



INTERIOR BOARD OF INDIAN APPEALS

Kiowa Tribe of Oklahoma v. Acting Anadarko Area Director,
Bureau of Indian Affairs

19 IBIA 157 (01/22/1991)

Affirmed on reconsideration:
19 IBIA 320



United States Department of the Interior

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

KIOWA TRIBE

v.

ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-113-A

Decided January 22, 1991

Appeal from a decision concerning the authority granted to Kiowa members of the Kiowa, Comanche and Apache Intertribal Land Use Committee by the Kiowa Constitution.

Affirmed.

1. Indians: Tribal Government: Generally--Regulations: Binding on the Secretary--Regulations: Force and Effect as Law

The Department of the Interior is bound by its own properly promulgated regulations, which have the force and effect of law.

2. Administrative Procedure: Burden of Proof--Indians: Tribal Government: Generally

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

APPEARANCES: Linda A. Epperley, Esq., Talhequah, Oklahoma, for appellant; R. W. Collier, Jr., Anadarko Area Director, Bureau of Indian Affairs, and Joe B. Walker, Acting Anadarko Area Director, pro sese; Dr. Eddie F. Brown, Assistant Secretary - Indian Affairs, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Kiowa Tribe seeks review of a January 30, 1990, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (BIA; Area Director), concerning the authority granted to Kiowa members of the Kiowa, Comanche and Apache Intertribal Land Use Committee (KCAILUC) by the Kiowa Constitution. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The background of the development of the KCAILUC was set forth in a prior Board decision, and will not be repeated here. See Kiowa Business Committee v. Anadarko Area Director, 14 IBIA 196, 197-99 (1986). The present controversy apparently began on December 28, 1989, when the KCAILUC submitted to the Anadarko Agency Superintendent (Superintendent) KCAILUC Resolution # 89-19 and an unsigned lease agreement between KCAILUC and KCA/Gemsco, authorizing a joint venture between the Kiowa, Comanche, and Apache Tribes and Gemsco, Inc., of Milford, Connecticut, to construct and operate an embroidered insignia and patch plant on land held jointly by the three tribes.

By letter dated January 16, 1990, the Superintendent stated that it was BIA's position that the Kiowa members of the KCAILUC lacked the authority to enter into long-term leases of jointly owned land without approval of the Kiowa Indian Council (KIC). ^{1/} The Superintendent indicated that this position was based upon a decision issued on June 21, 1984, by the Anadarko Area Director, which was upheld by the Assistant Secretary - Indian Affairs (Assistant Secretary) on August 29, 1984, and by this Board in the Kiowa Business Committee case, cited supra.

On January 23, 1990, appellant appealed the Superintendent's decision to the Area Director, stating: "It is the position of the Kiowa Tribal representatives to the [KCAILUC] that the 1984 Area Director's ruling and subsequent [Board] decisions were in error and not reflective of the meaning and intent of the Kiowa Constitution." By letter dated January 30, 1990, the Area Director affirmed the Superintendent's decision, listing three means by which the Kiowa Tribe could clarify the issue of the authority of its members of the KCAILUC: ^{2/}

1. Conduct a referendum election in which the Kiowa Indian Council votes on the approval of a 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 KCAILUC. ^{3/}
3. Amend the tribal constitution to include appropriate specific delegations of authority.

(Decision at 2). The Area Director concluded at page 3: "It is my personal opinion that a decision by the Interior Board of Indian Appeals may only be

^{1/} Under Art. V, sec. 1, of the Kiowa Constitution, the KIC consists of all tribal members 18 years of age or older. The KIC is given most of the governing powers of the Kiowa Tribe.

^{2/} The same suggestions were made to the KCAILUC in the Area Director's June 21, 1984, decision.

^{3/} Similar referendum items were voted down by the KIC in elections held on June 2 and Nov. 3, 1984.

reversed by the Office of the Secretary; however, you are afforded the following procedures for appeal as provided in 25 Code of Federal Regulations, Part 2.”

The Board received a telefax copy of appellant's notice of appeal from the Area Director's decision on March 1, 1990, and the original notice of appeal on March 5, 1990. The notice states:

The Kiowa Tribe will file its appeal documents in this case in the near future.

The KCA Intertribal Land Use Committee filed its Notice of Appeal on February 12, 1990, a copy of which is attached. We request that these appeals be consolidated for review. [4/]

This appeal will request that the Assistant Secretary - Indian Affairs reconsider and reverse the August 29, 1984, decision made by his predecessor and, instead, conclude that the KCA Intertribal Land Use Committee, including its Kiowa members, has the authority to enter into long-term leases of KCA land for economic development purposes.

On March 19, 1990, the Board received notification from the Assistant Secretary that he was assuming jurisdiction over this appeal under 25 CFR 2.20(c) and 43 CFR 4.332(b). 5/ Accordingly, by notice dated March 22, 1990, the Board transferred all materials concerning the case to the Assistant Secretary.

[1] On July 16, 1990, the Board received a request from the Area Director that it reassume jurisdiction over the appeal pursuant to 25 CFR

4/ This appeal was dismissed at the appellant's request. See Kiowa, Comanche & Apache Intertribal Land Use Committee v. Acting Anadarko Area Director, 18 IBIA 229 (1990).

5/ 25 CFR 2.20(c) provides:

"In accordance with the provisions of § 4.332(b) of Title 43 of the Code of Federal Regulations, a notice of appeal to the Board of Indian Appeals shall not be effective until 20 days after receipt by the Board, during which time the Assistant Secretary - Indian Affairs shall have authority to decide to:

"(1) Issue a decision in the appeal."

43 CFR 4.332(b) provides:

"In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board during which time the Assistant Secretary - Indian Affairs may decide to review the appeal. If the Assistant Secretary - Indian Affairs properly notifies the Board that he has decided to review the appeal, any documents concerning the case filed with the Board shall be transmitted to the Assistant Secretary - Indian Affairs."

2.20(e). 6/ By order of the same date, the Board made a preliminary determination that it had jurisdiction over the matter and requested that the administrative record be transferred back to it. On August 7, 1990, the Board received a letter from the Assistant Secretary asking that the matter be remanded to him so that he could collect additional documentary evidence and render a decision. After reviewing the Assistant Secretary's request and the applicable regulations, the Board issued an order on August 8, 1990, concluding that "no regulatory provision exists for the action requested by the Assistant Secretary" (Order at 2). The Board, citing Tarabochia v. Deputy Assistant Secretary - Indian Affairs (Operations), 12 IBIA 269, 275, 91 I.D. 243, 246 (1984), held that because the Department of the Interior is bound by its own properly promulgated regulations, which have the force and effect of law, the Assistant Secretary's request had to be denied.

The Board received the administrative record from the Assistant Secretary on August 14, 1990. 7/ By order of the same date, interested parties, including the Assistant Secretary, were given until September 17, 1990, in which to file any additional arguments, information, or materials which they wished the Board to consider. Only the Area Director made a filing in response to this order.

Pursuant to a request from the Oklahoma congressional delegation, on November 13, 1990, the Secretary of the Interior referred this case to the Acting Director of the Office of Hearings and Appeals pursuant to 43 CFR 4.5 8/ for review of the Board's August 8, 1990, order. By order dated January 10, 1991, the Acting Director left the case with the Board for a final decision.

Discussion and Conclusions

[2] The Board has consistently held that in appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency decision complained of was erroneous or not supported by substantial evidence. See Kays v. Acting Muskogee Area Director, 18 IBIA 431, 438 (1990), and cases cited therein. Here the notice of appeal merely states appellant's disagreement with the decision without setting forth any support for its contrary interpretation. 9/ Appellant did not file a brief. Because

6/ Section 2.20(e) states: "If the Assistant Secretary - Indian Affairs * * * does not make a decision within 60 days after all time for pleadings (including all extensions granted) has expired, any party may move the Board of Indian Appeals to assume jurisdiction subject to 43 CFR 4.337(b)."

43 CFR 4.337(c) concerns issues decided by BIA under its discretionary authority, and is not applicable in the present appeal.

7/ The administrative record supplied by the Assistant Secretary did not include any additional filings by appellant.

8/ Section 4.5 reserves the Secretary's authority to assume jurisdiction over a case pending before the Board.

9/ Arguments appearing in the administrative record regarding appellant's position in support of the earlier appeal were considered and rejected in that appeal.

it has not given any reasons to support a finding of error in either the Board's 1984 decision, which was the last decision in the earlier appeal, or the Area Director's application of that decision in the present case, appellant cannot sustain its burden of proof.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 30, 1990, decision of the Acting Anadarko Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
John H. Kelly
Administrative Judge
Alternate Member