

Sproul, Alice E

From: Stern, Paul D
Sent: Wednesday, November 14, 2012 10:53 AM
To: Woodcock, Carol (Collins)
Cc: Sproul, Alice E; Reid, Jerry
Subject: Stafford Act Amendments

Carol,

If enacted, the proposed Stafford Act Amendments (S. 2283) would *not* apply to Maine Tribes. “The relations between Maine and the Maine Tribes are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement.” *Akins v. Penobscot Nation*, 130 F.3d 482, 483 (1st Cir. 1997). Those statutes are the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721, *et seq.* (the “Federal Settlement Act”), which ratified and confirmed the “Act to Implement the Maine Indian Land Claims Settlement,” 30 M.R.S.A. §§ 6201, *et seq.* (the “State Settlement Act”). The legislation was designed to “create a unique relationship between state and tribal authority,” by “submit[ing] ... the [Maine Indians] and their tribal lands to the State’s jurisdiction [and] ... g[i]v[ing] the State a measure of security against future federal incursions upon these hard-won gains.” *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996). S. 2283 is such a federal incursion.

Except as specifically provided in the State Act, Maine’s Indians and their land and natural resources are subject to the laws of the State “to the same extent as any other person or lands.” 30 M.R.S. § 6204. This principle was specifically confirmed by Congress:

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 [its] 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).

[A]ll Indians, Indian nations, or tribes ... 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.A. § 1725(a)

Congress ensured this principle in two savings clauses, which mandate that federal Indian law existing at the time of the Settlement in 1980 or enacted thereafter would not apply in Maine if it affected Maine’s civil and regulatory jurisdiction:

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or

held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735; *see also* 25 U.S.C. § 1725(h) (any federal law that “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” as of October 10, 1980, that “affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine,” shall not apply in Maine).

S. 2283 is a “one size fits all” approach that allows all federally recognized “Indian tribal governments” to request presidential disaster and emergency declarations directly. The proposed amendment according to FEMA is designed to establish a “government to government relationship” between tribes and the federal government. It is also known as “treatment as state” status. This model was specifically rejected in the Federal and State Settlement Acts of 1980:

Thus, for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

S. Rep. No. 96-957, 96th Cong., 2nd Sess. at 31 (1980).

The Maine Act provides that the Penobscot Indian Nation and the Passamaquoddy Tribe are subject “to all the duties, obligations, liabilities and limitations of a municipality ... provided, however, that internal tribal matters ... shall not be subject to regulation by the State.” 30 M.R.S. § 6206(1). As subdivisions of the State, of course, municipalities are fully subject to the State’s governmental oversight, including federal disaster and emergency relief requests. Therefore, unless the Amendments specifically include the Maine Tribes, S. 2283 if enacted would not apply to them.

By way of example, in 1987, Congress amended the Clean Water Act by, *inter alia*, adding section 518, which allows Indian tribes to apply for “treatment as state” status. 33 U.S.C. § 1377(e). A tribe may be granted jurisdiction to regulate water resources within its borders in the same manner as states, including in particular establishing tribal water quality standards to be approved by EPA and issuing NPDES permits for discharges into such waters. *City of Albuquerque v. Browner*, 97 F.3d 415 (9th Cir. 1996). This provision has been construed by some courts to allow EPA to restrict dischargers upstream from Indian land to comply with a tribe’s water quality standards. *City of Albuquerque*, 97 F.3d at 424. Section 518 does not apply in Maine under the savings clause of the Federal Settlement Act because section 518 was not made explicitly applicable to Maine and would affect Maine’s regulatory jurisdiction. Indeed, Congress considered this very issue:

This section does not override the provisions of the Maine Indian Claims Settlement Act.... [T]he tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes...

Water Quality Act of 1987, Section-by-Section Analysis, H.R. Rept. 99-1004 at 166 (1986). Even without that legislative history, Section 518 would not apply. *See also Passamaquoddy Tribe*, 75 F.3d at 788-90 (federal Indian Gaming Regulatory Act passed after Maine Settlement Acts does not apply in Maine).

The Stafford Act currently treats tribes as local governments. 42 U.S.C. 5122(7). This is completely consistent with the carefully crafted Federal and State Settlement Acts of 1980. In fact, the treatment of

the Passamaquoddy Tribe and Penobscot Nation as municipalities was a central feature of the negotiated jurisdictional arrangement. The Senate committee noted that “the Maine Implementing Act accords the Passamaquoddy Tribe and Penobscot Nation the status of municipalities under State law; ...” S. Rep. No. 96-957, 96th Cong., 2nd Sess. at 18. (1980). It further explained that

The treatment of the Passamaquoddy Tribe and Penobscot Nation in the Maine Implementing Act is original. It is an innovative blend of customary state law respecting *units of local government* coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.... Section 6206 of the Maine Implementing Act provides that the Passamaquoddy Tribe and Penobscot Nation shall have all the powers, immunities, and obligations of any municipality under state law....

Id. at 29 (emphasis added). The two other Maine tribes -- the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs -- do not have municipal status. In fact, it is important to note that their tribal offices are located within existing municipalities -- Presque Isle and Littleton -- and their other small land holdings are located there and within other Aroostook County municipalities.

S. 2283 does not specifically include the Maine Tribes; therefore, if enacted it will not affect Maine’s jurisdiction under section 1735(b).

In order to be clear on this point, we suggest including in the legislative history the following:

This law does not override the provisions of the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721, *et seq.*, which ratified and confirmed the “Act to Implement the Maine Indian Land Claims Settlement,” 30 M.R.S.A. §§ 6201, *et seq.* The Maine Tribes are not eligible to submit a request for a declaration by the President that a major disaster or emergency exists. No problem with the present structure in Maine has been identified.

Thank you.