

**Task Force to Amend the Maine Act to Implement the Indian Land Claims Settlement In Accord with the Joint Resolution SPO622 LR 2507, Item 1, 129<sup>th</sup> Maine Legislature**

**Issue Paper Prepared for Discussion by the Task Force  
September 12, 2019**

**CIVIL JURISDICTION EXAMPLE:  
THE REGULATION OF NATURAL RESOURCES  
(HUNTING, TRAPPING, AND FISHING)**

**Federal Indian Law**

In 1979, one year before Congress settled the historic Indian land claims in Maine, the Supreme Court, in a landmark tribal fishing rights case, wrote that subsistence practices in their traditional territories are “not much less necessary to the existence of the Indians than the atmosphere they breathe[.]”<sup>1</sup>

Tribal Nations exercise inherent governmental authority over lands and natural resources -- including the exploitation of fish and wildlife through hunting, fishing and trapping -- within their Indian country.<sup>2</sup> Lands over which Indian tribes exercise this authority are (a) reservation lands retained as aboriginal title, i.e. lands that a tribe has used and occupied (exclusive of other tribes) from time immemorial and never ceded by valid treaty; (b) reservations lands specifically set aside for a tribe by federal law or treaty; or (c) lands that the United States takes into trust (or imposes a restraint on alienation) for a specific Tribal Nation or tribal citizens. We refer to all three types of lands here as “Indian country” or “reservations and trust lands.”

The inherent sovereign authority that Tribal Nations exercise over hunting, trapping, and fishing within their reservations and trusts lands is generally exclusive of any state authority.<sup>3</sup> However, the Supreme Court has held that a state may exercise limited authority over tribal fishing if it can “demonstrate that its regulation is a reasonable and

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<sup>1</sup> *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979).

<sup>2</sup> *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335–36 (1983) (“tribes have the power to manage the use of its territory and resources by both members and nonmembers [and] to undertake and regulate economic activity within the reservation”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (same).

<sup>3</sup> *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 342.

*This legal summary is intended for the sole purpose of facilitating the discussions of the Task Force. This summary is not intended to represent or otherwise reflect the legal position of any member of the Task Force or any tribal nation and shall not be so construed.*

necessary conservation measure . . . and that its application to the Indians is necessary in the interests of conservation.”<sup>4</sup>

Absent relinquishment by valid treaty or federal statute, Tribal Nations retain governmental authority to regulate the exploitation of natural resources within their reservations and trust lands.<sup>5</sup> Likewise, absent such relinquishment, the tribal citizens of Tribal Nations have the right to take fish and wildlife, pursuant to the Tribal Nation’s laws, for personal consumption or for sale. “The establishment of a reservation by treaty, statute, or agreement includes the implied right of Indians to hunt and fish on that reservation free of regulation by the state.”<sup>6</sup>

### **Status Quo in Maine**

Tribal sovereign authority over hunting, trapping, and fishing on reservation and trust lands was of utmost importance to the Maine tribes at the time of the land claims settlement, and one of the fundamental purposes for which Congress set aside lands for the Tribal Nations was to enable them to continue their sustenance practices. The Tribes’ subsistence resources are their cultural resources. Thus, retaining sovereign authority over the exploitation of fish and wildlife with their reservations and trust lands was critical to their survival, both in economic terms and for cultural identity.

*These are not romantic notions of the distant past.* For example, Penobscot family names, ntútem (or “totems” in English), reflect the fish in the River: Neptune (eel); Sockalexis (sturgeon), Penewit (yellow perch), and for untold generations, and well into the 1990s, until education about water pollution suppressed their sustenance practices, Penobscot families relied upon fish, eel, and other food sources from the River for up to four meals per week to the tune of two to three pounds per meal.<sup>7</sup>

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<sup>4</sup> *Antoine*, 420 U.S. at 207; *see also Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) (*Puyallup I*).

<sup>5</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §18.01, 1154 (Nell Jessup Newton ed., 2012) (citing *Worcester v. Georgia*, 31 U.S. 515, 552-553 (1832)). *See City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (recognizing sovereign authority of Pueblo to set water quality standards in Rio Grande to allow Pueblo to safely exercise ceremonial practices).

<sup>6</sup> William C. Canby, Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 518 (2d ed.2015) (citing *Menominee Tribe v. United States*, 391 U.S. 404 (1968)).

<sup>7</sup> These facts are supported by the sworn affidavits of Penobscot citizens filed in a variety of recent federal court cases and administrative proceedings and can be made available to the Task Force upon request.

Notwithstanding the grant of a significant measure of state authority over the Maine tribes and their lands and natural resources pursuant to the State's Maine Implementing Act (MIA) and the federal Maine Indian Claims Settlement Act (Settlement Act) that ratified MIA (collectively the "Settlement Acts"), tribal inherent authority over hunting, fishing, and trapping within the reservations and trust lands was largely left undisturbed.<sup>8</sup> The Settlement Acts recognized reserved tribal hunting, fishing, gathering, and trapping rights and authorities in at least two major ways: 1) Congress confirmed that the Maine tribes would "retain as reservations those [] natural resources which were reserved to them in their treaties [] and not subsequently transferred by them"<sup>9</sup>; and 2) MIA, 30 M.R.S.A. § 6207(1) provided that the Penobscot Nation and the Passamaquoddy Tribe would exercise exclusive regulatory authority over sustenance fishing by tribal members within their respective reservations and exclusive regulatory authority over hunting, trapping, and other taking of wildlife within their respective reservations and trust lands.<sup>10</sup>

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<sup>8</sup> As Maine Attorney General Richard Cohen testified, the State did not restore its authority over "traditional matters of heritage to the Indians such as fish and game." Settlement of Indian Land Claims in the State of Maine; Hearing Before the Committee on Interior and Insular Affairs, House of Representatives, 96<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.R. 7919.

<sup>9</sup> S. Rep. No. 96-957, at 18 (1980); H.R. Rep. 96-1353, at 18 (1980). The Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmac all entered into treaties that reserved lands and natural resources, including hunting and fishing rights. The State of Maine expressly agreed to uphold such treaty rights upon its entrance to the Union. *See* Maine Const., Art. X, sec. 5 ("the new State shall . . . assume and perform all the duties and the obligations . . . towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise").

<sup>10</sup> In his opening remarks at the Public Hearings on the MIA, Maine Attorney General Cohen stated "[a]s a general rule, States have little authority to enforce state laws on Indian Lands," but the settlement "recovers for the State much of the jurisdiction over the existing reservations that it has lost in . . . recent litigation," with specific "exceptions which recognize historical Indian concerns." Transcript of March 28, 1980 Public Hearing before the Joint Select Committee on Indian Land Claims, 6-7 (1980). . The Tribe's attorney, Thomas Tureen, testified that "as the negotiations progressed," the State expressed a willingness to compromise in recognition of "the Tribes' legitimate interest in . . . exercising tribal powers in certain areas of particular cultural importance such as hunting and fishing." *Id.* at 436. The State's representatives appreciated the critical importance of these sovereign powers for the tribes. Upon explaining the settlement to Maine's Joint Committee, Deputy Attorney General, John Paterson, provided Committee members with a report entitled "Indian Rights and Claims," emphasizing that:

A primary interest of tribal governments in pressing jurisdictional claims over persons and property is the Indian's desire to preserve the cultural heritage of the tribe. In order to preserve this unique legacy, the political integrity and economic viability of the tribal community must be respected and developed. . . . *The tribe's ability to regulate the use*

Despite the protection of ancient hunting, fishing, trapping and gathering rights in the Settlement Acts, tribal members still voiced the concern “[t]hat [,under the Settlement Act], subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine”.<sup>11</sup> For example, at the Senate Hearings on the settlement, Penobscot tribal citizen, Lorraine Nelson explained the importance of these rights for her family’s economic survival. Employing the Penobscot locution “fishes my islands,” meaning to fish in the waters surrounding islands, she testified:

My son hunts and fishes my islands to help provide for our family, and if we are to abide by State laws . . . my family will endure hardship because of the control of the taking of deer and fish. You know as well as I, inflation has taken its toll, and at the present time I am unemployed and have a family of five to support. Two of these children are going to college. I have brought them up by myself.<sup>12</sup>

To assuage these concerns, Congress, through its final committee reports on the Settlement Acts, responded that the hunting, trapping, and fishing rights and authorities under § 6207 were “expressly retained” and “sovereign” authorities that Maine could not control or “terminate.”<sup>13</sup> The legislative reports state further that the “State has only a residual right to prevent the []tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters . . . not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights.”<sup>14</sup>

Unlike the setting of federal Indian law, however, the MIA provides that the prosecution of violations of the Tribes’ hunting and fishing regulations by nonmembers proceeds to state court, not tribal court, and that the Maine Tribal State Commission has exclusive authority to promulgate regulations governing fishing by nonmembers on reservation and

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*and extent of development of [land and water] resources is central to the cultural preservation and economic vitality of the tribe.*

Council of State Governments, *Indian Rights and Claims*, at 3, attached to Memorandum Re: Background Documents from the John M. R. Patterson, Deputy Attorney General to Joint Select Committee on Indian Land Claims (March 27, 1980) in 2 MAINE JOINT SELECT COMMITTEE ON INDIAN LAND CLAIMS, BACKGROUND INFORMATION ON INDIAN LAND CLAIMS (1980) (on file with the University of Maine School of Law library).

<sup>11</sup> S. Rep. No. 96-957, at 14-16; H.R. Rep. 96-1353, at 14-16.

<sup>12</sup> *Proposed Settlement of Maine Indian Land Claims: Hearings on S. 2829 Before the S. Select Comm. on Indian Affairs*, 96th Cong. 38 (1980) (testimony of Lorraine Nelson).

<sup>13</sup> S. Rep. No. 96-957, at 14-15; H.R. Rep. 96-1353, at 14-15.

<sup>14</sup> S. Rep. No. 96-947, at 17; H.R. Rep. 96-1353, at 17.

trust lands. Under principles of federal Indian law, these adjudicatory and regulatory authorities would rest exclusively with the Tribal Nation.

In closing, the Wabanaki Tribal Nations' proposed changes to the MIA would bolster the ability of tribal members to exercise tribal hunting, fishing, and trapping rights and would improve the ability of the Tribal Nations to effectively regulate such activities on their reservations and trust lands. These changes would enhance tribal member access to traditional cultural activities, which will have positive ripple effects throughout the Wabanaki communities.