



INTERIOR BOARD OF INDIAN APPEALS

Kiowa, Comanche and Apache Intertribal Land Use Committee v.
Acting Deputy Assistant Secretary - Indian Affairs (Operations)

14 IBIA 207 (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, COMANCHE AND APACHE INTERTRIBAL LAND USE COMMITTEE
v.
ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 86-4-A

Decided August 1, 1986

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) declining to approve the fiscal year 1985 operating budget for the Kiowa, Comanche and Apache Intertribal Land Use Committee.

Affirmed.

1. Indians: Law and Order: Tribal Constitutions, Bylaws, and Ordinances

The Bureau of Indian Affairs has the right to apply tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law.

2. Indians: Law and Order: Tribal Constitutions, Bylaws, and Ordinances

Where a tribal constitution is clear upon its face, and the ordinary meaning of its language admits of only a single interpretation, the Bureau of Indian Affairs correctly applied unambiguous provisions of the constitution establishing the powers of the tribal government's various committees when it refused to approve a budget prepared by the Kiowa, Comanche and Apache Intertribal Land Use Committee.

APPEARANCES: Glenn M. Feldman, Esq., Washington, D.C., 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 October 18, 1985, the Board of Indian Appeals (Board) received a notice of appeal from the Kiowa, Comanche and Apache Intertribal Land Use Committee (KCAILUC, appellant). Appellant sought review of an August 28,

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.

1985, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) declining to approve its fiscal year 1985 operating budget. Because appellant is attempting to operate without an approved budget, appellant and appellee joined in a motion for expedited consideration. The Board grants expedited consideration, and for the reasons discussed below affirms appellee's decision.

The general events leading up to the formation of the present political organization of the Kiowa, Comanche, and Apache Tribes were reviewed in the Board's decision in Kiowa Business Committee v. Anadarko Area Director, 14 IBIA 196 (1986) (Kiowa Business Committee), and will not be repeated here. The background facts specific to the present case begin with the creation of KCAILUC by the General Councils of each of the three tribes in the late 1960s. ^{2/} The Kiowa General Council, which consisted of all adult members of the tribe, passed Resolution No. 67-1 on October 8, 1966. The resolution establishes the Kiowa representatives to KCAILUC and states in paragraph 3:

That the aforesaid representatives shall be and hereby are vested with 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; provided, that any action taken by said committee must be concurred in by at least two of the three members of the representatives of each separate tribe.

After being approved by the Department's Acting Associate Commissioner of Indian Affairs, the Kiowa Constitution was ratified by the tribe on May 23, 1970. In Article V, sections 1-3, this constitution establishes the Kiowa Indian Council (KIC) ^{3/} and the Kiowa Business Committee (KBC) and sets forth a new procedure for electing the Kiowa members of KCAILUC. Section 1 provides that KIC exercises most actual governing powers. Section 2 establishes KBC as an elected body with limited authority. KCAILUC is established to act in an intermediary capacity among the three tribes.

After ratification of the Kiowa Constitution, KCAILUC continued to operate as it had under the resolutions establishing it. In the performance of its operations, KCAILUC incurred certain expenses. During the first few years of KCAILUC's existence, these expenses were paid by the Bureau of Indian Affairs (BIA) on an ad hoc basis from funds held in trust jointly for the three tribes, as described by appellee in pages 3-4 of his August 28, 1985, decision:

From the materials before me, it appears that the BIA practice of approving KCAILUC budgets without requiring the approval

^{2/} The Kiowa and Comanche resolutions creating the KCAILUC were adopted on Oct. 8, 1966, and the Apache resolution on Nov. 16, 1968.

^{3/} KIC was a new name developed by the tribe to replace "General Council." The KIC and the former General Council have the same voting membership consisting of all adult members of the Kiowa tribe.

of the KIC was initiated prior to adoption of the Kiowa constitution and at a time when the duties and the expenses of the KCAILUC were modest. It also appears that the practice has continued unexamined for a number of years. Initially, the KCAILUC had no budget but simply submitted vouchers for its expenses as it incurred them. Funds were drawn from an IIM account containing rental income from KCA property. In May, 1969, rental income began to be deposited directly into a KCA Treasury account so that by April 1970, the IIM account was depleted. This fact evidently led the Superintendent to recommend to the KCAILUC that it enact a resolution requesting the transfer of necessary funds from the Treasury account to the IIM account, including, the Superintendent suggested, funds for FY 1971. Letter from Supt. to KCAILUC members, April 2, 1970. The Superintendent's recommendation appears to have led to adoption of the first KCAILUC budget on April 25, 1970. At that time, the Kiowa constitution had not been adopted, and the Kiowa members of the KCAILUC clearly had the authority, pursuant to the Kiowa resolution of October 8, 1966, to approve a KCAILUC budget on behalf of the Kiowa Tribe.

From 1970 until 1984, KCAILUC developed an annual budget, which was submitted to and routinely approved by BIA. Authority to approve the annual budget was apparently delegated first to the Anadarko Area Director (Area Director), and then to the Superintendent. These budgets remained relatively small until 1983, 4/ when funds were requested for planning the Kio-Man-Che development project. 5/

On October 17, 1984, BIA refused to approve the KCAILUC's proposed fiscal year 1985 operating budget. This decision, which was signed by both the Superintendent and the Area Director, stated at pages 1-2:

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 approve an annual budget. Therefore, the same reasoning which was the basis of the Area Director's June 21, 1984 decision, the July 20, 1984 transmittal of the KCAILUC appeal, the Assistant Secretary's August 29, 1984 decision on that appeal and his October 5, 1984 decision on the Kiowa Business Committee's (KBC) appeal are applicable to this decision.

4/ The amounts of the annual budgets were: 1971 - \$7,034; 1972 - \$17,151; 1973 - none; 1974 - \$15,835; 1975 - \$17,646; 1976 - \$40,000; 1977 - \$25,600; 1978 - \$28,000; 1979 - none; 1980 - none; 1981 - \$66,000; 1982 - \$88,892; 1983 - \$160,300; 1984 - \$188,000. The unapproved fiscal year 1985 budget was for \$367,700.

5/ The Kio-Man-Che project is a proposed commercial, industrial, and residential development on 312 acres of commonly owned tribal land. The project, which was responsible for the Kiowa Business Committee appeal, is apparently controversial.

As a result, the proposed FY 1985 KCAILUC budget cannot be approved without appropriate action by the Kiowa Indian Council (KIC). We recognize that this is a departure from past Bureau actions in approving KCAILUC budgets. However, as representatives of the United States government which is the trustee of these funds, we cannot, in good conscience, take what we believe to be an erroneous action and rationalize that we are doing so because others have done so in the past.

* * * [T]here 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 KCAILUC as it relates to the approval of annual budgets advanced from KCA jointly-owned funds:

1. Conduct a referendum election in which the Kiowa Indian Council votes on the approval of this specific budget.
2. Conduct a referendum election in which the Kiowa Indian Council votes on the delegation of its authority to approve annual budgets from KCA funds to the Kiowa representatives on the KCAILUC.
3. Amend the tribal constitution to include appropriate specific delegations of authority.

We would be happy to provide any requested technical assistance which would assist in these actions.

The Area Director then discussed certain specific items in the budget.

Appellant filed an appeal from the Area Director's decision. On August 28, 1985, appellee issued a decision affirming the Area Director. Appellee noted the present case was similar to the Kiowa Business Committee case, but was distinguishable because "the Area Office has routinely approved KCAILUC budgets without requiring the approval of the KIC" (Decision at 2). Appellee stated at page 3:

When the provisions of sections 1, 2, 3 and 5 [of the Kiowa Constitution] are considered as a whole, the conclusion appears inescapable that the power to approve KCAILUC budgets is vested in the KIC either by section 1(a) or by section 1(h) and section 5. The power to approve KCAILUC budgets, if not included in section 1(a), as you argue it is not, is a power not expressly referred to anywhere in the constitution and is therefore reserved to the KIC by section 1(h) and section 5. In light of the clear expression in section 1(h) and section 5 of an intent to divide powers only between the KIC and the KBC and to reserve unexpressed powers to the KIC, it is my view that the general

charge to the Kiowa members of the KCAILUC in section 3 to "work in conjunction with representatives of the Kiowa-Apache and Comanche Tribes to transact business regarding common property belonging to the three tribes" cannot reasonably be construed as a vesting of budget approval authority in the Kiowa members of the KCAILUC.

Appellee further found that KCAILUC's first operating budget was approved before the effective date of the Kiowa Constitution and that BIA merely continued to approve the operating budgets until the Area Director's October 17, 1984, decision without "examin[ing] the constitution * * * to determine whether it had modified the grant of authority to the KCAILUC members in the 1966 resolution" (Decision at 4).

Finally, appellee notes at page 5 of his decision:

Subsequent to the Area Director's decision, the Kiowa Tribe conducted an election on several proposed constitutional amendments. One of those amendments would have clearly vested the Kiowa members of the KCAILUC with the authority, *inter alia*, to approve KCAILUC budgets on behalf of the Kiowa Tribe. The amendment was rejected at an election held on June 1, 1985. While it is not conclusive with respect to the intent of those who voted on the Kiowa constitution in 1970, this recent vote demonstrates that the Kiowa people today do not want to vest the KCAILUC members with powers independent of the KIC. Thus, the Area Director's interpretation of the Kiowa constitution clearly appears to be in accord with the sense of the Kiowa people. [Footnote omitted.]

Appellant appealed this decision to the Board. Both parties filed briefs on appeal.

Initially, appellant does not appear to dispute BIA's right and duty to take a tribal constitution into account in carrying out its statutory responsibilities. Rather, appellant contends that, in construing tribal law, BIA should defer to the tribe's reasonable interpretation of its own laws and governing documents. Appellant argues that the 1966 tribal interpretation of the interaction between Resolution No. 67-1, establishing KCAILUC, and the Kiowa Constitution was set forth in Resolution No. 84-49, passed unanimously by KBC on May 23, 1984, in response to a request from the Area Director for a statement of KBC's position on that question. Resolution No. 84-49 states that Resolution No. 67-1 remains in full force and effect, and was altered by the ratification of the Kiowa Constitution only as to the method of choosing KCAILUC representatives.

[1] The Board agrees BIA has the right to look to tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law. In analyzing tribal law, BIA should give deference to the tribe's interpretation of its own laws. *See, e.g., and compare, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978); *Talton v. Mayes*, 163 U.S.

376, 385 (1896); Tom v. Sutton, 533 F.2d 1101, 1106 (9th Cir. 1976); Patrick Stands Over Bull v. Billings Area Director, 6 IBIA 98, 109 n.20 (1977); Felix S. Cohen's Handbook of Federal Indian Law, 247 (1982 ed.). The amount of deference due a tribal interpretation of its laws depends on the reasonableness of the interpretation in light of all relevant canons of construction.

[2] The Acting Deputy Assistant Secretary correctly concluded that, on its face, Article V of the Kiowa Constitution, respecting the division of tribal power, divides the entire power of the tribe respecting the approval of its annual budget between KIC and KBC. Thus Article V provides, at Section 1(h), that: "All other powers not vested in the business committee by Section 2 of this article shall be retained by the Kiowa Indian Council." Section 2, referred to above by the quoted portion of Section 1(h), provides that KBC shall "prepare annual budgets for submission to and approval of the Kiowa Indian Council." Section 3 of Article V mentions KCAILUC, but does not delegate any budgetary or other powers to the committee, and instead describes KCAILUC as a liaison committee for the Kiowa, Comanche, and Apache tribes respecting transactions involving property held by the three tribes in common. Section 5 of Article V provides:

Reserve Power Clause. 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 in original.]

There is no ambiguity in these provisions creating the budgetary scheme for the Kiowa tribe. The provisions of Article V of the tribal constitution describe a bicameral budget arrangement through which KBC proposes a budget and KIC acts upon the proposal. Any room for possible misunderstanding of this plan of organization is eliminated by the language of section 5 which makes clear that KIC has delegated to KBC only those enumerated powers described in the preceding sections and has retained all others to itself. KCAILUC is not delegated any powers, budgetary or otherwise, but is established to serve as a liaison between the tribes to facilitate dealings in matters arising from commonly held property. Appellant's arguments which seek to find a greater role for KCAILUC, despite the clear constitutional provisions which deny the committee any budgetary power, are therefore contrary to the expressed intention of the constitution itself.

A comparison of the Kiowa constitution adopted in 1970 with the proposed constitution rejected three years earlier is instructive concerning development of the plan of tribal budget process. The rejected 1967 constitution would have authorized KBC to exercise full control over spending tribal money (see Section 1(c), Article V of the rejected constitution) while giving KBC leasing authority only over lands which were not jointly

held with the other two tribes. (*Id.* Art. V, § 1(b).) The significance of a comparison of the 1967 constitutional proposal and the 1970 Kiowa constitution is described by the brief filed by the Office of the Solicitor at 6-7:

The 1970 constitution is very different from the 1967 proposal. The KIC, for which no provision was made in the 1967 proposal, is defined as the governing body of the tribe, Article I section 2, and certain powers are reserved to it. Article V section 1. No distinction is made in this reservation of power between solely-owned and jointly-owned funds and lands, although the distinction had been clearly recognized in the earlier proposal. The 1970 constitution, while evidencing the unwillingness of the Kiowa people to vest in the KBC the broad powers which the 1967 would have vested in it, did provide that the Kiowa members of the KCAILUC would be members of the KBC and would be selected by the KBC. Article V section 3. (The 1966 [KBC] resolution provided for selection by the Kiowa General Council and the 1967 proposed constitution would not have altered that provision.) It is particularly unlikely that the Kiowa people in 1970 intended simultaneously to provide that the Kiowa representatives to the KCAILUC would be KBC members and that those representatives would have far greater powers over tribal funds than the Kiowa people were willing to let the KBC itself exercise. All of these factors mitigate against a conclusion that the Kiowa people in 1970 intended to vest budget approval authority in the Kiowa members of the KCAILUC. [Footnote omitted.]

Although the 1966 KBC resolution No. 67-1 preceded the 1970 constitution, appellant nonetheless seeks to find a historical basis for arguments that the resolution should somehow outweigh the contrary provisions of the constitution regarding the delegation of powers to lease to the KCAILUC. Appellant purports to find support for this unusual result in an analysis of the administration for the Kiowa budget from the time KCAILUC was first formed until 1984. Appellant argues that for 14 years KCAILUC adopted a proposed budget which was submitted to BIA for approval. It is contended that this long-standing practice recognized both by BIA and the tribal business committee must be correct and should therefore be followed. This argument, however, ignores the fact that the annual budgets under consideration grew from about \$7,000 in 1971 to \$188,000 in 1984. The agency concedes, and common sense would indicate, that when the Kio-Man-Che project grew in financial importance it attracted much more attention both from BIA and the Kiowa tribe than it had in the initial stages of project formation. In 1984, when the Area Director undertook a review of the project as a consequence of the phenomenal growth of the undertaking, and it became apparent that the past budgets had not been prepared in conformity to the provisions of Article V of the Kiowa constitution, the practice of approving budgets prepared by KCAILUC was halted.

The first KCAILUC budget was adopted and forwarded for approval by BIA before the 1970 constitution was approved by the Kiowa tribe. Later

budgets simply followed the same procedure, without formal consideration of the effect of the 1970 constitution upon the budgeting practice previously adopted. However, as the Supreme Court observed in Montana v. Blackfeet Tribe, 105 S.Ct. 2399 (1985), the long continuation of an erroneous practice does not correct the error inherent in the practice. Where an erroneous course of administration has persisted over time, the error may nonetheless be corrected by putting an end to the erroneous practice. The Court's opinion in Blackfeet Tribe explains, at footnote 7, that in such cases prior opinions of the Department must be revised to correctly state the law:

We are likewise unpersuaded by the State's contention that we should defer to the administrative interpretation that the 1924 taxing proviso applies to leases executed under the 1938 Act. The State relies on opinions of the Department of the Interior in making this argument. As the Court of Appeals pointed out, however, the administrative record is not as strongly consistent as the State contends. 729 F.2d, at 1202-1203. The opinions issued prior to 1956 did not mention the 1938 Act or leases executed pursuant thereto. Thus, at best, they did not address the issue presented by this case, but simply assumed that the 1924 Act and this Court's decision in British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 56 S.Ct. 132, 81 L.Ed. 95 (1936), applied to leases executed under the 1938 Act. It was not until its 1956 opinion that the Department of Interior considered the relationship between the 1938 and 1924 Acts. The Department then held that the taxing provision had not been repealed by the 1938 Act. This 1956 opinion was unpublished and did not analyze whether Congress had intended the 1924 Act's provision to apply to leases entered pursuant to the 1938 Act. A 1966 opinion relied on the 1956 opinion. In 1977, the Department reconsidered the issue carefully and in far greater detail than it had in 1956, and reversed its prior decision. See 729 F.2d, at 1202-1203. On this record, we cannot accept the premise of the State's argument for deference to agency interpretation, that is, that the Department had a consistent 40-year practice. This is particularly true where, as here, the language and purpose of the 1938 Act are--for the reasons set forth above--clearly to the contrary.

Id. at 2404, 2405. This is just such a situation. An earlier informally initiated practice of approving KCAILUC budgets, which may not have been begun by a studied analysis of the law, was later corrected by a formal decision which carefully considered the issue raised by the budgetary practice in far greater detail than was the earlier action which initiated the practice. When he ended the unconstitutional practice which had permitted KCAILUC to participate in the budget process, the Area Director correctly applied the applicable provisions of Article V of the Kiowa constitution which had previously been ignored.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 28, 1985,

decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations), concluding that the Kiowa, Comanche and Apache Intertribal Land Use Committee lacks authority to submit an operating budget unless that budget is approved by the Kiowa Indian Council, is affirmed.

//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

ADMINISTRATIVE JUDGE MUSKRAT DISSENTING:

The majority opinion relies heavily upon the statement that Bureau of Indian Affairs (BIA) approval of Kiowa, Comanche, and Apache Intertribal Land Use Committee (KCAILUC) budgets simply developed over the years without much thought or attention, and was continued without ever being reviewed. The record indicates otherwise. In August 1983, when KCAILUC requested a withdrawal of \$500,000 from joint tribal funds, the practice of approving KCAILUC budgets was reviewed by the Field Solicitor, who apparently concurred with the 1973 Field Solicitor's opinion that KCAILUC had such authority. This 1983 opinion is not part of the record before the Board, so that the Field Solicitor's legal reasoning is not available. The 1983 opinion was, however, the basis for an April 24, 1984, letter written by the Director of the Office of Indian Services, BIA, repeating that KCAILUC had budget authority.

I do not dispute the authority and responsibility of an administrative agency to correct prior erroneous interpretations of law. See, e.g., Bonaparte v. Commissioner of Indian Affairs, 9 IBIA 115 (1981). I simply do not believe that the record and law in this case are as clear as the majority suggests. BIA's interpretation of the Kiowa Constitution fails to consider the historical context in which that document was written, the problems being addressed by the constitution's drafters and BIA advisers, and the contemporaneous interpretation of that document and Resolution No. 67-1 by the Department, including the Field Solicitor's Office. Consequently, I cannot accept BIA's interpretation of the constitution. In contrast, the tribe's interpretation of its laws is both reasonable and appropriate to the factual and legal situation giving rise to the constitution and its relationship with the KCAILUC. For these reasons, I respectfully dissent.

//original signed

Jerry Muskrat
Administrative Judge