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, 129th Maine Legislature

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

CIVIL JURISDICTION EXAMPLE: THE REGULATION OF NATURAL RESOURCES (GENERAL PRINCIPLES)

Federal Indian Law

Tribal Nations exercise inherent governmental authority over lands and natural resources within their Indian country.[1] 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."

Specific authority to regulate natural resources is generally presumed to have been retained by a Tribal Nation unless such authority has been limited under federal law.[2] Thus, the authority of Tribal Nations to regulate natural resources and the environment derives from "two interrelated sources": 1) retained inherent tribal sovereignty to govern tribal lands, to the extent such authority has not been limited by federal law; and 2) powers authorized by Congress under specific laws.[3]

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[1] *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).

[2] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §2.02, at 118 (Nell Jessup Newton ed., 2012) (citing *Worcester v. Georgia*, 31 U.S. 515, 552-553 (1832)).

[3] *Id* at §10.01, 784.

1) Tribal Authority

Tribal Nations are sovereign governments and property owners that have retained the inherent power to regulate their territory. [4] As such, Tribal Nations "may legislate to ensure environmental protection."[5] In particular, tribal governments possess the authority to establish comprehensive natural resource ordinances or laws that can touch upon all aspects of natural resource regulation including standards for conduct on tribal lands; requirements to obtain permits to engage in certain activities on tribal lands; guidelines for enforcement of natural resource-related laws/regulations; penalties for violations; and procedures for the administration of enforcement actions.

Within a so-called "checkerboard reservation," where original Indian landholdings were sold in fee simple to non-members, tribal authority over natural resources use by such non-members is limited.[6]

2) Powers Authorized by Congress

Laws passed by Congress have altered how natural resources are regulated in Indian country in two major ways. First, federal laws of general applicability, like the Clean Water Act or the Safe Water Drinking Act, enable federal regulation of resources in Indian country by agencies such as the Environmental Protection Agency (EPA).[7] Such statutes will sometimes delegate specific regulatory authority to Tribal Nations but permit the EPA to retain authority until a tribal government assumes regulatory control pursuant to an established process.[8]

Federal statutes that sanction Tribal Nations' regulatory authority over certain natural resource-related issues are grounded in the idea of federalism, which similarly respects the sovereign right of states to regulate their own lands and resources. Starting in the

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[4] *Id.*
[5] *Id.*
[6] *See Montana v. United States*, 450 U.S. 544, 565-566 (holding that in such a circumstance, tribes can regulate nonmember activities if the nonmember has entered into a "consensual relationship with the tribe or its members" or where the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").
[7] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §10.01, at 785.
[8] *See, e.g.*, 40 C.F.R. § 123.1(h) (Clean Water programs); 40 C.F.R. § 27.1 (Resource Conservation and Recovery Act hazardous waste program); *see also* U.S. EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984), *available at* https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf.

1980s, Congress began a practice of providing for the delegation of regulatory authority over natural resources to Tribal Nations through "Treatment as a State" or "TAS" provisions in pollution control laws. TAS status enables a Tribal Nation to assume primary regulatory control over the administration of standards and programs under the relevant federal statute.[9] There are currently three major federal pollution control laws that authorize Tribal Nations to obtain TAS status by the EPA: the Clean Water Act, the Safe Drinking Water Act, and the Clean Air Act. To achieve TAS status, a Tribal Nation must generally demonstrate that it possesses the jurisdiction and capacity to operate each element of the environmental program that is seeks to administer.[10] Tribes with TAS status and states may establish regulatory standards that are more stringent than EPA standards, which are considered minimum standards.[11]

Status Quo in Maine

In the late-1970s, federal court decisions confirmed that Maine lacked authority to control the exploitation of natural resources and related pollution of the same within the Maine Tribes' reservations. As Congress stated in its final committee reports on the land claims settlement in 1980, the U.S. Court of Appeals for the First Circuit had established that "the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States"[12] and that they were "entitled to protection under federal Indian common law doctrines."[13]

At that time, tribal members continued to engage in traditional subsistence practices, not fully understanding the polluted state of their sustenance resources. An EPA report found that as of 1968, "the Penobscot [River] . . . received the untreated industrial wastes discharged non-stop from seven pulp and paper mills," five of which flowed directly into the Main Stem – the home of the Tribe's aboriginal villages occupied from time immemorial. In 1964, this was equivalent to "untreated domestic sewage load produced in one day by about 5,000,000 people," thereby depressing "dissolved oxygen levels . . . as low as zero," in blatant violation of Maine's water quality standards.[14]

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[9] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §10.02 at 791 (citing Clean Water Act § 518, 33 U.S.C. § 1377(e))
[10] *Id*. at §10.03, at 794.
[11] *Id*. at §10.03, at 795.
[12] S. Rep. No. 96-957, at 14; H.R. Rep. 96-1353, at 14.
[13] S. Rep. No. 96-957 at 13.
[14] U.S.E.P.A., *A Water Quality Success Story: Penobscot River, Maine,* December, 1980 at 4-5, accessible at https://nepis.epa.gov/ via Google search, last visited Sept. 6, 2019.

Nevertheless, as set out in the separate paper on fishing, hunting and trapping practices, the Tribal Nations engaged in their traditional subsistence and cultural practices. For example, well into the 1990s, when tribal members became educated about pollution, Penobscot families, relied upon fish, eel, and other food sources from the Penobscot River for up to four meals per week to the tune of two to three pounds per meal.[15]

Pursuant to the Settlement Acts, with the exception of "internal tribal matters" for the Penobscot Nation and the Passamaquoddy Tribe, Congress generally granted Maine regulatory authority over the reservations and trust lands (and related natural resources) of Tribal Nations in Maine.[16]

Given the importance of environmental quality within Indian country for the Tribal Nations' subsistence and cultural practices, control over pollution has become a battleground. Paper corporations and the State of Maine have fought against both federal and tribal regulatory authority within the reservations and trust lands. Litigation has been ongoing for decades, and absent amendments to the Settlement Acts, is likely to continue.[17]

One example of the abysmal failure of the status quo is dioxin contamination of the Penobscot River. In the late 1990s, the United States Department of the Interior, as trustee for the Penobscot Nation, commenced a natural resources damages proceeding against potentially responsible parties, in particular, Lincoln Pulp & Paper (LP&P). In July, 1999, the Bureau of Indian Affairs commissioned a report entitled "Final Report: The Economic Value of Foregone Cultural Use: A Case Study of the Penobscot Nation." The report states that "the Penobscot Nation has been deprived of its rightful use of the Penobscot River" and estimates that the value of the Tribe's foregone use of the Penobscot River between $34.9 and $62.7 million.

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[15] 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.

[16] *See* 30 M.R.S.A. § 6204. ratified by 25 U.S.C. §§ 1721 et. seq..

[17] *See, e.g., Maine v. Wheeler*, Civil Action No. 1:14-cv-264-JDL (pending before the U.S. District Court for the District of Maine) (Maine claiming authority to promulgate water quality standards in Indian territories; ongoing controversies about whether Maine is required to protect sustenance fishing rights to ensure a quality and quantity of fish for tribal sustenance); *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007) (whether Maine may take over pollution permitting within Indian territories under the Clean Water Act); *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574 (1st Cir. 2001) (whether paper corporation can invoke Maine Freedom of Access Law to obtain governmental documents of the Penobscot Nation regarding efforts of the Nation to protect its reservation from environmental pollution).

In 2001, however, LP&P filed for Chapter 11 bankruptcy to discharge its obligations, including any claims for natural resources damages. The United States, as trustee for the Penobscot Nation, filed a proof of claim in that proceeding, to recover "damages suffered by the Penobscot Indian Nation . . . for the loss of its sustenance fishing right and cultural use due to the contamination of the waters and sediments of the Penobscot River, which includes areas of the Nation's reservation."

The Wabanaki Tribal Nations' proposed changes to the MIA in the area of civil jurisdiction over natural resources are intended to enhance the Tribal Nations' ability to regulate the environments in which they have lived since time immemorial. Increased tribal jurisdiction in these areas will have untold positive impacts in the waters, woods, and lands that the Wabanaki People and all Mainers cherish and rely upon.