

describe the areas over which it is giving the state jurisdiction by ratifying MIA. If Congress's use of the Indian Self-Determination Act in MICA section 1724(h) were meant to be an indication that resource management was internal to the southern tribes and not subject to state regulation, section 1725(b)(1) would be left without much content when it refers to "land and natural resources." On the other hand, it is relatively easy to give both these provisions meaning by concluding that any management agreements for the southern tribes' land and natural resources must also comply with relevant state land use and environmental laws, at least to the extent there are impacts on the state's interests outside the tribes' Indian Territories.

As another argument that the statutory origins weigh in favor of finding discharges to waters to be internal tribal matters, DOI notes that the NPDES program is part of the CWA, and EPA has long interpreted the CWA to embody a preference for tribal regulation of surface water quality on Indian reservations.¹³ DOI Op. at 17–18. EPA continues to strongly agree that Congress expressed a preference for tribal programs under the CWA within Indian reservations. But we find that this preference is not analogous to the statutory origins of the nursing position that the *Fellencer* court reviewed. In *Fellencer*, the matter subject to regulation was the employment of a community health nurse. The nurse's position was created under and funded by a federal program designed to promote tribal self-determination through, among other things, Indian employment preferences. *Fellencer*, 164 F.3d at 713. The nursing position at issue owed its very existence to a federal program designed to prefer Indian employment; therefore, it was reasonable to shield that position from state laws that would undo any such preference.

Here, the matters subject to regulation are the discharges to the waters of the Indian Territories by private persons and municipalities. The first goal enumerated in the CWA is to control

and eventually eliminate such discharges, not to create them. See 33 U.S.C. 1251(a)(1). Although the non-tribal wastewater treatment plants may have received federal funding, the funding was of a general nature aimed at reducing discharge of pollutants to navigable waters, not at promoting tribal self-determination. Unlike the nursing position in *Fellencer*, these discharges exist regardless of the federal government's preference for tribal self-determination, and the federal statutory framework regulating these discharges would not be defeated if an approvable state program is used to control them.

iv. The Great Northern and Georgia-Pacific Cases

The Maine Supreme Judicial Court and the United States Court of Appeals for the First Circuit issued their decisions in the *Great Northern* and *Georgia-Pacific* cases following DOI's issuance of its opinion and the major comments submitted by all the parties. *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574 (Me. 2001), cert. denied 534 U.S. 1019 (2001); *Penobscot Nation v. Georgia-Pacific*, 254 F.3d 317 (1st Cir. 2001), cert. denied 534 U.S. 1127 (2002). The parties hotly dispute the significance of these cases. These cases sprang out of a disagreement between the southern tribes and the paper companies as to whether the state's Freedom of Access Act (FOAA), 1 M.R.S.A. sections 401–410, Maine's counterpart to the federal Freedom of Information Act, applied to the tribes.

In state court, three paper companies sought to require the southern tribes to provide access to tribal governmental documents relating to environmental and water quality regulation. See *Great Northern Paper*, 770 A.2d at 577–80. The companies argued that the southern tribes' status as municipalities under MICA and MIA requires them to comply with FOAA, just like other political subdivisions of the state. Shortly before the paper companies filed their case in state court, the southern tribes unsuccessfully sought an injunction in federal court to bar the paper companies from interfering with an internal tribal matter in violation of MICA. The paper companies won access to certain tribal documents in the state courts, and the federal appeals court upheld the federal district court's decision not to enjoin the state court action. See *Georgia-Pacific*, 254 F.3d 317.

The Maine Supreme Judicial Court found that the internal deliberations of the tribes are internal tribal matters, but held that communications with other governments were not: "the Freedom of

Access Act does not apply to the Tribes in the internal conduct of their governments, but does apply when the Tribes communicate and interact with other governments." *Great Northern Paper, Inc.*, 770 A.2d at 591. The court decided that the decisions taken within a tribe to petition the federal or state government and the documents generated in the process were internal tribal matters excluded from state regulation. *Id.* at 589. When the tribes acted on that decision by communicating their desire, among other things, to have EPA retain the NPDES program in the Indian Territories, the documents generated in the process of that communication were subject to the FOAA because the communications sought to limit the authority of the state in the Indian Territories and could affect the relationships among the state, the tribes, and the federal agencies. *Id.* at 590. The state asserts that this holding indicates surface water quality regulation cannot be an internal tribal matter.

Opponents of the state point to the limits of these decisions. The state court's decision does not address the underlying question of environmental regulation in the tribes' Indian Territories; it is a decision about access to documents. Moreover, a state court decision is not generally binding on EPA when assessing the scope of internal tribal matters, which the First Circuit has twice held is a question of federal law. Finally, the First Circuit's decision to decline jurisdiction over the dispute is simply a narrow application of the "well [i.e., properly] pleaded complaint" rule designed to prevent litigants from transforming defenses under state law into federal causes of action. *Georgia-Pacific*, 254 F.3d at 321–22.

EPA agrees that neither of these cases dictate the outcome of our decision on Maine's application in the southern tribes' Indian Territories. The decision of the Maine Supreme Judicial Court did not find that the internal tribal matters exception is limited to those matters that do not affect non-members. 770 A.2d 574, 590 n. 19. The court also found, however, that because the communications between the tribes and the federal and state governments might have a meaningful effect on the public through EPA's action on the NPDES application, the documents were subject to the FOAA.

[T]he relationship between the state and the Tribes regarding the regulation of water quality within the state is a matter of legitimate interest of the citizens of this state. * * * In sum, because the decisions reached by the Tribes have resulted in actions of a

¹³ 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 MICA 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.