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MAINE V. JOHNSON: A STEP IN THE WRONG DIRECTION FOR THE TRIBAL SOVEREIGNTY OF THE PASSAMAQUODDY TRIBE AND THE PENOBSCT NATION

Whitney Austin Walstad*

Introduction

In August of 2007, the First Circuit Court of Appeals issued a decision in Maine v. Johnson.1 Declaring that regulation of pollutants by Indians into Indian waters was not within the scope of tribes' explicit authority over "internal tribal matters," the First Circuit concluded that two tribes in Maine — the Passamaquoddy Tribe and the Penobscot Nation — lacked the authority to regulate the discharge of pollutants by tribal-owned facilities into tribal waters.2

This decision, which reversed an order of the Environmental Protection Agency (EPA) prohibiting the State of Maine from regulating the pollutants being discharged from the two Indian-owned facilities, endangers the quality of water inside and surrounding the tribes' territories. Water quality is critical to tribal members' ability to fish for sustenance, an activity upon which their entire cultures are based. Paper companies and other municipalities have been dumping waste into the tribes' waters; one specific company, Lincoln Pulp & Paper, has dumped dioxin and other dangerous substances directly "into the Penobscot Indian Reservation."3 Dioxin is one of the most powerful and toxic carcinogens which accumulates in fish and other river organisms and thus poses an enormous threat to people dependant upon those very waters and fish.4 By narrowing the meaning of "internal tribal matters," this decision not only diminished the tribes' sovereignty, but creates environmental and health concerns as well.

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1. Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007).
2. Id. at 45-47.
4. Id. at 7.
This note will examine *Maine v. Johnson* and provide a rationale for why the First Circuit should have upheld the EPA’s order. Part I will examine the background of both tribes involved, as well as the history of events leading up to and including the Maine Indian Land Claims Act. Part II will analyze the sovereignty status of Indian tribes generally as well as that of the two tribes involved. Part III will discuss the Clean Water Act as well as the background of *Maine v. Johnson*. Part IV will analyze the arguments and contentions of all parties and the First Circuit’s decision. Finally, Part V will critique the First Circuit’s decision and discuss how the court could have used the resources available to perform a more in-depth analysis thereby protecting the tribes.

I. Background of the Tribes

The Passamaquoddy Tribe and the Penobscot Nation are two of four federally recognized Indian tribes located within Maine’s geographic boundaries. Today, the Passamaquoddy Tribe is located in the coastal regions of Maine, primarily along the Passamaquoddy Bay, and along the St. Croix River and its tributaries. The name “Passamaquoddy” — originating from the word “pestamohkatiyak” which literally means “pollock-spearer” or “those of the place where the pollock are plentiful” — not only reflects the importance of this specific fish, but fishing generally to the tribe’s way of life. The dependence of the tribe upon the St. Croix River for their “cultural, spiritual, and physical well-being” indicates its “deep and critical connection” to the waters. Thus, water regulations have major implications for the Passamaquoddy Tribe.

The Penobscot Indian Nation is centered around the Penobscot River and Bay in Penobscot County, Maine; the tribe’s name reflects the importance of the river to the Nation’s livelihood. The Penobscot people have “occupied the

9. BRODEUR, supra note 6, at 74-75.
Penobscot River watershed and relied upon its water and resources for physical, cultural, and spiritual sustenance for hundreds of years. The "Penobscot Nation is literally in and of the Penobscot River" and "its cultural survival depends upon the health of the river, and its members depend upon its resources for their physical and spiritual sustenance." The pollutants being discharged directly into tribal waters threaten the tribes' deeply rooted connection and dependence on their natural resources. Thus, the First Circuit's decision is bound to come with major implications for both tribes.

A. A Brief History

To understand the unique status of each tribe, it is essential to understand the tribes' complex history with the state. Most significant to that history is the Maine Indian Land Claims Act of 1980; over the course of a few very important events in the 1960s and 1970s, the Passamaquoddy Tribe and Penobscot Nation discovered they had valid claims to several thousand acres of land held by the State for hundreds of years.

The basis for the land claims began with the passage of the Non-Intercourse Act by the first Congress in 1790. The Act governed a variety of activities between Indians and non-Indians. Among those activities, the Non-Intercourse Act required that any land transfer from Indians or Indian tribes be approved by the United States Congress. This provision was enacted to protect Indians from unfair transfers of land; its importance has caused the Non-Intercourse Act to become known as the "linchpin of Federal Indian law." Over the ensuing years, title to most of the Passamaquoddy and Penobscot land was transferred to the State of Maine through agreements, sales, and leases in which the tribes relinquished the majority of their territories. Hundreds of years later it was discovered that these transfers were never approved by Congress as mandated by the Non-Intercourse Act.

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11. Id. at 32.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
Title to this relinquished land was never seriously in question until the early 1960s, when one of the governors of the Passamaquoddy Tribe discovered a copy of a 1794 treaty between the Commonwealth of Massachusetts and the tribe that had been kept in a shoebox for several years. This treaty formed the basis for the Penobscot Nation and the Passamaquoddy Tribe to instigate claims for several thousand acres of land being held by the state. The document reserved 23,000 acres of land for the Indians, in addition to fifteen islands in waters surrounding the township; however, by the time the treaty was discovered, the Indians no longer controlled the islands, which comprised about 6000 acres reserved to them by the deed. Although this deed confirmed the validity of the land claims, the Passamaquoddy Tribe had a difficult time finding an attorney who would take on their case.

These deeds, transfers, and agreements that gave away so much of these tribes’ land were never approved by Congress as required by the Non-Intercourse Act, and were therefore technically invalid. When the tribe realized this, tribal members gained confidence in the tribe’s claims, and began demonstrations on land under state or private party control that they believed rightfully belonged to the tribe. In addition, the tribal officers met with high level state officials to give notice of their claim. Eventually, the tribe secured an attorney; realizing the potential of the claims, the Passamaquoddy tribe asked the United States to bring suit against Maine on its behalf. However, the tribe was denied their request on the “grounds that the Non-Intercourse Act does not apply to non-recognized tribes and on the grounds that there was, thus, no trust relationship between the United States and the Maine tribes.”

The tribe next brought a declaratory judgment action against the Secretary of the Interior and the United States Attorney General; in 1972, the tribe won an order forcing the United States to file a protective action on its behalf. In 1975, the United States District Court for the District of Maine held that the

20. BRODEUR, supra note 6, at 69.
21. Id.
22. Id. at 70.
23. Id. at 69.
24. Id. at 70.
26. BRODEUR, supra note 6, at 71-72.
27. Id. at 71
28. Id. at 72.
Non-Intercourse Act applied to all Indian tribes, both federally and non-federally recognized. In addition, the district court held that the Non-Intercourse Act created a trust relationship between the United States and all Indian tribes. After intervening as a party defendant in the original action, the state and certain federal officials appealed the district court's decision. However, the United States Court of Appeals for the First Circuit affirmed the district court's decision and held that the United States had a duty to investigate and take action on behalf of any tribe when there had been an alleged violation of the Non-Intercourse Act. This was a small accomplishment in and of itself, as up to that point, no court had ordered the federal government to file a claim on behalf of anyone, "much less a multi-million-dollar lawsuit on behalf of a powerless and virtually penniless Indian tribe."


Once the potential for such complex litigation began to receive attention from the highest levels of the federal government, President Jimmy Carter appointed retired Georgia Supreme Court Justice William Gunter to study the case. After a "substantial study of the merits of the claims and the defenses to them, Justice Gunter recommended that the case be settled."

The Department of Justice then analyzed the case and described it as "potentially the most complex litigation ever brought in the federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties." Obviously the risk of going to trial had the potential for enormous consequences for the state. On the other hand, no tribe had ever won an action of this kind for the "return of any significant amount of land."

32. Id. at 667.
34. Id.; see Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1065 (1st Cir. 1979) (holding that tribes are entitled to protection under Federal Indian common law doctrines); see also H.R. REP. NO. 96-1353, at 13. This holding was later supported in another First Circuit decision.
35. BRODEUR, supra note 6, at 89.
37. Id.
38. Id. at 13-14.
39. BRODEUR, supra note 6, at 96.
By this point in time, the amount of land in question had grown exponentially. Because of the litigation, title to up to 12.5 million acres of land was in jeopardy and more than 350,000 people lived on the disputed lands, thereby creating title uncertainty with the potential to undermine the value of all of the property. In fact, in 1976 a municipal bond counsel based out of Boston informed the State of Maine that "it would no longer be able to give unqualified approval to municipal bonds issued within the disputed area."42 At stake for the Indians was the return of the millions of acres of land that had been wrongfully taken from them over the years, or possibly billions of dollars in actual and punitive damages.43 Settlement negotiations succeeded, and in 1980, the settlement was recorded by the Maine Indian Claims Settlement.44

The terms of the settlement provided for the Passamaquoddy Tribe and the Penobscot Nation to retain their reservation lands and all lands owned by them that had not been subsequently transferred away.45 In addition, the settlement provided that all land claims of the tribes would be extinguished in exchange for an appropriation of $81.5 million as follows: $54.5 million was established as a Land Acquisition Fund,46 and $27 million went to a settlement fund and was to be divided equally between the Passamaquoddy Tribe and the Penobscot Nation.47 The Land Acquisition Fund was established with the hope of purchasing 150,000 acres for each tribe.48 This purchased land would be held in trust by the United States for both the Passamaquoddy Tribe and Penobscot Nation.49

Although this arrangement appears favorable to the tribes, there were other terms of the settlement which favored the state. Under the Maine Indian

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40. H.R. REP. NO. 96-1353, at 14 (noting that the 12.5 million acres in question constituted sixty percent of the State of Maine).
41. Id. A significant portion of the acreage in dispute was "owned" by several large timber and paper companies which are now part of the pollution problem in the Maine v. Johnson case, and "whose vast holdings had long made them the dominant economic and political force in Maine." BRODEUR, supra note 6, at 98.
42. BRODEUR, supra note 6, at 97.
43. Id.
45. ME. REV. STAT. ANN. tit. 30, § 6203.
47. Id. § 1724(a),(b)(l).
48. Id. § 1724(d).
49. ME. REV. STAT. ANN. tit. 30, § 6205(1)(b).
50. Id. § 6205(2)(b).
Claims Settlement, the state assumed jurisdiction over most of the tribes’ activities. The settlement provided:

Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective territories, shall have, exercise, and enjoy all the rights, privileges, powers and immunities, including, but without limitation, . . . 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.\(^{51}\)

The settlement gave the tribes the status of municipalities and made persons and property subject to the laws of the state within the respective tribal territories.

**III. Tribal Sovereignty**

Generally, Indian tribes possess “those aspects of sovereignty not withdrawn by treaty or statute . . . .”\(^ {52}\) Tribes retain elements of “quasi-sovereignty” after turning land over to the United States and acknowledging their dependence on the federal government.\(^ {53}\) One of those aspects of sovereignty possessed by Indian tribes is the common law doctrine of sovereign immunity from suit.\(^ {54}\) The federal government has had a long history of encouraging tribal self-governance, reflecting the fact that tribes “retain ‘attributes of sovereignty over both their members and their territory’ . . . to the extent that sovereignty has not been withdrawn by federal statute or treaty.”\(^ {55}\) This policy operates “even in areas where state control has not been affirmatively preempted by federal statute.”\(^ {56}\)

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51. *Id.* § 6206(1) (emphasis added).
56. *Id.*
A. The Maine Tribes' Sovereignty

The sovereignty status of the Maine tribes prior to the Settlement Act was one of the points hotly contested in Maine v. Johnson. It is important to understand the level of sovereignty the Tribes held prior to the act because it modified their existing sovereignty status. The Tribes argued that if they retained their inherent sovereignty prior to the settlement, certain federal Indian common law doctrines discussed above required the government to protect that sovereignty.

There were multiple cases prior to Maine v. Johnson whose holdings had an effect on the tribal status of either the Passamaquoddy Tribe or the Penobscot Nation. One of the most important was Bottomly v. Passamaquoddy Tribe. This case concerned a contract dispute in which an attorney sought to recover fees from the Tribe for legal work. The real issue in the case boiled down to whether or not the Tribe and its officers were protected from suit by the doctrine of sovereign immunity. The Bottomly court concluded that the Passamaquoddy Tribe was, in fact, entitled to the benefits of the doctrine of sovereign immunity, and therefore the Tribe was immune from suit.

The State contended the Tribes had a diminished level of sovereignty prior to the Maine Indian Claims Settlement because of the lack of dealings the federal government had had with the Tribes. Maine also viewed the settlement itself as keeping general federal Indian common law from affecting the terms of the agreement. However, the Tribes viewed one House Report as confirming that their sovereignty remained intact at the point in time when the settlement took place. That report summarized the Bottomly case as

57. Prior to the Settlement Acts, the State of Maine passed laws governing the internal affairs of the two tribes, even threatening to change their laws or to terminate the tribes. H.R. REP. No. 96-1353, at 11 (1980).
58. Final Brief of Petitioners, supra note 3, at 19.
60. Bottomly, 599 F.2d 1061.
61. Id. at 1062.
62. Id. at 1061.
63. Id. at 1066.
64. Id. at 1065.
66. Final Brief of Petitioners, supra note 3, at 19.
holding that "the Maine tribes still possess inherent sovereignty to the same extent as other tribes in the United States."67 This holding is important because the Tribes argued that Congress had a duty to protect the "inherent authority" of Indian tribes "to govern reservation affairs from state encroachment."68

In determining what constitutes "internal tribal matters," it is necessary to have an understanding of the background of law relating to water pollution and pollutant discharges. This information comes from the Clean Water Act.

B. The Clean Water Act

The Clean Water Act69 is the culmination of an extensive environmental campaign to codify and nationalize "the business of water pollution control in the United States, relegating the states, whose authority had long dominated the area, to a largely secondary, supporting role."70 One of the Act's most important features is the National Point Discharge Elimination System (NPDES), a permitting program which regulates point source discharges throughout the United States.71 Specifically, the Act provides for a permitting program for the discharge of pollutants into navigable waters.72 The key to the NPDES program is that without an NPDES permit, facilities may not discharge any pollutants.73

Alternatively, the Act provides the ability for states to apply for a state permitting program, whereby a state may "administer its own permit program for discharges into navigable waters within its jurisdiction . . . ."74 This provision allows a ninety-day period for the EPA to approve the state's permitting program,75 and reserves the authority to the EPA to object to any proposed state permitting program if the state's program does not meet the

67. H.R. REP. NO. 96-1353 at 14. See generally Bottomly, 599 F.2d at 1064-66 (discussing sovereignty status of Passamaquoddy Tribe, and determining that the Tribe had enough sovereignty to qualify for immunity from suit).
72. Id. § 1342(a)(1).
73. Id. § 1342.
74. Id. § 1342(b).
75. Id. § 1342(c)(1).
requirements of the Clean Water Act; the EPA may also retake permitting authority from states under certain circumstances. 76

In addition, the Clean Water Act provides a way for Indian tribes to apply for permitting authority just as a state would. 77 Section 518 of the Act allows tribes to be treated like states for the purposes of applying for and obtaining permits for the discharge of pollutants into tribal waters. 78 Treatment of a tribe as a state requires the tribe to have a governing body capable of performing "substantial government duties and powers" 79 and that the activities to be exercised by the tribe pertain to protection of water resources that are the tribes own. 80 It is not apparent that the Passamaquoddy Tribe or Penobscot Nation have applied for this type of system yet- they simply hope to keep regulatory authority with the EPA instead of the state.

In fact, today, thirty-one federally recognized tribes have their own water regulation standards pursuant to the Clean Water Act, section 518. 81 Many of those tribes who do regulate their own water have statements of purpose, similar to the Pueblo of Acoma, which states that the regulation of water is to promote the "healthy propagation of fish, other aquatic life, and wildlife," "to prescribe water quality criteria in order to protect groundwater," and to "ensure that degradation of existing water quality does not occur." 82 Specifically, each tribe that retains its own water quality standards notes that "section 518 of the Clean Water Act allows federally recognized Indian tribes to enact water quality standards for the purpose of protecting waters within the exterior boundary of tribal lands." 83 Although the tribes at issue have not sought that type of authority, the fact that Congress made a special provision for tribes in the Act denotes their recognition of the importance of water quality to tribes.

76. For example, state authority may be revoked when it is determined that "a State is not administering a program approved under this section in accordance with requirements of this section." Id. § 1342(c)(3).
77. Id. § 1377(e).
78. Id.
79. Id. § 1377(e)(1).
80. Id. § 1377(e)(2).
83. Id.
IV. Background of Maine v. Johnson

The main issue in Maine v. Johnson was which entity should control the issuance of permits for the discharge of pollutants into waters in and surrounding tribal territory—the EPA, or Maine. This issue developed following Maine’s application for NPDES permitting authority pursuant to 33 U.S.C. § 1342(b). Because the Settlement Act and Maine Implementing Act (MIA) appear to divest the Tribes of some important attributes of tribal sovereignty, but reserve “internal tribal matters” as an area of governance with which the state cannot interfere, the critical dispute centered on the meaning of “internal tribal matters” and whether the issuance of permits for the discharge of pollutants fell within that category of authority.

This was such a critical question because the State “has an interest in ensuring that industries and other pollution dischargers along the river are not hampered by federal (or potentially tribal) restrictions to better protect the environment.” Thus, 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. It is not surprising that the State has taken the side of protecting the needs of these powerful paper and timber companies.

Pursuant to the authority granted to it by the Clean Water Act, the State of Maine applied for a state permitting program in lieu of the EPA program on November 18, 1999. Maine’s application presented questions regarding its authority over twenty-one facilities, nineteen of which were non-Indian facilities discharging pollutants into tribal waters, and the other two facilities were tribal-owned and discharging into tribal waters. The ninety-day application period was extended four times for debate and discussion and September 26, 2000, was set as the new deadline for the EPA to make a decision as to the permitting authority Maine had applied for, however, this deadline came and went without a decision by the EPA.

Eventually the EPA suspended issuance of the permits as required by § 1342(c)(1), which provides that no later than ninety days after a state applies for a permitting program, the issuance of permits for those discharges subject to the program shall be suspended unless it is determined that the State permit

84. Final Brief of Petitioners, supra note 3, at 35.
85. Maine v. Johnson, 498 F.3d 37, 40 (1st Cir. 2007).
86. Id.
87. Id.
88. Id.
program does not meet the requirements or guidelines set forth within the statute. In January of 2001, the EPA approved the state’s permitting program in all areas outside disputed Indian territory, but made no decision regarding the disputed applicability of the state’s jurisdiction in Indian country.

Two years later, in October of 2003, the EPA gave Maine the authority to issue permits to (and therefore control the regulation of) the nineteen non-Indian owned facilities that discharged pollutants within the territorial waters of the tribes. As to two tribal-owned facilities, the EPA concluded the impact of their discharges outside the tribes’ territories was “so immaterial that the permits fit within the internal tribal matters exception.”

Petitions for judicial review followed the EPA’s decision, and those petitions were consolidated. The appeal went directly to the First Circuit Court of Appeals. The First Circuit upheld the positions of Maine and the EPA that “the nineteen non-Indian discharge sources draining into tribal waters can be regulated by the state.” Referring to the explicit language of section 6204 of the state statute reserving jurisdiction to Maine over “all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . .” the court extinguished all of the tribes’ arguments for assertion of authority of the two tribal-owned facilities.

Thus, as to the two tribal-owned entities discharging into tribal waters, the First Circuit reversed the determination of the EPA and ordered those two facilities to comply with the state permitting program. This decision has repercussions in many arenas of law; not only does the decision impact the tribes’ environment and the health and way of life of tribal members, it further divests the tribes of sovereignty and self-governance.

90. Johnson, 498 F.3d at 40.
91. Id. Whether the discharges were actually into Indian territories was in dispute, but the court assumed the discharges were into Indian territory for purposes of the case. The discharges were into the navigable waters of the Penobscot, St. Croix, and Piscatiquis Rivers. Id. at 40 n.3.
93. Johnson, 498 F.3d at 41.
94. Id.
95. Id. at 45.
97. Johnson, 498 F.3d at 49.
A. The Tribes’ Contentions

One of the Tribes’ prime concerns was that “Maine’s permitting program might not ensure water quality standards adequate to protect the southern tribes’ right to fish for individual sustenance.”\(^98\) Maine statutes actually grant the right to regulate hunting and fishing to the tribes,\(^99\) and courts have recognized and upheld this right,\(^100\) indicating the state-recognized importance of these activities to the tribes’ way of life.

On appeal at the First Circuit, the Tribes contended that the EPA erred in approving Maine’s program as to the nineteen non-tribal facilities that discharge pollutants into tribal waters.\(^101\) The Tribes argued that under the Settlement Acts, they had the right to regulate pollution by non-Indians within their territories and that the “EPA has a trust obligation to retain permitting authority to facilitate tribal control over the tribes’ natural resources.”\(^102\) In addition, the Tribes argued that they share authority with the State, and should therefore have control of the permitting. Next, they argued that the inherent sovereignty of each tribe “remains intact” and thus the State lacked the necessary regulatory power over the tribes.\(^103\) The Tribes also cited House and Senate reports suggesting the sovereignty of the Passamaquoddy Tribe and the Penobscot Nation were on the same level as other Indian tribes.\(^104\)

Contrary to the State’s view of their status prior to the settlement, the Tribes argued that Congress understood and expressly confirmed their inherent sovereignty was still intact at the time of the settlement.\(^105\) In addition, the Tribes emphasized the First Circuit’s decision in *Bottomly* as further supporting the fact that the Tribes retained their sovereignty.

The Tribes relied upon federal Indian common law to combat the State’s argument that “the Penobscot Nation and the Passamaquoddy Tribe had no inherent sovereignty because their historic domination by Maine had, over time, destroyed it.”\(^106\) A tribe’s sovereignty “exists only at the sufferance of

\(^98\) Id. at 41.
\(^99\) ME. REV. STAT. ANN. tit. 30, § 6207.
\(^100\) Penobscot Nation v. Stilphen, 461 A.2d 478, 485 (Me. 1983) (holding that tribal sovereignty allows regulation of fishing and hunting by Indians on land owned by or held in trust for the tribe).
\(^101\) Johnson, 498 F.3d at 41.
\(^102\) Id.
\(^103\) Id. at 42.
\(^104\) Id. at 43.
\(^105\) Final Brief of Petitioners, supra note 3, at 21.
\(^106\) Id. at 19-20.
Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In addition, the Tribes argued that "neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity." Thus, the Tribes attempted to make the argument that prior to the Settlement Acts, despite their history of unsatisfactory treatment by the state, they still possessed their inherent sovereignty to the same extent as any other tribe.

The sovereignty status of the tribes is critical, and as the Tribes point out, "the scope of 'internal tribal matters' is a question of law, informed by general principles of federal Indian common law." If the tribes possessed their inherent sovereignty prior to the settlement, general principles of federal Indian law would require the government to protect that sovereignty, and would require that protection to influence the interpretation of the phrase "internal tribal matters." On the other hand, the State seemed to argue that the Settlement Acts overrode every other source of authority relating to federal and Indian law and divested any sovereignty the Tribe may have had at that point. The State urged the most strict construction of the phrase "internal tribal matters" and no protection from the federal government.

The Tribes' major contention was that the regulation of pollutants fell within one of the categories of powers explicitly granted to the tribes by statute — "internal tribal matters." The Maine law made it clear that the tribes were:

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.

The Tribes construed the provision, "internal tribal matters" broadly, arguing that it encompassed discharges of pollutants into tribal waters, even

107. Id. at 21 (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945 ed.) (emphasis added)).
108. Id. at 22.
110. Id.
111. See generally Corrected Brief of Petitioner, supra note 65.
112. Id.
by the nineteen non-Indian sources.\footnote{114} The First Circuit had even made it clear that the language "including" following the phrase "internal tribal matters" is a term of enlargement, "meaning that 'there are other items includable, though not specifically enumerated.'"\footnote{115} In addition, the Tribes urged the court to apply the same balancing test developed by two prior decisions, \textit{Akins v. Penobscot Nation}\footnote{116} and \textit{Penobscot Nation v. Fellencer},\footnote{117} to determine whether a specific issue is an "internal tribal matter."\footnote{118} The \textit{Akins} court held that the issuance of stumpage permits by the Penobscot Nation was an internal tribal matter and thus not subject to regulation by the State of Maine.\footnote{119} The \textit{Fellencer} court determined that a decision by the Penobscot Nation Tribal Council to terminate the employment of a non-Indian community health nurse constituted an "internal tribal matter" within the meaning of the Maine Indian Claims Settlement Act of 1980.\footnote{120} In each instance, the Court considered (a) whether the matter concerned the reservation resources or property of the tribe, (b) whether it involved the interests of only Indians or also affected non-Indians, (c) the extent to which state interests were involved, and (d) how the matter should be resolved, with respect to competing state and tribal interests, under principles of federal Indian law. The court considered each factor with respect to both parties involved.\footnote{121}

Upon a proper balancing of the \textit{Akins}/\textit{Fellencer} factors and the interests at stake, the Tribes concluded and insisted that regulation of their territorial waters was certainly an internal tribal matter which they had the right to control.\footnote{122} In fact, the EPA used this same analysis and determined that because two facilities were owned and operated by the tribal governments and non-Indians were not involved, "the federal interest in promoting tribal self-determination is very high and is not tempered by any substantial impacts on non-members," thus explaining why the state lacked permitting authority over those two facilities.\footnote{123}

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\item \footnote{114}{Maine v. Johnson, 498 F.3d 37, 44 (1st Cir. 2007).}
\item \footnote{116}{Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997).}
\item \footnote{117}{Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999).}
\item \footnote{118}{Final Brief of Petitioners, \textit{supra} note 3, at 33.}
\item \footnote{119}{Akins, 130 F.3d at 490.}
\item \footnote{120}{Fellencer, 164 F.3d at 707.}
\item \footnote{121}{Id. at 709.}
\item \footnote{122}{Final Brief of Petitioners, \textit{supra} note 3, at 35-36.}
\item \footnote{123}{Approval of Application by Maine to Administer the National Pollutant Discharge...}
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By allowing the State of Maine to regulate all twenty-one discharge facilities at issue, the First Circuit has jeopardized the tribes' fishing rights, a right that is granted to them by statute. Specifically, the tribes project that Maine will not set the permitting requirements at a high enough standard required to ensure the tribes' ability to continue fishing for sustenance so as to accommodate several large paper companies near the tribal lands. Because clean, healthy water plays a vital role in tribal culture and has a direct and substantial effect on the health and welfare of the tribes, "the Tribes have a strong interest in regulating on-reservation water quality." 

B. EPA'S Contentions

The EPA took a slightly different approach to this issue- it did not agree with the Tribes' argument that "internal tribal matters" encompassed the nineteen non-Indian discharge sources. However, as mentioned above, it did agree that due to the size of the discharges of the two tribal-owned discharge facilities, there are "no substantial impacts on non-members" and therefore regulation of permitting should be treated as an internal tribal matter.

C. The State of Maine's Contentions

The State took the position that it had authority to issue permits for all twenty-one facilities in question. Maine contend that the ability to regulate the Tribes' land and natural resources was expressly reserved by statute to the state, and thus, "Maine's power over the southern tribes greatly narrows ordinary tribal sovereignty vis-à-vis state law." Maine claimed that this grant satisfied the Clean Water Act, which requires a state to have "adequate authority to carry out the described [state permitting] program."
The state responded to the EPA's theory that unless there is a substantial impact on non-tribal members, the activity is outside Maine's jurisdiction by arguing that that theory "directly contravenes the plain language and intent of Congress" that the Tribes be subject to regulation by the State with regard to their land and natural resources, held in trust or otherwise.\footnote{134}

Maine adopted a narrower view of the phrase "internal tribal matters" than did the Tribes. The State claimed that the phrase should not apply to the nineteen non-Indian discharge facilities, but also claimed that it should not apply to the two tribal facilities that discharged into tribal waters.\footnote{135} The state argued that in addition to the fact that the Settlement Acts explicitly granted jurisdiction over land and natural resources to the state, there was nothing in any statute that would suggest the tribal discharges were exempt from Maine's jurisdiction as an "internal tribal matter."\footnote{136} Apparently, the state viewed the list of examples of internal tribal matters provided in the statute as exclusive.

The state also examined the balancing test suggested in Akins/Fellencer.\footnote{137} However, the state viewed the discharges from the Indian-owned facilities as being more substantial than the Tribes did, thus making it an activity that is not wholly "within the tribe."\footnote{138} In addition, Maine relied on the strength of its interests in regulating the pollution because the regulations would affect its own environment and its own resources.\footnote{139} Also, the State pointed out that the EPA made no finding that Maine's control of permitting had or would in any way "hinder the tribes' efforts to protect their environmental concerns."\footnote{140} Finally, the State argued that under the settlement, the EPA had no trust responsibility over Indian territory.\footnote{141}

\textbf{D. The First Circuit's Decision}

The First Circuit Court of Appeals reviewed the EPA's decision de novo.\footnote{142} The court agreed with the EPA that Maine had adequate authority to issue

\begin{itemize}
\item \footnote{134}{Corrected Brief of Petitioners, \textit{supra} note 65, at 26.}
\item \footnote{135}{\textit{Johnson}, 498 F.3d at 44.}
\item \footnote{136}{Corrected Brief of Petitioners, \textit{supra} note 65, at 30.}
\item \footnote{137}{\textit{Id.} at 33.}
\item \footnote{138}{\textit{Id.}}
\item \footnote{139}{\textit{Id.} at 38.}
\item \footnote{140}{\textit{Id.} at 39.}
\item \footnote{141}{\textit{Id.} at 41.}
\item \footnote{142}{Maine v. Johnson, 498 F.3d 37, 41 (1st Cir. 2007). The court noted that the EPA gets deference in applying ambiguous terms in any statute that it administers, and that the EPA is entitled to deference as to all factual findings it made unless they are unreasonable.}
\end{itemize}
permits for the nineteen non-Indian owned discharge facilities.\footnote{143} The basis for its decision rested in the explicit grant of authority to Maine over the Tribes’ land and natural resources as well as the fact that the Settlement Acts “expressly divested the Maine Tribes of sovereign immunity.”\footnote{144}

In response to the Tribes’ argument that certain House and Senate reports referred to the Tribes as having the same amount of sovereignty as other Indian tribes, the court noted that those reports referenced the view expressed by the Bottomly court, which predated the Settlement Acts. Thus, the Settlement Acts reflect a “redefined” scope of authority, “closer to Maine’s historic treatment rather than the full sovereignty asserted by the tribes.”\footnote{145} The court agreed with a House Report and a Senate Report that the settlement was a compromise in which the Tribes gave up their right to thousands of acres of land in return for extending state power over Indian territory, with the reservation that the Tribes would still be in control of “internal tribal matters.”\footnote{146}

The court considered the Tribes’ argument for concurrent authority, but determined that even if the State and the Tribes held concurrent authority, the State would have control.\footnote{147} The court noted that the real issue was whether Maine had \textit{adequate} authority to issue permits for discharges into the tribal waters, and that section 6204 was “about as explicit in conferring such authority as is possible.”\footnote{148} And even if the Tribes’ authority took priority over Maine law, that would only keep the State from being able to issue permits to discharge sources within tribal waters.\footnote{149} However, this was simply not the case, the court explained, because section 6204 gave the State of Maine “overriding authority” to regulate discharge within the scope of the Clean Water Act.\footnote{150}

The court did, however, give a little more consideration to the Tribes’ argument that the phrase “internal tribal matters” might include regulating the discharge of pollutants within tribal waters. After noting that the phrase “internal tribal matters” is “assuredly vague,”\footnote{151} the court relied upon the fact that in the statute, there are four examples of internal affairs listed, including

\begin{itemize}
  \item \footnote{143} \textit{Id.} at 45.
  \item \footnote{144} \textit{Id.} at 42 (citing 25 U.S.C. § 1725(d)).
  \item \footnote{145} \textit{Id.} at 43.
  \item \footnote{146} \textit{Id.}
  \item \footnote{147} \textit{Id.}
  \item \footnote{148} \textit{Id.}
  \item \footnote{149} \textit{Id.}
  \item \footnote{150} \textit{Id.}
  \item \footnote{151} \textit{Id.} at 44.
\end{itemize}
tribal membership, residence in tribal territory, elections, and use of settlement funds.\textsuperscript{152} Though the list is not exclusive,\textsuperscript{153} it is indicative of what the statute intended to mean by the phrase.\textsuperscript{154} Additionally, the court noted that generally, Maine law governs the natural resources of the Tribes and their territories, and the “internal tribal matters” exception “does not displace general Maine law on most substantive subjects.”\textsuperscript{155} Thus, the court concluded that the statute reserved the rights specifically listed in the statute, as well as “other matters of the same kind”\textsuperscript{156} but did not take priority over other Maine laws, including environmental regulations.\textsuperscript{157}

Next, the court discussed the only two decisions construing the phrase “internal tribal matters”\textsuperscript{158}: \textit{Akins} and \textit{Fellencer}. The court distinguished both cases by noting that in each, the State did not claim any right to regulate the activity over which the Tribe was asserting authority,\textsuperscript{159} whereas in the case at hand, Maine affirmatively asserted authority to regulate discharges over both non-tribal and tribal facilities.\textsuperscript{160} The First Circuit’s decision and analysis presents concerns that will be discussed below.

\textbf{V. Analysis}

The court’s analysis is somewhat convincing as to the nineteen non-tribal facilities. However, regarding the two facilities operated by Indians and discharging into tribal waters, the court’s determination that the issuance of discharge permits does not qualify as an “internal tribal matter” disregards its own precedent and undermines the importance of protection of Indian tribes.

The First Circuit brushed off the \textit{Akins/Fellencer} balancing test by claiming that “discharging pollutants into navigable waters is not a borderline case in

\begin{footnotesize}
\begin{enumerate}
\item[152.] See ME. REV. STAT. ANN. tit. 30, § 6206 (1996).
\item[153.] Akins v. Penobscot Nation, 130 F.3d 482, 486 (1st Cir. 1997).
\item[154.] \textit{Johnson}, 498 F.3d at 44 (citing Penobscot Nation v. Stilphen, 461 A.2d 478, 489 (Me. 1983)). This canon of statutory construction is known as \textit{noscitur a sociis} (Latin for “it is known by its associates”) and holds “that the meaning of an unclear or ambiguous word should be determined by considering the words with which it is associated in the context.” MERRIAM-WEBSTER’S DICTIONARY OF LAW 331 (1996).
\item[155.] \textit{Johnson}, 498 F.3d at 44.
\item[156.] \textit{Id.} at 44-45 (citing United States v. McKelvey, 203 F.3d 66, 71 (1st Cir. 2000)) (emphasis removed).
\item[157.] \textit{Id.}
\item[158.] \textit{Id.}
\item[159.] \textit{Id.} (citing Akins v. Penobscot Nation, 130 F.3d 482, 488 (1st Cir. 1997); Penobscot Nation v. Fellencer, 164 F.3d 706, 710-11 (1st Cir. 1999)).
\item[160.] \textit{Id.} at 45.
\end{enumerate}
\end{footnotesize}
which balancing or ambiguity canons can alter the result. 161 By failing to even consider the balancing of these factors, the court ignored several important facts. First, the court had previously noted that the phrase “include or including” is a term of enlargement. 162 Second, nothing in the statute indicated that the list of examples provided after “internal tribal matters” was exclusive. Third, the court’s own decision in Akins involved issuance of permits for tree stumpage, a natural resource on Indian lands, and the court had no problem determining that was an internal tribal matter. 163 Thus, the court should have at least considered some of the factors in the Akins/Fellencer balancing test.

Had the court performed this instructive analysis, it would have reached the conclusion that the regulation of discharges by Indian-owned facilities into Indian waters is wholly an “internal tribal matter.” First, considering the impact on non-Indians, the court should have taken a clue from the EPA and considered the fact that the impact on non-Indians was not substantial. 164 The Akins court seemed to emphasize this factor, by immediately indicating that stumpage permits appeared to be an “internal tribal matter” after determining that the interests of non-members were not at issue. 165

Next, if the court considered the same factors it did in Akins, it would have to consider that “the control of the permitting process operates as a control over the growth, health, and reaping” 166 of certain natural resources, such as timber in Akins, or fish in Johnson. In Akins, this was an argument in favor of the stumpage permits being classified as an “internal tribal matter.” 167

Additionally, allowing the EPA to retain control over the issuance of pollution permits does not impair or deteriorate any interests of the state. If anything, this would increase the water quality, as the EPA would work hand in hand with the tribes to set standards high enough to sustain their fishing activities. In no way would this harm any interest the state may have in the quality of its waters. In fact, it would likely increase water quality.

Finally, it would seem consistent with prior legal understandings to view the issuance of permits as an “internal tribal matter.” Two prior First Circuit decisions analyzed the phrase “internal tribal matters,” but were immediately

161. Id. at 46.
162. Akins, 130 F.3d at 486.
163. Id. at 490.
165. Akins, 130 F.3d at 486.
166. Id. at 487.
167. Id.
distinguished by the *Johnson* court. The court’s distinction was based on the premise that in both *Akins* and *Fellencer*, the state did not claim the right to regulate the activity at issue.\(^{168}\) This reasoning is critically flawed for one main reason. While the *Akins/Fellencer* test does recommend an analysis of the interests of both the tribe and the state, the analysis of the state’s interests is *not* conditioned on the state’s assertion of authority. In fact, in *Akins* and *Fellencer*, the interests of both parties were analyzed and considered\(^{169}\) even though the state had not “disclaimed any interest in regulation.”\(^{170}\) Thus, instead of attempting to distinguish the only two cases interpreting and providing guidance on the meaning of the phrase “internal tribal matters” the court should have followed its own precedent and given a thorough analysis of each factor. Such a task would necessarily have opened the court’s eyes to a different conclusion.

The court agreed with Maine that the phrase “internal tribal matters,” though not exclusive, would only extend to the examples listed in the statute and “matters of the same kind.”\(^{171}\) The court’s explanation that that phrase “does not displace general Maine law on most substantive subjects, including environmental regulation”\(^{172}\) ignores the holding of *Akins*. *Akins* involved a permitting system similar to the one at issue in *Johnson*, but was for stumpage permits relating to the harvesting of timber from the Penobscot Reservation.\(^{173}\) The *Akins* court applied the same factors and interpreted the same statute at issue in *Johnson*, but determined, despite the specific grant of authority to Maine over all land and natural resources of the tribe,\(^{174}\) that the permitting system was indeed an “internal tribal matter” and did so as a matter of law.\(^{175}\) Thus, upon an analysis of the prior case law and precedent, it is evident that the First Circuit’s decision is unprincipled at best, having failed to consider the most important and critical factors in such a powerful decision.

Further, with the stakes being so high, the court should have considered the interests of the tribe in allowing the EPA to regulate the issuance of pollution permits into their waters instead of the State of Maine. The toxins being released into the rivers upon which these tribes depend are extremely

\(^{168}\) Maine v. Johnson, 498 F.3d 37, 45 (1st Cir. 2007).
\(^{169}\) *Akins*, 130 F.3d at 487; Penobscot Nation v. *Fellencer*, 164 F.3d 706, 710-11 (1st Cir. 1999).
\(^{170}\) *Johnson*, 498 F.3d at 45.
\(^{171}\) *Id.*
\(^{172}\) *Id.*
\(^{173}\) *Akins*, 130 F.3d at 483.
\(^{175}\) *Akins*, 130 F.3d at 488.
dangerous and accumulate in the very fish and other organisms the tribes hunt for sustenance. Public policy alone demands a much more in-depth and serious analysis of the interests of the tribes and the possible repercussions of ceding control over water regulations to the state.

Conclusion

This court's decision will affect the health and well-being of two of Maine's federally recognized Indian tribes. Although there are multiple statute sections that appear to grant to Maine the authority over these regulations, the "fine print" must be taken into account and the statutes must be construed in a way that will ensure the tribes' health and continued ability to fish for sustenance. The First Circuit's decision took that away, setting a dangerous precedent in terms of not only divesting the tribes' already limited sovereignty, but also in terms of failing to protect the tribes' health and the continued existence of their tribal culture. It is not apparent that certiorari has been sought to the United States Supreme Court, but in the event that it is, the court should reverse the First Circuit's ruling and reinstate the EPA's order, giving further consideration to the nineteen non-tribal facilities as well.