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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, GREAT FALLS DIVISION**

EAGLE BEAR, INC.,

Plaintiff,

vs.

THE BLACKFEET INDIAN NATION
and DARRYL LaCOUNTE,
DIRECTOR OF THE BUREAU OF
INDIAN AFFAIRS,

Defendants.

Cause No. 4:22-cv-00093-BMM

**PLAINTIFF'S SECOND
SUPPLEMENTAL BRIEF IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT
(DOC. 22)**

Plaintiff Eagle Bear, Inc. (“Eagle Bear”) submits this Second Supplemental Brief pursuant to the Court’s Order (Doc. 117).

QUESTIONS PRESENTED

The Court asked the parties to brief the following issue:

Whether, applying the Code of Federal Regulations as of January 5, 2009, the withdrawal of a timely-filed appeal to a BIA area director of a BIA decision to cancel a lease with a federally recognized tribal nation either:

- 1) retroactively voids the operation of the timely filing of a notice of appeal to cause the underlying cancellation to “remain ineffective” per 25 C.F.R. § 162.621, or
- 2) causes the underlying decision to become effective.

SUMMARY ANSWER

A party’s “withdrawal” of its appeal to a BIA regional director does not, in and of itself, have any operative legal effect. Only an order of the BIA regional director can resolve the appeal or give effect to a superintendent’s cancellation decision. The answer to both of the Court’s questions is, therefore, “no.” A party’s withdrawal does not void the notice of appeal nor does it revive the underlying decision.

DISCUSSION

For the reasons explained below, an appeal from a superintendent’s lease cancellation decision forever renders the superintendent’s decision “ineffective.” The BIA’s regulations make no provision for reinstatement or revival of a superintendent’s decision, and the IBIA has confirmed that no such reinstatement

can occur. Instead, the appealed decision will “remain ineffective” until superseded and replaced by the regional directors’ decision resolving the appeal.

Once the superintendent’s decision is appealed, the regional director must reach a decision and only the regional director’s decision can resolve the appeal. Although parties may request to withdraw an appeal, the regional director may grant or deny that request at its discretion. A party’s withdrawal does not, in and of itself, have any legal effect and only the regional director may resolve the appeal.

1. An appeal renders a superintendent’s cancellation decision forever “ineffective.” Only a regional director can thereafter cancel the lease.

The BIA’s regulations make clear that a superintendent’s decision will only ever become final and effective if “the time for filing a notice of appeal has expired and no notice of appeal has been filed.” 25 C.F.R. § 2.6(b).¹ Once an appeal is timely filed, “[n]o decision . . . shall be considered final so as to constitute Departmental action.” 25 C.F.R. § 2.6(a). The BIA eliminated any doubt about this rule’s application when it expressly confirmed and restated the rule with

¹ All references herein to C.F.R. Title 25 are to the April 2008 printing. The portions of Title 25 relevant to this brief—Chapter I, parts 2 and 162—were not modified between the April 2008 and April 2009 printings of Title 25. *See* <http://federalregister.gov> (returning no results to searches for documents affecting Title 25 parts 2 and 162 between 04/01/2008 and 04/01/2009). Thus, the rules in effect as of January 5, 2009 can be determined by reference to the 2008 printing.

respect to a superintendents' lease cancellation decision:

§ 162.621 When will a cancellation of a lease be effective?

A cancellation decision involving a[] . . . lease will not be effective until 30 days after the tenant receives a cancellation letter from us. The cancellation decision will remain ineffective if the tenant files an appeal

25 C.F.R. § 162.621 (emphasis added).²

The foregoing rules providing that a superintendent's decision will remain ineffective once an appeal is filed are the only rules regarding the effect of an appeal on a decision. The regulations make no provision for revival or reinstatement of the decision following an appeal, including after withdrawal of that appeal. Instead, the regulations make clear that the superintendent's decision will ultimately be supplanted by the regional director's decision on the appeal. Only the regional director's decision can give effect to the superintendent's decision.

To the extent the regional director decides to cancel a lease, the regional

² Section 162.621 refers to "agricultural leases." The term "agricultural" has been omitted from the above quotation because Section 162.621 applies to business leases like Eagle Bear's. *High Desert Recreation, Inc. v. Acting Western Regional Director*, 52 IBIA 30, 31 n.4 (2010) ("By its language, section 162.621 applies to decisions involving 'agricultural' leases, but that reference is an obvious error because the provision is located in Part 162, Subpart F — *Non-Agricultural Leases*. A substantively identical provision is found at section 162.254, under Subpart B — *Agricultural Leases*, and it appears that the drafters . . . failed to conform the language of section 162.621 to refer to non-agricultural leases We construe section 162.621 as applying to non-agricultural leases.")

director has two options. First, the director can issue a preliminary decision giving “immediate” effect to the cancellation if the director “determines that public safety, protection of trust resources, or other public exigency requires” such immediate effect. 25 C.F.R. §§ 2.6(a) & 162.621. The second and only other option the regional director has if it decides to cancel the lease is to resolve the appeal and issue a written decision to that end. 25 C.F.R. § 2.19(a). The director certainly can decide to affirm and incorporate the superintendent’s decision, but the superintendent’s decision itself “remains ineffective.” The regional director’s decision becomes the operative BIA action. *See* 25 C.F.R. §§ 2.6(a) & 162.621. “[N]o legal consequences may flow from” the superintendent’s decision following an appeal. *See Spicer v. Eastern Oklahoma Regional Director*, 50 IBIA 328, 331 (2009) (analyzing the effect of an appeal on a regional director’s decision, which is subject to the same 25 C.F.R. § 2.6(a) rules as a superintendent’s decision).

As the IBIA has made clear, no decision by the regional director—whether to affirm the superintendent’s decision or otherwise—reinstates or revives the superintendent’s decision. *See Iron v. Acting Rocky Mountain Regional Director*, 51 IBIA 264, 266 n.5 (2010) (“The Regional Director characterizes the evidence as insufficient to warrant ‘reinstatement of the leases,’ but, of course, the cancellation decision remained—and still remains—ineffective due to Appellant’s appeals.”). Instead, the regional director’s decision becomes the only operative decision of the

BIA upon resolution of the appeal. *See Spicer*, 50 IBIA at 331 (“[U]nless and until [a regional director’s decision] is made effective [by the IBIA], the decision has no legal effect, and no legal consequences may flow from it.”)

2. A request to withdraw an appeal has no operative legal effect unless and until the deciding official issues a decision.

Again, a superintendent’s cancellation decision will “remain ineffective” following an appeal. 25 C.F.R. §§ 2.6 & 162.621. Only the regional director can thereafter take final action for the BIA and cancel the lease. It follows that a party cannot give final effect to the superintendent’s decision.

A party can request to withdraw an appeal, or make whatever other motions it desires, but whether and how to resolve such a request and how to decide the appeal itself are matters of discretion for the regional director. Indeed, the BIA’s regulations make no provision for withdrawal of an appeal nor, in fact, for any resolution of an appeal other than by a regional director’s decision. 25 C.F.R. § 2.19(a); *see generally* Title 25, chapter I, part 2, C.F.R.; *compare* 25 C.F.R. §§ 2.502 & .503 (2023) (the BIA’s rules were amended in September 2023 to address withdrawals and make clear that a request for withdrawal will be followed by a decision of “the reviewing official”).

This outcome is consistent with the BIA’s practice. (Doc. 106 at ¶¶ 94-96). As BIA superintendent Stephen Pollock, deputy superintendent Cliff Hall, superintendent’s office realty officer Tracy Tatsey, regional director’s office realty

specialist Bernadine Pease, regional director's office realty specialist Jodi Wagner, and BIA superintendent Thedis Crowe all testified, the regional director would ultimately issue a decision resolving the appeal and identifying the outcome no matter how the appeal was resolved. (*Id.* at ¶ 96). Especially if the BIA intended to cancel a lease following an appeal, the regional director would have sent a letter stating that the Lease was cancelled. (*Id.* at ¶ 94).

Although regional director decisions are not published and, therefore, this testimony about regional director practices cannot be confirmed by documentary evidence, the testimony is consistent with the IBIA's published decisions. The IBIA reviews appeals from regional directors' decisions and applies similar procedural rules to those appeals. *See, e.g.*, 43 C.F.R. §§ 4.1(b)(2), 4.21(a), (c), 4.337 (2008). When confronted with a party's withdrawal or motion for voluntary dismissal, the IBIA considers the request and then issues a decision. *E.g.*, *Hall v. Northwest Regional Director*, 69 IBIA 41 (2023) (not acting on initial withdrawal request because of misunderstanding of facts stated in request); *Heald v. Northwest Regional Director*, 51 IBIA 163 (2010) (dismissing appeal after receiving a "Notice of Withdrawal" reporting settlement); *Norine Wells v. Northwest Regional Director*, 49 IBIA 213 (2009); *Oglala Sioux Stockgrowers v. Great Plains Regional Director*, 44 IBIA 10 (2006) (dismissing appeal after "motion to withdraw" and "response in support" of motion). Like the BIA employees who

have testified in this case, the IBIA acknowledges that a party's withdrawal is not effective in and of itself and, instead, is only given effect by an agency order. *See id.*

This practice is also consistent with federal courts' treatment of motions for voluntary dismissal of claims or appeals. Beyond the very preliminary stages of a matter, a party cannot unilaterally dismiss its claims. F. R. Civ. P. 41(a); Wright & Miller, 9 Fed. Prac. & Proc. Civ. § 2364 (4th ed.). Whether to accept the voluntary dismissal is left to the sound discretion of the court. Likewise, no appeal may be withdrawn or voluntarily dismissed by unilateral action of a party. Instead, whether to allow withdrawal of an appeal is left to the sound discretion of the appellate court, which may either accept or reject the appeal. F. R. App. P. 42(b); *Shellman v. U.S. Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975); *Am. Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 246 (2014); Wright & Miller, 16AA Fed. Prac. & Proc. Juris. § 3988 (5th ed.).

Of note to this case, appellate courts have denied motions to dismiss an appeal for untimeliness of the motion relative to the court's preparation of a ruling and the movant's apparent misunderstanding of the consequences of withdrawal. *Ford v. Strickland*, 696 F.2d 804, 807 (11th Cir. 1983); *Loc. 53 Int'l Ass'n of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969); *Am Auto Mfrs. Assn't v. Comm'r Mass. Dep't of Env't Prot.*, 31 F.3d 18, 23 (1st Cir. 1994); *see*

also Hall, 69 IBIA at 41. Here, Eagle Bear made its request for withdrawal late into the appeal process, after the 60-day deadline for a decision from the regional director, at the insistence of the regional director's office, and with the undisputed agreement and understanding of all parties that the lease would remain in effect. (Doc. 106, SSUF ¶¶ 81-90, 97-109).

The BIA's adoption of this rule—that a party's withdrawal request does not have any operative legal effect—is clear on the face of its regulation. The BIA's adoption of this rule also makes good policy sense. Here, despite notice, the Nation did not participate in the appeal and, in fact, expressly indicated to the BIA that it did not wish the lease to be cancelled. (Doc. 106, SSUF ¶¶ 76-77, 80). Thus, there was no party to oppose Eagle Bear's withdrawal. That does not, however, mean that Eagle Bear was in unilateral control of the appeal or that the regional director was bound to grant the withdrawal Eagle Bear requested. The BIA directed Eagle Bear's withdrawal and decided not to cancel the Lease after appropriately consulting the Nation and the Nations head of the Land Department confirmed that the Nation wanted the Lease to continue. (Doc. 106 at ¶¶ 80-90).

3. Eagle Bear's January 5, 2009 letter withdrawing the appeal has no independent, operative legal effect. It is simply evidence of the Regional Director's decision not to cancel the Lease.

Eagle Bear was, therefore, unable unilaterally to withdraw the appeal, void the appeal, revive the superintendent's decision, or otherwise give effect to the

superintendent's cancellation decision. Only the Regional Director had the power to cancel the lease after Eagle Bear filed its appeal.

The question presented by Eagle Bear's claims in this matter and by the parties' summary judgment briefing is, therefore, what decision did the Regional Director make? Over 15 years have passed since the appeal was filed, and no record of a written decision by the BIA regional director has survived. Nevertheless, the Regional Director's decision to affirm the Lease is crystal clear from the record for all the reasons explained in Eagle Bear's previous briefing. (Docs. 23, 50, 68, 105, 113). All parties—Eagle Bear, the Nation, and the BIA—agreed that the Lease would remain in full force and effect. (Doc. 106 at ¶¶ 80-81, 85). Rents were subsequently collected, show cause letters were sent, a decision to cancel the Lease in 2017 was issued, and then that cancellation decision was overturned on appeal. (Doc. 106 at ¶¶ 33-35, 97-109). Every witness has sworn under oath that it was their intent following the events in 2008 and 2009 that the Lease remain in full force and effect and they all operated accordingly for the next dozen years. The totality of the circumstances unmistakably confirms that the Regional Director accepted Eagle Bear's curing rental payments and allowed Eagle Bear to continue under the Lease. (*See* Doc. 23 at 22-27).

CONCLUSION

For the foregoing reasons and the reasons identified in Eagle Bear's previous briefing, the Court should grant Eagle Bear's Motion for Partial Summary Judgment and deny the Nation's Motion for Summary Judgment.

Dated this 12th day of October, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E) and the Court's Order (Doc. 117), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and does not exceed ten pages in length, excluding the Caption, the Certificates of Service and Compliance, Tables of Contents and Authorities, and Exhibit Index.

Dated this 12th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2023, a true and correct copy of the foregoing was delivered by the following means to the following:

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