

ENTITY WITH JURISDICTION	INDIVIDUALS/GROUPS OVER WHOM JURISDICTION IS EXERCISED	FEDERAL LAW	MAINE (MICA/MIA)	TASK FORCE RECOMMENDATIONS
Tribe	<i>Tribes and tribal citizens</i>	<p>Aboriginal title (original Indian title over land) includes the exclusive right to hunt, fish and gather on that land.¹ Aboriginal title can only be extinguished by treaty, abandoned or eliminated by federal statute.² Additionally, termination of a reservation will not extinguish hunting, fishing and gathering rights unless the act of termination makes such extinguishment explicit.³</p> <p>Treaties may give tribes hunting, fishing and gathering rights on off-reservation lands.⁴</p> <p>Tribes have the power to regulate their lands as regards hunting, fishing and gathering.⁵</p> <p>Courts have found that tribes may regulate fishing by tribal members off tribal lands at “usual and accustomed” fishing places.⁶</p>	<p>The Passamaquoddy Tribe and Penobscot Nation have exclusive authority within their territories to promulgate ordinances regulating hunting and trapping on tribal land as well as fishing “on any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area.”⁷</p> <p>Notwithstanding any rule or regulation promulgated by MITSC or the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish within their respective tribal reservations for their individual sustenance (subject to certain oversight by the Commissioner of the Department of Inland Fisheries and Wildlife).⁸</p> <p>“...subject to [certain oversight by the Commissioner of the Department</p>	<p>Recommendation #1</p> <p>Recognize federal law regarding the exclusive jurisdiction of tribes to regulate fishing and hunting by tribal citizens of all federally recognized tribes on tribal lands, using the expanded definition of tribal lands described in criminal jurisdiction recommendation #1. (Vote 9-0, Rep. Dillingham absent)</p>

¹ Cohen’s Handbook of Federal Indian Law, §18.01 at pg. 1154 (Neil Jessup Newton ed., 2012).

² Cohen’s Handbook of Federal Indian Law, §18.01 at pg. 1155 (Neil Jessup Newton ed., 2012), citing *Mitchel v. United States*, 34 U.S. 711, 746 (1835) and *United States v. Santa Fe P.R.Co.*, 314 U.S. 339, 347 (1941).

³ Cohen’s Handbook of Federal Indian Law, §18.03[1] at pg. 1159 (Neil Jessup Newton ed., 2012); See *Menominee Tribe v. United States*, 391 U.S. (1968).

⁴ Cohen’s Handbook of Federal Indian Law, §18.04[1] at pg. 1163 (Neil Jessup Newton ed., 2012).

⁵ Cohen’s Handbook of Federal Indian Law, §18.03[2][a] at pg. 1160 (Neil Jessup Newton ed., 2012), citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, (1983), and *State v. McClure*, 268 P.2d 629, 635 (Mont. 1954).

⁶ Cohen’s Handbook of Federal Indian Law, §18.04[3][b] at pg. 1179 (Neil Jessup Newton ed., 2012); ee *Settler v. Lameer*, 507 F.2d 231, 239 (9th Cir. 1974).

⁷ *An Act to Implement the Maine Indian Claims Settlement*, 30 MRS §6207(1).

⁸ *An Act to Implement the Maine Indian Claims Settlement*, 30 MRS §6207(4).

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			of Inland Fisheries and Wildlife], ordinances may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation. ⁹	
	<i>Non-tribal citizens</i>	<p>Tribes have the authority to regulate the hunting, fishing and gathering activities of nonmembers on tribal land.¹⁰ This includes the authority to exclude non-citizens from hunting, fishing and gathering on tribal land.¹¹ While tribes can use civil remedies to enforce tribal laws and rules, tribes do not have criminal enforcement powers over non-citizens.¹²</p> <p>Courts have used the <i>Montana</i> test to examine the permissibility of tribal hunting, fishing and gathering laws and regulations governing non-tribal-citizens on non-citizen owned fee lands.¹³</p>	<p>Passamaquoddy Tribe and Penobscot Nation tribal ordinances regarding hunting and fishing within their territories “shall be equally applicable, on a nondiscriminatory basis, to all persons regardless of whether such person is a member of the respective tribe or nation...”¹⁴</p> <p>MITSC has exclusive authority to promulgate fishing rules or regulations on ponds not under the exclusive authority of the Passamaquoddy Tribe or Penobscot Nation, of which 50% or more of the linear shoreline is in Indian territory; any section of a river or stream, both sides of which are in Indian territory; and any section of a river or stream, one side of which is within Indian</p>	<p>Recommendation #2</p> <p>Restore and affirm the exclusive jurisdiction of tribes to regulate fishing and hunting by non-tribal citizens on tribal lands, using the expanded definition of tribal lands described in criminal jurisdiction recommendation #1, but do not cede any of MITSC’s authority to regulate hunting and fishing under current law to the State. (Vote 9-0, Rep. Dillingham absent)</p>

⁹ *An Act to Implement the Maine Indian Claims Settlement*, 30 MRSA §6207(1).

¹⁰ *Cohen’s Handbook of Federal Indian Law*, §18.06[1] at pg. 1185 (Neil Jessup Newton ed., 2012); See *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.ed 1017, 1022 (8th Cir. 1997).

¹¹ *Cohen’s Handbook of Federal Indian Law*, §18.06[1] at pg. 1185 (Neil Jessup Newton ed., 2012); See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (“A tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established”); and *Quechan v. Rowe*, 531 F.2d 408, 410 (9th Cir. 1976) (“In the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation.”).

¹² *Cohen’s Handbook of Federal Indian Law*, §18.06[1] at pg. 1185 (Neil Jessup Newton ed., 2012), citing *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978).

¹³ *Montana v. United States*, 450 U.S. 544, 565-566 (1981) (the *Montana* test examines whether a tribes has civil jurisdiction over a nonmember and is two part: (1) does the non-tribal member in question have a consensual relationship with the tribe or its members that is related to the conduct at issue, or (2) does the conduct in question threaten the tribe’s political integrity, economic security, or health or welfare); See *South Dakota v. Bourland*, 508 U.S. 679 (1993) for a more recent example of the application on the *Montana* test to tribal regulation of non-Indian hunting and fishing.

¹⁴ *An Act to Implement the Maine Indian Claims Settlement*, 30 MRSA §6207(1).

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			<p>territory for a continuous length of a half mile or more.¹⁵ Prior to the promulgation of such rules, state laws and rules remain in effect¹⁶ MITSC also had the authority to adopt rules to regulate the horsepower and use of motors on water less than 200 acres in surface area and entirely within Indian territory.¹⁷</p> <p>MITSC-promulgated regulations “shall be equally applicable on a nondiscriminatory basis to all persons regardless of whether such person is a member of the Passamaquoddy Tribe or Penobscot Nation.”¹⁸</p>	
State	<i>Tribes and tribal citizens.</i>	<p>States generally do not have the authority to regulate hunting, fishing and gathering by tribal citizens on tribal lands.¹⁹</p> <p>While states may regulate hunting, fishing and gathering by tribal members off tribal land to some degree, state conservation regulations applying to tribal members off tribal lands must be</p>	<p>The Commissioner of Inland Fisheries and Wildlife has the authority to conduct fish and wildlife surveys on Indian territory and waters, provided reasonable advance notice is provided and the tribe is provided the opportunity to participate. The Commissioner, after consultation with the tribe in question and after a public hearing, may also impose measures upon tribal lands,</p>	<p>Recommendation #3</p> <p>Relinquish jurisdiction granted to the State of Maine in the Maine Implementing Act with respect to the regulation of fishing and hunting by both tribal and non-tribal citizens on tribal lands, except that, with respect to conservation, the State of</p>

¹⁵ MITSC has promulgated certain fishing regulations. See “Fishing on Waters Under Jurisdiction of Maine Indian Tribal-State Commission,” C.M.R. 94-409, ch. 201.

¹⁶ *An Act to Implement the Maine Indian Claims Settlement*, 30 MRSA §6207(3). See also *Mills v. Penobscot Nation*, 861 F.3d 324 (1st Cir. 2017), in which the First Circuit reviewed two district court rulings made on cross motions for summary judgement. The First Circuit affirmed the district court ruling that the plain text of the MICSA and MIA regarding the extent of the Penobscot Indian Reservation was unambiguous and that the Reservation included islands in the Main Stem of the Penobscot River, but not the river itself. The Circuit Court reversed the district court ruling that determined that the MICSA provided the Nation with individual sustenance fishing rights in the entirety of the Maine Stem. The First Circuit determined that the judgment had been premature because the claim was not ripe and because the tribe lacked standing. The Court’s decision rested on its determination that the Nation had suffered no harm and faced no imminent threat to substance fishing, which the state had long allowed.

¹⁷ *An Act to Implement the Maine Indian Claims Settlement*, 30 MRSA §6207(3-A).

¹⁸ *An Act to Implement the Maine Indian Claims Settlement*, 30 MRSA §6207(3).

¹⁹ *Cohen’s Handbook of Federal Indian Law*, §18.06[2] at pg. 1187 (Neil Jessup Newton ed., 2012) (“The states’ ability to exercise concurrent regulatory authority over on-reservation hunting fishing and gathering activities by members of the governing tribe is severely restricted”); See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

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		non discriminatory and must be reasonable and necessary for conservation ²⁰ . A similar test has been applied to state safety regulations. ²¹	including regulations, intended to protect fish and wildlife stocks outside tribal boundaries. ²²	Maine may regulate tribal members engaged in such activities off tribal lands to the extent permitted under general principles of federal Indian law and in a manner consistent with reserved tribal treaty rights. (Vote 9-0, Sen. Carpenter and Rep. Dillingham absent)
	<i>Non-tribal citizens</i>	States have very limited authority to regulate hunting, fishing and gathering on tribal land. ²³	Fishing and hunting are regulated by the state except where the Penobscot or Passamaquoddy have authority as described above or where MITSC has authority as described above.	
Federal Government	<i>Tribes and tribal citizens</i>	The federal government has the power to regulate hunting, fishing and gathering by tribal citizens on tribal lands in the same manner as other tribal affairs. ²⁴ Though the federal government has not often exercised this power ²⁵ , the Secretary of the Interior has regulated fishing off of tribal lands. ²⁶	Nothing in the Maine Implementing Act limits federal jurisdiction.	
	<i>Non-tribal citizens</i>	The federal government has not heavily exercised its power to regulated hunting, fishing and gathering on tribal lands. ²⁷ 18	Nothing in the Maine Implementing Act limits federal jurisdiction.	

²⁰ Cohen’s Handbook of Federal Indian Law, §18.04[3][b] at pg. 1180 (Neil Jessup Newton ed., 2012); See *Dep’t of Game v. Puyallup Tribe*, 414 U.S. 44 (1973).

²¹ Cohen’s Handbook of Federal Indian Law, §18.04[3][b] at pg. 1181 (Neil Jessup Newton ed., 2012); See *Confederated Tribes of the Colville Reservation v. Anderson*, 761 F. Supp. 2d 1101, 1197 (E.D. Wash. 2011). (“Using the Supreme Court’s conservation-necessity standard as its guide, the Court holds that a state may enact and enforce laws regulating a tribal member’s exercise of an “in common” hunting right for public-safety purposes if the law(‘s): 1) reasonably prevents a public-safety threat; 2) is necessary to prevent the identified public-safety threat; 3) does not discriminate against Indians; and 4) application to the Tribe is necessary in the interest of public safety.”).

²² *An Act to Implement the Maine Indian Claims Settlement*, 30 MRSA §6207(6).

²³ Cohen’s Handbook of Federal Indian Law, §18.03[2][1] at pg. 1160 (Neil Jessup Newton ed., 2012); See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) and *Antoine v. Washington*, 420 U.S. 194 (1975).

²⁴ Cohen’s Handbook of Federal Indian Law, §18.06[3] at pg. 1189 (Neil Jessup Newton ed., 2012).

²⁵ Cohen’s Handbook of Federal Indian Law, §18.04[3][c] at pg. 1182 (Neil Jessup Newton ed., 2012).

²⁶ Cohen’s Handbook of Federal Indian Law, §18.06[3] at pg. 1189 (Neil Jessup Newton ed., 2012).

²⁷ Cohen’s Handbook of Federal Indian Law, §18.06[3] at pg. 1189 (Neil Jessup Newton ed., 2012).

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		<p>U.S.C. § 1165 makes trespass on Indian lands to hunt, fish or gather without tribal permission a federal crime. The Lacey Act²⁸ makes it a federal crime to transport, sell, receive, acquire or purchase fish, wildlife or plants harvested in violation of federal, tribal or state law.</p>		
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²⁸ 16 U.S.C. §§ 3371-3378.