



INTERIOR BOARD OF INDIAN APPEALS

Executive Branch of the Cheyenne and Arapaho Tribes of Oklahoma;
Fifth Legislature of the Cheyenne and Arapaho Tribes; and Darrell Flyingman
v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

62 IBIA 216 (02/23/2016)

Related Board cases:

53 IBIA 121
54 IBIA 117
54 IBIA 167
54 IBIA 276
54 IBIA 332
59 IBIA 1
59 IBIA 36
59 IBIA 39
59 IBIA 97



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

EXECUTIVE BRANCH OF THE)	Order Affirming Decision in Part
CHEYENNE AND ARAPAHO TRIBES)	and Dismissing Appeals in
OF OKLAHOMA; FIFTH)	Remaining Part
LEGISLATURE OF THE CHEYENNE)	
AND ARAPAHO TRIBES; AND)	
DARRELL FLYINGMAN,)	
Appellants,)	Docket Nos. IBIA 14-076
)	14-077
v.)	14-078
)	
ACTING SOUTHERN PLAINS)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	February 23, 2016

The Executive Branch of the Cheyenne and Arapaho Tribes of Oklahoma (Executive Branch), the Fifth Legislature of the Tribe (Fifth Legislature), and Darrell Flyingman (Flyingman), appealed to the Board of Indian Appeals (Board) from a February 10, 2014, decision (Decision) by the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA).¹ The Regional Director announced that BIA had decided to unilaterally modify nine existing Indian Self-Determination and Education Assistance Act (ISDA) contracts between BIA and the Cheyenne and Arapaho Tribes of Oklahoma (Tribe), for the purpose of adding funds to those contracts for Calendar Year (CY) 2014. The Regional Director found that the leadership of the Tribe was a matter of dispute, but concluded that funding could be added to the ISDA contracts without requiring him to make a tribal leadership recognition decision.

¹ This case involves a tribal dispute. The Board’s references to actions taken by or on behalf of the Tribe, tribal entities, or tribal officials, and the Board’s use of titles claimed by various individuals, shall not be construed as expressing any view on the status of those individuals or entities, as a matter of tribal law; on the underlying merits of the dispute; or on the extent, if any, to which there remains a live controversy within the Tribe over matters raised in these appeals.

The Executive Branch does not appeal from the addition of funding to the Tribe's contracts, nor does it contend that it has been unable to administer the contracts with the additional funding, but contends that it was arbitrary and capricious for the Regional Director not to make a tribal leadership determination as part of the funding decision, and argues that the Regional Director was required to recognize Eddie Hamilton as the new Governor of the Tribe. The Executive Branch fails to demonstrate that it was unreasonable for the Regional Director to refrain from issuing a tribal leadership recognition decision as part of the decision to add funding to existing ISDA contracts, particularly when the Executive Branch identifies no request from Hamilton to BIA requesting such recognition. Therefore, we affirm the Decision as challenged by the Executive Branch.

We dismiss the Fifth Legislature's appeal from the Decision for lack of standing, based on the Board's earlier decisions dismissing appeals filed by the same group in the name of the Tribe's Legislature. See *Bighorse v. Southern Plains Regional Director*, 59 IBIA 1, 4, 10-11, 18-20 (2014); *Third Legislature v. Acting Southern Plains Regional Director*, 54 IBIA 276 (2012). We do not address the Fifth Legislature's appeal further.

Appellant Flyingman contends² that he—not Hamilton—became the Tribe's Governor in January 2014, following what he contends was the only legitimate election proceeding conducted in the Fall of 2013. Flyingman contends that an Election Commission chaired by Frederick Blackbear declared him elected Governor, as a matter of law, after determining that Flyingman was the only candidate to file for that position with the Blackbear Election Commission. Flyingman argues that the Regional Director's decision to add funding to the ISDA contracts must be set aside because the underlying contracts were not lawfully executed under the Tribe's prior administration, and because

² There is some question whether there is still, in fact, a live controversy within the Tribe over Flyingman's claim to have become Governor of the Tribe in January 2014. Flyingman has participated in proceedings conducted by the tribal court that ruled in favor of Hamilton following the 2013 elections, in one case filing a motion to withdraw his case against the Executive Branch-supported Election Commission, and apparently conceding the validity of a Supreme Court appointment made by Janice Prairie Chief-Boswell (Boswell), whom the Executive Branch contends was Governor for an entire 4-year term preceding Hamilton. See Executive Branch Request for Leave to Supplement Record, Apr. 22, 2015, Ex. 1 (Motion by Flyingman to withdraw case), and Ex. 2 (Trial Court order dismissing case with prejudice). In the proceedings before the Board, Flyingman rejects the Executive Branch's contention that he has accepted the tribal court that rejected his claims. For purposes of this decision, our characterization of the controversy is based on the briefs that were filed with the Board.

funding the contracts has the practical effect of supporting Hamilton, whose administration apparently assumed control of the contracts from the prior tribal administration. We dismiss Flyingman's appeal in part because the Decision was limited to adding funding to existing contracts, and we are not convinced that the validity of the underlying contracts is properly raised by Flyingman in this appeal. And to the extent that Flyingman contends that the Regional Director erred by failing to recognize him as Governor of the Tribe, we affirm the Decision.

Background

In 2009, Boswell was elected Governor of the Tribe for a 4-year term, beginning in January 2010. Thereafter, a dispute arose, and Leslie Wandrie-Harjo (Harjo), Boswell's Lieutenant Governor, claimed that Boswell had been removed from office and replaced by Harjo. In three decisions issued in 2011 and 2012, the Regional Director recognized Boswell for certain purposes relating to the renewal or administration of various ISDA contracts between BIA and the Tribe. The first two decisions were appealed by Harjo and others; the third decision was appealed only by a group identifying itself as the Tribe's Third Legislature. *See Bighorse*, 59 IBIA at 3. The Board placed all three Boswell recognition decisions into effect while the appeals to the Board were pending.

In 2011, the Regional Director also issued a decision to recognize the composition of the Tribe's court, which the Boswell faction appealed to the Board. The Regional Director's court composition decision did not directly address the Governorship of the Tribe, but the court BIA recognized in the decision was siding with Harjo in the dispute. The Board declined to place the court composition decision into effect, and eventually vacated the decision. *Bighorse*, 59 IBIA at 2, 5-7.

In 2012 and 2013, Boswell executed nine multi-year contracts with BIA for the Tribe to administer a variety of programs under ISDA. All of the contracts extended at least through December 31, 2014. Supplemental Administrative Record (Supp. AR) 1-9.³ The ISDA contracts are funded on a Calendar Year (CY) basis, through Annual Funding Agreements (AFAs). Negotiations between BIA and the Tribe for the next year's AFA must commence no later than 120 days prior to the beginning of the new calendar year. *See, e.g.*, Initial Agreement, Contract A12AV00517 (Supp. AR 1 at 147, 153); *see also*

³ The Regional Director's initial administrative record submitted to the Board did not include the contracts that are subject to the Decision. The Board ordered the Regional Director to supplement the record with copies of the contracts. That supplemental record was received by the Board on May 19, 2014, and the parties were provided a table of contents to the supplemental record prior to briefing.

25 C.F.R. § 900.12 (tribe should submit an AFA proposal to BIA at least 90 days before the expiration date of the existing AFA). With exceptions not relevant here, BIA may not decline a tribe's proposed successor AFA if it is substantially the same as the prior AFA. 25 C.F.R. § 900.32. Amendments to an ISDA contract require the tribe's consent, with an exception incorporated in ISDA contracts, based on statutory model language, which allows BIA to unilaterally modify an ISDA contract for the purpose of adding funding to an AFA. *See, e.g.*, Agreement for Award/Contract A12AV00518 (Supp. AR 2 at 105, 114).

In the Fall of 2013, while the eight appeals decided in *Bighorse* were still pending before the Board, two tribal election commissions—one aligned with the Boswell faction and the other with the Harjo faction—conducted competing election proceedings for the next 4-year term, to commence in January 2014, for Governor of the Tribe. In an election held by one Election Commission, Eddie Hamilton was declared the winner, by a final vote count of 723 to 722, defeating Roberta Hamilton. Response of Executive Branch, Apr. 7, 2014, Ex. 1 (Final Election Results 11/13/2013).⁴ Flyingman and Roberta Hamilton challenged the election in tribal court, but their challenges were rejected and Hamilton was declared Governor.⁵ *Id.* (In re Governor and Lieutenant Governor of the Cheyenne and Arapaho Tribes, Case Nos. SC-2013-03, SC-2013-06, and SC-2013-08 (Cheyenne and Arapaho Supreme Court, Dec. 23, 2013)).

Another Election Commission, chaired by Frederick Blackbear and accepted by the Harjo faction, also conducted election proceedings for Governor in the Fall of 2013. Only Flyingman filed with that Election Commission as a candidate for Governor, and under tribal law, an unopposed candidate may be declared as elected. Thus, the Blackbear Election Commission declared Flyingman as having been elected by default.

Both Hamilton and Flyingman were sworn into office in January 2014 by individuals aligned with their respective factions.⁶ The Regional Director's administrative

⁴ Boswell apparently sought re-election but was eliminated in a primary election. *Bighorse*, 59 IBIA at 11 n.17.

⁵ Flyingman apparently sought to run for Governor in the election conducted by the Election Commission recognized by the Boswell faction, but was determined to be disqualified. Flyingman challenged Hamilton's election in the tribal court that the Executive Branch contends is the lawful tribal court, but he also took the position that the tribal court that had sided with Harjo was the lawful tribal court.

⁶ *See* Executive Branch Response to Motion to Make Decision Effective, Apr. 7, 2014, Ex. 1 (Copies of oaths of office and Webber Court decision declaring Hamilton as elected); Reply of Interested Party Judicial Branch ["Arrow Court"], Apr. 18, 2014, Ex. F (In Re (continued...))

record includes a notice from the Boswell-backed Election Commission certifying a tie between Eddie Hamilton and Roberta Hamilton in the election for Governor; a press account reporting the final results of that race as 749 to 739 (based on a recount),⁷ but noting that challenges had been filed with the Tribe's Supreme Court; and a notice from the Blackbear Election Commission declaring Flyingman elected as an unopposed candidate. *See* AR 3 – 6. The record does not include any correspondence to BIA from either of the Election Commissions, or from Hamilton or Flyingman, regarding the election results or the Tribe's ISDA contracts, or requesting recognition by BIA of the election results.⁸

On February 10, 2014, the Regional Director issued the decision that is the subject of these appeals. The Regional Director announced that BIA has decided to fund nine ISDA contracts with the Tribe using “the unilateral modification procedure allowed” in ISDA contracts. Decision at 1; *see also* 25 U.S.C. § 4501(c) (Model Agreement § 1(e)(2)(B)). According to the decision, the unilateral modifications to the contracts, once finalized, would result in providing direct program funds and contract support funds to the Tribe. Decision at 1. The Decision does not purport to approve the renewal of any ISDA contracts or the renewal of any AFAs with the Tribe.

The Regional Director addressed the tribal dispute by stating that the “issue of who constitutes the recognized tribal government of the [Tribe] is currently a matter of dispute and uncertainty since the two alleged tribal elections that were held in late 2013.” *Id.* According to the Regional Director, BIA was “aware of three persons claiming to be the rightful Governor” of the Tribe. *Id.* After discussing the general doctrine requiring non-interference by the Federal government in internal tribal affairs, and the exception allowing or requiring BIA to make an interim recognition decision during a tribal government dispute when necessary for government-to-government purposes, the Regional Director

(...continued)

Administration of Oaths of Office, Case No. SC-AD-2014-01 (Cheyenne and Arapaho Supreme Court, Jan. 6, 2014)) (Order to “memorialize” that a member of the Arrow Court had sworn Flyingman into office and to memorialize that he became the lawful Governor); *see also* *Bighorse*, 59 IBIA at 4-5 (discussion of “Arrow” and “Webber” courts).

⁷ This tally appears to have been based on the first recount; a second recount apparently resulted in the 723-722 final result.

⁸ In addition to ordering the Regional Director to complete the administrative record by submitting copies of the nine ISDA contracts and related documents subject to the Decision, the Board specifically ordered the Regional Director to submit copies of any correspondence from Boswell, Harjo, Hamilton, or Flyingman, to BIA, or from BIA to any of those individuals, regarding 2014 funding for the ISDA contracts.

concluded that BIA's ability to unilaterally modify the contracts to add funding made it unnecessary for him "to make a tribal leadership determination at this time." *Id.* at 3 (unnumbered).

The Executive Branch appealed to the Board, characterizing the Decision as "refusing to defer to and be bound by" decisions of tribal forums that the Executive Branch contends confirmed that Hamilton was elected Governor. Executive Branch Opening Brief (Br.), Oct. 29, 2014, at 2. The Executive Branch does not appeal from the decision to add funding to the Tribe's ISDA contracts, and does not contend that it has been unable to administer the ISDA contracts, but argues that the Regional Director's decision to refrain from making a tribal leadership recognition decision, as part of the funding decision, placed a "cloud of instability and doubt around the tribal election." Executive Branch Notice of Appeal, Mar. 14, 2014, at 2.

The Fifth Legislature and Flyingman also appealed to the Board, construing the Decision as effectively siding with Hamilton by adding funds to the ISDA contracts, because the Hamilton Administration apparently assumed control over the contracts and programs from the Boswell Administration. According to Flyingman, the funding decision should be vacated because the underlying ISDA contracts executed by Boswell were not properly authorized by the Tribe.

On May 30, 2014, the Board placed the Decision into effect, rejecting arguments by Flyingman and the Fifth Legislature that it would be in the best interest of the Tribe to cut off all ISDA funding to the Tribe until the appeals that were pending before the Board were resolved.

On July 10, 2014, prior to briefing on the merits of these appeals, the Board issued its decision in the eight appeals involving BIA's recognition of Boswell and the composition of the tribal court. The Board vacated BIA's court composition decision as arbitrary and capricious, and dismissed the remaining appeals involving the Boswell – Harjo competing claims to the Governorship because neither contended that they were still Governor of the Tribe. *Bighorse*, 59 IBIA at 2-4. The Board dismissed the Legislature's appeals for lack of standing. *Id.* at 4. Flyingman, as the purported successor-in-interest to Harjo, sought reconsideration of the *Bighorse* decision, construing it as having recognized the election of Hamilton, and of our decision to vacate BIA's court composition decision. The Board denied reconsideration. *Bighorse v. Southern Plains Regional Director*, 59 IBIA 97, 99 (2014).

Discussion

I. Jurisdiction

We first address our jurisdiction to consider these appeals.⁹ We conclude that the Regional Director's decision may be properly characterized as a "pre-award" ISDA decision, falling under 25 C.F.R § 900.150(i), because the decision whether to amend an ISDA contract necessarily precedes the amendment itself. As we have explained, the fact that a decision whether to amend an existing ISDA contract post-dates the original contract does not render the decision on a proposed amendment a "post-award" decision, within the meaning of the ISDA regulations governing the Board's jurisdiction. *See Shoshone-Bannock Tribes v. Bureau of Indian Affairs*, 61 IBIA 98, 104-05 (2015). And as is evident from the appeals in this case, a decision by BIA to amend an ISDA contract, even unilaterally, may well implicate corollary issues regarding the government-to-government relationship with a tribe. In addition, we note that none of the claims raised in these appeals is based on contract rights or remedies that would arise as a result of BIA's amendments to the contracts. Thus, we conclude that we have jurisdiction to consider these appeals.

II. Merits

A. Executive Branch Appeal

Whether or not a tribal leadership determination by BIA would have been a permissible part of the decision to add funding to the ISDA contracts, we are not convinced that it was an abuse of discretion for the Regional Director to refrain from doing so in this case. First, the record supports the Regional Director's statement that the leadership of the Tribe was a matter of dispute and uncertainty, showing as it does that there had been competing elections, and that even the election embraced by the Executive Branch was the subject of dispute between Eddie Hamilton and Roberta Hamilton. *See* AR 4. Second, as the Executive Branch itself acknowledges, BIA's earlier court composition decision—supported by one faction, opposed by another, and still pending before the Board—itsself created uncertainty. Executive Branch Opening Br. at 3. The fact that the Board *subsequently* vacated BIA's court composition decision as arbitrary and capricious does not mean that, at the time the Decision was issued, the Regional Director was incorrect in finding that a dispute existed. And because the court composition decision was still pending, we find no basis to conclude that the Regional Director erred in failing to "defer

⁹ The Board specifically solicited briefing from the parties on the Board's jurisdiction to consider an appeal from BIA action to unilaterally modify an existing ISDA contract. *See* Order, Mar. 28, 2014, at 2.

to” the rulings of the Tribal Court that the Executive Branch contends is the lawful court and contends has been accepted and affirmed in various tribal forums.

Finally, as noted earlier, there is no evidence in the record that Hamilton ever sought recognition by BIA, either in connection with administration of the ISDA contracts or otherwise. We do not hold that an explicit request is required in all cases, before it may be necessary or permissible for BIA to issue a recognition decision, but in the absence of such a request, an appellant undoubtedly has a higher burden in demonstrating that BIA erred by declining to issue such a decision. In the present case, we conclude that the Executive Branch has failed to demonstrate that it was unreasonable for BIA to add funding to the Tribe’s ISDA contracts without including a tribal recognition decision.

B. Flyingman Appeal

Flyingman’s primary argument in his appeal to the Board is that the Decision to add funding to the ISDA contracts should be vacated because the underlying contracts were not properly authorized by the Tribe and thus not properly entered into by Boswell. Those issues, at most, might have been implicated by the appeals from the Boswell recognition decisions; we are not convinced that they are properly raised in this appeal.¹⁰ Thus, to the extent Flyingman seeks to challenge the underlying contracts, we dismiss his appeal as outside the scope of the Board’s review of the Decision. *See* 43 C.F.R. § 4.318.

In addition, as is the case with Hamilton, there is no evidence in the record that Flyingman contacted BIA with a request that he be recognized as Governor of the Tribe, whether in connection with BIA action on the Tribe’s ISDA contracts or any other BIA action that might be required and which would involve the government-to-government relationship with the Tribe. Thus, to the extent Flyingman seeks to argue that the Regional Director erred in failing to issue a recognition decision, and in failing to recognize him as Governor of the Tribe, we conclude that he has not met his burden to show that the Regional Director acted unreasonably, and thus we affirm the Decision.¹¹

¹⁰ The validity of ISDA contracts with terms extending beyond Boswell’s term as Governor conceivably might have been a basis on which to argue that the appeals from the Boswell recognition decisions were not moot, but that argument was not raised in the appeals decided in *Bighorse*. On the other hand, as noted, Harjo did not appeal from the third Boswell recognition decision, which might well have precluded either Harjo or Flyingman, as her purported successor-in-interest, from defeating the suggestion of mootness in those appeals.

¹¹ We disagree with Flyingman’s suggestion, *see* Flyingman Notice of Appeal, Mar. 13, 2014, at 1, that the Regional Director lacked authority to issue a decision to fund the
(continued...)

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 affirms the Regional Director's February 10, 2014, decision in part, with respect to the appeals by the Executive Branch and Flyingman, and dismisses the appeals in remaining part.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

(...continued)

contracts, based on the fact that the appeals from the Boswell recognition decisions were still pending before the Board. Each of the Boswell recognition decisions had been placed into effect by the Board, thus allowing BIA to implement the decisions and, as necessary, to take further action with respect to ISDA contracts between the Tribe and BIA.