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**UNITED STATES OF AMERICA and BAY MILLS INDIAN COMMUNITY,
SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS and GRAND TRAVERSE
BAND OF OTTAWA AND CHIPPEWA INDIANS, Intervenor-Plaintiffs, v. STATE
OF MICHIGAN, ET AL., Defendants.**

File No. M26-73

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
MICHIGAN**

1993 U.S. Dist. LEXIS 8686

April 21, 1993, Decided

April 21, 1993, Filed

JUDGES: [*1] ENSLEN

OPINION BY: RICHARD A. ENSLEN

OPINION

OPINION

This matter is before the Court on the Bay Mills Indian Community's motion to amend the Executive Council's rules of procedure. The Executive Council consists of the three Tribal Chairpersons, the Director of the Department of Natural Resources, and the Secretary of the Interior. The purpose of the Executive Council is to encourage out-of-court dispute resolution. It is intended to be the primary arena for the development and implementation of fishery resource management decisions in the 1836 ceded waters.

Positions of the Parties

The Executive Committee's current Rules of Procedure require a unanimous vote to pass anything. The proponent of a failed motion may invoke the dispute resolution procedure. The Bay Mills Indian Community ("BMIC") contends that the unanimity requirement makes it difficult for the Committee to perform the function it was created for because, as the BMIC puts it, it can be "held hostage" by a minority of one.

Therefore, the BMIC proposes that the voting rules

be altered to require only 4 of 5 votes to pass a motion. Under their proposal, it is the one Council Member voting "no" who then has a right to invoke [*2] the dispute resolution procedure. This proposal was raised on two occasions at Executive Council Meetings, and on both occasions it failed to receive unanimous approval.

In response to the present motion, the Grand Traverse Band submitted an information filing in support of the motion, which provided helpful background information.

The United States also submitted an information filing in support of the motion. The United States does not contend that the amendment will decrease the number of information filings submitted to the Court, because parties which are unsuccessful at the Executive Council level will continue to pursue their positions, just as they do now. However, the United States asserts that the amendment will turn the Executive Council into a body of action, instead of inaction. The current system essentially requires inaction in the face of a dispute. In contrast, the amendment would enable a majority of the Council to act affirmatively unless and until it receives instructions from the Court to the contrary.

Amicus curiae Michigan United Conservation Club ("MUCC") filed a brief in opposition to the motion. MUCC asserts that the State of Michigan is often the lone [*3] dissenter on the Council, and that the unanimity requirement encourages moderation and consensus. MUCC argues that the proposed amendment would

eliminate the necessity of taking the State of Michigan's position into account, and therefore tribal proposals are likely to become less conciliatory and more provocative. As a result, MUCC contends that the proposed amendment would make the Executive Council a more confrontational body, and as a result, more disputes would be raised for the Court's resolution.

Finally, the State of Michigan has submitted an information filing in opposition to the pending motion. The State contends that the Council's inability to function is not a result of the requirement of unanimity. Instead, the Council flounders only on a few particularly difficult issues. The State's listing of the seven issues brought before the Court in the last seven years appears to support this contention. The State's position is that in order to reduce conflict, the Executive Council must learn to work together as a group, rather than alerting the rules to allow four members to force their will on a lone dissenter.

Discussion

This Court clearly intended the Executive [*4] Council to play a meaningful role in resolving disputes among the parties. Paragraph 3 of the Dispute Resolution Mechanism requires review by the Executive Council as a prerequisite to bringing a dispute before this Court. While I realize that the current mode of operation of the Executive Council may be frustrating, I do not believe that the amendment to the voting rules proposed by the Bay Mills Indian Community will remedy the problem.

First, the fact that the vote on difficult issues is often four to one has a different significance in this case than others. The parties do not appear to dispute that the State of Michigan is commonly the lone dissenter. Therefore, the 80% of Council members in favor of a particular measure does not represent a coalition of diverse interests. Instead, the fact that four parties regularly perceive themselves to have the same interests essentially divides the Council into two camps, which represent two distinct philosophies, approaches, goals, or sets of opinions.¹ The reason that I ordered this set of parties to work together is because I did not want one camp to go forward without garnering the support of the other. The proposed amendment does [*5] not further this goal any more than the unanimity requirement. It simply shifts the burden of appeal from one camp to the other.

¹ This statement is not meant to imply that the philosophies, approaches, goals, or opinions of

the three tribal communities and the United States are homogeneous. Rather, it appears from the voting records that they have been able to resolve their differences, and perhaps make compromises in their positions, before the vote of the Executive Council.

Secondly, because the current rules allow a proposal to be defeated by one vote, the status quo is preserved until the Court is prompted by the unsuccessful proponent to review the dispute. Under the pending proposal, a proposal could be adopted and implemented by a four to one vote. In that case, the status quo would be altered until the Court reviews the dispute. However, under the Bay Mills amendment, if the Court reverses the decision of the Executive Council, remedial action would be required in order to return to the status quo. In some [*6] cases, a reversion to the status quo would be impossible. I believe the potential for fluctuation in policy this presents is worse than the frustration which the current voting system admittedly can cause.

Arguably, the problem noted above could be avoided by amending the voting requirements to allow a proposal to "pass" with four votes, but also providing that an appeal to the Court by a losing party would operate as an automatic stay on enactment. While this shifts the burden of appeal to the minority party, it appear to me to fall significantly short of the relief the Bay Mills Indian Community seeks. Additionally, this alternative shares a defect that the original proposed amendment possess. I believe that allowing a 4 to 1 vote undermines the incentive to persuade and compromise. As they stand, the rules require proponents to seek consensus. If a proposal is defeated by one vote, the proponent has an incentive to modify the proposal and present it again in hopes of convincing the hold-out to vote with the majority. As a result, although difficult issues must be resolved by the Court, it is possible that the current system works to temper the positions of the parties before the [*7] issue reaches the Court, even though they ultimately cannot agree. If the proposed amendment were adopted, I am concerned that there is little incentive for the three Tribal Chairpersons and the United States to seek the approval of the State of Michigan at the Executive Council stage. Therefore, the positions of the parties on difficult disputes might arrive at the Court more polarized than they otherwise would be, and that much more difficult to resolve.

For the foregoing reasons, I do not believe that the amendment the BMIC seeks would further the goals behind the creation of the Executive Council. I know that the present system binds the five represented parties together, and that each would like to escape the constraints that the position of the others puts on them. However, it is my intention that all five parties represented on the Executive Council struggle together. Your futures are inextricably bound, and you must find a way to work together. Therefore, the BMIC's motion will be denied.

Dated in Kalamazoo, MI: April 21, 1993

RICHARD A. ENSLEN

United States District Judge

ORDER

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED that [*8] the Bay Mills Indian Community's motion to amend executive rules of procedure (dkt. #1103), dated October 5, 1992, is **DENIED**.

Dated in Kalamazoo, MI: April 21, 1993

RICHARD A. ENSLEN

United States District Judge