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DOI vs. EPA  
A Battle over Tribal Jurisdiction in Maine

I. Introduction

On October 31, 2003 the Environmental Protection Agency (EPA) approved the State of Maine's application to administer and enforce the Maine Pollution Discharge Elimination System (MEPDES). The approval would allow Maine to regulation in tribal territories of the Penobscot Nation and the Passamaquoddy Tribe, with the exception of lands falling under exclusive tribal jurisdiction.

The issue at bar involves a dispute between the EPA/State of Maine and the DOI/Southern Tribes of Maine, namely the Penobscot Nation and the Passamaquoddy Tribe (southern tribes). The EPA has granted authority under section 402(b) Clean Water Act (CWA) to Maine, which allows the state to administer the National Pollution Discharge Elimination System (NPDES) program as a state program, See, 40 CFR 123.23(b). The southern tribes of Maine, along with the Department of Interior, claim that this grant of authority, which allegedly implicates internal tribal matters, is a violation of tribal sovereignty. The EPA responds that the MICSA (Maine Indian Claims Settlement Act), which ratified the MIA (Maine Implementing Act), afforded the state adequate authority to implement its MEPDES permitting programs in the tribal lands of the southern tribes. The only exceptions to this authority, claims the EPA, are any permits for facilities the discharge of which would qualify as internal tribal matters.

## II. EPA's View of State Jurisdiction Over Tribal Lands

States generally lack the authority to govern within tribal lands, See, e.g. *California v. Cabazon*, 480 U.S. 202 (1987). As such, if a state does not demonstrate “specific authority” in tribal country, the EPA is not authorized to allow the state to operate the NPDES permitting program. In order for a state to carry out a NPDES program on tribal land the state must produce specific authority that allows it to do so. The actions of EPA do not determine or alter the jurisdictional relationship between Indian territory and state regulated land. As such, the required report produced by a state seeking to implement a NPDES program must cite authority other than the EPA for its jurisdiction. Such a change in jurisdiction can only be made by Congress and the change must bear “some rational relationship to the best interest of the Indian tribes,” *Morton v. Mancari*, 417 U.S. 535 (1974). However, in the case of Maine, the EPA argues that because the MICSA and MIA are unique in federal law, the EPA must rely on a different analysis of tribal authority than the usual one, *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1<sup>st</sup> Cir. 1997) (“The treatment of the Passamaquoddy Tribe and Penobscot Nation in the Main Implementing Act is original”).

## III. Congress's Grant of Jurisdiction Over Tribal Lands to the State of Maine

Congress granted to the state of Maine jurisdiction over the territories of the federally recognized Maine Indian tribes in the Maine Indian Claims Settlement Act of 1980 (MICSA), 25 U.S.C. 1721. Once result of the MICSA was the ratification of the Maine Implementing Act (MIA), 30 M.R.S.A. 6201. The state of Maine claims that the “combination of the federal and state statutes grants the state authority to regulate discharge to water adequate to support Maine's administration of the MEPDES program in the Indian Territories.” The EPA acknowledges that any ambiguity in statutory interpretation must be decided in favor of the tribe. However, it

claims that there is no ambiguity in the MICSA. “When interpreting the meaning of federal statutes, EPA’s first duty is to determine whether Congress has spoken to the issue at hand, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

#### IV. *Chevron* Test for Determining Congressional Intent

The EPA points to three factors from the *Chevron* case to be considered when determining Congressional intent: (1) plain meaning; (2) reasonable inference from the structure of the statute; and (3) legislative history. *Chevron U.S.A. Inc. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 859-864 (1984).

##### A. Plain Meaning Prong

With regard to the plain meaning prong of the *Chevron* test, the EPA points to a key provision of the MICSA, which states that:

The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

The source of the MIA’s authority over Indian jurisdiction is the MISCA. Where the two statutes conflict, the federal act trumps. 25 U.S.C. 1735(a). Only Congress may alter tribal jurisdiction, and therefore, federal courts have found that MIA’s interpretation is a matter of federal law, *Atkins*, 130 F.3d at 485; *Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1<sup>st</sup> Cir. 1999), cert. denied 527 U.S. 1022 (1999).

Section 6206(1) of MIA “sets out the core of the jurisdictional relationship between the state and the southern tribes” as follows:

[T]he Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to the laws of the State, provided, however, that internal tribal

matters, including membership in the respective tribe or nation, the right to reside within the respective organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

The EPA reads this provision as giving the tribes control over their land, as long as the tribal law does not conflict with the laws of the State of Maine. The exception to this rule is regulation of internal tribal matters, over which the tribe always has authority.

#### B. Statutory Structure Prong

With regard to the statutory structure prong of the *Chevron* test, the EPA points out that the MICSA makes a specific reference to environmental law, “a provision that prevents the application of generally applicable federal Indian laws and regulations that would otherwise ‘affect or preempt...jurisdiction of the State of Maine including, without limitation, laws of the State relating to land use or environmental matters....’” 25 U.S.C. 1725(h). This provision, claims the EPA, works in conjunction with section 1735(b), which “prevents subsequently enacted federal Indian statutes from inadvertently affecting or preempting state jurisdiction after the effective date of MICSA.” 25 U.S.C. 1735(b). The combination of these provisions, often called the “savings clause[s]” prevents the general body of Indian law from “intentionally affecting or displacing MICSA’s grant of jurisdiction to the state,” *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 789 (1st Cir. 1996) (...court upheld the operation of section 1735(b) when it found that the subsequently-enacted Indian Gaming Regulatory Act does not apply in Maine because Congress did not make it specifically applicable to the state). Thus, tribal law granting Indian Tribe’s jurisdiction over their own land is trumped by the congressional grant of jurisdiction to the State of Maine in the MICSA.

### C. Legislative History Prong

Finally, addressing the third prong of the *Chevron* test, the EPA interprets the legislative history of the MICSA to demonstrate that Congress intended that state environmental law would apply in southern tribal lands. This, claims the EPA, is clear from the only Senate Reports that discuss environmental law, which “show quite explicitly that Congress understood it was making state environmental regulation applicable to the southern tribes’ Indian Territories.”

The main point of departure between the EPA and the DOI involves the internal tribal matters exception. The EPA claims that the DOI’s expansive view of internal tribal matters prevents the State of Maine from regulating the environment, at least for the purpose of implementing the NPDES permitting program. The EPA postulates that the DOI’s expansive view of internal tribal matters stems from a misunderstanding of Congressional intent. The Senate Report specifically discusses application of state environmental law through section 1725(b)(1), which is the provision in MICSA that ratified MIA and its jurisdiction provisions for the southern tribes. The provision reads as follows:

State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under the Act. S. Rep. At 27.

The EPA usually affords much deference to the DOI regarding tribal matters; however, the EPA claims to have special expertise with regard to NPDES permitting, and believes its interpretation is the correct one. Congress delegated authority the EPA to implement the CWA and NPDES programs. As a result of EPA’s specialize authority and knowledge, it claims that it is in a position to “refine DOI’s analysis.”

V. DOI's Interpretation of Tribal Jurisdiction in the State of Maine and its Conflict with the View of the EPA

DOI and the tribes conclude that exclusion of internal tribal matters from state regulation “prevents Maine from regulating the environment, as least for the purpose of implementing its MPDES permitting program in the southern tribes’ Indian Territories.” Upon examination of the statute, the DOI interprets the legislative history of MICSA as strengthening tribal sovereignty. The DOI points to a Senate Report which concludes that “rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs...the settlement strengthens the sovereignty of the Maine Tribes” DOI Op. at 6-7, quoting S. Rep. At 14.

The DOI relies on the legal status of the southern tribes immediately prior to the passage of the MICSA. In *Bottomly v. Passamaquoddy Tribe*, the First Circuit held that the southern tribes were basically in the same position as Indians across the nation with “inherent powers of a limited sovereignty” to regulate tribal matters, 599 F.2d 1061, 1065-66 (1st Cir. 1979). The DOI then infers that “if Congress were indeed strengthening the sovereignty of the Maine tribes in comparison with their legal status in 1980, MICSA must accord the southern tribes at least as much authority to regulate their own environment as Indian tribes outside Maine enjoy.”

The EPA, however, disagrees, claiming “both congressional committee reports for MICSA make it clear that Congress understood it was acting against the backdrop of Maine’s position that the southern tribes were essentially wards of the state.” The Supreme Judicial Court of Maine in *State of Maine v. Dana* found that “the trial court had erred in not conducting fact-finding to determine if the site of a crime had retained its aboriginal character and was therefore under the exclusive criminal jurisdiction of the federal government” 404 A.2d 551 (1979). This court, along with the *Bottomly* court found that the Passamaquoddy Tribe retained limited sovereignty; however, neither court discussed the state’s and the tribe’s respective jurisdiction,

and neither case involved the Penobscot Nation. From this, the EPA infers that “Congress viewed MICSA as a settlement of the parties’ positions in litigation that were not yet fully resolved,” and claims that “[b]oth of the congressional committee reports for MICSA make it clear that Congress understood it was acting against the backdrop of Maine’s position that the southern tribes were essentially wards of the state.”

EPA claims that when Congress provided for the internal tribal matters exception from the grant of state jurisdiction, “it was strengthening the southern tribes sovereignty in comparison with the federal government’s nearly complete abandonment of the tribe’s inherent sovereignty up to that point.” This proposition is supported, EPA claims, by the language surrounding the quote DOI pulled from the Senate Report:

While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with these decisions [recognizing the federal status of Maine tribes] the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes. S. Rep. At 14; H.R. Rep. At 15.

Therefore, the EPA claims that legislative history did not intend for

‘Internal tribal matters’ to act as a codification of either the full cope of inherent sovereignty retained by most Indian tribes or the core of government powers of other tribes. Rather, Congress clearly intended internal tribal matters to be a more narrow reservation of a subset of tribal authority that was unique in scope from those power retained by other tribes.

The DOI interprets internal tribal matters to mean “the right to reside within the ‘respective Indian territories’ and ‘tribal government.’” However, according to the EPA, the DOI’s interpretation of the internal tribal matters exception is so broad as to negate the need for the exception at all. In the words of the EPA, it “swallow[s] the rule.” The DOI’s interpretation renders the concept of internal tribal matters virtually indistinguishable from “inherent powers of

limited sovereignty” that is generally afforded to tribes outside of Maine. The *Akins* case, claims the EPA, stands for the proposition that two are not one in the same:

While defining what constitutes an internal matter controlled by Indian tribes is hardly novel in Native American law, it is novel in this context. The relations between Maine and the Penobscot Nation are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement, *Akins*, 130 F.3d at 483.

## VI. Conclusion

The positions of the DOI and EPA adverse, however there is strong support for both arguments. Both parties postulate as to what each side believes Congress meant when it ratified the MIA and MICSA. Perhaps the only true answer to this question will have to come from Congress.