



INTERIOR BOARD OF INDIAN APPEALS

Kiowa, Comanche and Apache Intertribal Land Use Committee v.
Acting Anadarko Area Director, Bureau of Indian Affairs

18 IBIA 229 (04/06/1990)



United States Department of the Interior

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

KIOWA, COMANCHE & APACHE : Order Dismissing Appeal
INTERTRIBAL LAND USE :
COMMITTEE, :
Appellant :
v. :
Docket No. IBIA 90-57-A
ACTING ANADARKO AREA DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee : April 6, 1990

On February 20, 1990, the Board of Indian Appeals (Board) received a notice of appeal from the Kiowa, Comanche & Apache Intertribal Land Use Committee (appellant). Appellant seeks review of a January 30, 1990, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (BIA; appellee), concerning the authority given to Kiowa members of appellant under the Kiowa constitution.

The appeal was assigned the above docket number on March 12, 1990, pursuant to 43 CFR 4.336 (54 FR 6488 (Feb. 10, 1989)). It was docketed on March 27, 1990, after receipt of the administrative record.

On April 2, 1990, the Board received appellant's motion to transfer jurisdiction over appeal to the Assistant Secretary - Indian Affairs or, in the alternative, to dismiss appeal without prejudice. ^{1/} Appellant's motion states at pages 2-3:

The issue raised by the two appeals ought to be decided by the Assistant Secretary. Both appeals seek reconsideration of a 1984 decision made by the Assistant Secretary's predecessor. [^{2/}] It is appropriate, therefore, that that office decide this issue. The Assistant Secretary sought to assume jurisdiction over this appeal, but missed the deadline for doing so by one day.

^{1/} A second appeal from the same decision was filed by the Kiowa Tribe. The Assistant Secretary properly assumed jurisdiction over that appeal pursuant to the provisions of 25 CFR 2.20(c) and 43 CFR 4.336 (54 FR 6488). That appeal was transferred to the Assistant Secretary on Mar. 22, 1990.

^{2/} The motion overlooks the fact that the appeal also seeks reversal of the Board's decision in Kiowa Business Committee v. Anadarko Area Director, 14 IBIA 196 (1986). In Kiowa Business Committee the Board followed the referenced Aug. 29, 1984, decision of the then Assistant Secretary. Kiowa Business Committee was not appealed to Federal court. Appellee's Jan. 30, 1990, decision in this case was based upon the Board's decision. Although, as is discussed below, the Secretary of the Interior has retained authority in 43 CFR 4.5(a) to review, *inter alia*, any Board decision, the Board is not aware of any such authority delegated to the Assistant Secretary.

Although the Regulations are silent on the subject, we believe that the Board has the discretionary authority to transfer a case before it to the Assistant Secretary in the interest of justice and under the appropriate circumstances. This is such an instance. If the two appeals proceed in different forums, there is the possibility of contradictory decisions, which will further confuse an already difficult and complex situation.

The Assistant Secretary is going to decide the Kiowa appeal. We believe that the interests of all parties would be served by transferring this appeal to that office, where the appeals can be consolidated for presentation and decision.

If the Board is unable or unwilling to do so, however, we would alternatively request that the KCA Land Use Committee be authorized to voluntarily dismiss this appeal, without prejudice.

No party will be harmed by such a dismissal. No time or energy has been expended on this appeal except for the preparation of the administrative record, which would have had to be prepared for the Kiowa appeal in any event.

The Board first addresses appellant's motion that this case be transferred to the Assistant Secretary. Under the Department's appeals regulations, jurisdiction over an appeal from a decision issued by a Bureau of Indian Affairs (BIA) area director is vested in the Board. See 25 CFR 2.20(a) and 43 CFR 4.331 and 4.332 (54 FR 6487-88 (Feb. 10, 1989)). This jurisdiction is subject to be divested by proper action of the Assistant Secretary under 25 CFR 2.20(c) and 43 CFR 4.336 (54 FR 6488). The Board has already held that jurisdiction over this case was not properly assumed by the Assistant Secretary under those regulations. See Order of Mar. 15, 1990.

The Board's jurisdiction can be divested later in only two circumstances. First, 43 CFR 4.337(b) (54 FR 6488) provides:

Where the Board finds that one or more issues involved in an appeal or in a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issues pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary - Indian Affairs for further consideration.

The issue in this case is the authority granted to the Kiowa members of appellant under the Kiowa constitution. This is not an issue involving the exercise of discretionary authority committed to BIA, and appellant has not so alleged. Accordingly, the appeal cannot be transferred to the Assistant Secretary under section 4.337(b).

Second, 43 CFR 4.5(a) provides:

Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:

(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, * * * and render the final decision in the matter after holding such hearing as may be required by law; and

(2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the office, or to direct any such employee or employees to reconsider a decision * * *. [3/]

The Board assumes that, under the Secretary's reserved authority, he can assume jurisdiction over an appeal before it and direct a decision to be issued by the Assistant Secretary. This procedure has not been invoked here.

Instead, appellant seeks to have the Board transfer jurisdiction over a case that is properly before it under some nebulous discretionary authority. The Board has only that authority delegated to it by the Secretary and set forth in its regulations. It has no "discretionary" authority to transfer a case properly before it to another office of the Department, and there is no regulatory authority for such a transfer under the conditions present here. Accordingly, the Board denies appellant's motion to transfer this appeal to the Assistant Secretary.

In the alternative, appellant asks the Board to dismiss its appeal without prejudice. Dismissals without prejudice are intended to allow an appeal to be refiled at a later time for a decision on the merits. Because the time for filing an appeal from the Acting Area Director's decision has passed, it would be inappropriate to dismiss this appeal without prejudice.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Acting Anadarko Area Director's January 30, 1999 decision is dismissed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Franklin D. Arness
Administrative Judge
Alternate Member

3/ 45 CFR 4.5(b) grants the same authority to the Director of the Office of Hearings and Appeals. This authority is, however, personal to the Director and does not include the authority to assure jurisdiction and transfer the case to another office of the Department.