

nineteenth centuries. 30 M.R.S.A. section 6203(5) and (8). MICSA provides for the southern tribes to acquire lands outside the original reservations and to have the United States take up to 150,000 acres acquired by each southern tribe into trust "for the benefit of the respective tribe or nation." 25 U.S.C. 1724(d).

The geography of the pre-MICSA reservations, which are still the center of the Indian Territories, demonstrates the importance of water quality to the southern tribes. Portions of the Passamaquoddy Pleasant Point Reservation lie along the St. Croix River and the tribe's community at its Indian Township Reservation is housed in immediate proximity to areas flooded by the Grand Falls Dam impoundment. Notwithstanding the dispute discussed below, all parties appear to agree that the Penobscot Nation's reservation includes at least the islands in the main stem of the Penobscot River, which were not sold prior to 1980, starting with Indian Island, and proceeding north approximately 45 miles up to the fork in the river where west and east branches of the river converge. There also appears to be no dispute that the reservation does not include the upland on either side of the Penobscot River's banks. The Penobscot community is housed on Indian Island, completely surrounded by the river. The river also flows through and around the rest of the original reservation. Clearly, the physical setting of the southern tribes in such close proximity to important rivers and waters makes surface water quality very important to them and their riverine culture.

The lands taken into trust for the southern tribes pursuant to MICSA are generally large unfragmented parcels spread across central Maine that are clearly described in modern conveyances recorded with the relevant registry of deeds and the Bureau of Indian Affairs. The boundaries of the original reservations are much less clear, however. There are serious disputes about the precise geographic reach of the southern tribes' reservations under MICSA, some of them arising out of interpretations of the treaties referred to in MIA. EPA specifically invited comment on those disputes when we first extended the comment period on Maine's application. See 66 FR 12791, 12793 (February 28, 2001).

The dispute that most directly impacts existing permitted discharges involves how far the Penobscot Reservation in the Penobscot River extends upriver and whether it includes the bed and banks of the river. DOI has concluded that the Penobscot

reservation includes the bed and banks of the Penobscot River. Letter from Edward B. Cohen to John P. DeVillars, September 2, 1997 at 6 (Ad. Rec. section 4-25). According to DOI, the Penobscot River bank separates the reservation—the river and islands—from the non-Indian land on either side. Pursuant to DOI's position, facilities located near the bank of the river where the Nation's reservation lies, with discharge pipes into the river, are crossing a boundary into the Nation's reservation. The Penobscot Nation also asserts that its reservation includes not only the main stem of the Penobscot River north of Indian Island, but also the east and west branches up to the headwaters and tributaries. The state maintains that the reservation only includes the islands in the main stem. DOI has not announced a position on this dispute over the branches and tributaries.

The NPDES program applies at the point of discharge, and it is the location of the discharge outfall that generally determines which NPDES permitting authority has jurisdiction to issue permits for discharges from a facility that straddles a jurisdictional boundary, such as the border between two states or between Indian country and non-Indian country areas. All nineteen of the non-member facilities EPA retained are situated with the bulk of their facilities and operations on non-tribal land and outfall pipes in the Penobscot River, its branches, or tributaries north of Indian Island. According to DOI's announced position on the boundaries of the Penobscot's reservation, at least seven nonmember facilities located outside of the reservation discharge into its waters of the main stem.

EPA acknowledges that the state and other interested parties vigorously dispute DOI's conclusion about these boundaries. EPA emphasizes that we are taking no action to determine the boundaries of the southern tribes' Indian Territories. Today, EPA is approving the state to administer the MEPDES program both inside and outside of the southern tribes' Indian Territories, except permits for facilities with discharges that EPA determines are internal tribal matters. Therefore, EPA need not determine the exact location of those boundaries in this action.

b. Authority To Regulate Discharges to Indian Territory Waters Under MICSA

EPA has concluded that MICSA unambiguously grants Maine adequate regulatory authority to administer the MEPDES permitting program for most of the discharges in the southern tribes' Indian Territories. EPA does not agree with the DOI opinion that the southern

tribes' area of exclusive jurisdiction over internal tribal matters reaches so far as to preclude the state from regulating any discharges to water in the southern tribes' Indian Territories. Rather, the Agency has concluded that the permitting of two existing tribal facilities are internal tribal matters and beyond the reach of Maine's program.

When interpreting the meaning of federal statutes, EPA's first duty is to determine whether Congress has spoken to the issue at hand. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). In the *Chevron* case, the Court used three methods to determine Congress' intent: the plain meaning of the statutory text; reasonable inferences from the structure of the statute; and the legislative history. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 859-864 (1984); see also, *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 793 (1st Cir. 1996). As EPA applies these methods, we remain mindful that Congressional intent to intrude on tribal sovereignty must be unmistakably clear. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Penobscot Nation v. Fellerer*, 164 F.3d 706, 709 (1st Cir. 1999).

i. Statutory Text of MICSA and MIA

The key provision in MICSA addressing the jurisdictional relationship between the southern tribes and the state defines that relationship by referring to MIA.

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

25 U.S.C. 1725(b)(1). In addition, one of the purposes of MICSA is "to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation." 25 U.S.C. 1721(b)(3). The ultimate source of MIA's authority to affect Indian jurisdiction is MICSA, and where the MIA and MICSA conflict, the federal act controls. 25 U.S.C. 1735(a). The two statutes are closely intertwined, and under the U.S. Constitution, only Congress may alter a tribe's jurisdiction; therefore, federal courts have concluded that MIA's interpretation is a matter of federal law. *Akins*, 130 F.3d at 485; *Penobscot Nation v. Fellerer*, 164 F.3d 706, 708 (1st Cir. 1999), cert. denied 527 U.S. 1022 (1999).

Section 6206(1) of the MIA sets out the core of the jurisdictional