

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MILLE LACS BAND OF CHIPPEWA)
INDIANS, et al.)
Plaintiffs,)

UNITED STATES OF AMERICA,)
Plaintiff-Intervenor,)
and)

ST. CROIX CHIPPEWA INDIANS OF)
WISCONSIN, et al.)
Plaintiff-Intervenors,)

Civil No. 3-94-1226

STIPULATION

vs.)

STATE OF MINNESOTA, et al.)
Defendants,)

COUNTY OF AITKIN, et al.)
Defendant-Intervenors,)

JOHN W. THOMPSON, et al.)
Defendant-Intervenors,)

and)

SAVE LAKE MILLE LACS)
ASSOCIATION,)
Amicus Curiae.)

I. PROCEDURAL BACKGROUND.

In this litigation, plaintiffs (the Mille Lacs Band, et al.) and plaintiff-intervenors (the United States and the six Wisconsin Bands) seek a declaratory judgment: (1) stating that the plaintiff and plaintiff-intervenor Bands continue to possess rights to hunt, fish and gather under the 1837 Treaty with the Chippewa, 7 Stat. 536 ("1837 Treaty"), in the Minnesota portion of the

territory ceded in that treaty ("Minnesota Ceded Territory"); (2) defining the nature and scope of those rights; and (3) delineating the restraints that the 1837 Treaty imposes on State regulation of the exercise of those rights. In addition, plaintiff and plaintiff-intervenors seek an injunction barring defendants (the State of Minnesota, et al.), their officers, agents, servants, employees and attorneys, and anyone acting in concert with them, from any actions or inactions which would prevent or interfere with the exercise of such rights except as authorized in the Court's declaratory judgment.

The litigation was bifurcated by court order on April 9, 1991. Phase I was limited to "the threshold issues presented in this case, namely, whether plaintiffs' rights to hunt, fish and gather under the Treaty of 1837 continue to exist, whether they extend to lands now or previously in private ownership, and the general nature of such rights." The matters reserved for Phase II were "resource allocation issues and the validity of particular measures to regulate the exercise of such rights."

Plaintiffs, plaintiff-intervenor the United States, defendants, and defendant-intervenors (nine counties and six landowners) were parties to Phase I. After trial, the Court "declared and adjudged that the privilege guaranteed to the Chippewa of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included within the territory ceded to the United States by the Treaty of 1837 continues to exist." Mille Lacs Band v. Minnesota, 861 F. Supp. 784, 841 (D. Minn. 1994).

Second, the Court defined the nature and the scope of the rights and determined whether they extend to private lands. It held *inter alia* that: (1) "exercise of the usufructuary rights should be limited to lands in the ceded territory that are not privately owned because no right of

access was included in the privilege”¹; (2) the treaty contains no right to harvest pine timber but otherwise secures to the Chippewa the right to harvest “all of their surrounding natural resources”; (3) the treaty does not impose “any restrictions on the time, place or manner of the exercise of the privilege”; (4) the treaty permits “continued use of the privilege for commercial purposes,” and (5) the treaty does not limit the Chippewa to “any particular techniques, methods, devices or gear.” Id. at 836 and 838.

Third, the Court delineated “the legal standards for state regulation” of the hunting, fishing and gathering privilege, while reserving for Phase II “the application of these standards to particular regulations and any allocation issues.” Id. at 838-39. The Court held that the State may regulate the exercise of the rights “in the interests of conservation, ‘provided the regulation meets appropriate standards and does not discriminate against the Indians.’” Similarly, the State may regulate “to ensure public health and safety if the regulations do not discriminate against the Indians and are ‘reasonable and necessary to prevent or ameliorate a substantial risk to the public health or safety.’” In both cases, the Court specified the showings the State must make in order to satisfy these standards. And, the Court held that “[t]he state may not impose its own regulations if the Band can effectively self regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs.” Id.

On September 23, 1994, the Court entered a pre-trial order for Phase II. Pursuant to paragraphs 1, 3 and 4 of that order, the parties exchanged the following pre-trial statements.

-- Plaintiffs and plaintiff-intervenor the United States filed a Joint Preliminary Pre-

¹ The Court explained that “[i]n this sense, privately owned lands do not include public lands formerly in private ownership or private lands open to public hunting, fishing, and gathering.” Id. at 836. The parties dispute the scope of this statement and will address it in a summary judgment motion.

Trial Statement for Phase II on November 23, 1994. The joint statement identified specific State statutes and regulations that the Mille Lacs Band and the United States contend violate the standards for state regulation set forth in the Court's Phase I decision. They attached to their joint statement a proposed Band conservation code to regulate hunting, fishing and gathering by Band members in the Minnesota Ceded Territory.

-- Defendants and defendant-intervenors each filed separate Preliminary Pre-Trial Statements for Phase II on January 13, 1995. The State's pre-trial statement set forth State laws and regulations it contends are applicable to Band members under the 1837 Treaty, and the State's concerns regarding various provisions of the Band's proposed conservation code.

-- On March 17, 1995, the Mille Lacs Band and the United States filed revisions to their joint pre-trial statement, attaching a revised Band conservation code and a revised list of the State statutes and regulations they contend violate the standards in the Phase I decision. The revised conservation code was submitted on behalf of the six Wisconsin Bands who were then applying for intervention as well as the Mille Lacs Band. It contained numerous revisions which were intended to address concerns raised by the State in its pre-trial statement.

The six Wisconsin Bands were granted leave to intervene on March 23, 1995. On April 26, 1995, the Court entered a revised Phase II pre-trial order. It established an August 1, 1995, deadline for filing dispositive motions regarding any defenses against the Wisconsin Bands' claims for hunting, fishing and gathering rights under the 1837 Treaty. Accordingly, defendant and defendant-intervenors filed motions for summary judgment on or around August 1, 1995, regarding the continued existence, nature and scope of the Wisconsin Bands' rights in the Minnesota Ceded Territory under the 1837 Treaty. The court ruled on these motions on March 29, 1996, finding that the Wisconsin Bands' rights are identical to those of the Mille Lacs Band.

Since the exchange of the November 1994 and March 1995 pre-trial statements, and the conclusion of written and oral discovery, the plaintiffs, plaintiff-intervenors, State defendants and their respective technical advisors have held numerous meetings and exchanged voluminous information in an effort to narrow the issues raised in the pre-trial statements.

The participating parties have made substantial progress in narrowing the Phase II issues. As a result of their efforts, the plaintiff and plaintiff-intervenor Bands have prepared a revised Conservation Code, which is attached as Exhibit A hereto, and a series of Commissioner's Orders to implement that Code, which are attached as Exhibit B hereto. In addition, the Bands have unilaterally drawn up a series of measures to govern their management of their members' hunting, fishing and gathering activities, which are set forth in the Management Plans attached as Exhibit C hereto. In addition, the Bands and the State have agreed to a series of Protocols, attached as Exhibit D hereto, to coordinate harvest management and resource assessment in the Minnesota Ceded Territory. Finally, in reliance on the revised Band Conservation Code, Commissioner's Orders, Management Plans and Protocols, the State has agreed that the statutes and regulations listed as "Resolved" in Exhibit E hereto do not, under present circumstances, meet the standards for State regulation in the Court's Phase I decision, leaving only the statutes and regulations listed in Exhibit E as "Unresolved" at issue in this phase of the case.

II. STIPULATION.

Plaintiffs, plaintiff-intervenors and defendants (the "Stipulating Parties") hereby stipulate and agree that:

1. Upon adoption of the Band Code, including authorization of State of Minnesota Department of Natural Resources personnel to enforce the provisions of such Code, issuance of the Commissioner's Orders and approval of the Management Plans and Protocols attached as

Exhibits A, B, C and D hereto by one or more of the plaintiff or plaintiff-intervenor Bands, and enforcement of the same, the application to such Bands and their members of the State statutes and regulations listed in Exhibit E hereto as "Resolved", to the extent set forth in Exhibit E, will not be necessary for conservation, public health or safety as those terms were used by the Court in its Phase I decision, and will therefore be unlawful. The only particular State statutes and regulations whose application to Band members remains in dispute in the current phase of this case are listed in Exhibit E as "Unresolved". The positions of the Stipulating Parties with respect to those statutes and regulations are indicated in the Comments column in Exhibit E. Those issues will be presented to the Court for resolution on summary judgment motion or at trial.

2. The requirements of this stipulation shall become effective immediately upon entry of the court's final order.

3. If any Band fails to adopt a conforming conservation code, attempts to rescind or otherwise nullify its entire code, or substantially fails to enforce the provisions of its code, Band members harvesting within the Minnesota Ceded Territory shall be subject to applicable state laws and regulations. The State reserves the right to make objections to any individual provision changes sought by the Bands in accordance with the procedures set forth in the Protocols set forth in Exhibit D hereto.

4. The State and the Bands stipulate that there shall be fair, uniform and diligent enforcement of the conforming conservation codes pursuant to this Court's final order.

5. This stipulation is binding upon all Stipulating Parties, their successors in office, their agents, employees and representatives, and any and all persons claiming an interest through these parties.

6. All records of tribal courts involving the exercise of treaty harvest rights shall be open for inspection and copying by the State Department of Natural Resources at reasonable times upon reasonable notice. The actual proceedings in said courts shall also be open to the State Department of Natural Resources. Any such records or proceedings that are protected by tribal law as confidential, such as juvenile records, shall also be kept confidential by the State.

7. It is the express intention of all Bands and the State that their respective enforcement officers work cooperatively in enforcing Band conservation codes. The Minnesota Department of Natural Resources agrees to make good faith efforts to coordinate with Band conservation wardens and Great Lakes Indian Fish and Wildlife Commission wardens duly appointed by a Band, in their enforcement activities. The Bands agree to make good faith efforts to coordinate with State Department of Natural Resources Conservation Officers in their enforcement activities.

8. The Bands and Great Lakes Indian Fish and Wildlife Commission Enforcement and Biological staffs shall share harvest, registration and similar data with the Minnesota Department of Natural Resources enforcement personnel in a timely and professional manner in accordance with Protocol No. 4.

9. The Stipulating Parties shall comply with the terms and provisions of the Protocols set forth in Exhibit D hereto including, without limitation, the procedures for resolving future disputes regarding the application of particular State statutes and regulations to Band members.

10. In addition to the statutes and rules noted as "unresolved" in Exhibit E, this Stipulation does not resolve the following issues: a) resource allocation issues presented in this phase of the case; b) which private lands may be available for Band harvest under their Conservation Code; c) natural resource management decision making authority; and d) whether

the Bands may exercise their treaty rights throughout those lakes that are only partially within the Minnesota Ceded Territory and, if not, how to determine the harvest available to the Bands in such lakes. Those issues will be presented to the Court for resolution on summary judgment motion or at trial.

11. Nothing in this Stipulation shall prejudice the rights of any party to appeal the court's Phase I decision or its rulings on the continued existence, nature or scope of the Wisconsin Bands' treaty rights, and this Stipulation shall be subject to, and may be modified or rescinded based on, the outcome of any such appeal.

12. The stipulating parties agree that this court should retain continuing jurisdiction over this case to facilitate the implementation of the court's orders and decrees herein, to resolve any disputes among the parties with respect thereto, or to address other matters as the court may deem appropriate.

13. The court may enter an order incorporating the terms of this Stipulation.

Date: July 12, 1996

Marc D. Slonim

MARC D. SLONIM
JOHN B. ARUM
JAMES M. GENIA
Attorneys for Plaintiff, Mille Lacs Band

Date: June 26, 1996

Howard F. Bichler

HOWARD F. BICHLER
Attorney for Plaintiff-Intervenor,
St. Croix Chippewa Indians

Date: July 18, 1996

M. Joan Warren
M. JOAN WARREN
Attorney for Plaintiff-Intervenor,
Lac Courte Oreilles Indians

Date: 6-18-96

Milton Rosenberg
MILTON ROSENBERG
Attorney for Plaintiff-Intervenor,
Red Cliff Band of Lake Superior

Date: June 25 1996

Kevin Potter
KEVIN POTTER
Attorney for Plaintiff-Intervenor,
Sokaogon Chippewa Community

Date: 7/16/96

James M. Jannetta
JAMES M. JANNETTA
Attorney for Plaintiff-Intervenor,
Bad River Band of Lake Superior

Date: June 27 1996

Carol Brown-Biermeier
CAROL BROWN-BIERMEIER
Attorney for Plaintiff-Intervenor,
Lac du Flambeau Band

Date: June 11, 1996

William A. White
WILLIAM A. WHITE
Attorney for Plaintiff-Intervenor,
United States of America

Date: June 14, 1996

William A. Szotkowski
WILLIAM A. SZOTKOWSKI
MICHELLE E. BEEMAN
PETER L. TESTER
Attorneys for Defendant, State of Minnesota