

tribal discharge that may have substantial effects on water quality beyond the southern tribes' Indian Territories, EPA will assess at that time whether the potential impacts of the new discharge would be sufficiently confined to remain an internal tribal matter.

Use of tribal lands and natural resources and tribal control over their natural resources: The operations of these facilities are entirely contained within the lands of the tribes. The small discharges from these facilities have their most immediate effect on the waters either within or directly adjacent to the southern tribes' reservations. Therefore, managing the impact of those discharges on their Indian Territories is of most immediate concern to the tribes.

Interest of the State of Maine: While Maine has applied to administer the MEPDES program for all the discharges in and around the southern tribes' Indian Territories, *Akins* and *Fellencer* require us to weigh the state's interest in these two permits against the tribes' interests. The practical effect on the state of EPA withholding authority for these permits from the state program is negligible because the environmental impact of these facilities discharges is comparatively immaterial. We have approved the state to issue nearly all of the existing NPDES permits that discharge in or around the southern tribes' Indian Territories. But far more important than the simple number of permits, we have approved the state to issue the permits with the largest discharges that account for the overwhelming bulk of the water quality impacts from point sources in these waters. So we believe the state's remaining interest in securing the issuance of these last two minor discharge permits is relatively slight.

In contrast, the southern tribes' interest in regulating these tribal facilities that provide governmental services to tribal members is enormous. Congress made it clear under MICSA that it was preserving the sovereignty of the southern tribes to a certain extent:

The treatment of the Passamaquoddy Tribe and the Penobscot Nation in the Maine Implementing Act is original. It is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.

S. Rep. at 29. The facilities attendant to these two remaining discharge permits function as part of the governmental infra-structure on which the southern tribes rely to support the very existence of their communities as independent cultures. It impairs the state's interest in

water quality regulation very little to respect the tribes' vital interest maintaining their direct relationship with the federal government in regulating these two operations.

Prior legal understandings: Finding that the regulation of the tribal facilities located in the Indian Territories that discharge to what may be Indian Territory waters is an internal tribal matter is strongly supported by the *Akins* court's presentation of federal Indian law. The court found that general federal Indian law stood for the proposition that the state would generally be preempted from regulating on tribal lands because of the strong federal interest in tribal self-determination. 130 F.3d at 490. These two facilities are owned and operated by the tribal governments and non-members are not involved, so the federal interest in promoting tribal self-determination is very high and is not tempered by any substantial impacts on non-members.

Ambiguity and assessing environmental impacts: EPA concluded that Congress's decision to authorize the state to regulate the environment in the southern tribes' Indian Territories was unambiguous, and that the reservation of internal tribal matters does not reach discharge permits with substantial effects on non-members. But in assessing the status of these two tribal facilities and their discharges, we have concluded that their impacts outside the southern tribes' Indian Territories are so immaterial that the permits fit within the internal tribal matters exception. While there might be some debate over the scope of that impact, in this situation, EPA believes it is appropriate to invoke the doctrine directing us to resolve ambiguities in the meaning of a statute relating to Indian sovereignty in favor of Indian tribes.

Moreover, EPA believes that the Agency's judgment about the scope of the environmental impacts from these facilities is important. While EPA is not assigned the role of implementing MICSA, we are the agency delegated to implement the CWA and, therefore, serve as the federal government's expert on surface water quality regulation and discharge permitting. Thus, EPA believes it falls to us to weigh the environmental effects of these two minor discharges as we sort through the factors the First Circuit has developed to apply the concept of internal tribal matters under MICSA.

Based on a thorough review of MICSA and MIA, their legislative histories, relevant judicial precedent, and the many comments EPA received from all sides of this issue, the Agency

concludes that MICSA unambiguously grants the State of Maine adequate authority over discharges to tribal waters to support administration of the MEPDES program in the Indian Territories of the Penobscot Nation and Passamaquoddy Tribe, with the exception of any permits for facilities with discharges that EPA determines are internal tribal matters. EPA has determined that there are currently two tribal facilities that the state cannot adequately regulate, and EPA will retain the NPDES permits for discharges from those facilities.¹⁶

3. Federal Indian Trust Responsibility in Maine

EPA has received almost as many comments about the nature of our trust responsibility to the Maine tribes as about jurisdiction under MICSA. Again, EPA responds in detail to all those comments in our response to comments document. But we offer here an overview of our analysis because we believe it is an important complement to our conclusion that Maine has adequate authority to administer the MEPDES program in the southern tribes' Indian Territories.

a. Dispute Over the Applicability of the Trust in Maine

The state and some commenters argue that MICSA's savings clauses prevent the trust from applying in Maine. The trust is a doctrine developed under federal common law, and the Maine Supreme Judicial Court has held that the federal law which the savings clauses exclude from Maine includes federal common law. *Stilphen*, 461 A.2d at 488; *but see, Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (finding that the trust responsibility compels the application of the canons of Indian treaty construction to MICSA). According to this argument, to the extent the trust doctrine operates for the benefit of Indians, it would violate the savings clauses and cannot apply in Maine.

On the other hand, many parties argue that the trust doctrine requires EPA to protect the Maine tribes and their natural resources. This responsibility cannot be delegated to the state, but is an obligation the federal government must carry out on a government-to-government basis directly with the

¹⁶ EPA will determine whether future point source discharges in the Indian Territories of the southern tribes, including the disputed territories, qualify as internal tribal matters using a case-by-case review of individual permit applications or proposed state permits. This approach will allow the Agency to base its decision on a fully developed administrative record with particularized attention to the facts surrounding each permit application.