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PUBLIC COMMENTS OF THE AROOSTOOK BAND OF MICMACS AND THE HOULTON BAND OF MALISEET INDIANS

ON THE APPLICATION OF THE STATE OF MAINE TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR THE AUTHORIZATION TO ADMINISTER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM OVER INDIAN LANDS OR TERRITORIES IN THE STATE OF MAINE

August 21, 2000

Submitted to:
The United States Environmental Protection Agency, Region I, New England
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The Aroostook Band of Micmacs (Micmac) and the Houlton Band of Maliseet Indians (Maliseet), hereby submit Public Comments to the United States Environmental Protection Agency (EPA) on the authority of the State of Maine ("Maine" or "State") to administer the National Pollution Elimination Discharge System (NPDES) pursuant to Section 402 of the Clean Water Act, 33 U.S.C. Section 1342(b) over Indian lands and territories in the State of Maine.

INTRODUCTION

In a Federal Register Notice dated, June 28, 2000, EPA requested comments on whether EPA should delegate authority to the State of Maine to implement the Maine Pollutant Discharge Elimination System (MEPDES) pursuant to Section 402 of the Clean Water Act over Indian lands and territories in the State of Maine.

EPA must deny the State application in regards to Indian land and territories in the State and retain Federal jurisdiction over the NPDES program for the following reasons:

1) The State has no authority or jurisdiction over the lands or members of the Aroostook Band of Micmacs (Micmac).

2) Pursuant to its Trust obligations EPA must retain authority for the NPDES program over the land and Territory of the Houlton Band of Maliseet Indians until the Tribe and State reach an agreement on jurisdiction in accordance with the Act.

3) The EPA has a legally enforceable fiduciary duty to preserve and protect the Maliseet's and Micmac's Tribal Culture and Tradition. A decision to delegate the NPDES program to the State may adversely impact the culture and traditions of the Maliseet and Micmac Tribes and would not be in the best interest of the Tribes.

4) The federal Trust relationship requires that EPA refrain from delegating the NPDES program over Micmac and Maliseet lands or territories to the State.

1. THE STATE HAS NO AUTHORITY OR JURISDICTION OVER THE LANDS OR TERRITORY OF THE MICMAC

Maine statute 30 MRSA Section 7201 et seq. purports to define the jurisdictional relationship between the State and the Micmacs. This statute was ratified and approved by the United States Congress in Public Law 102-171, , 105 Stat. 1143, (November 26, 1991). (hereinafter cited as the "Micmac Act"). However, 30 MRSA 7201 et seq. never went into effect and was void ab initio and a nullity at the time Congress approved it.

On May 18, 1989, the Governor of Maine, 'approved" a new State statute titled, "An Act to Implement the Aroostook Band of Micmacs Settlement Act" Chapter 148 of the Public Laws of 1989, Codified as 30 MRSA Section 7201 et seq. (Micmac Statute). The Micmac Statute attempts to, among other things, define the jurisdictional powers and limitations of the Micmac within the State:

> **30 Section 7203. Laws of the State to apply to Indian Lands**
>
> Except as otherwise provided in this Act, the Aroostook Band of Micmacs and all members of the Aroostook Band of Micmacs in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

Significantly, the Micmac Statute provides the Tribe with an opportunity to approve or disapprove the legislation and it further provides that such legislation shall only become effective if the Tribe submits a certification of its agreement to the Secretary of State:

> 2. Within 60 days of the adjournment of the legislature, the Secretary of State receives written certification by the Council of

> the Aroostook Band of Micmac that the Band has agreed to this Act, copies of which shall be submitted by the Secretary of the State and the Clerk of the House of Representatives, provided that in no event shall this Act become effective until 90 days after adjournment of the Legislature. Chapter 148 of the Maine Public Laws of 1989, Section 4. (Attachment 1)

The Tribe did not agree with the Micmac Statute and did not submit a written certification to the Secretary of State. Thus, the Micmac Statute was, and is, void and without effect.

Moreover, the Maine Attorney General's office has confirmed that the Micmac Statute is a nullity. On June 16, 2000, Maine Assistant Attorney General, William R. Stokes, in a letter to Mr. John Nale, Esq., stated that the Secretary of State has no record of the required certification and that he is concerned that "... the Maine (sic) Implementing Act never became effective notwithstanding the enactment by the Untied States of legislation ratifying and approving it." (Attachment 2)

Furthermore, the State is, and has been, aware that the Micmac Statute required ratification by the Micmac before it could become effective. A review of the codified Maine Statutes shows that each section of 30 MRSA Section 7201 et seq, contains the following disclaimer "(NOTE: Needs ratification by Indian tribes per Secretary of State)." (Attachment 3). The Maine Attorney General failed to identify this problem in State jurisdiction in his submission to EPA regarding State authority over the Micmac.

Moreover, Congressional ratification of the Micmac Statute did not overcome the initial lack of certification by the Micmac. Congress merely approved an " agreement" on jurisdiction between the State and the Micmac. Congress did not "adopt" the State legislation as its own, or enact federal legislation to address the Tribe/State jurisdictional

issue. The clear intent of Congress was to leave the details regarding jurisdiction up to the State and the Tribe.

Furthermore, the provisions of the original Maine Indian Claims Settlement Act of 1980, 25 U.S.C 1721 et seq. do not provide jurisdiction for the State over Micmac land or territory. In 1991, Congress passed the Micmac Act. The Micmac Act explicitly creates a separate and distinct relationship between the State and the Micmac, not controlled by the provisions of the 1980 Act:

> (b) Purpose.- It is the purpose of this Act to-
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> ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs" (Micmac Act, Section 2(b) (4))

The "Micmac Settlement Act" is further defined to specifically and solely apply to the Micmac Statute:

> the Act entitled 'Act to Implement the Aroostook Band of Micmacs Settlement Act' that was enacted by the State of Maine in Chapter 148 of the Maine Public Laws of 1989, and all subsequent amendments thereto. (Section (3) (8) of the Micmac Act)

Thus, the jurisdiction of the State over Micmac land or territory is exclusively defined and controlled by the contents of the State "Micmac Settlement Act" and that piece of legislation never went into effect.

In addition, absent Congressional approval, the State has no authority to pass new legislation impacting upon the aboriginal and inherent Micmac jurisdiction over its lands and territory in Maine. Section 6 (a) of the Micmac Act provides federal recognition to the Micmac. It is established beyond question that unless Congress acts to remove

jurisdiction, a federally recognized Tribe retains all of its original jurisdiction over Tribal lands, members and resources.

Moreover, pursuant to the Micmac Act, the State cannot amend Chapter 148 of the Public Laws of Maine without the agreement of the Micmac:

> The State of Maine and the band are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by, or held in trust for the benefit of... the band. The consent of the United States is hereby given to the State of Maine to amend the ***Micmac Settlement Act*** for this purpose: ***Provided that such amendment is made with the agreement of the Aroostook Band of Micmacs***. (emphasis added) (Micmac Act, Section 6 (d))

Therefore, until such time as Congress acts, or the State and Micmac agree to amend the Micmac Statute, jurisdiction over Micmac lands and territory resides solely with the Micmac.

For all the reasons stated above, the EPA cannot authorize the State of Maine to administer the NPDES program in Maine over any Micmac land or territory.

2. PURSUANT TO ITS TRUST OBLIGATIONS EPA MUST RETAIN AUTHORITY FOR THE NPDES PROGRAM OVER THE LAND AND TERRITORY OF THE HOULTON BAND OF MALISEET INDIANS UNTIL THE TRIBE AND STATE REACH AN AGREEMENT ON JURISDICTION IN ACCORDANCE WITH THE ACT.

The Act does not strip the Maliseet of their original inherent jurisdiction but merely provides limited concurrent jurisdiction to the State. Furthermore, until the State of Maine and the Maliseet agree on the contours of State/Tribal jurisdiction, as contemplated in 25 U.S.C 1725 (e) (2), EPA must retain control of the NPDES program over Maliseet land and territory.

It is a well established principle of federal law that Tribes retain all sovereignty and jurisdiction over their lands and people not specifically withdrawn by treaty or statute; Montana v. United States, 450 U.S. 544, 564 (1981) and Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir, 1994))(see www. ca1.uscourts. gov, 61 pages)[1]. The statutory analysis employed by the First Circuit Court in Rhode Island provides a step-by-step analysis useful for determining whether a Tribe's inherent Sovereignty and jurisdiction have been withdrawn by Congress. Application of this analysis to the Act and the Maliseet, supports the conclusion that the Maliseet have retained their inherent Sovereignty and jurisdiction over their lands and people.

In Rhode Island, the Court based it decision on five rules (Rhode Island Rules) of statutory construction which are also relevant to this case: 1) Ambiguities in the statute

[1] It is generally accepted that Indian Tribes retain significant sovereign power unless Congress acts to limit it. See Cohen, Handbook of Federal Indian Law, at 247-53.

are resolved in favor of Tribes. Rhode Island at 10, quoting from Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87; 2) Federal recognition confirms that the Tribe possesses sovereignty over it lands and territories that "predates the birth of the republic (Rhode Island at 18); 3) The solitary fact that Congress transfers power to a State does not mean that a Tribe lacks similar power over its land and territory (Rhode Island at 35); 4) In determining whether a federal statute has removed jurisdiction from a Tribe, the Tribe's original sovereignty, is a necessary "backdrop against which the applicable federal statutes must be read." (Rhode Island at 35 quoting from McClanahan v State Tax Comm'n, 411 U.S. 164, 172 (1973)); and 5) All aspects of sovereignty and jurisdiction not specifically withdrawn by Treaty or statute remain with the Tribe. (Rhode Island at 36) ("Jurisdiction is an integral aspect of retained Sovereignty" id at 36.)[2] After the application of the Rhode Island Rules, the Court identified two factors crucial to its determination that the Rhode Island Act does *not* transfer jurisdiction over the Tribe to the State. First, the Rhode Island Act does not use words like "exclusive" or "complete" to describe the grant of authority to the state; and it does not further limit the Tribe's jurisdiction in other ways. id at 36-38.

The application of the Rhode Island Rules, along with the two factors noted above, to the Maine Act, results in the conclusion that the Maliseet retained their original jurisdiction. In Rhode Island, the First Circuit found that the Maine Act was modeled on the Rhode Island Act and that these Acts contained parallel "grants of jurisdiction"

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[2] See also, The Kansas Indians, 5 Wall. 737, 755 (1867), The Court explained that "[i]f the tribal organization is preserved intact, and recognized by the political department of the government as existing, then they are a `people distinct from others,' separated from

Footnote continues on next page.

expressed in "similar language" id at 38. Although the Court also pointed to the language of 25 U.S.C 1725(f.) as an example of a provision that defines the limits of Tribal jurisdiction, that section of the Act does *not* apply to the Maliseet:

> (f) Indian jurisdiction separate and distinct from State Civil and Criminal jurisdiction
>
> The *Passamaquoddy Tribe and the Penobscot Nation* are hereby authorized to exercise jurisdiction separate and distinct from the civil and criminal jurisdiction of the state of Maine, to the extent authorized by the Maine Implementing Act, and any amendments thereto. 25 U.S.C 1725(f) (emphasis added)

Like the statute at issue in Rhode Island, the grant of jurisdiction to the State of Maine in the Act does not explicitly strip the Maliseet of jurisdiction, limit the Maliseet jurisdiction, or transfer jurisdiction from the Tribe to the State. The plain language of the Act declares that only the Penobscot and Passamaquoddy entered into an agreement with the State on the definition of their respective jurisdictions:

> The State of Maine, with the agreement of the Passamaquoddy Tribe and the Penobscot Nation, has enacted legislation defining the relationship between the Passamaquoddy Tribe, the Penobscot Nation, and their members, and the State of Maine. 25 U.S.C 1721(a) (8)

In fact, there is an absence of any language in the Act limiting or terminating the Maliseet jurisdiction over their lands and territories:

> Except as provided in section 1727 (e) and section 1724 (d) (4) of this title, all Indians, Indian nations, or other tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, and the Penobscot Nation ..., shall be subject to the criminal jurisdiction of the State, the laws of the state, and the civil and

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the jurisdiction of [the State], and to be governed exclusively by the government of the Union."

> criminal jurisdiction of the courts of the state, to the same extent as any other person. 25 U.S.C 1725(a)

Compare this language to Section 1708(a) of the Rhode Island Settlement Act that was found by the Court not to remove Tribal jurisdiction:

> Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. 25 U.S.C 1708 (a)

While 25 U.S.C 1725 does attempt to more broadly define the State's jurisdiction, there is no concomitant removal or limiting of the Maliseet's inherent jurisdiction. This language stands in sharp contrast to several provisions of the Act which explicitly define the jurisdiction of the Passamaquoddy and Penobscot Nation (See 25 U.S.C 1721 (b)(3), 25 U.S.C (1725 (b)(1), and 25 U.S.C 1725 (b) (1) and (f)) based on agreements between these Tribes and the State. The lack of any language in the Act limiting or defining Maliseet jurisdiction is notable as federal statutes diminishing the sovereign rights of Indian Tribes are strictly construed. (Rhode Island at 38)

If Congress had wanted to remove jurisdiction from the Maliseet it would have used clear and express language to do so. (Rhode Island, at 38) Thus, the Maliseet's inherent sovereignty and jurisdiction over its lands and territory was not disturbed by the Act. Furthermore, the Act only ratifies the Maine Implementing Act in regards to the State/Penobscot/Passamaquoddy agreement and confirms that Congress intended the Maliseet and the State to reach their own agreement on jurisdiction:

> Purpose
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> (3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation, and

> (4) to confirm that all other Indians, Indian nations and tribes... shall be subject to all laws of the State of Maine, as provided herein. 25 U.S.C 1721(b) (3) and (4). (emphasis added)

Until such an agreement is reached, the Maliseet are subject only to State laws as provided by Section 1725(a) and, as discussed above, Section 1725(a) does not limit or remove the inherent jurisdiction of the Maliseet. While the State of Maine may have desired that jurisdiction be removed from the Maliseet, clearly, Congress did not agree with this demand. Congress expressed its desire, in 25 1725(e)(2), for State and the Maliseet to negotiate the final contours of their respective jurisdictions in Maine, in a similar manner as the Penobscot and Passamaquoddy.

Absent an agreement between the State and the Maliseet regarding the definition of their respective jurisdictions in Maine, the Trust responsibility compels EPA to retain jurisdiction until such an agreement is reached.

EPA LACKS AUTHORITY TO ALTER JURISDICTIONAL STRUCTURE OF THE ACT

Congress did not delegate authority to EPA to alter the jurisdictional structure of the Act. Moreover, EPA cannot delegate authority to the State over Maliseet lands or territories for operation of the NPDES program on the basis of concurrent jurisdiction.. Congress clearly anticipated that the State and the Maliseet would negotiate the contours of their respective jurisdiction in Maine and EPA is not authorized to compel a different result:

> The State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the

> State of Maine over lands owned by or held in trust for the benefit of the band or its members. 25 U.S.C 1725 (e) (2).

However, some have argued that the Maliseet were disenfranchised from their jurisdiction by the Act and that the federal government also has relinquished its trust authority. If that is true, then section 1725 (e)(2) has no logical meaning and is surplusage. If the Maliseet have no jurisdiction, than the purpose of this section can only be to provide advance Congressional approval for all future *enhancements* to Maliseet jurisdiction. Such an interpretation turns the State's twenty-five year record of insisting that the Maine Tribes have no jurisdiction, on its head. Congress was certainly not concerned about the State providing the Maliseet *too much* jurisdiction!

However, Congress did express its concern that the State might improperly attempt to *diminish* Maliseet jurisdiction. In 25 U.S.C 1724 (d)(3)(D), Congress declared that the Maliseet could not take land into Trust until they agreed on terms and appropriate legislation was enacted by the State. Rather than leave it to the State to define the terms of such an agreement, Congress placed specific limits on what the State could address, including an absolute restriction on jurisdiction:

> such agreement shall not include any other provision regarding the enforcement or application of the laws of the State of Maine. 25 U.S.C. 1724 (d) (3) (D).

The only conclusion that can give a logical, meaningful and consistent effect to both sections 1725 (e)(2) and 1724 (d) (3) (D) is that they were included *because* the

Maliseet retain jurisdiction and because Congress wanted to ensure that the State did not improperly *diminish* Maliseet jurisdiction.[3]

Absent an agreement on jurisdiction between the State and the Maliseet, neither the Clean Water Act, nor other EPA statutes or regulations, provide EPA with authority to create, diminish or alter the Tribal/State jurisdictional decisions made by Congress. Therefore, EPA must exercise its federal Trust responsibility and retain authority for the NPDES program over Maliseet land and territory, until such time as the State and the Tribe reach an agreement on jurisdiction, or Congress or the Courts, resolve the issue.[4] (see US. Department of Interior (DOI), Office of the Solicitor, Letter from Edward Cohen to Gary Guzy, page 5, footnote 9, May 16, 2000)[5].

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[3] The State, and others, have asserted that rulings in prior State and federal district court cases support the argument that the Maliseet, and other Maine Tribes, lack jurisdiction. However, as the federal government was not a party to any of those prior cases, EPA is not bound by those rulings. Drummond v United States, 324 U.S. 316 (1945) and United States v Candelaria 271 U.S. 432 (1926). (In HRI v EPA __ F.3d__, (10th Cir. 2000). EPA took the position that "the United States may not be bound by judgments rendered in other cases in which Indians or Indian tribes represented themselves without the direct involvement of the federal government" citing both Drummond and Candelaria, (Brief for Respondent at 40, HRI v EPA __ F.3d__, (10th Cir. 2000). (Attachment 4)

[4] It is worth noting that section 1735 of the Act provides that any "conflict of interpretation" between the Act and Maine Implementing Act is ruled by the federal Settlement Act. 25 U.S.C 1735. Moreover, a finding of concurrent jurisdiction does not implicate 25 U.S.C 1725 (h). The application of 1725 (h) to the jurisdictional issues discussed above, would, in effect, bar the Maliseet from exercising their inherent jurisdiction as contemplated by Congress.

[5] The DOI is authorized by Congress to supervise all public business relating to Indians in the United States (43 U.S.C 1457 (10)) (Attachment 15). Therefore, its opinion on the nature and scope of the federal Trust responsibility deserves deference by EPA.

3. THE EPA HAS A LEGALLY ENFORCEABLE FIDUCIARY DUTY TO PRESERVE AND PROTECT THE MALISEET'S AND MICMAC'S TRIBAL CULTURE AND TRADITIONS. A DECISION TO DELEGATE THE NPDES PROGRAM TO THE STATE MAY ADVERSELY IMPACT THE CULTURE AND TRADITIONS OF THE TRIBES AND WOULD NOT BE IN THEIR BEST INTERESTS

NATURE OF THE FEDERAL TRUST RESPONSIBILITY

A legally enforceable Trust responsibility attaches to the federal government when an obligation of the federal government can be interpreted from the terms of a statute. Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980); The United States Congress made such a legally enforceable commitment to the Tribes in Maine to protect and preserve their culture and traditions.

The Act is structured to implement this commitment in at least three ways: 1) The Act provides for money, land and natural resources to be placed in a federal Trust.[6](25 U.S.C 1724 et seq.); 2) The Act provides protections against the diminishment of Tribal jurisdiction. (Micmac Act, Section 6 (d), 25 U.S.C 1724(d)(3)(D) and 1725 (e)(2)), and, 3) The Act provides authority to Tribal governments to preserve Tribal culture and traditions. (25 U.S.C. 1726 and Micmac Act, Section 7 (a)). Moreover, the legislative history of the Act supports this interpretation:

> Nothing in the Settlement provides for acculturation, nor is it the intent of Congress to disturb the culture or integrity of the Indian people of Maine. To the contrary, the settlement offers protections against this result being imposed by outside entities by providing for

[6] In signing the Act, President Carter acknowledged that "the Federal Government had failed the to live up to its responsibility to the Maine Indians" and that the Act addressed this injustice by creating "a permanent land base and trust fund for the tribes..." Maine Indian Claims Settlement Act of 1980. Remarks at the Bill Signing Ceremony, October 10, 1980 (Attachment 14)

> tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all internal matters. The Settlement also clearly establishes that the Tribes of Maine will continue to be eligible for all federal Indian cultural programs. (Sen. Melcher, Report to the Senate Select Committee on Indian Affairs, Authorizing Funds for the Settlement of Indian Claims in the State of Maine, S. 2829), Report Number 95, 95th Cong., 2nd Sess.17, (September 17, 1980).(hereinafter cited as "Senate Report") (Attachment 17)

This commitment by Congress to preserve Tribal culture and traditions is rooted in their reaction to the treatment of the Maine Tribes by the State and federal governments prior to 1980 One must view the structure of the Act together with the situation of the Maine Indian in 1980, in order to understand the nature of the commitment Congress made to the Tribes. (See Minnesota v Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) "... [W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.")

At the time the Act was passed, the culture and traditions of the Maine Indians were facing extinction. In 1973, the United States Civil Rights Commission (Commission) conducted a review of State programs, reports and documents regarding Indian programs. They also held a two-day public hearing on the treatment of Indians in Maine. The Commission was so disturbed by its findings that it released preliminary findings, eighteen months before the final report:

> In view of the urgency of the conditions confronting Indians in Maine, The Advisory Committee, in May 1973 released its preliminary findings and recommendations... . Maine Advisory Committee to the U.S. Commission on Civil Rights . "Federal And State Services And the Maine Indian" Introduction, page 2, (December 1974) (hereafter cited as "Commission Report") (Attachment 5)

When the Commission issued its official report in December 1974, it described the State-Indian relationship as one of extreme indifference on the part of the State, characterized by discrimination in the administration of state and federal services and capped off by the fact that "...Indians (in Maine) have seldom been included in the planning or decision-making process which affects their lives." (Commission Report Transmittal letter) The Commission also provided a stunningly grim assessment of Tribal life in Maine just prior to the negotiation of Maine Tribes' land claims:

> Federal and State services have been withheld from a people whose need for assistance is tragically evident; unemployment among Maine Indians as of 1973 was reliably estimated at 65 per cent: a 1971 study of off-reservation housing for Indians found 45 percent substandard and poor; health studies of the Maine Indian reveals chronic and severe problems of alcoholism, malnutrition, and disease; *bicultural education, which is central to the preservation of tribal values and traditions, is largely nonexistent;* the ratio of Indian children in foster care homes is 16 times that of the general population, yet only 4 of the 136 Indian children under foster case in Maine have been placed in Indian homes—homes which in some cases were built by the State but are now considered physically inadequate to meet State licensing standards... The Advisory Committee concludes that these facts are not isolated quirks of circumstance: they are a result of practices of discrimination against Maine's Native American population (Commission Report, Letter of Transmittal, Maine Advisory Committee to the U.S. Commission on Civil Rights.) (Attachment 5) (emphasis added)
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> ... The Indians in Maine are Native Americans, their ancestors considered themselves one community, and today they comprise a distinct people. They have weathered the ridicule and racial discrimination of surrounding non-Indian communities. They have withstood long-standing governmental policies ... to erode their political and cultural ties.... The attitudes of the dominant culture might have had a divisive effect on the Indians of Maine had they not been so determined to maintain their identity.
> Commission Report, Introduction, page 1. (Attachment 5)

This disturbing picture of the relationship between the Maine Tribes and the State, provides the backdrop for the subsequent land claims negotiations.

In 1977, the Passamaquoddy Indians and the Penobscot Indian were determined to reclaim their lands, as well as their culture and their traditions. The history of their poor treatment by the State and federal govevernments was prominent in the minds of the Tribal representatives when they sat down to negotiate the settlement of their land claims. The "Passamaquoddy/Penobscot Negotiating Committee" on August 23, 1977, sent a memo to President Carter, dated August 23, 1977, eloquently expressing the Tribes collective thoughts and goals:

> Our position on the details of the proposed settlement are not based on personal desires or gains. Nor is our position based strictly on what we believe we are legally entitled to. We have instead attempted to think in terms of ***what is minimally necessary to insure our goal of ultimate independence and the long term survival for our people, while at the same time trying to approximate the situation that our People would be in today if the federal government had fulfilled the promises made in the Revolutionary War and had indeed acted as a model trustee in our interests over the years.***" (Memorandum to President Jimmy Carter from the Passamaquoddy/Penobscot Negotiating Committee, page 7, August 23, 1977). (emphasis added) (Attachment 7)

Their goal was to attain independence and secure cultural survival for their Tribes. It was in this context that the Tribes negotiated the settlement now embodied in the Act.

The State asserts the Tribes negotiated away their jurisdiction and were anxious to be rid of all federal oversight, including the federal Trust relationship. However, they use as evidence, public statements made by Penobscot and Passamaquoddy counsel, Tom

Tureen, that they took out of context. While Mr. Tureen publicly acknowledged that a deal was struck on jurisdiction and acknowledged the Tribes found some federal regulatory laws to be troubling, he never stated that the Tribes had negotiated away all of their jurisdiction[7]. He also never stated that the Tribes were eager to rebuff all aspects of federal oversight and the Trust relationship.

Moreover, Mr. Tureen's statements, when taken in the proper context, support the Tribes' contention that the Act provides relief only from any federal *regulatory* law:

> Increasingly, both sides found areas of mutual interests, for example in the case of the General body of ***Federal Indian Regulatory Law*** which the Tribes came to see as a source of ***unnecessary federal interference in the management of Tribal property***..." Testimony of Tom Tureen, State of Maine, Joint Select Committee Public Hearing on Maine Indian Claims Settlement, March 28, 1980 (emphasis added) (Attachment 16)

The above statement was made seven months prior to the passage of the Act. Ultimately, Congress addressed the problem of "interference with the management of Tribal property" by requiring the Department of the Interior to manage Indian Trust lands and natural resources "in accordance with terms established by the respective Tribe or Nation... ." 25 U.S.C 1724 (h). Significantly, just prior to his statement quoted above, Mr. Tureen had just finished saying that the State came to understand "the Tribes'

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[7] Significantly, Mr. Tureen, in a letter to Senator Melcher, unambiguously stated that the Tribes' agreement on jurisdiction retained all of their inherent sovereign jurisdiction:

> An agreement with the State was ultimately reached which provided that ***in addition to their status as federally recognized tribes***, the Passamaquoddy and the Penobscot Nation ***would also*** have municipal status for various purposes under Maine law. (emphasis added) Senate Report page 53-54 (Attachment 17)

legitimate interest in managing their internal affairs, in exercising tribal powers in certain areas of particular cultural importance such as, hunting and fishing, and securing basic Federal protections against future alienation for the lands to be returned in the Settlement."

Moreover, the federal interference Tribes wanted relief from was created by the maze of federal regulatory laws found in places like Section 25 of the United States Code and related regulations found in the Code of Federal Regulations.

The Senate testimony of Secretary of the Interior, Cecil Andrus, on the section that was to become 25 U.S.C. 1725(h), leaves no doubt that its intent was solely to address federal regulatory law.

> This single provision would make inapplicable every provision of Federal law codified in title 25 of the United States Code and all other Federal Indian laws, except certain unspecified provisions respecting "financial benefits." The task of identifying those provisions would be a time consuming and probably a litigious one... . (Proposed Settlement of the Maine Indian Land Claims: Hearing on S 2829 Before Senate Select Committee on Indian Affairs, 96th Cong., 2nd Sess. 135(1980) (statement of Cecil Andrus, Secretary of the Interior)[8]

The "provisions" referred to by Secretary Andrus above, are obviously statutory and regulatory provisions, not elements of federal common law.

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[8] The language of 25 U.S.C 1722(d) has also been cited in other comments as evidence that Congress intended to remove the Tribes access to federal common law. Section 1722(d) only defines the scope of *State* law applicable to Tribes, not which *federal* laws, common or otherwise, apply to Tribes.

CONGRESS INTENDED TO CONTINUE TRUST RELATIONSHIP

The language of both of the 1980 and 1991 Settlement Acts clearly intends there to be a continuing Trust relationship between the federal government and the Maine Tribes. Both Settlement Acts create a Trusteeship for Tribal funds, Tribal lands and Tribal natural resources pursuant to 17 U.S.C 1724 and P.L 102-1721, 105 Stat.1143, Section 4 (1991).

Moreover, Congress exhibited a notable interest in the continuation of the Trusteeship in order to protect the jurisdictional rights of the Maliseet and Micmac. In the Act, Congress explicitly retained the authority to ratify and approve future agreements regarding State-Tribal jurisdiction. (25 U.S.C 1725 (e) (2) and at Public Law 102-171, 105 Stat. 1143, Section (6)(d) (1991)). Furthermore, Congress acted to protect the Maliseet from any attempt by the State to improperly diminish the Tribe's jurisdiction:

> ... such agreement shall not include any other provision regarding the enforcement or application of the laws of the State of Maine. 25 U.S.C 1724 (d) (3) (D).

COMPARE ALASKA NATIVE CLAIMS SETTLEMENT ACT TO MAINE ACTS

Congress knew how to explicitly abrogate the Trust relationship and chose not to do so in the Act. Compare provisions of the Maine Acts with similar provisions of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C 1601 et seq. (ANCSA). The Supreme Court found that Section 1601(b) of ANSCA explicitly abrogates the federal Trusteeship[9]:

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[9] While the Maliseet and Micmac do not endorse the outcome of Venetie, the analysis used by the Court is applicable to this case.

> (b) the settlement should be accomplished ... without creating a reservation system or lengthy wardship or trusteeship..."43 U.S.C 1601(b)

In the case of Alaska v Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), the Supreme Court held that the federal government ended its Trust relationship with Alaska Natives by using this explicit language. The Court also found it "significant", and in support of its ruling, that ANSCA transfers Tribal lands to state chartered and state regulated corporations, 43 U.S.C 1607. The stark differences between the language and structure of ANSCA and the Maine Acts is of "decretory significance" (see State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, (1st Cir, 1994)(see www. ca1.uscourts. gov at 38) and show that Congress intended to retain the Trust relationship with the Maine Indians.

The Supreme Court has held that federal statutes cannot abrogate the trust responsibility unless the intent is "clear", "plain" or "manifest" Rosebud Sioux Tribe v. Kneip, 430 U.S. 584. Thus, if Congress intended to end its Trust relationship with the Maliseet and the Micmac, it was obligated to do it explicitly and it knew how to do it explicitly. Therefore, the Maine Settlement Acts of 1980 and 1991, manifest Congressional intent to maintain the Trust relationship with the Tribes.[10]

[10] Congress had another opportunity in the 1991 Settlement Act, 11 years after the original Act, to explicitly abrogate the Trust. It is significant that it declined to do so.

THE DELEGATION OF THE NPDES PROGRAM TO THE STATE WILL ADVERSELY IMPACT THE CULTURE, TRADITIONS THE MALISEET AND MICMAC TRIBES

TRIBAL CULTURE INTERTWINED WITH THE ENVIRONMENT

Environmental protection for the Maliseet and the Micmac is a matter of cultural survival. Their history, legends, tradition, and culture are deeply rooted in nature.

The State's arguments against the existence of a Trust relationship overlooks the crucial role hunting, fishing and gathering native foodstuffs for sustenance and ceremony play in Tribal culture and tradition. These acts are considered part of the "web of life" that nourishes and protects the Tribe. In this context, the "environment" forms the foundation of the web of life and, therefore, the foundation of Tribal culture and tradition. In turn, Tribal culture and tradition require the Tribes to manage, protect and enhance the environment so that the web of life will continue for future generations.

The primal connection to the earth that Tribal cultures maintain with the web of life makes Native Americans a distinct and unique People. Today, when contamination makes it impossible to hunt, fish or gather food stuffs in accordance with their traditions, they cannot pick up and go elsewhere. They must stay and suffer the consequences.[11] Therefore, when a natural resource is adversely impacted or damaged by influences beyond the Tribes control, a vital part of the Tribes cultural link is broken. Accordingly,

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[11] Furthermore, Native Americans are unique amongst all the ethnic groups that inhabit the United States. Native Americans cannot return to a "Mother" country to explore a lost ethnic identity, rediscover lost traditions or introduce their young to a culture that the adults no longer can remember.

preservation and protection of natural resources is preservation and protection of Tribal culture.

In negotiating the land claims settlement and in the Congressional hearing on the Act, the Tribes insisted that their most basic and precious rights be preserved and their tribal culture and traditions be protected by the Act.

Thus, in order to repair past damage done to the Tribes, Congress made a legally enforceable commitment to maintain the environment that supports the fish, animals and plants on their lands and territories in order to preserve and protect the Maine Tribal culture and traditions or "common welfare" of the Tribe.[12]

EPA RESPONSIBILITY AS FEDERAL TRUSTEE

Long before the Supreme Court put a name to the government's relationship with Tribes, Congress established a doctrine which pledged protection and assistance to American Tribes. Article III of the Northwest Ordinance of 1787, which was ratified by the first Congress assembled under the new constitution in 1789, 1 Stat, 50, 52 declared:

> The utmost good faith shall be always observed toward the Indians: their land and property shall never be taken from them without their consent: and in their property, rights and liberty they shall never be invaded or disturbed, ... but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

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[12] The fact that the Clean Air Act is singled out in the committee reports as an example of a regulation that Tribes would not be delegated, is not dispositive or inconsistent with the Tribes position. At the time of the signing of the Act none of the Maine Tribes had manufacturing or other smokestack industries and, in fact, the Maliseet and Micmac had no land base at all. The Tribes had not anticipated that the Clean Air Act would actually play a role on their lands or territories. It should also be noted that Congress did not address the impact of the delegation of any federal program on the Trust responsibility.

The Supreme Court found that the Trust was an original duty of the United States to Tribes, United States v Kagama 18 U.S. 375; 6 S. Ct. 1109; 1886 U.S. LEXIS 1939; 30 L. Ed. 228; Board of County Commissioner v. Seber, 318 U.S. 705, 714 (1943)[14] and that in its dealings with Indian Tribes, the federal government bears a special trust obligation to protect their interests. Oneida County v. Oneida Indian Nation 470 U.S. 226 (1985).

Furthermore, when Congress creates a legally enforceable commitment to a Tribe, the Trust relationship between the federal government and the Tribe requires that the government be held to the highest level of fiduciary responsibility:

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> These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen". United States v Kagama 18 U.S. 375; 6 S. Ct. 1109; 1886 U.S. LEXIS 1939; 30 L. Ed. 228.
>
> In the exercise of war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the body politic. Board of County Commissioner v. Seber, 318 U.S. 705, 714 (1943).

> In carrying out its treaty obligations with Indian Tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which is found expressly in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Seminole Nation v United States, 316 U.S. 286, 296-97 (1942) (footnotes omitted).

Moreover, when federal officials take actions pursuant to their Trust relationship with Indians, they are judged by the same trust principles that govern the conduct of private fiduciaries. See, United States v. Mitchell 463 U.S 206, 226, 103 S.Ct. at 2972; Seminole Nation v Untied States, 316 U.S. 286, 297, 62 S.ct 1049, 1054, 86 L. 1480 (1942); American Indians Residing on Maricopia-AK Chin Chin Reservation v. United States, 667 F.2d 980, 980, 229Ct Cl. 167(1981),cert denied, 456 U.S. 989, 102 S.Ct 2269, 73 L.ED 2d 1284 (1982).

As a federal Trustee, EPA is obligated to protect from harm the Micmac and Maliseet Tribal cultural practices. EPA already recognizes that it has a legally enforceable fiduciary obligation to protect Tribal lands, assets and resources:[15]

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[15] Pursuant to its Trust responsibility, EPA currently consults with Tribes and other federal agencies working under various federal statutes, to protect the culture and traditions of the Maine Indians' from the adverse impact of federal activities such as environmental permitting and licensing. This consultation process, and the protections it provides to the Tribes, will be lost if the EPA delegates the NPDES program to the State for Indian Country.

> TRUST - ...The Federal Indian Trust Responsibility is a legally enforceable fiduciary obligation on the part of the United Sates, to protect tribal lands, assets, resources... . (Tribal Issues Meeting for RAs and Deputy RAs, Dallas Texas, January 27, 1999, Section titled "Indian Country 101", Definition of "Trust.") (Attachment 7)
>
> (e.g. EPA Region I, NPDES Permit Number ME0000175, Great Northern Paper-East Operation; Receiving Water: West Penobscot Branch; April 15, 1999, *"EPA's Trust responsibility requires that the Agency, consistent with Agency authorities, insure that this permit protects tribal rights to resources that may be impacted by the discharge.*") (emphasis added)(Attachment 8)

In 1992, independent of its Trust obligations, EPA made an initial determination that Native Americans are a unique racial group that merit special consideration because of their relationship to, and reliance on, the environment. This determination was part of an EPA study that found the ill effects of environmental contamination fall disproportionately on minority and Tribal populations in the Untied States:

> Native Americans are a unique racial group with a special relationship with the federal government and distinct environmental problems.
> ...Indian Tribes may be at a higher risk for certain pollutants than the average population due to the subsistence practices, including high wild food and fish consumption rates.
> ...EPA's risk analysis methodologies may not include factors (e.g. diet and other *cultural* practices) which accurately assess risk in Indian Country (Draft Report to the Administrator from the EPA Environmental Equity Workgroup, Environmental Equity, Reducing Risk for all Communities. (February 1992)) (emphasis added) (Attachment 9)

On February 11, 1994, President Clinton acted to address the problem of disproportionate environmental impacts identified by the EPA study and issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations

and Low-Income Populations." It required federal agencies to adopt strategies to address environmental justice concerns within the context of agency operations and it established Agency-wide goals for American Indian Tribes.

In 1995, in response to Executive Order 12898, EPA issued its own Environmental Justice Strategy. EPA's Environmental Justice Strategy moved to recognize, for the first time, that the Native American culture is inextricably bound to the environment, and it ordered EPA employees to take this fact into account when making decisions that might impact upon Tribes:

> ... Human health and environmental research and other activities involving Tribal and indigenous environments and communities will take into account the cultural use of natural resources. These activities will seek contributions from Tribal governments and indigenous people in order to incorporate their traditional understandings of, and relationships to, the environment. "The EPA's Environmental Justice Strategy" April 3, 1995.[16]

Within days of the issuance of EPA's Environmental Justice Strategy, EPA Region One began to prepare training sessions to educate EPA staff on "...Indian culture and traditions that are so valuable in the environmental decision making and support systems..." The Region was eloquent in its description of the Native American connection to the environment:

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[16] The State has no comparable guidance for incorporating Tribes into the environmental regulatory process or to acknowledge the Tribes unique relationship with the environment. Furthermore, the State is not bound by a Trust obligation to protect the culture and traditions of the Maine Tribes. If EPA approves the NPDES delegation, undoubtedly, the State will subsequently request authorization to run the full gamut of delegable environmental programs in Indian Country. Thus, the federal government will be unable to adequately protect the Tribes, the Tribes will not continue to play a significant role in decisions that may adversely impact their culture and traditions and the health, safety and welfare of their people and, finally, the Tribes may be forced to abandon their traditions and face acculturation.

> The Tribe that was here is no longer, the Tribe that was here loved this land, protected this land, and gave its life for this land, its waters, its air, and all its relations with Mother Earth and all creation. No other groups of people loved this land, America, more than the Tribe... .(Draft Training Paper-Indian, EPA/Tribal Cultural Training and Education 4/20/95.) (Attachment 18)

By 1998, EPA fully accepted the fact that Tribal culture could not be separated from environmental protection and regulation. EPA guidance applying the Agency's Environmental Justice Strategy to NEPA, required employees to consult with Tribes to ensure any environmental impact on Tribal cultural practices were addressed in the NEPA review process:

> *However, as a result of particular cultural practices, populations may experience disproportionately high and adverse effects.* For example, the construction of a new treatment plant that will discharge to a river or stream used by subsistence anglers may affect that portion of the total population. Also, potential effects to on- or off-reservation tribal resources (*e.g., treaty-protected resources, cultural resources and/or sacred sites) may disproportionately affect the local Native American community and implicate the federal trust responsibility to tribes.* Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, US EPA, April 1998 at 11. (emphasis added) (Attachment 10)

> ... Indian Tribe representation in the process should be sought in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and treaty rights. This will help to ensure that the NEPA process is fully utilized to address concerns identified by tribes and to enhance protection of tribal environments and resources. As defined by treaties, statutes, and executive orders, the federal trust responsibility may include the protection of tribal sovereignty, properties, natural and cultural resources, *and tribal cultural practices.* Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, USEPA, April 1998 at 25. (emphasis added) (Attachment 10)

Then, in 1998 and 1999, EPA signed agreements with the Micmac and Maliseet respectively, wherein, EPA agreed to respect the fundamental relationship between Tribal culture and the environment which exists for these Tribes:

> Environmental Justice principles will be used in EPA's decision making processes, including placement of a high priority on tribal cultural resources such as subsistence needs and traditional practices. Aroostook Band of Micmac / EPA Agreement, (April 30, 1998) and Houlton Band of Maliseet Indians/ EPA Agreement, (June 7 1999). [17] (Attachment 11)

EPA Region I has issued a statement that the Tribal/ EPA Environmental Agreements are only a "planning tool" and that "the TEA's have no legal bearing on the NPDES application." (Attachment 12) This statement can not withstand scrutiny.

EPA documents reveal that the Agency initially considered calling the TEA's "Workplans" but rejected that title as the document was more appropriately called an "Agreement" [18]

> During initial deliberations on how to move forward with these plans, it was decided that rather than being "Workplans" these were more appropriately defined as "Agreements"(See: Template for EPA/Tribal Environmental Agreements, US EPA Region I, March 17, 1995) (Attachment 13)

Moreover, the plain language of the TEA describes it as much more that just a "planning tool." The TEA is clearly an EPA policy document that establishes EPA ground

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[17] Whether or not the TEAs alter the Tribes "status" or "legal authority", EPA's acknowledgment that Tribal culture and the environment are inextricably linked cannot be denied or ignored.

[18] Webster's Ninth New Collegiate Dictionary defines "Agreement" as: an arrangement as to a course of action; Compact, Treaty; a contract duly executed and legally binding; the language or instrument embodying such a contract.

rules for a government to government relationship between the Tribe and the federal government

> This Agreement provides the framework for a relationship in support of the Presidents April 29, 1994, directive and the Administrators Indian Policy of 1984 and July 1994... . This Agreement provides a framework for the implementation of procedures and practices insuring the implementation of that relationship... . (Maliseet TEA)

The TEAs have a direct impact on the NPDES application process, notwithstanding, the EPA statements to the contrary. Within the TEA, the federal government specifically agrees to adhere to a number of policies and principles affecting Tribes, including, acknowledging the link between the environment and Tribal culture and traditions. The EPA Region I Regional Administrator and the Chiefs of the Micmac and Maliseet "executed" these "agreements" and "agreed to be duly bound by its commitments": EPA cannot just ignore it own policy, and executed agreements, that commit the Agency to incorporate into its decision making process the fact that a link exists between the environment and Tribal culture.

As described above, EPA has a fiduciary duty to preserve and protect the Tribal culture and traditions of the Maine Indians. Moreover, EPA has determined that a direct link exists between environmental protection and Tribal culture. Furthermore, EPA policy committed the Agency to consider this link when taking any action that might impact on the Tribes. Thus, EPA must apply both its knowledge of disparate environmental impacts on Tribes and the requirements of the Micmac and Maliseet TEAs to the Maine NPDES application process.

EPA MUST RETAIN AUTHORITY FOR NPDES OVER MALISEET AND MICMAC LANDS AND TERRITORIES TO PRESERVE AND PROTECT TRIBAL CULTURE AND TRADITIONS

It is evident from the discussion above, that Congress fashioned a specific and legally enforceable commitment to the Maine Indians to protect and preserve their culture. To interpret it otherwise makes a mockery of the structure of the Act and ignores direct legislative history on this point:

> Nothing in the Settlement provides for acculturation, nor is it the intent of Congress to disturb the culture or integrity of the Indian people of Maine. (Senate Report at 17) (Attachment 17)

Nevertheless, it has been asserted by others, that the Maliseet and Micmac have no more sovereignty or jurisdiction in Maine than the Knights of Columbus. However, the Knights of Columbus have neither federal recognition of their aboriginal authority, nor Congressional approval to organize a government for the "common welfare" of their people, nor, money, nor land nor natural resources set aside in federal trust, nor a Congressional statement acknowledging their right to preserve and protect their culture and their people. It is ludicrous to interpret the Maine Acts as removing all jurisdiction and the Trust relationship from the Maine Indian Tribes.

Based upon studies and data analysis, EPA made a determination that Tribal culture and traditions are directly linked to, and impacted by, environmental protection. EPA's determination that a link exists between Tribal culture and the environment has far greater consequences for the Maine Indians than for Indians in other states because of the history, purpose and requirements of the Act. With the Act, Congress made a clear and unambiguous commitment to the Maine Indians to preserve and protect their culture and traditions. Thus, the Act transforms the federal government's general Trust responsibility

towards Indian Tribes into a legally enforceable obligation to the Micmac and Maliseet to protect and preserve their culture and traditions. Therefore, EPA, on behalf of the federal government, must now act to fulfill this commitment[19].

The State of Maine has a long record of asserting that the Maine Indian Tribes have no authority or jurisdiction in Maine. By logical extension, the State, could ignore the link between Tribal culture and environmental regulation, and would have the authority to legislate away the Tribes' culture and traditions entirely and, ultimately, to force their acculturation

The repeated assertions by the State, and others, that Maine environmental programs protect all Maine residents cannot stand up to the fact of EPA's determination that Tribes experience disproportionately high and adverse effects of contamination, and, the adequate protection of Tribal culture, health and safety requires specific attention and procedures. Under the State's theory of its authority and the federal Trust responsibility, Maine Tribal culture and traditions would be particularly vulnerable. In fact, the State's submission to EPA requesting delegation of the NPDES program, fails to offer any protection for the "unique racial groups with distinct environmental problems" living within its borders.

Thus, it is quite conceivable, given the lack of protections offered to Tribes by the State, that the State could enforce environmental regulations that do not violate state or federal environmental standards, yet would adversely impact Tribal culture and traditions.

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[19] The point here is not that the EPA's Environmental Justice Policy applies to the Maine Indians, but rather, the EPA made a determination directly linking environmental protection to the protection of Tribal culture. Pursuant to its Trust obligation, EPA

Footnote continues on next page.

Furthermore, under the State's scenario, the Tribes would have no recourse but to accept the State's actions.

Thus, the State's interpretation of the Act, is wholly inconsistent with the commitment Congress made to the Tribes to protect their culture and defend them against forced acculturation[20].

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cannot ignore this determination when making a decision on the State's NPDES application.

[20] In 1973, Maine's Congressional delegation to wrote to President Nixon to request federal services for Maine Tribes. The delegation endorsed the President's position that the policy of termination was "morally and legally unacceptable" and that "there should be no termination without the consent of the Indians." However, by failing to recognize and protect the Tribal cultural link to the environment, the State could effect, without the consent of the Tribes, the same destruction of Tribal culture it found so "morally and legally unacceptable" in 1973. Letter to the President from Senator Muskie, Senator Hathaway, Congressman Kyros and Congressman Cohen. Dated June 5, 1973. (Attachment 19)

4. THE FEDERAL TRUST RELATIONSHIP REQUIRES THAT EPA REFRAIN FROM DELEGATING THE NPDES PROGRAM OVER MICMAC AND MALISEET LANDS OR TERRITORIES TO THE STATE

Two legitimate disputes arise under the Maine Settlement Acts of 1980 and 1991. One, in the absence of a clear Congressional mandate, how to settle the boundary between the Maliseet's and Micmac's retained inherent jurisdiction and the jurisdiction that Congress delegated to the State. Two, how must EPA employ its Trust responsibility to protect and preserve the Tribe's culture and traditions.

EPA does not have the authority to address either of these issues. While EPA may have the desire to address these issues, Congress did not delegate authority to EPA to alter or diminish Tribal jurisdiction or the federal Trust responsibility. Moreover, in accordance with its federal Trust obligation, EPA must retain authority for the NPDES program over Maliseet and Micmac lands and territories, until these disputes are resolved by Congress or the Courts.

In a recent ruling, the 10th Circuit supported the use of EPA's Trust responsibility as the basis for its decision to withhold delegation of a program under the Safe Drinking Water Act to a state for Tribal lands and territories, until state/Tribal jurisdictional disputes were adjudged. HRI v. EPA, __f.3d__(10th Cir. 2000). The facts in HRI parallel those in this case. Moreover, the findings of the Court are directly applicable to the issues presented by Maine's request for delegation of the NPDES program over Micmac and Maliseet lands and territories.

HRI involved a dispute over whether EPA could, in the face of "non-discretionary" statutory language, retain the authority to operate the Underground

Injection Control (UIC) program under the Safe Drinking water Act 42 U.S.C Sections 300f to 300j-26 (SDWA), over Tribal lands in New Mexico.

In 1983, EPA delegated the UIC program to the State of New Mexico, but not for state lands within "Indian Country." However, the State asserted its authority over certain parcels of land that the Navajo Nation claimed to be "Indian Country." Subsequently, the Tribe also asserted jurisdiction over these same lands and requested authority to operate the UIC program on those lands.

EPA had previously determined that in situations where it can not readily resolve jurisdictional disputes between a Tribe and a state, the federal Trust obligation compels it to retain jurisdiction until the dispute is resolved:

> An Indian Tribe would probably object to a State exercising jurisdiction over lands it perceives as Indian lands, and a state would object to an Indian Tribe exercising authority over lands which it believes to be non-Indian lands. (Brief for Respondent at 44, HRI v EPA __ F.3d__, (10th Cir. 2000)). (Attachment 4)

Subsequently, EPA found that the jurisdictional dispute between New Mexico and the Navajo Nation was "intractable" and not easily resolved by EPA and, therefore, it required adjudication before EPA could make a final determination. (Brief for Respondent at 45, HRI v EPA __ F.3d__, (10th Cir. 2000)).

Then, pursuant to its federal Trust obligations, EPA moved to retain authority over the UIC program for the disputed lands until the merits of the dispute were adjudged by a Court of competent jurisdiction.

The State of New Mexico argued that EPA's determination violated the mandatory statutory language of the UIC program. HRI at__. Additionally, the State

pointed out that SDWA required that jurisdiction remain with the State until such time as the Tribe is approved to run the program:

> (U)ntil an Indian Tribe assumes primary enforcement responsibility, the currently applicable underground injection control program *shall* continue to apply. 42 U.S.C. 300h-1(e)[21] (emphasis added)

In response to New Mexico's argument, the Court observed that, even if EPA had previously delegated authority over "Indian Country" to the State, EPA was not authorized to increase or diminish "Indian County" and such a delegation would have no effect:

> Such an analysis mischaracterizes the scope of EPA's authority under the SDWA. The EPA does not have the power to change the Indian Country status of land – that is a status conferred by Congress. If Section 8 is indeed Indians Country, then New Mexico's program could not extend to it in the first instance and cannot be "currently applicable" within the meaning of the statute. HRI at __.

The Court then proceeded to conduct an analysis of EPA's responsibility to Tribes under the federal government's Trust obligations. It concluded that the EPA bears a special Trust obligation to protect the interests of Indians and that this Trust obligation also requires EPA to construe statutes liberally in favor of Indians and resolve ambiguities in their favor. Furthermore, the Court agreed that in situations where EPA can not readily resolve jurisdictional disputes between a Tribe and a state, the federal Trust obligation compels it to retain jurisdiction until the dispute was resolved. HRI at ___.

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[21] Section 402(b) of the Clean Water Act contains a similar directive:

> The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist.... 33 U.S.C Section 1342(b)

At length, the Court decided that EPA's determination to refrain from making a decision on the merits and to refrain from delegating the UIC program to New Mexico until the jurisdictional dispute was resolved by a court, was reasonable and within the Agency's discretion. The Court based its ruling on four factors: 1) EPA's Trust obligation to Tribe; 2) Congress had not directly addressed the issues in dispute; 3) The "complicated jurisdictional history of many Indian lands;" and, 4) EPA's action did not impair the overall scheme of delegated regulation and enforcement contemplated by SWDA. HRI at ___.

EPA's application of it Trust responsibility to the delegation of federal programs to states, which was approved by the Court in HRI, is directly applicable to the disputes raised by Maine's request to operate the NPDES program over Tribal lands and territories.

Similar to HRI, before EPA can delegate the NPDES program to Maine, it must resolve complex jurisdictional disputes not addressed by Congress. Moreover, EPA is not authorized to alter or diminish Tribal jurisdiction or the federal Trust responsibility. Furthermore, the history of the past twenty years shows that the disputes regarding the State's jurisdiction over Tribal lands and territories and the role of EPA Trust responsibility in the delegation of environmental programs, are complicated and intractable. Additionally, EPA can easily retain authority over the NPDES program for the Micmac and Maliseet without significantly disrupting the general implementation of the NPDES program in Maine.[22]

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[22] The Maliseet and Micmac Tribes currently have a combined total of less than 2000 acres of land.

Thus, in accordance with the holding in HRI and it federal Trust obligation, EPA must refrain from delegating authority to the State of Maine to operate the NPDES program over lands and territories of the Micmac and Maliseet, until the critical jurisdictional and Trust disputes are adjudged by a court of competent jurisdiction, or resolved by Congress. [23]

[23] Although in HRI, the EPA was interpreting a regulation to allow it to retain jurisdiction, the Court's analysis is clearly applicable in the absence of such regulation because it is founded on EPA's federal Trust obligation, the lack of Congressional direction on the issues, and the complex nature of the case, caselaw and Tribal jurisdictional issues.

CONCLUSION

For all the reasons stated above, in accordance with federal law, policy and guidance and the EPA's Trust responsibility, the EPA must deny the State's application to run the federal NPDES program over lands and territory of the Micmac and Maliseet Indians.

Dated: August 21, 2000

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