



INTERIOR BOARD OF INDIAN APPEALS

Kiowa Business Committee v. Anadarko Area Director,
Bureau of Indian Affairs

14 IBIA 196 (08/01/1986)



United States Department of the Interior

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

KIOWA BUSINESS COMMITTEE

v.

AREA DIRECTOR, ANADARKO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 84-53-A

Decided August 1, 1986

Appeal from a decision of the Anadarko Area Director interpreting the Kiowa Constitution as it relates to the Kiowa, Comanche, and Apache Inter-tribal Land Use Committee.

Dismissed.

1. Board of Indian Appeals: Jurisdiction

An appeal from a decision of a Bureau of Indian Affairs Area Director or the Deputy Assistant Secretary--Indian Affairs (Operations) may properly be before the Board of Indian Appeals even though a related matter has been decided by the Assistant Secretary for Indian Affairs. However, when the parties before the Board are identically situated to those appearing before the Assistant Secretary, and the issues arise from the same transaction and are precisely the same as those decided by the Assistant Secretary, the precedent established by the Assistant Secretary's decision in the similar case is controlling.

APPEARANCES: F. Browning Pipestem, Esq., Norman, Oklahoma, for appellant; Anita Vogt, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. 1/

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On September 20, 1984, the Board of Indian Appeals (Board) received a notice of appeal from the Kiowa Business Committee (KBC, appellant). Appellant, under 25 CFR 2.19 2/, sought review by the Board of a decision issued

1/ Ms. Vogt was appointed to a judgeship on the Board of Indian Appeals on June 9, 1986, but has taken no part in the Board's consideration of this case.

2/ Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [now, Deputy Assistant Secretary--Indian Affairs (Operations)] shall:

on June 21, 1984, by the Anadarko Area Director, Bureau of Indian Affairs (BIA; Area Director, appellee). The decision involves the interpretation of the Kiowa Constitution as it relates to the authority of the Kiowa, Comanche, Apache Intertribal Land Use Committee (KCAILUC). For the reasons discussed below, the Board holds that this appeal must be dismissed.

Although constituting separate tribes, the Kiowa, Comanche, and Apache Tribes were settled on and given joint ownership of one reservation in Oklahoma by the United States Government. See Treaty with the Kiowas, Comanches and Apaches (Medicine Lodge Treaties) (Oct. 21, 1867), 15 Stat. 581 and 589. The three tribes jointly exercised governmental authority and land administration functions over the reservation through the Kiowa-Comanche-Apache Intertribal Business Committee. In the early 1960s when the tribes began revitalizing their separate governments, the Intertribal Business Committee was dissolved. Thereafter, both governmental and land administration functions were handled by the general councils of the tribes. Each general council consisted of all the adult members of that tribe. The concurrence of all three general councils was required for actions involving administration of the commonly owned lands.

In 1966, with BIA assistance, the tribes created KCAILUC. The tribal resolutions creating KCAILUC gave it authority to manage commonly owned lands. Specifically, Kiowa General Council Resolution No. 67-1, adopted on October 8, 1966, gave the Kiowa representatives to KCAILUC "the authority of this General Council to enter on its behalf into leases, permits, easements, rights of way, and other transactions, except the sale thereof, relating to tribal lands commonly owned by the Kiowa, Comanche, and Apache Tribes to the extent that this General Council could so act." Appellant states KCAILUC has, since 1966, continuously exercised the powers delegated to it by the three tribes. ^{3/}

A proposed Kiowa constitution was also pending when Resolution No. 67-1 was passed. This constitution, which apparently gave significant powers to elected tribal officials, was rejected. A second proposed constitution, drafted with BIA assistance, limited the powers of elected officials and retained more power in the people themselves. This constitution was ratified by the tribe on May 23, 1970, after being approved by the Acting Associate Commissioner of Indian Affairs. Article V, sections 1-3 of the adopted constitution concern the Kiowa Indian Council (KIC), KBC and KCAILUC:

fn. 2 (continued)

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the [Deputy Assistant Secretary] within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

^{3/} The Comanche tribal resolution was adopted on Oct. 8, 1966, and the Apache resolution on Nov. 16, 1968.

Section 1. Kiowa Indian Council. Authority to act concerning the following matters shall be vested in the Kiowa Indian Council (all members of the tribe eighteen (18) years of age or older) unless specifically delegated:

- a. Approval of an annual budget.
- b. Claims.
- c. Sale of tribal land.
- d. Long term industrial, commercial, or development leases.
- e. Contracts with Federal, State or local governments or private firms.
- f. Legal counsel contracts.
- g. Selection of tribal employees.
- h. All other powers not vested in the business committee by Section 2 of this article shall be retained by the Kiowa Indian Council.
- i. Any of the above powers may be delegated to the business committee.

Section 2. The Kiowa Business Committee shall be empowered to take necessary action on the following:

- a. Revocable permits, farm and grazing leases, oil, gas and mineral leases; easements and rights-of-way.
- b. Appoint subordinate committees.
- c. Promote arts and crafts and Kiowa Indian Culture.
- d. Prepare annual budgets for submission to and approval of the Kiowa Indian Council.
- e. Accept applications for tribal employment and submission to the Kiowa Indian Council for selection.
- f. Determine term of employment and salary of tribal employees.

Section 3. Kiowa, Comanche and Apache Intertribal Land Use Committee. The Chairman of the Kiowa Business Committee and business committee members designated by the business committee

shall work in conjunction with representatives of the Kiowa-Apache and Comanche Tribes to transact business regarding common property belonging to the three (3) tribes.

KBC contends its constitution did not specify the powers of KCAILUC, but merely amended the means of choosing the Kiowa representatives to KCAILUC. KBC further contends that, from 1966 until 1983, its interpretation of its laws, to the effect that KCAILUC continued to have authority over the commonly held lands, was concurred in by all three tribes, BIA, and the Department's Anadarko Field Solicitor's Office (Field Solicitor).

In September 1983, KCAILUC announced plans for a privately financed planned unit development on 312 acres of commonly owned lands. This project, called Kio-Man-Che, incorporated recreational, commercial, and residential uses. Planning for the project continued throughout 1983 and 1984. Trust funds of the three tribes were used by KCAILUC for planning, design, and redevelopment work. A subentity, the Kiowa, Comanche and Apache (KCA) Development Authority, was created to manage and oversee the development project.

As part of the Kio-Man-Che project, a master lease covering the 312 acres was prepared. The master lease was between KCAILUC, acting for and on behalf of the Kiowa, Comanche, and Apache Tribes, as lessor, and the KCA Development Authority, as lessee. The intent of the master lease was to allow the KCA Development Authority to enter into subleases with the tenants who would be part of the overall development plan.

The master lease involved several drafts and was the result of many meetings and discussions between KCAILUC, the KCA Development Authority, counsel and consultants for these groups, the Field Solicitor, and staff members of the BIA Anadarko Agency and Area Office. In early April 1984, final agreement on the master lease appeared imminent.

At about the same time, the Area Director expressed concern that KCAILUC did not have authority to enter into the master lease. Accordingly, he requested each tribal Business Committee to submit to him its own interpretation of whether or not their tribal representatives on KCAILUC had authority to approve long-term economic development leases of commonly owned lands. All three Business Committees responded that their representatives had full leasing authority. Appellee, however, argues that KBC's interpretation is of limited weight because of the organization imposed by the 1970 constitution. He states:

The interpretation involved here is that of the KBC. It is not at all clear that the KIC, which is defined in the Kiowa constitution as the governing body of the tribe (Article I section 2), would agree with the KBC's interpretation. In fact, the results of the June 1, 1985, constitutional amendment election (discussed below * * *) indicate otherwise. In view of the relative roles of the KBC and the KIC under the Kiowa constitution, the KBC's interpretation is not necessarily entitled to

the same status as the interpretation of the KIC would be, had such an interpretation been presented to the Area Director.

Appellee's answer brief at 3-4, n.1. The Kiowa response as given by KBC is contained in Resolution No. 84-49, adopted by KBC on May 23, 1984, by a vote of 5 to 0, with no abstentions. The resolution states in pertinent part:

WHEREAS, the Director, Anadarko Area, Bureau of Indian Affairs, has requested from the Kiowa Business Committee an interpretation of the scope and meaning of these provisions.

NOW THEREFORE BE IT RESOLVED, that the Kiowa Business Committee hereby states that the principles set forth in the Kiowa General Council Resolution dated October 8, 1966 * * * are still operative; and

BE IT FURTHER RESOLVED, that the provision of Article V, Section 3 of the Kiowa Tribal Constitution is intended to implement the October 8, 1966 Resolution and is fully consistent with that Resolution; and

BE IT FURTHER RESOLVED, that the Kiowa Business Committee fully agrees with the conclusion of the Field Solicitor, Anadarko, in the memorandum dated September 19, 1973, in which the Field Solicitor states that "The Kiowa, Comanche and Apache Intertribal Land Use Committee has full authority to . . . perform . . . acts and services relating to tribal lands commonly owned by the three tribes provided no attempt is made to sell or encumber the title to said lands;" and

BE IT FURTHER RESOLVED, that the KCA Intertribal, Land Use Committee has exercised such authority with respect to lands commonly owned by the three tribes for many years; and

BE IT FURTHER RESOLVED, that Article V, Section 3 of the Kiowa tribal constitution and the October 8, 1966 Resolution which it implements are specific delegations of authority to the KCA Intertribal Land Use Committee and that no further or additional Kiowa tribal consent or ratification is necessary with respect to actions of the Kiowa members of the KCA Intertribal Land Use Committee; and

BE IT FURTHER RESOLVED, that the Kiowa Business Committee hereby recognizes the authority of the KCA Intertribal Land Use Committee to charter the KCA Development Authority for the purpose of ensuring the orderly and professional development of tribal lands commonly owned by the three tribes.

KBC's letter transmitting Resolution No. 84-49 to the Area Director further stated at pages 1-2:

In the Kiowa Constitution the Kiowa Business Committee has both specified and implied powers. Due to the fact that the Kiowa Indian Council consists of approximately 5,800 Kiowas over the age of 18, it is illogical and impractical to believe that 5,800 people could interpret and define. It is possible to have 5,800 interpretations of the same question, therefore, the Kiowa Business Committee as the authorized elected representatives of the Kiowa Tribe has authority to act for the tribe on matters affecting official tribal affairs by the wording of Section 4, of Article V of the Kiowa Constitution, Tribal Delegations, which provides ". . . when a delegation is authorized by a duly adopted resolution of the business committee, said delegation shall act for the Kiowa Indian Tribe. No matter affecting official tribal affairs shall be discussed with Washington officials unless it shall have been previously approved as an agenda item by the business committee." Therefore, it is the Kiowa Business Committee that determines what the official position of the Kiowa Tribe will be concerning tribal affairs.

On June 21, 1984, the Area Director notified the Kiowa Tribe of his decision that KCAILUC could not enter into the master lease or other long-term economic development leases of commonly owned lands. That letter states at pages 1-2:

I am greatly impressed by the depth of reasoning in the Kiowa Business Committee's resolution and the attachments thereto. These illustrate not only a commendable thoroughness in the tribe's approach to the matter, but also a comprehensive understanding of the precepts of tribal law. You are correct that great weight is given by the Department to the tribal elected representatives' interpretation of constitutional provisions.

However, when faced with a decision to approve a long-term development lease of the magnitude envisioned for the Kio-Man-Che project, the delegations of authorities to the signatories must be explicit and indisputable. Clarification of this authority with finality will heighten the viability of the project which, conversely, could be jeopardized in the event the tribal management structure is challenged by any affected party.

Another significant factor is the potential liability of the Secretary should a subsequent finding be made that the authority to enter into such a lease had been retained by the Kiowa Indian Council which would nullify the execution and approval of the lease in the first instance.

Therefore, it is my determination that the authority of the Kiowa representatives on the Kiowa, Comanche and Apache Intertribal Land Use Committee to enter into long term industrial,

commercial or development leases must be specifically delegated or approved by the Kiowa Indian Council. This determination is based on the following analysis:

First, the Constitution and Bylaws of the Kiowa Indian Tribe of Oklahoma states in Article V, Section 1, that the Kiowa Indian Council (KIC) retains the power to act on "Long term, industrial, commercial or development leases." It is my understanding that at the time of the approval and ratification of the Kiowa Constitution, the tribe possessed only a few cemeteries in exclusive ownership. All of the other land over which it exercised any degree of control was owned jointly with the Comanche and the Apache Tribes. Therefore, I cannot rationalize or accept the premise contained in your interpretation that it was the intent of the drafters of the constitution to retain long term leasing authority to the KIC solely on lands owned exclusively by the Kiowa Tribe.

Second, Article V, Section 5 provides that "Any right and power heretofore vested in the Kiowa Indian Tribe but not expressly referred to in this constitution shall not be abridged by this article, but may be exercised by the members of the Kiowa Indian Council through the adoption of appropriate amendments to this constitution and bylaws. By this article, all powers, NOT expressly vested in the business committee are reserved to the Kiowa Indian Council." (emphasis added.) Given this strong language, it is impossible for me to agree with the contention in your interpretation that the Kiowa Business Committee has both specified and implied powers.

Accordingly, it was very likely that the drafters of the constitution and the membership who ratified it intended for the Kiowa Indian Council to retain the authority to enter into long term leases on any lands in which the tribe had an interest.

There are at least three alternative methods by which the Kiowa Tribe may clarify with finality the matter of the authority of its representatives on the Kiowa, Comanche and Apache Intertribal Land Use Committee as it relates to the Kio-Man-Che lease:

1. Conduct a referendum election in which the Kiowa Indian Council votes on the approval of this specific lease.
2. Conduct a referendum election in which the Kiowa Indian Council votes on the delegation of its authority to approve long term leases on jointly-owned lands to the Kiowa representatives on the Land Use Committee.

3. Amend the tribal constitution to include appropriate specific delegations of authority.

Pursuant to a request from appellant, by letter dated July 3, 1984, the Area Director provided appellant with the background information he used in reaching his decision. He stated at page 1 of that letter:

1. I made the decision set forth in my letter dated June 21, 1984, after consulting with the Assistant Area Directors, the Agency Superintendent, the Area and Agency Tribal Government Services staffs, and the staff of the Regional Solicitor's office. I did not obtain a consensus from my staff; the decision was solely my own.

2. The only written solicitor's opinion considered was the advisory one written by John L. Rogers on September 19, 1973, a copy of which is enclosed. The other legal advice considered was given orally.

3. The documents which were considered in the formulation of the decision were the Constitution and Bylaws of the Kiowa Indian Tribe of Oklahoma, the tribe's interpretation of the applicable provisions of that constitution as transmitted by your letter dated May 24, 1984 (with the subsequent submittals), and the original resolution establishing the Kiowa representatives on the KCA Intertribal, Land Use Committee (Kiowa 67-1, dated October 8, 1966).

Two appeals were eventually taken to the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary) from the Area Director's June 21, 1984, decision. One appeal, filed by KCAILUC and the KCA Development Authority, was decided adversely to those appellants by the Assistant Secretary for Indian Affairs (Assistant Secretary) on August 29, 1984. The second appeal, filed by present appellant, was not decided within the time established by 25 CFR 2.19. Consequently, appellant sought review of the Area Director's decision by the Board.

By order dated September 20, 1984, the Board made a preliminary determination that it had jurisdiction over the appeal and requested the administrative record. On October 18, 1984, the Board received a motion to dismiss from appellee alleging the Board did not have jurisdiction because on August 29, 1984, the Assistant Secretary "rendered a final agency decision in this matter, wherein he upheld the Area Director's decision." Although appellee admitted appellant had filed a separate appeal, he argued that on October 5, 1984, the Assistant Secretary had reaffirmed the August 29 decision. Appellee concluded "[i]t is clear from the August 29 and October 5 letters that, although there were two appeals, there was a single decision made by the Assistant Secretary." Motion at 1-2.

Appellant was given an opportunity to respond to this motion, and it opposed dismissal. By order dated January 16, 1985, the Board denied the motion to dismiss, stating at page 2:

Under [25 CFR] 2.19 the Deputy Assistant Secretary, or Assistant Secretary acting in place of the Deputy, has 30 days in which to render a decision in an appeal. The Deputy Assistant Secretary received two separate appeals from the Anadarko Area Director's June 21, 1984, decision. These appeals could have been consolidated, but they were not. The parties to each appeal were not notified of the decision in the other appeal. Under these circumstances, appellant's right to a decision in its appeal in accordance with Departmental regulations cannot be denied.

Under the Board's ruling in [Interim Ad Hoc Committee of the Karok Tribe v. Sacramento Area Director, 13 IBIA 76 (1985)], appellant is entitled to a decision by the Board. The parties are advised that, in reaching its decision, the Board will consider the Assistant Secretary's August 29 decision to the extent that similar or identical issues are raised in the present appeal. See Karok Tribe, supra; Willie v. Commissioner of Indian Affairs, 10 IBIA 13 (1982). [Footnote omitted.]

The Board again requested the administrative record.

The record was received on July 22, 1985. Both parties filed briefs in response to the Board's July 22, 1985, notice of docketing. Appellant argues that appellee's decision is in violation of the Kiowa Constitution as written, intended, and interpreted by the tribe. Furthermore, appellant contends its interpretation of the constitution was the interpretation agreed to by BIA and the Field Solicitor from 1970 until 1983, and that the present decision constitutes a complete departure from previous practice. Appellant states the interpretation violates the letter of the constitution, the history of the enactment of Resolution No. 67-1 and of the constitution, and the tribe's right to interpret its own laws. Thus, appellant states at page 4 of its reply brief:

Appellee states that the Area Director cannot acquiesce in an unreasonable interpretation of the governing document because of his trust responsibilities, and further, that he is obligated to uphold the governing document and implement Federal law. The troublesome aspect of determinations of this kind is in finding the demarcation point between self-determination and paternalism. For instance, at the point the Area Director's interpretation is unreasonable, he is in violation of trust responsibilities and federal law. At the point his interpretation is reasonable, and the Tribe's interpretation is reasonable, is it a function of

trust responsibilities and independent judgment by the Area Director to substitute his reasonable judgment for the equally reasonable judgment of the Tribe? Assuming, arguendo, that this Board finds both interpretations reasonable, who wins? It would seem that justice and equity would require that the Area Director prevail when the tribal interpretation is patently unreasonable, and the Tribe should prevail in all other instances. That the tribal interpretation is not patently unreasonable is clear in that until the present issue arose, the Tribe, the Solicitor, and the previous Area Directors all shared the tribal view. The Area Director's view is last in time and stands alone. Unless no other reasonable view can be taken, the Area Director must be reversed. [Emphasis in original.]

Appellee argues first that the Assistant Secretary's August 29, 1984, and October 5, 1984, decisions are final agency determinations in this matter and that the Board lacks jurisdiction to reverse those decisions. Alternatively, appellee argues that appellee's decision was correct on the merits.

The Board held in its January 16, 1985, order denying appellee's motion to dismiss that the Assistant Secretary lacked jurisdiction to issue the October 5, 1984, decision because the appeal had already been properly transferred to the Board under 25 CFR 2.19. The Board also indicated in that order, however, that in reaching its decision the Board would consider the Assistant Secretary's August 29, 1984, decision, to the extent that similar or identical issues were raised in the present appeal.

In his August 29 decision, the Assistant Secretary held that: the Kiowa Constitution could not be read to vest long-term leasing authority in the Kiowa members of KCAILUC; the Area Director's decision did not find that Resolution No. 67-1 was repealed by implication by the ratification of the constitution; any inconsistency with prior Departmental interpretations of the Kiowa Constitution was not as great as perceived; and the decision did not impede Indian self-determination because, by listing three alternative courses of action for the tribe, the Department recognized the tribe's authority to take the action necessary to proceed with the project.

[1] The present appeal is brought by a party identically situated to the parties in the August 29 decision and raises the same issues decided by the Assistant Secretary. The issue here is precisely the same as that which was decided by the Assistant Secretary on August 29, 1984: whether KCAILUC had authority to make long-term leases on behalf of the Kiowa tribe. As a consequence, the Board finds there has already been a Secretarial decision concerning the issue before it. Indeed, as appellee points out, not only is the issue raised identical, but the decision appealed from is the same. The prior decision by the Assistant Secretary is therefore, controlling. See Willie, supra. See also 43 CFR 4.331(b). 4/

4/ This regulation exempts from appeal BIA decisions "approved by the Secretary."

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 Area Director's June 21, 1984, decision is dismissed.

//original signed
Franklin D. Arness
Alternate Member

We concur:

//original signed
Wm. Philip Horton
Acting Chief Administrative Judge

//original signed
Bernard V. Parrette
Alternate Member

I concur in the result only:

//original signed
Jerry Muskrat
Administrative Judge