



INTERIOR BOARD OF INDIAN APPEALS

Keweenaw Bay Indian Community v. Minneapolis Area Director,  
Bureau of Indian Affairs

29 IBIA 72 (02/07/1996)



# United States Department of the Interior

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

KEWEENAW BAY INDIAN COMMUNITY

v.

MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-82-A

Decided February 7, 1996

Appeal from the disapproval of a tribal ordinance.

Affirmed.

1. Indians: Generally--Indians: Tribal Powers: Self-Determination

As part of the well-established Federal policy of respect for tribal self-government, the Department of the Interior should, under normal circumstances, allow the tribes involved in an inter-tribal dispute an opportunity to resolve the matter among themselves.

2. Indians: Treaties: Treaty Rights--Indians: Trust Responsibility

In dealing with rights established by treaty, the Federal trust responsibility runs equally to all signatory tribes.

APPEARANCES: Joseph P. O'Leary, Esq., Baraga, Michigan, for appellant; Priscilla A. Wilfahrt, Esq., Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director; Milton Rosenberg, Esq., Madison, Wisconsin, for the Red Cliff Band of Lake Superior Chippewa.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Keweenaw Bay Indian Community (Community) seeks review of a January 27, 1995, decision of the Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving Resolution KB-431-94, amending the Community's Trapping, Hunting and Fishing Ordinance (Fishing Ordinance). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

### Background

This appeal is the latest round in an on-going dispute between the Community and the Red Cliff and Bad River Bands of Lake Superior Chippewa Indians over their respective fishing rights in certain Michigan waters of

Lake Superior. The Sixth Circuit Court of Appeals has succinctly stated the essential background of this dispute:

The Community, the Bad River Band, and the Red Cliff Band are all successors in interest to bands of Lake Superior Chippewa who signed the United States Treaty with the Chippewa of 1842 [7 Stat. 591]. In dividing the annuity payments due the various signatories to the treaty, Article V states that "the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas." (Emphasis added [by the court]). In its complaint, the Community alleges that, the language of the treaty notwithstanding, the Chippewas have never regarded natural resources, including fishing rights, to be shared in common, even among different bands of its tribe. Accordingly, the Community contends that it has the exclusive right to certain "home waters" around its reservation at Lake Superior in Michigan, and that it must consent to any fishing by others therein.

The Community was approached by the Red Cliff and Bad River bands many times between 1973 and 1983 for permission to fish in the Michigan waters of Lake Superior. The Community consistently denied such permission and the bands respected such denials. In 1985, however, the Community agreed to allow fishermen from the two bands to fish in the waters, provided that these individuals complied with the Community's regulations and fished only west of the Keweenaw Peninsula. The fishermen refused to abide by the regulations, and in 1986, after an allegedly coercive and unfair meeting, the three bands signed an agreement allowing Red Cliff and Bad River fishermen into the Community's alleged "home waters" unrestricted by Community regulations. The agreement was renewed once and remained effective until 1988. In 1988, the Community elected a new tribal chairperson, who was allegedly coerced into signing a commercial fishing agreement with the bands, which allowed them to fish in the Community's "home waters" until 1990. In 1990, the Community refused to sign another agreement and withdrew permission for the other two bands to fish in the Michigan waters. The Bad River and Red Cliff bands subsequently signed a bilateral agreement authorizing themselves to fish in the Michigan waters.

Keweenaw Bay Indian Community v. Michigan, 11 F.3d 1341, 1344 (6th Cir. 1993). <sup>1/</sup>

The Community responded to the Red Cliff and Bad River Bands' agreement by filing suit against the State of Michigan, the Bands' tribal chairmen, and

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<sup>1/</sup> The relevant judicial history of this case is: Keweenaw Bay Indian Community v. Michigan, No. 2:91-CV-28 (W.D. Mich. June 12, 1992) (Keweenaw Bay I); motion to alter or amend denied, 152 F.R.D. 562 (W.D. Mich. 1992) (Keweenaw Bay II); aff'd, 11 F.3d 1341 (6th Cir. 1993) (Keweenaw Bay III).

several individual fishermen from the Red Cliff and Bad River Bands. According to the Community's complaint, which was quoted by both the district and the circuit courts, the Community sought "to protect and preserve the lake trout fishery resource in the Michigan waters of Lake Superior within the territory ceded to the Lake Superior Chippewa in the Treaty of 1842, in order to insure fulfillment of the Tribe's treaty-reserved fishing rights." Keweenaw Bay I, slip op. at 1; Keweenaw Bay II, 11 F.3d at 1343.

Concluding that the Community's complaint sought a determination of the treaty rights in the Michigan waters of Lake Superior, the district court held that the Red Cliff and Bad River Bands were indispensable parties which could not be joined because of their sovereign immunity. Keweenaw Bay I. Because of the problem of sovereign immunity, the court suggested that Congress might be the only forum in which the respective rights created in the 1842 Treaty could be determined. The court declined to change this ruling in Keweenaw Bay II, noting that "[t]he issue of 'home waters' is clearly open to different opinions." 152 F.R.D. at 564.

In Keweenaw Bay III the circuit court affirmed the finding of sovereign immunity. It added, however, that it might be possible to resolve the dispute under 25 CFR 249.2(a), 2/ which authorizes the Secretary of the Interior to regulate off-reservation treaty fishing rights.

By letter dated February 23, 1994, the Community filed a complaint with the Area Director concerning the lack of enforcement of fishing regulations against Red Cliff and Bad River fishermen, but also requested that the Secretary initiate a meeting of chairpersons of the three concerned tribes so that they could attempt to resolve the dispute among themselves. If such a meeting could not be held or was not productive, the Community requested the promulgation of regulations after it had an opportunity to present its evidence concerning the existence of "home waters" when the 1842 Treaty was signed.

By a joint letter dated April 22, 1994, the Red Cliff and Bad River Bands also requested the promulgation of regulations, and apparently submitted a proposed rule.

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2/ 25 CFR 249.2(a) provides:

"The Secretary of the Interior may upon the request of an Indian tribe, request of a State Governor, or upon his own motion, and upon finding that Federal regulation of Indian fishing in any waters in which Indians have a treaty-secured nonexclusive fishing right is necessary to assure the conservation and wise utilization of the fishery resources for the present and future use and enjoyment of the Indians and other persons entitled thereto, promulgate regulations to govern the exercise of such treaty-secured fishing rights in such waters for the purpose of preventing, in conjunction with appropriate State conservation laws and regulations governing fishing by persons not fishing under treaty rights, the deterioration of the fishery resources."

It appears that discussions on possible regulations were on-going at the time briefs were filed in this appeal. The Board has been informed by the Twin Cities Field Solicitor's office, however, that no significant progress has been made toward the promulgation of regulations.

In the meantime, on July 16, 1994, the Community amended its Fishing Ordinance by Resolution KB-431-94. The resolution provides:

WHEREAS: Treaties between the United States and Indian tribes, such as the 1842 Treaty, are to be construed in accordance with the understanding of the original tribal signatories to the Treaty; and

WHEREAS: In Article II of the 1842 Treaty the ancestors of the \* \* \* Community reserved the right to hunt, fish, and gather on the territory ceded to the United States in the Treaty; and

WHEREAS: Article II of the 1842 Treaty also reserved to the ancestors of the \* \* \* Community "the other usual privileges of occupancy." The \* \* \* Tribal Council has determined that the original tribal signatories understood this to mean that each sovereign band could continue to exercise exclusive resource use prerogative within, and control access to, the Treaty-reserved resources within the territory that was traditionally considered a band's home territory; and

WHEREAS: The \* \* \* Tribal Council desires to fully exercise the rights to control access reserved to [the Community's] predecessor bands in order to promote conservation and to protect and preserve the natural resources within [the Community's] home territory and home waters:

NOW, THEREFORE BE IT RESOLVED, that the \* \* \* Tribal Council hereby asserts its rights under the 1842 Treaty to control access to the Treaty-reserved resources in [the Community's] home waters and home territories. Included in this right is the authority to regulate the hunting, fishing, and trapping activities of all Indian persons who desire to hunt, fish, or trap pursuant to the 1842 Treaty within the home waters and home territories of [the Community]; and

BE IT FURTHER RESOLVED, that the \* \* \* Tribal Council has amended its hunting, fishing, and trapping laws \* \* \*. All hunting, fishing, and trapping activities within [the Community's] home waters and home territories by Indian persons pursuant to the 1842 Treaty shall be governed by the laws and regulations of [the Community] \* \* \*.

Resolution KB-431-94 was submitted to the Superintendent, Michigan Agency, BIA (Superintendent), for approval in accordance with Article VI,

section 2, of the Community's Constitution. <sup>3/</sup> By letter of July 28, 1994, the Superintendent disapproved the resolution. The Community appealed this decision to the Area Director. Basing her decision on both the Community's Constitution and the 1842 Treaty, the Area Director affirmed the Superintendent's decision on January 27, 1995. The Community appealed to the Board. Briefs have been filed on appeal by the Community, the Area Director, and the Red Cliff Band.

### Discussion and Conclusions

The following provisions of the 1842 Treaty are of particular relevance to this appeal:  
Article II:

The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress. [Emphasis added.]

Article III:

It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the encoded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands, shall be the common property and home of all the Indians, party to this treaty. [Emphasis added.]

Article V:

Whereas the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas, party to this treaty; \* \* \* and whereas all the encoded lands belonging to the aforesaid Indians, are hereafter to be held in common \* \* \*. [Emphasis added.]

The Community contends--as it did throughout the Federal court proceedings--that in 1842 the Chippewa bands had "home territories" and "home waters." According to the Community, each band had the primary right to

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<sup>3/</sup> Article VI, sec. 2, of the Constitution provides procedures for BIA consideration of "[a]ny resolution or ordinance which, by the terms of this Constitution, is subject to review by the Secretary of the Interior." The Superintendent reviewed the resolution under Article VI, sec. 1(n), of the Constitution, which authorizes the Tribal Council:

"To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals, and general welfare of the \* \* \* Community in regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting non-members shall be subject to review by the Secretary of the Interior."

use the natural resources located in its "home territory" and "home waters" and had the right to prohibit the use of those resources by members of other bands. It contends that, in enacting Resolution KB-431-94, it was merely exercising its historical right to exclude members of other bands from using the natural resources located in its "home waters." Citing Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) and Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), the Community contends that the 1842 Treaty must be interpreted as the Indians signing it would have understood it, and that those Indians would have understood the phrase "with the other usual privileges of occupancy" in Article II of the Treaty to refer to the right of each band to exclude the members of other bands from that band's "home territory" and "home waters."

The Area Director and the Red Cliff Band rely on other parts of the 1842 Treaty, in particular the "in common" language of Article V, to argue that the Treaty reserved the land and waters in common to all of the Treaty signatories.

The Board has also considered the 1854 Treaty with the Chippewas (1854 Treaty), 10 Stat. 1109. Article 2 of the 1854 Treaty set aside specific tracts of land as reservations for the various bands. <sup>4/</sup> The 1854 Treaty did not divide the waters of Lake Superior. The Board is not aware of any other treaty, nor has any party cited such a treaty, which divided the waters of Lake Superior among the signatories to the 1842 Treaty.

In Keweenaw Bay Indian Community v. Michigan, 784 F. Supp. 418 (W.D. Mich. 1991), the court considered the extent of the lands comprising the Community's reservation. The court "ruled that title to and jurisdiction over the bed and waters of the Keweenaw Bay had passed to the State of Michigan, upon its admission to statehood, prior to the creation of the reservation," and that "[t]he boundary of the [Community's] reservation, accordingly, does not encompass the Bay." 784 F. Supp. at 420.

Based upon its examination of the 1842 Treaty and the submissions of the parties in this appeal, the Board agrees with the district court in Keweenaw Bay that

it appears \* \* \* that the 1842 Treaty was designed to govern relations between the Lake Superior Chippewa as a whole and the United States. How the various Chippewa bands allocated resources among themselves was not addressed in the treaty. What [the Community is] \* \* \* seeking is not so much an interpretation of the treaty as an historical assessment of the Chippewa culture, economic structures and inter-tribal relations.

(Slip op. at 11).

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<sup>4/</sup> The Community states at page 14 of its opening brief that "the Chippewa refused to sign the 1854 Treaty unless it provided for reservations of land to specific bands, or allied bands, within their home territories."

The Board has carefully reviewed, *inter alia*, the language of the 1842 Treaty, the Community's ethnohistorical evidence, and several related court decisions, including in particular, the historical and linguistic discussion in Mille Lacs Band of Chippewa Indians v. Minnesota, Civ. No. 4-90-605 (D. Minn. Aug. 24, 1994). It concludes that the United States was dealing in the 1842 Treaty with the Chippewa bands as a whole and was not particularly concerned about how the various bands divided and/or utilized any of the territories and rights secured by the treaty. Although by 1854 both the Chippewa and the United States found it necessary or desirable to divide the land among the various bands, the United States still expressed no concern about division or utilization of the ceded waters of Lake Superior, thereby leaving such decisions to the bands.

[1] As part of the well-established Federal policy of respect for tribal self-government, the Board has frequently cautioned restraint when, for example, the Department is required to interpret tribal law (Maroquin v. Anadarko Area Director, 29 IBIA 45 (1996); Decorah v. Minneapolis Area Director, 22 IBIA 98 (1992)), and has itself abstained from exercising its jurisdiction in favor of tribal resolution of intra-tribal disputes (Johnson v. Acting Minneapolis Area Director, 28 IBIA 104 (1995); Wells v. Acting Aberdeen Area Director, 24 IBIA 142 (1993)). This policy of deference to tribal sovereignty has at least as much application when the issue involved is an inter-tribal dispute.

[2] Because the 1842 Treaty gives a right to the signatory Chippewa bands as a whole, the Department, which owes a trust responsibility to each of those signatory bands, should be especially circumspect when asked to approve an action taken by one band that would work to the detriment of other bands, particularly when there is disagreement among the bands concerning the extent of their respective rights. For this reason, the Board affirms the Area Director's January 27, 1995, decision insofar as it declined to approve Resolution KB-413-94 because it infringes on the rights of other signatories to the 1842 Treaty. 5/

The effect of this decision--like the decisions of the Federal courts before it--is to place the bands back where they have essentially been since 1842, *i.e.*, in the position of determining for themselves how their treaty fishing right in Lake Superior should be utilized. The Community's attempts to force a Federal forum to answer this question have diverted attention from the fact that this is primarily an inter-tribal matter, in which the United States has only a peripheral interest. 6/

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5/ The Area Director also disapproved the resolution on the grounds that it conflicted with the Community's Constitution. Because it is not necessary to the disposition of this appeal, the Board does not reach this issue of constitutional interpretation.

6/ Although the Board makes no holding on this point, it appears that the United States' primary interest would be in ensuring that whatever decision

The decision on how the treaty fishing right in Lake Superior should be utilized should be made by the Chippewa bands which have that right. 7/ This decision might include a determination of whether the Community's concept of "home waters" should be applied to the present-day treaty fishery. 8/ The alternative to a decision by the bands is that, in order to prevent possible violence and/or harm to the fishery resource, a decision may well be imposed on them through legislation, the promulgation of regulations, or court decision. 9/

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fn. 6 (continued)

the bands make does not run afoul of any applicable statutes, regulations, or international agreements relating to such matters as the overall conservation and protection of the waters of Lake Superior and/or its fishery resource.

7/ It appears that only the Community and the Red Cliff and Bad River Bands have previously participated in this controversy. An Oct. 4, 1994, letter from the Area Director to the Community indicates that there are twelve bands with rights emanating from the 1842 Treaty. In its filings, in addition to the Red Cliff and Bad River Bands, the Community listed as interested parties the Lac Vieux Desert Band, the Mille Lacs Band, the Lac Courte Oreilles Band, the Fond du Lac Band, the Bois Forte Band, the Lac du Flambeau Band, the Grand Portage Band, the Sokaogon Chippewa Community, and the St. Croix Chippewa Indians.

If each of the twelve bands is a successor to a treaty signatory, it is possible that each of them has a treaty right to fish in the waters of Lake Superior, whether or not the band or its members have previously asserted such a right. Because the 1842 Treaty gave a right to the signatory Chippewa bands as a whole, it would logically follow that each successor band to a treaty signatory would have the right to participate in any decision concerning the utilization of the treaty fishery resource.

In her Oct. 4, 1994, letter the Area Director stated: "The Area Office encourages the [Community] to attempt to arrive at a consensus with the other eleven 1842 Treaty Tribes because of their mutual interests in the exercise of Treaty rights and privileges." The Community apparently agreed that all of the present-day bands had a right to participate in the discussions. In an Oct. 13, 1994, letter to the Area Tribal Operations Officer, the Community stated that its efforts to reach a consensus agreement were unsuccessful because representatives from only four tribes participated.

8/ Because it concludes that the bands should decide whether "home waters" ought to play a role in the modern regulation of the fishery, the Board finds it unnecessary to address the Community's remaining arguments.

9/ In Keweenaw Bay I, II, and III, the courts refrained from hearing the case, even though they had jurisdiction, because tribal sovereign immunity prevented them from joining the Bands, who were indispensable parties. If tribal sovereign immunity were waived in the future, the courts would most likely hear the case and render a decision. As one of many possible examples where a Federal court determined the respective treaty rights of disputing tribes, see United States v. Lower Elwha Tribe, 642 F.2d 1141 (9th Cir. 1981).

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 27, 1995, decision of the Minneapolis Area Director is affirmed

//original signed

Kathryn A. Lynn  
Chief Administrative Judge

I concur:

//original signed

Anita Vogt  
Administrative Judge