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A Tiny Fish and a Big Problem: Natives, Elvers, and The Maine Indian Claims Settlement Act of 1980

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NOTES

A TINY FISH AND A BIG PROBLEM: NATIVES, ELVERS, AND THE MAINE INDIAN CLAIMS SETTLEMENT ACT OF 1980

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INTRODUCTION

On April 8, 2014, authorities arrested Frederick J. Moore, a member of Maine's Passamaquoddy Tribe, for illegally harvesting juvenile eels in New York State.¹ Moore was charged with three felony counts and two misdemeanors for poaching animals² scarcely the size of a thin shoelace.³ The fish, called an elver, is the juvenile stage of the North American eel, and a pound of these tiny creatures has sold for as much as \$2000 in recent years.⁴ In fact, a well-equipped elver fisherman can make \$10,000 in one night or over \$100,000 in one season.⁵ Despite the high price, elvers are not especially rare in the United States.⁶ In fact, they are fairly common, but their migration goes relatively unnoticed by the millions of people living in the populous cities on the East Coast.⁷

The gold rush for elvers has brought attention to a previously lowly fish, and in the process amplified preexisting federal, state, and tribal tensions that have not been heavily explored in existing scholarship. This Note focuses specifically on Maine, the state with the largest elver fishery⁸ and where the fish is at the center of a

1. See Joe Lawlor, *Passamaquoddy Tribe Member, Former Representative, Charged with Eel Poaching*, PORTLAND PRESS HERALD (Apr. 19, 2014), http://www.pressherald.com/2014/04/19/passamaquoddy_tribe_member_former_representative_charged_with_eel_poaching_in_new_york/ [https://perma.cc/NXW3-E5CU].

2. See *id.*

3. See Press Release, Middle Level Commissioners, Elvers Galore (July 14, 2014), <http://www.sustainableeelgroup.com/wp-content/uploads/2014/07/Elvers-at-St-Germans-PS-press-release-2.pdf> [https://perma.cc/5ZL4-AHME].

4. See *id.*; Lawlor, *supra* note 1. Eels go by a variety of names depending on their life stage. In an early stage, eels are called glass eels because of their clear color. See generally JAMES PROSEK, EELS 116-17 (2010). When eels begin to show black pigment, which occurs shortly after they enter the freshwater ecosystem, they are called elvers. *Id.* Eels can look so different at different stages of their life that they have been confused in the past for different species. *Id.* at 117-18. For the sake of simplicity, this Note will refer to all juvenile eels as elvers.

5. See Annie Sneed, *Glass Eel Gold Rush Casts Maine Fisherman Against Scientists*, SCI. AM. (Aug. 5, 2014), <http://www.scientificamerican.com/article/glass-eel-gold-rush-casts-maine-fishermen-against-scientists/> [https://perma.cc/6ZQ6-U7VY]. To understand why such a tiny fish is so valuable, see *infra* Part I.A.

6. See PROSEK, *supra* note 4, at 119.

7. See *id.* at 116.

8. The effect of this little fish on the Maine economy has been significant, as the fishery had a value of nearly \$33 million in 2013. ME. DEP'T OF MARINE RES., HISTORICAL MAINE

conflict at the nexus of conservation, jurisdiction, and tribal rights. The source of this conflict is the Maine Indian Claims Settlement Act of 1980 (MICSA), the legislation that outlines the relationship between Maine's natives and the State,⁹ and which Maine's tribes have challenged in the elver context for its effect on aboriginal fishing rights and tribal sovereignty.¹⁰ That a scarce resource would bring attention to these issues should not be surprising—the distribution of natural resource rights has in many ways defined the relationship between the United States and American natives since the country's early days.¹¹

In this case, elvers are a way to explore the growing tension between Maine's native tribes and the State over MICSA. Although the tribe's argument for greater fishing rights is legally weak,¹² the fight over elvers reveals weaknesses and uncertainties in MICSA, especially regarding tribal rights. The cloud of uncertainty surrounding MICSA interferes with Maine's ability to effectively manage other resources. These problems require a solution, for the mounting tension between the tribes and the State is unlikely to abate.¹³ Therefore, despite hardening stances on both sides of this

ELVER LANDINGS, <http://www.maine.gov/dmr/commercialfishing/documents/elver.table.pdf> [<https://perma.cc/6GFT-JTVZ>] (last updated Feb. 19, 2016) [hereinafter HISTORICAL MAINE ELVER LANDINGS]. This figure represented 6 percent of the total value of Maine's commercial fisheries in 2013. ME. DEP'T OF MARINE RES., MAINE COMMERCIAL LANDINGS, <http://www.maine.gov/dmr/commercialfishing/documents/AnnualAllSpecies.table.pdf> [<https://perma.cc/JE9T-T9U8>] (last updated Feb. 19, 2016) (dividing the nearly \$33 million in elvers by the over \$540 million in total value of fish in Maine for 2013).

9. See *infra* Part III.A.

10. See generally ME. INDIAN TRIBAL STATE COMM'N, ASSESSMENT OF THE INTERGOVERNMENTAL SALTWATER FISHERIES CONFLICT BETWEEN PASSAMAQUODDY AND THE STATE OF MAINE (June 17, 2014), http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf [<https://perma.cc/VK33-U4NA>].

11. For example, the Trail of Tears began when gold was discovered in northwest Georgia. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 13-14 (1831). More recently, the United States entered into a settlement agreement with Alaska's native tribes for a historic sum of money when it became apparent that the tribes' land claim affected an area of the state with rich oil fields. Gigi Berardi, *The Alaska Native Claims Settlement Act (ANCSA)—Whose Settlement Was It? An Overview of Salient Issues*, 25 J. LAND RES. & ENVTL. L. 131, 131, 133 (2005). Fishing rights are even a common source of international conflict. See, e.g., MARK KURLANSKY, *COD: A BIOGRAPHY OF THE FISH THAT CHANGED THE WORLD* 162-66 (1997) (describing a series of three wars between Iceland and the United Kingdom over fishing rights that were simply, but aptly, named the "Cod Wars").

12. See *infra* Part III.C.

13. See *infra* Part III.C.

issue, the time has come for Maine to reassess MICSA and find a solution that would make the boundaries of the law more certain and effective not only for its fisheries, but also for other regulatory areas. Failing to do so could cause excessive, effectively unregulated fishing of a species with significant conservation concerns.

This argument is important for four reasons. First, as the story at the beginning of this Note highlights, the tension between tribal and governmental authorities is not strictly a Maine issue.¹⁴ The man charged with poaching, Frederick J. Moore, was a Maine native teaching New York natives how to fish for elvers.¹⁵ Like Moore, the New York tribal official took issue with all state-imposed restrictions on the tribe's traditional activities.¹⁶

Second, although much scholarship exists concerning such issues in the Pacific Northwest,¹⁷ there is not much written about tribal issues on the East Coast.¹⁸ This Note examines an underexplored area of native law that could prove useful for tribes across the nation.

Third, understanding the scope and nature of MICSA is important even if conservation concerns lead to the fishery's closure.¹⁹ For Maine, learning how to regulate elvers effectively could be useful in preventing the overexploitation of other fisheries, of which Maine has many.²⁰ In addition, it is not unfathomable that the rags-to-

14. See Lawlor, *supra* note 1.

15. See Bill Trotter, *Tribal Official Facing Charges in NY Vows to Take Elver Debate Beyond Maine*, BANGOR DAILY NEWS, <http://bangordailynews.com/2014/04/23/news/state/passamaquoddy-official-facing-charges-in-ny-vows-to-take-elver-debate-beyond-maine/> [<https://perma.cc/6M53-2LMX>] (last modified Apr. 23, 2014, 6:36 PM).

16. See Lawlor, *supra* note 1.

17. See, e.g., Michael C. Blumm & James Brunberg, "Not Much Less Necessary ... Than the Atmosphere They Breathed": *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 NAT. RES. J. 489 (2006) (discussing a landmark Supreme Court case that restored tribal fishing rights on the Columbia River); Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247 (1995) (discussing the use of culture as a basis for subsistence laws).

18. Only one scholar has explored MICSA, and that research addresses MICSA's jurisdictional problems. See *infra* Part III.D.

19. See *infra* Part I.C (discussing the closure of most elver fisheries in the United States).

20. Maine's most notable fisheries, currently and historically, include cod, lobster, and salmon, among many others. See *Historical Maine Fisheries Landings Data*, ME. DEPT MARINE RES., <http://www.maine.gov/dmr/commercialfishing/historicaldata.htm> [<https://perma.cc/6TGB-G47B>] (last updated Feb. 19, 2016).

riches story of the lowly eel could repeat itself for another junk fish.²¹

Lastly, although MICSA is unique to Maine, this Note's discussion about how to balance the rights of the tribes with a state's regulatory authority will provide useful guidance for federal and state fisheries regulations.

This Note proceeds in four parts. Part I provides background to the current controversy, including the reasons why the elver is particularly vulnerable to overharvesting. The overall success of this important species hinges on the ability of Maine's legislature to balance economic and environmental concerns. Part I also discusses Maine's tribes, with particular attention paid to the Passamaquoddy, the most vociferous opponent of the elver regulations. Part II discusses the legal history of the elver fishery in Maine. This Part will pay close attention to the interplay between federal, state, and tribal regulatory authority.

Part III explores MICSA and discusses the Act's provisions, state and tribal interpretations, and the challenges to its authority. Lastly, Part IV explores potential solutions to the problem, drawing from Maine's unique history as well as successful solutions implemented in other states. This Note will discuss the optimal solution to the problem: using the conflict over the elver fishery to strike a new compromise between the natives and the state that would clarify and reiterate MICSA. Such a deal would satisfy pressing needs for both parties: Maine would achieve greater oversight, and the natives would be able to participate at a greater level in a highly lucrative fishery or receive comparable consideration.

21. The boom for elver is similar to the boom in Maine's urchin fishery during the 1980s and 1990s. See Bill Trotter, *Elver Fishery Boom Generates Memories of 1990s Urchin Bust*, BANGOR DAILY NEWS (Apr. 14, 2013, 12:48 PM), <http://bangordailynews.com/2013/04/14/business/elver-fishery-boom-generates-memories-of-1990s-urchin-bust/> [https://perma.cc/BS C8-2ZBM]. Like elvers, urchins became lucrative when Pacific stocks declined. See *id.* The harvest has declined dramatically since the 1990s. See *id.*

I. BACKGROUND

A. *Origins of the Lucrative Elver Fishery*

The great demand for eel does not come from the United States, but rather from foreign countries, particularly those in Asia and Europe.²² In Japan, the eel's oily meat is a prized sushi centerpiece;²³ in several European countries, it is a smoked delicacy.²⁴ Although both of these places have native populations of eel, pressure on their fisheries has been so great that the fish is endangered.²⁵

The United States has capitalized on the enormous international demand for eel largely because Americans have not historically consumed significant amounts of eel.²⁶ As a result, commercial fishermen in the United States have, until recently, engaged in a limited commercial harvest,²⁷ making the United States a prime harvesting ground.²⁸

In order to satisfy the world demand for eel, fishermen catch the fish in their juvenile stage.²⁹ Eel are then shipped to Chinese fish farms where they are raised to marketable size.³⁰ Once big enough, the farmers sell them to distributors around the world.³¹

22. See PROSEK, *supra* note 4, at 119.

23. In fact, the Japanese value eel most for use in kabayaki unagi, a culturally significant summertime meal. See *id.* at 120.

24. RICHARD SCHWEID, CONSIDER THE EEL 17 (2002).

25. See *infra* notes 60-63 and accompanying text.

26. See, e.g., Commonwealth v. Seechrist, 27 Pa. Super. 423, 426 (Super. Ct. 1904) (“[E]els ... are not in either class of game or food fish.”); Commonwealth v. Shupp, 32 Pa. C. 178, 178 (Ct. of Quarter Sess. of the Peace 1906) (summarizing the case and noting that “eels ... are not described as either game fish or food fish.”); see also PROSEK, *supra* note 4, at 119 (“[T]he eel had been largely ignored as a food fish in modern America.”). A bit more historical probing reveals that this was not always the case. See MOURT'S RELATION 97 (Henry Martyn Dexter ed., Press of Geo. C. Rand & Avery 1865) (“*Squanto* went at noone to fish for Eeles, at night he came home with as many as he could well lift in one hand, which our people were glad of, they were fat & sweet, he trod them out with his feete, and so caught them with his hands without any other Instrument.”).

27. See PROSEK, *supra* note 4, at 118-19 (stating that commercial fishing for elvers developed in the late 1970s and peaked in the mid-1990s).

28. See *id.* at 119.

29. See *id.* at 120.

30. See *id.*

31. See *id.*

With the increased pressure on the elver fishery, however, come well-founded worries that the American eel may soon become endangered.³² The imperfect knowledge of eel biology has compounded these concerns.³³

B. The Mystery of Eel Biology

Despite the fact that people have harvested eel for a long time,³⁴ there are still things about eels that leave scientists baffled.³⁵ In particular, not much is known about the fish's breeding habits.³⁶ What is known is that all eels in rivers on the East Coast are born in the Atlantic Ocean and migrate to the sea to spawn.³⁷ Specifically, the eel migrates out of its home waters to the Sargasso Sea in the middle of the Atlantic Ocean.³⁸ No one has witnessed an eel spawn, but scientists have narrowed the area where they believe the activity occurs to this calm, quiet two million square mile stretch of ocean named after the thick green mats of sargassum seaweed that periodically cover its surface.³⁹ Aside from eels and seaweed, the Sargasso is also known as the home of the Bermuda Triangle.⁴⁰ If finding a downed aircraft in this area has proved elusive, pinpointing exactly where a fish no bigger than a yardstick⁴¹ spawns has proved all but impossible. Nevertheless, the spawn occurs every year and, in the spring, young elvers return to rivers across the East Coast of the United States.⁴²

The imperfect knowledge of eel biology is the reason why eel must be caught at the elver stage and raised in fish farms: it is very dif-

32. See *infra* Part I.C.

33. See *infra* Part I.B.

34. See SCHWEID, *supra* note 24, at 69-71 (discussing the ancient Greeks and their taste for eel).

35. The work of Professor James McCleave, however, has significantly improved the quantity and quality of research on the eel. For a list of his works, see *James McCleave*, UNIV. OF ME., SCH. MARINE SCI., http://www.umaine.edu/marine/people/profile/james_mccleave [https://perma.cc/5XFN-4VML] (last visited Apr. 15, 2016).

36. See PROSEK, *supra* note 4, at 133-34.

37. See SCHWEID, *supra* note 24, at 14-15.

38. *Id.*

39. See *id.*

40. *Id.* at 15.

41. See *id.*

42. See *id.*

difficult, if not impossible, to commercially breed eel in captivity.⁴³ In addition, farming eel from a young age ensures that more market-sized eel can be produced for less cost than shipping live, full-sized eel overseas.⁴⁴

C. Current Conservation Status of the Eel

Against the backdrop of an incomplete scientific knowledge is a highly successful and valuable commercial harvest that, in its present state, threatens the long-term success of the species. Historical evidence reveals, however, that elvers were once a common sight in the spring and could be seen migrating slowly upstream by the millions.⁴⁵ There was an abundance of eel throughout the eastern United States, including up the Mississippi and into the Midwest.⁴⁶ Today the eel population is “at or near historically low levels,”⁴⁷ and evidence shows that eel harvests have declined drastically since the 1970s.⁴⁸

There are four primary reasons for the decline. The first culprit is dams. Dams make the spring migration of elvers more difficult by impeding the ease with which they can swim upstream.⁴⁹ In addition, adult eels, returning to the sea to spawn in the fall, often become caught in hydroelectric turbines.⁵⁰

The second problem is overfishing. Catching too many eel during the fall and spring migrations has a significant negative impact on the eel population.⁵¹ Eel are particularly vulnerable when caught as elvers because their numbers are concentrated at that stage, and harvesting methods are very effective.⁵²

43. See PROSEK, *supra* note 4, at 118-19; SCHWEID, *supra* note 24, at 17.

44. See PROSEK, *supra* note 4, at 120.

45. See *id.* at 117-18.

46. See *id.*

47. *American Eel*, ATLANTIC STS. MARINE FISHERIES COMMISSION, <http://www.asmfc.org/species/american-eel> [https://perma.cc/WM6D-THYQ] (last visited Apr. 7, 2016).

48. See *id.* (“From the 1970s to the mid-1980s, American eel supported significant commercial fisheries, with landings ranging from 2.5 to 3.6 million pounds. Landings dropped to 1.6 million pounds in 1987 and have remained at low levels, ranging from 1.5 million to 700,000 pounds since then.”).

49. See PROSEK, *supra* note 4, at 252-53.

50. See *id.*

51. See *American Eel*, *supra* note 47.

52. See *id.*

The third problem, related to the second, is ineffective regulation that has not been able to stem poaching. Although most states have outlawed the practice of fishing for elvers,⁵³ two states, Maine and South Carolina, hold a commercial elver season.⁵⁴ In all states, including those without an open fishery, regulation has proved difficult to enforce because of the lucrative nature of the activity⁵⁵ and the fact that elvers are best caught at night.⁵⁶ The problem is significant enough that it has attracted the attention of the federal government.⁵⁷

The final reason is the biology of the eel itself. Scientists believe that eels take many years to grow to maturity.⁵⁸ Thus, there is a long time between when an eel is born and when it reproduces. Slow maturation is generally an indicator of a species that is particularly vulnerable to overharvesting.⁵⁹

53. Scott Calvert, *Illegal Trading of Young Eels Is Investigated*, WALL ST. J. (May 6, 2014, 8:38 PM), <http://www.wsj.com/articles/SB10001424052702303417104579546111093741486> [<https://perma.cc/6KTN-X3DT>] (stating that elver fishing is legal only in Maine and South Carolina).

54. *Id.*

55. *See supra* notes 4-5 and accompanying text.

56. Bill Trotter, *Elvers Fetching More Than \$2,000 Per Pound*, BANGOR DAILY NEWS (Mar. 23, 2012, 5:54 PM), <http://bangordailynews.com/2012/03/23/news/hancock/elvers-fetching-more-than-2000-per-pound/print/> [<https://perma.cc/J4EA-L35F>].

57. Federal law makes it unlawful to “sell ... or purchase any fish or wildlife ... taken ... in violation of any law ... or regulation of the United States.” 16 U.S.C. § 3372(a)(1) (2012). Federal cases concerning the illegal interstate trade of elvers are very common. *See, e.g.*, *United States v. Fiore*, No. CRIM. 99-19-P-H, 1999 WL 33117078, at *1 (D. Me. June 3, 1999); *United States v. McDougall*, 25 F. Supp. 2d 85, 88-89 (N.D.N.Y. 1998). The practice has become so widespread that it has attracted the attention of the United States Department of Justice, which has been investigating the practice throughout the Eastern Seaboard. *See* Jat Field, *From Poacher to Dealer: Feds Investigate Illegal Elver Trade*, ME. PUB. BROADCASTING NETWORK (May 23, 2014), <http://www.mpbnet.net/Home/tabid/36/ctl/ViewItem/mid/5347/ItemId/33893/Default.aspx> [<https://perma.cc/3USX-587B>].

58. *See American Eel*, *supra* note 47.

59. For example, the diamondback terrapin, once common table fare throughout the Chesapeake Bay region, takes an average of over five years to reach sexual maturity. *See* BARBARA BRENNESEL, *DIAMONDS IN THE MARSH: A NATURAL HISTORY OF THE DIAMONDBACK TERRAPIN* 20 tbl.1.2 (2006). Terrapin became popular at the end of the nineteenth century, and overharvesting led to scarcity within thirty years of the animal’s culinary rise to fame. *See* Michael W. Fincham, *The Men Who Would Be Kings: How Grand Plans for the Lowly Terrapin ... Went Somewhat Awry*, 7 CHESAPEAKE Q. 10, 10-14 (2008), <http://www.chesapeakequarterly.net/V07N4/main2/> [<https://perma.cc/DJ4F-E5NA>]. The rise and fall of the terrapin fishery correlated with the boom and bust of the town that became the industry’s epicenter—Crisfield, Maryland. *See id.* In contrast, oysters can reach sexual maturity in only one year, and it has taken years of intensive harvesting, pollution, and disease to reduce them to 1

In light of the creature's fate in other parts of the world, the eel's decline in America is ominous. In fact, the American eel has become the target of a concentrated harvest, largely in response to overfishing in Asia and Europe.⁶⁰ In 2010, the European Union banned exports of eel because stock levels were too low.⁶¹ Japanese eel stocks have been in serious decline for decades,⁶² and the International Union for Conservation of Nature and Natural Resources recently classified the Japanese eel as endangered.⁶³

Because of the low stocks in Europe and Japan, the American eel had been experiencing increased harvest.⁶⁴ In 2011, however, the problems of overfishing and poaching became particularly acute when the Japanese earthquake and tsunami disrupted the eel fishery even further.⁶⁵ Combined with the European moratorium on eel exports, these factors led to severe reductions in the global supply of eel, which drove the market price for elvers to record levels.⁶⁶

As a result of the high market prices, harvest of elvers in Maine reached a historic high of 21,611 pounds in 2012,⁶⁷ an amount that roughly equates to 54 million juvenile eels.⁶⁸ Although Maine required a license to harvest the fish, there was no quota on the

percent of their former stock. *See Oysters*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://chesapeakebay.noaa.gov/fish-facts/oysters> [<https://perma.cc/J5PA-RKFT>] (last visited Apr. 15, 2016).

60. *See, e.g.*, Stéphane Ringuet et al., *Eels: Their Harvest and Trade in Europe and Asia*, 19 TRAFFIC BULL. 81, 84-85 (2002); Laurie Schreiber, *A Wild Fishery Tamed: Maine Elvers Are in Demand in Asia, but Quotas Limit Catch*, MAINEBIZ (May 4, 2015), <http://www.mainebiz.biz/article/20150504/CURRENTEDITION/304309994/a-wild-fishery-tamed:-maine-elvers-are-in-demand-in-asia-but-quotas-limit-catch> [<https://perma.cc/SHU9-5CAN>] ("The fishery took a dramatic turn in recent years due to intensified demand from Asia stemming from declines in the European stocks that Asian eel farmers had been using.")

61. *See* Sneed, *supra* note 5.

62. *See* PROSEK, *supra* note 4, at 119.

63. *See* D. Jacoby & M. Gollock, *Anguilla Japonica*, IUCN RED LIST THREATENED SPECIES (2014), <http://www.iucnredlist.org/details/166184/0> [<https://perma.cc/CK4B-D7U7>].

64. PROSEK, *supra* note 4, at 119.

65. *See* Sneed, *supra* note 5.

66. *See id.* The value of a pound of elvers was significantly lower in both 2013 and 2014, but the value returned to 2012 levels in 2015. *See* Patrick Whittle, *Decision Due Soon on Whether to List American Eels as Endangered Species*, PORTLAND PRESS HERALD (Sept. 14, 2015), <http://www.pressherald.com/2015/09/14/decision-due-soon-on-whether-to-list-american-eels-as-endangered-species/> [<https://perma.cc/W8QL-JPZB>].

67. *See* HISTORICAL MAINE ELVER LANDINGS, *supra* note 8.

68. There are about 2500 elvers per pound. PROSEK, *supra* note 4, at 120 n.1.

amount that individual fishermen could catch in 2012.⁶⁹ In addition, the fine for failure to have a license was minimal.⁷⁰ In the face of little oversight, poaching was a common problem in 2012.⁷¹

At the same time as these poaching and harvesting strains, the Atlantic States Marine Fisheries Commission (ASMFC) released its 2012 American Eel Benchmark Stock Assessment.⁷² After a lengthy study, the Assessment concluded that “the American eel population is *depleted* in U.S. waters” and found that “[t]he stock is at or near historically low levels.... due to a combination of historical overfishing, habitat loss due to damming ... mortality ... pollution ... disease, and unexplained factors at sea.”⁷³

The ASMFC was not the only entity to realize the dangers the eel faced. Although the United States Fish & Wildlife Service concluded in 2007 that it was not necessary to list the eel as an endangered species,⁷⁴ in 2011, the Fish & Wildlife Service filed a 90-day finding on a petition to list the American eel as threatened under the Endangered Species Act.⁷⁵ In October 2015, the Fish & Wildlife Service announced its decision not to list the American eel as an endangered species and noted that it is not likely to become endangered in the near future.⁷⁶ In reaching its conclusion, the Fish & Wildlife Service looked to the destruction of habitat, the extent of commercial and recreational fishing, the effects of disease or predation, the adequacy

69. See 2011 Me. Laws 1506 (imposing no quota limit).

70. See *id.* § 6404-A, H, K (amending and imposing stricter penalties).

71. *Id.* at 1506 (“[T]here are widespread violations in the elver fishery due to the dramatic increase in the price per pound of elvers and harsher penalties need to be in effect to combat the violations.”).

72. See ATL. STATE MARINE FISHERIES COMM’N, AMERICAN EEL BENCHMARK STOCK ASSESSMENT (May 2012), http://asmfc.org/uploads/file/americanEelBenchmarkStockAssessmentReport_May2012.pdf [<https://perma.cc/YFA8-B9ZX>].

73. *Id.* at 15.

74. Press Release, U.S. Fish & Wildlife Serv., Endangered Species Act Protection for American Eel Not Needed (Jan. 30, 2007), <http://www.fws.gov/news/ShowNews.cfm?ID=74D68E47-E43A-2F97-6C6BC67786E85454> [<https://perma.cc/H4YZ-93DG>].

75. Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List the American Eel as Threatened, 76 Fed. Reg. 60,431, 60,432-33 (Sept. 29, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter 90-Day Finding]. After conducting a 90-day finding, the Fish & Wildlife Service conducts a 12-month finding, after which the Service determines whether the species should be considered threatened. See *id.* at 60,444.

76. Endangered and Threatened Wildlife and Plants; 12-Month Findings on Petitions to List 19 Species as Endangered or Threatened Species, 80 Fed. Reg. 60,834, 60,837 (Oct. 8, 2015) (to be codified at 50 C.F.R. pt. 17).

of regulatory mechanisms, and other natural or manmade factors.⁷⁷ Despite the Fish & Wildlife Service's decision, the fate of the eel in other parts of the world and the increased fishing pressure provides reason to worry about the species' continued success.

D. Current Status of the Passamaquoddy Tribe

Similar to the eel, the Passamaquoddy Tribe faces significant threats to its way of life. The name for the Tribe hints at the sea-going nature of the natives; Passamaquoddy means "pollock-plenty-place," in reference to a cod-like fish caught in Maine's waters.⁷⁸ The Passamaquoddy are one of the four federally recognized tribes in Maine.⁷⁹ Other tribes include the Penobscot Tribe, the Aroostook Band of Micmac Indians, and the Houlton Band of Maliseet Indians.⁸⁰ The Passamaquoddy live in "Downeast Maine," an area along the northern coast of Maine.⁸¹ There are currently 3369 tribal members listed on the tribal census rolls, with 2005 Passamaquoddy at the Pleasant Point reservation and 1364 at the Indian Township reservation.⁸² In comparison, there are only 610 Penobscot natives living on the Indian Island reservation⁸³ and 18,482 total natives in Maine.⁸⁴

Despite the rich natural resources of the area, Downeast has 6 percent unemployment and a median household income of \$36,486.⁸⁵

77. See 90-Day Finding, 76 Fed. Reg. at 60,431, 60,435-41.

78. See ME. INDIAN TRIBAL STATE COMM'N, *supra* note 10, at 67.

79. See *Federal and State Recognized Tribes*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#me> [<https://perma.cc/CNT4-96NN>] (last updated Mar. 2016).

80. *Id.*

81. See *Passamaquoddy Tribe—Pleasant Point*, U.S. ENVTL. PROTECTION AGENCY [EPA], <http://www3.epa.gov/region1/govt/tribes/passamaquoddypleasantpoint.html> [<https://perma.cc/RJY9-GRG7>] (last updated Apr. 14, 2016).

82. *Our People*, PASSAMAQUODDY TRIBE, http://www.passamaquoddy.com/?page_id=14 [<https://perma.cc/3GS6-86KY>] (last visited Apr. 15, 2016).

83. *Profile of General Population and Housing Characteristics: 2010, Penobscot Indian Island Reservation*, U.S. CENSUS BUREAU, <https://perma.cc/9F6B-PXXZ>.

84. TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 7 tbl.2 (Jan. 2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf> [<https://perma.cc/L9RB-ACMG>].

85. *Selected Economic Characteristics: Washington County, Maine*, U.S. CENSUS BUREAU, <https://perma.cc/FH8D-N8SY> (listing the economic characteristics of Washington County, Maine in 2012).

For the Passamaquoddy on the reservations, the statistics are far worse: the Pleasant Point Reservation has a 23.5 percent unemployment rate and a median income of \$25,769,⁸⁶ and the Indian Township Reservation has an 18.3 percent unemployment rate and a median income of \$24,886.⁸⁷ These statistics are similar for the Penobscot tribe.⁸⁸ Though hunting, fishing, and logging make up only a small percentage of the Passamaquoddy's economic activity,⁸⁹ this number is higher than that for the rest of the state.⁹⁰ Instead, 50.6 percent of the members on the reservations are employed in administrative jobs, including education, health, social services, or public administration.⁹¹ In comparison, the average unemployment rate is 4.8 percent and the median salary is \$48,219 for all citizens of the State of Maine.⁹²

The Passamaquoddy are a people with a history of fishing⁹³ and a present economic dilemma, which has left nearly one in four natives on the reservations without a job.⁹⁴ It is against this backdrop that the Tribe has pushed for greater ability to fish for elvers.⁹⁵ Although the fishery could provide the Passamaquoddy with much-

86. *Selected Economic Characteristics: Passamaquoddy Pleasant Point Reservation*, U.S. CENSUS BUREAU, <https://perma.cc/8KTA-YLF6> (listing the economic characteristics of Passamaquoddy Pleasant Point Reservation, Washington County, Maine in 2012).

87. *Selected Economic Characteristics: Passamaquoddy Indian Township Reservation*, U.S. CENSUS BUREAU, <https://perma.cc/P4A4-9WFK> (listing the economic characteristics of Passamaquoddy Indian Township Reservation, Washington County, Maine in 2012).

88. *Selected Economic Characteristics: Penobscot Indian Island Reservation*, U.S. CENSUS BUREAU, <https://perma.cc/PQ8X-G9H2> (listing the economic characteristics of Penobscot Indian Island Reservation, Penobscot County, Maine in 2012).

89. Only 11.1 percent of the population is employed in these activities. See *Selected Economic Characteristics: Passamaquoddy Pleasant Point Reservation*, *supra* note 86.

90. Only 2.5 percent of Maine's population is employed in these activities. *Selected Economic Characteristics: Maine*, U.S. CENSUS BUREAU, <https://perma.cc/TU39-QHBP> (listing the economic characteristics of Maine in 2012).

91. See *Selected Economic Characteristics: Passamaquoddy Pleasant Point Reservation*, *supra* note 86.

92. *Selected Economic Characteristics: Maine*, *supra* note 90.

93. See *Culture & History*, PASSAMAQUODDY TRIBE, http://www.passamaquoddy.com/?page_id=24 [<https://perma.cc/YC5Y-R8VE>] (last visited Apr. 15, 2016).

94. See *supra* note 86 and accompanying text.

95. See, e.g., Bill Trotter, *Elver Dispute Between State Agency, Passamaquoddy Flares up Again*, BANGOR DAILY NEWS (May 6, 2015, 9:17 PM), <http://bangordailynews.com/2015/05/06/business/state-passamaquoddy-elver-dispute-flares-up-again/> [<https://perma.cc/73WL-NALP>] ("The department and the tribe have been skirmishing over the elver fishery for the past several years.").

needed jobs, this employment would be short term if founded on an unsustainable fishery. Thus, the Passamaquoddy's desire to control its elver fishery unencumbered by the state government runs headlong into very real concerns about the long-term sustainability of the elver harvest.⁹⁶

II. LEGAL HISTORY OF THE ELVER FISHERY IN MAINE

This Part explores the laws regulating the fishing of elvers in Maine. The Part begins with a brief discussion of Maine's elver laws as they apply within the state. It goes on to discuss the laws as they apply specifically to Maine's natives. It concludes with a look at the ASMFC, an interstate governing body that has the power to impose regulatory requirements on elver fisheries.

A. *Maine Elver Legislation*

The elver fishery has existed in Maine since the early 1970s.⁹⁷ Due to a collapse in the price of eel, however, the harvest was non-existent between 1979 and 1990.⁹⁸ Demand resumed in the early 1990s and the fishery took off, with the price reaching upwards of \$200 per pound by the middle of the decade.⁹⁹ Suddenly, what had previously not been on the radar to most fishermen had become a valuable fishery.

Reflecting the fishery's quick rise to prominence, Maine's statutes did not pose meaningful restrictions on the harvest. For example, it was not until 1995 that Maine imposed a license requirement for elver fishing.¹⁰⁰ Later in 1995, Maine became more concerned about the conservation of the species for "ecological and economic rea-

96. For potential solutions to this problem, see *infra* Part IV.

97. See *The Maine Eel and Elver Fishery*, ME. DEP'T MARINE RESOURCES, <http://www.maine.gov/dmr/rm/eel/elver/factsheet.htm> [<https://perma.cc/E932-JES4>] (last visited Apr. 15, 2016).

98. See *id.*

99. See HISTORICAL MAINE ELVER LANDINGS, *supra* note 8.

100. See An Act to Change the Licensing Year for Certain Marine Resource Licenses and to Establish an Eel Fishing License, 1995 Me. Laws 991, 992 (changing the licensing year for certain marine resource licenses and establishing an eel fishing license).

sons.”¹⁰¹ Accordingly, the legislature passed an emergency law that established stricter licensing requirements for elver fishing.¹⁰² These requirements set fees for licenses, required the payment of additional fees depending on the quantity and type of equipment used, and established closed seasons.¹⁰³ Additionally, the law created an “Eel and Elver Management Fund,” funded by the fees imposed on licenses and equipment.¹⁰⁴ The fund was set up to “research and manage the State’s eel and elver resources and to enforce the laws related to eels and elvers.”¹⁰⁵

Between 1997 and 1998, the elver harvest increased from 7360 pounds to 14,431 pounds.¹⁰⁶ The rapid change caught the attention of the Maine legislature, which found that “the level of fishing pressure experienced in the fishery places [the] resource at risk.”¹⁰⁷ The new regulations limited the maximum number of pieces of gear per license holder¹⁰⁸ and required fishermen to report their catch to the Department of Natural Resources.¹⁰⁹ The law also required the Commissioner of Marine Resources to conduct a study on the harvest of elvers and “make recommendations regarding any changes to the number of licenses and gear restrictions for the 2000 elver fishing season.”¹¹⁰

The following year, in response to the study, the legislature limited the number of elver licenses to 827, determined who would qualify for a license based on participation in previous years,¹¹¹ and established a lottery for those who did not meet the qualifications.¹¹² The price for elvers dropped below \$30 per pound in the early 2000s and remained low until the latter part of the decade, when demand

101. See An Act Regarding the Harvesting of Eels and Elvers, 1995 Me. Laws 1361, 1361 (regulating the harvesting of eels and elvers).

102. See *id.* sec. A-8, § 6505-A.

103. See *id.* sec. A-8, §§ 6505-A, 6505-B; sec. A-9, § 6575(1).

104. See *id.* sec. A-8, § 6505-D.

105. *Id.* sec. A-8, § 6505-D(2).

106. See HISTORICAL MAINE ELVER LANDINGS, *supra* note 8.

107. See An Act Concerning the 1999 Elver Fishery, ch. 7, 1999 Me. Laws 29, 29 (regulating the 1999 elver fishery).

108. See *id.* sec. 4, § 6505-A(5).

109. See *id.* sec. 15, § 6864(6).

110. See *id.* sec. 16.

111. See An Act Regarding Elver Fishing Licenses, ch. 534, sec. 1, § 6505-A(2)(C)-(D), 1999 Me. Laws 1201, 1201 (regulating elver fishing licenses).

112. See *id.* sec. 1, § 6505-A(C)-(D), sec. 2, § 6505-A(2-19).

caused prices to climb back up into the \$200-\$300 per pound range.¹¹³ Importantly, harvests did not exceed 10,000 pounds annually for the entire decade, falling as low as 1282 pounds in 2004.¹¹⁴ As a result, the legislature did not devote much time to the fishery, apart from making some minor changes to current legislation.¹¹⁵

Then, as a direct result of the 2012 earthquake and tsunami in Japan and a moratorium on the harvest of the European eel, the price for elvers skyrocketed.¹¹⁶ In response, the harvest of eels jumped from 8585 pounds in 2011 to 21,611 pounds in 2012.¹¹⁷ With elvers selling for over \$1800 per pound,¹¹⁸ the previous fine of “not less than \$100 nor more than \$500” provided Maine’s regulations with baby teeth.¹¹⁹ As a result, the legislature found it necessary to pass new legislation in order to curb “widespread violations in the elver fishery due to the dramatic increase in the price per pound of elvers” by imposing “harsher penalties.”¹²⁰

In 2013, prices remained high and poaching was rampant, which created the need for even more enforcement.¹²¹ The legislature made a violation of the elver license requirement a strict liability crime and kept the fine at \$2000 but mandated that none of it could be suspended.¹²² In addition, the law required greater reporting measures¹²³ and mandated that elver fishermen provide law enforcement with photo identification upon request.¹²⁴

113. See HISTORICAL MAINE ELVER LANDINGS, *supra* note 8.

114. See *id.*

115. See, e.g., An Act to Implement Recommendations of the MCJUSTIS Policy Board Concerning the Drafting of Crimes and Civil Violations Pursuant to Resolve 1997, Chapter 105, as Amended, 2003 Me. Laws 1201, 1216 (drafting crimes and civil violations for various acts).

116. See Sneed, *supra* note 5.

117. See HISTORICAL MAINE ELVER LANDINGS, *supra* note 8.

118. *Id.*

119. See An Act to Sustain the Elver Fishery, ch. 549, sec. 1, § 6404-A(7), 2011 Me. Laws 1506, 1507 (increasing the fine from the previous range of \$100-\$500 to \$2000 for violating the section).

120. See *id.* at 1506.

121. See *id.*

122. An Act to Improve Enforcement of Marine Resources Law, ch. 468, sec. 28, § 6575-D(1)-(2), 2013 Me. Laws 1277, 1278 (mandating the terms of violation of the elver fishing license requirement).

123. See *id.* sec. 41, § 6864(13).

124. See *id.* sec. 9, § 6305(1-A).

Noticeably absent from the previous regulations is a weight restriction. This is because prior to 2014, the only limits on the fishery were the number of licenses and the amount of gear a fisherman could use.¹²⁵ Not surprisingly, given the unprecedented catch of 2012 and the lingering difficulties in enforcement, 2014 brought with it further changes. The most significant of these was the implementation of an individual quota.¹²⁶ The quota would be calculated based on the landings reported in 2011, 2012, and 2013.¹²⁷ Individual quotas were to be calculated by averaging a harvester's two highest years in that time frame and deducting approximately 42 percent from "the license holder's average landings."¹²⁸ The legislature set the minimum quota at four pounds and allocated the native tribes 2453 pounds.¹²⁹

In order to enforce the quota requirements, Maine introduced an elver transaction card.¹³⁰ The regulations require licensed elver fishermen to present the card for every elver transaction.¹³¹ Strict penalties ensure that fishermen comply with the transaction card requirement.¹³²

B. Special Elver Regulations for Maine's Native Tribes

Since 1998, Maine's fishing regulations have created special rules for the native tribes. The first law applied only to the Passamaquoddy Tribe and allowed the tribal authority to issue its own licenses.¹³³ License holders, however, were to comply with state regulation of

125. *See supra* notes 100-103, 108 and accompanying text.

126. *See* Act of Mar. 18, 2014, ch. 485, sec. 3, § 6302-B(2), 2013 Me. Laws 1308, 1309-10 (adding an individual quota).

127. *See Individual Fishing Quotas Set for 2014 Elver Season*, ME. DEPT MARINE RESOURCES, <http://www.maine.gov/dmr/news/2014/2014ElverSeasonQuotas.htm> [<https://perma.cc/TV9P-KSLB>] (last visited Apr. 15, 2016).

128. *See id.*

129. *See id.*

130. *See* An Act to Improve Enforcement of Marine Resources Law, ch. 468, sec. 9, § 6305(1-B), 2013 Me. Laws 1277, 1279.

131. *See id.* sec. 24, § 6505-A(1-D).

132. *See supra* notes 121-24 and accompanying text (disallowing sale of elvers if no transaction card is present).

133. *See* An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, ch. 708, sec. 1, § 6302-A(1), 1997 Me. Laws 1823, 1824 (creating an exemption for the Passamaquoddy Tribe).

the fisheries.¹³⁴ The law also allowed for sustenance fishing, defined as “all noncommercial consumption” and did not include “sale of marine organisms.”¹³⁵ The rules also make it clear that the law does not amend the Act to Implement the Maine Indian Claims Settlement.¹³⁶

In 2011, the Maine legislature expanded the tribal exemption to the Penobscot Tribe.¹³⁷ The law limited the Penobscot to eight commercial licenses for elvers but allowed additional licenses “if the commissioner determines that elver resources are sufficient to permit the issuance of new licenses.”¹³⁸ In 2012, the law added the Aroostook Band of Micmacs.¹³⁹ In 2013, the legislature included the Houlton Band of Maliseet Indians, effectively applying the tribal exemption to all four of the federally recognized tribes.¹⁴⁰ In 2013, the legislature placed limits on the number of elver licenses the Passamaquoddy and Houlton Band of Maliseet could issue,¹⁴¹ a measure it had taken for the Penobscot in 2011¹⁴² and the Aroostook Band of Micmacs in 2012.¹⁴³

The 2014 law retained the limit on the number of licenses allowed¹⁴⁴ but also allocated each tribe a percentage share of the total allowable harvest in the state, of which the Passamaquoddy receive the majority.¹⁴⁵ Under the law, the tribes allocate the quota among

134. *See id.*

135. *See id.* sec. 1, § 6302-A(2).

136. *See id.* sec. 3.

137. *See* An Act to Provide Members of the Penobscot Nation with Marine Resources Licenses, ch. 137, sec. 1, § 6302-A(1), 2011 Me. Laws 192, 192-93 (expanding the availability of marine resources licenses for members of the Penobscot Nation).

138. *See id.* sec. 1, § 6302-A(1)(E).

139. *See* An Act to Make Technical Changes to Maine’s Marine Resources Law, ch. 598, 2011 Me. Laws 1584, 1584 (creating an exemption for the Aroostook Band of Micmacs).

140. *See* An Act Relating to Certain Marine Resources Licenses, ch. 8, sec. 1, § 6302-A(1), 2013 Me. Laws 50, 50-51 (regulating marine resources licenses).

141. *Id.* sec. 1, § 6302-A(3)(E-1)-(G).

142. *See* An Act to Provide Members of the Penobscot Nation with Marine Resources Licenses, ch. 137, sec. 1, § 6302-A(3)(E), 2011 Me. Laws 192, 194. The legislature later revised the number of allowable licenses in 2013. *See* An Act Regarding Commercial Elver Fishing Licenses Issued by the Penobscot Nation, ch. 9, sec. 1, § 6302-A(3)(E), 2013 Me. Laws 54, 54-55 (limiting the number of elver fishing licenses the Penobscot can issue).

143. *See* An Act to Make Technical Changes to Maine’s Marine Resources Law, ch. 598, sec. 17, § 6302-A(3)(E), 2011 Me. Laws 1584, 1589.

144. *See* ME. REV. STAT. ANN. tit. 12, § 6302-A(3)(E)-(G) (2015).

145. *See* ME. REV. STAT. ANN. tit. 12, § 6302-B(1) (2015). The quota allocates 14 percent to the Passamaquoddy, 6.4 percent to the Penobscot, 1.1 percent to the Houlton Band of

the license holders and the State issues transaction cards.¹⁴⁶ If a tribe exceeds its annual quota, the amount is deducted from future allocations.¹⁴⁷

These rules have not been without controversy, and they reflect compromises between the tribes and state authorities. In 2013, Maine limited the Passamaquoddy to 200 elver fishing licenses.¹⁴⁸ Instead of obeying the law, the Tribe issued 575 licenses, of which the State ultimately invalidated all but 150.¹⁴⁹ After acrimonious negotiations,¹⁵⁰ the 2014 regulations allotted a quota for the Passamaquoddy of 1572 pounds.¹⁵¹ The Tribe begrudgingly accepted this compromise in order to ensure that its members would be able to participate in the fishery.¹⁵²

The 2015 season brought further tensions between the Passamaquoddy and the State. Because of a conservation-minded reduction of the elver quota,¹⁵³ the State considered and ultimately passed a lower limit of 1356 pounds for the Passamaquoddy.¹⁵⁴ In the middle

Maliseet, and 0.4 percent to the Aroostook Band of Micmacs. *Id.*

146. *See id.* § 6302-B(2).

147. *See id.* § 6302-B(3).

148. *See* Matthew Stone, *State, Tribe Find Common Ground in Meeting, Passamaquoddy Official Says*, BANGOR DAILY NEWS, <http://bangordailynews.com/2013/04/03/news/state/passamaquoddy-officials-headed-to-capitol-to-seek-elver-solution/> [https://perma.cc/K53H-HDTE] (last modified Apr. 3, 2013, 6:28 PM).

149. *See id.*

150. The spring of 2014 was marked by back and forth negotiations that ultimately ended with the Passamaquoddy begrudgingly adopting individual quotas for its members. *See* Bill Trotter, *Tribes Adopt Individual Quotas as Maine's 2014 Elver Season Begins*, BANGOR DAILY NEWS, <http://bangordailynews.com/2014/04/06/business/tribes-agree-to-individual-quotas-as-2014-elver-season-in-maine-begins/> [https://perma.cc/6D6B-BKN7] (last modified Apr. 6, 2014, 5:43 PM).

151. *See* 13-188-32 ME. CODE R. § 32.35(C) (LexisNexis 2014). In contrast, other Maine tribes were given significantly less. The 2014 regulations allot 713 pounds to the Penobscot Nation, 124 pounds to the Houlton Band of Maliseet Indians, and 44 pounds to the Aroostook Band of Micmac Indians. *Id.*

152. *See* Trotter, *supra* note 150 (“Given the dire economic problems facing tribal members and the investment of two years in developing the elver fishery, the [T]ribe made the difficult decision to amend their own law to assure safety for their fishers.” (quoting Joseph Socobasin, chief of the Passamaquoddy tribe’s Indian Township)).

153. *See* ATL. STATES MARINE FISHERIES COMM’N, ADDENDUM IV TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN EEL § 3.1.1 (Oct. 2014) (setting Maine’s elver quota at 9668 pounds annually and noting that the quota will be reevaluated for the 2018 fishing season). For a discussion of the ASMFC’s powers, see *infra* Part II.C.

154. 13-188-32 ME. CODE R. § 32.35(C) (LexisNexis 2015). These regulations allotted 620 pounds to the Penobscot Nation, 107 pounds to the Houlton Band of Maliseet Indians, and 39

of the 2015 season, Maine enacted an emergency regulation because of concerns that Passamaquoddy subsistence fishers were using larger fyke nets to catch and sell large amounts of unrecorded elver.¹⁵⁵ Also in 2015, the state legislature rejected a bill that would have made the elver fishery subject to concerted management between the State and the tribes.¹⁵⁶

Maine's tribes have challenged elver fishing regulations and will likely continue to do so in the future, calling into question the effectiveness of such regulations. This is only part of the tribes' resistance to the legislation outlining the relationship between the tribes and Maine.¹⁵⁷

C. *The ASMFC Regulations*

One of the motivations behind Maine's increasing desire to regulate the elver fishery has been the lingering threat of action by the ASMFC.¹⁵⁸ The ASMFC has its origins in a compact between the Atlantic states, which became effective in 1942 after Congress gave its consent.¹⁵⁹ Since 1942, Congress has increased the ASMFC's power. For example, in 1950, Congress approved amendments to the compact that established the Commission as the governing body of the Compact and made it permanent.¹⁶⁰ The Compact, and the Con-

pounds to the Aroostook Band of Micmac Indians. *See id.*

155. *DMR Implements Emergency Regulation to Protect Maine's Elver Fishery*, ME. DEP'T MARINE RESOURCES (May 6, 2015), <http://www.maine.gov/dmr/news/2015/EmergencyElverRule.htm> [<https://perma.cc/AKC8-D3CF>] ("Chief Fred Moore, in a conversation with Marine Patrol, has admitted that the [T]ribe plans to ship the eels harvested by sustenance fishermen out of the country, a clear violation of Maine sustenance laws.")

156. Andrew Westney, *Maine Tribes Leave State Legislature Amid Acrimony*, LAW360 (May 26, 2015, 6:37 PM), <http://www.law360.com/articles/660096/maine-tribes-leave-state-legislature-amid-acrimony> [<https://perma.cc/3ZG3-Y6VS>].

157. *See infra* Part III.C.

158. *See Sneed, supra* note 5.

159. *See* An Act Granting the Consent and Approval of Congress to an Interstate Compact Relating to the Better Utilization of the Fisheries (Marine, Shell, and Anadromous) of the Atlantic Seaboard and Creating the Atlantic States Marine Fisheries Commission, Pub. L. No. 77-539, 56 Stat. 267 (1942). The original compact was between fourteen states, including Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, and Virginia. *Id.* at art. II.

160. *See* Act of Aug. 19, 1950, Pub. L. No. 81-721, sec. 1, 3, 64 Stat. 467, 467 (establishing the Atlantic States Marine Fisheries Commission as the permanent governing body of the Atlantic Marine Fisheries Compact).

gressional action approving it, reflect the need, even at an early date, to ensure the protection of Atlantic fisheries.¹⁶¹

In 1993, Congress granted the ASMFC the power to make and enforce rules in the Atlantic Coastal Fisheries Cooperative Act of 1993.¹⁶² The Act gives the ASMFC the ability to regulate or impose a fishing moratorium upon states that do not comply with measures needed for conservation.¹⁶³ Thus, when the ASMFC imposes stricter regulations or a moratorium on the fishing of eels, Maine's citizens are required to comply or face federal penalties under the Magnuson-Stevens Fishery Conservation and Management Act.¹⁶⁴ This Commission provides the motivation behind the increasingly strict regulations passed by Maine's legislature. It highlights the need for the State to demonstrate that it has the situation under control and that it can effectively regulate all of the people within its boundaries.

III. THE MAINE INDIAN CLAIMS SETTLEMENT ACT OF 1980

The last Part discussed the legislation governing the elver fishery in Maine, particularly as it applied to Maine's native tribes.¹⁶⁵ Although Maine has the ability to regulate its fisheries, the ASMFC has jurisdiction to impose stricter regulations if necessary.¹⁶⁶ This looming threat undergirds Maine's desire to have an effective and sustainable regulatory scheme.

Part of an effective regulatory scheme is the ability to ensure that the state's citizens—including the natives—comply with the law. But does Maine have the jurisdiction to interfere with tribal matters in this way? And if so, from where does this power derive? This Part

161. See S. REP. NO. 76-1600, at 2 (1940) (Conf. Rep.).

162. See 16 U.S.C. §§ 5101-06 (2012).

163. See *id.* § 5106(c)(1). The ASMFC has power over "States" as defined in the statute: Connecticut, Delaware, the District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Virginia, and the Potomac Rivers Fisheries Commission. See *id.* § 5102(13).

164. See *id.* § 5106(f) (imposing civil penalty). The Act provides civil penalties of up to \$100,000 and criminal penalties of up to six months in prison, a fine of \$100,000, or both. See Magnuson-Stevens Fishery Conservation and Management Act of 1976 §§ 308(a), 309(b), 16 U.S.C. §§ 1858(a), 1859(b).

165. See *supra* Part II.

166. 16 U.S.C. §§ 5101(a), 5103(b)(1).

discusses MICSA and how it fundamentally altered the relationship between the tribes and the State. This Part also delves into the tense history of the application of the Act to fisheries.

A. Background: Federal Law and Other Precedent

The basis for the relationship between the federal government and the native tribes within the United States is found in Article 1, Section 8 of the Constitution, which grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁶⁷ The intent of this provision was to give a “broad grant of power to the federal government and a limit on state power to interfere with federal Indian policy.”¹⁶⁸ Congress exerted this policy-setting authority when it passed the first of the Indian Nonintercourse Acts in 1790, which placed the power to purchase land from native tribes solely in the hands of the federal government.¹⁶⁹

These broad powers mean that, unless Congress has delegated its powers over the tribes to a state, federal law takes precedence.¹⁷⁰ Therefore, the first step to understanding jurisdiction is to determine whether Congress has delegated its authority to a particular state and to look closely at the legislation granting this power. Congress has the ability to grant a state these powers regardless of whether the tribes within that state have agreed to the terms.¹⁷¹ Although this is legally possible, it is likely that the political ramifications of such an action would be severe, meaning that Congress rarely exercises this power. For Maine, the relationship between the tribes and the State is outlined in an act that Congress passed in 1980, which effectuates a settlement between the two parties.¹⁷²

167. U.S. CONST. art. I, § 8, cl. 3.

168. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02, at 23 (Nell Jessup Newton et al. eds., 2012).

169. See Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138. The fact that the federal government alone has the power to purchase such lands became crucially important in the case of Maine's tribes in the twentieth century. See *infra* Part III.B.

170. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 168, § 6.04, at 530 (“States generally lack civil and criminal jurisdiction over Indians within Indian country, absent federal legislation specifying to the contrary.”).

171. See *id.*

172. See *infra* Part III.B.

B. *The Settlement Acts*

The Settlement Acts originated in lingering disputes over land ownership between the natives and the State of Maine.¹⁷³ At issue was a treaty made in 1794 between the Passamaquoddy and the Commonwealth of Massachusetts,¹⁷⁴ which had not received congressional approval.¹⁷⁵ If Maine's natives could prove that the 1794 treaty violated the Nonintercourse Act of 1790, this would open the door to reclaiming large tracts of ancestral lands.¹⁷⁶ Maine's natives pushed for restitution in the 1970s, a time that had proved to be politically advantageous to natives throughout the United States: several acts of Congress and court decisions demonstrated that natives were gaining traction on a national level.¹⁷⁷ As a result, natives were eager to settle their centuries-long differences while the political climate remained favorable to their cause.

In the midst of the increasing attention to Indian concerns, the Maine natives won a major victory in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*.¹⁷⁸ In the decision, the First Circuit determined that the Nonintercourse Act of 1790 applied to the Passamaquoddy.¹⁷⁹ The court also determined that a trust relationship existed between the Passamaquoddy and the federal government that had not been precluded by the long-standing relationship between Maine and the Tribe.¹⁸⁰ The decision paved the way for further litigation and the potential return of 12.5 million acres from Maine to the tribes.¹⁸¹ The likelihood of litigation caused President Carter to intervene in 1977.¹⁸²

173. See generally PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND 69-141 (1985) (describing the history of the land disputes between the Passamaquoddy and the State).

174. See, e.g., *Culture & History*, supra note 93; see also *1794 Treaty Between the Passamaquoddy Tribe and the Commonwealth of Massachusetts*, ME. ST. ARCHIVES, http://digitalmaine.com/cgi/viewcontent.cgi?article=1001&context=arc_docs [https://perma.cc/HS2J-5ERL] (last visited Apr. 15, 2016).

175. See BRODEUR, supra note 173, at 87.

176. See *id.*

177. See *id.* at 4-7.

178. See 528 F.2d 370, 380-81 (1st Cir. 1975).

179. See *id.* at 380.

180. See *id.*

181. See BRODEUR, supra note 173, at 95-100.

182. See *id.*

The result of President Carter's intervention was the 1980 Maine Indian Claims Settlement Act.¹⁸³ The purposes of the Act were fourfold:

- (1) to remove the cloud on the titles to land in the State of Maine resulting from Indian claims;
- (2) to clarify the status of other land and natural resources in the State of Maine;
- (3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation[;] and
- (4) to confirm that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.¹⁸⁴

To achieve these purposes, the Act made state laws applicable to the tribes by ratifying the Maine Implementing Act (MIA).¹⁸⁵ Under MIA, the laws of the State of Maine applied to Indian lands.¹⁸⁶ MIA also made the Passamaquoddy and Penobscot territories the equivalent of municipalities.¹⁸⁷ Additionally, MICA effectively abrogated prior treaties between the State of Maine and the Indian Nations, including actions that were pending in court at the time.¹⁸⁸

In return for this clarification, MICA created the Maine Indian Claims Settlement Fund, in which Congress deposited \$27 million.¹⁸⁹ In addition, the Act created the Maine Indian Claims Acquisition Fund, in which Congress deposited \$54.5 million for the purpose of acquiring land and natural resources for the tribes.¹⁹⁰

183. *See id.* at 129, 131.

184. 25 U.S.C. § 1721(b)(1)-(4) (2012).

185. *See id.* § 1725(b)(1).

186. *See* ME. REV. STAT. ANN. tit. 30, § 6204 (2015).

187. *See id.* § 6206(1) (“[T]he Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities ... and shall be subject to all the duties, obligations, liabilities and limitations of a municipality ... and subject to the laws of the State.”). The law gives the tribes power over “internal tribal matters.” *See id.*

188. *See* 25 U.S.C. § 1731.

189. *See id.* § 1724(a).

190. *See id.* § 1724(c).

Both funds were held in trust for the tribes, and the Act specified how much of each fund would go to each tribe.¹⁹¹

MICSA and the accompanying state implementing act aimed to fundamentally change jurisdictional dynamics between Maine and the native tribes.¹⁹² In effect, tribes were not to be seen as separate entities but as municipalities subject to the jurisdiction of the state. Thus, when Congress passed the law, it terminated certain native rights and gave Maine the ability to regulate certain native activities.

Important in the case of *elvers*, MIA, as ratified by MICSA, applied Maine's laws to the natives.¹⁹³ It made "all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them ... subject to the laws of the State ... to the same extent as any other person or lands or other natural resources therein."¹⁹⁴ Courts have upheld the notion that the Settlement Acts changed the nature of jurisdiction. For example, in *Maine v. Johnson*, the court held that "the Settlement Acts expressly divested the Maine tribes of sovereign immunity ... and with limited exceptions, made the Maine tribes subject to the general criminal and civil law of Maine *even with respect to activities carried out on tribal lands*."¹⁹⁵

C. Tense History of MICSA's Application to Fisheries

Following the passage of MICSA, several disputes have arisen over the extent of the Act with regard to fishing rights. Since MIA and MICSA passed in 1980, natives have contested the application of state law to fisheries, discrimination actions, and environmental

191. *See id.* § 1724(b)(1).

192. Similar settlement acts in other states fundamentally changed the relationship between those states and the tribes, establishing municipality-like status for the tribes. *See, e.g.*, Natalie Landreth & Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 AM. INDIAN L. REV. 321, 327-30 (2012).

193. *See* ME. REV. STAT. ANN. tit. 30, § 6204 (2015).

194. *Id.*

195. 498 F.3d 37, 42-43 (1st Cir. 2007) (emphasis added); *see also* Houlton Band of Maliseet Indians v. Ryan, 484 F.3d 73, 74-75 (1st Cir. 2007) (holding that the State of Maine had the power to enforce employment discrimination laws against Maine tribes); *Akins v. Penobscot Nation*, 130 F.3d 482, 483 (1st Cir. 1997) ("The relations between Maine and the Penobscot Nation 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.").

law.¹⁹⁶ The Act has become the primary point of contention between the tribes and the State because of its effect on tribal sovereignty.

Thus, in many respects, the resistance to state fisheries laws is a form of social protest: a repudiation of a law that Maine's natives see as having collateral consequences that were not foreseen when it was passed. In some ways, MICSA was a bad deal for the natives. Although it brought in \$81 million, this number is small in comparison to other settlements made with natives, and more importantly, it required giving up certain valuable native rights.¹⁹⁷ For example, a consequence of MICSA was that when a Supreme Court ruling¹⁹⁸ and an act of Congress¹⁹⁹ gave tribes the ability to have casinos, Maine's tribes were excluded because MICSA specifically gave the State the ability to legalize gaming on the reservations.²⁰⁰ Not only do casinos generate large profits, but they also provide much needed long-term jobs.²⁰¹ Thus, Maine's natives have come to see MICSA as standing in the way of lucrative federal rights and have worked to find a way to invalidate it. It is against this backdrop that Maine's natives have fought the elver regulations.

The resistance to Maine's fishing regulations is not new. In 1998, the defendants in *State v. Beal* challenged the State's issuance of thirteen citations to members of the Passamaquoddy Tribe and argued against the State's ability to regulate the shellfish fishery under MIA.²⁰² The Passamaquoddy argued that the Acts did not ab-

196. See generally ME. INDIAN TRIBAL STATE COMM'N, *supra* note 10 (discussing the legal battles over the Passamaquoddy fishing rights); see also *Houlton Band of Maliseet Indians*, 484 F.3d at 74-75 (applying Maine employment law to the tribes); *Johnson*, 498 F.3d at 42-43 (rejecting the Passamaquoddy's argument that tribal sovereignty exempted the Tribe from environmental law in spite of MICSA).

197. The Alaskan equivalent to MICSA gave natives 45.5 million acres of land and nearly \$1 billion. See Landreth & Dougherty, *supra* note 192, at 321.

198. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

199. See Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721 (2012)).

200. See 25 U.S.C. § 2719(b)(1)(B)(I) (2012); see also *Cabazon Band of Mission Indians*, 480 U.S. at 207 ("[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.").

201. In fact, one of the stated reasons for the legalization of Indian Gaming was to provide "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

202. See *State v. Beal*, No. 96-957, at 1 (Me. Dist. Ct. 1998), http://www.mitsc.org/documents/139_1998-3-27StatevBeal.pdf [<https://perma.cc/Q38H-GU65>].

rogate the natives' right to fish in their traditional waters.²⁰³ After finding that MIA and MICSAs were both "silent on the express issue of salt-water fishing rights," the court determined that "[w]hile salt-water fishing is an important part of the Tribe's history, it is not a uniquely Indian activity."²⁰⁴ The court further reasoned that "[f]ishing is also of crucial importance to all citizens of Maine, and it is in their capacity as citizens of Maine that the Implementation Act has bound tribal members to abide by Maine's marine resources laws."²⁰⁵

At the heart of this conflict were two separate sources of law. The first was *Penobscot Nation v. Stilphen*, a case that found that cultural considerations were not relevant when the subject matter of the suit was not "uniquely Indian."²⁰⁶ The second was Maine Revised Statute title 30, § 6204, which applied the laws of the State to tribal lands.²⁰⁷

Therefore, the tribes' resistance to state regulation of fisheries is on questionable legal ground, especially for the elver fishery. The U.S. Supreme Court has "repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation."²⁰⁸ In this context, it is hard to see the tribes' actions as anything short of illegal and contrary to the state's legitimate interest in preserving its fisheries stocks. It would seem that the analysis of this entire Note should end here; under a strict reading of the law, it would. But the idea of arresting large amounts of natives for violating natural resources law would be politically damning, reminiscent of not-so-distant Indian removal,²⁰⁹ and expensive to prosecute, especially in the face of continued opposition. Under these circumstances, the law is without teeth, and attempts to regulate a fishery sustainably have proven ineffective. Compromise might be the only solution.

Maine's tribes might have another argument to make in favor of their stance. A February 2015 Environmental Protection Agency (EPA) decision letter concerning the Clean Water Act provides the

203. *See id.*

204. *See id.* at 2, 10.

205. *See id.* at 10.

206. 461 A.2d 478, 490 (Me. 1983).

207. *See* ME. REV. STAT. ANN. tit. 30, § 6204 (2015).

208. *See* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999).

209. *See supra* note 11 and accompanying text.

first real victory against MICSA and in the process has created renewed tensions with the State.²¹⁰ The EPA's analysis suggests that some native sovereignty rights did in fact survive MICSA.²¹¹ The EPA found that one of the purposes of MICSA was "to provide a land base on which these Tribes could continue their unique cultures" and noted that "[a] critical element of tribal cultural survival is the ability to exercise sustenance living practices, including sustenance fishing."²¹² Thus, although the EPA determined that Maine had the ability to regulate water quality standards, it had to do so with the goals of MICSA in mind.²¹³ Specifically, Maine had to ensure that the water quality in tribal waters was such that natives could safely eat fish that they caught.²¹⁴

This understanding of MICSA could have important implications that sweep beyond the elver fishery. The EPA's decision, while acknowledging Maine's regulatory authority, requires Maine to take into account tribal needs when crafting these regulations.²¹⁵ The tribe may argue, likely unsuccessfully, that the right to "sustenance living practices" includes a commercial fishing element.²¹⁶ A better argument, however, is that the compelling interest of "tribal cultural survival" might warrant allotting a greater portion of the total elver quota in order to further the tribal economy. In this light, the argument that the tribes need greater participation in economic activity in order to employ their members and preserve their culture is not a stretch under a broad reading of MICSA.

At the very least, a broad reading would require Maine to engage in careful rethinking of its regulatory policy, perhaps even giving natives a greater role in the decision-making process. It would provide a powerful check against Maine's regulatory abilities. Although

210. See EPA, ANALYSIS SUPPORTING EPA'S FEBRUARY 2, 2015 DECISION TO APPROVE, DISAPPROVE, AND MAKE NO DECISION ON, VARIOUS MAINE WATER QUALITY STANDARDS, INCLUDING THOSE APPLIED TO WATERS OF INDIAN LANDS IN MAINE (2015), <https://turtletalk.files.wordpress.com/2015/02/2015-2-2-me-wqs-epa-decision-letter-attachment-a.pdf> [<https://perma.cc/N4G2-YKYX>].

211. See *id.* at 1-3.

212. See *id.* at 2.

213. See *id.*

214. See *id.* at 2-3.

215. See *id.*

216. Such an understanding would require a stretch of the traditional understanding of the term "subsistence." See *infra* notes 234-35 and accompanying text.

the State of Maine is likely to challenge the EPA,²¹⁷ the decision gives credence to arguments that MICSA is far from clear regarding tribal rights.²¹⁸

The effects of this decision have caused deep rifts between Maine's Governor and the tribes. The Governor recently rescinded an earlier executive order that had aimed to "[p]romote[] effective two-way communication between the State and the Tribes"²¹⁹ because "collaboration and communication with the tribes have proved to be unproductive because the state of Maine's interests have not been respected" in the ongoing relationship between sovereigns.²²⁰ In response to the Governor's executive order and the inability to gain greater rights in the elver fishery, the Passamaquoddy and Penobscot Tribes have withdrawn their delegates from the Maine House of Representatives²²¹ and have asked Congress to reassess MICSA.²²² Thus, the relationship between the tribes and the State is rapidly deteriorating.

In summary, the EPA's decision and the increasing tension between the State and the tribes suggest that there are some tribal rights that survived MICSA. Thus, the question of the extent to which MIA and MICSA retain aboriginal rights for Maine's tribes remains a contested issue. At present, the sense that MICSA was a

217. See Colin Woodward, *LePage Calls EPA's Tribal Waters Ruling 'Outrageous'*, PORTLAND PRESS HERALD (Mar. 2, 2015), <http://www.pressherald.com/2015/03/02/maine-governor-on-epas-tribal-waters-ruling-its-an-outrage/> [https://perma.cc/78FG-LDPM].

218. Further support for reading greater rights into MICSA comes from President Obama's recent emphasis on tribal rights, a position that he outlined in a recent trip to Alaska in which he also officially changed Mount McKinley back to Mount Denali, its native name. *Full Transcript: Obama Speaks at Roundtable with Alaska Native Leaders in Anchorage*, ALASKA DISPATCH NEWS (Sept. 1, 2015), <http://www.adn.com/article/20150901/full-transcript-obama-speaks-roundtable-alaska-native-leaders-anchorage> [https://perma.cc/S8RE-VCBW] ("My administration also is taking new action to make sure that Alaska Natives have direct input into the management of Chinook salmon stocks, something that has been of great concern here.").

219. See Me. Exec. Order No. 21 FY 11/12 (Aug. 26, 2011), http://maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=306288&v=article2011 [https://perma.cc/9UZW-ECF3].

220. See Nick McCrea, *Maine Tribes Want Congress to Review State's Actions, Take Fresh Look at Settlement Act*, BANGOR DAILY NEWS (May 30, 2015, 6:38 PM), <http://bangordailynews.com/2015/05/30/news/state/maine-tribes-want-congress-to-review-states-actions-take-fresh-look-at-settlement-act/> [https://perma.cc/8PT9-6TMD].

221. See Westney, *supra* note 156.

222. See McCrea, *supra* note 220.

bad deal,²²³ as well as the victory in the EPA case, have given fuel to native resistance to state regulatory power, calling into question the effectiveness of such laws. The ability to enforce the law is important to having an effective regulatory scheme, and Maine must take action not only to mitigate tensions with the tribe but also to ensure that it can continue to have lucrative fisheries.

D. More Support for the Tribes' Position: UNDRIP and the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) could theoretically provide support for the tribes' position and further cast into doubt the extent to which MIA and MICSA abrogated native rights.²²⁴ This declaration is not binding law, but rather was intended to persuade policymakers around the world to consider certain rights and guiding principles when making laws affecting indigenous peoples.²²⁵ Notably, the Maine State Legislature supported UNDRIP.²²⁶ Nicole Friedrichs, an attorney specializing in federal Indian law, concluded that MIA and MICSA have failed to guarantee native rights and that the UNDRIP provides a reason to revisit MICSA.²²⁷ Although Friedrichs provides a thought-provoking analysis that looks into whether Maine is treating the state's natives fairly, she fails to explore the meaning of paragraph two, article 46 of UNDRIP,²²⁸ which states:

The exercise of the rights set forth in this Declaration *shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations*. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and

223. Although doubtless an extreme stance, one native has gone on record stating that MICSA was "a subtle and legal form of genocide." ME. INDIAN TRIBAL STATE COMM'N, *supra* note 10, at 21.

224. See Nicole Friedrichs, *A Reason to Revisit Maine's Indian Claims Settlement Acts: The United Nations Declaration on the Rights of Indigenous Peoples*, 35 AM. INDIAN L. REV. 497 (2011).

225. See *id.* at 500-01.

226. See *id.* at 497.

227. See *id.* at 526.

228. See *id.* at 507.

respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.²²⁹

In Maine, MIA and MICSA alter the relationship between the tribes and the State and make state law applicable to all matters except inter-tribal affairs.²³⁰ Thus, the question becomes whether there is a good reason for enforcing limitations on tribal fishing rights.²³¹ In the case of elvers, there is a compelling interest in ensuring the long-term viability of the fishery as well as the species.²³² Furthermore, nothing in UNDRIP gives states or natives the unlimited right to a commercial fishery, especially a right to engage in a commercial enterprise to the detriment of a species' survival.²³³ More importantly, although the Passamaquoddy argue that the State has infringed on their right to subsistence fishing because the State does not include the right to barter or exchange, no definition of subsistence fishing allows commercial fishing.²³⁴ And elver fishing, by its nature, is almost always a commercial enterprise.²³⁵ Thus, once again, the tribes' argument for greater rights in the elver context appears questionable.

229. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, at art. 46, ¶ 2 (Sept. 13, 2007) (emphasis added), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [<https://perma.cc/Q3CM-UUJU>].

230. See ME. REV. STAT. ANN. tit. 30, § 6206(1) (2015).

231. See Declaration on the Rights of Indigenous Peoples, *supra* note 229.

232. See *supra* Part I.C.

233. See generally Declaration on the Rights of Indigenous Peoples, *supra* note 229.

234. See *DMR Implements Emergency Regulation to Protect Maine's Elver Fishery*, *supra* note 155 (“[W]hen elvers are valued at \$2,000 per pound they are not being caught for sustenance, they are being caught and sold.”); see also *Subsistence Definition*, COLLINS ENG. DICTIONARY, <http://www.collinsdictionary.com/dictionary/English/subsistence> [<https://perma.cc/VQ7H-5KLT>] (defining subsistence as “the means by which one maintains life”) (last visited Apr. 15, 2016); *Subsistence Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/subsistence> [<https://perma.cc/8TGM-PB68>] (defining subsistence as “the amount of food, money, etc., that is needed to stay alive”) (last visited Apr. 15, 2016); *Subsistence Fishing*, ALASKA DEP’T FISH & GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=fishing> [<https://perma.cc/A4SB-MJFJ>] (“Subsistence uses of wild resources are defined as ‘noncommercial, customary and traditional uses’ for a variety of purposes.”) (last visited Apr. 15, 2016).

235. Elvers are shipped overseas where they are raised to maturity and sold to satisfy the demand for adult eel. See *supra* notes 26-31 and accompanying text.

On the other hand, MIA and MICSA did not intend to deprive Maine's natives of all cultural autonomy.²³⁶ An agreement that would achieve such an effect would likely violate the principles in UNDRIP and be unreasonably coercive.²³⁷ In this sense, MICSA was not simply a payoff to get the natives to submit to state authority. One of its primary purposes and goals was to settle a long-simmering land dispute, one that threatened the long-term health of the state because of the uncertain land title.²³⁸ In this sense, MIA and MICSA only tangentially dealt with fisheries or jurisdiction. In drafting MICSA, Congress may have wanted to integrate natives into the rest of the state instead of setting them apart. Thus, part of the \$81 million payout was consideration for the natives to submit to Maine's jurisdiction.²³⁹ But Congress may have designed MICSA with the additional goal of making sure that the tribes received the intended benefits of the settlement and determined that the new jurisdictional structure was the best way to achieve that purpose. Nevertheless, there is a strong argument that there are lingering native sovereignty rights that MIA and MICSA did not alter.²⁴⁰ This is especially true if, as one early Supreme Court case noted, fishing rights are "not much less necessary to the existence of the Indians than the atmosphere they breathe[]." ²⁴¹

In summary, MIA and MICSA fundamentally changed the relationship between the natives and the State, but numerous challenges and the recent EPA decision cast doubt on MICSA's effects on tribal rights. If subsistence or other indigenous rights persist,

236. See 25 U.S.C. § 1725 (2012) (enumerating the state's power and reserving certain authority for the native tribes); ME. REV. STAT. ANN. tit. 30, § 6202 (2015) (setting out the sovereign powers of the native tribes).

237. UNDRIP explicitly states that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." Declaration on the Rights of Indigenous Peoples, *supra* note 229, art. 4.

238. See 25 U.S.C. § 1721(b)(1) (stating that one of the purposes of MICSA was "to remove the cloud on the titles to land in the State of Maine resulting from Indian claims"); see also *supra* Part III.B (arguing that the threat of lawsuits over title to certain land caused the federal government to pass MICSA).

239. See 25 U.S.C. § 1721(b)(4) (stating that under MICSA, the tribes were subject to state law).

240. See ME. INDIAN TRIBAL STATE COMM'N, *supra* note 10, at 197.

241. See *United States v. Winans*, 198 U.S. 371, 381 (1905). Although *Winans* demonstrates the centrality of fishing in the culture of the Pacific Northwest, it dealt with the right to fish, not the right to fish without restriction. See *id.* at 377.

Maine will have difficulty enforcing not only its elver regulations, but those regarding other natural resources as well. It is therefore imperative that Maine find a solution to the problem.

IV. POTENTIAL SOLUTIONS

The previous Part discussed the history of MIA and MICSA and the rights of Maine's natives. It concluded that there may be native rights that persist despite the fact that MIA and MICSA both clearly bring the tribes under state jurisdiction for all but "internal tribal matters."²⁴² This Part examines potential solutions to the problem and concludes with an analysis of which action is most likely to succeed.

A. Maintaining the Status Quo

One course that Maine could take would be to do nothing. However, continuing to manage the fishery in its current manner would have some negative effects. The first is uncertainty. Maine has had difficulty gaining control over the elver fishery, and the natives' resistance to these measures creates the possibility that a significant number of people will not obey the law, making the regulatory system ineffective.²⁴³ The second negative consequence is the potential effect on other fisheries. The natives' resistance to Maine's regulation of salt-water fisheries has a long history that extends beyond just elvers.²⁴⁴ This dissatisfaction is bound to create more problems with other fisheries in the future. It will not simply go away when the elver fishery ceases to be valuable or the eel becomes endangered.

The third negative effect is the possibility that MIA and MICSA violate the inherent rights of indigenous peoples.²⁴⁵ Although a strong argument exists that the natives traded the right to regulate their own fishing activities for valuable consideration,²⁴⁶ it remains to be seen the extent to which the tribes contracted away their right

242. ME. REV. STAT. ANN. tit. 30, § 6206(1) (2015).

243. See *supra* Part III.C.

244. See *supra* notes 202-05 and accompanying text.

245. See *supra* Part III.D.

246. See *supra* Part III.D.

to resources. Nevertheless, the recent EPA decision suggests that native rights did survive MICSA to some extent.²⁴⁷

The most important problem with failing to take action concerns the rapidly disintegrating relationship between the tribes and the State. As discussed earlier in this Note, two of Maine's four federally recognized tribes have left the state legislature and called for the United States Congress to revisit MICSA.²⁴⁸ Maine's governor has effectively ended negotiations with the tribes.²⁴⁹ This lack of communication threatens to exacerbate what is already a tense relationship. A compromise must be made, not only to ensure an effective regulatory scheme for elvers, but also to ensure the future success of negotiations between the parties.

B. Brokering a Deal

The best possibility for Maine is to broker a deal with the tribes, providing them with valuable consideration in exchange for an official settlement of jurisdictional issues. One potential deal would be to promise the tribes a certain number of permits for eel farming. As of yet, there are no eel farms in Maine.²⁵⁰ The growth of a domestic eel farming industry would be of great advantage to others involved in the elver trade. A recently proposed law that would require a \$5000 elver export license would create an incentive to develop the domestic industry.²⁵¹ The license requirement adds further fuel for a growing number of academics and business people who question the logic of shipping elvers around the world when a domestic eel farm would be able to participate in the highly

247. *See supra* Part III.C.

248. *See supra* notes 221-22 and accompanying text.

249. *See supra* notes 219-20 and accompanying text.

250. Although the idea has been proposed in the past, there have been no successful ventures in Maine. *See* Tom Groening, *Elver Farming Proposed*, BANGOR DAILY NEWS (Mar. 4, 2000), <http://archive.bangordailynews.com/2000/03/04/elver-farming-proposed/> [https://perma.cc/D9TR-7HGQ]; *see also* Tom Porter, *Eel Farms in Maine? Idea is Gaining Traction*, MPBN NEWS (Jan. 15, 2015), <http://news.mpbnet.net/post/eel-farms-maine-idea-gaining-traction> [https://perma.cc/NN6N-VA9K].

251. Kevin Miller, *Elver Exporters May Need License*, PORTLAND PRESS HERALD (Jan. 26, 2015), <http://www.pressherald.com/2015/01/26/elver-exporters-may-need-license/> [https://perma.cc/W5HJ-T5EY].

lucrative international trade in the animals.²⁵² With the rising popularity of eel as a food fish, and the increasing number of Asian immigrants in America, such a proposition might prove lucrative in the domestic market as well.²⁵³ In return for granting the permits, the natives would agree to settle the disputes over MIA and MICSA.

Alternatively, or if the eel becomes endangered, Maine could fund tribal-run eel farms to boost stocks of American eel. Under this plan, tribes would catch elvers, raise them to a certain size in captivity, and return them to Maine ecosystems. A similar plan using eel farms is already being used in Japan to boost depleted stocks.²⁵⁴ This would provide the tribes with an economic boost and would also help restore or revive the elver fishery.

The problem is that eel farms raise significant environmental concerns. Fish farming can wreak havoc on an ecosystem, as the practice concentrates nutrient pollutants and may lead to algal blooms.²⁵⁵ Furthering this problem is the addition of drugs or pesticides to water in order to increase farm production.²⁵⁶ Nevertheless, with proper oversight and regulation, such farms might diminish the expense and environmental waste of shipping American eel to China and back in order to satisfy domestic demand.

Another plausible solution might be to grant the tribes exclusive regulatory control over certain sections of Maine rivers in exchange for clarification of the issues with the Settlement Acts. This would be similar to some solutions achieved on the West Coast for salmon. Specifically, Columbia River Zone 6, a 147-mile stretch of the Columbia River, is open only to natives for the commercial harvest

252. Proponents of eel farms discussed the possibility at the January 2015 Northeast Aquaculture Conference. See Porter, *supra* note 250.

253. In 2000, 3.6 percent of Americans were Asian. See *Profile of General Demographic Characteristics: 2000*, U.S. CENSUS BUREAU, <https://perma.cc/M52W-RG2Z>. By 2010, this number had risen to 4.8 percent. See *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU, <https://perma.cc/VN7Q-Z86R>.

254. Currently, Japan is attempting to use eel farms to breed elvers in captivity for food, in theory making wild capture of eels unnecessary. See Winifred Bird, *In Japan, Captive Breeding May Help Save the Wild Eel*, YALE ENV'T 360 (Oct. 10, 2013), http://e360.yale.edu/feature/in_japan_captive_breeding_may_help_save_the_wild_eel/2700/ [<https://perma.cc/HRW4-5C9P>].

255. See Charles Clover, *Pollution from Fish Farms 'as Bad as Sewage'*, TELEGRAPH (Sept. 19, 2000, 12:00 AM), <http://www.telegraph.co.uk/news/uknews/1355936/Pollution-from-fish-farms-as-bad-as-sewage.html> [<https://perma.cc/EW74-Q6T6>].

256. David Barboza, *In China, Farming Fish in Toxic Waters*, N.Y. TIMES (Dec. 15, 2007), <http://www.nytimes.com/2007/12/15/world/asia/15fish.html> [<https://perma.cc/FM3H-D5F6>].

of salmon.²⁵⁷ Commercial activity upstream is subject to a quota to ensure that natives can have a viable fishery.²⁵⁸ Maine could set aside certain stretches of river for natives in a similar manner. The tribes might like this plan because it would give them some of the autonomy that they desire. Maine might like it because the autonomy would be limited to only certain areas. The problem with this plan, however, is that it would require Maine to partially give up regulatory control of a section of one or more of its rivers. In light of the ASMFC's increased attention to the health of the American eel population, Maine would worry that unrestrained fishing, even in a small area of river, could have devastating effects for the fishery.

Lastly, there is the possibility that Maine could offer the natives a lump sum or land in exchange for a formal clarification of the issues. This is the simplest deal that could be made and would be beneficial because it would be easier for the state than giving up some regulatory power and less risky for the tribe than setting up an eel farm. However, this suggestion has issues as well. Determining the amount of money or land necessary to settle the uncertainties in MICSA would be very difficult and likely contentious. In addition, political leaders may balk at the suggestion considering the large amount of money that the U.S. government gave the tribes in 1980. Furthermore, the mere suggestion of giving the tribes money may further weaken any attempt to enforce MICSA in the future should the negotiations break down. Lastly, MICSA demonstrates that simply giving money to the tribes, without any attempt to improve their economic condition or help them develop an ongoing source of income, may be problematic.²⁵⁹

C. Concerted Management of the Fishery

Another less likely solution that the tribes have proposed is concerted management of the fishery. This plan might be similar to the one set up in Washington State following the *United States v.*

257. See *Columbia River Zone 6*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, <http://www.critfc.org/about-us/Columbia-river-zone-6> [<https://perma.cc/CF2D-PRJQ>] (last visited Apr. 15, 2016).

258. See *id.*

259. See *supra* Part I.D.

Washington decision.²⁶⁰ Under such a plan, both the state and the tribe would be responsible for determining appropriate limits on the elver harvest.²⁶¹

The problem with this plan is that it would make Maine's ability to regulate its fishery uncertain, as the natives would likely want few to no restrictions on their harvesting. Maine would be unlikely to want to give up its ability to be the sole regulator of fisheries because, in addition to being a major concession, it would also make it more difficult to reach conclusions on fisheries management. Having two governing bodies for regulating elvers would make it more difficult to come to an agreement. The present disintegration of the relationship between the tribes and the state makes such an agreement even less likely, and the uncertainty that inaction would produce could cost the state a valuable fishery. This is because if Maine has difficulties regulating its fishery, it is more likely that the ASMFC will want to intervene instead. The end result would be the loss of a lucrative enterprise for all Mainers.

D. Appealing to the ASMFC

The tribes could come to an agreement with the ASMFC that would either enable them to be exempted from the fishing quota the Commission imposed upon Maine, or that would pressure Maine to expand its elver quota for natives.²⁶² Under this plan, the tribes would appeal to the ASMFC to allow Maine a special native quota that would not count toward the allowed harvest for the rest of Maine's citizens.

260. See 384 F. Supp. 312 (W.D. Wash. 1974); see also Rob Carson, *Boldt Decision on Tribal Fishing Still Resonates After 40 Years*, NEWS TRIB. (Feb. 9, 2014), <http://www.courts.wa.gov/content/PublicUpload/eclips/2014%2002%2010%20Boldt%20Decision%20on%20tribal%20fishing%20still%20resonates%20after%2040%20years.pdf> [<https://perma.cc/9M9D-AQEJ>] ("The decision had consequences for native tribes not only in Western Washington but also throughout the United States—and to some extent for indigenous people around the world.").

261. See *Salmon & Steelhead Conservation*, WASH. DEPT FISH WILDLIFE CONSERVATION, <http://wdfw.wa.gov/conservation/salmon/co-management/> [<https://perma.cc/GD7V-JG28>] (last visited Apr. 15, 2016) (describing the cooperation between tribal and state authorities in regulating salmon and steelhead fisheries following the *United States v. Washington* decision).

262. Such disparate treatment would seemingly violate the Equal Protection Clause of the U.S. Constitution. However, in *Morton v. Mancari*, the Court noted that a preference for federally recognized tribes was not based on racial characteristics, but rather political characteristics. See 417 U.S. 535, 553 n.24 (1974).

One of Maine's chief concerns with the elver fishery has been the threat that the ASMFC will close down the fishery.²⁶³ Reaching a deal with the Commission would negate that threat and allow a narrow exception to the ASMFC's rules. In exchange, the natives would agree to otherwise obey Maine's non-quota-related elver fishing laws. This would give the natives the increased harvest that they desire. Because of the ASMFC's approval, Maine would rest assured that the native harvest would not cause it to face mandatory decreased quotas.

The problem with an agreement between Maine tribes and the ASMFC would be the creation of a precedent for allowing exceptions to its environmental regulations. The Commission would be unwilling to give a special deal to Maine that might cause tribes from the other states to demand a similar deal. The ASMFC could get around this dilemma by making it clear that the exception is a one-time deal and is contingent on Maine having an open elver season. This would prevent special carve-outs for all but South Carolina, in which elver fishing is also legal.²⁶⁴ Nevertheless, it is difficult to see how this would not pave the way for further demands from other tribes.

Additionally, Maine's legislature would probably not like such a deal because it would circumvent its authority. A deal would work around the state and could lead to further tensions. Maine might have good reason to be wary of a separate quota for another reason: the possibility that increased stress on the fishery would lead to either a moratorium or the reduction in the state's non-native quota. Although the ASMFC has the power to set quotas, these numbers are based on the long-term health interests of the species.²⁶⁵ Thus, the ASMFC has likely set the current quota at the maximum sustainable harvest level. Increasing harvest beyond this level would subvert the purpose of the ASMFC and jeopardize the species. Therefore, it is hard to see how any increase in the quota for tribes would not directly take away from the allotment for non-natives.

Furthermore, even if an agreement with the ASMFC succeeded, it would not solve all of the problems with MIA and MICA that this

263. See Sneed, *supra* note 5; see also *supra* Part II.C (discussing ASMFC's power to regulate fisheries).

264. See *supra* notes 53-54 and accompanying text.

265. See *supra* Part II.C.

Note raises.²⁶⁶ The Acts would continue to create issues for the tribes in other regulatory areas, including other fisheries. In addition, making an agreement with the ASMFC would likely fail to ease the tensions between the tribes and the state and might actually exacerbate them.

E. Analysis

The best solution to the problem would be to broker a deal. Regardless of the presence of jurisdictional problems in MICSA, clarifying Maine's ability to regulate native fisheries would introduce much-needed certainty to the law. Such a deal would be valuable because it would affirmatively bring Maine's natives under its regulatory laws. This would enable Maine to create sustainable fisheries and prevent the appearance that the state lacks control, negating the ASMFC's incentive to fill a regulatory void.

The other solutions described above, although they might solve the problem if implemented, are unlikely to occur. Maine is unlikely to want to share its regulatory power with the tribes, and a coordinated management approach might be too difficult to implement. A compromise might arise if the state designates specific rivers or sections of rivers to the various tribes and allows them to harvest and sell a predetermined weight from the area. Again, this might be best if Maine frames it as a deal, with the object of reinforcing the jurisdictional aspects of MIA and MICSA.

A direct appeal to the ASMFC would eliminate Maine's concerns that the Commission will impose harsher penalties on the state because of its inability to control native harvests. Although such a deal might solve one of Maine's biggest concerns, it would do little to further the conservation goals that are necessary to ensure a sustainable eel population. Furthermore, native and non-native harvests do not operate in a vacuum. Adding to the native quota will likely mean decreasing the non-native quota in order to ensure the elver harvest is at a sustainable level. Lastly, and most significantly, such a deal would not solve the lingering jurisdictional problems that affect other areas of regulation.

266. *See supra* Part III.B (discussing the jurisdictional authority MICSA granted Maine over the natives).

Thus, a deal seems to be the best option. The consideration for such a deal does not need be inordinately expensive or even concern elvers. It may not even concern environmental law at all. The ideas listed above²⁶⁷ are only a few examples of the many possible solutions. The deal must, however, be a beneficial compromise and establish some degree of certainty.

The tribes will have leverage in negotiation because of one significant wrinkle: the possibility that Maine's tribes maintain certain indigenous rights regardless of MIA and MICSA.²⁶⁸ If this is the case, then a much better deal, perhaps an amendment to the existing Acts, or even a treaty, would have to be made. This assumes, however, that the natives can limit indigenous rights for money or other consideration. A court might determine that such rights are so central to the identity of the tribes that they cannot simply be bartered away.²⁶⁹ If the rights are able to survive despite the specific language of MIA and MICSA, then it is unclear that any contract or deal could forfeit such rights. Neither Maine, the federal government, nor the natives would want to adopt such a strong understanding of indigenous rights, as it would strangle both the ability to regulate and the ability to receive payment for giving up rights. A softer understanding would balance the needs of the tribes and the regulatory needs of Maine, which would enable the parties to broker a deal effectively.

CONCLUSION

The elver's rise to prominence has led to increased questions about the fishery's long-term stability.²⁷⁰ The conflict between Maine's tribal and state authorities poses difficulties in creating effective means of managing the resource. Although MIA and MICSA make state laws applicable to Maine's tribes and give them municipality status, significant questions remain over the extent to which the tribe contracted away their resource rights in MIA and MICSA.²⁷¹ Thus, Maine's best option is to craft a deal that clarifies

267. *See supra* Part IV.A-D.

268. *See supra* Part III.D.

269. *See, e.g., supra* note 241 and accompanying text.

270. *See supra* Part I.C.

271. *See supra* Part III.D.

the Settlement Acts and enables the state to regulate its fishery effectively and prevent the end of a valuable commercial enterprise. This would enable Maine to regulate not only eels, but also any overharvested or at-risk species. The controversy over elvers is not simply about eels, but it is instead an offshoot of larger jurisdictional questions in the wake of MIA and MICSA. The Settlement Acts have left lingering questions about jurisdiction. Thus, a clarification would have benefits in other areas of the law as well.

Moreover, as the confrontation between a former Passamaquoddy official and New York authorities discussed at the beginning of this Note suggests, the controversy over elver fishing rights is not strictly a Maine concern.²⁷² It is part of a larger issue over the proper balance between state regulatory authority and the rights of American Indians. Although the law governing these relationships is different depending on the state, tribe, and circumstances, the underlying conflict is the same: determining the rights of indigenous peoples in a modernized economy and dealing with the effects of a history of discrimination and economic depression.

The twenty-first century has been one in which people throughout the globe have realized the limits of the natural world. As governments deal with the finite nature and impending exhaustion of resources upon which economies depend, indigenous peoples can often get lost in the shuffle. The question becomes what to do when an urgent need for regulation meets thousands of years of cultural tradition. Guilt plays a role here, because the dams, pollutants, and unregulated fishing of the majority has led to a decreased bounty for the original inhabitants.²⁷³ This guilt is a continuing motivation in the tribal-state relationship, and it is something that the Settlement Acts did not and could not extinguish. Against the background of this guilt, Maine, and other states like it, must walk a thin line between ensuring sustainability, providing for the economy, and respecting the dignity of the first Americans. The boundary is murky and requires elucidation through occasional compromise. As the conflicts between Maine and its tribes show, the time has come to reassess MICSA and give it the certainty necessary to create effective regulations. More than the success of the eel and the

272. See Lawlor, *supra* note 1.

273. See *supra* Part I.C.

lucrative elver fishery is at stake; the health of Maine's natural resources and native tribes depends on such reassessment.

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* J.D. Candidate 2016, William & Mary Law School; B.A. 2012, University of Notre Dame. Though I cannot tell you where eels spawn, I can tell you that this Note sprang from many long conversations with family, friends, and classmates. I would particularly like to thank Jillian Allen for first bringing this issue to my attention and whose help and support has been invaluable throughout the process. I would also like to thank all of the editors of the *William & Mary Law Review* for their hard work in editing this Note, especially Christopher Kaltsas, whose enthusiasm from day one was infectious.