did not violate any directive from the Board in *Wandrie-Harjo*. But assuming that his failure to do so adversely affected Wandrie-Harjo, it does not follow that the action actually taken by the Regional Director — the August 23 Decision from which she appealed — adversely affected her. Nor does it follow, as Wandrie-Harjo incorrectly assumes, that treating her appeal as an appeal from inaction — even if it provided a basis for finding that she was adversely affected — would provide the means for the relief that she seeks.

It is well-established that the scope of an appeal from inaction is limited to a review by the Board of whether BIA is required to take action in response to a demand for action, and does not include a determination of what that action should be. *See, e.g., Sandy Point Improvement Co. v. Northwest Regional Director*, 51 IBIA 277, 278 (2010). But in her notice of appeal, Wandrie-Harjo expressly asked the Board *not* to remand (i.e., refer) the matter to the Regional Director for a merits decision, but instead asked the Board to decide the underlying tribal government dispute. *See* Notice of Appeal at 3. Thus, assuming that we construed Wandrie-Harjo's notice of appeal too narrowly, we are not convinced that our dismissal was inappropriate because, had we construed it more broadly, we would still have found no basis for Wandrie-Harjo to maintain an appeal in which she sought relief that was not available from the Board — an assumption of jurisdiction over the merits. If Wandrie-Harjo believes that some Federal action is required of BIA, and that taking such action necessitates a decision by BIA on whom it will recognize as Governor of the Tribe, nothing in our dismissal of her appeal from the Decision precludes her from pursuing a demand

for such action, and appealing inaction in accordance with and within the constraints of § 2.8.³

Wandrie-Harjo contends that our dismissal would require her to re-start the process and request a decision from the Regional Director to recognize her as Governor of the Tribe, and that the adverse effects of requiring her to do so “cannot be overstated.” Petition at 5. But a § 2.8 demand for action, if BIA doesn’t respond, can ripen into appealable inaction in 10 days, *see* 25 C.F.R. § 2.8(b), less time than it took for Wandrie-Harjo to file her petition for reconsideration. Thus, even if we were convinced that her notice of appeal should have been construed as an appeal from inaction, and even if we disregarded the fact that Wandrie-Harjo sought relief that would not be available in such an appeal, we are not convinced that our dismissal of her appeal caused her such prejudice as to constitute extraordinary circumstances.

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 denies the petition for reconsideration.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

³ We note that although Wandrie-Harjo recites various adverse effects resulting from the fact that Janice Prairie Chief-Boswell (who claims to remain the Governor of the Tribe) retains control of tribal facilities and resources, it is not clear from either Wandrie-Harjo’s notice of appeal or her petition for reconsideration what specific request she made to BIA that required BIA action. A demand for recognition, standing alone, cannot form the basis for requiring BIA to do so. To the contrary, BIA must refrain from making a recognition decision, and thus interfering in a tribal dispute, unless and until some Federal action is required of BIA, which necessitates a recognition decision. *See, e.g., Alturas Indian Rancheria v. Pacific Regional Director*, 54 IBIA 138, 140 (2011) .