

have been essentially that of other tribes nationwide, but that conclusion was far from settled law. The *Bottomly* court found that Congress had never acted to deprive the Passamaquoddy Tribe of its sovereign immunity. 599 F.2d 1061. The Supreme Judicial Court of Maine in *State of Maine v. Dana* found that the trial court had erred in not conducting fact-finding to determine if the site of a crime had retained its aboriginal character and was therefore under the exclusive criminal jurisdiction of the federal government. 404 A.2d 551 (1979). While both courts found that the Passamaquoddy Tribe retained a limited sovereignty and the *Dana* court strongly intimated that the area where the crime took place qualified as Indian country, 404 A.2d at 563, neither court ruled on the subject of the state's and tribes' respective jurisdictions over the reservation, and neither case involved the Penobscot Nation. It thus makes sense that Congress viewed MICSAs as a settlement of the parties' positions in litigation that were not yet finally resolved.

Both of the congressional committee reports for MICSAs make it clear that Congress understood it was acting against the backdrop of Maine's position that the southern tribes were essentially wards of the state. Based on this assertion, the state claimed the authority to regulate virtually all aspects of the southern tribes' existence, with little to distinguish the tribes from any other voluntary association of state citizens. "Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to change these laws or even terminate these tribes." S. Rep. at 14; see also H.R. Rep. at 14. 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. See *Joint Tribal Council*, 528 F.2d at 375 (in which the U.S. Secretary of the Interior argued that the United States had no trust relationship with the Passamaquoddy Tribe). The language that surrounds DOI's quotation from the Senate Report confirms this conclusion:

While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with these decisions [recognizing the federal status of Maine tribes] the settlement

provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.

S. Rep. at 14; H.R. Rep. at 15.

Therefore, EPA does not believe that the reference to strengthening tribal sovereignty in the legislative history indicates that Congress meant "internal tribal matters" to act as a codification of either 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.

ii. Statutory Analysis and Internal Tribal Matters

The southern tribes and DOI are clearly correct that Maine is prevented from regulating internal tribal matters. This term is not exhaustively defined in either MIA, where it appears, or in MICSAs, which simply ratifies its appearance in MIA. 30 M.R.S.A. section 6206(1); 25 U.S.C. 1725(b)(1). Rather, MIA simply provides a list of examples illustrating internal tribal matters, and the First Circuit has twice held that this list is not exclusive. *Akins*, 130 F.3d at 486; *Fellencer*, 164 F.3d at 709. But EPA is unable to conclude that this exception extends generally to reserve regulation of discharges to Indian Territory waters from the grant of state authority under MICSAs.

DOI's statutory analysis focuses on two of the examples of internal tribal matters in MIA: "the right to reside within the respective Indian territories" and "tribal government." The tribes and DOI assess how federal courts and EPA have interpreted similar attributes of tribal sovereignty as they operate generally under federal Indian law outside the context of MICSAs. Under DOI's interpretation, the internal tribal matters exception would swallow the rule. The greatest weakness of DOI's argument that internal tribal matters includes "regulation of water quality including point-source discharges," DOI Op. at 18, is that it largely fails to reconcile that conclusion with the grant of authority to the state to regulate the environment in the southern tribes' Indian Territories, as reflected in text, structure, and legislative history of

MICSAs and MIA outlined in the previous section.

DOI's interpretation of these statutory examples renders the concept of internal tribal matters virtually indistinguishable from the "inherent powers of a limited sovereign" that tribes generally have outside of Maine. But as the *Akins* court concluded, one cannot equate internal tribal matters under MICSAs with customary concepts of internal matters or internal affairs under federal Indian law:

While defining what constitutes an internal matter controlled by Indian tribes is hardly novel in Native American law, it is novel in this context. The relations between Maine and the Penobscot Nation are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement.

130 F.3d at 483. Therefore, EPA concludes that the simple reference to the general federal Indian law defining the traditional concepts of tribal government and tribal control over access to their lands cannot provide the complete answer to this question that DOI finds. DOI Op. at 12.¹⁰

Although the examples of internal tribal matters in MIA do not completely describe the scope of the exceptions to the state's regulatory authority, it might well be possible for an environmental regulatory program, or elements of it, to operate in a manner that its effects on non-members are limited enough or that the tribal interest is so great that it qualifies as an internal tribal matter. Indeed, for two existing tribal facilities in the southern tribes' Indian Territories, EPA has determined that regulating their water discharges is an internal tribal matter, as described below. But EPA concludes that regulating discharges that would have substantial effects on non-members is not so confined that it qualifies as an internal tribal matter.

iii. Judicial Guidance on Internal Tribal Matters: The *Akins* and *Fellencer* Cases

Independent of DOI, EPA has reviewed the two federal Court of Appeals decisions that depended on the scope of internal tribal matters, *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir.

¹⁰ That is not to say that the internal tribal matters examples of tribal government and the right to reside are rendered meaningless. EPA notes that the tribes may decide who may live in their Indian Territories and how to conduct the affairs of their governments without the ability to regulate non-member discharges to waters of Indian Territory by facilities located outside of Indian Territory. See e.g. *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574, 590–91 (Me. 2001) (southern tribes control access to the internal deliberations of their tribal governments).