



INTERIOR BOARD OF INDIAN APPEALS

Marlin D. Kuykendall v. Commissioner of Indian Affairs and Yavapai-Prescott Tribe

9 IBIA 90 (10/23/1981)



# United States Department of the Interior

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

MARVIN D. KUYKENDALL

v.

COMMISSIONER OF INDIAN AFFAIRS AND  
YAVAPAI-PRESCOTT TRIBE

IBIA 81-2-A

Decided October 23, 1981

Appeal from decision by Commissioner of Indian Affairs approving decisions by Phoenix Area Director and Truxton Canyon Agency Superintendent, Bureau of Indian Affairs, regarding adoption of a law and order code by the Yavapai-Prescott Tribe.

Appeal dismissed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally --  
Rules of Practice: Appeals: Standing to Appeal

Appellant business lessee of tribal trust lands held not to be an interested party affected by a final administrative action of an official of the Bureau of Indian Affairs within the meaning of Interior Board of Indian Appeals practice rule sec. 4.331 (46 FR 7337 (Jan. 23, 1981)) so as to be entitled to seek review of agency determination that lessor Indian tribe had failed to legally enact a tribal law and order code.

APPEARANCES: Robert B. Hoffman, Esq., for appellant Kuykendall; Philip E. Toci, Esq., for appellee tribe; Robert Moeller, Esq., Office of the Solicitor, Phoenix Area Office, for appellee Commissioner of Indian Affairs.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

On September 20, 1979, appellee Yavapai-Prescott Tribe approved a resolution adopting a tribal code entitled "Yavapai-Prescott Tribe Law and Order Code" establishing a tribal court empowered to exercise judicial power in both civil and criminal matters within a juridical

scheme described by the code. On the same day, the Superintendent of the Truxton Canyon Agency, Bureau of Indian Affairs (BIA), approved the code for the Department. On November 2, 1979, appellant Marlin D. Kuykendall gave notice of appeal from the superintendent's decision. On December 1, 1979, the Phoenix BIA Area Director, acting on the appeal, affirmed the decision of the agency superintendent approving the tribal code. On August 15, 1980, on appeal to the Commissioner of Indian Affairs, the decision approving the tribal code was again affirmed.

Appellant, in a prior separate action sought to raise the propriety of the tribal code as an issue before this Board. Kuykendall v. Phoenix Area Director and Yavapai-Prescott Tribe, 8 IBIA 76, 87 I.D. 189 (1980), judicial review pending sub nom. Yavapai-Prescott Indian Tribe v. Andrus, Civil Court 80-464 PCT-CLH, U.S.D.C. (Ariz.). That appeal was, however, decided upon other grounds. (The Board's decision notes that, among other reasons for the decision announced, the status of the specific Yavapai tribal trust lands administered by the Secretary was, under the terms of the lease and applicable regulations implementing leasing statutes, beyond the subject matter jurisdiction of the tribal court to determine. (Id. at 87 I.D. 195.)) Despite this prior decision, appellant now seeks a determination by this Board concerning the legal effect of the tribal code. Appellant contends that his status as a "non-Indian lessee of land located within the Yavapai-Prescott Community Reservation" entitles him to an opinion concerning the legal effect of the tribal code since he is "vitally affected by changes in the substantive and procedural aspects of law applicable to occupants of the Reservation." He concedes that his dispute with the tribe concerning his lease of tribal lands was otherwise disposed of by the Board's 1980 decision cited above.

Appellant makes no showing to indicate how the existence of the code affects him personally. He argues that the tribe has not properly enacted the code because it failed to obtain Departmental approval of the basic document. This alleged failure, appellant contends, is the exercise of governmental authority in excess of the power of the tribe which violates Departmental regulations.

Since there is no case in controversy between appellant and appellees, there are no facts, disputed or agreed-upon, to consider. Brief histories of the tribe, the tribal code, and regulations of the Department concerning tribal courts are before the Board. These documents form the basis upon which the parties have framed arguments concerning the power of the tribe to adopt, and the Department to approve, the creation of a tribal code. If presented to a court, such an appeal would clearly raise questions of ripeness, standing, and mootness. While the issue brought before the Board does not apparently rise to constitutional levels, it does seek to define the constitutional authority of the tribe, and inferentially raises questions of due process in arguments advanced by appellant concerning the propriety of Indian courts deciding questions affecting the property rights of non-Indians.

The dangers suggested by appellant are, however, hypothetical; they are at best, speculation about future conduct based upon past experience in a lease dispute that has been previously decided. Prior decisions by the Department have required that parties seeking relief must show a substantive interest in a specific disputed matter cognizable by the Department entitling them to standing to maintain an appeal. United States v. Casey, 22 IBLA 358, 82 I.D. 546 (1975); Estate of Brown, 1 IBIA 320, 79 I.D. 619 (1972).

Rules of practice governing appeals before the Interior Board of Indian Appeals published at 46 FR 7337 (Jan. 23, 1981) limit the scope of appeals in administrative matters involving officials of the BIA to "cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant" (section 4.330(a)(1) (46 FR 7337)). While the Board may, under its rules of practice, render decisions in other matters upon referral, it may do so only at the order of the Secretary, or upon request of the Assistant Secretary for Indian Affairs, or Commissioner of Indian Affairs (section 4.330(a)(2) (46 FR 7337)).

An interested party having standing to appeal to the Board is defined at section 4.331 of the rules of practice to be one who, in a "case" protests a "determination, finding, or order" which affects a "right or privilege of the appellant." The Board's prior rules were to the same effect. (43 CFR 4.351, 4.353 (1980)). In this matter, there is no such claim made by appellant, who speculates that the approval of the law and order code may have such an effect in a future transaction which is not now foreseeable. The existence of a past dispute in which the code might have affected appellant is not sufficient to establish a violation of any claimed right or privilege of appellant currently affected by BIA decisionmaking.

By way of dicta, the Board notes that the Yavapai-Prescott Tribe is a federally recognized tribe (44 FR 7237 (Feb. 6, 1979)) which enjoys the same attributes of tribal sovereignty as other Indian tribes. So far as the power to approve a tribal law and order code is concerned, the tribe doubtless has the power to approve the tribal law and order code in the exercise of tribal sovereignty unless the power has been taken away by Congress. See United States v. Wheeler, 435 U.S. 313 (1978). No statute of the United States denying the tribe the power to approve a tribal law and order code has been cited by appellant; it appears to the Board that none has been enacted, nor do any regulations of the Department require Secretarial approval of a law and order code adopted by an Indian tribe such as the Yavapai-Prescott Tribe which is not organized under the Indian Reorganization Act, as amended 25 U.S.C. §§ 461-486 (1976). Were the Board to consider this matter in the context of a case in controversy before the Department, therefore, it would conclude that approval of the tribal code by the agency superintendent was unnecessary, as the tribe and BIA contend.

Appellant has no personal rights at stake in the matters here sought to be brought before the Board; he lacks standing to appeal under the rules of practice promulgated for the Board by the Department. The appeal is therefore dismissed.

This decision is final for the Department.

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Franklin D. Arness  
Administrative Judge

We concur:

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//original signed  
Wm. Philip Horton  
Chief Administrative Judge

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Jerry Muskrat  
Administrative Judge