



INTERIOR BOARD OF INDIAN APPEALS

Amber J. Bighorse, Cheyenne and Arapaho Tribal Council, and Governor Janice Prairie Chief-Boswell; Executive Branch of the Cheyenne and Arapaho Tribes, and Housing Authority of the Cheyenne-Arapaho Tribes of Oklahoma; Governor Leslie Wandrie-Harjo and Third Legislature, Cheyenne and Arapaho Tribes v. Southern Plains Regional Director, Bureau of Indian Affairs

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

Third Legislature v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

59 IBIA 1 (07/10/2014)

Petition for Reconsideration Denied:

59 IBIA 97

Related Board cases:

53 IBIA 121

54 IBIA 117

54 IBIA 167

54 IBIA 276

54 IBIA 332

59 IBIA 36

59 IBIA 39

62 IBIA 216

Introduction

These eight appeals to the Board of Indian Appeals (Board), from five discrete decisions of the Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), involve the same underlying tribal dispute that developed within the Cheyenne and Arapaho Tribes (Tribe) during the administration of Governor Janice Prairie Chief-Boswell (Boswell). Boswell was elected to a 4-year term that began in January 2010 and which expired in January 2014. In each of these appeals, one or more individuals or entities claiming some official status within the Tribe¹ challenged one or more of the Regional Director's decisions as improperly interfering with the internal affairs of the Tribe, and as making an incorrect determination as a matter of tribal law concerning the tribal dispute. Conversely, for decisions they viewed as favorable, the tribal parties supported one or more of the Regional Director's decisions, in whole or in part, as having been properly issued and as correct. The decisions, the appeals, and our dispositions, fall into four groups:

(1) Court Composition Decision.² Amber Bighorse, the Tribal Council,³ and Boswell appealed from the Regional Director's decision to summarily affirm a decision by BIA's Concho Agency Superintendent (Superintendent) to recognize the composition of the Tribe's courts.⁴ We vacate the Court Composition Decision, because it was arbitrary and capricious for the Regional Director to affirm the Superintendent's decision without addressing the numerous and substantial objections raised by Boswell in her appeal from that decision. Even if we were to look to the Superintendent's decision to provide the necessary reasoning, we would vacate the court composition decisions because the Superintendent provided no proper justification for making a decision on the composition of the Tribe's courts, and thus violated the prohibition against interfering in the internal affairs of a tribe in the absence of a justification for BIA to take action on a separate matter

¹ The Board's references to actions taken by or on behalf of tribal officials, tribal entities, or the Tribe, and the Board's use of titles claimed by various individuals, shall not be construed as expressing any view on the underlying merits of the dispute.

² Letter from Regional Director to "All Interested Parties," Sept. 1, 2011 (Court Composition Decision).

³ Under a Constitution adopted in 2006, the Tribe has four branches of government. The Tribal Council consists of all member of the Tribe eighteen years of age and older. Constitution of the Cheyenne and Arapaho Tribes, Art. II, § 2, and Art. V, § 1 (Administrative Record (AR) Tab 30). Unless stated otherwise, references to the administrative record are to the record submitted for the Court Composition Decision, Docket Nos. IBIA 12-020 and 12-021.

⁴ Docket Nos. IBIA 12-020 (Bighorse and Tribal Council) and 12-021 (Boswell).

which, in turn, necessarily implicates and requires a BIA determination on internal tribal matters.

(2) Housing Improvement Program (HIP) Decision.⁵ Boswell and the Housing Authority aligned with Boswell jointly appealed from the Regional Director's decision rejecting the Housing Authority's proposal to contract with BIA for HIP under the Indian Self-Determination and Education Assistance Act (ISDA).⁶ Because BIA subsequently approved the HIP proposal, there is no longer a controversy between these appellants and the Regional Director on this matter, and we dismiss this appeal as moot.

(3) First and Second Boswell Recognition Decisions.⁷ Leslie Wandrie-Harjo (Harjo) and the Tribe's Third Legislature (through individuals claiming to constitute or control the Legislature), appealed from decisions by the Regional Director to recognize Boswell, on an interim basis (90 days and 60 days, respectively), as the Governor of the Tribe, for certain ISDA contract-related purposes that required BIA action.⁸ Harjo, who was elected as Boswell's Lieutenant Governor, contended that Boswell was subsequently removed from office by the tribal court and by the Tribe's Legislature, and that she (Harjo) succeeded Boswell as Governor for the remainder of Boswell's term. In their appeals, both Harjo and the Third Legislature sought, as relief, orders recognizing Harjo as Governor. We dismiss these appeals as moot because Harjo does not still claim to be the Governor, and in response to a suggestion of mootness, she does not contend that an order declaring her to be the Governor is either available or would provide her with any legally consequential relief.

(4) Third Boswell Recognition Decision.⁹ Only the Third Legislature appealed from a third Boswell recognition decision of the Regional Director, to recognize Boswell's

⁵ Letter from Regional Director to Ida Hoffman, Acting Executive Director, Cheyenne-Arapaho Housing Authority, Sept. 9, 2011 (HIP Decision) (Docket No. IBIA 12-051 AR Tab A8).

⁶ Docket No. IBIA 12-051.

⁷ Letter from Regional Director to Boswell, Dec. 15, 2011 (90-day interim recognition) (First Recognition Decision) (Docket Nos. IBIA 12-065 and 12-066 AR Tab 6); Letter from Regional Director to Boswell, May 24, 2012 (60-day interim recognition) (Second Recognition Decision) (Docket Nos. IBIA 12-123 and 12-126 AR Tab 1).

⁸ Docket Nos. IBIA 12-065 (Harjo) and 12-066 (Third Legislature); and 12-123 (Harjo) and 12-126 (Third Legislature).

⁹ Letter from Regional Director to Boswell, Aug. 15, 2012 (recognition of Boswell's signature in order to process ISDA payments to the Tribe) (Third Recognition Decision).

signature as the authorized tribal signature for certain ISDA contract-related purposes that required BIA action.¹⁰ Although the mootness doctrine would also support dismissal of this appeal, we dismiss it for lack of standing. The Third Legislature's standing—its entitlement to appeal to the Board—is a threshold issue that was raised and briefed when only the Third Legislature, and not Harjo, appealed from this decision. The Third Legislature did not dispute the arguments raised by Boswell that as a matter of Tribal constitutional law, the Legislature is not entitled to appeal the Regional Director's decision to the Board because it lacks capacity to bring suit as a plaintiff-appellant in a non-tribal forum. Thus, we conclude that the Legislature has not demonstrated that it is entitled to appeal from the Regional Director's decisions and we dismiss its appeal from the Third Recognition Decision accordingly, as well as its appeals from the decisions that were also challenged by Harjo.

Background

I. Introduction

In 2009, Boswell was elected Governor of the Tribe for a 4-year term, beginning in January 2010. Thereafter, a dispute within the tribal government arose, and a faction of the Tribe aligned with Harjo claimed that Boswell was removed from office through a combination of tribal court orders and action by the Legislature, and that Harjo had succeeded Boswell as Governor. Boswell contended that the tribal court orders purporting to suspend or remove her from office exceeded the constitutional authority of the Tribe's judicial branch, and that the individuals issuing or upholding those orders were no longer tribal judges or justices. According to Boswell, the individuals purporting to constitute the Tribe's Supreme Court were individuals whose terms as justices had expired, and who had been replaced by Boswell's nominees when neither the Legislature nor the Tribal Council disapproved them in the manner and within the time periods prescribed by the Tribe's Constitution. Boswell also contended that the Legislature did not lawfully impeach and remove her because it failed to obtain the constitutionally required unanimous vote for taking such action.

In response to Boswell's nominations to fill four positions on the Tribe's Supreme Court, the Tribe's Supreme Court Justices who were in office at the time of the nominations (Dennis W. Arrow, Enid K. Boles, Katherleen R. Guzman, and Lindsay Robertson) ("Arrow Court"), issued, *sua sponte*, a preemptive order to enter "holdings" interpreting the Tribe's Constitution, under which Boswell's appointments would be invalid. See *In re: The Judicial Branch of the Cheyenne and Arapaho Government*, No. SC-AD-

¹⁰ Docket No. 13-002.

2010-07, Second Supplemental Order at 18-20 (Cheyenne-Arapaho S. Ct. Aug. 12, 2010) (AR Tab 26, Ex. H).¹¹

Boswell, supported by an opinion issued by the Tribe's Attorney General, *see* AR Tab 18, Ex. 5, disregarded the order of the Arrow Court and swore in her nominees for the Tribe's Supreme Court, consisting of Daniel Webber, Mary Daniel, John Ghostbear, and Jennifer McBee ("Webber Court"). By December 2010, trial judge Bob Smith had declared Boswell as "suspended" from office due to her failure to comply with court orders, and the Webber Court had issued orders nullifying Smith's orders and nullifying various other actions by the members of the Arrow Court against Boswell and those aligned with her.

II. Court Composition Decision

On December 29, 2010, the Acting Superintendent sent a letter to Boswell, with copies to Harjo, the Legislature, and the "Court." The Acting Superintendent stated as a general proposition that in order for BIA "to deal with tribes and their subordinate entities," BIA must determine "that the tribal officials have authority to act on behalf of the Tribe under their tribe's constitution." Letter from Acting Superintendent to Boswell, Dec. 29, 2010 (AR Tab 29). The Acting Superintendent stated that the Agency was "faced with a complex and confusing situation" in which there were two panels of Supreme Court Justices, a new trial judge, a tribal court order purportedly suspending Boswell from office and designating or appointing Harjo in her place, "and numerous conflicting court orders concerning these and related actions." *Id.* The Acting Superintendent stated that because BIA did not have any certainty that the tribal court or Supreme Court is "properly composed or that their actions are valid," he was "prepared to review the court and its composition to determine which parties may have the legitimate claim to any positions." *Id.* According to the Acting Superintendent, "[t]his will then assist us in determining the validity of the several court orders that have been issued." *Id.* The Acting Superintendent solicited documentation from the parties on the make-up of the trial court and Supreme Court.

Both the Boswell and Harjo factions made submissions to the Superintendent, with Boswell arguing that it was improper for the Superintendent to issue any court composition decision, and in the alternative arguing that her Supreme Court nominees were properly confirmed and installed as a matter of tribal law and consistent with Tribal Supreme Court precedent. Harjo argued that the Arrow Court should be recognized and that BIA should

¹¹ The Second Supplemental Order itself was prompted by an ongoing dispute between the Judicial Branch and Boswell over compensation for Bob Smith as Chief Judge of the Tribe's trial court.

issue a written statement acknowledging her as the Acting Governor of the Tribe due to Boswell's suspension by the tribal court.

On March 28, 2011, the Superintendent issued a decision in which she concluded that the Agency would recognize the Tribe's Supreme Court as consisting of the Arrow Court, and would recognize Bob Smith (who purported to have suspended Boswell) as the validly seated trial court judge. Letter from Superintendent to Boswell, Mar. 28, 2011, at 4 (unnumbered) (AR Tab 19).

The Superintendent began her decision by noting that the Tribe has ISDA contracts through which it receives funding for the tribal courts, and that "in order to assure that the contract is in compliance and the funds used properly, it is necessary to determine the legitimacy of the actions taken by the two factions in regards to the tribal court." *Id.* at 1. The Superintendent stated that BIA had "been advised that there may be pending matters under the Indian Child Welfare [Act (ICWA)] program which may or may not have been resolved in accordance with the law." *Id.* The Superintendent expressed concern that the tribal courts dispute "may make it difficult or impossible to insure the safety and welfare of Indian children." *Id.* "Thus," the Superintendent asserted, "our decision is in the interest of ensuring that tribal courts issue valid orders with regard to those programs and staff under [ISDA] contracts, e.g., Social Services, Indian Child Welfare, and Child Protection." *Id.* The Superintendent also stated that BIA has been "advised that potentially conflicting orders have been issued by both court systems," and that "[i]n order to determine which court may be able to resolve tribal conflicts and to assure judicial services" to the Tribe, BIA "must determine first which court has legitimate authority." *Id.* at 3 (unnumbered).

The Superintendent did not identify any specific "pending matters" under ICWA, or any other pending matters in which the validity of tribal court orders was in doubt, nor did she articulate the relationship between any such (unidentified) orders and the roles and responsibilities of BIA in such cases. The Superintendent did not purport to take any action pursuant to ISDA or any of the Tribe's ISDA contracts, e.g., by withholding or suspending funding, by identifying contract violations or noncompliance, or by purporting to instruct the Tribe where to direct ISDA funding within the Tribe. All of the Tribe's ISDA contracts were being administered by the Boswell administration. Instead of identifying any specific pending matters that required or warranted BIA action, the Superintendent stated that BIA would "recognize orders which appear to be necessary to insure the immediate health, safety and welfare of tribal citizens." *Id.* at 4 (unnumbered). She also stated that any decision to recognize or not recognize certain orders "will be on a case by case basis when and if they are brought before us." *Id.* Thus, the Superintendent did not purport to take any action with respect to the Tribe's (Boswell's) administration of any ISDA contracts.

Boswell appealed the Superintendent's court composition decision to the Regional Director, and the parties filed extensive briefs, offering arguments and supporting

documentation for their respective positions. Boswell argued that it was improper for the Superintendent to interfere with the internal affairs of the Tribe by issuing a court composition decision, and that the Superintendent had no authority, under the ISDA contracts or otherwise, to do so. Boswell argued that the Superintendent had “seriously overreached” in purporting to issue the decision “to ensure” that the Tribe was “in compliance” with its ISDA contracts. Boswell’s Notice of Appeal to Regional Director, at 18 (AR Tab 18). In the alternative, Boswell argued that, as a matter of tribal law, her judicial appointments were valid and the orders issued by the Arrow Court were invalid. In a supplemental pleading, Boswell submitted a resolution, passed after the Superintendent’s decision was issued, in which the Tribal Council ratified and affirmed that Boswell was still Governor, ratified and confirmed as valid her appointments to the Supreme Court, and rejected the Arrow Court’s Second Supplemental Order as having been issued without constitutional authority and rejecting its interpretation of the Tribe’s Constitution. *See* AR Tab 17.

On September 1, 2011, the Regional Director issued his Court Composition Decision, a one-page decision in which he stated that he had reviewed the Superintendent’s “decision, the administrative record furnished by the Superintendent, additional records contained in this office and the submissions of the interested parties to this dispute.” AR Tab 4. Without any discussion, the Regional Director concluded: “Based upon such review, the Superintendent’s decision is hereby affirmed.” *Id.*

Bighorse, the Tribal Council, and Boswell appealed the Court Composition Decision to the Board. The Board denied a motion by the Arrow Court to intervene in the appeal as the Judicial Branch of the Tribe, but granted the Arrow Court permission to file an amicus answer brief to the opening briefs in the Court Composition Decision appeals.¹²

III. HIP Decision

Shortly after issuing the Court Composition Decision, on September 9, 2011, the Regional Director issued a decision declining a proposal from the Tribe’s Housing Authority aligned with Boswell to contract with BIA under ISDA to operate HIP. The Regional Director based his decision on the failure of the Housing Authority to present “irrefutable evidence” that it had authority to submit the proposal, and a finding that there was “lack of clarifying information” about whether Boswell or Harjo was Governor. HIP Decision at 1-2 (unnumbered).

¹² The Board subsequently denied as untimely a motion by the Webber Court to appear as amicus.

The Boswell administration invoked the Tribe's right to an informal conference, under the ISDA regulations, *see* 25 C.F.R. §§ 900.153–.154, in lieu of appealing directly to the Board. Following the informal conference, the Secretary's representative issued a recommendation to uphold the Regional Director's HIP Decision. *See* Letter from Rebecca Cryer to Ida Hoffman, Nov. 21, 2011 (Docket No. IBIA 12-051 AR Tab 3).

Boswell's Executive Branch and Housing Authority appealed the HIP Decision to the Board, and the Board received the appeal on December 27, 2011.¹³ Subsequently, after the Board placed the Regional Director's First Recognition Decision, dated December 15, 2011, into immediate effect, *see below*, and after a follow-up appeal to the Board by the Executive Branch and Housing Authority concerning the HIP proposal, *see Executive Branch of the Cheyenne and Arapaho Tribes v. Southern Plains Regional Director*, 54 IBIA 332 (2012), BIA apparently finalized the HIP contract with the Tribe through the Boswell administration.¹⁴

IV. Boswell Recognition Decisions

On December 15, 2011, the Regional Director issued a decision to recognize Boswell, on an interim basis for 90 days, as the Governor of the Tribe for purposes of taking action on certain ISDA contract proposals and requests. First Recognition Decision at 1-2 (unnumbered). Harjo and the Third Legislature appealed to the Board, asking the Board to set aside BIA's interim recognition of Boswell and to issue a decision recognizing Harjo as Governor of the Tribe, based on orders issued by Bob Smith and the Arrow Court in Harjo's favor. *See* Harjo's Notice of Appeal, Jan. 12, 2012, at 7 (seeking an order recognizing Harjo as Governor and Harjo's signature as the authorized signature on ISDA

¹³ Under the ISDA regulations, when BIA issues an ISDA decision that is appealable to the Board, the tribe may seek an informal conference in order to attempt to resolve the dispute without litigation. *See* 25 C.F.R. § 900.153. If the tribe is dissatisfied with the recommended decision issued by the Secretary's designated representative who presides over the informal conference, the tribe may then appeal BIA's initial decision to the Board within 30 days of receiving the recommended decision from the informal conference. *See id.* § 900.157.

¹⁴ In addition to the HIP Decision rejecting the Boswell administration's HIP proposal, the Regional Director also issued a decision rejecting a HIP proposal from the anti-Boswell faction, and the Third Legislature (but not Harjo) appealed that decision. The Board solicited briefing on the Legislature's authority to bring the appeal, and after the Third Legislature failed to respond, the Board dismissed the appeal for failure to demonstrate standing. *See Third Legislature of the Cheyenne and Arapaho Tribes v. Acting Southern Plains Regional Director*, 54 IBIA 276 (2012).

documents); Harjo's Opening Brief, May 10, 2012, at 13 (seeking recognition of Harjo as Governor and Arrow Court as the Tribe's Supreme Court); Third Legislature's Opening Brief, May 11, 2012, at 9-10 (requesting order directing BIA to contract with the Tribe through Harjo and to honor and enforce the Tribe's Supreme Court and trial court orders). On February 3, 2012, the Board consolidated the appeals from the Court Composition Decision, the HIP Decision, and the First Recognition Decision, and placed the First Recognition Decision into effect. *See* Pre-Docketing Notice and Orders, Feb. 3, 2012, at 3-8.

On May 24, 2012, the Regional Director issued the Second Recognition Decision, this time recognizing Boswell, on an interim basis for 60 days, as Governor of the Tribe for purposes of taking action on certain drawdown requests for ISDA contracts with the Tribe. Second Recognition Decision at 1, 3-4 (unnumbered). Harjo and the Third Legislature appealed to the Board, and again sought an order directing BIA to recognize Harjo as the Governor of the Tribe and to honor and enforce orders of Bob Smith and the Arrow Court favoring Harjo. *See* Harjo's Notice of Appeal, June 18, 2012, at 2 (Docket No. IBIA 12-123); Fourth Legislature's Opening Brief, Oct. 15, 2012, at 5 (Docket Nos. IBIA 12-123 and 12-126).¹⁵ The Board placed the Second Recognition Decision into effect. *See* Order, July 23, 2012 (Docket Nos. IBIA 12-123 and 12-126).

On August 15, 2012, the Regional Director issued the Third Recognition Decision, in which he decided to "continue to recognize the signature of [Boswell] in order to process payments to the Tribe" under 12 ISDA contracts identified in the decision. Third Recognition Decision at 2 (unnumbered). The Regional Director disclaimed an intent to make a determination on who was the "valid leader" of the Tribe, but concluded that it was necessary for BIA to take action on its obligations to fund the listed ISDA contracts, and that Boswell had the only authorized tribal signature on file with BIA for ISDA contracts. *Id.* at 1. The Regional Director filed a motion with the Board to make the Third Recognition Decision effective immediately, and after obtaining copies of the subject contracts and allowing briefing by the parties, the Board granted the motion and placed the Third Recognition Decision into effect. *See* Order Granting Regional Director's Motion, Sept. 6, 2012 (undocketed) (subsequently included in appeal record for Docket No. IBIA

¹⁵ There is agreement that the Tribe has only one Legislature and that the designations "Third," "Fourth," or "Fifth" refer to sessions of that Legislature. For convenience, we refer to Appellant Legislature as the "Third Legislature," the name in which it originally filed its appeals, and which it continued to use during these proceedings, while also at times referring to itself using the successor "Fourth" or "Fifth" Legislature designations. As noted earlier, *supra* note 1, we express no opinion on whether the individuals purporting to constitute or control the Tribe's Legislature for purposes of bringing appeals in the name of the Legislature are members of the Legislature as a matter of tribal law.

13-002). The Third Legislature appealed from the Third Recognition Decision. *See* Third Legislature’s Notice of Appeal, Aug. 28, 2012 (Docket No. IBIA 13-002).

Harjo did not appeal the Third Recognition Decision. Because only the Legislature—and no individual or entity purporting to represent the Executive Branch of the Tribe—appealed from the Third Recognition Decision, the Board ordered the parties to brief whether the Legislature has standing to appeal the Regional Director’s decision. The Board advised Appellant Legislature that it had the burden to demonstrate standing, and referred to the Board’s appeal regulations as well as to an earlier decision by the Board dismissing another appeal by the Third Legislature for failure to demonstrate standing. *See* Pre-Docketing Notice and Order for Briefing on Standing, Oct. 1, 2012, at 1-2 (Docket No. IBIA 13-002) (citing *Third Legislature*, 54 IBIA at 276-77). In *Third Legislature*, the Board noted that under the Tribe’s Constitution, the Executive power of the Tribe is vested in the Executive Branch, and that it was not apparent on what basis or authority the Legislature would have standing to appeal, as relevant to that case, from a decision by the Regional Director rejecting the HIP proposal submitted to BIA on behalf of an office that is part of the Executive Branch. *Third Legislature*, 54 IBIA at 277.

In response to the Board’s order to demonstrate standing to appeal the Third Recognition Decision, the Third Legislature argued that the decision adversely affects its “interests,” and the interests of individual legislators, within the meaning of 25 C.F.R. § 2.2, because by allowing Boswell to exercise effective control of the Tribe, the decision enabled her to deny the legislators their due salaries. The Third Legislature did not address the question of what authority individual legislators or the Legislature of the Tribe has, as a matter of tribal law, to bring an appeal in a nontribal forum, based upon an interest derived from a claim against the Governor for nonpayment of salaries.

Boswell’s Executive Branch filed a response arguing that with one limited exception pertaining only to an action in *tribal* court, the Tribe’s Legislature lacks the authority and capacity to sue, as a matter of Tribal constitutional law. Relying on both the language of the Constitution and judicial precedent from the Tribe’s Supreme Court (pre-dating the court composition dispute), the Executive Branch argued that the Legislature’s powers under the Constitution are limited, and do not include the power or “capacity to engage in litigation as a *plaintiff*, *an intervenor*, or *in any other capacity*.” Executive Branch Response on Standing, Nov. 15, 2012, at 2-3 (citation omitted). The Executive Branch also argued that even under the Board’s appeal regulations and doctrine of standing, the Legislature does not have standing to represent the interests of the Tribe, and lacks a legally protected interest, in the context of an administrative appeal to the Board from the Regional Director’s decision. Aside from the issue of whether the Legislature has authority to bring an appeal to the Board, the Executive Branch contended that the individuals representing themselves as the Tribe’s Legislature are not, in fact, the Legislature, and thus Appellant “Third Legislature” cannot in any event maintain the appeal.

The Regional Director also contended that the Legislature, as a branch of the Tribe's government, would lack standing to appeal from the Third Recognition Decision. The Regional Director relies on *Keen v. United States*, 981 F. Supp. 679 (D.D.C. 1997), in which the court dismissed for lack of standing an action brought by three Justices of the Cherokee Nation's Judicial Appeals Tribunal challenging a decision of the Assistant Secretary – Indian Affairs to reassume the administration of the Law Enforcement Program, as requested by a tribal resolution. The Regional Director argued that in both cases the issue raised was one of funding and salaries, and the court found that the plaintiffs “do not have an individual interest in tribal funds,” and claims to tribal funds do not create standing. Regional Director's Answer Brief on Standing, Nov. 2, 2012, at 2 (quoting *Keen*, 981 F. Supp. at 686 n.12).

The Third Legislature did not file a reply or otherwise respond to the arguments of the Executive Branch and Regional Director that it lacks capacity and authority to bring the appeal as a matter of tribal law, and also lacks standing under judicial principles of standing and the Board's regulations.¹⁶

V. 2013 Tribal Election(s) and Briefing on Possible Mootness for These Appeals

Under the Tribe's Constitution, the Governor and Lieutenant Governor are elected for a 4-year term. The election is held in an odd-numbered year, with a primary held in October and the general election is held in November. Constitution Art. IX, §§ 9, 10. The new term of office for Governor and Lieutenant Governor begins in the January following the election. *Id.* Art. IX, § 14.

In a tribal election held in November 2013, Eddie Hamilton was elected to succeed Boswell as the Governor of the Tribe.¹⁷ According to information provided by the Regional Director, approximately 1500 voters participated in that election. *See* Regional Director's Brief in Response to Order Allowing Briefing on Possible Mootness, Jan. 27, 2014, Ex. B. According to the Executive Branch (i.e., Hamilton's administration as the

¹⁶ The Third Legislature did respond to an allegation by the Executive Branch that the Third Legislature's opening brief on standing was not timely filed, but offered no response to the Executive Branch and the Regional Director on the standing issue itself. We agree with the Third Legislature that its brief was timely filed with the Board, notwithstanding the fact that the Third Legislature apparently mailed a service copy to the Executive Branch 3 days after filing by mail with the Board.

¹⁷ Boswell apparently was eliminated in a primary, and the election board conducting these election proceedings concluded that in the general election, Hamilton defeated the remaining candidate.

successor to Boswell's administration), the election results were certified by the election board, and disputes—including a challenge by Darrell Flyingman, who sought to run in that election—were resolved in the Tribe's Supreme Court (i.e., referring to the Webber Court).¹⁸ Harjo did not run in this election. Harjo, Flyingman, the Third Legislature, and the Arrow Court do not dispute the facts concerning this election, but contend that it was conducted by an illegal election board.

Also in the fall of 2013, another election board apparently initiated a primary process for a tribal election. Only Flyingman filed to run for the office of Governor in the election proceeding conducted by this election board. Based on Flyingman's unopposed candidacy, this election board issued a notice that Flyingman was "declared elected," in accordance with a 2008 tribal court decision concerning unopposed candidacies. Regional Director's Brief in Response to Order Allowing Briefing on Mootness, Jan. 27, 2014, Ex. C. Harjo, the Third Legislature, and the Arrow Court contend that this election proceeding was valid and that Flyingman is now Governor. Hamilton's Executive Branch does not recognize the election proceedings in which Flyingman was declared elected, and contend that both the (true) Legislature and the Tribal Council also have rejected Flyingman's claim to the Governorship.¹⁹

As relevant to these appeals, however, it is undisputed that following the two election proceedings in the fall of 2013 and two proceedings in January 2014 to swear in a new Governor, neither Boswell nor Harjo claims to now be the Governor of the Tribe.

On December 12, 2013, following the two election proceedings, the Board received a Suggestion of Mootness from the Regional Director, advising the Board that while there might be a new dispute over who is the Governor of the Tribe, neither Boswell nor Harjo were making any claim to be the current Governor following the 2013 election(s). The Board allowed briefing on the issue.

¹⁸ The Webber Court now apparently includes Richard J. Goralewicz. *See* Executive Branch's Brief in Response to Order on Possible Mootness, Feb. 18, 2014, Ex. 4. No party has suggested that a change to the composition of the Webber Court is relevant to the proceedings before the Board.

¹⁹ The Boswell/Hamilton/Executive Branch faction contends that, as a matter of both tribal law and largely of fact, the Tribe has resolved the dispute, the tribal membership recognizes and accepts Hamilton as Governor, and only a small faction within the Tribe, plus members of the Arrow Court (none of whom, according to the Executive Branch, is a tribal member), continue to align with Flyingman.

Discussion

I. Standing

The Board recently confirmed its interpretation of its appeal regulations as incorporating, as minimum requirements, the same elements of standing that form the constitutional requirements for judicial standing. *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 296-97 (2014) (*POLO*). In *POLO*, we also noted that the Board has used the term “standing” to refer generally to whether an appellant is entitled to pursue an appeal before the Board, which may involve inquiries and issues beyond the minimum requirements associated with judicial standing. *See id.* at 298-99. An appellant has the burden to establish that it has standing to bring an appeal. *Del Rosa v. Pacific Regional Director*, 58 IBIA 191, 191 (2014).

II. Mootness

As a matter of prudence and in the interest of administrative economy, the Board has a well-established practice of adhering to the doctrine of mootness. *See POLO*, 58 IBIA at 290 n.12; *Picayune Rancheria of the Chukchansi Indians v. Pacific Regional Director*, 58 IBIA 255, 257 (2014); *Alcantra v. Pacific Regional Director*, 58 IBIA 252, 253 (2014); *County of Santa Barbara, California v. Pacific Regional Director*, 58 IBIA 57, 59 (2013); *Van Mechelen v. Northwest Regional Director*, 56 IBIA 111, 112 (2013); *Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005). “The mootness doctrine is based on the requirement that an active case or controversy must be present at all stages of the proceedings.” *Alcantra*, 58 IBIA at 253. “The Board does not consider appeals that are moot — i.e., where nothing turns on the outcome and no relief is available.” *Schmidt v. Bureau of Indian Affairs*, 54 IBIA 173, 177 (2011) (citing *Forest County Potawatomi Community v. Deputy Assistant Secretary – Indian Affairs*, 48 IBIA 259, 264 (2009) (discussing doctrine of mootness)). An appellant bears the burden in opposing a suggestion of mootness. *Reeder v. Acting Southern Plains Regional Director*, 55 IBIA 201, 202 (2012).

III. Court Composition Decision

None of the tribal parties, in substance, contends that the Court Composition Decision was rendered moot by the change in the Governorship and Lieutenant Governorship of the Tribe resulting from the 2013 election(s). Although Bighorse, the Tribal Council, and Hamilton (as successor to Boswell) seek dismissal of their appeal from the Court Composition Decision, they would have the Board do so only in conjunction with vacating the decision and, apparently, after finding that any internal tribal dispute over the composition of the tribal court has been fully resolved in their favor within the Tribe as a matter of tribal law. And in seeking an order vacating the decision, they contend that if it

is left in place, it will continue to create needless instability and unwarranted uncertainty. Harjo, Flyingman, and the Third Legislature contend that the Court Composition Decision, and related appeals, are not moot because a decision by the Board upholding the decision would have the consequence of determining which tribal court's rulings should be recognized by BIA, which in turn, they argue, will affect whether Hamilton or Flyingman should be recognized as the current Governor of the Tribe.

In suggesting that these appeals are moot, the Regional Director does not specifically address the Court Composition Decision.

Whether or not the composition of the tribal court may have been resolved within the Tribe, in whole or in part, as a matter of tribal law or as a matter of internal tribal politics and internal tribal dispute resolution mechanisms, the open-ended character of the Superintendent's decision arguably would, if given effect (i.e., if the merits were resolved in favor of affirming the Regional Director's decision), have continuing consequences in the context of BIA's dealings with the Tribe. Unlike the situation with the Governorship, no party contends that any material change in the composition of the tribal courts has occurred since the Regional Director issued the Court Composition Decision. And although the Superintendent disclaimed any intent to be determining the validity or invalidity of any particular tribal court orders, by purporting to determine which individuals are the Tribe's trial judge and Supreme Court justices, the Superintendent's decision at a minimum gives the appearance of determining, as of the date it was issued, that the Arrow Court was still the legitimate Supreme Court of the Tribe, and that the Webber Court was not. Under these circumstances, we conclude that the appeals from the Court Composition Decision are not moot, and we proceed to address the appeals on the merits.

On the merits, we vacate the Court Composition Decision. The Regional Director's decision is devoid of reasoning. When Boswell appealed from the Superintendent's court composition decision, she raised a host of objections, procedural and otherwise, to the Superintendent's issuance of *any* decision purporting to "decide" the composition of the Tribe's courts, as well as the result he reached. Particularly in the context of a tribal dispute, where BIA is obligated to avoid unjustified intervention and interference, it was incumbent upon the Regional Director to properly justify and explain why he chose, notwithstanding Boswell's objections, to affirm the Superintendent's decision. Issuing a one-sentence summary affirmance was arbitrary and capricious. To issue a reasoned decision requires reasoning, which is wholly absent from the decision. Nor can the Board discern the Regional Director's reasoning from the administrative record, and the Regional Director has not offered any explanation or defense of the decision on appeal. The fact that the tribal parties do not even agree on what effect the Superintendent's decision would have only reinforces our conclusion that it was not permissible for the Regional Director to summarily affirm that decision with no discussion or analysis to address the allegations of error raised by Boswell.

Nor does the Regional Director appear to have attached any importance to the decision in the context of BIA's ability to carry out its obligations toward the Tribe: He did not support a motion made by Harjo to make the Court Composition Decision effective. It is telling that, rather than view (and defend) the decision as something necessary in order for BIA to carry out its Federal obligations, the Regional Director appears to view the dispute as one that may be left to the "appropriate tribal parties . . . currently before the Board." Brief of Regional Director, June 18, 2012, at 2. But when the threshold issue has been raised whether a BIA decision intruding into internal tribal affairs is "essential for Federal purposes," *Cayuga Indian Nation of New York v. Eastern Regional Director*, 58 IBIA 171, 179 (2014), it is rarely if ever appropriate for the Regional Director to take such a hands-off approach.

Even if we were to look past the Regional Director's arbitrary summary affirmance, and consider the merits of the underlying Superintendent's decision, we would vacate that decision because the Superintendent failed to identify—or purport to take—any separate Federal action which, in turn, would have necessitated a BIA decision concerning the composition of the tribal court. At best, the Superintendent's decision was an impermissible and gratuitous advisory opinion. The Superintendent's vague and unfocused attempt to use the Tribe's ISDA contracts for certain programs as a Federal "hook" to justify a BIA determination of the composition of the tribal courts in this case is unconvincing.²⁰

²⁰ The Arrow Court, in a renewed motion seeking to intervene in these appeals as the Tribe's Supreme Court, argues that "federal law requires the adjudication of our status by this Board." Request of Supreme Court [Arrow Court] to File Renewed Motion to Intervene, Feb. 5, 2014, at 3. Earlier, however, the Arrow Court took the seemingly unequivocal position

that no [ISDA] (or any other) contract between the Cheyenne and Arapaho tribes and the BIA may validly delegate to the BIA the power to determine the "composition . . . of the Cheyenne and Arapaho Tribes' Judicial Branch," and we find absolutely nothing in [ISDA] OR the Tribes' [ISDA] contracts with BIA that would even *purport* to authorize (let alone require) any such transfer of tribal sovereign power to the Bureau of Indian Affairs.

Second Supplemental Order at 12 (AR Tab 26, Ex. H). We have considered the arguments of the Arrow Court in pleadings filed with the Board as amicus, and we deny the Arrow Court's renewed motion to intervene as a party. Of course, the extent the Arrow Court seeks to intervene as a party-appellant, its motion would be untimely because the 30-day time period for filing an appeal is jurisdictional. *See* 43 C.F.R. § 4.332(a).

As the Board has emphasized in numerous cases, BIA does not have some free-standing right or obligation to intervene in tribal government disputes, and principles of tribal sovereignty and self-determination make such intervention impermissible in the absence of some separate matter that requires or warrants BIA action. *See Cayuga*, 58 IBIA at 179-181 (and cases cited therein). In the present case, any purported justification based on the Superintendent's professed concerns about the Indian Child Welfare program and the safety and welfare of Indian children is undercut by her failure to identify any specific ICWA proceedings for which a BIA determination of the validity of a tribal court order was necessary, or to take any actual action in that regard based upon the determination made regarding the tribal courts. Issuance of the decision for a generalized prospective purpose based on a tribal court order that "may" (or may not) exist, and circumstances that "may" (or may not) occur in future, and unnamed matters, was impermissible. Notably, the parties that vigorously seek to have the Regional Director's and Superintendent's court composition decisions affirmed do not refer to any tribal court orders involving ICWA or social services cases, but instead are plainly interested in having the Superintendent's decision affirmed as a springboard for asserting their own claims of legitimacy, even though the Superintendent expressly disclaimed any intent to decide the validity of any particular court orders.

For the above reasons, we vacate the Court Recognition Decision of the Regional Director, and the underlying decision of the Superintendent.²¹

IV. HIP Decision

Following the Board's decision to place the First Recognition Decision into effect, and following another appeal on that matter by the Executive Branch to the Board, BIA apparently finalized the HIP contract with the Tribe through the Boswell administration. No party has argued that a controversy still exists between the Executive Branch/Housing Authority appellants and the Regional Director on this matter. Any dispute over the Regional Director's HIP Decision has been superseded by subsequent actions taken by the Board and BIA, and the appeal in Docket No. IBIA 12-051 is moot.

²¹ We need not and do not decide under what circumstances, if any, it would be permissible for BIA, e.g., in deciding whom to recognize as the political leadership of a tribe, to decide a dispute over the composition of a tribal court, and the validity of court orders, as an incident to making a tribal leadership determination.

V. First and Second Recognition Decisions

Harjo, in her alleged capacity as Governor of the Tribe, appealed both the First and Second Recognition Decisions, as did the Third Legislature.²² We now consider whether these appeals are moot, and we conclude that they are.²³

We begin by reminding all parties that the relevant cases or controversies before the Board must be evaluated in the context of the disputes between the appellants and the *Regional Director*, not between or among tribal parties. Any consideration of the underlying tribal dispute, or an issue of tribal law, is only relevant and (possibly) permissible insofar as it relates to the Board's review of the *Regional Director's* actions and decisions, in this case to recognize Boswell on an interim basis, for limited periods of time, in order to execute ISDA contract documents or to satisfy contractual funding obligations to the Tribe.

As relevant to these appeals, the relief sought by Harjo and Third Legislature was an order recognizing Harjo as the Governor with whom BIA must deal for ISDA contracting purposes. That relief is no longer available because Harjo no longer claims to be Governor. Nor has Harjo contended that a declaratory judgment from the Board that she was, in fact, Governor of the Tribe at the time the First and Second Recognition Decisions were made would afford her any actual relief in that capacity. Both Harjo and the Third Legislature also sought an order from the Board recognizing the Arrow Court, but that was at best a subsidiary issue that might (or might not) arise in the context of the Board's determination of whether it was permissible for the Regional Director to recognize Boswell on an interim basis, under the factual circumstances that existed at the time the decisions issued. In any event, we have vacated the court composition decisions on the merits.

²² Because both Harjo and the Third Legislature appealed the First and Second Recognition Decisions, and raised the same claims and made the same substantive arguments, the Board did not order briefing on the issue of the Third Legislature's standing to appeal from those decisions.

²³ The Regional Director's suggestion of mootness was only properly filed in the first set of appeals consolidated with Docket No. IBIA 12-020, but no additional substantive issues were raised in the briefs for the appeals from the Second Recognition Decision, and the Regional Director and Executive Branch suggested that all of the appeals from the Boswell Recognition Decisions are moot. No party objected to the Executive Branch's assertion that the additional appeals are similarly situated. The Board consolidates all eight of these appeals for purposes of this decision.

The Third Legislature contends that the issue of temporary recognitions of an individual as Governor for ISDA-contracting purposes “will likely arise again in the future.” Fifth [Third] Legislature’s Objection to Suggestion of Mootness, Mar. 7, 2014, at 40. But offering the abstract proposition that a BIA interim recognition decision might recur is not the same as demonstrating that the circumstances under which the Regional Director recognized Boswell on an interim basis, and declined to recognize Harjo instead, are likely to recur, yet evade review. Whether or not there is, in reality, a continuing leadership dispute within the Tribe—an issue on which we express no opinion—the parties opposing dismissal of the Boswell Recognition Decisions have not met their burden to demonstrate that a live controversy exists over BIA’s recognition of Boswell for limited purposes during the time in which both she and Harjo claimed to be Governor, with whom the Regional Director should have dealt in taking those ISDA actions.

VI. Appeal from the Third Recognition Decision by the Third Legislature

As noted earlier, only the Third Legislature appealed to the Board from the Third Recognition Decision, and the Board ordered briefing on whether the Third Legislature has standing to appeal that decision. The issues of standing and mootness are closely related, and the jurisdiction of Federal courts is premised on the principle that a case or controversy must be present at all stages of litigation. See *Cloverdale Rancheria v. Pacific Regional Director*, 48 IBIA 308, 310 (2009); *Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 312 (2005). The Board adheres to the doctrine of mootness as a matter of prudence and administrative efficiency. Mootness may provide a proper basis for dismissing an appeal without addressing an appellant’s standing.

Ordinarily, if an appeal in a tribal government dispute has become moot, and if a determination of the appellant’s standing would itself implicate internal tribal matters, e.g., issues of tribal law, the Board would dismiss the appeal as moot without addressing standing, to avoid unnecessarily interpreting tribal law. For example, in *Third Legislature v. Acting Southern Plains Regional Director*, 54 IBIA 276 (2012), the Board dismissed an appeal from the Third Legislature “for failure to demonstrate standing,” when the Third Legislature failed to respond to a Board order to demonstrate standing. *Id.* at 277. In that case, we found it appropriate to resolve the appeal on the basis of the Third Legislature’s failure to make any showing whatsoever, without having to address the merits of the standing issue.

Experience has since taught the Board that the faction filing appeals in the name of the Tribe’s Legislature—whether the Third, Fourth, or now Fifth—is likely to continue to seek to actively participate as an appellant or interested party in appeals to the Board over disputes, or alleged disputes, involving the Governorship of the Tribe, or other matters involving the government-to-government relationship between the Department and the Tribe, as evidenced most recently by the “Fifth Legislature’s” recent appeal from a Regional

Director decision following the 2013 tribal election(s).²⁴ In *Third Legislature*, we limited the basis for our dismissal in order to avoid unnecessarily interpreting tribal law. But given the apparently recurring nature of the issue, and the potential intrusiveness into tribal affairs that would occur if the Board improperly affords the Legislature (or the individuals purporting to represent the Legislature) greater rights in this forum than the Legislature is entitled to as a matter of tribal law, plus the fact that the issue of the Legislature's standing has been squarely raised and briefed by the parties, we believe that it is appropriate to resolve on the merits the issue of the Third Legislature's entitlement to appeal the Regional Director's Recognition Decisions to the Board.

On that issue, we conclude the Legislature has not demonstrated that it is entitled to appeal to the Board because it does not dispute the Executive Branch's argument that the Tribe's Legislature lacks the capacity, as a matter of Tribal constitutional law, to participate as a party litigant-appellant in this nontribal forum. Thus, we dismiss the appeal from the Third Recognition Decision for lack of standing, as well as the Third Legislature's appeals from the other two recognition decisions.

In response to the Board's order for briefing on the Third Legislature's standing to appeal from the Third Recognition Decision, the Executive Branch argues that as a matter of Tribal constitutional law, the Legislature lacks the capacity—the right—to initiate or pursue litigation in a non-tribal forum. The Executive Branch contends, as we noted in *Third Legislature*, that the Tribe's Constitution provides that the Executive power of the Tribe is vested in the Governor, who shall execute, administer, and enforce the laws. 54 IBIA at 277 (citing Constitution of the Cheyenne and Arapaho Tribes, Art. VII, §§ 1(c), 4(a)). In contrast, the Tribe's Constitution, as interpreted by the Tribe's Supreme Court, provides that the Legislature's constitutional powers are limited, and do not extend (with an exception not relevant here) to filing litigation in a non-tribal forum. The Legislature did not respond to the Executive Branch's arguments, and made no arguments on its own to support its capacity to bring the appeal. We conclude that the Legislature has failed to demonstrate that it is entitled to bring the appeal, and thus failed to demonstrate standing. See *Yeahquo v. Southern Plains Regional Director*, 36 IBIA 11, 12 (2001) (current and former members of the tribe's business committee “produce[d] absolutely nothing to show that the [t]ribe has authorized them to bring this appeal on its behalf”); *Shoshone-Bannock Tribal Tax Comm'n v. Acting Portland Area Director*, 30 IBIA 185, 186 (1997)

²⁴ See *Fifth Legislature, Cheyenne and Arapaho Tribes v. Acting Southern Plains Regional Director*, Docket No. IBIA 14-077 (appeal from Regional Director's February 10, 2014, decision on funding Tribe's ISDA contracts). Both Hamilton's Executive Branch (Docket No. IBIA 14-076) and Flyingman (Docket No. IBIA 14-078) appealed, in whole or in part, from the same decision, and all three appeals remain pending.

(tribal tax commission failed to show that it had authority under tribal law to challenge BIA's approval of an ordinance enacted by the tribe's business council).²⁵

Of course, even if the Legislature were to have had standing to appeal, we would conclude that the appeal from the Third Recognition Decision is moot, for the same reasons we concluded that the appeals from the first two Recognition Decisions are moot.

Conclusion

We conclude that the appeals from the Court Composition Decision are not moot, and that on the merits, the decisions of the Regional Director and Superintendent must be vacated as arbitrary and capricious, and an impermissible intrusion into tribal affairs. The appeals from the Recognition Decisions are moot because neither Boswell nor Harjo now claims to be Governor, and thus the relief requested by the appellants challenging those decisions is not available. And the Third Legislature lacks standing to appeal from the Recognition Decisions, which is dispositive with respect to the Third Recognition Decision, which Harjo did not appeal.²⁶

²⁵ As noted earlier, the legal "interest" relied upon by the Third Legislature as the basis for its standing is that tribal legislators are entitled to be paid their salaries by the Governor and they were wrongfully denied those salaries by Boswell. The Third Legislature argues that by recognizing Boswell as Governor on an interim basis for ISDA purposes, the Regional Director adversely affected that interest. Both the Executive Branch and the Regional Director contend that the Third Legislature has not stated a cognizable interest that would serve as the foundation for asserting and vindicating tribally based rights that arise under ISDA in an appeal challenging a BIA decision to recognize an individual as the Tribe's Governor for ISDA contracting purposes. Because we conclude that the Legislature has not demonstrated that it has the capacity to pursue its appeal before the Board, we need not decide whether it would otherwise meet the requirements of standing set forth in the Board's appeal regulations, in challenging the Recognition Decisions.

²⁶ Each of the decisions issued by the Regional Director involved discrete matters, either in subject matter or temporally, and none of the decisions purported to affect or modify a prior decision. All were issued in the broad context of the same underlying tribal dispute, but one in which the parties alleged that additional developments within the Tribe would or could affect a subsequent decision. During the merits briefing in these appeals, no party suggested that the pendency of an earlier-filed appeal or appeals from an earlier decision or decisions had divested the Regional Director of the authority to issue a new decision on the new matter presented. To the extent that the Board, exercising its jurisdiction, placed the Recognition Decisions into effect, we consider our orders to have superseded and rendered (continued...)

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 September 1, 2011, court composition decision, and the underlying decision of the Superintendent; we dismiss the Third Legislature's appeals for lack of standing; and we dismiss the remaining appeals as moot.²⁷

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

(...continued)

moot any issue regarding the effectiveness of the Regional Director's decisions as they may pertain to ISDA contracting actions taken pursuant to them.

²⁷ All unresolved pending motions are either denied or rendered moot by this decision.

A ninth appeal to the Board filed during the Boswell-Harjo controversy involves a decision by the Regional Director regarding a fee-to-trust land acquisition proposal submitted by Boswell to BIA. See *Executive Branch v. Acting Southern Plains Regional Director*, Docket No. IBIA 13-004 (appeal from Aug. 10, 2012, "Bruner" decision). The Board will rule separately on that appeal.