

Indian Territories. *See e.g.*, 38 M.R.S.A. section 467(7). EPA cannot deny the strong interest that the state has shown in regulation of discharges to Indian Territory waters.

Given the state's strong interest in regulating discharges to waters in Maine, the fact that all but three of the discharges to Indian Territory waters are by non-member facilities and all but two have their operations located outside of the Indian Territories by any interpretation of Indian Territory boundaries takes on great significance. Because the facilities are located outside of the Indian Territories, the factor relating to the diminishment of the state's interest and authorities within Indian Territory does not apply. Because they are not tribal or tribal member facilities and are located outside of the Indian Territories, the tribal interest in regulating them is diminished and the state interest increased. The state would have its full inherent authority to regulate the facilities themselves. If EPA found that the state lacked adequate authority to regulate the discharges for purposes of the NPDES program because the discharge points for these facilities were in the Indian Territories, however, it would have a grave effect on the state's very strong interest in regulating the discharges to water by facilities which it otherwise may regulate.

DOI's opinion notes that only a small percentage of the discharges covered by the state's program application are in the southern tribes' Indian Territories. DOI Op. at 15 n. 22. The suggestion appears to be that denying the state's application for these discharges will not substantially impair the state's overall interest in regulating discharges to waters throughout the state. EPA does not agree that this approach adequately characterizes the state's interest in the waters at issue here.

First, this jurisdictional dispute is about the state's authority in the Indian Territories. Therefore, the more relevant analysis is the apportionment of discharges into waters that may lie in those Indian Territories, not the whole state. From this perspective, 19 of the 21 dischargers are non-tribal facilities, and two are tribal.

Even if we look at the entire state, however, the state's interest in these waters is considerable, though the number of permits may be small. The Penobscot River is the state's largest river and its largest watershed; it is literally an artery for the state's economy and a major resource for much of central Maine. Withholding the permitting authority for the discharges along this stretch of the Penobscot River

from the state's water quality permitting program would deprive the state of the ability to implement its MEPDES program in a significant portion of a critical waterway. EPA believes that doing so would have a significant effect on the state's interest in this application.

*Prior legal understandings:* While noting that MICSA creates a unique framework distinct from federal Indian law, the *Akins* court looked to "[g]eneral federal Indian caselaw" for support of its conclusion that stumpage permits are an internal tribal matter, because it had "long presumed that Congress acts against the background of prior law." 130 F.3d at 489 (citing *Kolster v. INS*, 101 F.3d 785, 787–88 (1st Cir. 1996)); see also *Fellencer*, 164 F.3d at 712 ("a court must take into account the tacit assumptions that underlie a legislative enactment, including not only general policies but also preexisting statutory provisions.") (quoting *Passamaquoddy Tribe*, 75 F.3d at 789). The *Akins* court cited with approval both a case holding that state taxation of non-Indian activities on tribal lands was preempted, *Akins*, 130 F.3d at 490 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)), and a case holding that a tribe had the inherent authority to tax non-Indian activities on tribal land as part of its powers of self-government. *Id.* (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)). DOI's opinion and the southern tribes' comments summarize the federal Indian case law, which has uniformly upheld inherent tribal authority to regulate water quality under the CWA, including non-member pollution sources. DOI Op. at 16 (citing, *inter alia*, *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998)).

The *Akins* court noted that "[the *White Mountain Apache* and *Merrion*] cases uniformly recognize the importance of the factors we have stressed: that the issue involves matters between tribe members and matters of the economic use of natural resources inherent in the tribal lands." 130 F.3d at 489–90. The court contrasted *White Mountain Apache* and *Merrion*, which permitted tribal taxation of non-member timber harvesting and mineral extraction that took place on tribal lands, with *Montana* and *Strate*, which denied tribal jurisdiction over hunting and fishing and torts on non-member lands. *Id.* The court referred to those cases to throw into sharp relief the fact that *Akins* concerned tribal member timber harvesting from tribal lands. Although the court noted that "tribes retain considerable control over nonmember conduct on tribal land," it

limited the holding of the case by noting that "only tribal conduct [was] at issue" in *Akins*. *Id.* (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)). The First Circuit focused on its conclusion that tribal control over the conduct of tribal members' use of tribal natural resources was clearly within the scope of inherent tribal authority under general federal Indian law, and was therefore consistent with prior legal understandings. It drew no larger conclusions under MICSA about the regulation of non-members.

The *Fellencer* court did not examine how federal Indian law treats members versus non-members, having disposed of the impact on the non-member *Fellencer* in its discussion of the previous factors. The *Fellencer* court found "particularly important" the prior legal understandings that Title VII of the Civil Rights Act of 1964 (employment discrimination) exempted tribes from its coverage, and that the Indian Civil Rights Act of 1968 granted exclusive jurisdiction to the tribal courts "because they inform the intent of Congress in the adoption of the Settlement Act." *Fellencer*, 164 F.3d at 712. The court's analysis of this factor merges into the following discussion of statutory origins, where the court also examined the support in federal Indian law for tribes preferring Indians in employment decisions.

The tribal regulation of even non-member discharges to Indian Territory waters is consistent with the prior legal understandings against which MICSA was enacted. EPA finds that this factor is outweighed by the other factors. Furthermore, Congress clearly intended to depart from prior legal understandings concerning environmental regulatory authority in these Indian Territories.

*Statutory origins of the subject matter:* The *Fellencer* court noted an additional factor beyond those addressed in *Akins*: do the statutory origins of the subject matter suggest that tribal control is appropriate? In *Fellencer* the community nurse position was funded under a program where Congress specifically provided for "an employment preference for Indians in the legislation." *Id.* at 713. DOI and the tribes point out that MICSA itself, 25 U.S.C. 1724(h), provides for the southern tribes to manage their "land or natural resources" pursuant to agreements with DOI under the Indian Self-Determination Act, which promotes tribal self-government by transferring federal programs to the tribal governments. But MICSA also uses exactly the same term, "land or natural resources," in section 1725(b)(1) to