

## **Analysis of the Aroostook Band of Micmacs Sovereignty and Jurisdiction**

### **Introduction**

The Aroostook Band of Micmacs (Band) rejects the position of the State of Maine (State) that it has governing authority over the Tribe. The following legal analysis will show that the 1991 Aroostook Band of Micmac Settlement Claims Act (Pub.L 102-171, November, 26, 1991, 105. 1143) (ABMSA) supersedes and replaces the 1980 Maine Indian Land Claims Settlement Act and the 1980 Maine Implementing Act. This analysis will show that legislation passed by the State in 1989, and ratified by Congress in 1991, that purports to limit the Band's sovereignty and jurisdiction never took effect and cannot now be used as a basis to limit or abrogate the Band's inherent sovereign authority.

In 1972, the Penobscot Nation and the Passamaquoddy Tribe filed lawsuits against the State to reclaim Tribal lands. The Houlton Band of Maliseet Indians filed its own claim in 1979. In 1980, Congress enacted the Maine Indian Claims Settlement Act (25 U.S.C 1721 et seq.) (MICSA) to settle these lawsuits and all other potential Maine Tribal land claims.

MICSA extinguished aboriginal Indian title for all Indian Tribes in Maine.<sup>1</sup> The Penobscot Indian Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians were paid the collective sum of \$81.5 million to settle their land claims. The Band, however, was denied compensation by MICSA because it was not recognized as a bona fide Tribe. In addition, the Band was also denied any services from State and federal governments afforded the other three Tribes.

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<sup>1</sup> "(c) Claims extinguished as of date of transfer.

By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Passamaquoddy tribe, Penobscot Nation, the Houlton band of Maliseet Indian or any of their members or by any other Indian, Indian Nation, tribe or band of Indians, or any predecessors or successors in interest thereof, arising at the time or or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy, shall be deemed extinguished as of the date of the transfer."

MICSA at 25 U.S.C 1723 (c).

By 1986, the Band managed to compile documentation to prove it was a Tribe and pursued relief from MICSA. In response to this documentation, the State enacted “An Act to “Implement the Aroostook Band of Micmacs Settlement Act”(Chapter 148 of the Public Laws of 1989, Codified as 30 M.R.S.A Section 7201 et seq.) (MMA). Under the MMA the State recognized the Band’s aboriginal claims but attempted to limit the Tribe’s sovereign authority. In order to become law, the State required the Band to certify in writing its agreement to the MMA. The Band, however, never certified its agreement and, therefore, maintains that it cannot be governed by it.

In 1991, Congress acted to redress the inequity caused by MICSA by passing the Aroostook Band of Micmac Settlement Claims Act.<sup>2</sup> The ABMSA provided the Band with federal recognition and \$900,000 in compensation for the extinguishment of its aboriginal title to lands in Maine. Although the ABMSA ratified the MMA, it did not abrogate the Band’s sovereignty and jurisdiction. This analysis will show that Congress intended the ABMSA to replace MICSA and MIA in defining the sovereignty and jurisdiction of the Band. The analysis will also show that despite Congressional ratification of the MMA, that Act did not take effect because the Band never provided its written consent. Therefore, the Band’s sovereign authority and jurisdiction, which is now solely defined by the terms of the ABMSA, remains largely intact.

## **I. NEITHER THE 1980 MAINE INDIAN CLAIMS SETTLEMENT ACT, NOR THE 1980 MAINE IMPLEMENTING ACT, CAN BE USED BY THE STATE TO ASSERT JURISDICTION OVER THE AROOSTOOK BAND OF MICMACS.**

The State of Maine claims that it has exclusive jurisdiction over the Band. The State contends that it can assert jurisdiction over the Band pursuant to four federal and State statutes: the 1991 ABMSA; the 1989 Maine Micmac Implementing Act; the 1980

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<sup>2</sup> “The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 932) to settle all claims of the Aroostook Band of Micmacs resulting from the Bands omission from the Maine Indian Claims Settlement Act of 1980, and for other purposes, having considered the same, report H.R. 932 favorably thereon without amendment and recommend that the bill do pass. The purpose of H.R. 932 is to settle all claims of the Aroostook Band of Micmac Indians resulting from the Bands omission from the Maine Indian Settlement Act of 1980 and provide federal recognition for the Tribe. ” The Committee on Interior and Insular Affairs, 102 H. Rpt. 229, Page 1, October 1, 1991. (Hereinafter “House Report”) (Attachment II)

“The decision to seek a legislative remedy to the Micmacs omission from the 1980 Maine Indian Land Claims Settlement Act was not taken lightly and results only after a very careful review of the options and the issues involved. If we did not believe that the Micmacs had a just cause for legislative recourse, we would not have introduced this bill.”

Statement of Congresswoman Olympia Snowe, Co-sponsor of H.R 932, Aroostook Band of Micmac Settlement Act, during the floor debate on H.R 932. November 12, 1991. Congressional Record Page House-31291 (Attachment III)

Maine Indian Land Claims Settlement Act (MICSA); and, the 1980 Maine Implementing Act (MIA).<sup>3</sup>

An analysis of the language, the legislative history and context of the ABMSA, in light of the applicable federal case law, demonstrates that Congress intended to substitute the ABMSA for those provisions of MICSA and the MIA that applied to the Band. It has been long established that “[O]ne Congress is not bound by the decisions of a previous Congress. *Association of Civilian Technicians v. Federal Labor Rels. Auth.*, 173 F.3d 25 (1<sup>st</sup> Cir1999)) citing *Reichelderfer v. Quinn*, 287 U.S. 315, 318, 77 L. Ed. 331, 53 S. Ct. 177 (1932)). Moreover, “[I]f one Congress clearly and manifestly makes known its intent to supplant an existing law, a court can find repeal by implication.” *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789, (1st Cir. 1996). “[I]f the latter act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act” *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). (See also *Watt v. Alaska*, 451 U.S. 259, 267(1981) (*Radzanower v. Touche Ross & Co* 426 U.S 148, 154 (1976), *Association of Civilian Technicians v. Federal Labor Rels. Auth v FLRA*, 173 F.3 25 at 27-28 (1<sup>st</sup> Cir. 1999) (“If one Congress clearly and manifestly makes known its intent to supplant an existing law, a court can find repeal by implication”); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789, (1st Cir. 1996), *Rhode Island v. Narragansett*, 19 F.2d 685 at 704 (1994); *U.S v Tynen*, 78 U.S 88, 92 (1870) (internal quotes omitted) citing *Bartlet v. King*, 12 Mass. 536, 545-6. (“A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law as well as in reason and common sense, operate to repeal the former. . .;” and, *Pierpont v. Crouch*, 10 Cal. 315 316-317, (1858) (“A statute may be repealed by implication as well as in direct terms; and it is well settled, that where a subsequent Act is repugnant to a prior one, the last operates without any repealing clause, as a repeal of the first; and where two Acts, passed at different times, are not in terms repugnant, yet if it is clearly evident that the last was intended as a revision or substitute of the first, it will repeal the first to the extent in which its provisions are revised or substituted the last Act must be considered, to the extent of the difference, as substituted for the first.”)

In analyzing the relationship between the ABMSA and the MICSA, it is significant to note that Congress replaced the general provisions of MICSA with the more specific language of the ABMSA. “[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Morton v Mancari* 417 US 535 at 551 (1974) citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). See also; *Rodgers v. United States*, 185 U.S. 83, 87-89 (1902). See also D. *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204,208 (1932) citing *Kepner v. United States*, 195 U.S. 100, 125 (1904). (“Specific terms prevail

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<sup>3</sup> See letters from Assistant Attorney General Paul Stern dated 2/27/02 and Maine Human Right Commission dated 1/25/02 and 4/04/02. (Attachment IV). The Attorney General and the MHRC refer to the ABMSA as “Special legislation.” and the 1980 MICSA as the “federal” or “general” Settlement Act. There is no basis in the legislative record to regard the ABMSA in this manner. The ABMSA is a duly enacted federal statute that stands apart from the MICSA.

over the general in the same or another statute which otherwise might be controlling.”) *In re Hassenbusch*, 108 Fed. 38. *United States v. Peters*, 166 Fed. 613, 615.

A review of the language and the legislative history of the ABMSA show that Congress clearly intended ABMSA to act as a substitute for those provisions in MICSA that might apply to the Band. First, Congress purposefully decided not to amend MICSA to redress the Band’s omission from that Act and instead passed a separate act to accomplish its goal.<sup>4</sup> Furthermore, Congress intentionally structured the ABMSA to parallel but be separate from the MICSA settlement provided to the three other federally recognized Maine Tribes (Passamaquoddy, Penobscot and Maliseet).<sup>5</sup> Both Acts cover the same subject matter: the Band’s land claims; the Band’s sovereignty and the Band’s jurisdictional relationship with the State.<sup>6</sup> However, MICSA was designed to address the

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<sup>4</sup> “The Bill we are introducing does not amend the 1980 Maine Indian Claims Settlement Act, and we do not intend that any of the issues covered in that landmark legislation be reopened or considered. The purpose of the Micmac settlement legislation is to bring some fairness to the unfortunate situation the tribe faces, whereby there no programs available to help it deal with the poverty and lack of education among tribal members. Exclusion from the 1980 MICSA prohibits the tribe from being eligible for crucial tribal services provided by the BIA.” Statement by Senator Cohen and Senator Mitchell on the introduction of “S 374. A bill to settle all claims of the Aroostook Band of Micmacs resulting from the band’s omission from Maine Indian Claims Settlement Act of 1980.” 102<sup>nd</sup> Cong 1<sup>st</sup> Sess., 137 Cong Rec. S 1715, (January 3, 1991) (Attachment V)

<sup>5</sup> “Fundamentally this bill treats the Micmacs just as Congress treated Maine’s’ other three Tribes. It uses the same process and provides the same benefits.” Statement by Congresswoman Olympia Snowe, Co-sponsor of H.R. 932, Aroostook Band of Micmac Settlement Act, during floor debate on H.R. 932. November 12, 1991 House Congressional Record, Page 31292. (Attachment VI)

<sup>6</sup> The ABMSA:

Acknowledges Band’s aboriginal land claims ABMSA Section 2(3)). Compare to MICSA 25 U.S.C 1721;

Defines the Band’s jurisdictional relationship to the State and federal governments (ABMSA Section 2(b)(4); Section 6 (a), (b) and (d); Section 7, Section 8 and, Section 11). Compare to MICSA 25 U.S.C Sections 1721(b)(3), 1725(h), 1725(b)(1), 1725(e), 1725(i), 1726, 1727 and 1735;

Provides \$900,000 in a land acquisition fund (ABMSA Section 4 (a)). Compare to MICSA Section 1724;

Provides a property tax fund for the future use of the Aroostook Band of Micmacs ABMSA Section 4 (b)). Compare to Public Law 99-566 (100 Stat. 3185, October 27, 1986) which established a tax fund for Maliseet;

Provides for the United States to take land into trust for the Band (ABMSA Section 5 (a)); Compare to MICSA 25 U.S.C 1724;

Provides for protection against alienation of the Band’s trust lands; provides protection from State condemnation proceeding ABMSA Section 5(b)); Compare to MICSA 25 U.S.C 1724;

Provides Federal recognition of the Band (ABMSA Section 6(a). Compare to MICSA 25 U.S.C 1725(i);

Provides the members of the Band the services which the United States provides to Indians because of their status as Indians (ABMSA Section 6 (c) Compare to MICSA at 25 U.S.C 1725(i);

issues raised by the Maliseet, Penobscot and Passamaquoddy land claims and only indirectly applied to the Band.<sup>7</sup> On the other hand, the ABMSA *only* applies to the Band

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Provides for a Tribal government recognized by the United States (ABMSA Section 7) Compare to MICSA at 25 U.S.C 1726;

Provides for the Band's implementation of the Indian Child Welfare Act (ABMSA Section 8). Compare to MICSA at 25 U.S.C 1728; and,

Provides language that ensures the Act is regarded as superior to the 1980 Maine Implementing Act, the MICSA and the MMA. (ABMSA Section 11). Compare with MICSA 25 U.S.C 1735.

<sup>7</sup> E.g. 25 U.S.C 1723 "Claims extinguished as of date of transfer" . . . .

"By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians **or any of their members or by any other Indian, Indian nation, tribe or band of Indians, or any predecessors** or successors in interest thereof, arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy, shall be deemed extinguished as of the date of the transfer." (Emphasis added)

25 U.S.C 1725 "State laws applicable"

"(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State. Except as provided in section 8(e) and section 5(d)(4) [[25 USCS §§ 1727](#)(e) and 1724(d)(4)], **all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.**" (Emphasis added)

1725(d)

"(d) Capacity to sue and be sued in State of Maine and Federal courts; [28 USCS § 1362](#) applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments.

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, **and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts**; and section 1362 of title 28, United States Code, shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: Provided, however, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act. (Emphasis added)

1725 (h)

"(h) General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine. **Except as otherwise [otherwise] provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine**, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of

and was designed to specifically attend to the Band's land claims, sovereignty and jurisdiction. Congress intentionally set out to cure the defects of the MICSA. These defects include the termination of the Band's aboriginal land claims without compensation (25 U.S.C 1723), failure to provide the Band federal recognition, failure to acknowledge of the Band's Tribal heritage and its historic ties to Maine, alteration of the Band's sovereignty and its jurisdictional relationship to Maine without the Band's consent (25 U.S.C 1725) and failure to ensure the protection to the Band's children under the Indian Child Welfare Act. The ABMSA restored the Band's land claim, sovereignty, and jurisdiction and ensured the protection of the Band's children. The ABMSA:

Acknowledges the Band's Tribal heritage in Maine (ABMSA Section 2);

Acknowledges the Band's historic ties to land in Maine and their aboriginal rights to lands in Maine (ABMSA Section 3 (1));

Ratifies a State Implementing Act (MMA). ("Purpose" ABMSA Section 2(b)(4)),<sup>8</sup>

Provides the Band with compensation for settling its land claims in Maine. (ABMSA Section 4);

Provides federal recognition to the Band creates a new jurisdictional framework for the Band and the State. ("Law Applicable" ABMSA Section 6));

Provides federal recognition of the Band's right to a Tribal government Tribal government apart from the State ("Tribal Organization" ABMSA Section 7),

Protects of the Band's lands and natural resources ("Aroostook Band Trust Lands" ABMSA Section 5 (5)) and

Affirmatively extends federal protection to the Band's children ("Implementation of the Indian Child Welfare Act" ABMSA Section 8).

Furthermore, the plain language of Sections 2(b)(4), 6(b) and 11 of ABMSA demonstrate that Congress fully intended ABMSA to act as a substitute for MICSA. "Congress expresses its intent through the language it chooses." *State of Rhode Island v. Narragansett Indian Tribe* 19 F.3d 685,698 quoting from *INS v. Cardoza-Fonesca*, 480 U.S. 421,431 n.12 (1987). In ABMSA Section 2(b)(4), Congress unambiguously stated that the Band and the State would have their own separate agreement on jurisdiction, not ruled by MIA or MICSA:

Purpose. - It is the purpose of this Act to:

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Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State." (Emphasis added)

<sup>8</sup> See below at "**Ratification of the MMA**"

Ratify the Micmac Settlement Act, **which defines the relationship between the State of Maine and the Aroostook Band of Micmacs.**<sup>9</sup> (Emphasis added)

Furthermore ABMSA Section 6(b) provides significant evidence that Congress was well aware that MICSA would not apply to the Band after the enactment of the ABMSA, except for those sections of MICSA that Congress specifically incorporated into the ABMSA:

Section 6(b) Application of Federal Law.- For the purposes of application of Federal law, the Band and its lands shall have the same status as other Tribes and their lands accorded Federal recognition under the terms of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1721 et seq.)  
ABMSA 6(b)

The State claims that all of the “terms” of MICSA, including those referred to in Section 6(b), were applicable to the Band, and all Maine Tribes, both prior to, and after the enactment of the ABMSA. The language of Section 6(b) suggests that the State is incorrect. Congress obviously knows how to ensure that the terms of an entire statute remain effective. Yet, Congress does not act gratuitously and, rather than include language that acted as a general savings clause for MICSA, Congress chose only to adopt specific MICSA provisions into the ABMSA.<sup>10</sup> The inclusion of section 6(b) in the ABMSA supports the presumption that Congress was aware by enacting the ABMSA it would effectively repeal those MICSA provisions that apply to the Band.

The State cannot use Congress’s silence regarding the other provisions of MICSA as basis for inferring Congressional intent to apply those provisions to the Band after the enactment of the ABMSA. As a general matter, silence is insufficient to show Congressional intent in regards to Indian legislation. *NLRB v Pueblo of San Juan*, 276 F.3d 1186 (10<sup>th</sup> Cir. 2002) (“Silence is not sufficient to establish congressional intent to strip Indian Tribes of their retained inherent sovereignty to govern their own territory.” *id* at 1196). *See also EEOC v Cherokee Nation*, 871 F.2d 937 (10 Cir 1989)<sup>11</sup> and *Russ v*

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<sup>9</sup> The “Micmac Settlement Act” is further defined in the ABMSA to exclusively apply to the MMA:  
“(8) The term “Micmac Settlement Act” means 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 ABMSA.”

<sup>10</sup> The ABMSA Section 8 (Implementation of the Indian Child Welfare Act) also contains a reference to MICSA:

“Section 8 Implementation of the Indian Child Welfare Act.

For the purposes of this section, the Band is an 'Indian tribe' within the meaning of section 4(8) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(8)), except that nothing in this section shall alter or affect the jurisdiction of the State of Maine over child welfare matters as provided by the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1721 et seq.).”

<sup>11</sup> “We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists . . . and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the

*Wilkins*, 624 F.2d 914 (9<sup>th</sup> Cir. August 1, 1980).<sup>12</sup> Thus, in light of Congress' purposeful inclusion of Section 6(b), and its total silence on whether other provisions of MICSA would apply to the Band, we can infer an affirmative intent by Congress to substitute ABMSA for MICSA, and repeal those provisions MICSA that might otherwise be applied to the Band. Significantly, therefore, the following provisions of MICSA were not adopted by reference in the ABMSA and, accordingly, they do not apply to the Band:

25 U.S.C 1725(a) "State laws applicable

(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State. Except as provided in section 8(e) and section 5(d)(4) [[25 USCS §§ 1727](#)(e) and 1724(d)(4)], all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

25 U.S.C 1725(d)

"(d) Capacity to sue and be sued in State of Maine and Federal courts; [28 USCS § 1362](#) applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments.

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; and section 1362 of title 28, United States

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special canons of construction to the benefit of Indian interests. *Merrion*, 455 U.S. at 148-49 n. 11 ("Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence [in the Tribe's Constitution] is that the sovereign power to tax remains intact."). We conclude that, in this case, the bases for inferring congressional intent were not so clear as to overcome the burden which the EEOC was required to carry." *EEOC* at 939

<sup>12</sup> Compare the facts of ABMSA and the Band to the facts in *Russ*. In *Russ*, the Court found Congressional intent to diminish a Tribe's Reservation, although it was not directly stated in legislation. The Court in *Russ* based its decision on the language of administrative documents relating to the Act, the legislative history of the Act and the specific language of the Act, all of which identified the diminishment of the Reservation as the goal of the Act. The administrative documents, legislative history and statutory language of the ABMSA lack any indication that Congress intended MICSA to generally apply to the Band after the enactment of the ABMSA. In fact, Congress' adoption by reference of only certain specific MICSA provisions presents a powerful argument to the contrary.

Code, shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: Provided, however, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act. (Emphasis added)

Congress also affirmatively displayed its intent to displace the MICSA in Section 11 of the ABMSA. Congress declared in Section 11 that in any conflict of interpretation between or among the ABMSA, MICSA or the MMA the ABMSA shall be the controlling law:

Sec. 11. Interpretation.

In the event of a conflict of interpretation between the provisions of the Maine Implementing Act, The Micmac Settlement Act, or the Maine Indian Lands claims Settlement Act of 1980 (25 U.S.C. 1721 et seq.) and this Act, **the provisions of this Act shall govern.**

(Emphasis added) (ABMSA, Section 11)

The language of Section 11 acknowledged that the language of the other prior acts can be read to apply to the Band, but it also established that it is solely the ABMSA that we look to define the contour of the settlement Congress created for the Band. Thus, the plain language and structure of ABMSA manifests Congress's affirmative intent to replace the general provisions of MICSA that applied to the Band with the more specific provisions in the ABMSA.

The statements of the sponsors of the ABMSA and of the Senate and House Committee Reports that accompanied the ABMSA also substantiate that Congress intended to substitute the ABMSA for the MICSA. ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Brothers et al. v. Calvert Distillers Corp.*, 341 U.S. 384 at 394 (1951)). The legislative history of the ABMSA shows that Congress intended the Act as a piece of comprehensive legislation to specifically attend to the Band's land claims, sovereignty and Tribe/State jurisdictional issues.<sup>13</sup> Notably, the legislative history does not demonstrate any intent by

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<sup>13</sup> "Purpose

S. 374 was introduced by Senator Cohen (for himself and Senator Mitchell). A companion bill, H.R. 932, was introduced in the House of Representatives by Congresswoman Olympia Snowe on February 6, 1991. The purpose of the bill is to settle all claims of the Aroostook Band of Micmac Indians resulting from the extinguishment of all possible land claims of the Aroostook Band of Micmac Indians in the State of Maine and failure of the Maine Indian Claims Settlement Act of 1980 (P.L. 96-420; 94 Stat. 1785; 25 U.S.C. 1721 et seq., as amended) to provide any compensation to the Band for such extinguishment. The bill will extend to the Aroostook Band of Micmac Indians the same compensation, rights and benefits as were provided to the Houlton Band of Maliseet Indians in the Maine Settlement Act. It will authorize the appropriation of a \$900,000 settlement fund to be used for land acquisition or economic development purposes, and authorize the Aroostook Band of

Congress to abrogate the Band's sovereignty, or provide any indication that Congress expected MICSA to apply to the Band, except were Congress so directed:

The bill we are introducing does not amend the 1980 Maine Indian Claims Settlement Act, and we do not intend that any of the issues covered in that landmark legislation be reopened or reconsidered. The purpose of the Micmac settlement legislation is to bring some fairness to the unfortunate situation the tribe faces, whereby there are no programs available to help it deal with the poverty and lack of education among tribal members. Exclusion from the 1980 MICSA prohibits the tribe from being eligible for crucial tribal services provided by the BIA. In addition, State Indian assistance programs were terminated following passage of the 1980 act, thus eliminating a source of funding long used by the tribe." Statement by Sen Cohen and Sen. Mitchell on Introduction of S 1715, 102 Cong 1st Sess. 137 Cong Rec. S 1715, Vol. 137 No. 25 (February 6, 1991) (Attachment V)

The purpose of H.R. 932 is to settle all claims of the Aroostook Band of Micmac Indians resulting from the Bands omission from the Maine Indian Settlement Act of 1980 and provide federal recognition for the Tribe." (Mr. Miller, Conference Report to The Committee on Interior and Insular Affairs, Settling All Claims of the Aroostook band of Micmacs, 102 H. Rpt. 229, Page 1, October 1, 1991. (House Report at 1)

H.R. 932 provides the Aroostook Band of Micmacs the same rights and privileges afforded the Houlton Band of Maliseet Indians in 1980. (House Report at 4)

[T]he bill will extend to the Aroostook Band of Micmac Indians the same compensation, rights and benefits as were provided to the Houlton Band of Maliseet Indians in the Maine Settlement Act, it will authorize the appropriation of a \$900,000 settlement fund to be used for land acquisition or economic development purposes, and authorize the Aroostook Band of Micmacs to organize on the same basis as the Houlton Band of Maliseet. (Senate Report at 1)

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Micmacs to organize on the same basis as the Houlton Band of Maliseet Indians." Sen. Inouye, Conference Report on (Sen. Inouye, Conference Report to the Senate Select Committee on Indian Affairs, Settling All Claims Of The Aroostook Band Of Micmacs Resulting From The Bands Omission From The Maine Indian Claims Settlement Act Of 1980, And For Other Purposes. Senate Report Number 102-136, 102nd Cong., 2<sup>nd</sup> Sess. Page 1, (August 2, 1991). (Hereinafter "Senate Report") (Attachment VII)

It is evident from the plain language of the ABMSA, and the above quotes, that Congress purposely set out to provide the Band with its own comprehensive settlement act, as well as, preserve the prior settlement reached between the State and the Penobscot, the Passamaquoddy and the Maliseet represented by MICSA. While the legislative history also shows that Congress intended to provide the Band with the same settlement it provided to the Maliseet in 1980, there is not so much as a hint that Congress also intended to apply the same law (MICSA) to both the Micmac and the Maliseet. Indeed, Congress went out of its way to create a separate law just for the Band, when it could have just amended MICSA to include the Band.

The settlement Congress provided the Band in the ABMSA was designed by Congress to be outside the scope of MICSA. The plain language and the legislative history of the ABMSA support the conclusion that Congress intended the ABMSA to supersede and repeal those provisions of MICSA that might apply to the Band. Thus, at the point when Congress enacted the ABMSA, the MICSA no longer provided the State jurisdiction over the Band's lands, resources, and members, or limited the Band's sovereignty. Consequently, neither MICSA, nor the MIA, can now be used by the State as a basis to assert jurisdiction over the Band, or to limit the Band's sovereignty.<sup>14</sup>

### **Ratification Of The MMA**

Congress ratified the MMA even though ABMSA does not contain express ratification language. "Judicial precedent has loosely established two types of ratification--express and implied." *Utah Ass'n of Counties v. Clinton*, 1999 U.S. Dist. LEXIS 15852, page 37. Regardless of whether the ratification is express or implied, "[I]n the end, the Court must make its decision solely from an analysis of congressional intent." *id* at 37 n12. The totality of the evidence demonstrates that Congress intended to ratify the MMA. ("Absent an express ratification by Congress, in order to find congressional ratification this Court should find that either a single congressional act or the totality of congressional acts reflects a distinctively clear intent on the part of the national legislature to ratify the underlying executive act." *id* at 45-46).

The language of the ABMSA specifically states that one purpose of that Act is to ratify the MMA

Purpose. - It is the purpose of this Act to:  
Ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs.

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<sup>14</sup> The MIA derives its authority from Congress' ratification of that Act in MICSA. As the Band was not a party to MICSA, it is questionable whether the MIA ever applied to the Band. If the MIA did apply to the Band before the enactment of the ABMSA, there is no legal basis now to support the continued application of that Act to the Band. By ratifying the MMA as part of the ABMSA, Congress manifestly expressed its intent to substitute the MMA for the MIA. See ABMSA Section MICSA at 25 U.S.C 1721(b)(3) to compare ABMSA language.

ABMSA, Section 2(b)(4).

The legislative history of the ABMSA is replete with affirmative statements regarding Congress' intent to ratify the MMA. (See Attachments II and VII). Furthermore, Section 6(d) of the ABMSA authorizes the State and the Band to *amend* the MMA without the consent of Congress. This language would be wholly unnecessary if Congress had not intended to ratify the MMA in the first place. ("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.) (ABMSA, Section 6(d)).<sup>15</sup>

## **II. THE 1989 STATE IMPLEMENT ACT (MMA) IS VOID AND CANNOT CONFER AUTHORITY OR JURISDICTION TO THE STATE OVER THE LANDS, MEMBERS OR RESOURCES OF THE AROOSTOOK BAND OF MICMACS**

As discussed above, Congress intended the ABMSA to define the jurisdictional relationship between the State and the Band. ABMSA relies on the MMA to describe the boundaries of that relationship. The MMA was designed to remove the Band's sovereignty and place the Band under the jurisdiction of the State. The ABMSA, other than the ratification of the MMA, only includes two limitations on the Band; it provides for the application of federal law and the Indian Child Welfare Act in the same manner as MICSA as each is applied to Penobscot, Passamaquoddy and Maliseet in MICSA.

However, by its very terms, the MMA never went into effect and was void at the time Congress passed the ABMSA. Congressional ratification of the MMA did not cure this defect, as Congress does not have the authority to vacate the terms of an otherwise legally enacted State law.

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

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<sup>15</sup> See also *US v Alaska* 521 U.S. 1 (1997) where the Supreme Court found that Congress' reference to a Presidential Executive Order in the Alaska Statehood Act was enough to establish that Congress intended to ratify the Order and apply it to the State of Alaska. "Under the strict standards of *Utah Div. of State Lands*, the Executive Order of 1923 reflected a clear intent to include submerged lands within the Reserve. In addition to the fact that the Order refers to coastal features and necessarily covers the tidelands, excluding submerged lands beneath the coastal features would have been inconsistent with the purpose of the Reserve--to secure a supply of oil that would necessarily exist beneath both submerged lands and uplands. Section 11(b) of the Alaska Statehood Act, which noted that the United States owned the Reserve and which included a statement of exclusive legislative jurisdiction under the Enclave Clause, reflects Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." *id* at 45-46.

Similar to *Alaska*, Section 2(b)(4) of ABMSA reflects Congress' intent to ratify the MMA.

the Public Laws of 1989, Codified as 30 MRSA Section 7201 et seq. (MMA). The MMA purports to, among other things, assert the jurisdiction of the State over the Band:

### **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. (Attachment VIII)

Yet, the MMA, including 30 M.R.S.A 7203, never went into effect. Section 4 of the MMA contains a contingency that prevents the Act from taking effect unless the Band certified its agreement with the Act within 60 days of the adjournment of the legislature:

Section 4. Effective date. This Act shall be effective only if:

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 VIII)

However, the Band did not submit the required written certification to the Secretary of State either within the sixty days, or at any other time. Notably, the Maine Attorney General's office has confirmed that the Band did not certify its agreement with the Act and, consequently, that MMA never went into effect. In a letter dated June 16, 2000, Maine Assistant Attorney General, William R. Stokes, confirmed that the Secretary of State has no record of the required certification and that that "the Maine (sic) Implementing Act [MMA] never became effective notwithstanding the enactment by the United States of legislation ratifying and approving it." (Attachment IX)

Furthermore, the Maine Revised Statutes Annotated includes a disclaimer in each section of the MMA (30 M.R.S.A Section 7201 et seq.) that states the following: "**(NOTE: Needs ratification by Indian tribes per Secretary of State)**."<sup>16</sup> Thus, the Maine Attorney General and the Maine Office of the Revisor of Statutes agree with the

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<sup>16</sup> See official State of Maine web site for the Maine Office of the Revisor last updated on January 8, 2002. <http://janus.state.me.us/legis/statutes/30/title30sec7201.html>. (See printout from State web site at Attachment X).

Band that by its very terms the MMA could not take effect unless the Band certified its agreement pursuant to Section 4 of the Act. Indeed, there is no dispute over whether the Band certified its agreement; the State apparently agrees that the Band did not submit its certification.

The Maine Supreme Court has not addressed the issue of whether the Band's failure to certify its agreement nullifies the MMA. Nevertheless, this Court has consistently held that it looks to the plain meaning of the statutory language to give effect to the legislative intent. Only where that language is vague or ambiguous does the Maine Supreme Court look beyond the language of the act in order to discern legislative intent. See Pennings v Pennings, 786 A.2d 622. See also *In Re Estate of Footer* 749 A.2d 146, 2000 Me 69 (Me 2000). *N.A Burkitt Inc v Champion Rd mach. Ltd*, 2000 ME 209. *Kimball v. Land Use Regulation Com'n* 745 A.2d 387 2000 Me 20. *Liberty Mutual Insurance Co. v Superintendent of Ins.* 689 A.2d 600, 1997 ME 22. *Great Northern Paper v Penobscot Nation* 2001 ME 68 (2001).

The plain meaning of the statutory language of Section 4 of the MMA is clear and unambiguous; if the Band fails to certify its agreement with the Act, the Act cannot become law (“**This Act shall be effective only if: . . . 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.**” (Emphasis added)).

The Maine Attorney General has issued a legal Opinion, in another matter, that supports the Band's position. Remarkably, the Attorney General was asked to interpret the impact of an identical contingency requirement on the “Effective date” of a statute. The Attorney General concluded the contingency must occur exactly as required by the legislature in order for the legislation to take effect. This other matter is also instructive as it also relates to legislation that involves Indian Tribes in Maine.

In 1985, the Penobscot Nation (PN) requested an extension of the deadline for the acquisition of trust lands beyond the date provided for in MICSA. The Maine legislature agreed, and passed the necessary legislation. However, the legislation included language identical to that in Section 4 of the MMA and required the PN to submit a written certification of their agreement with the Act within 60 days of the adjournment of the Maine Legislature.<sup>17</sup> The PN submitted its certification on the 62<sup>nd</sup> day after the adjournment of the legislature. Subsequently, the Maine Deputy Secretary of State requested that the Maine

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<sup>17</sup> “This Act shall not be effective unless, within 60 days of the adjournment of the Legislature, the Secretary of State receives a written certification by the Governor and the Council of the Penobscot Nation that the nation has agreed to the provisions of this Act pursuant to the United States Code, Title 25, Section 1725(e)(1) . . .” P.L. 1985 c.69 Section 2

Attorney General provide a legal opinion regarding the impact of the PN's failure to meet the 60-day requirement.

The resulting Attorney General Opinion in that case supports the Band's position regarding the MMA. The Attorney General informed the Deputy Secretary of State that the PN's certification of its agreement "did not occur within 60 days of the legislatures adjournment as required by P.L. 1985 c.69 Section 2", and, therefore, that Public Law, by its very terms, "shall not be effective." He went on to conclude, "[t]he only remedy for this problem is for the legislature to reenact the provisions of Chapter 69..." (See Op. Maine Atty. Gen. 85-16, September 9, 1985 (Attachment XI).

The conclusion reached by the Maine Attorney General in the PN matter, and others,<sup>18</sup> applies with equal force to an interpretation of Section 4 of the MMA. Therefore, the failure of the Band to certify its agreement to the MMA rendered that Act, by its own terms, ineffective, void and unenforceable against the Band.

### **III. CONGRESSIONAL RATIFICATION OF THE MMA DID NOT ELIMINATE THE REQUIREMENT THAT THE BAND PROVIDE ITS CONSENT**

Congressional ratification of the MMA did not eliminate the requirement that the Band must consent to the Act before it can take effect.

The Constitution provides Congress with plenary authority over Indian Tribes. The law of federal preemption prevents the states from applying state law to Indian Tribes on federal reservations or trust lands, without an express grant of authority from Congress. It has been long understood that state law does not apply to Indian affairs except to the extent that the United States, "gives or has given its consent." See Bennett & Seaton, Federal Indian Law 501 (Department of Interior, GPO, 1958). See also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) *Antoine v. Washington*, 420 U.S. 194, 201-02, (1975) *Morton v Mancari* 417 U.S 535, 551-53 (1974) and *Penobscot v Fellencer*, 164 F.3d 706 (1<sup>st</sup> Cir. 1999) ("First, Congress' authority to legislate over Indian affairs is plenary and only Congress can abrogate or limit an Indian tribes sovereignty." id at 709). See also Laurence Tribe, American Constitutional Law, 525 (1988). Therefore, as the MMA purports to address matters of Tribal sovereignty and jurisdiction, MMA was an unconstitutional exercise of authority by the State.

However, Congress can choose to ratify unauthorized state acts that otherwise would be vulnerable to attack as an unconstitutional intrusion on the power of Congress

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<sup>18</sup> In a subsequent Maine Attorney General Opinion, regarding the interpretation of a provision of the MICSA, the Attorney General took the unequivocal position that when the language of a statute is clear and unambiguous it "must be interpreted to mean exactly what it says" (See Op. Maine Atty. Gen. 86-11, April 28, 1986, quoting from *Concord General Mutual Co v Patrons-Oxford Mutual Insurance Co.* 411 A.2d 1017, 1020. (Me 1980)) (Attachment XII)

*Northeast Bancorp v Board of Governor of the Federal Reserves System*, 472 U.S. 159, 173 (1985), if Congress had the authority to accomplish the same result in the first place. (“The test always is, does the legislative body which ratifies possess authority to do the act or confer power to do it in the first instance? *Lincoln v. United States*, 197 U.S. 419, \_\_\_ (1905)) (See also *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 at 302 (1937) “It is well settled that Congress may, by enactment not otherwise inappropriate, “ratify . . . acts which it might have authorized.” and *Mattingly v. District of Columbia*, 97 U.S. 687 (1878); “A governmental body “may effectively ratify what it could theretofore have lawfully authorized.” *Sullivan v. Carrick*, 888 F.2d 1 at 4 (1<sup>st</sup> Cir (1989)) There is no question that Congress had the authority to limit or abrogate the Tribe’s sovereignty and jurisdiction before the State passed the MMA in 1989. Thus, Congress could rightfully ratify the MMA to bring the Act back within the framework of the constitution

However, Congress does not have the Constitutional authority to alter an otherwise validly enacted “Effective date” provision of a State statute, thus, it could not remove the “Effective date” requirements of the MMA through ratification of that Act in 1991. Unlike the substantive portions of the MMA over which the Constitution gives Congress plenary authority, the Constitution leaves the manner and timing of the enactment of state laws to the individual states. The assumption of authority by Congress to override the clear and expressed intent of the Maine legislature regarding how and when a State law can take effect is a direct violation of the Constitution as it puts the State’s own sovereignty in jeopardy. (“States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union “with their sovereignty intact.” *FMC v. S.C. State Ports Auth.*, 2002 U.S. LEXIS 3794, page 16, quoting from *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779. (1991) (“There was a reservation to the several states of all the powers of government which they had not granted to the national government by the Constitution or which the Constitution had not prohibited them from exercising. Every state remained a self-governing political community in respect of its own inhabitants, in every relation where those inhabitants are not by the Constitution placed under the authority of the national government. What is retained by the states as “rights, privileges and powers” constitutes the state sovereignty, and the people of every state of the several states of the Union have under their control entirely every relation of their inhabitants, that is not under the control of the United States by reason of some provision of the Federal Constitution. With these domestic relations, the state's inhabitants can deal as they see fit.” *United States v. Thibault*, 47 F.2d 169,171 (1931)).

While Congress has plenary authority over Tribes, Congress’ power over the states is limited by the Constitution. *New York v. United States*, 505 U.S. 144,161 (1992) (“As an initial matter, Congress may not simply “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program . . . . While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.”); See also *Reno v. Condon*, 528 U.S. 141,149 (2001) (“The Federal Government may neither issue directives requiring the States to address particular

problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”); *Printz v US*, 521 U.S 898, 934-943; *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (“The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.” To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.”); and, *Lane County v. Oregon*, 74 U.S. 71, 75-79 (1868).

Furthermore, Congressional approval or ratification of a state act is a separate and distinct question from whether the underlying State act is void for failure to comply with state law. In *Kickapoo Tribe of Indians v Babbitt*, 827 F. Supp. 37 (D.D.C. 1993) rev’d on other grounds at *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491 (D.C. App. 1995) the Court found that the United States “approval” of a State-Tribe gaming Compact did not validate an otherwise unlawful state act. In *Kickapoo*, the Court addressed the delegated authority of the Secretary of the Interior to ratify, or “approve,” State-Tribe gaming Compacts that addressed jurisdictional and other matters. In the early 1990’s, the Governor of Kansas entered into a gaming Compact with the Kickapoo Tribe that would bind the State of Kansas. First, the State Supreme Court declared the Governor had exceeded her authority and that the Compact was void. Next, the D.C. federal district court found that although the Compact was deemed “approved” by the United States, such approval did not mean the Compact was valid and binding on the State. (. . . . [t]he district court concluded that the Governor's *ultra vires* action meant that the State of Kansas never lawfully entered into the compact and thus the compact was void. *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491,1494, (D.C. App. 1995)). See also *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, (1996).<sup>19</sup> Aff’d on appeal in *Pueblo of Santa Ana*

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<sup>19</sup> In *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, (1996) the court addresses whether a Compact entered into by a Tribe and a State is invalid or ineffective, although ratified by the United States, when the Governor lacked authority to sign on behalf of the state. Compare to *Kickapoo*. The separation of approval and validity maintains the principles of federalism allowing the states to maintain their sovereignty with minimal federal intrusion; and preserving the federal government's role of ensuring the integrity of the supremacy of the United States through the ratification process. Congress delegated authority to the Secretary of the Interior to ratify such Tribe-state Compacts in-lieu of Congress. Thus, the court here states, "to find that Secretarial approval [i.e. United States] somehow overrides a compacts requirements or provisions would frustrate an important purpose [balancing federal-state interests] of the Act. id. at 1293 citing S. Rep. No. 100-446 (1988). Congress did not intend *approval* to "override deficiencies in the compact under state law." id at 1293. Thus, the Secretary's "approval cannot itself validate an otherwise invalid compact." id. at 1293.

Thus, by analogy, Congressional ratification of the MMA merely provided the Act with the Constitutionally required Congressional approval, but leaves it to State law to determine the validity of the MMA.

*v. Kelly* 104 F.3<sup>rd</sup> 1546 (10 Cir N.M. 1997.). *Cert denied, Pueblo of Santa Ana v. Kelly* 522 U.S. 807 (1997), holding that a compact signed by the Governor, who lacked authority under state law to sign the compact “is void, in the same sense that any document executed without proper authority is void, namely it has no legal effect” citing *Narragansett Tribe of Rhode Island v Rhode Island*, 1996 U.S. Dist. 1996 WL 97856 (D.R.I 1996) id. at 1554.

Both *Kickapoo* and *Pueblo of Santa Ana* confirm that Congress does not have plenary authority to cure the underlying defects of a state act through ratification. Where the subject matter is within Congress’ constitutional authority it can ratify, and give constitutional effect to, an otherwise unlawful state act. However, where the underlying defects of such state act are based solely on state law (e.g. the scope of the authority of the Governor or how and when a state law becomes effective), then ratification does not overrule state law to cure the defect and the law or act remains invalid.

The MMA was duly enacted by the Maine legislature and approved by the Governor of Maine in accordance with the laws and constitution of the State. The MMA requires the Band certify its agreement with the Act within 60 days of the adjournment of the legislature. The Band failed to so certify. The State was under no federal obligation to enact a statute that addressed the Band. It is the prerogative of the citizens of the State of Maine to determine when and how a State statute will take effect. *Gregory v. Ashcroft*, 501 U.S. 452, 457-463 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. id. at 458.) Congress’ ratification of the MMA only authorized the State to enter an agreement with the Band. The MMA without such ratification would be unconstitutional. However, such ratification could not, and did not, eliminate or alter the requirements of Section 4 of the MMA that requires the Band to agree to the Act before it can take effect.

Congress had the opportunity to refuse to ratify MMA, amend the substantive provisions of the MMA that fall within its plenary authority over Tribes, or create its own State-Tribe jurisdictional language for the ABMSA. However, it did not have the authority to usurp a purely State function by altering the “Effective date” provisions of the MMA. Such authority falls outside its plenary power over Tribes and its Constitutional authority over States. Therefore, while Congress has the supreme power to prescribe the jurisdictional relationship between the Band and the State, Congress has no constitutional authority to nullify the legitimate effective date requirements of the MMA.<sup>20</sup>

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<sup>20</sup> In the lone case of *Pottawatomie Tribe Of Indians v. United States*, 125 Ct. Cl. 60 (1953), the court found that Congressional ratification of an agreement between a Tribe and an agent of the United States cured the underlying defects of the agreement. However, the facts in *Pottawatomie* are easily distinguishable from the present matter. *Pottawatomie* involves a claim by a Tribe that that yearly annuities called for by treaties with the United States were improperly commuted by a faulty subsequent agreement with the Tribe. The Tribe alleged that the agreement to commute the annuities never took effect because the government agent misrepresented the purpose of agreement to Tribal members, failed to get a majority of the Tribe to consent to the commutation and that the agreement was not submitted to the Tribal council for a approval. id at 63. First and foremost, the court in *Pottawatomie* concluded that Congress had the

In sum, without Congressional ratification, the MMA was an unconstitutional infringement on the plenary power of Congress to regulate Indian affairs. While the subsequent ratification of the MMA provided constitutional authority to the Act, it did not override or eliminate the “Effective date” provisions of the MMA and validate an otherwise invalid State law.

### **MICSA and MIA Cannot Be Revived By The Failure of MMA To Take Effect.**

The failure of the MMA to take effect does not afford the State a legitimate basis to claim that MICSA and MIA can “fill the gap” and provide the State with jurisdiction over the Band. As discussed above, Congress intended that ABMSA replace the authority of MICSA and MIA over the Band. The State may be frustrated by the failure of the MMA

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authority to unilaterally commute the annuities. (“Congress had the right to commute these annuities without the consent of the tribe.”) *id* at 64. Next, the court found that Congress was specifically aware of the alleged defects of the agreement and it must have intended to cure these defects when it ratified the agreement:

Although there may have been irregularities in securing the agreement, we think these were cured by the ratification of the agreement by Congress. When Congress ratified it, it knew the agreement had not been signed on the authority of the general council of the tribe, but by its individual members; it knew that some names had been signed by the Indian Superintendent, pursuant to authority given him in separate instruments, which were attached to the agreement; it knew that some of the signatures had been witnessed by only one man; and it knew that the thumb print of the tribal member had not been affixed to some of the authorizations, as the Indian Commissioner had directed. Having ratified the agreement with knowledge of these irregularities, it must be presumed either to have waived them or to have been of the opinion that the agreement had been secured in the way it intended that it should be secured when it passed the Act of 1908. *id* at 65.

Ultimately, the court based its decision on the fact that Congress has the plenary authority to abrogate Tribal treaties with, or without, the consent of the Tribe:

It is, of course, true that agreements are ordinarily executed by an Indian tribe on the authority of its general council, and not by the individual members of the tribe. However, this seems to us immaterial in this case, since Congress, by the passage of the Act of April 4, 1910, *supra*, ratifying the agreement and appropriating the money to carry it out, approved what the Commissioner of Indian Affairs had done in securing the agreement. Congress had the power to commute these annuities, if it thought this was for the best interests of the Indians, without their consent, and, hence, it seems to us immaterial whether or not that consent was obtained in the customary fashion. To say the least, Congress thought that the consent obtained was sufficient to justify it in commuting the annuities. *id* at 65-66.

Clearly the facts and the holding in *Pottawatomie* cannot be applied here. Unlike *Pottawatomie*, the issue presented in the instant is whether Congress has the constitutional authority to override the State’s validly enacted “Effective date” requirements for a State statute. As discussed previously, Congress’ plenary authority over Tribes does not extend to commandeering the State’s legislative process to achieve a particular result. Furthermore, the *Pottawatomie* court found that prior to its ratification of the commutation agreement, Congress had significant information regarding the agreements’ alleged irregularities. There is no similar evidence in the record here that Congress was aware that the MMA had failed to take effect.

to take effect, nevertheless, that failure alone cannot revive the authority of statutory language repealed by Congress. Any other result goes squarely against the intent of Congress that the State and the Band have a separate legal relationship outside MICSA and MIA. Congress set up a regulatory scheme in ABMSA that was parallel but separate from MICSA and MIA. Congress did this intentionally to avoid reopening and disturbing these earlier Acts that did not directly and specifically address the Band. Ultimately, the Band was able to prove its credentials for federal recognition and Congress provided that recognition with minimal limitations on the Band.

MICSA and MIA cannot be automatically revived by the failure of the MMA to take effect. The Band is a federally recognized Tribe, and in the absence of MICSA, MIA and the MMA, the Band retains all of its sovereignty and jurisdiction that has not been otherwise removed by the ABMSA. As noted above, the only express limitations that the ABMSA placed on the Band was to apply federal law and the Indian Child Welfare Act to the Band in the same manner as described in MICSA for the other Maine Tribes. There is no indication in the language, or the legislative history of the ABMSA, that Congress anticipated, despite the enactment of the ABMSA, that MICSA would also apply to the Band. (See *Blackfeet Tribe v. Montana* 729 F.2d 1192 (9<sup>th</sup> Cir. 1983), Aff'd on other grounds at *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759) (“We conclude that Montana's collection of maxims is insufficient support for what we view to be an unlikely proposition: that Congress intended that part of one sentence in one of the statutes otherwise totally superseded by the 1938 Act be incorporated into the 1938 Act, and that Congress manifested its intention through silence. There is nothing in the legislative history or the language of the 1938 Act even hinting that Congress anticipated that the provisions of *any* of the prior leasing statutes would be applied to leases issued under the 1938 Act.” id. at 1202-1203)

The proper interpretation of the Band’s sovereign authority and jurisdiction requires close attention to the analytical framework set out by the Supreme Court for construing how and when Congress can abrogate or limit Tribal sovereignty and jurisdiction. The ABMSA grants federal recognition to the Band. Federal recognition means that the “Tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government to government relationship with the United States” 25 C.F.R. Section 83.12. Furthermore “Federal recognition is just that: recognition of a previously existing status. . . . The Tribe’s retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic.” *Rhode Island v. Narragansett Indian Tribe*, 19 F.3<sup>rd</sup> 685, 694 (1<sup>st</sup> Cir. 1993).

Federally recognized tribes occupy a unique position *vis-a-vis* federal and state governments. As a matter of federal law, the tribes are distinct, independent political communities, which retain their original right of self-governance. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3<sup>rd</sup> 685, 701 (1<sup>st</sup> Cir 1994) (quoting *Santa Clara Pueblo v. Martinez* 436 US 49, 55(1978)). Federal recognition also confers “the protection services, and benefits of the federal government available to Indian tribes by virtue of their status as tribes.” And means that such tribes are “entitled to the immunities and

privileges available to other federally recognized tribes by virtue of their government to government relationship with the United States as the responsibilities, powers, limitations and obligations of such tribes” 25 C.F.R. Section 83.2. Among these immunities and privileges are the common law rights of self-government and sovereign immunity.

The United States Supreme Court has consistently recognized that until Congress acts “Indian tribes retain attributes of sovereignty over both their members and their territory” *California v Carbozon Band of Mission Indians* 480 US 202, 207 (1987) quoting *United States v Mazuire*, 419 US 544,557 (1975) and *Washington v Confederated Tribes of Colville Indian Reservation* 447 US 134, 154(1980) and that “. . . The sovereignty that the Indian tribes retain is of a unique and limited character. It only exists at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain existing sovereign powers.”<sup>21</sup> *United States v. Wheeler* , 435 U.S. 313, 323 (1978).

The Supreme Court also insists that federal legislation designed to abrogate or limit Tribal jurisdiction or sovereignty immunity must do so directly and explicitly:

If there [is] ambiguity . . . the doubt would benefit the tribe, for 'ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

Furthermore, a waiver of sovereign immunity must be clear and concise and unequivocal. It will not be based on ambiguities. “There will not be a waiver brought about by implication or by bootstrapping or by borrowing. . . . [T]he Court must assume that the learned members of Congress, some of whom are learned members of various bars, can say ‘waiver of sovereign immunity’ . . . just as easily as any eight-grader writing the same type of legislations.” *United States v Washington* 872 F.2d 874, 880 (9<sup>th</sup> Cir. 1989) (quoting *McClellan Ecological Seepage Situation v Weinberger*, 655 F.supp. 601,605 (E.D. Cal 1986)).

As the Band is a federally recognized Tribe its sovereign authority cannot be abrogated unless Congress does so clearly and directly. Yet, without the MMA, the ABMSA does not abrogate the Tribe’s sovereignty and jurisdiction over its lands, members or resources. Congress did not adopt, or incorporate, the provisions of the MMA in the ABMSA; it only gave Constitutional approval to a State statute that infringed on the plenary powers of Congress. The failure of MMA to take effect has no substantive impact on the other provisions of the ABMSA. The provisions that control the Band’s trust fund, land acquisition, Tribal government, legal relationship to the

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<sup>21</sup> See Felix S. Cohen’s, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945) “ Perhaps the most basic principle of all Indian Law, supported by a host of decisions... is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each tribe begins a relationship with the Federal Government as a sovereign power, recognized in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.

federal government, and the protection of the Band's children all remain intact. As the Maine Attorney General previously stated, the remedy for this situation is for the Maine legislature to enact another bill and provide the Band with an opportunity to certify its agreement. The fact that the language of MICSA or MIA can still be read to apply to the Band overlooks the intent of ABMSA to take the Band outside the jurisdiction of these two Acts. Thus, as Congress intended ABMSA, not MICSA or MIA, as the ultimate law governing the Band, the failure of the MMA cannot reactivate MICSA or MIA without a clear and express act of Congress. Therefore, regardless of whether MMA is effective, the MICSA and the MIA, cannot be used by the State to assert jurisdiction over the Band, or used as a basis to claim that Congress abrogated or limited the Band's sovereignty and jurisdiction.

#### **IV. MICMAC V BOUDMAN WAS WRONGLY DECIDED AND DOES NOT ESTOP THE UNITED STATES FROM SUPPORTING THE BAND'S POSITION**

Although the holding in *Micmac v Boudman* 54 F.Supp 2d 44 (1999) finds that the Band is subject to the State's anti discrimination laws, this decision improperly relied upon the "Findings and Policy" Section of the ABMSA, the language of MICSA and MIA and court decisions construing the intent of MICSA. The United States has a distinct governmental interest in safeguarding the rights of the Band, the *Boudman* decision does not act as a bar to the federal government from now supporting the Band in opposition to the holding in that case.

The decision in *Boudman* does not withstand scrutiny because it is not based on an analysis of the substantive provisions of the ABMSA or validity of the MMA. Judge Brody's decision in *Boudman* relies solely on language found in ABMSA Section 2 ("Congressional Findings and Declaration of Policy") (Finding and Policy Section) and the MICSA and MIA. Furthermore, Judge Brody's analysis rests upon the erroneous assumption that Congress enacted identical settlement acts for the Houlton Band of Maliseet Indians (Maliseet) and the Band:

The Federal Micmacs Act [ABMSA] explains that Defendant is to be treated like the Maliseet Indians:

The Band was not referred to in the [Federal Act] [MICSA] because historical documentation of the Micmac presence in Maine was not available at that time. ... The Aroostook Band of Micmacs, in both its history and presence in Maine, is similar to the Houlton Band of Maliseet Indians and would have received similar treatment under the [Federal Act] if the information available today had been available to Congress and the parties at that time. ... It is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefited from inclusion in the [Federal Act].

Pub. L. No. 102-171, § 2, 105 Stat. 1143 (1991). In the Court's view, Congress was unequivocal in its intention to accord Defendant the same legal treatment afforded the Maliseet Indians in the Implementing Act and the Federal Act. Bearing this in mind, the Court now turns to the relevant provisions of these two statutes.

*Boudman* at 47. (See also ABMSA “Congressional Findings and Declaration of Policy” Section 2 (4) and (5))

While Congress intended to provide the same settlement the ABMSA and the history of that Act make clear that Congress intended ABMSA to govern the relationship between the State and the Tribe. Thus, the Court’s rationale for finding that the State has jurisdiction over the Band is critically flawed. First, the language of the Finding and Policy section cannot be used to override the substantive provisions of the ABMSA and the MMA. The Finding and Policy Section is nothing more than a statement of policy, which does not confer jurisdictional powers on the State or determine its rights vis-à-vis the Band. *Poe v. Haw. Labor Rels. Bd.*, 40 P.3d 930, 941 (2002) (“The general rule of statutory construction is that policy declarations in statutes, while useful in gleaning the purpose of the statute, are not, of themselves, a substantive part of the law which can limit or expand upon the express terms of the operative statutory provisions.”). See also *Price Dev. Co. v. Orem City*, 995 P.2d 1237 (2000) (“We have referred to a statement of legislative purpose as a “preamble” to the operative provisions of a statute. And we have held that as such, a preamble is nothing more than a statement of policy which confers no substantive rights.” *id.* at 1246) *Illinois Independent Tel. Asso. v. Illinois Commerce Com.*, 539 N.E.2d 717 (1988) (“The preamble does not confer powers or determine rights.” (Internal cites omitted) *id.* at 726); *Brown v. Kirk*, 355 N.E.2d 12 at 16-17 1976; and *Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1247 1973 (“However, since the general section setting forth legislative goals neither constitutes an operative section of the statute nor prevails over the specific provisions, as clarified by regulations, we refrain from the pursuit of a metaphysical analysis of the “meaning” of “meaning.” (Internal cites omitted) *id.* at 1247.)

Judge Brody also erred in limiting his analysis of the ABMSA to the Finding and Policy Section. The fact remains that the MMA was never certified by the Band, as required by the language of that Act, and Congressional ratification did not cure this underlying defect. Significantly, the ABMSA does not provide any other mechanism that the State can use to assert jurisdiction over the Tribe. (Compare language of ABMSA Section 6 (Laws Applicable) to MICSA at 25 U.S.C Section 1725(a) (“Civil and Criminal Jurisdiction of the State”). Notwithstanding Judge Brody’s decision, the language of the “Finding and Purpose” Section cannot be used to resurrect the MMA or grant jurisdiction to the State over the Band.

Furthermore, It is also beyond dispute that the Constitution only grants Congress the authority to address Tribal matters, including Tribe-State authority and jurisdiction. Consequently, a federal district court, absent an act of Congress, does not have the authority to grant jurisdiction to the State over the Band, nor can the court validate an otherwise invalid State act that provides the State authority over the Band.

Second, Judge Brody's analysis ignored the fact that while Congress may have intended to provide a similar settlement to both the Band and the Maliseet, it purposely created two separate and distinct statutory schemes to accomplish this goal. The language and structure of the ABMSA and the MMA are not identical to the MICSA and the MIA. The structure, language and legislative history of the ABMSA all demonstrate that Congress intended ABMSA to exclusively govern the relationship between the Band and the State. The ABMSA only provided one possible mechanism for the State to assert authority over the Band, the MMA. However, at the time Boudman was decided the MMA was invalid, thus, Judge Brody was in error when he determined that MICSA and MIA provided a basis for State jurisdiction over the Band.

Finally, Judge Brody's analysis of the MIA and MICSA is seriously flawed. The Judge cites to the Me. Rev. Stat. Ann. Tit. 30 Sections 6202<sup>22</sup>, 6204,<sup>23</sup> 6206 and 6206-A<sup>24</sup>

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<sup>22</sup> "While the Passamaquoddy and the Penobscot enjoy some immunity from state law, the Maliseet Indians are unconditionally subject to state law. An introductory provision of the Implementing Act explains:

The foregoing agreement between the Indian claimants and the State ... represents a good faith effort by the Indian claimants and the State to achieve a just and fair resolution of their disagreement over jurisdiction on the present Passamaquoddy and Penobscot Indian reservations and in the claimed areas. To that end, *the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State.*

Me. Rev. Stat. Ann. tit. 30, § 6202 (1996) (emphasis added)."  
*Boudman* at 47

<sup>23</sup> "The Implementing Act goes on to state that "except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State ... 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 ..." Me. Rev. Stat. Ann. tit. 30, § 6204 (1996)".

*Id.* at 47

<sup>24</sup> "In Sections 6206 and 6206-A, the Implementing Act clarifies the exception extended to the Passamaquoddy and the Penobscot. Section 6206 explains that, when certain issues are implicated, the Passamaquoddy and the Penobscot will *not* be subject to state law:

Except as otherwise provided in this Act, *the Passamaquoddy Tribe and the Penobscot Nation*, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and *shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters*, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income *shall not be subject to regulation by the State.*

Me. Rev. Stat. Ann. tit. 30, § 6206(1) (1996). The Federal Act affirms this provision. See *25 U.S.C. § 1725(b)(1)* (1994) ("The Passamaquoddy Tribe [and] the Penobscot Nation ... shall be subject to the jurisdiction of the State of Maine to the extent ... provided in the Maine Implementing Act.").

In contrast to the status of the Passamaquoddy and the Penobscot, the Implementing Act affords the Maliseet Indians no "internal tribal matters" exception to application of state law. The purposefulness of this omission is reflected in the Federal Act, which states:

to support his conclusion that Congress intended to provide jurisdiction to the State over the Maliseet, and, thus, the Band. However, a systematic examination of these Sections reveals no such Congressional intent.

Prior to the enactment of MICSA, Congress repudiated the statement in Section 6202 that the Maliseet “will be wholly subject to the laws of the State.” Congress specifically found the language of Section 6202 was contrary to the intent of scope of Tribe’s impending federal recognition: “It is stated [in the MIA] that the “The Houlton Band of Maliseet Indians and its lands is wholly subject to the laws of the state.” As a “Finding” or a statement of “Policy”, this does not constitute a substantive assertion of jurisdiction over the Maliseet. It differs from S. 2829 in that the Federal legislation will extend Federal recognition to the Maliseet. In addition, S. 2829 will provide that Maliseet land must also be taken into trust once acquired . . . which will entail some exemptions from state laws.” (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, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. Page 35, (September 17, 1980)). (Attachment XIII)

As previously discussed, MIA, including Section 6204, was superseded and repealed by the ABMSA and should not have been used to as a basis to find State jurisdiction over the Band. Moreover, Section 6206-A of MIA,<sup>25</sup> contrary to Judge Brody’s assertion, was not part of the original Implementing Act approved by Congress in 1980 (“In Sections 6206 and 6206-A, the Implementing Act clarifies the exception extended to the Passamaquoddy and the Penobscot.” *Boudman* at 47). Maine Pub L. 1981, c 675 added section 6206-A to the MIA in 1982. However, Maine Pub. L. 1981, c 675 also required that Congress ratify and approve the Act before it could become effective. Section 8 of that Act states:

Sec. 8 Effective date. This Act shall be effective only upon the enactment of legislation by the United States:

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All Indians, Indian nations, or tribes or bands of Indians in the State of Maine, *other than the Passamaquoddy Tribe, the Penobscot Nation, and their members* ... shall be subject to the civil and criminal jurisdiction of the State, the laws of the state, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein. 25 U.S.C. § 1725(a) (1994) (emphasis added). As these provisions make clear, the Maliseet Indians are not subject to the "internal tribal matters" exception enjoyed by the Passamaquoddy and the Penobscot. n1 Since Congress has indicated that Defendant is to be treated like the Maliseet Indians, the Court concludes that, like the Maliseet Indians, Defendant cannot claim immunity from suit based on an asserted "internal tribal matters" exception, which extends only to the Passamaquoddy and the Penobscot.”  
Id. at 47-48

<sup>25</sup> “Powers of the Houlton Band of Maliseet Indians

The Houlton Band of Maliseet Indian shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers.” Pub. L. 1981, c 675, Section 6206-A.

1. Ratifying and approving this Act without modification.

Congress has never ratified Maine Pub. L. 1981, c 675 and this Act remains ineffective. (See Attachment XIV). In addition, Section 1725(e)(2) of MICSA (25 U.S.C. 1725(e)(2)), requires that any amendments to the MIA that address the jurisdiction of the Maliseet have the consent of the Tribe before taking effect. The Maliseet did not provide their consent to Maine Pub. L. 1981, c 675 amendment as required by 25 U.S.C. 1725(e)(2). Thus, 6202-A cannot be used to demonstrate Congress' intent to provide the State jurisdiction over the Maliseet or the Band.

Judge Brody also relies upon MIA Section 6206 and MICSA Section 1725(a) (25 U.S.C 1725(a)) to place the Maliseet under State authority. The Judge noted that Section 6206 did not contain the same "internal Tribal matters" exception for the Maliseet that was provided to the Penobscot and Passamaquoddy. He claimed that Congress' omission of any language granting this exception to the Maliseet in MICSA reflects the "purposefulness" with which Congress removed the Maliseet's own sovereign authority, and by reference, the Band's authority. (*See* Boudman at 47-48) However, Judge Brody leaps over and ignores a single fundamental fact about the Section 6206 and the MIA. The "internal tribal matters exception" "granted" to the Penobscot and Passamaquoddy in 6206 was the result of a multi-year negotiation between these two Tribes and the State that the Maliseet were not invited to participate in. This negotiation resulted in an agreement, wherein, the Penobscot and Passamaquoddy gave up certain sovereign authorities and in exchange the State agreed to let these Tribes retain control over "internal tribal matters." This agreement was eventually codified in the MIA.

The Maliseet were not a party to this agreement with the State. In fact, the legislative history shows that the State refused to negotiate any settlement with the Maliseet. The State did not believe that the Maliseet were a bona fide Tribe. Furthermore, the State did not believe that the Maliseet would get federal recognition and, thus, did not feel compelled to enter into a jurisdictional agreement with the Maliseet similar to that agreed to by the Penobscot and the Passamaquoddy. When Congress ultimately provided federal recognition to the Maliseet, unlike the Penobscot and Passamaquoddy, the Maliseet's jurisdiction was not limited by any prior agreement with the State, thus no language regarding their retained rights was required or necessary in MICSA. One of the primary tenets of American Indian jurisprudence is that a Tribe retains all of its sovereignty and jurisdiction not removed by Congress.

While Congress appears to have subjected the Maliseet to some State authority in 25 U.S.C 1725(a), it did not also abrogate the Maliseet's inherent sovereign authority. In fact, Congress acted to ensure that the Maliseet would have the capacity to protect their political and cultural integrity well into the future. (*See* 25 U.S.C 1724, 25 U.S.C 1726 and 25 U.S.C 1727). Thus, the fact that MICSA specifically preserves certain rights to the Penobscot and Passamaquoddy, but not the Maliseet, has no substantive bearing on the authority and jurisdiction of the Maliseet, or for that matter, the Band.

Based on the above, the Band believes that the legal and policy basis of Judge Brody's decision in *Boudman* is fatally flawed. The Finding and Purpose Section of the ABMSA and the provisions of the MICSA and the MIA do not provide a valid basis upon which to determine that State laws apply to the Band.

### **The United States Is Not Estopped From Taking a Position Contrary to *Micmac v Boudman***

As discussed above, the legal and policy basis for the decision in *Boudman* was contrary to the intent of Congress and not supported by the ABMSA or federal law. The decision in *Boudman* impacts the federal government's interest in safeguarding the rights of the Band. Consequently, the United States has an obligation to support the Band's defense of its sovereign authority and jurisdiction and it is not bound by the decision in *Boudman*.

The unique relationship between the federal government and Tribes created by the Constitution, and further defined by the Supreme Court, creates a distinct governmental interest in determinations that effect Tribal rights and authority. (*See Heckman v United States*, 224 U.S. 413, 440 (1912) ("The federal government has a duty to protect Tribes and the authority to carry out its obligations. "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. ...(cites omitted)); *United States v Candelaria*, 271 U.S. 432, 439-440 (1926); and, *HRI v EPA*, 198 F.3d 1224, 1245 (10<sup>th</sup> Cir 2000). The Supreme Court has long held that the federal government has a duty to protect the interests of Tribes (*Seminole Nation v United States* 316 U.S. 286, 296-97 (1942). This duty includes protecting a Tribe's jurisdiction. See *HRI* at 1243 and cases cited therein. ("The federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction." *id.* at 1243). See also *Heckman v. United States*, 224 U.S. 413, 437 (1912) ("This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.")

Furthermore, the federal government has an obligation to ensure that legislation passed for the benefit of a Tribe is properly interpreted and enforced. *See Bowling & Miami Inv. Co. v. United States*, 233 U.S. 528, 535 (1914) ("It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest."); *Heckman v United States*, 224 U.S. 413, 440 (1912) ("The Authority to enforce restrictions of this character is the necessary complement of the power to impose them"); and, *Alonzo v United States*, 249 F.2d 189, 197 (10<sup>th</sup> cir 1957) ("We are of the opinion that the Governmental interest in the instant

action is as great as it would be if the fee to the lands involved were in the United States. Indeed, since the United States is suing as a guardian of a dependent nation in discharge of a fiduciary duty, its right and duty to protect the interests of its wards may be even greater than it would be if it were suing in its own behalf with respect to its own lands.”)

The Supreme Court has also held that the United States may not be bound by judgments rendered in other cases involving Tribal rights in which Indians or Indian Tribes represented themselves without the direct involvement of the federal government. *See Drummond v. United States*, 324 U.S. 316,318 (1945) (“But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy.”); *Heckman v. United States*, 224 U.S. 413, 437 (1912); *Bowling & Miami Inv. Co. v. United States*, 233 U.S. 528, 535 (1914); *United States v. Hellard*, 322 U.S. 363,366 (1944) (“Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action (internal cites omitted) (“But, as we have said, the Act in question purports to be no more than a jurisdictional statute. It fails to say that the United States is not a necessary party; nor does it suggest that the United States or its officers are confined to a limited role in the proceedings. We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a state or federal court to adjudicate claims to restricted lands and to order their sale or other distribution that Congress dispensed with that long-standing requirement. The purpose to effectuate such a major change in policy must be clear.” (cites omitted) *Id.* at 368); *United States v Candelaria*, 271 U.S. 432,443 (1926); and, *HRI v EPA*, 198 F.3d 1224,1245 (10<sup>th</sup> Cir. 2000). *See also HRI*, United States Department of Justice (DOJ) Brief for Respondent at 40, “[t]he 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”) (Attachment XV )

The case of *Micmac v Boudman* addresses the interpretation and enforcement of a federal statute enacted for the benefit of the Band.<sup>26</sup> As outlined above, the Court in *Boudman* erroneously used language from the ABMSA, MIA and MICSA to support a finding that the Band is subject to State law. Moreover, the Court failed to address the validity of the MMA. The decision in this case directly impacts the sovereign interests of the Band and the sovereign fiduciary obligations of the United States to protect the rights of the Band. As the federal government was not a party to the Boudman case it is not bound by that ruling. Therefore, for all the reasons stated above, the United States should now act to support the Band’s arguments in opposition to the Boudman decision.

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<sup>26</sup> “The purpose of the Micmac settlement legislation is to bring some fairness to the unfortunate situation the tribe faces, whereby there no programs available to help it deal with the poverty and lack of education among tribal members. Exclusion from the 1980 MICSA prohibits the tribe from being eligible for crucial tribal services provided by the BIA.” Statement by Senator Cohen and Senator Mitchell on the introduction of “S 374. A bill to settle all claims of the Aroostook Band of Micmacs resulting from the band’s omission from Maine Indian Claims Settlement Act of 1980.” 102<sup>nd</sup> Cong 1<sup>st</sup> Sess., 137 Cong Rec. S 1715, (January 3, 1991) (Attachment V)

#### **IV. CONCLUSION**

The language, legislative history and context of ABMSA establish that Congress intended for the provisions of ABMSA to supersede MICSA and exclusively govern the relationship between the Band and the State of Maine, except for those sections of ABMSA that Congress specifically directed be based on provisions in MICSA. Furthermore, the State legislation that was ratified by Congress in the ABMSA, and that purports to transfer jurisdiction to the State over the Band's land, resources and members, and limit the Band's sovereignty (MMA), was never consented to by the Band as required by the plain language of the MMA. Congressional ratification of the MMA did not vacate the requirement that the Band must consent to the Act before it can become effective.

For all the reasons stated above, the MMA, MICSA and the MIA do not provide jurisdiction to the State over the Band, or abrogate the Band's sovereign authority. Thus, the Band's sovereignty, including sovereign immunity, and jurisdiction over its lands, resources and members remains intact.

## ATTACHMENT I

### **Historical Background**

The Aroostook Band of Micmac Indians is located in the far northern corner of the State of Maine. The Band currently identifies 800 members, most of who reside in Aroostook County, Maine within a 20-mile radius of Presque Isle where the tribal headquarters is located. The St. John River separates Aroostook County, Maine from the Maritime Provinces where 28 other Micmac Bands are located. The Government of Canada recognizes the Canadian Bands. While the Canadian Bands of Micmac and the Aroostook Band of Micmacs are related, they are separate and distinct communities. A nine-person council, each of who serves a two-year term and has a Tribal Chief and a vice-Chief who both serve two-year terms as well, governs the Aroostook Band of Micmacs.

The members of the Aroostook Band of Micmacs are descendants from the Micmac Nation whose aboriginal range once encompassed the area from the eastern shores of the Canadian Maritime provinces to southern Maine and even the coast of Massachusetts. Testimony indicates that the Micmac Band was included or expressly made signatory to treaties with the Colony of Massachusetts in 1678, 1693, 1699, 1713, 1717, 1725, 1726, 1727, 1749, and 1752.

On the 19<sup>th</sup> of July 1776, representatives of the Micmac Nation met with representatives of the Commonwealth of Massachusetts, which at that time included what is now the State of Maine. The meeting between the Band and the Commonwealth occurred just 15 days after the Declaration of Independence had been endorsed by the U.S. Continental Congress; and was personally requested by George Washington future 1<sup>st</sup> President. General Washington also sent two medallions with his likeness to be given to the Band as a symbol of peace and friendship prior to a request that the Micmac Nation to help the newly declared independent colonies fight the British Army<sup>27</sup>. One of the medallions sent by General Washington now resides in the British Museum and the other is held within the Micmac Nation. signed a treaty on behalf of the United Colonies of America with the Micmac. At the conclusion of the meeting in Watertown, Massachusetts, the Micmac agreed to a friendship treaty with the United States, now generally referred to as the "Treaty of Watertown." The Treaty of Watertown created a formal political alliance between the newly formed government of the United States of America and the Micmac Nation, wherein Micmac agreed to support the American revolutionary forces against the British.

After reading the Declaration of Independence, Massachusetts Governor James Bowdoin then proclaimed that the Micmac and Maliseet had become their "Brothers," and declared that "the United States now form a long and strong chain, and it made longer and stronger by our brethren of the (Maliseet) and Micmac Bands joining with us; and may the Almighty God never suffer this Chain to be broken." As President of the Revolutionary Council, Governor Bowdoin then toasted "and wished that the friendship

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<sup>27</sup> The Micmac had already been fighting the British army for many years.

now established might continue as long as the Sun and Moon shall endure, which was pledged by the Indians."

As tribal allies of the United States, Micmac warriors joined the American revolutionary forces under Colonel John Allan in Machias, Maine. Col. Allan had been designated "Chief Commander of the Eastern Indians." Arriving in their birch-bark canoes, the Micmac presented Colonel Allan with "a long string of Wampum declaring the most fervent Zeal for America." With their fellow Wabanaki, Micmac tribes people camped in the woods nearby, and elected their own war leaders, who were then "commissioned, with the pay of lieutenants, and authority to maintain the U.S. stronghold at Passamaquoddy." Colonel Allan paid the Micmac from an account called "Indian Contingencies," which was funded by the United States. In addition, their supplies came from the Machias trading post "at the Charge of the United States."

By 1792, the Maliseet, Micmac and Passamaquoddy Tribes were in poor circumstances and jointly filed a petition with the Massachusetts General Court for land. In 1794 a treaty was concluded between the Commonwealth of Massachusetts and the Passamaquoddy Tribes and others connected with them. As a part of the Statehood Act of 1820, Maine assumed all duties and obligations of the Commonwealth of Massachusetts towards Indians within the newly formed State.

In 1972, the Penobscot Indian Nation and the Passamaquoddy Tribe filed two lawsuits against the State of Maine to reclaim Tribal lands that were taken by the State. The Houlton Band of Maliseet Indians filed its own claim in 1979. The Maine Indian Claims Settlement Act of 1980 (25 U.S.C 1721 et seq.) (MICSA) was designed to settle all Maine Tribal land claims. MICSA extinguished aboriginal Indian title for all of the Indian Tribes in Maine. In return, Congress recognized the Penobscot Indian Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians and paid them the collective sum of 81.5 million dollars to settle their land claims. However, MICSA also extinguished any potential claim the Aroostook Band of Micmacs had to lands within the State of Maine. The Band received no benefits or recompense from the MICSA, and they were denied any of the services from State and federal governments afforded other recognized Tribes.

At the time MICSA was passed, the Band did not have sufficient funds to document its aboriginal claims. Nonetheless, by the mid 1980s the Band managed to compile the requisite documentation and pursued relief from MICSA in the form of compensation and federal recognition.

In 1991, Congress moved to redress the inequity caused by MICSA and passed the Aroostook Band of Micmac Settlement Claims Act (Pub.L 102-171, November, 26, 1991, 105. 1143) (ABMSA). The ABMSA provided the Band with federal recognition and \$900,000.00 in compensation for the prior extinguishment of their aboriginal title to lands in Maine.