



INTERIOR BOARD OF INDIAN APPEALS

Timothy Tarabochia v. Deputy Assistant Secretary - Indian Affairs (Operations)

12 IBIA 269 (06/06/1984)

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# United States Department of the Interior

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

TIMOTHY TARABOCHIA

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 84-10-A

Decided June 6, 1984

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying the issuance of a fishing identification card.

Affirmed.

1. Indian Tribes: Hunting and Fishing: Off- Reservation

Under 25 CFR 249.3 an applicant for a Bureau of Indian Affairs fishing identification card must be a member of a tribe with Federally recognized treaty fishing rights.

2. Regulations: Binding on the Secretary--Regulations: Force and Effect as Law

Duly promulgated regulations have the force and effect of law and are binding upon the Department.

3. Regulations: Validity

The Board of Indian Appeals does not have the authority to declare a duly promulgated regulation of the Department to be invalid.

APPEARANCES: Timothy Tarabochia, pro se; Vernon Peterson, Jr., Esq., Office of the Field Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee; Richard Reich, Esq., Taholah, Washington, for amicus curiae the Quinault Indian Nation. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On January 6, 1984, the Board of Indian Appeals (Board) received a notice of appeal and brief from Timothy Tarabochia (appellant). Appellant sought review of a November 3, 1983, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) affirming the Acting Portland Area Director's refusal to issue appellant a fishing identification card (I.D. card) under 25 CFR Part 249. Appellant argues that he was entitled to such an I.D. card so that he could fish in the usual and accustomed areas of the Quinault, Quileute, and Hoh Tribes. The Quinault Indian Nation (Quinault Nation, amicus) sought and was granted amicus curiae status in this case. <sup>1/</sup> For the reasons discussed below, the Board affirms appellee's decision.

Background

On June 2, 1983, appellant, a member of the Wahkiakum Band of Chinook Indians (Wahkiakum), wrote to the Solicitor's Office of the Department of the Interior (Department) requesting that the Bureau of Indian Affairs (BIA) issue him an I.D. card that would be valid against regulation by the State of

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<sup>1/</sup> See Order Granting Amicus Curiae Status and Extension of Time, Apr. 3, 1984.

Washington. <sup>2/</sup> Such cards are authorized under 25 CFR Part 249. Appellant's letter was referred to the Portland Area Office, BIA. By letter dated July 6, 1983, the Acting Area Director refused to issue appellant an I.D. card on the grounds that BIA had no authority to issue I.D. cards to members of the Wahkiakum. This decision was based on 25 CFR 249.3(b), which provides that "[n]o such card shall be issued to any Indian who is not on the official membership roll of the tribe which has been approved by the Secretary of the Interior." The Acting Area Director concluded at page 1 of his decision letter:

The Wahkiakum Band of Chinook Indians is not a signatory to any treaty with the United States and is not a Federally-recognized Tribe with a government-to-government relationship with the United States. A list of such recognized Tribes is published in the Federal Register. See 47 F.R. 53130 (November 24, 1982). <sup>[3/]</sup> Furthermore, the Wahkiakum Band of Chinook Indians does not have an official membership roll which has been approved by the Secretary of the Interior.

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<sup>2/</sup> On Oct. 7, 1981, appellant was charged with illegal gillnet fishing by the State of Washington. According to the memorandum opinion and order in Washington v. Tarabochia, Case No. K-2469, Grays Harbor District Court, Dept. No. One, Grays Harbor County, State of Washington, issued on Nov. 24, 1981, appellant was

"fishing with gillnet gear in the Chehalis River in Grays Harbor County, Washington, at a time and place where the Quinault Indian Tribe members were conducting off-reservation salmon fishing on their usual and accustomed fishing grounds. There was no closure by the State for conservation purposes, insofar as Quinault Indian fishing was concerned, but other than for Indian fishing the season was closed. \* \* \* [Appellant] was not \* \* \* carrying a [BIA] identification card and none had been issued to him \* \* \*; had [appellant] been a Quinault Indian with proper Quinault I.D. card, he wouldn't have been arrested for unlawful gillnet fishing - he would have been lawful insofar as the state is concerned."

Order at 1. The State Judge granted appellant's motion to dismiss the case, concluding that "Mr. Tarabochia had a right to fish, and had done everything he could have done to secure that right." Order at 6.

<sup>3/</sup> The Department's list of Federally recognized Indian tribes is published annually in the Federal Register. For the most current list, see 48 FR 56862 (Dec. 23, 1983). The Wahkiakum is still not a Federally-recognized tribe.

Additionally, the Acting Area Director noted:

[T]he Ninth Circuit Court of Appeals ruled in Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176 (9th Cir. 1981), that the Wahkiakum Band has neither a treaty protected right nor an aboriginal fishing right to fish in the band's claimed usual and accustomed fishing areas in the Columbia River. The Wahkiakum Band's broader claim that it possesses Federally protected fishing rights which may be exercised throughout the usual and accustomed areas of the Quinault, Quileute, and Hoh Tribes has not been established and is presently before the District Court in Wahkiakum Band v. Schmitten, Civil No. C-81-630T (W.D. Wash).

(Letter at page 2).

Pursuant to information contained in the Acting Area Director's decision, appellant appealed this decision to the Commissioner of Indian Affairs on July 15, 1983. <sup>4/</sup> On November 3, 1983, appellee affirmed the Acting Area Director's decision. Appellee first noted that appellant did not challenge the finding that BIA lacked authority to issue an I.D. card under its regulations. He concluded that the appeal lacked merit under Bateman, supra, and because of the pending litigation in Schmitten, supra.

The Board received appellant's notice of appeal from this decision on January 6, 1984. Appellant submitted a brief with his notice of appeal. The Board docketed the case on February 16, 1984, after receiving the administrative record from BIA. On March 26, 1984, the Board received a brief from appellee, and a motion for leave to appear as amicus curiae together with a

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<sup>4/</sup> The administrative review functions of the vacant office of Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary--Indian Affairs (Operations) by memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

brief from the Quinault Nation. Amicus status was granted by Board order dated April 3, 1984. Further briefs and motions were filed by appellant and amicus. <sup>5/</sup>

### Discussion and Conclusions

Appellant's request for a fishing I.D. card is not an isolated incident. The treaties granting special fishing rights to certain Pacific Northwest Indian tribes <sup>6/</sup> have been under judicial review for more than a decade. The most recent Supreme Court decision on this subject is Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). In that decision, Mr. Justice Stevens recounted in detail the historical relationship of the Indians of this area with its anadromous fish population, the treaties and preceding negotiations guaranteeing fishing rights to those Indians, and the conflicts and resulting litigation that have arisen because of the present need to impose conservation restrictions on fishing and to reach an accommodation between the interests of treaty Indians and others exploiting this resource. <sup>7/</sup>

[1] This history, although informative, is not necessary to the disposition of the present case. The BIA found that appellant was not entitled

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<sup>5/</sup> See note 8, *infra*.

<sup>6/</sup> Treaty of Medicine Creek (10 Stat. 1132); Treaty of Point Elliott (12 Stat. 927); Treaty of Point no Point (12 Stat. 933); Treaty of Neah Bay (12 Stat. 939); Treaty with the Yakama (12 Stat. 951); and Treaty of Olympia (12 Stat. 971).

<sup>7/</sup> See Halbert v. United States, 283 U.S. 753 (1931), for a discussion of the affiliation of the small, autonomous Indian groups residing in northwestern Washington into what is now the Quinault Nation.

to an I.D. card under Departmental regulations set forth in 25 CFR 249.3. That regulation states in pertinent part:

(a) The Commissioner of Indian Affairs shall arrange for the issuance of an appropriate identification card to any Indian entitled thereto as prima facie evidence that the authorized holder thereof is entitled to exercise the fishing rights secured by the treaty designated thereon. The Commissioner may cause a federal card to be issued for this purpose or may authorize the issuance of cards by proper tribal authorities: Provided, That any such tribal cards shall be countersigned by an authorized officer of the Bureau of Indian Affairs certifying that the person named on the card is a member of the tribe issuing such card and that said tribe is recognized by the Bureau of Indian Affairs as having fishing rights under the treaty specified on such card. \* \* \*

(b) No such card shall be issued to any Indian who is not on the official membership roll of the tribe which has been approved by the Secretary of the Interior. Provided, That until further notice, a temporary card may be issued to any member of a tribe not having an approved current membership roll who submits evidence of his/her entitlement thereto satisfactory to the issuing officer and, in the case of a tribally issued card, to the countersigning officer.

Accordingly, in order to be eligible for an I.D. card the applicant must be a member of a tribe with Federally recognized treaty fishing rights.

The Quinault Nation of the Quinault Reservation is, by virtue of the Treaty of Olympia, 12 Stat. 971, an Indian tribe with Federally recognized treaty fishing rights. See, e.g., Bateman, supra at 178-79. Because of the composite nature of the Quinault Nation, amicus states that membership is open to anyone having 1/4 degree or more Quinault, Queet, Quileute, Hoh, Chehalis, Cowlitz, or Chinook blood. Appellant does not dispute this assertion or the fact that he has less than 1/4 degree Chinook blood and is, therefore, not eligible for membership in the Quinault Nation. Neither has appellant been

adopted into the Quinault Nation. 8/ Appellant is, therefore, not eligible for an I.D. card as a member of the Quinault Nation.

Furthermore, appellant is not entitled to either a permanent or a temporary I.D. card on the basis of his membership in the Wahkiakum Band. The Wahkiakum membership roll has not been approved by the Department, nor does the Department recognize that the band has treaty fishing rights as a result of its affiliation with treaty signatory tribes. The question of the Wahkiakum's claimed treaty fishing rights is currently in litigation. See Schmitt, *supra*. 9/

[2, 3] Therefore, appellant is not entitled to either a temporary or a permanent fishing I.D. card under Departmental regulations. Duly promulgated Departmental regulations have the force and effect of law and are binding upon the Secretary. The Board is without authority to declare such regulations invalid.

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8/ Appellant's attempts to be adopted into the Quinault Nation formed the basis for a dispute between appellant and amicus. Two motions concerning this subject are pending before the Board. A motion from amicus seeks the admission of a brief in response to appellant's reply brief on the grounds that appellant raised new factual material in his brief. Appellant moved for suppression of this brief and filed additional material relating to his attempted adoption. The statements of both appellant and amicus relating to circumstances surrounding appellant's attempts to be adopted will be admitted. Accordingly, amicus' motion to file a responsive brief is granted, and appellant's motion to quash that brief is denied.

9/ As noted in the earlier BIA decisions in this case, it was determined in Bateman that the Wahkiakum have neither treaty nor aboriginal fishing rights in the Columbia River. The Bateman court, in dicta, indicated that the Wahkiakum were "entitled to share such rights as are granted to the original signatories by the treaty." Bateman, *supra*, at 179-80. The Department disagrees with this interpretation of rights acquired through affiliation. The extent of the Wahkiakum's fishing rights as an affiliated Indian group is the precise issue raised in Schmitt.

In his brief, however, appellant does not directly attack the regulations in 25 CFR Part 249. Instead he argues that the Wahkiakum have treaty fishing rights arising from the band's affiliation with the Quinault and other treaty tribes. Appellant's arguments apparently seek a Board determination that the mere claim of treaty rights supersedes the regulations. As mentioned previously, the validity of the Wahkiakum's claimed treaty fishing rights is presently in litigation in the United States District Court for the District of Washington in Schmitt, supra. The Board will not permit a collateral attack on the regulations and on the pending court case. Under the present circumstances, the Wahkiakum are not recognized as having treaty fishing rights arising by virtue of their affiliation with the Quinaults. Until the Wahkiakum are judicially determined to have treaty fishing rights, or until 25 CFR 249.3 is found improper through judicial review or is otherwise changed by the Department, that regulation sets forth the law governing the issuance of both permanent and temporary fishing I.D. cards and is dispositive of this appeal.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Deputy Assistant Secretary's decision of November 3, 1983, is affirmed.

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Jerry Muskrat  
Administrative Judge

We concur:

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//original signed  
Bernard V. Parrette  
Chief Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge