September 2010

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Cassandra Barnum

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http://dx.doi.org/https://doi.org/10.15779/Z38XG12

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A Single Penny, an Inch of Land, or an Ounce of Sovereignty: The Problem of Tribal Sovereignty and Water Quality Regulation under the Maine Indian Claims Settlement Act*

Cassandra Barnum**

This Note has three goals: to describe the Environmental Protection Agency’s 2003 delegation of National Pollutant Discharge Elimination System permitting authority to the State of Maine under the Clean Water Act, to critique the Agency’s decision based on principles of federal Indian law, and to propose solutions to the resultant problems faced by Maine’s Indian tribes—namely, an inability to safely pursue their cultural tradition of subsistence fishing due to insufficiently protective state water quality standards. The Note describes the history of the Maine Indian Claims Settlement Act and the Maine Implementing Act, and the problems those Acts pose with regard to State authority in tribal lands for purposes of National Pollutant Discharge Elimination System permitting. It then details the Environmental Protection Agency’s decision in favor of the State’s authority to regulate water quality in tribal waters, and the First Circuit’s affirmation of that decision. Those decisions, the Note argues, were not made with the proper appreciation for the basic interpretive canons of federal Indian law. Finally, the Note offers and provides normative justifications for three potential solutions to the basic problems posed by the delegation and the Settlement Acts: first, the Environmental Protection Agency could reject state water quality standards as inadequately

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* This Note was awarded the 2010 Irving Oberman Memorial Award, given by Harvard Law School each year for the best student paper in environmental law.

** Law Clerk to the Honorable Patti Saris, United States District Court, District of Massachusetts; J.D., Harvard Law School, 2010. The author would like to thank Professor Joseph Singer for his supervision and guidance, as well as Professor Robert Anderson and Seth Johnson for their input. The views expressed in this Note are those of the author and do not reflect the views of the judiciary. All unpublished documents are on file with author unless otherwise cited.

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protective, based on the federal trust responsibility to Indian tribes; second, the tribes could assert their own regulatory authority over the waters at issue; and, third, the Settlement Acts could be amended to explicitly allow for concurrent state and tribal authority over water pollution regulation within tribal territories.

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INTRODUCTION

The Penobscot Indian Nation and Passamaquoddy Tribe of Southern Maine (together, “the Southern Tribes” or “the Tribes”) have a longstanding commitment to the health and quality of waterways in what is now the State of Maine (the State). The Southern Tribes inhabited the area and survived on subsistence fishing for thousands of years before the arrival of European settlers in North America.1 Given the historical importance of the fisheries and the traditional centrality of the riverine environment to tribal culture, the Southern Tribes’ interest in water quality regulation is vital to their continued cultural survival.2 The current state of the law in Maine, however, is such that the Southern Tribes face the prospect of having no control and only minimal influence over water quality within their own reservations. The legal relationship between the State and the Southern Tribes has a complicated history, and the extent of each respective government’s legal jurisdiction remains a source of conflict between the State and the Tribes today. Environmental

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2. See Rodgers, supra note 1, at 827 (noting importance of watershed to tribal culture); Charles J. Marecic, A Ripple in Stillwater: The Penobscot Indian Nation, the River and Current Indian Law in Maine 2–17 (Spring 1998) (unpublished manuscript); Dean R. Snow, Wabanaki “Family Hunting Territories”, 70 AM. ANTHROPOLOGIST 1143 (1968) (describing hunting patterns of ancestral inhabitants of the area); Letter from Gregory Sample, Attorney for Passamaquoddy Tribe, to G. Steven Rowe, Attorney Gen. for the State of Me. (Apr. 1, 2002) (noting Tribe’s concerns that State regulators would not “assist the tribes to gain protection for other tribal uses of critical importance to tribal culture”); Letter from William Philip, Tribal Chief, Aroostook Band of Micmac Indians, and Brenda Commander, Tribal Chief, Houlton Band of Maliseet Indians, to John Ashcroft, Attorney Gen. for the United States (Mar. 15, 2001) (stating that EPA decision “will significantly impact our Tribal members, our Tribal resources, and our ability to practice our religious and traditional rituals”); Letter from William Philip, Tribal Chief, Aroostook Band of Micmac Indians, and Brenda Commander, Tribal Chief, Houlton Band of Maliseet Indians, to Carol Browner, Adm’r, U.S. Envtl. Prot. Agency (Oct. 16, 2000) (“Tradition runs deep in our Tribes, so despite the warnings, some of our members continue to follow their traditional eating and gathering patterns.”).
regulation is only one component of this conflict, but it is the focus of this Note.

In this Note, I discuss this problem in the context of Maine’s application to the Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES) in the State. Under that program, created under the federal Clean Water Act (CWA), EPA issues permits to dischargers of pollutants, with the goal of maintaining water quality standards set by states. Section 402(b) of the CWA allows EPA to delegate permitting responsibilities to a state, upon the state’s application and satisfaction of certain requirements. On October 31, 2003, EPA approved the State of Maine’s application to administer the NPDES program within the territories of the Southern Tribes. EPA had previously approved Maine’s application for much of the State, but had withheld approval from the State for those facilities within Tribal territory or whose discharges were into Tribal territorial waters.

Of critical importance in this decision was EPA’s uncertainty over the proper interpretation of the Maine Indian Claims Settlement Act of 1980 (MICSA), and its state law counterpart, the Maine Implementing Act (MIA) (together, “the Acts” or “Settlement Acts”). These two Acts ratified a judicial settlement between the State of Maine and the Southern Tribes that resulted from a land claim action the Tribes had brought in federal court in the 1970s. The Acts established a new and unique jurisdictional arrangement between the Tribes and the State, and EPA was forced to decide how that arrangement should function in the context of water pollution control. The State and the Tribes interpreted the Acts differently with regard to the State’s regulatory jurisdiction over tribal natural resources, including tribal waters. In its October 2003 decision, EPA approved Maine’s request to administer permitting for nineteen non-tribal facilities with discharges into tribal waters, but retained federal permitting authority for two facilities administered by

4. See id. § 1342.
5. See id. § 1342(b).
10. The Aroostook Band of Micmac Indians and the Houlton Band of Maliseets were also minimally involved in the settlement, but will not be discussed here.
12. See Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787 (1st Cir. 1996) (describing jurisdictional arrangement as “unique”).
the Tribes. Both the Tribes and the State challenged this outcome, each claiming authority over all twenty-one facilities at issue.\(^3\)

The Maine NPDES delegation poses several interesting problems with regard to interpreting both the CWA and the Settlement Acts. Normally, under the CWA, section 518 allows EPA to treat Indian tribes as states for the purposes of NPDES delegation.\(^4\) The CWA is unambiguous on this front, and in most cases a state would have no claim to NPDES permitting authority over tribal waters; either EPA would delegate NPDES authority to the tribes at issue or would retain that authority for itself.\(^5\) The jurisdictional provisions of the Settlement Acts, however, significantly complicate the situation for Maine and the Southern Tribes.

As part of the settlement embodied in the Acts, the Southern Tribes “agreed to adopt the laws of the State as their own,”\(^6\) and assumed the status of state municipalities for certain purposes.\(^7\) What this means in terms of authority to regulate discharges and set water quality standards, normally set by the state or tribe in whose territory the water exists,\(^8\) is unclear from the text of the Acts. Further complicating the issue are two provisions of MICSA explicitly preempting federal laws that would “affect the application” of state laws,\(^9\) creating a question as to whether the tribes-as-states provision of the CWA is even applicable in Maine. In delegating NPDES authority to Maine over non-tribal discharges to tribal waters, EPA resolved all of these statutory interpretation questions in favor of the State.

This decision has the potential to severely impact survival of tribal culture. As one tribal document argued,

Native laws and customs assign human beings a spiritual duty to maintain the balance and health of the natural world. Encroachment on this basic right of recognition of our own spiritual laws and customs, including the right to manage and use our resources, means cultural genocide for the Maine Indians.\(^10\)

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17. \textit{See id.} § 6206(1).
The threat to tribal culture is quite real because current state water quality standards do not allow for safe subsistence fishing; indeed, state regulators have advised consuming no more than twenty-two meals of fresh-water fish from Maine waters per year.\textsuperscript{21}

In this Note, I detail these interpretive conflicts surrounding EPA's decision to delegate NPDES authority to Maine, attempt to place these conflicts in both historical and jurisprudential context, and offer my own critiques and solutions. Part I offers a brief discussion of the history of the Settlement Acts. Part II then discusses and evaluates EPA's decision-making process, based on the administrative record for the 2003 \textit{Federal Register} notice approving Maine's application, and discusses the First Circuit's analysis of EPA's decision in the 2007 case \textit{Maine v. Johnson}.\textsuperscript{22} I contend that the administrative and judicial outcomes are objectionable, first from a purely interpretive perspective, and then from a substantive perspective. The current inability of the Penobscot and St. Croix Rivers to support subsistence fishing demonstrates the importance of this conflict in the areas of environmental protection and tribal sovereignty, and creates a strong case for more equitable jurisdictional sharing.\textsuperscript{23} In Part III, I propose three potential solutions for addressing the problems raised by the Maine NPDES delegation. The first option is for EPA to maintain the status quo with regard to NPDES delegation, but to reject Maine's water quality standards as insufficiently protective under CWA section 303,\textsuperscript{24} in reliance on the federal trust responsibility to Indian tribes. The second is for the Tribes to assert authority over their own facilities based on either delegated NPDES authority under CWA section

\begin{itemize}
  \item 21. \textit{See Reg'l Envtl. Monitoring & Assessment Program, Me. Dep't of Envtl. Prot., Fish Tissue Contamination in the State of Maine} (2005), \textit{available at} http://www.maine.gov/dep/blwq/hg_pres.htm [hereinafter \textit{Fish Tissue Contamination Report}]; \textit{see also} Donna M. Loring, \textit{In the Shadow of the Eagle: A Tribal Representative in Maine} 159 (2008) ("The paper companies have polluted our river and destroyed our entire way of life, leaving us with toxic waste that I'm certain has caused the death of hundreds of Penobscot people."). Further impeding the exercise of the Tribes' subsistence fishing rights is the fact that many of the native species no longer inhabit the fisheries due to the processes of industrial development and damming. \textit{See Wide-Ranging Benefits, Penobscot River Restoration Trust}, \textit{http://www.penobscotriver.org/content/4033/Widerange_Benefits} (last visited Feb. 21, 2010).
  \item 22. \textit{See} Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007).
  \item 23. Unfortunately, the advent of industrialization and two centuries' worth of negligence in environmental protection has resulted in substantial bioaccumulation of toxins in the Penobscot River and St. Croix River fisheries. \textit{See Dioxin Monitoring Program, Maine Dep't of Envtl. Prot., DEPLW-0963, 2008 Report (Including Data on Dioxin-Like PCBS Collected in the Surface Water Ambient Toxics Monitoring Program)} 5 (2008) [hereinafter \textit{Dioxin Report}]; \textit{see also} Susan Young, \textit{Maine 7th Worst in Toxic Pollution of Water}, \textit{Bangor Daily News}, Feb. 17, 2000, at B1; Marecic, \textit{supra} note 2, at 5 ("The Penobscots' reliance on fishing has been hampered by health warnings posted from Lincoln southward to the coast.").
\end{itemize}
or their own municipal home rule authority. The final option is a legislative amendment to the Settlement Acts that would clarify the jurisdictional sharing arrangement, and establish a system of concurrent state and tribal authority wherein polluters would have to comply with the more stringent of the two regimes. Ultimately, this Note concludes that, while amending the Settlement Acts would be the best option from a substantive perspective, the home rule solution is more realistic politically, because the Tribes can pursue it without antecedent action by EPA or the State.

I. HISTORY OF THE MAINE SETTLEMENT ACTS

The origins of the Southern Tribes' land claims lie in a treaty made in 1794 between the Passamaquoddy Tribe and the State of Massachusetts, then-owner of the land now constituting the State of Maine. In 1790, Congress had passed a law, called the Trade and Intercourse Act, that outlawed the sale of Indian lands without explicit approval from Congress. The treaty between the Passamaquoddy and Massachusetts, made without congressional approval, transferred more than a million acres of land (the Tribe's entire aboriginal territory) from Indian ownership to the State, and was therefore not in accordance with the Trade and Intercourse Act. The modern Passamaquoddi suspected that the Trade and Intercourse Act did, in fact, apply to tribes from the original 13 colonies, and that the 1794 treaty was null and void as a result. The Tribe therefore decided to bring a land claim for the entirety of their ancestral hunting grounds.

26. See Stephen Brimley, Native American Sovereignty in Maine, 13 ME. POL'Y REV. 12, 14–16 (2004); PAUL BRODEUR, RESTITUTION 82, 82 (1985); ROLDE, supra note 1, at 13.
28. See ROLDE, supra note 1, at 20; BRODEUR, supra note 26, at 87.
29. See BRODEUR, supra note 26, at 87.
30. See id.; Brimley, supra note 26, at 15. At the time of the Southern Tribes' land claims in the early 1970s, the Tribes were functionally under the jurisdiction of the State of Maine, and seemed not to have the “trust relationship” with the federal government that would have guaranteed them certain benefits and special status. See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 374 (1st Cir. 1975) (“Since its admission as a state, Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe. . . . In contrast, the federal government's dealings with the Tribe have been few.”). A trust relationship between the federal government and Indian tribes was initially established with the Trade and Intercourse Act of 1790, 1 Stat. 137 (current version at 25 U.S.C. § 177 (2006)), which prohibited the sale of Indian lands without federal approval. For complicated reasons beyond the scope of this Note, it was assumed until the mid-1970s that the Trade and Intercourse Act and accompanying trust relationship did not apply to Indian tribes whose territories were within the original 13 colonies. See ROLDE, supra note 1, at 25; BRODEUR, supra note 26; CHARLES WILKINSON, BLOOD STRUGGLE 225 (2005). This assumption was contested, and ultimately found erroneous, as part of the Southern Tribes' land claims litigation. See BRODEUR, supra note 26, at 95; see also Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649
The doctrine of sovereign immunity required that the Tribe seek the aid of the federal government in bringing suit against the State of Maine, the current owner of much of the land. While the Department of the Interior attempted to stall the case beyond the statute of limitations, the State (at this stage) was actually supportive of the Passamaquoddies getting their day in court. The Passamaquoddies were able to convince a federal district court in Portland to order the Department of Justice (DOJ) to file a protective action on behalf of the Tribe and thereby preserve the court’s jurisdiction over the merits past the statute of limitations deadline. DOJ filed a similar protective action on behalf of the Penobscot Nation. Ultimately, the district court ruled on the merits that the Trade and Intercourse Act applied to the Southern Tribes, thereby creating a trust relationship between the Tribes and the federal government, and thus scuppering the DOJ’s argument that it could decline to litigate on the Tribes’ behalf if no such relationship existed. The First Circuit affirmed.

At this point, as the federal government debated whether to bring the full 12.5-million-acre land claim for both Tribes in federal court, the Tribes attempted to negotiate a settlement with the State that would not involve dispossessing landowners, but encountered significant resistance from state officials. When the Justice and Interior Departments announced their intentions to file ejectment actions on behalf of the Southern Tribes, however, the State finally began to take the Tribes’ claims seriously. There was never any serious risk of the federal government suing to eject its own citizens from their homes, but the Tribes’ legal claims for compensation were strong, so an out-of-court settlement seemed inevitable.

Settlement negotiations did not take place on an even playing field. The Tribes sought to recover, at the very least, title to three hundred

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32. See BRODEUR, supra note 26, at 88–89; ROLDE, supra note 1, at 26.
33. See BRODEUR, supra note 26, at 90–93; ROLDE, supra note 1, at 27; see also Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975); Brimley, supra note 26, at 16.
34. See BRODEUR, supra note 26, at 93–94.
35. See id. at 95; see also Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979); Passamaquoddy Tribe, 388 F. Supp. at 655–60; State v. Dana, 404 A.2d 551 (Me. 1979) (holding that Passamaquoddy are an Indian tribe for purposes of federal law).
36. See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).
37. See Brimley, supra note 26, at 16; BRODEUR, supra note 26, at 97–98.
38. See BRODEUR, supra note 26, at 98–99; WILKINSON, supra note 30, at 227.
39. See BRODEUR, supra note 26, at 101; WILKINSON, supra note 30, at 226.
thousand acres of land or the financial equivalent thereof.\textsuperscript{40} The Maine congressional delegation's first move was to introduce legislation that would extinguish the Southern Tribes' aboriginal title and limit their capacity to collect money damages.\textsuperscript{41} Special White House representatives to the negotiations repeated the threat, but President Carter himself refused to endorse extinguishing the Tribes' aboriginal title; this spurred substantial anger and anti-Indian backlash among the residents and political actors in Maine.\textsuperscript{42} Indeed, state politics played a substantial role in the settlement negotiations, with both a denate seat and a governorship at stake in 1978.\textsuperscript{43} As settlement negotiations slowly proceeded under the shadows of these impending elections, State actors eager for the support of Maine voters insisted the Tribes should not receive any state money or land, nor should they receive any exemptions from state taxes or jurisdiction.\textsuperscript{44}

Ultimately, even after extensive negotiations, the State was simply unwilling to give ground on these issues. Governor Joseph Brennan was elected in 1978 "on a solemn pledge that the Indians would not get an inch of land or a single penny from the State of Maine,"\textsuperscript{45} and understood that even with exclusively federal funding, any settlement viewed as a substantial concession to the Tribes would be politically disadvantageous.\textsuperscript{46} The Tribes, for their part, had little to bargain with beyond the moral weight of their claims; actually bringing their case to court to be decided by a jury of non-Indian Mainers was not a palatable option.\textsuperscript{47} The result was a settlement agreement that, while financially

\begin{itemize}
\item \textsuperscript{40} See BRODEUR, supra note 26, at 106.
\item \textsuperscript{41} See id. at 99; ROLDE, supra note 1, at 34; see also Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that federal government's taking of lands from tribes did not constitute Fifth Amendment taking requiring compensation).
\item \textsuperscript{42} See BRODEUR, supra note 26, at 103–08.
\item \textsuperscript{43} See Rodgers, supra note 1, at 831 (describing settlement negotiations as "threatened by politics, slowed by law, and jeopardized by jealousies"); ROLDE, supra note 1, at 40 ("A crescendo of fury was being reached in Maine."); id. at 42 (describing a "climate of potential violence, fueled . . . by Governor Longley's fiery rhetoric," and noting that "[g]unshops were emptied of weapons, hastily bought by panicked property owners fearful of losing their land and homes"); see also Kagama v. United States, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where [Indian tribes] are found are often their deadliest enemies.").
\item \textsuperscript{44} See BRODEUR, supra note 26, at 109. Maine Governor James Longley was outraged by the proposition that the Southern Tribes should be exempt from state taxes, civil laws, and criminal laws. He purportedly "stalked out of the final meeting charging that the Indians were conspiring to establish 'a nation within a nation.'" Id. His successor, Joseph Brennan, was equally staunch in his opposition to the Tribes' claims, a stance that undoubtedly helped him in his gubernatorial campaign. See id. at 115.
\item \textsuperscript{45} Id. at 115.
\item \textsuperscript{46} See id.
\item \textsuperscript{47} See BRODEUR, supra note 26, at 134; Brimley, supra note 26, at 17 ("Despite having a strong case against the state, after years of laborious politicking and battling in courts, it is easy to see in retrospect why the tribes opted for settlement.").
\end{itemize}
rather generous (on the federal government's dime), arguably subjected the Tribes almost entirely to the State's jurisdiction, with what has been interpreted as only a very narrow exception for "internal tribal matters". Jurisdictionally this was an improvement over the Tribes' situation prior to the settlement, in which they had no legal protection from state interference even in their own tribal affairs, but it was oppressive compared to the more autonomous jurisdictional status enjoyed by many Indian tribes in the Western states.

The settlement ultimately embodied in the MIA and MICSA has been the subject of significant contention between the Tribes and the

48. See id. at 125; see also ME. REV. STAT. tit. 30, §§ 6204, 6206(1) (2010); Diana Loring, Tribal-State Relations, 13 ME. POL'Y REV. 27 (2004) ("The land claims settlement act was a state's dream.").

49. See Maine v. Johnson, 498 F.3d 37, 42 (1st Cir. 2007) ("Maine's power over the southern tribes greatly narrows ordinary tribal sovereignty vis-a-vis state law."). Tribal jurisdiction in states not governed by settlement agreements like that at issue in Maine is a matter of federal law, and specifically, very often, judge-made federal common law. See generally Matthew L.M. Fletcher, The Supreme Court and Federal Indian Law, 85 NEB. L. REV. 121 (2006). Congress has acted in some circumstances to affirmatively prescribe jurisdictional arrangements in Indian country, as with the Indian Country Crimes Act, 18 U.S.C. § 1152 (2006), the Major Crimes Act, 18 U.S.C. § 1153 (2006), and Public Law 280, ch. 505, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (2006) & 28 U.S.C. § 1360 (2006). Absent congressional action, however, Indian aboriginal sovereignty is preserved by default. See United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted."); NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2 (LexisNexis 2005) (1945) ("Those powers that lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty that has never been extinguished. This sovereignty preexisted the formation of the United States and persists unless diminished by treaty or statute or, in certain instances, by federal common law."). The Supreme Court has given a fairly narrow definition to this "limited sovereignty," allowing for tribal jurisdiction over non-Indians, and sometimes even non-member Indians, in only very limited circumstances. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribes have no criminal jurisdiction over non-Indians); Montana v. United States, 450 U.S. 544, 555-56 (1981) (holding that Indian tribes have civil regulatory authority over non-members in Indian country only when non-members "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," or when nonmember activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"). These so-called "Montana exceptions," the areas where the Montana court held Indians to have authority over non-members, have been interpreted narrowly. See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709 (2008); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Nevada v. Hicks, 533 U.S. 353 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997). However, EPA has established a presumption that, once tribes make an initial showing of water quality impairment and its negative impacts, impairment of water quality poses a danger sufficient to satisfy the second Montana exception. See Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,877 (Dec. 12, 1991) (codified at 40 C.F.R. § 131 (2010)). This presumption has been judicially affirmed. See Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998). Tribes who qualify and who are not otherwise subject to limiting legislation are therefore able to regulate non-member discharges under the CWA.
State. Part of the problem is that the language of the Settlement Acts is not particularly clear in certain critical areas—a result of multiple cross-references and internal contradictions. Federal Indian law requires that Congress express its intentions with exceptional clarity if it seeks to authorize state jurisdictional and regulatory authority over Indian tribes. The Settlement Acts, however, embodied a series of compromises between the Southern Tribes and the State rather than a coherent congressional policy; this fact may have contributed to the ambiguities in the Acts’ language. Certainly it has contributed to subsequent litigation, as the Tribes and the State have come to differ on what they thought they were agreeing to and on how the language of the Acts should be interpreted. In evaluating each side’s claims, it is important to remember (and the above history is meant to illustrate) that the compromises in the Settlement Act resulted less from reasoned policy analysis than from political pressures, anti-tribal sentiment, and unequal bargaining power.

II. WATER PERMITTING AUTHORITY UNDER THE MAINE SETTLEMENT ACTS AND THE CLEAN WATER ACT

This Part deals with the conflict between the Tribes and the State about how the CWA and the Settlement Acts should interact. Because neither statute was written with the other explicitly in mind, it is unclear exactly how the Settlement Acts should affect the application of the basic CWA regime. Under the CWA, discharging pollutants from a point source into U.S. waters is illegal without a NPDES permit. To maintain the quality of the water body, EPA issues permits to dischargers limiting the amount of pollutants they may release.

Within this system, states are responsible for establishing and maintaining water quality standards for water bodies within their

50. See, e.g., Passamaquoddy Tribe v. Maine, 897 F. Supp. 632 (D. Me. 1995); Penobscot Nation v. Fellencier, 164 F.3d 706 (1st Cir. 1999); Aroostook Band of Micmacs v. Ryan, 484 F.3d 41 (1st Cir. 2007); Houlton Band of Maliseet Indians v. Ryan, 484 F.3d 73 (1st Cir. 2007); Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007).
51. This problem is discussed in more detail below. See infra Part III.A. As one practitioner put it, “I think people drafted [the Maine Settlement Act] after drinking a lot of wine and partying, because it just doesn’t make a lot of sense.” Douglas Luckerman, Sovereignty, Jurisdiction and Environmental Primacy on Tribal Lands, 37 N EW ENG. L. REV. 635, 638 (2003).
52. See, e.g., Bryan v. Itasca Cnty., 426 U.S. 373 (1976) (finding that Public Law 280, Congress’ grant to certain states of civil adjudicatory authority over Indians, did not include the power to tax or otherwise regulate Indian tribes).
53. See Brimley, supra note 26, at 22 (“It is no secret that tribal-state relations historically have been strained in Maine. The settlement act has done little to improve relations, and in most cases has further contributed to the strain.”).
55. See id. §§ 1312, 1313.
States also have the option of managing the NPDES program and issuing permits themselves, which requires submitting an application that describes proposed permitting programs. With regard to complete and otherwise adequate applications, the CWA stipulates that "[t]he Administrator shall approve each such submitted program unless he determines that adequate authority does not exist" to issue and enforce permits for discharges. This provision has been the source of conflict in Maine. The State has claimed that it has adequate authority to manage permitting for facilities discharging to tribal waters as well as facilities owned and operated by the Tribes, whereas the Tribes have argued that the State lacks adequate authority for those classes of discharging facilities. The following subparts address the details of both the CWA and the Settlement Acts, and the arguments of the Tribes and the State.

A. The Clean Water Act and the Southern Tribes

In most states, it is clear that tribal facilities on reservations are beyond the reach of state authority under the CWA. This is because states generally lack regulatory jurisdiction in Indian country under principles of federal Indian law, and, more importantly, the CWA generally treats tribes as states for purposes of delegation of NPDES permitting authority. With the Settlement Acts, however, the Southern Tribes ceded some authority to the State. The Tribes and the State disagree about just how much and in what areas.

56. See id. § 1313(a)(2).
57. See id. § 1342(b); 40 C.F.R. §§ 123.21–30.
59. See Maine v. Johnson, 498 F.3d 37, 40 (1st Cir. 2007); Public Comments of the Penobscot Nation on the Application of the State of Maine to the United States Environmental Protection Agency for the Authorization to Administer the National Pollutant Discharge Elimination System (Feb. 29, 2000) [hereinafter Penobscot Nation Comments]; Comments of the Passamaquoddy Tribe on the Application of the State of Maine to Administer the NPDES Program (Feb. 29, 2000) [hereinafter Passamaquoddy Tribe Comments]; Corrected Brief of Petitioner, Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007) (No. 04-1363 / 04-1375 (consolidated)); Corrected Brief of Intervenor-Respondent, Maine v. Johnson, 498 F.3d 37 (No. 04-1363 / 04-1375 (consolidated)); Corrected Reply Brief of Petitioner, Maine v. Johnson, 498 F.3d 37 ((No. 04-1363 / 04-1375 (consolidated)); Final Brief of Petitioners, Maine v. Johnson, 498 F.3d 37 (No. 04-1363 / 04-1375 (consolidated)); Final Brief of Respondents-Intervenors, Maine v. Johnson, 498 F.3d 37 (No. 04-1363 / 04-1375 (consolidated)).
61. 33 U.S.C. § 1377(a), (e) (2006). Neither side of the debate has seriously argued that the "tribes as states" treatment could apply to the Southern Tribes under the terms of MICSA, which provides that federal laws "generally applicable to" or "enacted . . . for the benefit of Indians" are not applicable in Maine if they "affect or preempt" the jurisdiction or laws of the State. 25 U.S.C. §§ 1725(h), 1735(b) (2006). The possibility that this language might not prohibit treatment of the Southern Tribes as states under the CWA is addressed in Part IV.B.1; for purposes of this Part, it is enough to note that the baseline assumption of the CWA is that states lack authority over tribal point sources.
The jurisdictional provisions of the 1980 settlement appear mostly in the MIA. The legislative findings of that Act declare that the Southern Tribes agreed to “adopt the laws of the State as their own.” This language suggests that while the Tribes would use the same laws as the State, they would not be under the State’s actual jurisdictional authority (because they would adopt those laws as their own, not simply render themselves subject to the State’s laws). However, the Act later states:

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.\(^6\)

Facially, this seems a fairly straightforward grant of full civil and criminal jurisdiction to the State. The opening clause “Except as otherwise provided in this Act,” however, complicates the statutory analysis, because it refers both backward to the legislative findings and forward to a more specific provision regarding the jurisdictional arrangement:

Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.\(^6\)

This provision seems to render the Tribes functionally equivalent to “municipalities of and subject to the laws of the State,”\(^6\) but is ultimately ambiguous as to the allocation of regulatory jurisdiction between the Tribes and the State. This is because it is unclear to what extent the Tribes’ municipal status is meant to establish the boundaries of their jurisdiction, and it is also unclear what matters qualify as “internal tribal matters”\(^6\) under the MIA.

\(^6\) ME. REV. STAT. tit. 30, § 6202 (2010).
\(^6\) Id. § 6204.
\(^6\) Id. § 6206(1).
\(^6\) Id.
\(^6\) Id.
B. EPA’s Delegation of NPDES Permitting Authority to Maine

This question of what the MIA encompasses with the term “internal tribal matters” became a key point of contention as EPA considered Maine’s application for administration of the NPDES program. EPA initially approved Maine’s application for all non-tribal territories in 2001, but withheld decision on facilities implicating tribal interests.67 Those facilities fall into two categories: those that, while located outside tribal lands, discharge into tribal waters (there are nineteen such facilities), and those that discharge into tribal waters from within the Tribes’ lands (there are two such facilities). On November 18, 2003, EPA approved the State’s application with regard to the nineteen non-tribal facilities discharging into tribal waters, but again reserved decision on the two tribal facilities.68

The critical issue for EPA was whether the State had “adequate authority” over facilities discharging into tribal waters, such that it could issue and enforce NPDES permits for those facilities.69 As noted above, normally the CWA would preclude state authority over Indian territory for purposes of water pollution management. However, Maine argued in its initial application that the CWA was not applicable to the Southern Tribes because, under the Settlement Acts, “members of Maine’s Indian tribes are to be treated exactly the same as any other person, except as otherwise prescribed in the State Act.”70 Specifically, the State argued that the tribes-as-states provisions of the CWA amounted to giving “special status” to Indians, and therefore violated the Settlement Acts’ prohibition on application of federal laws that “affect or preempt” the State’s jurisdiction.71

The Southern Tribes objected to the State’s assumption of authority over water pollution regulation within their territories and waters.72 Their concerns were both practical and theoretical. On the practical side, the Tribes predicted that the State would be insufficiently protective of water quality, and accused the State of favoring non-Indian interests, specifically those of industry, over environmental protection.73 The

69. See supra note 85 and accompanying text.
70. Andrew Ketterer, Attorney General’s Statement of Legal Authority for Maine’s National Pollutant Discharge Elimination System (NPDES) and Pretreatment Programs 34 (Nov. 2, 1999) [hereinafter “Attorney General’s Statement”].
71. Id. at 35–36 (quoting 25 U.S.C. § 1725(h) (2006)).
72. See generally Penobscot Nation Comments, supra note 59; Passamaquoddy Tribe Comments, supra note 59.
73. See Letter from Richard M. Hamilton, Chief of the Penobscot Indian Nation, to Richard G. Manfredonia, Chief of Water Quality Branch at U.S. EPA Region 1 (Dec. 9, 1999) (“The State of Maine has, in the past, failed to enforce its environmental laws with regard to
practical implications of this failure would be an inability to engage in subsistence fishing and other traditional uses of tribal waterways. On the theoretical side, the Tribes' primary concern was that State authority over water quality regulation in tribal territory represented an encroachment on tribal sovereignty as reserved in the Settlement Acts. Specifically, the Tribes alleged that their reserved right to take fish for subsistence under MIA section 6207(4) included the right to regulate water quality, and that water quality regulation was an "internal tribal matter" under MIA section 6206(1).

The Maine Department of Environmental Protection (MEDEP) has frequently faced this accusation from both Indian and non-Indian fronts. See, e.g., Letter from Chief William Phillip, Aroostook Band of Indians, and Chief Brenda Commander, Houlton Band of Maliseet Indians, to Carol Browner, Adm'r, U.S. EPA (Oct. 16, 2000) (noting that "during the past twenty years, the State has failed to take any actions to address the disproportionate environmental and health impacts that state decisions have had on its Tribal citizens," expressing concern that "business interests such as the lumber and paper industry will be the dominant voice heard on environmental matters," and offering several examples); Letter from Nick Bennett, Staff Scientist, Natural Res. Council of Me., to Stephen Silva, U.S. EPA Region 1 (Aug. 8, 2000) ("Failure of Maine's DEP to adequately enforce its own clean water regulations in Indian territories . . . clearly shows that Maine's DEP does not take protection of tribal resources seriously."); Testimony on the Proposed Delegation of the NPDES Program Authority Pursuant to Section 402 of the Clean Water Act from the U.S. EPA to the State of Maine, presented by Laura Rose Day, Watershed Project Director, Natural Resources Council of Maine (Feb. 16, 2000) (expressing concern about "an agency culture of unwillingness to take strict enforcement action" within the MEDEP); Whitney Alston Walstad, Maine v. Johnson: A Step in the Wrong Direction for the Tribal Sovereignty of the Passamaquoddy Tribe and the Penobscot Nation, 32 AM. INDIAN L. REV. 487, 497 (2008) (expressing concern that "in order to accommodate the several large paper companies situated in the areas at issue, the State might not set standards that would ensure the water quality necessary to sustain the Tribe's sustenance and dependence on the rivers"); Christine Malumphy & Randall Yates, In Brief, Muddying Tribal Waters: Maine v. Johnson, Internal Tribal Affairs, and Point Source Discharge Permitting in Indian Country, 35 ECOLOGY L.Q. 263, 267 (2008) ("The state is concerned that there will be 'too much environmental protection' and that business will suffer."); Rodgers, supra note 1, at 834 (citing extensive violations of MEDEP permits); Douglas Luckerman, Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands, 37 NEW ENG. L. REV. 635, 639 (2003) (discussing State's opposition to Tribal water quality standards in light of concerns about business interests).

74. See Affidavit of Daniel Kusnierz, Water Resources Program Manager for Penobscot Nation (Feb. 28, 2000); see also Letter from Chief William Phillip, Aroostook Band of Indians, and Chief Brenda Commander, Houlton Band of Maliseet Indians, to Carol Browner, Administrator, U.S. EPA (Oct. 16, 2000) ("Our people are afraid of getting sick or dying from engaging in our traditional Tribal activities.").

75. See Penobscot Nation Comments, supra note 59, at 11-24; Passamaquoddy Tribe Comments, supra note 59, at 5-26; cf. LORING, supra note 21, at 156 ("The Land Claims Settlement Act was supposed to affirm our sovereign rights, not deny them!").

76. ME. REV. STAT. tit. 30, § 6207(4) (2010) ("Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.").

77. Id. § 6206(1) (providing that "internal tribal matters" are not subject to state regulation); see Penobscot Nation Comments, supra note 59, at 11-24; Passamaquoddy Tribe Comments, supra note 59, at 5-26.
The Department of the Interior (DOI) also provided an opinion on the delegation, urging EPA to retain permitting authority over tribal territory.\textsuperscript{78} DOI argued that EPA's general policy in favor of Indian self-government\textsuperscript{79} as well as the general corpus of federal Indian law should inform any reading of the Settlement Acts and specifically the "internal tribal matters" analysis.\textsuperscript{80} Pursuant to basic precepts of federal Indian law, American Indian tribes are understood to have aboriginal sovereignty over their own people and lands.\textsuperscript{81} Under the reserved rights doctrine, treaties and agreements with Indian tribes constitute grants of rights from the tribes to the United States, and not the other way around, meaning that tribes reserve any rights they do not explicitly cede.\textsuperscript{82} This doctrine has obvious implications for interpreting the Settlement Acts. Further, because divesting a tribe of any of its sovereign powers requires a clear statement from Congress, the Settlement Acts should not be read to abrogate any tribal rights by implication.\textsuperscript{83} DOI's substantive arguments on the proper interpretation of the Settlement Acts in light of these general canons of construction are discussed below in the context of EPA's decision.


\textsuperscript{79} William D. Ruckelshaus, EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), available at http://www.epa.gov/superfund/community/relocation/policy.htm. Specifically, that policy is summarized as follows:

> In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands.

\textit{Id. at 1.}

\textsuperscript{80} DOI Opinion at 9–10; \textit{see also} Walstad, \textit{supra} note 73, at 500.

\textsuperscript{81} See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979).

\textsuperscript{82} See United States v. Winans, 198 U.S. 371, 381 (1905).

\textsuperscript{83} See Bryan v. Itasca Cnty., 426 U.S. 373 (1976); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 n.5 (1999) ("[A]ny general presumption about the legality of executive action runs into the principle that treaty ambiguities are to be resolved in favor of the Indians."); \textit{see also} DOI Opinion, \textit{supra} note 78, at 8.
C. EPA's Rationale in Delegating NPDES Permitting Authority to Maine

1. MICSA Statutory Framework

EPA resolved the NPDES delegation controversy largely in favor of the State, granting the State authority over the non-Indian discharges to tribal waters, and retaining permitting authority only over two tribally-owned facilities. The November 18, 2003 Federal Register notice began by asserting that the State had adequate authority, for purposes of the CWA, over all discharges that would not constitute “internal tribal matters.” In establishing the framework for its decision, EPA seemed to accept DOI’s conclusion that federal Indian law should inform its interpretation of the Settlement Acts:

The State of Maine must have adequate authority in the Southern Tribes' Indian Territories in order for EPA to approve the state's application for those areas, and federal Indian law would generally bar state authority in Indian Country. Thus, EPA must determine whether MICSA granted adequate authority to the state in the Indian Territories. Because of the canon of construction requiring that statutory ambiguities be construed in favor of tribes, such a grant of authority to the state would have to be unambiguous.

However, unlike DOI, EPA found MICSA to provide such an unambiguous grant of authority to the State. It relied primarily on a

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85. Id. at 65,053 (“EPA finds that MICSA grants the state adequate authority to implement its MEPDES program in the Indian Territories of the Penobscot Nation and the Passamaquoddy Tribe, with the exception of any permits for facilities with discharges that would qualify as an internal tribal matter.”).
86. Id. at 65,055.
87. See id. EPA’s decision not to defer to DOI on issues of federal Indian law is notable. EPA stated, “we believe that DOI has misunderstood what Congress intended in MICSA and the practical impacts of implementing an NPDES program. EPA does not disagree with DOI lightly, because the Department is the federal government’s expert agency on Indian law and is charged with administering MICSA.” Id. at 65,059. EPA then went on to state correctly that, given the format of DOI's opinion letter, it was owed "respect" only "to the extent it [was] persuasive." Id.; see also United States v. Mead Corp., 533 U.S. 218 (2001). EPA relied mostly on its experience with the CWA and its status as the agency charged with administering that statute in justifying its decision to disagree with DOI. It noted that the facts of the case present a clear tension between the interest of the Nation in the environmental quality of its Indian Territory and the interest of the state in applying its discharge permitting program statewide. We believe the Agency's understanding of the CWA in general and the NPDES program in particular makes an important contribution when weighing these interests, and that we are in a position to refine DOI's analysis.

Approval of Application of Maine, 68 Fed. Reg. at 65,059. While this may be true, it is undeniable that the bulk of EPA's legal analysis is interpreting the Settlement Acts, and not the CWA. Its justification for disagreeing with DOI is therefore slightly disingenuous.
facial reading of MIA section 6206(1), the general description of tribal powers as coextensive with those of "a municipality of and subject to the laws of the State," buttressed by the statutory definition of "laws of the State" as including "the Constitution and all statutes, rules or regulations and the common law of the State." EPA read this language to mean that the Settlement Acts made "state regulatory authority applicable to the Southern tribes and their Indian Territories, with the very important exception of 'internal tribal matters.'"

EPA found that environmental regulation was included in this general grant of state authority. The basis for this argument was what the First Circuit has termed the "savings clauses" in MICSA. One of these clauses, section 1725(h), provides that federal laws generally applicable to Indians apply to the Tribes in Maine,

except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

EPA acknowledged that this clause did not resolve the issue of what authority the Southern Tribes retained over environmental regulation within their territories, but found it significant that state environmental laws were specifically mentioned. "This provision," EPA reasoned, "supports the conclusion that the original grant of jurisdiction to the state was designed to include some measure of environmental regulation. Otherwise, why would Congress have bothered to protect that area of state authority under section 1725(h)?" EPA did not address the fact that this reasoning from negative implication violated the canon of construction it had cited mere paragraphs earlier.

2. Legislative History of MICSA

EPA's reasoning also relied in part on the legislative history of MICSA. Specifically, EPA cited the following language in the report issued by the U.S. Senate Select Committee on Indian Affairs:

88. ME. REV. STAT. tit. 30, § 6206(1); see supra note 64 and accompanying text.
89. Approval of Application of Maine, 68 Fed. Reg. at 65,057 (quoting ME. REV. STAT. tit. 30, § 6203(4)).
90. Id.
91. See Passamaquoddy Tribe v. Maine, 75 F.3d 784, 789 (1st Cir. 1996).
94. Id.
State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.\footnote{95}{Id. at 65,058 (quoting S. REP. NO. 96-957, at 27 (1980)).}

EPA took this language to "show quite explicitly that Congress understood it was making state environmental regulation applicable to the southern tribes' Indian Territories."\footnote{96}{Id. at 65,057.} In context, however, this legislative history is not quite so clear. Shortly before the passage quoted in EPA's Federal Register notice above, the Senate report states that "[a]pplication of Maine law cannot jeopardize or impair . . . interests of the tribes in their [trust] property."\footnote{97}{S. REP. NO. 96-957, at 27.} In the passage EPA cited, the Senate committee was considering the issue of whether State environmental regulation might burden the Tribes' ability to benefit financially from their lands, not whether it might impair an environmental or cultural interest. The committee did not seem to consider the possibility that the Tribes might want to impose environmental regulations stricter than those of the State. The Senate report therefore did not address whether being subject to Maine environmental laws might itself impair the Tribes' non-financial interest in environmental protection of their trust property, and whether state laws might be "barred from application" in Indian territory on those grounds.

The Senate report did offer the Clean Air Act (CAA) tribal provision as an example of a federal environmental law that would not apply in Maine, because "it affords special rights to Indian tribes and Indian lands," and those rights "would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine tribes."\footnote{98}{Id. at 31.} EPA rightfully pointed out that this language, again, "would be pointless if Congress did not specifically intend to make state environmental regulation applicable in the southern tribes' Indian Territories."\footnote{99}{Approval of Application of Maine, 68 Fed. Reg. at 65,058.} However, it is important to recognize that important differences between the CAA and the CWA, having to do with the relative preclusive effects of those laws, render EPA's conclusion suspect. This argument is discussed in more detail below.\footnote{100}{See infra Part IV.B.1.}
3. The Problem of Concurrent Jurisdiction

Upon concluding that state environmental laws applied in Indian country in Maine, EPA moved on to discuss the question of whether the Southern Tribes could exercise concurrent jurisdiction over water quality. EPA looked to the Rhode Island Indian Claims Settlement Act (RIICSA) as a starting point, since its jurisdictional language is quite similar to that of the Maine Settlement Acts. A First Circuit decision about RIICSA, Rhode Island v. Narragansett Indian Tribe, found Rhode Island tribal jurisdiction to exist concurrently with and ultimately to preempt state environmental regulatory authority in the context of the Indian Gaming Regulatory Act.

EPA emphasized, however, that the Narragansett court explicitly compared RIICSA to MICSA; the court noted that while RIICSA placed no limits on tribal concurrent sovereignty, MICSA explicitly stated that “[t]he Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.” As noted above, MIA section 6206(1) states that the Southern Tribes have

all rights, privileges, powers and immunities . . . and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters . . . shall not be subject to regulation by the state.

Determining that this language rendered the Tribes equivalent to state municipalities for jurisdictional purposes, EPA concluded:

[T]he state has not delegated to municipalities the authority to issue permits that would implement the NPDES program under the CWA. Therefore, EPA sees no basis under MIA for finding that the southern tribes’ concurrent jurisdiction could exclude or preempt state regulation of discharges to waters in the Indian Territories.

101. Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–1716 (2006); see id. §1708 (stating that “settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island”).
103. See 19 F.3d 685, 701 (1st Cir. 1994) ("[W]e rule that the Tribe retains concurrent jurisdiction over the settlement lands and that such concurrent jurisdiction is sufficient to satisfy the corresponding precondition to applicability of the Gaming Act."); see also Approval of Application of Maine, 68 Fed. Reg. at 65,058.
105. ME. REv. STAT. tit. 30, § 6206(1) (2010); see supra note 64 and accompanying text.
This summary conclusion poses several problems. First, while it is true that Maine has not delegated authority to its municipalities to implement the NPDES program specifically, that does not preclude municipal regulatory authority more generally. The important consequences of this fact, namely that municipalities have the capacity for environmental regulation in their own right, is discussed in more detail below in Part III. Further, EPA assumes without justification that section 6206(1) establishes the bounds of tribal jurisdiction as being equivalent to that of a Maine municipality. As argued more thoroughly below, this is not the best reading of the MIA, and unnecessarily cabins tribal authority.

4. Internal Tribal Matters

Because EPA read section 6206(1) broadly to establish the bounds of tribal jurisdiction, it followed that independent tribal authority was limited to “internal tribal matters” under that section. On the question of whether the State exercising delegated NPDES authority in tribal territory would unlawfully intrude on tribal sovereignty over internal tribal matters, EPA’s analysis was directly in conflict with DOI’s opinion on the matter. Indeed, EPA’s Federal Register notice proceeded along exactly the same lines as DOI’s opinion, and with the same structure, but reached opposite conclusions on every issue. Specifically, both opinions proceeded through analyses of sovereignty, statutory language, and judicial precedent.

a. Indian Sovereignty

DOI argued that federal Indian law precepts, including canons of construction and general understandings of inherent tribal sovereignty, should govern the understanding of the phrase “internal tribal matters.” It argued that the Maine Indian tribes retained inherent sovereign authority over their environment, relying on the familiar doctrine in Indian law that “unless expressly divested by Congress, [tribes’] attributes of inherent sovereignty remain intact.” It emphasized language from the Senate report stating that “the settlement

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107. See Me. Const. art. VIII, pt. 2, § 1 (establishing municipal home rule over “all matters ... local and municipal in nature”).
108. See infra notes 246–253 and accompanying text.
109. See infra notes 171–184 and accompanying text.
111. See DOI Opinion, supra note 78, at 5–10.
112. Id. at 7, 8 (citations omitted).
strengthens the sovereignty of the Maine tribes." EPA, in response to this point, argued that this language meant only that

[when Congress preserved a subset of the southern tribes' inherent sovereignty from state regulation by carving out "internal tribal matters" from the grant of state jurisdiction, it was strengthening the southern tribes' sovereignty in comparison with the federal government's nearly complete abandonment of the tribes' inherent sovereignty up to that point.]

Because the State had claimed and exercised total control over the Southern Tribes prior to the land claims litigation, EPA argued, strengthening the Tribes' sovereignty did not equate to granting them the full scope of inherent sovereignty retained by most Indian tribes or the core governmental powers of other tribes. Rather, Congress clearly intended internal tribal matters to be a more narrow reservation of a subset of tribal authority that was unique in scope from those powers retained by other tribes.

EPA concluded, therefore, that the Southern Tribes did not retain the inherent authority to regulate their environment to the same extent as other tribes across the country.

b. Statutory Interpretation

For both DOI and EPA, the matter of sovereignty served only as a "backdrop" against which to make statutory interpretation arguments. The MIA lists several examples of "internal tribal matters" in section 6206(1): "membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income." The First Circuit has said that this list is not exclusive. DOI centered its statutory interpretation on the "right to reside" example and the "tribal government" example. On the right to reside point, DOI argued that the right to reside entails the right to exclude, which in turn "clearly includes the right to regulate." Indian tribes have been found

113. Id. at 7 (quoting S. REP. NO. 96-957, at 14 (1980)).
115. Id.
116. Id. at 65,059.
117. See DOI Opinion, supra note 78, at 8.
118. See ME. REV. STAT. tit. 30, § 6206(1) (2010).
119. See Akins v. Penobscot Nation, 130 F.3d 482, 486 (1st Cir. 1997); Penobscot Nation v. Fellencer, 164 F.3d 706, 709 (1st Cir. 1998). Both cases are discussed below. See infra notes 128–146 and accompanying text; see also Approval of Application of Maine, 68 Fed. Reg. at 65,060; DOI Opinion, supra note 78, at 10.
120. ME. REV. STAT. tit. 30, § 6206(1) (2010).
to have the right to regulate non-member conduct in their territories that threatens tribal health or welfare. DOI argued, and EPA has made generalized findings that "water quality impacts from non-Indian activities would generally have 'serious and substantial impacts on tribal health and welfare.'" As a result, DOI stated that the Tribes should have the right to regulate water quality as an internal tribal matter. On the "tribal government" point, DOI quoted EPA as stating that "water quality management serves the purpose of protecting health and safety, which is a core governmental function, whose exercise is critical to self-government." DOI concluded, "since water quality management is crucial to self-government and MIA recognizes the inherent authority of the Passamaquoddy and the Penobscot to be self-governing," the Tribes' right to self-government should include the right to water quality regulation.

EPA responded summarily to these statutory arguments with the assertion that "[u]nder DOI's interpretation, the internal tribal matters exception would swallow the rule," insofar as DOI "fails to reconcile [its interpretation] with the grant of authority to the state to regulate the environment in the southern tribes' Indian Territories, as reflected in the text, structure, and legislative history of MICSA and MIA." This statement fails to adequately respond to DOI's arguments about sovereignty and statutory interpretation, because DOI presented an alternative reading of those precise factors—text, structure, and legislative history—that EPA relied on to dismiss DOI's opinion.

c. Judicial Precedent

The bulk of DOI's and EPA's arguments centered on the First Circuit's approach to "internal tribal matters" as set out in two cases from the mid-nineties, Akins v. Penobscot Nation and Penobscot Nation v. Fellencer. In Akins, the First Circuit balanced five factors to determine

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Attorney General's Statement, supra note 70, at 14 (claiming state right of entry to regulated facilities).
122. See DOI Opinion, supra note 78, at 11 (citing Montana v. United States, 450 U.S. 544, 566 & n.15 (1981)).
123. Id. (quoting Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (codified at 40 C.F.R. § 131 (2010))).
124. Id. at 11.
125. Id. at 12 (quoting Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,879).
126. Id.
128. See 130 F.3d 482 (1st Cir. 1997).
129. See 164 F.3d 706 (1st Cir. 1998).
that the Nation’s timber harvesting policy was an internal tribal matter, and the *Fellencer* court summarized those factors as follows:

(1) the disputed policy regulated only tribal members; (2) the policy related to lands acquired by the Nation with federal funds received for that purpose, and the lands were considered “Penobscot Indian Territory”; (3) the policy affected the Nation’s ability to regulate its natural resources; (4) at least on its face, the policy did not implicate or impair the interest of the State of Maine; and (5) the recognition that the timber harvesting policy involved an “internal tribal matter” was consistent with prior legal understandings.130

The *Fellencer* court added a sixth factor, namely the “statutory origins” of the program at issue.131 The court emphasized that it would not use these factors as an “essential test”; rather, it stated, “we use the *Akins* considerations as one source of guidance in resolving this case.”132 EPA and DOI each used these factors to support their conclusions on the proper statutory interpretation. Because the *Akins* factors, like many multi-factor analyses, are subject to manipulation in support of any substantive conclusion, I provide only a brief summary of both sides’ arguments on this issue.

DOI resolved the balancing test in favor of finding water quality regulation to be an internal tribal matter.133 DOI acknowledged that tribal regulation of water quality would impact non-member and State interests; however, it argued that the paramount importance of water quality to the Tribes outweighed those non-tribal interests.134 DOI found those competing interests to be of minimal importance, given the State’s other statutory means of protecting water quality under the CWA.135 The Penobscot Nation’s victories in both *Fellencer* and *Akins*, along with federal Indian law, also weighed in favor of the Tribes under DOI’s analysis of the fifth factor.136 On the statutory origins of the program, DOI argued that MICSFA, in stipulating that the Tribes would “manage their land and natural resources in accordance with” the Indian Self-Determination Act, rendered water quality regulation an internal tribal matter.137

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130. See id. at 709.
132. *Fellencer*, 164 F.3d at 709.
134. See id. at 13.
136. See id. at 16.
EPA undertook its own analysis of the Akins factors and found that they weighed, on balance, against finding that regulation of non-member discharges was an internal tribal matter. It found the potential impact on non-members to be much higher than that considered in either Akins or Fellencer, where at most one non-member's interests were at stake. EPA also found, unlike DOI, that the resources at issue were not solely those of the Tribes, given the extraterritorial impacts of regulating flowing water. EPA further made the opposite judgment from DOI in finding that the State's interest in regulation outweighed the Tribes' interests in maintaining water quality. It pointed out that the State had not even intervened in the Akins and Fellencer cases, whereas in this case the State defended its interests fiercely. With regard to prior legal understandings, EPA acknowledged that the weight of federal Indian law and the First Circuit cases weighed in favor of the Tribes, but stated, "EPA finds that this factor is outweighed by the other factors." On the statutory origins point, EPA acknowledged MICSA's reference to the Indian Self-Determination Act, but found that reference outweighed by the grant of regulatory authority to the State elsewhere in the statute.

While EPA found that regulation of non-member discharges into tribal waters was not an internal tribal matter, it undertook a separate analysis with regard to tribally-owned facilities. It found that, under the Akins factors, regulation of tribally-owned facilities did qualify as an internal tribal matter, and it retained permitting authority for the two such facilities in tribal territory.

D. Maine v. Johnson

Predictably, both the Southern Tribes and the State challenged EPA's decision in court. The State sought to control the two facilities over which EPA had retained permitting authority, and the Tribes sought to force EPA to retain authority over the nineteen non-tribal facilities that discharged to tribal water. The First Circuit, in an opinion by Judge Boudin, ruled entirely in favor of the State, finding that Maine had "adequate authority" for purposes of NPDES delegation with regard to

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139. See id. at 65,062.
140. See id.
141. See id.
142. See id.
143. See id. at 65,063.
144. See id. at 65,063–64 (citing 25 U.S.C. § 1725(b)(1)).
145. See id. at 65,065–66.
146. See id. at 65,066.
147. See Maine v. Johnson, 498 F.3d 37, 41 (1st Cir. 2007).
both the nineteen non-tribal facilities and the two tribally-owned facilities.148

Judge Boudin relied primarily on a facial reading of MIA section 6204, which the opinion cited as follows:

any lands or natural resources owned by them [or] held in trust for [the southern tribes] . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person . . . or natural resources therein.149

Judge Boudin found this general grant of authority to be sufficient for purposes of the CWA, notwithstanding the Tribes' potential arguments with regard to concurrent jurisdiction:

The southern tribes say that state authority over land and water resources can coexist with tribal authority, pointing to certain provisions of the Settlement Acts that explicitly make state authority "exclusive." So, the tribes say, the existence of Maine's authority does not automatically negate concurrent tribal authority over the same subject matter. But the question here is whether Maine has adequate authority to implement permitting as to the tribes' lands, and section 6204 on its face is about as explicit in conferring such authority as is possible. What the tribes might do if Maine did not legislate is beside the point.150

The court then quickly dismissed the possibility that the Tribes might meaningfully exercise concurrent jurisdiction, arguing that "[i]f there is 'concurrent' jurisdiction at all, it is subordinate to Maine's overriding authority to act within the scope of section 6204, which clearly includes Maine's power to regulate discharge permitting consistent with the Clean Water Act."151

The court then moved on to consider the "internal tribal matters" exception to state jurisdiction under the Settlement Acts. Judge Boudin rejected the Tribes' challenge to state jurisdiction over the nineteen non-tribal facilities by distinguishing the current case from Akins and Fellencer, wherein the State had not asserted an interest in the litigation:

By contrast, in the present case, Maine affirmatively asserts authority as to both tribal and non-tribal land to regulate discharges into navigable waters. The Settlement Act provisions just quoted affirm that power. If the internal affairs exemption negated so specific a

148. See id. at 48-49.
149. ME. REV. STAT. tit. 30, § 6204; see also Johnson, 498 F.3d at 42. The court's citation of section 6204 omits the introductory phrase "Except as otherwise provided in this Act," the importance of which will be discussed below, infra notes 162-184. Further, the statute does not specify that section 6204 applies to the Southern Tribes; it refers to "all Indians."
150. Johnson, 498 F.3d at 43 (emphasis in original) (citations omitted).
151. Id.
ground of state authority, it is hard to see what would be left of the compromise restoration of Maine's jurisdiction.\textsuperscript{152}

This argument is reminiscent of EPA's argument that DOI’s interpretation of “internal tribal matters” would “swallow the rule.”\textsuperscript{153} In both forums, the Tribes' arguments that environmental regulation could ever be an internal tribal matter foundered on MIA’s explicit grant of environmental regulatory authority to the State, even within the Tribes’ territories.\textsuperscript{154}

With regard to the two tribally-owned facilities and whether they qualified as internal tribal matters, Judge Boudin summarily stated that “[d]ischarging pollutants into navigable waters is not of the same character as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property.”\textsuperscript{155} Remarkably, Judge Boudin declined to even apply the balancing analysis from \textit{Akins} and \textit{Fellencer}. He argued that those cases involved issues arguably close to the (perhaps blurred) statutory borderline, and even there we said that the weighing of such considerations was only “one source of guidance.” \textit{Fellencer}, 164 F.3d at 709. Discharging pollutants into navigable waters is not a borderline case in which balancing, \textit{Akins}, 130 F.3d at 486–87, 488, or ambiguity canons, \textit{Fellencer}, 164 F.3d at 709, can alter the result.\textsuperscript{156}

Here Judge Boudin essentially stated that the statute was unambiguous in its grant of authority to the State, and that detailed analysis or balancing tests were unnecessary. This was a remarkable statement because neither the State, the Tribes, nor EPA had even argued that the balancing tests from \textit{Akins} and \textit{Fellencer} should not apply.\textsuperscript{157}

\section*{III. Canons of Statutory Construction and Interpretive Critiques}

Maine, EPA, and the First Circuit all relied on interpretations of the Settlement Acts that, while facially reasonable, disregarded several important canons of statutory interpretation. Because American Indian law is generally common law rather than statutory law, judges’ interpretations of statutes and other legal texts have been critically important to the history and development of Indian law. Over time, the

\textsuperscript{152} \textit{Id.} at 45.
\textsuperscript{153} \textit{See supra} note 127 and accompanying text.
\textsuperscript{154} \textit{See ME. REV. STAT.} tit. 30, § 6204.
\textsuperscript{155} \textit{Johnson}, 498 F.3d at 46.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} The state had argued that the “language, structure and legislative history” of the Settlement Acts were enough to answer the “internal tribal matters” question absent a detailed balancing of interests, but nonetheless acknowledged the \textit{Akins}/\textit{Fellencer} analysis to be the “framework of relevant First Circuit precedent.” Final Brief for Petitioner, \textit{supra} note 59, at 33.
case law has come to recognize certain unique rules of interpretation that should be applied in Indian law cases. An Indian law casebook enumerates these canons of construction:

[1] treaties, agreements, statutes, and executive orders [must] be liberally construed in favor of the Indians; and [2] all ambiguities are to be resolved in [their] favor. . . . In addition, [3] treaties and agreements are to be construed as the Indians would have understood them, and [4] tribal property rights and sovereignty are preserved unless Congress' intent to the contrary is clear and unambiguous.

These “Indian canons” have developed as a thumb on the scale in favor of Indian tribes, whose lack of bargaining power and political status has traditionally disadvantaged them in litigation. This Part addresses the application of these interpretive methods, and others, to the Settlement Acts; it argues that EPA and the First Circuit failed to apply the Indian canons appropriately, and that this was both jurisprudentially and normatively undesirable.

A. Canon of Sympathetic Construction

The first and most important of the Indian canons, despite Judge Boudin’s insistence that ambiguity canons should not apply in this case, is the canon of sympathetic construction. This canon suggests that statutory ambiguities should be construed in favor of Indian tribes. This


161. Johnson, 498 F.3d at 46.

162. See Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1986) (citing “the familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians”); Byran v. Itasca Cnty., 426 U.S. 373, 392–93 (1976); Philip S. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 HARV. L. REV. 381, 412–18 (1993) (arguing that the canon reflects three early Indian law cases’ creation of a quasi-constitutional clear statement rule with regard to abrogating tribal sovereignty). Professor Frickey compellingly argues that the canon was originally intended to and should serve as a “super-strong clear-statement rule,” suggesting that courts should only find tribal sovereignty to be abrogated by “unmistakable statutory text.” Id. at 414 n.147 (emphasis added). That Judge Boudin found the canon inapplicable because the MIA was “unambiguous” reflects a fundamental misunderstanding of the canon’s function, a misunderstanding also reflected in modern Supreme Court opinions. See id. at 423 (discussing “the extent to which the Indian law canon has been degraded,” serving in one Supreme Court case as “something approximating only a weak end-of-the-game tiebreaker”). The normative undesirability of this degradation is
canon bears on a feature of the Settlement Acts that EPA mentioned only briefly and that the First Circuit did not note at all, namely the cross-referencing between sections 6202, 6204 and 6206 of the MIA.\textsuperscript{163} Section 6204 states, in its entirety,

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.\textsuperscript{164}

It is this seemingly broad grant of authority to the State that the First Circuit relied on to determine that the State had adequate authority in Indian Territory for purposes of NPDES delegation.\textsuperscript{165} However, the introductory phrase “Except as otherwise provided in this Act” means that section 6204 must be read in conjunction with the rest of the MIA.

Section 6202, containing the legislative findings and declaration of policy, is particularly relevant. That section provides in part: “the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State . . . .”\textsuperscript{166} One must take section 6202 into account in reading section 6204, because the language of section 6202 clearly establishes that the Southern Tribes are not “wholly subject to the laws of the state.” As shown above, section 6202 draws a distinction between the Houlton Band of Maliseets and the Southern Tribes, wherein the Southern Tribes “adopt the laws of the State as their own to the extent provided in this Act,” and are not “wholly subject to the laws of the State” as the Maliseets are.\textsuperscript{167}

If nothing else, the cross-referencing of these two sections with the language of “to the extent provided in this Act” and “except as otherwise provided in this Act” creates confusion and ambiguity as to the extent to

\textsuperscript{163} For EPA’s treatment of this issue, see Approval of Application of Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 68 Fed. Reg. 65,052, 65,057 (Nov. 18, 2003).

\textsuperscript{164} ME. REV. STAT. tit. 30, § 6204.

\textsuperscript{165} See supra notes 149–151 and accompanying text.

\textsuperscript{166} ME. REV. STAT. tit. 30, § 6202.

\textsuperscript{167} See also 25 U.S.C. § 1721(b) (2006) (“It is the purpose of this subchapter . . . (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.”) (emphasis added).
which the Southern Tribes should be automatically bound by state law. While the statute does not make clear what it means for the Tribes to “adopt the laws of the State as their own,” it is reasonable to infer that, under such a structure, the Tribes would administer and enforce the laws of the State themselves, rather than being subject to state enforcement. This reading, which maintains a greater degree of tribal sovereignty than the State’s interpretation, should be the favored reading under the canon of sympathetic construction. Further, that canon favors an interpretation that gives real weight to the phrase “[e]xcept as otherwise provided in this Act” in section 6204, by reading it to exclude the Southern Tribes from section 6204’s broad grant of state jurisdiction, by reference to section 6202.

B. Statutes Should Be Read Such That No Part Is Rendered Meaningless

The cross-reference between sections 6204 and 6202 is also relevant with regard to the canon of construction that discourages reading statutes in such a way as to render any portion of those statutes meaningless. Under the meaninglessness canon, section 6204 should be understood to reference section 6202 in its language of exception; reading the statute otherwise would render meaningless the distinction between the Maliseet Indians and the Southern Tribes in section 6202. What would it mean for the Southern Tribes to “adopt the laws of the state as their own” under section 6202 if they and their lands are “subject to the laws of the State,” just as the Maliseets are “subject to the laws of the state”?

Under this reading, the Southern Tribes did not abdicate their inherent sovereign powers in “adopting the laws of the State as their own.” The key to this interpretation is to read section 6206 differently.

168. Recall Douglas Luckerman’s suspicion that “people drafted [the Maine Settlement Act] after drinking a lot of wine and partying, because it just doesn’t make a lot of sense.” Luckerman, supra note 51, at 638.

169. See Wilshire Oil Co. v. Costello, 348 F.2d 241, 243 (9th Cir. 1965) (“A statute should not be construed as to be rendered meaningless.”); Labbe v. Nissen Corp., 404 A.2d 564, 567 (Me. 1979) (“Nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible.”).

170. Consider a similar argument with regard to the canon of construction disfavoring readings that create redundancy. See Continental Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 555 F.3d 399, 410 n.32 (5th Cir. 2009) (citing “the requirement that our interpretations not create redundancies”); United States v. Menasche, 348 U.S. 528, 538–39 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute . . . .”) (internal quotations omitted). If section 6204 rendered all Maine tribes automatically subject to the laws and jurisdiction of the State, the waiver of sovereign immunity in section 6206(2) would be redundant. See ME. REV. STAT. tit. 30, §§ 6206(2), 6204 (2010) (“The Passamaquoddy Tribe, the Penobscot Nation and their members may sue and be sued in the courts of the State to the same extent as any other entity or person in the State provided, however, that the respective tribe or nation and its officers and employees shall be immune from suit when the respective tribe or nation is acting in its governmental capacity to the same extent as any municipality or like officers or employees thereof within the State.”).
from how EPA, the State and the First Circuit read it. Section 6206(1)
states,

Except as otherwise provided in this Act . . . the Passamaquoddy Tribe
and the Penobscot Nation shall have, exercise and enjoy the rights,
privileges, powers and immunities, . . . and shall be subject to all the
duties, obligations, liabilities and limitations of a municipality of and
subject to the laws of the State, provided, however, that internal tribal
matters . . . shall not be subject to regulation by the State.171

Note the fundamental grammatical ambiguity here with regard to the
phrase “and subject to the laws of the State.” That phrase could attach to
the Tribes as its antecedent (that is, “[The Southern Tribes] . . . shall be . . .
subject to the laws of the State”) or it could attach to “a municipality” as
its antecedent (that is, “a municipality of and subject to the laws of the
State,” as distinct from a tribal or otherwise independent municipality).
Recall that EPA relied primarily on section 6206(1) to establish that the
Tribes were subject to the laws of the State; this suggests that it adopted
the first reading (wherein the Tribes are the antecedent to the phrase
“and subject to the laws of the State”).172 The State and the First Circuit
also read this passage to demark the outer bounds of the Tribes’ powers
under the Settlement Acts, despite the fact that this conclusion blatantly
violates the canon of sympathetic construction: section 6206(1) is subject
to the far narrower, more grammatically intuitive reading wherein
“municipality” is the antecedent to the immediately following phrase
“and subject to the laws of the State.” Again, this reading is buttressed
by taking the introductory phrase, “except as otherwise provided in this
Act,” seriously. If the Southern Tribes genuinely “adopt[ed] the laws of
the State as their own” under section 6202, it is fair to infer that they
retained the independent sovereignty to enforce and implement those
laws.

Section 6206(1), then, should be read merely to establish that the
Southern Tribes have the powers to act as “a municipality of and subject
to the laws of the State,” and that when they do so, they have all the
powers and limitations of such a municipality. But section 6206(1) does
not on its face limit tribal authority to those powers or bind it with those
limitations when a tribe is acting pursuant to tribal sovereignty, and not
state law municipal authority.173 The “internal tribal matters” proviso at

171. ME. REV. STAT. tit. 30, § 6206(1) (emphasis added); see supra note 64 and
accompanying text for the complete text of § 6206(1), including examples of “internal tribal
matters.”

172. See supra note 89 and accompanying text.

173. See Marecic, supra note 2, at 23–24 (explaining that Southern Tribes, “for purposes of
relations with state government, maintain an additional presence, that of a federally recognized
Indian tribe and a municipality”); Brimley, supra note 26, at 18 (“The tribes argue they would
never relinquish their sovereign status and that the municipal status was meant to be in addition
the end of section 6206(1) can easily be harmonized with this reading if one understands it as a clarification that certain tribal functions, namely those that resemble local government functions, are not subject to state regulation because the Tribes undertake them in their role as Tribes and not as municipalities. The distinction between acting as a Tribe and acting as a municipality is not an obvious one, but this is precisely why the "internal tribal matters" proviso in section 6206(1) was necessary. Because tribes and municipalities undertake so many of the same activities of self-government, it was necessary to clarify that tribal governance not undertaken pursuant to state law municipal authority would not be subject to state regulation. This result finds support in the canon of construction that a proviso should be read to apply to or limit only the clause to which it is attached, and not other portions of the section or statute in which it is found. Pursuant to that canon, the proviso that "internal tribal matters" are not subject to state regulation should serve to limit only the phrase preceding it, namely that Tribes should have the powers and limitations of a municipality of and subject to the state; that proviso should not be read to have any impact on the meaning of another portion of the statute, like section 6202.

Admittedly, most authorities have not read the statute this way (including EPA, the State, and the First Circuit). The statute and its

to their sovereignty—granting them access to municipal funding sources for the development and repair of infrastructure on the reservation, for example.

174. ME. REV. STAT. tit. 30, § 6207 is subject to a similar reading. That section, which states that Tribes may regulate hunting and fishing within their territories, could be understood as an implied limitation on other, non-specified tribal powers, just as the internal tribal matters proviso has been read by EPA, the State, and the First Circuit to impliedly limit tribal authority over all non-internal tribal matters. However, it could just as easily be read to clarify that when Tribes are acting as tribes, the state may not intrude upon their sovereign authority to regulate hunting and fishing on their territories, even by non-members. Similarly, the second clause of section 6206(2), see supra note 170, draws a distinction between the Tribes as tribes, which rendered themselves subject to suit as part of their compromise with the state of Maine, and Tribes as municipalities, which are protected from suit to the same extent as other Maine municipalities.

175. It might not always be possible to know, for a given action, whether the Tribe seeks to act pursuant to municipal or tribal authority; in many cases, it might make no difference—where no limiting state law applies, for example. Cf. Burkett v. Youngs, 199 A. 619, 622 (Me. 1938) ("That it may not always be easy to distinguish local administration from State administration, and separate State from municipal functions, presents no new difficulty."). However, where drawing a distinction is necessary, history might help in determining what government actions constitute municipal activity. See, e.g., City of Augusta v. Augusta Water Dist., 63 A. 663, 664 (Me. 1906) (listing "the education of children, the care of roads, the furnishing of fire protection, and of water for domestic and public purposes," as traditional "public municipal functions").

176. See Aaron v. United States, 204 F. 943, 946–47 (8th Cir. 1913) (describing "the cardinal canon of construction that an exception or proviso in a statute affects and relates to the paragraph or clause in which it is found, or to which it is annexed, only, and not to the entire statute, or to other sections, paragraphs, or clauses in it, unless a different intention and purpose on the part of the legislative body is clearly disclosed by the enactment").

177. See also Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983).
legislative history are subject to multiple reasonable interpretations.\footnote{178} While this much is true of many legal texts, the poor drafting of the Settlement Acts, replete with cross-references, run-on sentences, and grammatical uncertainties, makes them highly ambiguous. This should trigger the Indian canons of construction and place a heavy thumb on the scale of a reading that, like the one offered above, maximizes tribal sovereignty.

The Indian canons are not applied as consistently as would be ideal in the jurisprudence of the First Circuit or the Supreme Court,\footnote{179} but there is a strong normative basis for doing so here (beyond the general normative reasons, which are already strong, to apply the canons in every Indian law case involving statutory ambiguities).\footnote{180} The Settlement Acts were negotiated in a context that was highly unfavorable to the Tribes on several levels. As shown in Part I above, the Tribes essentially had to make concessions to the State in order to get anything at all, since the federal government would be very hesitant to bring suit against its own citizens in Maine.\footnote{181} Further, the settlement was negotiated at an unfortunate historical moment from the perspective of the Tribes. While the federal government had shifted away from its "termination" policy by the late 1970s, the so-called "self-determination era" had not yet fully caught on, especially for eastern tribes, by the time the Settlement Acts were passed in 1980.\footnote{182} This yielded an arrangement for the Tribes that,  

\footnote{178.} For example, the House Report has language supporting both the EPA reading ("Essentially, the Maine Implementing Act accords the Passamaquoddy Tribe and Penobscot Nation the status of municipalities under State law; it provides for the application of State law to persons and property within the Penobscot Indian Territory and the Passamaquoddy Indian Territory . . . ") and the reading suggested above ("It provides that the Tribe and Nation will adopt certain laws of the State as their own but the independent legal status of the Tribes under Federal law is recognized . . . "). H.R. REP. NO. 96-1353, at 19 (1980).

\footnote{179.} See, e.g., City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (reversing the Court of Appeals' finding "that the parcels [subject to the land claim in the case] qualify as 'Indian country,' as that term is defined by statute, because they fall within the boundaries of a reservation set aside by the 1794 Canandaigua Treaty for Indian use under federal supervision"). But see Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (preserving Indian hunting and fishing rights under the applicable treaty by reference to the canon that treaties should be interpreted as Indians would have understood them at the time of their making).

\footnote{180.} See Frickey, supra note 162, at 412–18 (arguing that early Indian law cases establish a quasi-constitutional clear statement rule for diminishing tribal sovereignty).

\footnote{181.} See supra note 39 and accompanying text.

\footnote{182.} President Nixon issued a special message to Congress in 1970 advocating self-determination for Indian tribes. See Special Message to Congress on Indian Affairs, 1 PUB. PAPERS 564, 564–67 (July 8, 1970). Congress endorsed this approach when it passed the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450–458 (2006), in 1975, marking a major legislative shift in Indian policy away from the "Termination Era" of the fifties and sixties, during which the federal government sought to terminate the trust relationship between itself and Indian tribes. These events did not immediately affect a sea change in tribal-state or tribal-federal relations, however. See WILKINSON, supra note 30, at 239 (describing the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629h (2006), negotiated shortly after}
especially under EPA’s restrictive interpretation, falls short of the sovereignty enjoyed by many Indian tribes in the American West. Interpreting the Settlement Acts more broadly under the Indian canons would equalize this imbalance and align the Maine tribes’ sovereignty with that enjoyed by tribes elsewhere in the country, and with the current trend towards tribal self-determination.

IV. POTENTIAL SOLUTIONS TO THE PERMITTING AUTHORITY CONFLICT

EPA’s decision, as affirmed and revised by the First Circuit in Maine v. Johnson, leaves the Southern Tribes in dire straits with regard to their ability to safeguard their own natural resources. As normatively desirable as the statutory interpretation suggested above might be, it is unlikely to be adopted in light of the fact that EPA’s decision has already been judicially affirmed in Maine v. Johnson. There is no reason to believe that EPA would go through the substantial administrative effort it would require to change its official interpretation; even if it did, Maine would inevitably challenge that decision and win before a court that has already offered its own interpretation of the Settlement Acts closely aligned with that endorsed by the State.

In principle, the CWA allows for EPA to revoke delegated NPDES authority from states that fail to implement the program in accordance with statutory requirements. Those requirements are extensive and it is entirely possible that Maine’s program fails on one or more grounds, but the possibility of revocation is minimal: no NPDES delegation has ever

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Nixon’s statement, as “termination in disguise”); NEWTON ET AL., supra note 49, at 103 (“The concept and operation of a self-determination and self-government policy runs counter to many of the long-established bureaucratic ways. . . . Furthermore, the framework for the administration of Indian affairs in both the executive and legislative branches of the federal government has been an historic impediment to Indian policy reform.”). Further, the historic distinction between western and eastern tribes in the field of Indian law meant that most federal Indian policies were directed at western tribes; the tribes of the original thirteen colonies had long been subject, however unjustly, to state control. See ROLDE, supra note 1, at 37 (“[T]he federal government saw the Maine Indians in a totally different light from the warriors on the western frontier, i.e., in Indian Country. The Maine tribes had long since lost their land, warfare ability, and power and had acknowledged themselves dependent subjects of Massachusetts.”) (emphasis omitted); see also BRODEUR, supra note 26, at 82; Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

183. See supra note 49.
184. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (laying out policies “in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications,” and “to strengthen the United States government-to-government relationships with Indian tribes”); Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOCS. 00887 (Nov. 5, 2009) (“My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13,175.”).
been withdrawn, even in the face of substantial state program deficiencies. Therefore any realistic solution to the problem of inadequate water quality will have to accept, and attempt to work around, the Maine delegation.

In this Part, I propose three potential solutions to the problem and discuss the relative desirability of implementing each. The first is for EPA to reject Maine’s water quality standards under the federal trust responsibility to Indian tribes. The second is for the Tribes to attempt to regulate the contested facilities using tribal NPDES permitting authority or municipal home rule authority. The third is to amend the Settlement Acts to clearly provide for concurrent State and tribal authority over the contested facilities. This third solution would be optimal for purposes of clarifying the rights of the various parties to the conflict, and for strengthening tribal sovereignty. The first solution would address none of the underlying legal sources of the conflict, but would be helpful in terms of mitigating the practical impacts of the NPDES delegation. For reasons of political feasibility, the second proposed solution, and specifically the municipal home rule option, is the most realistic because it does not require authorizing action by any entity other than the Tribes; however, any such tribal action would undoubtedly face legal challenges in state and federal court.

A. Solution 1: EPA Rejects Maine’s Water Quality Standards Under the Federal Trust Responsibility

As noted above, the practical problem with Maine implementing the NPDES program, from the tribal perspective, is twofold: the Tribes fear inadequate enforcement, on the one hand, and insufficiently protective water quality standards—and concomitantly weak pollutant limitations in NPDES permits—on the other. With regard to the second, it is possible that the federal trust responsibility, a core element of federal Indian law, could justify EPA in rejecting the State’s water quality standards under the CWA. EPA addressed this possibility in its decision:

The CWA reserves substantial authority to EPA in states authorized to administer the NPDES program so that the Agency can oversee the state program and ensure its consistency with the CWA. The most obvious authority EPA retains is the ability to object to proposed state NPDES permits that EPA determines violate the CWA. Following an EPA objection, the state must either address EPA’s concerns or EPA ultimately takes over issuance of the permit. 33

186 See Erik R. Lehtinen, Virginia as a Case Study: EPA Should Be Willing to Withdraw NPDES Permitting Authority From Deficient States, 23 WM. & MARY ENVTL. L. & POL’Y REV. 617, 629 (1999) (explaining the process of withdrawal and noting that none of the forty-two NPDES delegations made as of 1999 had ever been withdrawn).
U.S.C. 1342(d)(2). Where states have authority to promulgate water quality standards, EPA is also charged with reviewing those standards and can object to any standards that do not meet the requirements of the CWA. Again, if the state does not address EPA’s objection, EPA ultimately has authority to take over promulgation of such standards. 33 U.S.C. 1313(c)(3). . . . EPA concludes that MICSAs and the CWA combine to charge EPA with the responsibility to ensure that permits issued by Maine address the southern tribes’ uses of waters within the state, consistent with the requirements of the CWA.¹⁸⁷

Determining when EPA might be justified in taking such action pursuant to the trust responsibility requires an analysis of two distinct but interconnected legal regimes, namely the scope of the common law federal trust responsibility and the scope of the EPA Administrator’s discretion to reject state water quality standards under CWA section 303.¹⁸⁸


The United States’ trust responsibility to the Indian tribes is the result of common law doctrine that has developed over nearly two centuries. The doctrine originated with Justice Marshall’s opinion in Cherokee Nation v. State of Georgia, wherein he said of the Indian tribes:

They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.¹⁸⁹

This wardship construct developed over time into a concept of a trust relationship, in which the Indians are the beneficiary and the United States the trustee.¹⁹⁰ As the Court explained it in 1942, the federal government’s “conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”¹⁹¹ In that same case, the Court quoted then-Judge Cardozo on the nature of the fiduciary relationship:

¹⁸⁷. Approval of Application of Maine, 68 Fed. Reg. 65,052, 65,067–68 (Nov. 18, 2003). The Johnson court also addressed the possibility of EPA invoking the trust responsibility to protect tribal interests, but only to find that the issue was not ripe for decision because EPA had not acted on a particular permit. See Maine v. Johnson, 498 F.3d 37, 47 (1st Cir. 2007).
¹⁸⁹. 30 U.S. 1, 10 (1831); see also Ed Goodman, Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right, 30 ENVTL. L. 279, 291 (2000).
A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Therefore the United States' obligations with regard to the Indian tribes are substantial, and the government is held to a high standard. However, because of the doctrine's common law essence, its scope is by nature unclear.

The government's general role as environmental protector and regulator further complicates the issue. Because the relationship between the federal government and the Indian tribes is more complex than that of a simple financial trustee and a beneficiary, and because the resources at issue are often subject to competing demands, the government's role is a complex one; in the environmental context, the federal government must play multiple roles, acting as regulator and decision-maker as well as trustee. The situation is further complicated by the existence of statutes that guide and constrain federal action with regard to the environment.

The relationship between environmental statutes and the federal trust responsibility is not clearly defined. The Supreme Court addressed the issue in two cases from the early 1980s, establishing that there is an affirmative link between the demands of an applicable statute and the nature of the federal government's trust responsibility in a given circumstance. In United States v. Mitchell (Mitchell I), the Court explained that the General Allotment Act of 1887, which allotted reservation lands to individual Indians, did not create an attendant federal trust responsibility to manage the environment on those lands.

The legislative history of the Act plainly indicates that the trust Congress placed on allotted lands is of limited scope. Congress

193. See Goodman, supra note 189, at 300 ("[T]he varying articulations of the trust standard by the federal courts have given the United States a great deal of flexibility in interpreting and implementing its role in protecting tribal resources."); Ray Torgerson, Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law, 2 TEX. ON C.L. & C.R. 165, 168 (1996) ("The judiciary has always assumed the largest role in interpreting the trust doctrine, attempting to define its meaning, establishing its scope, and applying its mandates."); Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471, 1493 (1994) ("The trust doctrine is a prominent doctrine in Indian law, but it is also perhaps the most amorphous. Its precise origin and content remain unclear after nearly two centuries of jurisprudential interpretation.").
194. See, e.g., Nevada v. United States, 463 U.S. 110, 127 (1983) ("In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent.").
intended that, even during the period in which title to allotted land would remain in the United States, the allottee would occupy the land as a homestead for his personal use in agriculture or grazing. . . . The General Allotment Act, then, cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands. Any right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act.\textsuperscript{196}

The Court did not mention the general common law trust responsibility that the federal government owes to the Indian tribes, suggesting that perhaps the more general trust responsibility was superseded by the specific obligations imposed by the statute.\textsuperscript{197}

Three years later, however, in \textit{United States v. Mitchell (Mitchell II)}, the Court did invoke the general trust responsibility in addition to the trust obligations placed on the federal government by specific statutes.\textsuperscript{198} In \textit{Mitchell II}, the Court found that while the General Allotment Act did not establish a broad federal trust responsibility for managing the environment on Indian lands, certain other timber management and other statutes or regulations did establish such a responsibility, and exposed the federal government to claims for money damages when it breached that trust.\textsuperscript{199} The plain language of the statutes was not the Court's only reference point, however. The Court explained:

Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."\textsuperscript{200}

This suggests that a trust responsibility may be implicit in the substantive obligations of a statute even if not explicitly stated in that statute's language; however, the Court rejected this possibility, at least with

\textsuperscript{196} \textit{Id.}
\textsuperscript{197} The D.C. Circuit embraced this view. \textit{See N. Slope Borough v. Andrus}, 642 F.2d 589, 612 (D.C. Cir. 1980); \textit{see also California v. Watt}, 668 F.2d 1290, 1324 (D.C. Cir. 1981) (describing the scope of the federal trust responsibility "as being no broader than that of the environmental statutes with respect to which the Secretary already had a duty to comply").
\textsuperscript{199} \textit{See id.} at 224 ("The language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship.").
\textsuperscript{200} \textit{Id.} at 225 (internal citations omitted).
reference to the availability of damages, in its most recent pronouncement on the trust responsibility in *Navajo Nation v. United States*.201 In *Mitchell II*, however, the Court also invoked the general common law trust responsibility in support of its conclusion, stating:

> Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”202

The Court did not explain how the general trust responsibility and the statutory trust responsibility related, except to say that the former supported the finding of the latter. It left open the question of whether the general trust responsibility can be limited or precluded by a more specific statutory trust responsibility.

Subsequent to *Mitchell II*, some lower courts have taken a narrow view of the scope of what the trust responsibility requires, a view largely affirmed in the more recent *Navajo Nation*.203 Neither the Supreme Court nor the lower courts, however, have given as much attention to or put such limitations on what the trust responsibility permits. Therefore, even if the trust responsibility does not require EPA to reject Maine water

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201. 129 S. Ct. 1547 (2009). Specifically, the Court stated,

> The Federal Government's liability cannot be premised on control alone. The text of the Indian Tucker Act makes clear that only claims arising under “the Constitution, laws or treaties of the United States, or Executive orders of the President” are cognizable (unless the claim could be brought by a non-Indian plaintiff under the ordinary Tucker Act). In *Navajo I* we reiterated that the analysis must begin with “specific rights-creating or duty-imposing statutory or regulatory prescriptions.” If a plaintiff identifies such a prescription, and if that prescription bears the hallmarks of a “conventional fiduciary relationship,” then trust principles (including any such principles premised on “control”) could play a role in “inferring that the trust obligation [is] enforceable by damages.”

*Id.* at 1558 (citations omitted). Critically, the Court’s holding addressed only the availability of damages as a remedy for violations of the trust responsibility, and therefore does not preclude the possibility that an agency could choose to act pursuant to a trust responsibility implicit in a statutory scheme.


203. See United States v. Wilson, 881 F.2d 596, 600 (9th Cir. 1989) (“Absent some showing of federal control or supervision over tribal monies or properties, or the existence of a fiduciary duty based on an authorizing document such as a statute or a regulation, there can be no trust relationship between . . . Indians and the BIA.”) (internal citations omitted); see also Skokomish v. Fed. Energy Regulatory Comm’n, 121 F.3d 1303, 1308 (9th Cir. 1997) (affirming that Federal Energy Regulatory Commission has trust responsibility to Indians, but only “exercises this responsibility in the context of the [organic statute]”). These holdings essentially deny or at least ignore the existence of a general common law trust responsibility to the Tribes, locating the trust responsibility solely in the provisions of applicable statutes. This narrow approach would seem to violate the dicta from *Mitchell II* affirming the existence of such a general trust responsibility. *Mitchell II*, 463 U.S. at 225.
quality standards under the CWA, EPA may nevertheless be able to invoke the trust responsibility as justification for doing so.

2. The Federal Trust Responsibility and Water Quality Standards

a. Water Quality Standards: Statutory Framework

The CWA requires states to adopt water quality standards for each of their water bodies, and each standard "shall remain in effect unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act." More specifically, the Act requires the following:

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

Taken together, these provisions require that the Administrator approve water quality standards unless they are insufficiently protective of designated or existing uses, or do not protect public health or welfare and serve the purposes of the CWA generally. EPA has formalized these requirements in regulations, explaining that:

(a) Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. The review involves a determination of:

(1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;

(2) Whether the State has adopted criteria that protect the designated water uses;

(3) Whether the State has followed its legal procedures for revising or adopting standards;

(4) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and

205. Id. § 1313(c)(2)(A); see also 40 C.F.R. § 131.2 (2009).
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Whether the State submission meets the requirements included in §131.6 of this part. . . .

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (a)(5) of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal standards under section 303(c)(4) . . . if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (a)(5) of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act. 206

Courts have demonstrated willingness to defer to EPA in its review of state water quality standards, whether EPA has accepted or rejected those standards. 207 For the purposes of the Southern Tribes, however, EPA's technical expertise is not at issue, nor are most of the review criteria stipulated in the regulations cited above. Instead, the relevant legal issue is whether, if Maine's water quality standards satisfy the requirements of the CWA and attendant regulations for the population at large, EPA nevertheless has authority by virtue of its trust responsibility to Indian tribes to reject those standards in the interest of the Tribes, who will be disproportionately impacted by water contamination. Answering this question requires analyzing the scope of the trust responsibility as it relates to the CWA, as well as the scope of the general common law trust responsibility.

b. The CWA Implicates the Federal Trust Responsibility

Neither the Clean Water Act nor EPA's implementing regulations address the issue of EPA's duty to protect specific segments of the population that might require cleaner water than the population at large. As such, the statute and regulations are ambiguous on that question, and EPA should receive deference from a court for its interpretations of what the regulations require. 208 This should be true even if a court has spoken to the issue in the past, as long as the court did not stipulate that its

207. See, e.g., Natural Res. Def. Counsel v. EPA, 806 F. Supp. 1263, 1272–73 (E.D. Va. 1992) ("The arbitrary and capricious standard of review under section 10(2)(A) of the APA, 5 U.S.C. § 706(2)(A) (1976 and Supp. III 1979) is a highly deferential one. . . . As already stated, this Court must afford the EPA great deference in a highly technical administrative decision such as this one."); Miss. Comm'n on Natural Res. v. Costle, 625 F.2d. 1269, 1276 (5th Cir. 1980) ("It was not unreasonable for the EPA Administrator to interpret the Act as allowing him to require states to justify standards not in conformance with the criteria policy.").
interpretation was the only possible correct one. This factor might encourage EPA to take action despite potential litigation from the State.

One district court has deferred to EPA's use of a national average for fish consumption in approving state water quality standards, despite the fact that "protection of subpopulations such as sportfishers and Native Americans will likely never be effectuated by any broad based rule." However, this establishes only that EPA is not required to use a more tailored standard; it does not preclude EPA from doing so. This is especially true given that the court did not mention or discuss the trust responsibility, basing its decision instead on deference to EPA's technical expertise.

If EPA were to interpret the Act and attendant regulations as implicating the trust responsibility and therefore requiring higher water quality standards than those issued by the State, it should find support in the canon of sympathetic construction. While the Supreme Court has at some points held that this rule applies only to statutes passed for the benefit of Indians, at other points it has applied the rule to statutes that deal with Indians, even if not passed for their benefit.

c. The Common Law Trust Responsibility

In lieu of finding that the CWA implicates a specific statutory trust responsibility, EPA could draw on the general common law trust responsibility, referred to in *Mitchell II*, to support rejecting state water quality standards as insufficiently protective of Indian tribes. As noted above, that general trust responsibility holds the federal government to strict fiduciary standards in its management of tribal property. This includes the duty to protect natural resources. In this case, the natural resource at issue is the fish populations; the Southern Tribes have a

211. See supra note 162 and accompanying text.
214. See supra note 202 and accompanying text.
215. See supra note 201 and accompanying text. The holding in *Navajo Nation v. United States*, 129 S. Ct. 1547 (2009), sharply limited the availability of damages as a remedy for violation of the trust responsibility, by finding damages available only where a statute explicitly established a trust relationship. But this does not affect the federal government's general trust obligation to Indian tribes and their resources.
216. See Klamath Water Users Protective Ass'n v. U.S. Dep't of Interior, 189 F.3d 1034, 1037 (9th Cir. 1999) (acknowledging the federal government's "fiduciary responsibility to protect and manage the natural resources of the Indian Tribes").
statutory right to subsistence fish in Maine waters, meaning that the fish are a tribal natural resource subject to the federal trust responsibility.\(^{217}\)

The state water quality standard for dioxin is sufficient to protect fish populations from disease and death, but does not prevent bioaccumulation of dioxin in fish sufficiently to protect Indian tribes that fish for sustenance.\(^{218}\) While the fish do not suffer, and therefore the natural resource is adequately protected in one sense, the state water quality standard at its current level does not adequately protect natural resources as resources. That is, an element of nature, like a plant or animal population or a mineral deposit, is not a "resource" unless it is useful to humans.\(^{219}\) In this respect, the D.C. Circuit was arguably mistaken when it stated that "where the Secretary has acted responsibly in respect of the environment, he has implemented responsibly, and protected, the parallel concerns of the Native Alaskans."\(^{220}\) As a factual matter, protecting human health often requires more stringent standards than protecting the environment alone. As a legal matter, therefore, the trust responsibility to protect tribal natural resources should permit, if not force, EPA to reject state water quality standards that are insufficiently protective of the Southern Tribes' health. It is not unreasonable to suggest that the "punctilio of honor the most sensitive"\(^{221}\) requires, or at

\(^{217}\) ME. REV. STAT. tit. 30, § 6207(4) (2010) (affirming Tribes' ability to take fish for sustenance).

\(^{218}\) See Examples of Penobscot Nation Concerns Raised During Tribal Review of NPDES Permits (Sept. 1, 1999); Letter from Richard M. Hamilton, Chief, Penobscot Indian Nation, to Richard G. Manfredonia, Chief, Water Quality Branch, U.S. EPA Region 1 (Dec. 9, 1999); DIOXIN REPORT, supra note 23; FISH TISSUE CONTAMINATION REPORT, supra note 21.

\(^{219}\) Merriam-Webster's Online Dictionary defines resource as "a : a source of supply or support : an available means — usually used in plural b : a natural source of wealth or revenue — often used in plural c : a natural feature or phenomenon that enhances the quality of human life." Definition of Resource, MERRIAM-WEBSTER, http://www.merriamwebster.com/dictionary/resource (last visited Sept. 28, 2010). EPA took a similar approach to this issue. See Approval of Application of Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 68 Fed. Reg. 65,052, 65,067 (Nov. 18, 2003) ("[T]he right to take fish for individual sustenance must mean more than the right to reel in fish that expose the tribe to unreasonable health risks."); EPA, Response to Comments on Maine's Application for NPDES Program Authorization in the Territories of the Penobscot Nation and Passamaquoddy Tribe 84 (Oct. 31, 2003) ("It would be a hollow bargain indeed if MICSRA secured to the Southern Tribes the right to take fish for sustenance if consuming those fish exposed tribal members to unreasonable health risks."); see also Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979) ("[I]t is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish."); United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980) (finding the right to fish valueless without a guaranteed share of the fishery); cf. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (holding that harm to humans, even absent harm to the environment, is sufficient injury in fact to support standing to sue).


\(^{221}\) Meinhard v. Salmon, 164 N.E. 545, 546 (1928) (quoted in Seminole Nation v. United States, 316 U.S. 286, 297 & n.12 (1942)).
least allows, the federal government to manage tribal resources in such a way as to maintain their usefulness to the Tribes.

This solution seems feasible, insofar as EPA explicitly addressed the trust responsibility in its decision, stating that “EPA is in a position, consistent with MICS A, CWA, and our trust responsibility, to require the state to address the tribes’ uses consistent with the requirements of the CWA.”

EPA’s current focus on environmental justice as a policy area of particular concern should also weigh in favor of taking action to protect tribal resources. However, given EPA’s caveat that “EPA cannot now predict with any particularity how the CWA’s requirements will govern particular permitting or implementation issues as they arise under the [Maine Pollution Discharge Elimination System] program,” and its further admonition that “EPA’s oversight role does not mean that the tribes will necessarily be completely satisfied with the conclusions EPA reaches about how the CWA applies to particular tribal uses,” the Southern Tribes should not unduly rely on this possibility. Further, as a solution to the problems presented by the Settlement Acts and the NPDES delegation, the trust responsibility solution is not ideal insofar as it serves as a stopgap measure rather than addressing the root of the problem by bolstering the Tribes’ control and sovereignty over their own resources.

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223. See, e.g., Hearing on EPA’s 2011 Budget Proposal, Senate Committee on Environment and Public Works, 111th Cong. (2010) (statement of Lisa P. Jackson, Administrator, U.S. Envtl. Prot. Agency), available at http://yosemite.epa.gov/opa/admpress.nsf/0/3d0b9ff4e4ad7b18852576d30054ab8?OpenDocument (last visited Sept. 28, 2010) (“We have begun a new era of outreach and protection for communities historically underrepresented in environmental decision making. We are building strong working relationships with tribes, communities of color, economically distressed cities and towns, young people and others, but this is just a start. We must include environmental justice principles in all of our decisions.”); Bullets for Carol Browner from the Four Tribes, supra note 20, at 1 (“EPA has collected Environmental Justice data that shows that because of cultural and sustenance practices, Tribes are disproportionately impacted by environmental contamination.”); Penobscot Nation Comments, supra note 59, at 7 (quoting Letter from Ida E. Deer, Ass’t Sec’y, Indian Affairs, U.S. Dep’t of Interior, to Carol M. Browner, Adm’r, U.S. Envtl. Prot. Agency (Apr. 8, 1994) (“President Clinton’s recent Executive Order regarding environmental justice should be applied to this permit process. As you know, one purpose of the Order and the federal government’s increased emphasis on environmental justice is to ensure that minorities in our society live in healthy communities. . . . Due to the island location of its reservation, the Penobscot Indian Nation is subject to a disproportionate burden of the risks and harms occasioned by industrial plants . . . .”)).

224. Approval of Application of Maine, 68 Fed. Reg. at 65,068. EPA also warned that if actions taken pursuant to the trust responsibility had the effect of preempting or affecting the application of state law, such action would run afoul of MICS A’s savings clauses. See id. at 65,067.
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B. Solution 2: Allow Tribes to Assert Authority over Their Own Facilities via Delegated NPDES Permitting Authority or Municipal Home Rule Authority

The second solution is for the Tribes to assert authority over their own facilities through two possible methods. First, the Tribes could attempt to convince EPA to delegate NPDES permitting authority directly to them, as allowed under the Clean Water Act. Second, the Tribes could simply impose their own permitting requirements on the facilities within their territories pursuant to their inherent rights to govern local matters as municipalities under state law.

1. Delegated NPDES Authority

The more drastic potential solution to the problem would be for EPA to delegate NPDES permitting authority to the Tribes as states (TAS) under CWA section 518. EPA noted but did not address in detail this possibility in its decision.

The clearest statement of Congress's preference for tribal regulation of surface water quality is section 518, which, among other measures, provides for EPA to authorize Indian tribes to administer programs under the CWA, including NPDES programs. 33 U.S.C. 1377(e). The state and some commenters have vigorously argued that the savings clauses in MICSA prevent CWA section 518(e) from applying in Maine. EPA is not acting today on an application from any Maine tribe to implement the NPDES program, therefore, the question of whether section 518(e) operates in Maine is not directly relevant to our decision.

The "savings clauses" in MICSA to which EPA refers occur in sections 1725(h) and 1735(b), in nearly identical language. Section 1735(b) provides:

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

226. See supra note 61 and accompanying text; see also Rodgers, supra note 1, at 832 n. 142. ("The TAS provisions of the Clean Water Act are generally applicable laws that do apply.").
The State's argument that the TAS provision does not apply under the savings clauses assumes that treating the Tribes as states for purposes of NPDES permitting would “affect or preempt the application of the laws” of the State. As briefly discussed above in Part II, the legislative history for this section of MICSA, quoted in EPA’s decision, does address the issue to some degree. The Senate report stated:

> It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian [sic] or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, for example, although the federal Clean Air Act, 42 U.S.C. 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

The State read this language to implyly preclude application of the CWA’s TAS provision. However, as noted above in Part II, the CWA and CAA tribal provisions function differently. The CAA provision cited in the Senate Report gives tribes the exclusive right to redesignate their territories for purposes of setting air quality standards; redesignation is a critical component of that process. As such the CAA provision prevents state air quality standards from applying within Indian territories. By contrast, the CWA TAS provision simply allows tribes to be treated as states for purposes of any portion of the water regulation process. The Southern Tribes could therefore be given charge of NPDES permitting for designated facilities without preventing the State’s water quality standards from applying in those waters, and the application of state law would be neither “affected” nor “preempted.”

The legislative history of CWA section 518 explicitly mentions the Settlement Acts, a fact that the Maine v. Johnson court drew on to

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229. Corrected Brief of Intervenor-Respondent, supra note 59, at 22; Attorney General’s Statement, supra note 70, at 35–36.
230. See supra notes 98–99 and accompanying text.
233. See 42 U.S.C. § 7474(c) (2006) (“Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.”) (emphasis added).
234. See 33 U.S.C. § 1377(e) (2006) (“The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section . . . .”).
conclude, incorrectly, that TAS could never apply to the Maine Tribes. Specifically, the congressional record states: "This section does not override the provisions of [MCSA]. Consistent with subsection (h) of the Settlement Act, the tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes under subsection (d) of this provision." The court in Maine v. Johnson stated, by contrast, "When in 1987 Congress empowered Indian tribes generally to apply for 'treatment as state' status under the Clean Water Act, 33 U.S.C. § 1377(e), including permitting authority, the legislative history noted that 'tribes addressed by the [federal] Settlement Act are' excluded." Judge Boudin here selectively quoted and thus mischaracterized the legislative history of section 1377 in his blanket statement that Congress intended the Maine tribes to be excluded from treatment as states. In fact, Congress only excluded the Tribes from TAS under section 1377, subsection (d), which provides for cooperative agreements between states and tribes. The legislative history did not exclude the Tribes from treatment as states under subsection (e), and presumably Congress would have done so explicitly, as it did with subsection (d), had it intended to do so at all.

Indeed, there would be no reason for Congress to exclude the Tribes from treatment as states under subsection (e), because of its highly customizable nature. Treatment of the Tribes as states solely for purposes of NPDES permitting over a small number of facilities would not even prevent state permitting authority from applying over the same facilities; dischargers would simply have to comply with the most stringent permit limit. Because Maine law would still apply, there is no reason to think that such a scheme would "affect or preempt the application of the laws" of the State. It is worth noting that "affect the application" is subject to two interpretations; it could mean "have an effect on the substantive outcome," or it could mean "have an impact on whether or not the State law applies." Obviously, treating the Tribes as states would affect the application of Maine law under the first interpretation if the Tribes set stricter discharge limits than the State, which they almost certainly would. But, again, the canon of sympathetic construction weighs in favor of the second interpretation.

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236. Maine v. Johnson, 498 F.3d 37, 43 (1st Cir. 2007).
237. It is possible, but unlikely, that the legislative history’s reference to subsection (d) rather than (e) constituted scrivener’s error. In that event, obviously, the TAS solution would be far less realistic. Cf. Johnson v. United States, 529 U.S. 694, 723–24 (2000) (Scalia, J., dissenting) (suggesting that one should only assume a scrivener’s error “where the effect of implementing the ordinary meaning of the statutory text would be patent absurdity or demonstrably at odds with the intentions of its drafters”).
Moreover, there is precedent in the Federal Register for this reading of the phrase “affect the application.” In a response to an application for an amendment adding safety provisions to a nuclear power license, the Nuclear Regulatory Commission made clear that while the added specifications were more stringent than the specifications already in the license, they did not “affect the application” of those specifications. Specifically, the NRC stated: “The proposed changes do not affect the application of the Technical Specifications. The additional surveillance provides an additional limitation and is therefore more stringent than the current requirements.” This suggests that a requirement in excess of the statutory requirement does not affect the application of the statute. Given that reading the phrase “affects the application of the laws of the State” to mean “has an effect on whether or not State law applies” is a reasonable and not unprecedented interpretation, the rule of sympathetic construction should control and the statute should be read in this manner to maximize tribal authority and autonomy.

“Preempt” is a technical term defined by Black’s Law Dictionary to mean “that where legislature has adopted scheme for regulation of given subject, local legislative control over such phases of subject as are covered by state regulation ceases.” Tribal authorization for NPDES permitting would not have the effect of preempting state law under this definition. State law would still apply, and violators of state water pollution control laws would still be subject to enforcement actions by the state. Because state legislative control would not “cease,” and in fact would not even be abrogated, authorizing the Southern Tribes under the CWA would not preempt the application of state law.

These readings of the terms “affect” and “preempt” do not render the terms redundant of one another; rather, preemption is a subset of affecting. That is, the application of a law can be affected without being entirely preempted, which is why the statute uses both terms. For example, if the federal law at issue required state water quality standards to be approved by tribal governments before those standards would apply, the laws of the State would be affected but not preempted, because the particular standards would be inapplicable prior to approval, but the law in general would still be in effect. The CWA as it actually exists does not pose either of these problems; federal and state water quality measures exist concurrently and are enforced by both federal and state authorities, and therefore authorizing the Southern Tribes under the CWA would neither affect nor preempt the application of State laws.

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240. Id. at 6994.
As with the trust responsibility solution, this TAS solution would likely face stringent opposition from Maine, given the State’s arguments on the matter over the course of the NPDES delegation.\textsuperscript{242} TAS would likely not fare well before the First Circuit either, which has already stated in dicta (if incorrectly) that TAS does not apply.\textsuperscript{243} Furthermore, given that the First Circuit also already affirmed EPA’s delegation of NPDES authority to the State with regard to the nineteen non-tribal facilities discharging into tribal waters in \textit{Maine v. Johnson}, it is almost unthinkable that that delegation would ever be reversed.\textsuperscript{244} Therefore the scope of any TAS delegation would be limited to the two tribally owned facilities that EPA has not yet delegated to the State despite the First Circuit’s finding in \textit{Johnson} that such delegation would be proper.\textsuperscript{245} This limited scope renders the TAS solution, even if it could be implemented, far from ideal. The TAS solution has the advantage over the trust solution, however, of providing the Tribes with real control over their own resources and bolstering their sovereignty.

\section*{2. Municipal Home Rule Authority}

As noted in Part II above, EPA’s delegation decision briefly addressed the issue of concurrent state and tribal authority over water pollution regulation.\textsuperscript{246} EPA concluded that because tribal authority equaled that of other Maine municipalities, which have not been delegated NPDES permitting authority, the Tribes’ potential concurrent authority over environmental regulation did not preempt state permitting authority in Indian territory. I have argued broadly that to understand tribal authority as being limited to that of a Maine municipality is a poor reading of the Settlement Acts.\textsuperscript{247} However, it is worth considering whether it might be in the Tribes’ interest to accept such a reading if doing so can vest them with the power they seek. Therefore, for purposes of the following discussion, I will assume that the Tribes’ regulatory authority is identical to that of a Maine municipality.

Because EPA was concerned only with establishing adequate state authority in Indian territory, it focused on finding that tribal municipal authority, whatever its extent, did not preempt state regulatory authority. It did not consider the question of what municipal regulatory authority the Tribes might have short of that preemptive capacity, but there is

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\item \textsuperscript{242} See, e.g., Corrected Brief of Intervenor-Respondent, \textit{supra} note 59, at 23–25; Maine v. Johnson, 498 F.3d 37, 47 (1st Cir. 2007).
\item \textsuperscript{243} \textit{Johnson}, 498 F.3d at 43.
\item \textsuperscript{244} \textit{Id.} at 45.
\item \textsuperscript{245} \textit{Id.} at 45–47.
\item \textsuperscript{246} See Approval of Application of Maine, 68 Fed. Reg. at 65,058; \textit{supra} notes 102–108 and accompanying text.
\item \textsuperscript{247} See \textit{supra} notes 171–184 and accompanying text.
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reason to believe that such municipal authority may include the power to regulate water pollution. Maine municipalities are granted home rule authority under the State Constitution.\textsuperscript{248} Municipal home rule authority does not necessarily preempt state regulatory authority,\textsuperscript{249} and therefore EPA was correct that tribal concurrent authority would not have the effect of precluding state authority in Indian territory. But what EPA did not note, critically, is that state authority would not necessarily preempt municipal regulation either. Indeed, the Town of Jay, Maine, has enacted its own environmental permitting program, which has survived challenges from industry in state and federal courts.\textsuperscript{250} Given this precedent, there is reason to believe that the Tribes could enact their own similar program in their municipal capacity. Drawing on municipal authority rather than inherent sovereignty might be in the Tribes' interest, for two reasons: the State has already argued that the Tribes' authority equals that of Maine municipalities,\textsuperscript{251} and the Tribes' municipal-type authority also would not face any of the myriad common law limitations on the exercise of tribal sovereignty over non-members.\textsuperscript{252}

Like the TAS solution, this municipal home rule authority solution is unlikely to fare well on the ground in light of political realities.\textsuperscript{253} Also like the TAS solution, it suffers from the same limitations in scope, and has the further disadvantage of acquiescing to the State's very limited reading of tribal jurisdiction as equivalent to municipal authority. However, unlike the trust responsibility solution or the TAS solution, it

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\textsuperscript{248} ME. CONST. art. VIII, pt. 2, § 1 ("The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.").

\textsuperscript{249} See Robert W. Bower, \textit{Home Rule and the Preemption Doctrine: The Relationship Between State and Local Government in Maine}, 37 ME. L. REV. 313, 325 (1985) (explaining that, under the model on which the Maine Constitution's home rule provision is based, home rule "authority shall not be deemed to limit or restrict the power of the legislature to enact laws of statewide concern uniformly applicable to every city").

\textsuperscript{250} See Int'l Paper Co. v. Town of Jay, 928 F.2d 480 (1st Cir. 1991); Int'l Paper Co. v. Town of Jay, 665 A.2d 998 (Me. 1995).

\textsuperscript{251} See, e.g., Corrected Brief of Petitioner, Maine v. Johnson, \textit{supra} note 59, at 12.

\textsuperscript{252} See \textit{supra} note 49. Of course, municipal authority faces its own similar limitations, given that the scope of municipal home rule is by definition limited to matters "local or municipal in character." ME. CONST. art. VIII, pt. 2, § 1. Any municipal permitting program would therefore presumably not bind actors outside the tribes' territories.

\textsuperscript{253} Especially given that the State has authority under the Maine Constitution to prohibit municipal environmental regulation with legislation, it seems like it would be easy for the state to defeat, if it wanted to, any tribal effort to implement such a program. Of course, to do so, the state would need to prohibit all other municipalities, including the Town of Jay, from implementing environmental regulations as well, given the constitutional provision's statement that municipal home rule allows all actions not prohibited "by Constitution or general law." ME. CONST. art. VIII, pt. 2, § 1 (emphasis added); see also ME. CONST. art. IV, pt. 3, § 13 (prohibiting special legislation).
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has the advantage of not requiring any action from EPA or any other non-tribal actor.

C. Solution 3: Amend the Settlement Acts to Accommodate Tribal Interests

The most appealing if not necessarily the most feasible solution, from both a practical and a theoretical perspective, is to amend the Settlement Acts to better accommodate tribal interests in environmental protection. The State would probably be even less amenable to this solution than to the others suggested above, but because the Settlement Acts are a matter of federal law, the State’s opposition theoretically would not be fatal to this possibility. The political issues surrounding this proposition are discussed in more detail below.254

Concurrent authority over water pollution regulation is entirely familiar under the CWA.255 The basic model adopted by the CWA is that more than one authority can impose regulations on water pollution, but that no state or local standard can be less stringent than the established federal standard.256 Indeed, under the cooperative federalism structure of the CWA, states often implement water pollution strategies that are more stringent than the federal baseline.257 In most states, state authorities have adopted responsibility for NPDES permitting; however, absent that delegation, states still have authority to implement their own water quality programs under section 1370.258 In Massachusetts, for example, the Commonwealth and EPA operate separate regulatory permitting regimes.259 While often state and federal permits will be issued jointly, in the event that they contain different requirements, dischargers are
The Southern Tribes and Maine could exercise concurrent authority over the contested discharge sites in a similar fashion. This could be accomplished via a narrow amendment or a broad one; both options are discussed below.

1. **Narrow Amendment: Add a Water Pollution Management Provision**

   The simplest amendment from a drafting perspective would be to simply add a provision to the Settlement Acts stipulating that the Southern Tribes have concurrent regulatory authority over discharges of pollutants into tribal waters. This amendment could take the form of a simple add-on granting the Tribes this explicit power and spelling out its parameters. The authority could be tied to the CWA or could be free-standing (the Penobscot Nation, it is worth noting, already has an extensive water quality monitoring program entirely independent of CWA requirements). One complexity of locating tribal authority in the CWA would be that, currently, the only source of that authority would be the TAS provision in section 518. While this provision allows for concurrent federal and tribal authority (as the federal government always has authority under the CWA), it does not provide for concurrent state and tribal authority. In order to avoid the necessity of amending or affecting the CWA, the Tribes could be authorized, based on their sovereign authority, to operate programs identical in content to the NPDES and water quality programs concurrently with the State.

   While such an amendment has the appeal of simplicity and narrow scope, it does not strike at the heart of the problem. Ultimately the Tribes are suffering from a restrictive reading of the Settlement Acts that limits their inherent sovereignty in contravention of both federal Indian policy and judicial canons of construction. The practical implications of this reading in the environmental context are limited, at least for now, to

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260. Dominion Energy Brayton Point, LLC, 12 E.A.D. 490, 497 n.5 (EAB 2006) (“Under the CWA, the Region is required to apply the more stringent of the section 316(b) technology standard or any applicable state water quality standard.”).


water quality concerns, and therefore it is tempting to address those implications narrowly and others as they arise, if only because to do so is less daunting than addressing the problem at its roots.

But such patchwork problem solving creates difficulties of its own. In this case, granting the Tribes explicit authority over water pollution regulation would concede that the Tribes do not have the necessary sovereignty to operate such a program under the current structure of the Settlement Acts, and would simultaneously maintain and strengthen that structure. In other words, such an amendment would constitute a pyrrhic victory, and an inelegant one at that.²⁶⁵ It could ultimately create more confusion than it resolved, since it would leave ambiguous the extent of tribal sovereignty.

2. Broad Amendment: Rework Jurisdictional Provisions of MIA

At the opposite end of the spectrum, a different potential amendment could simply scrap much of the current language on jurisdiction in the MIA and replace it with a more definitive and clear statement on the extent of tribal authority. The Tribes would hope, pursuant to such an amendment, to exercise the same sovereignty enjoyed by many of the tribes in the western United States.²⁶⁶ Such sovereignty, however, would come with the same limitations that apply to Indian tribes outside of Maine in exercising sovereignty over non-members, and courts have severely limited the ability of Indian tribes to exercise authority and jurisdiction over non-Indians even within their own territories.²⁶⁷ Certain precedents suggest that these limitations would not prevent the Tribes from enacting and managing an effective water pollution regulation system,²⁶⁸ but the recent judicial trend in Indian law has increasingly been to constrict tribal sovereignty as to non-members and their lands.²⁶⁹

Therefore any revision of the basic jurisdictional provisions of the Settlement Acts, even if taken to the outer reaches of inherent tribal sovereignty as understood by the courts, would require explicit congressional authorization of water pollution regulatory authority to

²⁶⁵. While this collateral damage could be limited by a proviso stipulating that the amendment should not be construed to limit the Tribes' inherent authority under the Act, such a proviso would defy common sense, and likely not carry much weight with interpreters.
²⁶⁶. See supra note 49.
²⁶⁷. See id.
²⁶⁸. See Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998) (upholding tribal regulatory authority as to water pollution over non-members).
²⁶⁹. See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709 (2008) (refusing to apply one of the Montana exceptions to bar a land sale because "the sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the tribe, but cannot fairly be called "catastrophic" for tribal self-government").
ensure that such authority would survive judicial review. As with the first proposed amendment above, that authority could take a number of forms, the simplest of which would be to create a program identical to that embodied in the CWA—but, again, with the critical difference of explicitly allowing for concurrent state and tribal authority.

Pairing that authorization with a broader reworking of jurisdiction under the Settlement Acts would have administrative advantages. The current structure of the Settlement Acts creates confusion by prefacing both of the most important statements on jurisdiction, sections 6204 and 6206(1) of the MIA, with the phrase “except as otherwise provided in this Act.” The “Legislative findings and declaration of policy” section of that act, section 6202, itself states that “the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act,” establishing that these three sections cross-reference one another while containing conflicting mandates; it is nonsensical to adopt the laws of the state as one’s own only to then become “subject to the laws of the state” or be self-determining only with regard to “internal tribal matters.” Consolidating and clarifying the Acts’ jurisdictional provisions would minimize potential litigation and allow both the Tribes and the State to pursue their regulatory agendas without fear of having their actions struck down in court.

3. Normative Arguments in Favor of Broad Amendment

A broad amendment to the Settlement Acts like that suggested above, equalizing the Southern Tribes’ sovereignty with that of Indian tribes elsewhere in the country, would have strong normative advantages as well as administrative ones. Most obviously, protecting tribal sovereignty in this case would promote environmental protection and improve water quality. Such an amendment would also begin to redress the injustice inherent in treating the Maine Tribes less favorably than their western counterparts. Also, giving the Southern Tribes conclusive authority over their own lands and natural resources would “accord with core values underlying the United States Constitution, as well as the basic

270. ME. REV. STAT. tit. 30, §§ 6204, 6206(1) (2010); see supra notes 63–64 and accompanying text; see also Marecic, supra note 2, at 27 (describing MICSA as so convoluted as to be “either useless or dangerous”); L. Scott Gould, December Song: The Waiting Game for Tribal Sovereignty in Maine, 20 ME. B. J. 18, 25 (2005) (arguing that the current Settlement Acts require enforcement officials to act as “jurisdictional gymnasts”).


272. Id. § 6204.

273. Id. § 6206(1).

274. Gould, supra note 270, at 25 (“[C]larifying territorial jurisdiction in the Implementing Act will forestall much of the expensive and divisive litigation that has characterized attempts to enforce the act.”).

275. See id. (“[A]mending the Implementing Act is the right thing to do.”).
norms that have been developed over 200 years to regulate the relations between the United States and the various Indian nations.\textsuperscript{276}

It is unjust to treat the Maine Indians differently from Indians elsewhere in the country simply because the Southern Tribes were politically weak at the time the Settlement Acts were passed.\textsuperscript{277} Self-determination is too important a value within the American constitutional system to fall prey to an accident of chronology.\textsuperscript{278} As Professor Joseph Singer explains this phenomenon, "most Americans have the view that the United States conquered the Indian nations a long time ago and that remaining vestiges of tribal sovereignty are an anomaly."\textsuperscript{279} The prevailing view in Maine in the 1970s that the Indian tribes were completely subject to state law likely reflects this same incorrect assumption.

That the Settlement Acts were passed prior to the federal government's commitment to tribal self-determination, however, should not excuse the Acts' deficiencies with regard to tribal authority relative to the western tribes. The Fourteenth Amendment to the Constitution promises equal protection of the laws to all citizens, and subjecting the Southern Tribes to comparatively draconian levels of state control violates the spirit, if not the letter, of that provision.\textsuperscript{279} The Acts should be amended to reflect a more modern and ethical approach to Indian relations. As uncomfortable as it is to contemplate the United States' continuing conquest of Indian nations, modern Mainers have a moral duty to acknowledge that those Indian nations have a continuing presence and continuing right to govern themselves and their lands. The mere passage of time has not destroyed their original sovereignty.\textsuperscript{281}

Further, it is morally indefensible to deprive a distinct political community of sovereignty over their own territory simply because the majority of Mainers perceive that sovereignty as having been

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  \item \textsuperscript{277} \textit{See supra} note 182.
  \item \textsuperscript{278} \textit{See id.} at 665-668 (arguing that the Supreme Court's abrogation of Indian sovereignty is contrary to "core American values").
  \item \textsuperscript{279} \textit{Id.} at 645.
  \item \textsuperscript{280} All Indians are citizens of the United States pursuant to the Snyder Act or Indian Citizenship Act of 1924. 8 U.S.C. § 1401 (2006).
  \item \textsuperscript{281} \textit{See Singer, supra} note 262, at 666 ("Although some may believe that the tribes were conquered long ago and lost their sovereignty, this is not true."). Nor, it is worth noting, does the fact that the Tribes were compensated for much of their land legitimate the process of conquest or destroy tribal sovereignty. \textit{See Joseph William Singer, Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity} 3 (Mar. 10, 2010) (unpublished manuscript) ("Although the United States did pay for most (but not all) of the land it took from Indian nations and provided for compensation in a 1946 statute for transfers that had been inadequately compensated, a robust principle of rectification would recognize that no amount of compensation is adequate to undo the wrong.").
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extinguished by conquest.\textsuperscript{282} Even the less controversial justifications one could imagine the State offering for its position, such as the State's interest in uniform application of the law or administrative efficiency, pale in comparison to the right of self-determination. One need only consider Americans' profound commitment to their own democratic institutions to emphasize the point by way of the Golden Rule: would the citizens of Maine think that Indian control over their land were fair if the tables were turned?

4. \textit{Political Reality: Is Amendment Feasible?}

Despite the weight of these normative claims, it seems unlikely, given the political realities on the ground, that the State would acquiesce to amending the Settlement Acts. The State has taken formidable efforts to gain control over the discharges at issue in the NPDES delegation, and in the process has emphasized the "hard-won gains" it achieved in settlement negotiations—a point not without irony in light of the disparity of bargaining power between the State and the Tribes at the time of settlement.\textsuperscript{283} But the basis for Maine's opposition to tribal (or even federal) control over these discharges, beyond a general opposition to tribal sovereignty, is not entirely clear. Based on the legislative history of the Settlement Acts, Maine's primary motive for seeking regulatory control over tribal territory was concern that the Tribes would provide inadequate environmental protection.\textsuperscript{284} The whole reason for the Southern Tribes' desire for regulatory authority, and the premise for this whole discussion, however, is that the State has been inadequately protective of tribal resources, and the Tribes would like to impose stricter regulations.\textsuperscript{285} If concern for environmental protection is truly the State's motivation at this point, Maine should at least be open to the narrow amendment proposed above. A regime of concurrent authority would ensure that, even if tribal priorities shifted, dischargers would still have to comply with the State's regulations.

Unfortunately for the Tribes, Maine's motivations are fairly clearly no longer environmentally protective in nature. This much can be gleaned from the industrial sector's overwhelming show of support for Maine's position in the NPDES conflict.\textsuperscript{286} That support indicates that

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  \item 282. \textit{Cf.} \textit{The Federalist} No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (expressing concern that "factions" of self-interested citizens would suppress the rights of minorities).
  \item 283. \textit{See generally} Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996) \textit{see also} Corrected Brief of Petitioner, Maine v. Johnson, \textit{supra} note 59, at 35.
  \item 284. \textit{See supra} notes 95–97 and accompanying text.
  \item 285. \textit{See supra} note 73.
  \item 286. EPA received comments in favor of Maine's application for state-wide NPDES delegation from a substantial number of industrial stakeholders in the area, including the State
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Maine's priority is to accommodate industrial interests rather than tribal ones, and therefore to limit environmental regulation. This is perfectly understandable given the large number of Maine citizens employed in the timber and paper industries. Especially given the current economic downturn, concerns about the economic impacts of strict environmental regulation are reasonable. But the progress of the environmental movement since the passage of the Settlement Acts, as well as the potential economic benefits of industrial innovation in response to environmental concerns, might pull in the other direction.

CONCLUSION

It would be naïve to expect that any political solution to the problems posed by the Maine NPDES delegation could happen smoothly or quickly. The Indian tribes of Maine have struggled to retain their culture and independence for over two hundred years, and that struggle will no doubt continue. The State's interests in uniform governance and protecting its constituents are strong and should not be written off. But those interests are not compelling enough to justify subjecting the Southern Tribes to the impossible choice of abandoning their centuries-old cultural practices or suffering serious health risks. As a matter of fairness and of promoting tribal self-determination, in keeping with federal policy, the Southern Tribes must be given the authority at least to regulate discharges from their own wastewater facilities. Accomplishing this goal will be difficult in the face of political, practical, and legal difficulties, not least of which is the First Circuit's decision in Maine v.

287. See Letter from Gerry French, Special Projects Dir., Pulp & Paperworkers' Research Council, to Stephen Silva, EPA Me. State Office (April 4, 2000) (expressing strong support for Maine administration of NPDES permitting and fear that, should the Tribes be granted such authority, industry-sector jobs would be lost).


289. See supra notes 1–2 and accompanying text; see also note 21 and accompanying text.
Johnson. Because of these difficulties, the trust responsibility solution or the municipal home rule solution is the most likely to be feasible in the short term. However, it is important to think about how the Tribes could garner the political capital to convince Congress to amend the Settlement Acts, and thereby achieve a more just power-sharing arrangement with the State.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.