



INTERIOR BOARD OF INDIAN APPEALS

Marlin D. Kuykendall v. Phoenix Area Director, Bureau of Indian Affairs
and Yavapai-Prescott Tribe

8 IBIA 76 (06/02/1980)

Also published at 87 Interior Decisions 189

Judicial review of this case:

Reversed, *Yavapai Prescott Indian Tribe v. Watt*, 528 F. Supp. 695 (D. Ariz. 1981)

Reversed & remanded, 707 F.2d 1072 (9th Cir. 1983)

Reinstating some counts, No. CIV 80-464-PCT-CLH (D. Ariz. June 26, 1984)

Affirmed, No. CIV 80-464-PCT-CLH (D. Ariz. June 17, 1985)

Earlier judicial case:

Dismissed for failure to exhaust administrative remedies, *Kuykendall v. McGee*,
Civ No. 79-834 (D. Ariz. Jan. 28, 1980)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF MARLIN D. KUYKENDALL

v.

PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS,
AND YAVAPAI-PRESCOTT TRIBE

IBIA 80-24-A

Decided June 2, 1980

Appeal from decision by Area Director permitting lease of Indian trust lands to be cancelled by tribe without approval of the Secretary.

Reversed.

1. Indian Lands: Leases and Permits: Long-term Business/
Agriculture: Cancellation

Where a business lease between tribe and automobile dealer contains a cancellation clause providing for alternative remedies in case of breach of the agreement by lessee, use of the phrase "and/or" in reference to the various alternatives cannot reasonably be construed to be a delegation to the tribe of Secretarial authority to cancel the lease in the event of breach of the lease by the lessee. Nor does the existence of alternative remedies in the lease constitute Secretarial consent that the tribe undertake to administer the lease without agency participation contrary to Departmental regulations.

2. Indian Lands: Leases and Permits: Long-term Business/
Agriculture: Cancellation

Where Departmental regulations at 25 CFR Part 131 are incorporated by reference as part of the lease, those regulations are to be applied in the administration of the lease as though fully set out in the written lease agreement. The regulations incorporated into the lease become binding upon the parties. The agency may not ignore nor act contrary to the provisions of the incorporated regulations which require Secretarial consent to cancellation of the lease, subject to certain specified due process requirements set out in the regulations.

3. Indian Lands: Leases and Permits: Long-term Business/
Agriculture: Cancellation

A collateral attempt by a tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached the lease" is ineffective to result in cancellation since the judgment goes beyond the subject matter jurisdiction of the court to enforce.

APPEARANCES: Thomas J. Reilly, Esq., for appellant; Robert Moeller, Esq., for appellee, Commissioner of Indian Affairs; Philip E. Toci, Esq., for appellee, Yavapai-Prescott Tribe.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Factual and Procedural Background

On September 11, 1969, the Superintendent of the Truxton Canyon Agency executed a lease on behalf of the Yavapai-Prescott Community

Association with Appellant Kuykendall for a tract of land in Prescott, Arizona, to be used for an automobile agency. The lease incorporates 25 CFR Part 131 by reference, and provides, in the default provisions of the lease, for 30- and 60-day grace periods, following notice of default, during which time appellant shall be permitted to cure any claimed breach of the lease before termination may be sought. 1/

Appellant's initial performance under the lease became the cause for several notices in 1970 and 1971 from the Agency Superintendent that there was failure to make timely survey, failure to provide a plat on time, failure to pay rent on time, failure to show proof of insurance, and failure to begin construction as scheduled. By late 1971, however, it appears the initial problems had been overcome; appellant had built a \$200,000 garage building on the leased land; the land had been surveyed and found to contain 4 instead of 2 acres. 2/ A plat had been furnished, and insurance premiums and rents were being paid.

In 1975 appellant subleased the auto business to Jay Piccinati, without, apparently, any prior consultation with the tribe. 3/

In October 1975, the Agency Superintendent gave appellant notice his sublease to Piccinati was considered to be a breach of his lease

1/ 25 CFR 131.14 provides the lessee shall have a "reasonable" cure time.

2/ Resulting in a doubling of the lease payments to \$1,600 from \$800.

3/ The former association is now a tribe. 45 FR 27828 (Apr. 24, 1980).

with the tribe. The matter was negotiated and finally settled. Also in 1975 the tribe enacted a sales tax ordinance which taxed retail sales on the reservation. In 1977 Piccinati returned the auto business on the leased land to appellant, who during the time of the Piccinati operation had failed to make the agreed lease payments for September 1976, and had failed to make an interest payment claimed to be due on late rents. Appellant had charged Piccinati \$2,400 monthly rent, during part of the sublease, although he informed the tribe the rent was to be \$1,400. 4/

In March 1979 the partnership of Smith and Henkel subleased the auto business from appellant. Preliminary negotiations involved obtaining the approval of the new operators by the auto manufacturers concerned. While this transaction was going on, appellant claims to have notified the tribal business manager of the proposed sublease and the negotiations for the sale of the business. The manager, however, denies that he was told about the sale and new sublease. Smith and Henkel agreed to pay Appellant Kuykendall \$200,000 for the business, subject to tribal approval of the sublease, with the understanding appellant would remain primarily liable for the lease payments and would continue to deal with the tribe concerning the lease.

On March 9, 1979, a form of sublease was presented by appellant to the tribe for approval. The tribe refused to approve the sublease,

4/ The tribe takes the position it is entitled to charge sales tax on the rental. It claims \$3,000 due on this account.

and demanded more information about the partners, which was supplied. When the tribe discovered that Smith and Henkel had formed a corporation (primarily for tax purposes), it refused to approve the sublease for that stated reason.

On April 6, 1979, the tribe informed appellant the sublease was disapproved, and notified him the sublease was a breach of the lease with the tribe. He was notified that, to cure the breach, he must remove Smith and Henkel and retake the dealership himself. Also on April 6 the tribe notified Smith and Henkel they were in wrongful possession of tribal land. They were given 15 days to obtain an approved sublease or be removed from the land.

On May 16, 1979, the tribe agreed that Smith and Henkel should remain in possession of the leased land; on June 6, 1979, however, they were again notified to quit the property.

On June 27, 1979, appellant was notified by the tribal attorney that his lease with the tribe was terminated. On September 11, 1979, appellant made his annual lease payment to the Truxton Canyon Agency; it was accepted, but later returned. ^{5/} Prior to this transaction, on August 30, 1979, the Area Director had opined in writing that the lease cancellation by the tribe was validly done and was "not subject to our intervention or to our administrative determination." ^{6/}

^{5/} A memo in the file indicates that this was not a lapse on the part of the agency. The matter was apparently decided only after consultation with Area Director's Office.

^{6/} The appeal is taken from that determination.

On September 20, 1979, the tribe approved a law and order code creating a tribal court, which the Truxton Canyon Agency Superintendent approved the same day. An undated form of small claim summons and complaint, was served on appellant on October 24, 1979, summoning him to a trial in the newly constituted tribal court on November 26, 1979, in an action brought against him by his sublessees Smith and Henkel for declaratory judgment. Appellant refused to appear, but instead chose to challenge the jurisdiction of the court, questioning that it was properly constituted by appealing from the Superintendent's order of September 20, which approved the code and established the court. Finding Kuykendall in default, the tribal court on February 1, 1980, ordered the improvements on the leased land (the auto agency) "forfeited." The Smith-Henkel sublease with Kuykendall was declared "a nullity," and any possessory right of Smith and Henkel was found to depend upon the will of the Yavapai-Prescott Tribe. ^{7/}

^{7/} Earlier, the U.S. District Court for Arizona, in Kuykendall v. McGee, Civ. No. 79-834 (D. Ariz. Jan. 28, 1980), found that appellant had failed to exhaust his administrative remedies with the Department concerning the lease termination, and dismissed his action for declaratory judgment and injunction against the tribe. In dicta in his order, the Judge assumes the lease provides a clause permitting termination by the tribe. Since he directly finds, however, in support of his judgment, that appellant failed to exhaust his administrative remedy and that the lease properly incorporates the termination provisions of 25 CFR Part 131, this apparent inconsistency properly refers only to the issues respecting tribal sovereignty raised in the Federal case. To find otherwise would make the court's holding meaningless, since the issue referred to this agency (whether this lease was terminated) would otherwise have been decided by the District Court.

Issue on Appeal

On May 8, 1980, this Board determined the interest of administrative economy would be best served by resolution of the apparent threshold issue: Whether a business lease granted by an Indian tribe with approval of the Secretary pursuant to the provisions of 25 U.S.C. § 415 (1976), may be terminated by the tribe without Secretarial approval or action. The Board finds that the lease may not be cancelled with out Secretarial approval.

Discussion and Conclusions

[1] The first paragraph of the September 11, 1969, lease provides:

THIS CONTRACT is made and entered into this 11th day of September, 1969, by and between The Yavapai-Prescott Community Association hereinafter called the Lessor, whose address is P.O. Box 1390, Prescott, Arizona, and Marlin D. Kuykendall, hereinafter called the Lessee, whose address is P.O. Box 911, Prescott, Arizona, under the provisions of the Act of August 9, 1955 (69 Stat. 539) as implemented by Part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25 - Indians, and any amendments thereto which by reference are made a part hereof. [Emphasis in original.]

The incorporation by reference of regulations into Federal contracts is an established procedure in Government contracting. Such provisions in Government contracts are upheld by the courts, which

recognize the practice to be binding upon the contracting parties. 8/ One of the incorporated regulations, 25 CFR 131.14, requires that termination for breach of a lease entered into under authority of the regulations appearing at Part 131 is subject to Secretarial approval. 9/

Despite the requirements of 25 CFR 131.14, the Yavapai-Prescott Tribe, relying upon numbered Clause 30, DEFAULT, of the September lease, argues that the Secretary delegated to the tribe the power to cancel the lease when language was inserted into the lease in Clause 30 that "then Lessor and/or the Secretary may either [elect to pursue a number of alternative remedies]." 10/

8/ Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961); Rehart v. Clark, 448 F.2d 170 (1971) (for a decision holding applicable regulations to apply to a Government contract, even though not actually incorporated by specific reference, see G. L. Christian and Assoc., v. United States 312 F.2d 418, 427, rehearing denied, 160 Ct. Cl. 58 (1963), cert. denied, 375 U.S. 954 (1963), rehearing denied, 376 U.S. 929 (1964)).

9/ See also 25 CFR 131.5 and 131.12 for further limitations concerning leasing and the power of the Secretary, generally. The statute implemented by these regulations, the Act of August 9, 1955, 69 Stat. 539, 25 U.S.C.A. § 415 (West Supp. 1980), provides in pertinent part:

"(a) Any restricted Indian lands, * * * tribally * * * owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for * * * business purposes, * * * as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land * * * on the * * * Yavapai-Prescott Community Reservation which may be for a term of not to exceed ninety-nine years, * * *. Leases for * * * business purposes * * * may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior."

10/ Numbered Clause 30 provides:

"30. DEFAULT

"Time is declared to be of the essence of this lease. Should Lessee default in any payment of monies or fail to post bond, as

Both the Yavapai-Prescott Tribe and the Phoenix Area Director argue that the language in Clause 30 constitutes a delegation of

fn. 10 (continued)

required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 30-day period Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant of this lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 60-day period Lessee shall have the privilege of curing such breach, then Lessor and/or the Secretary may either:

"A. Collect by suit or otherwise, all monies as they become due hereunder, or enforce, by suit or otherwise, Lessee's compliance with any other provisions of this lease, or

"B. Re-enter the premises and remove all persons and property therefrom excluding the personal property belonging to authorized sub-lessees, and either

"(1) Re-let the premises without terminating this lease, as the agent and for the account of Lessee, but without prejudice to the right to terminate the lease thereafter, and without invalidating any right of Lessor and the Secretary or any obligation of Lessee hereunder. Terms and conditions of such re-letting shall be at the discretion of Lessor and the Secretary, who shall have the right to alter and repair the premises as they deem advisable, and to re-let with or without any equipment or fixtures situated thereon. Rents from any such re-letting shall be applied first to the expense of re-letting, collecting, altering, and repairing, including attorney's fees and any real estate commission actually paid, insurance, taxes and assessments and thereafter toward the payment to liquidate the total due, Lessee shall pay to Lessor monthly, when due, any deficiency, and Lessor and the Secretary may sue thereafter as each monthly deficiency shall arise.

"(2) Terminate this lease at any time and even though Lessor and the Secretary have exercised rights as outlined in (1) above. Exercise of this remedy shall exclude recourse to any other remedy, but shall not preclude recovery of amounts due to Lessor for the period prior to termination.

"C. Take any other action deemed necessary to protect any interest of Lessor. No waiver of a breach of any of the covenants of this lease shall be construed to be a waiver of any succeeding breach of the same or any other covenant.

"Any action taken or suffered by Lessee as a debtor under any insolvency or bankruptcy act shall constitute a breach of this lease. In such event, the Lessor and the Secretary shall have the options set forth in sub-articles (1) and (2) herein, and furthermore, the Lessor is hereby declared to be a first preferred creditor, except as provided in Article 22."

Secretarial authority to the tribe to cancel the lease for default in the performance of the lessee. 11/ It is difficult, in view of the general tenor of the lease document, 12/ to accept their assumption

11/ The Area Director argues at page 5 of his answer dated November 9, 1979, that the use of the words "and/or the Secretary" are a delegation to the tribe of the power to cancel the lease, and, at page 6, observes that, "Nothing in 25 U.S.C. 415 prohibits the Secretary, through lease terms which he approves and has approved in the subject lease, from authorizing the tribe to terminate the lease for cause." The position taken by the tribe is more complex. The tribe assumes a delegation of Secretarial power and seeks to make the theory of tribal sovereignty dispositive of the issue here by stating the issue in the case to be:

"May an organized Indian tribe recognized by both Congress and the Secretary of the Interior, acting under a lease of tribal property which has been negotiated and approved by the Secretary of the Interior, exercise its sovereignty and right of self determination by terminating such lease for a material and substantial breach thereof by the lessor, in accordance with the terms of the lease, or is the sovereignty and self determination of the Tribe limited to the exclusive remedy of requesting the Secretary of the Interior to act in behalf of the Tribe by proceeding under the provisions of 25 CFR 131.14?" (Answer of the tribe dated November 9, 1979, at page 4.)

12/ Clause 7 recites that the Secretary is the agent of the tribe for purposes of the lease; payments are to be made to the Secretary. Clause 8 provides accounting under the lease shall be made to the Secretary and tribe, jointly. Clause 10 provides that plans shall be jointly approved by the tribe and the Secretary. Clause 12 provides that major construction shall be jointly approved. Clause 16 provides that required bonds shall be deposited with the Secretary. Clause 17 provides that a construction bond, in a form suitable to the Secretary may be required and that joint approval by the tribe and Secretary will be required prior to obligation of building loan agreements. Clause 19 requires joint approval of subleases. Clause 22 requires joint approval prior to encumbrancing. Clause 24 requires proof of payment to lienors to be furnished jointly to the tribe and Secretary. Clause 26 agrees to hold the tribe and the United States harmless from casualty claims. Clause 29 describes the effect arbitration under the lease may have upon actions by the Secretary. Clause 35 provides that all lessees' obligations under the lease are jointly owed to the tribe and the United States, so long as the land continues in trust status. Clause 41 provides for joint inspection of the leased premises by the tribe and the Secretary.

that the use of the words "and/or" in Clause 30 constituted a delegation of Secretarial authority to administer leased trust property contrary to Departmental regulations. The fiduciary relationship of the Secretary to the tribe in such matters is fixed by the regulations required by statute 13/ and defined by case law. 14/ The phrasing of the second sentence of Clause 30, upon which the tribe relies for its stated position, while awkward, merely refers to the alternative actions to be taken to pursue the various remedies described in Clause 30 which are jointly available to the Secretary and the tribe. Nothing in the language used suggests the Secretary planned to terminate the trust relationship or relinquish the administration of the trust property to the tribe in the event appellant should default. Moreover, the conduct of the parties during the early administration of the lease confirms that the Secretary was not excused from his trust duties by defaults in the lease, but rather he was then required to administer the contract according to the terms respecting default. 15/

13/ 25 U.S.C. § 415 (1976).

14/ See United States v. Jim, 409 U.S. 80 (1972); United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

15/ From 1969 until 1978, notices to cure were given by the Superintendent. Thus, deficiency notices were sent by the Bureau of Indian Affairs (BIA) to appellant April 20, 1970; January 14, 1971; January 22, 1971; September 25, 1975; December 7, 1976; and December 30, 1976. The tribe's reaction to the sublease to Smith-Henkel in 1978 provided the first indication that the September 11, 1969, lease was not regarded by the tribe as subject to BIA administration. For 9 years of the lease, however, the agency administered the lease for the tribe, and the tribe acquiesced in that arrangement.

[2] Even had the Secretary wished to pursue such a course, he would have been prevented from doing so by the Departmental regulations appearing at 25 CFR Part 131. The agency is bound by its own regulations: Especially where these regulations insure that private citizens directly affected by Government action shall not be deprived of their interests without the due process protections furnished by the agency regulations. 16/ In this situation appellant lessee of Indian land claims, correctly, that his lease cannot be cancelled except in conformity to the provisions of 25 CFR 131.14, which, in addition to due process safeguards concerning notice, includes a right of appeal to the Commissioner of Indian Affairs and to this Board. 17/ (Suggestion is made in the record before the Board that the regulations could and should be amended by the BIA to provide for administration of business leases by the tribe. See Transcript of Tribal Court Proceedings in Smith and Henkel v. Yavapai-Prescott Community at 87-91. Notwithstanding the possible merits of this suggestion, the Board is bound by the regulations now in force.)

[3] This matter must necessarily be returned to the Phoenix Area Director for regular administration of the lease between the parties. The collateral attempt by the tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached

16/ United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969).

17/ 25 CFR 2.18, 2.19.

the lease" 18/ was ineffective in and of itself to result in cancellation since the judgment went beyond the subject matter jurisdiction of that court to enforce. Pursuant to 25 CFR 131.14, promulgated by the Secretary in response to 25 U.S.C. § 415 (1976), the Department is vested with final cancellation authority over business leases of trust land. 19/ This holding is not a novel position for the Department, but rather follows past decisions of the Secretary concerning lease cancellations. 20/

Decision

The August 30, 1979, determination by the Phoenix Area Director that the Yavapai-Prescott Tribe was authorized to cancel appellant's

18/ Although there is much in the record concerning the handling of the subleases of the auto dealership (including the transcript of the tribal court proceedings), there is no description of any damage to the tribe caused by the two subleases made by appellant since 1969. The Area Director will need to consider whether there was in fact any breach in this case where it affirmatively appears the sublessees were acceptable to the tribe. He will also need to consider whether the subleases were commercially reasonable and in the best interest of the tribe.

19/ See Bledsoe v. United States, 349 F.2d 605, 607 (10th Cir. 1965).

20/ Prior decisions of this Board, which are final for the Department, have recognized that leases of tribally owned trust land effectuated under provisions of 25 CFR Part 131 may not be cancelled without Departmental approval. See Merrill Karlen v. Commissioner, 6 IBIA 181 (1977); Benjamin D. Vieau v. Commissioner, 6 IBIA 150 (1977); Alton Brown v. Albuquerque Area Director, 5 IBIA 155 (1976). In a related subject area, it is recognized that cancellation of rights-of-way over tribally owned trust land requires Departmental action. See 25 CFR Part 161. This requirement is provided by regulation even though the governing statutes, 25 U.S.C. §§ 323-324 (1976), expressly address only the authority of the Secretary to grant such rights-of-way. See Whatcom County Park Board v. Portland Area Director, 6 IBIA 196, 84 I.D. 938 (1977); Brown County, Wisconsin, 2 IBIA 320 (1974).

lease with the Yavapai-Prescott Tribe without the approval of the Secretary is set aside. This matter is remanded to the Area Director with instructions to administer the lease pursuant to the provisions of 25 CFR Part 131 and the lease agreement of September 11, 1969. 21/ This decision is final for the Department.

//original signed
Franklin Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Mitchell J. Sabagh
Administrative Judge

21/ Although this entire matter appears to have been fully presented for decision, final action by the Board is not possible since there has been no agency decision on the merits. While the decision reviewed (that the Area Director was without authority to act) is set aside, the question concerning the propriety of the lease cancellation remains yet to be decided. This is a matter for the agency to decide, subject to a further right of appeal to the Commissioner and the Board.