

**BALANCING THE FISHES' SCALES: TRIBAL, STATE, AND
FEDERAL INTERESTS IN FISHING RIGHTS AND WATER
QUALITY IN MAINE**

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INTRODUCTION

At their core, legal conflicts often involve disputes over power, money, respect, or any combination thereof.¹ The State of Maine has a complicated and often adversarial legal relationship with the federally recognized Native American Tribes (Tribes) in the State.² Perhaps the most contentious legal

1. N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW*, at xi (2008).

2. Cassandra Barnum, Note, *A Single Penny, an Inch of Land, or an Ounce of Sovereignty: The Problem of Tribal Sovereignty and Water Quality Regulation Under the Maine Indian Claims Settlement Act*, 37 *ECOLOGY L.Q.* 1159, 1161 (2010). Barnum's Note provides an excellent look into the history and legal issues surrounding the battles between Maine and the Tribes over water quality regulation. In fact, her Note recommended that the EPA invoke the federal trust responsibility to tribes

relationship pertains to the scope of Maine's authority to regulate water resources on Indian territories and lands (Indian lands).³ The ongoing conflicts between Maine and the Tribes over water resource regulation are complex and often volatile, involving clashes over power, money, and respect.⁴ A series of state and federal laws setting aside reservation and trust land for the Tribes in the 1980s and 1990s laid the foundation for the water resource disputes between Maine and the Tribes.⁵ These laws codified complex settlement negotiations between the State and Tribes, and resulted in a unique jurisdictional framework for the protection of Tribal natural resources.⁶ The legal conflict at the center of this Note erupted in February 2015, and juxtaposes Maine's authority to regulate water quality standards (WQS) with the Tribes' right to fish for sustenance on Indian lands.⁷ The emotional responses ignited by this conflict illuminate why the parties need a more comprehensive and less adversarial approach to settling these disputes.

The current dispute crystalized on February 2, 2015, when the Environmental Protection Agency (EPA) sent a letter to the Maine Department of Environmental Protection (DEP).⁸ The letter informed the DEP that the EPA was disapproving all of Maine's WQS related to human

to disapprove Maine's water quality standards for failing to protect the Tribes' sustenance fishing rights. *Id.* at 1202. Five years later, in 2015, the EPA did just that, and this Note focuses on its decision.

3. See Bill Trotter, *EPA Ruling on Water Quality Standards in Penobscot River Tribal Sections Could Cost Towns Millions*, BANGOR DAILY NEWS (Feb. 11, 2015, 3:15 PM), <http://bangordailynews.com/2015/02/11/news/state/epa-ruling-stirs-debate-over-legal-financial-effect-of-indians-territorial-dispute-in-maine/> (discussing how representatives from Maine believe that the EPA's 2015 disapprovals for water quality standards could cost state businesses and municipalities millions of dollars).

4. Colin Woodard, *LePage Calls EPA's Tribal Waters Ruling 'Outrageous'*, PORTLAND PRESS HERALD (Mar. 2, 2015), <http://www.pressherald.com/2015/03/02/maine-governor-on-epas-tribal-waters-ruling-its-an-outrage/> (regarding disputes over the Penobscot River, Penobscot Indian Nation Chief Kirk Francis said that the Tribe is "not against economic development," but Maine needs to "[r]ecognize the cultural needs of the tribes . . . so we can manage a lifestyle that maintains the cultural traditions of a people").

5. Barnum, *supra* note 2, at 1171.

6. See FRIEDERICHS ET AL., THE DRAFTING AND ENACTMENT OF THE MAINE INDIAN CLAIMS SETTLEMENT ACT 8 (2017), http://www.mitsc.org/documents/157_2017-2-22Suffolk.MICSAReport.Final.Feb2017.pdf (discussing the time and effort put into the negotiation process for state laws); Barnum, *supra* note 2, at 1168 (explaining that the laws essentially subjected the Tribes "almost entirely to the State's jurisdiction," which is different than the jurisdictional status of many Indian tribes in the western United States).

7. Letter from H. Curtis Spalding, Reg'l Adm'r., U.S. Env'tl. Prot. Agency, to Patricia W. Aho, Comm'r, Me. Dep't of Env'tl. Prot. (Feb. 2, 2015), https://www.epa.gov/sites/production/files/2016-04/documents/me_let_020215.pdf [hereinafter February, 2015 Letter].

8. *Id.*

health criteria for waters on Indian lands.⁹ Subsequent letters on March 16, 2015, and June 5, 2015, communicated additional disapprovals for Indian lands.¹⁰ The EPA's letters shocked State officials.¹¹ Prior to the February 2015 letter, the EPA had never addressed Maine's WQS for Indian lands.¹² In fact, from 2004 to 2014, every time the EPA addressed new standards or proposed WQS in Maine, it explicitly refrained from taking any action on the standards as applied to Indian lands.¹³

The inaction prompted Maine to file suit against the EPA in federal court in July 2014.¹⁴ Maine asserted its authority to establish WQS for all waters within the State under the Clean Water Act (CWA) and demanded EPA action on all WQS in the State, including those for Indian lands.¹⁵ The

9. The EPA never identified the precise geographic scope of waters on Indian lands in any of its letters. ME DEP'T OF ENVTL. PROT., DEP'S POSITION ON EPA'S WRONGFUL DISAPPROVALS OF MAINE'S WATER QUALITY STANDARDS 1 (2015) (on file with author) [hereinafter DEP'S POSITION]. However, this Note assumes that the term includes surface water bodies found wholly within, partially within, or directly abutting the reservation and trust lands procured with federal funds for the Tribes in Maine. Under the primary federal law establishing the reservation and trust land for Maine's Tribes, known as the Maine Indian Claims Settlement Act, the purpose of the land acquisition fund was to "acquir[e] land or natural resources" for the Tribes. 25 U.S.C. § 1724(d) (2012). "[L]and or natural resources" include "water and water rights, and hunting and fishing rights." *Id.* § 1722(b). As such, this Note assumes that the EPA referred to waters on the reservation and trust lands, or waters abutting these lands, when referring the waters on or in Indian lands. *See infra* Part II.B (analyzing the Tribes' sustenance fishing rights codified in Maine and federal laws setting reservation and trust lands aside for the Tribes). The letter also disapproved other WQS throughout the State, none of which are at issue here. DEP'S POSITION, *supra*.

10. Letter from H. Curtis Spalding, Reg'l Adm'r, U.S. Env'tl. Prot. Agency, to Patricia W. Aho, Comm'r, Me. Dep't of Env'tl. Prot. (Mar. 16, 2015), https://www.epa.gov/sites/production/files/2016-04/documents/me_let_031615.pdf; Letter from H. Curtis Spalding, Reg'l Adm'r, U.S. Env'tl. Prot. Agency, to Patricia W. Aho, Comm'r, Me. Dep't of Env'tl. Prot. (June 5, 2015), https://www.epa.gov/sites/production/files/2016-04/documents/me_let_060515.pdf.

11. *See* Woodard, *supra* note 4 (quoting Maine Governor Paul LePage, who claimed the ruling was "outrageous").

12. Letter from H. Curtis Spalding, Reg'l Adm'r, U.S. Env'tl. Prot. Agency, to Patricia W. Aho, Comm'r, Me. Dep't of Env'tl. Prot. (Feb. 2, 2015), <http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060g.pdf> [hereinafter EPA's Analysis]. The EPA's Analysis was attached to the EPA's February, 2015 Letter, and provides a detailed analysis of the EPA's decision regarding the disapproval of WQS on Indian lands. *Id.*

13. *Id.* According to the State, many of the WQS that the EPA finally acted upon in 2015 were pending for more than "10, 20, or even 30 years." DEP'S POSITION, *supra* note 9, at 1.

14. Complaint at 1, *Maine v. McCarthy*, 46 ELR 20182 (D. Me. 2016) (No. 1:14-cv-00264-JDL).

15. The 24-page Complaint laid out Maine's primary contention that it had environmental jurisdiction over all water within the state, pursuant to the Settlement Acts and the CWA. *Id.* at 1–2. *See infra* Part II.A (explaining the various state and federal laws addressing Tribal relations with Maine, collectively known as the Settlement Acts). In addition, the initial Complaint alleges that the EPA secretly communicated with Maine Indian Tribes, specifically the Penobscot Indian Nation. Complaint, *supra* note 14, at 2. The EPA discussed the Tribes' efforts to promulgate their own WQS as well as

lawsuit forced the EPA to take action on the WQS for Indian lands, but in the end, Maine did not like the results.¹⁶ After weighing its options, on October 8, 2015, Maine filed an amended complaint to its July 2014 suit against the EPA—claiming that the 2015 disapprovals for WQS on Indian lands were unlawful.¹⁷ While this Note does not predict the outcome of Maine's suit against the EPA, the complexity of the legal issues sheds light on why the collective federal, Tribal, and state interests would be better served by an out-of-court settlement.

This Note analyzes the policy considerations, legal framework, and lost opportunities illuminated by the EPA's decision to disapprove WQS on Indian lands in Maine. Part I considers the federal interests in the dispute and provides an analysis of the EPA's rationale for the decisions, including its trust responsibility and authority under the CWA.¹⁸ Part II considers the Tribes' interest by analyzing the history of the Tribes' agreements with Maine and the Tribes' rights under Maine and federal law in the context of the EPA's decision. Part III analyzes Maine's primary legal arguments against the EPA's decision and highlights why Maine's interests are likely better served by working cooperatively with the EPA and Tribes. Finally, Part IV recommends how Maine and the Tribes can build mutual trust and attempt to resolve future conflicts outside of the courts. Given the incessant conflicts over Tribal water rights under the current framework, Part IV provides a suggestion for how Maine and the Tribes can do more to encourage compromise—rather than waste valuable resources in the war over water quality.

A. Water Quality Regulation in Maine and EPA's Decisions

The CWA requires that any individual or entity discharging pollutants from a point source into waters of the United States must obtain a National Pollutant Discharge Elimination System (NPDES) permit.¹⁹ NPDES permits work to protect and maintain water quality by

obtain their own separate delegated authority to administer pollution discharge permitting under the CWA. *Id.*; see also Susan Sharon, *Maine Sues EPA Over Water Quality Assessments on Tribal Lands*, ME. PUB. (July 8, 2014), <http://news.mpbnet.net/post/maine-sues-epa-over-water-quality-assessments-tribal-lands> (discussing Maine's decision to file suit against the EPA).

16. See DEP'S POSITION, *supra* note 9, at 1, 3.

17. Second Amended Complaint at 1, *Maine v. McCarthy*, 46 ELR 20182 (D. Me. 2016) (No. 1:14-cv-00264-JDL).

18. See *infra* Part IV.A (discussing the lost opportunities for Maine to limit federal intrusion by failing to address the EPA's and Tribes' concerns).

19. See Clean Water Act, 33 U.S.C. § 1331(a) (2012) (provision of the CWA permitting states to adopt their own WQS subject to EPA approval).

limiting the volume of pollutants; since 1972, they have been responsible for “significant improvements” in the quality of the Nation’s water bodies.²⁰ The CWA allows states to apply for EPA authorization to administer the NPDES program within their borders, subject to EPA oversight, if the state intends to enforce effluent standards that meet, or exceed the EPA’s standards.²¹

The EPA approved Maine’s application to administer the NPDES program in 2003, but explicitly withheld Maine’s jurisdiction to regulate Tribal discharges on Indian lands.²² The decision led to litigation culminating in the First Circuit Court of Appeals decision in *Maine v. Johnson* in 2007.²³ In that decision, the First Circuit ultimately acknowledged Maine’s authority to regulate surface water discharge permits under the NPDES program—including discharges by the Tribes on Indian lands.²⁴ Because the CWA also gives states the authority to establish and maintain WQS for surface waters within their borders, Maine felt that *Johnson* bolstered its position vis-à-vis the Tribes.²⁵ However, even after *Johnson*, the EPA remained reticent to take action on the WQS on Indian lands.²⁶

According to the EPA’s 2015 letters, it delayed addressing the WQS on Indian lands even after *Johnson* because Maine’s authority remained unclear.²⁷ This murkiness flowed from the “unique statutory framework” governing the relationship between Maine and the four federally recognized Indian Tribes in Maine: the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet, and the Aroostook Band of Micmacs.²⁸ This framework includes both state and federal acts codifying agreements

20. *Supplemental Module: NPDES Permit Program*, ENVTL. PROT. AGENCY, <https://www.epa.gov/wqs-tech/supplemental-module-npdes-permit-program> (last updated Feb. 14, 2017).

21. 33 U.S.C. § 1342(b) (2012); 40 C.F.R. §§ 123.21–123.30 (2015).

22. Application by Maine to Administer the National Pollutant Discharge Elimination System Program, 68 Fed. Reg. 65,052–65,053 (Nov. 18, 2003) (notice and final approval).

23. *Maine v. Johnson*, 498 F.3d 37, 39 (1st Cir. 2007).

24. *See id.* at 46–47 (finding that the discharge of pollutants into navigable waters on Tribal lands was outside the “internal affairs exemption” of the Settlement Acts).

25. 33 U.S.C. § 1331(a)(2) (2012); Letter from Janet T. Mills, Attorney Gen., Me., to Gina McCarthy, Adm’r., U.S. Env’tl. Prot. Agency & Loretta Lynch, Attorney Gen., U.S. Dep’t of Justice, Ex. A 1–2 (June 12, 2015), https://www.epa.gov/sites/production/files/2015-06/documents/60_day_noi_from_state_of_maine_re_3_epa_actions_on_maine_wqs.pdf.

26. February, 2015 Letter, *supra* note 7, at 2.

27. EPA’s Analysis, *supra* note 12, at 9.

28. Letter from Hilary C. Tompkins, Solicitor, U.S. Dep’t of the Interior, to Avi S. Garbow, Gen. Counsel, U.S. Env’tl. Prot. Agency (Jan. 30, 2015), <http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060qq.pdf> [hereinafter DOI Letter].

between Maine and the Tribes, collectively known as the “Settlement Acts.”²⁹ The Settlement Acts defined and enhanced the Tribes’ land base and subjected the Tribes to the civil and criminal jurisdiction of Maine, except for “internal Tribal matters.”³⁰

As the First Circuit found in *Johnson*, administering NPDES permits and “environmental regulations” are not “internal Tribal matters.”³¹ This holding is unique to Maine, however, because under long-recognized principles of federal Indian law, states generally do not have civil regulatory authority (including the authority to regulate the environment) in Indian country, unless expressly authorized by Congress.³² Following a January 30, 2015, opinion letter from the Department of the Interior (DOI), the EPA felt that it had enough information to rule on Maine’s authority to set WQS on Indian lands.³³ The EPA ultimately found *Johnson* controlling and conceded that “the unique jurisdictional formula” gave Maine the authority to set WQS on Indian lands.³⁴

Even though the EPA clarified Maine’s authority to set WQS on Indian lands, the EPA concluded that Maine’s authority is not absolute.³⁵ The EPA remains charged with reviewing all WQS promulgated by states and can object to any standards or designated uses that it feels do not meet the requirements of the CWA.³⁶ If a state fails to address the EPA’s objection to the standards, the EPA can take over and promulgate standards that it deems appropriate.³⁷ This is the route that the EPA took in its 2015 disapproval of Maine’s human health standards for waters on Indian lands.³⁸ The EPA found that the Settlement Acts explicitly acknowledge

29. The Settlement Acts consist of: the state-law Maine Implementing Act (MIA), ME. STAT. tit. 30, §§ 6201–6214 (2016); the federal Maine Indian Claims Settlement Act (MICSA), 25 U.S.C. §§ 1721–1735 (2012); the state-law Micmac Settlement Act (MSA), ME. STAT. tit. 30 §§ 7201–7207 (2016); and the federal Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991) (codified as amended at 25 U.S.C. § 1721 (2012)).

30. EPA’s Analysis, *supra* note 12, at 9.

31. *Maine v. Johnson*, 498 F.3d 37, 44–45 (1st Cir. 2007).

32. EPA’s Analysis, *supra* note 12, at 2. *See* Act of Aug. 15, 1953, Pub. L. No. 83–280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2012)) (establishing a method for certain states to assume jurisdiction over Indian reservations); 25 U.S.C. §§ 1321–1326 (2012) (establishing an alternate method for certain states to acquire jurisdiction).

33. *See* EPA’s Analysis, *supra* note 12, at 3 (noting that the EPA “carefully considered and relied upon” the DOI’s Jan. 30, 2015 opinion letter while reaching their decision).

34. *Id.* at 2.

35. *Id.* at 8.

36. 33 U.S.C. § 1313(a)(2) (2012).

37. 33 U.S.C. § 1313(e)(3) (2012).

38. February, 2015 Letter, *supra* note 7, at 4.

sustenance-fishing rights for the Tribes in Maine.³⁹ Because the Settlement Acts explicitly set aside land for the Tribes to “continue their unique culture,” which “include[s] sustenance fishing,” Maine’s WQS must protect such rights.⁴⁰ Acting as trustee for the Tribes, the EPA read Maine’s designated use of “fishing” on Indian lands to mean “sustenance fishing.”⁴¹ As such, the EPA concluded that Maine did not account for an adequate fish-consumption rate when determining its human health criteria for waters on Indian lands.⁴² Essentially, the EPA claimed that the WQS could not support fish populations healthy enough for the Tribes to consume safely within their sustenance fishing rights.⁴³ Understandably, the Tribes in Maine applauded the EPA’s decisions.⁴⁴

B. Maine’s Response

Not surprisingly, given the jurisdictional issues implicated by the EPA’s decision, Maine responded much differently than the Tribes. On March 17, 2015, and June 12, 2015, Maine’s Attorney General, Janet Mills, sent the EPA a notice of intent to sue over the disapprovals.⁴⁵ The notice of intent letters described Maine’s position that the EPA’s disapprovals were unlawful.⁴⁶ Janet Mills followed up on October 8, 2015, when she filed an amended complaint to Maine’s 2014 action against the EPA, reiterating the claims from the 2015 notice of intent letters.⁴⁷ Maine’s legal arguments relate to the EPA’s interpretation of the Settlement Acts and the EPA’s application of a new “sustenance fishing” designated use for waters in Indian lands.⁴⁸ Additionally, underlying Maine’s legal claims are broader

39. EPA’s Analysis, *supra* note 12, at 4.

40. *Id.* at 2.

41. *Id.*

42. *Id.* at 3.

43. *Id.*

44. *See* Trotter, *supra* note 3 (discussing how Penobscot Chief Kirk Francis said that he “couldn’t be happier” with the EPA’s decision).

45. Letter from Janet. T. Mills to Gina McCarthy, *supra* note 25. The June 12, 2015 notice of intent letter is actually an amended notice of intent to sue from the March 17, 2015 letter, incorporating the additional disapprovals from the EPA’s June 5, 2015 letter. *Id.* at 1, Ex. A 1.

46. *Id.* at Ex. A 3 [hereinafter NOI Exhibit A].

47. Second Amended Complaint, *supra* note 17, at 3–5.

48. NOI Exhibit A, *supra* note 46, at 3. Maine argues that its legal challenges are properly brought under the Administrative Procedure Act and also asserts mandatory duty claims against the EPA under the CWA. *Id.* at 4; Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2012). *See also* 33 U.S.C. § 1365(a)(2) (2012) (authorizing suits to be filed against the Administrator of the EPA when he or she breaches a nondiscretionary duty with respect to a state).

policy arguments relating to Maine's interests in regulating water quality within the State under a centralized and comprehensive framework.⁴⁹

The long list of Maine's legal claims revolves around the EPA's creation of a designated "sustenance fishing" use for waters in Indian lands, and how this designation contravenes the Settlement Acts.⁵⁰ Maine contends that the EPA's decision creates a two-tiered regulatory system, elevating the goals of Maine's federally recognized Tribes over the rest of Maine's population.⁵¹ Maine argues that the EPA's creation of an entirely new designated use of "sustenance fishing" in Maine waters, without a public notice-and-comment process, violates the CWA and Administrative Procedure Act.⁵² Maine's overarching arguments are that the EPA improperly interprets the Settlement Acts and that the EPA's unilateral creation of the "Tribal sustenance fishing" designation "usurps Maine's role as a 'State' under the Clean Water Act."⁵³

From a policy perspective, Maine claims that the EPA's proposed heightened standards to protect Tribal sustenance fishing rights will have a regulatory reach well beyond the waters in Indian lands.⁵⁴ For example, numerous entities, including industries and municipalities, are currently regulated under the NPDES program for discharges into the Penobscot River system alone.⁵⁵ The Penobscot Nation's reservation consists of islands in the Penobscot River.⁵⁶ The EPA's decisions suggest that the permit requirements for multiple regulated entities on the Penobscot, and other regulated entities discharging into different state waters near Indian lands, will need to change to comply with the stricter human health criteria.⁵⁷ Additionally, Maine argues that since the EPA failed to define the precise boundaries of "waters in Indian lands," the decisions drastically disrupt longstanding regulatory expectations in Maine's water quality classification system.⁵⁸

49. NOI Exhibit A, *supra* note 46, at 4.

50. Second Amended Complaint, *supra* note 17, at 49–50.

51. *Id.* at 3.

52. DEP'S POSITION, *supra* note 9, at 3.

53. NOI Exhibit A, *supra* note 46, at 3; Second Amended Complaint, *supra* note 17, at 4.

54. Second Amended Complaint, *supra* note 17, at 3; NOI Exhibit A, *supra* note 46, at 4.

55. Woodard, *supra* note 4.

56. *Id.*

57. *Id.*

58. *Id.* Maine and other opponents to the EPA's decisions argue that the economic consequences of the EPA's decisions would cost Maine municipalities millions of dollars in system upgrades and increased taxes, as well as costing industries millions in new equipment and reduced production. *See id.* (discussing the economic consequences of more stringent water quality standards for municipalities and industries in the Penobscot River Valley alone).

C. Constant Tensions

The current dispute over WQS for Indian lands illustrates the strong tensions between Maine and the Tribes over the scope and application of the Settlement Acts. Since the first enactment, Maine and the Tribes have repeatedly litigated the meaning of the Acts.⁵⁹ The frequency and aggressive nature of these lawsuits strained the relationship between the Tribes and Maine.⁶⁰ The relationship has become so spiteful that in April 2015, Maine Governor Paul LePage rescinded a 2011 Executive Order directing state agencies to establish policies recognizing the sovereignty of the Tribes.⁶¹ In response, Tribal representatives in the Maine Legislature for the Penobscot Nation, Passamaquoddy, and Aroostook Band of Micmacs abandoned their seats in the Legislature and issued a statement saying that they no longer recognized Maine's authority to interfere with Tribal "self-governing rights," such as fishing for sustenance.⁶² Then, on October 14, 2015, only six days after Maine filed its complaint against the EPA's WQS disapprovals, Governor LePage issued another Executive Order stating that Maine's attempts to promote collaboration "with the Tribes have proved to be unproductive because the State of Maine's interests have not been respected in the ongoing relationship"⁶³

Donna Loring, a former Tribal Representative in the Maine Legislature, captured the Tribes' vantage point in state-tribal conflicts over the Settlement Acts, stating: "Since Maine became a state in 1820, it has tried to make us disappear—and, when that didn't happen, it chose to make us invisible."⁶⁴ At a minimum, the Tribes believe that Maine is limiting their ability to self-govern, critically threatening Tribal cultural and spiritual life.⁶⁵ Water resources, especially large rivers such as the Penobscot, are

59. Nicole Friederichs, *A Reason to Revisit Maine's Indian Claims Settlement Acts: The United Nations Declaration on the Rights of Indigenous Peoples*, 35 AM. INDIAN L. REV. 497, 525 (2010-2011).

60. *Id.*

61. The Associated Press, *Maine Native American Tribes Say Trust Is Deteriorating*, N.Y. TIMES (Nov. 15, 2015), http://www.nytimes.com/2015/11/16/us/maine-native-american-tribes-say-trust-is-deteriorating.html?_r=0.

62. *Id.*

63. Me. Exec. Order No. 2015-12 (Oct. 14, 2015), <http://www.maine.gov/tools/whatsnew/attach.php?id=659947&an=1>.

64. DONNA M. LORING, IN THE SHADOW OF THE EAGLE: A TRIBAL REPRESENTATIVE IN MAINE 11 (2008).

65. Friederichs, *supra* note 59, at 498.

inextricably linked to the Tribes' history, culture, and identity.⁶⁶ As such, the Tribes view Maine's claims of unbridled regulatory control over these waters not only as an attempt to limit Tribal power, but also as showing a lack of understanding and respect for Tribal culture and customs.⁶⁷

On the other side, Maine contends that the Settlement Acts clearly prevent the "two-tiered" regulatory structure for land and water resources that the Tribes are calling for.⁶⁸ Maine believes that the Tribes are attempting to circumvent the Settlement Acts, by going behind Maine's back and secretly communicating with the EPA and other federal agencies.⁶⁹ For instance, even though the Settlement Acts subject the Tribes to the civil and criminal jurisdiction of Maine, beginning in the late 1990s, the Penobscot Nation began requesting that the EPA grant the Tribe "treatment as a State" (TAS) status under § 518 of the CWA.⁷⁰ TAS status would permit the Penobscot Nation to administer their own NPDES program and set WQS wholly separate from Maine's WQS.⁷¹ However, Congress clarified that because of Maine's regulatory jurisdiction, established by the Settlement Acts, the TAS provision does not apply in Maine.⁷² Actions like those of the Penobscot Nation led Maine to lose trust in the Tribes' motives. Maine sees the Tribes' secret communications with federal agencies as a means to get more than what the Tribes bargained for under the Settlement Acts.⁷³

The divergent viewpoints of Maine and the Tribes provide an important lens through which to view the WQS dispute. It is unlikely that anyone involved in negotiating the Settlement Acts, on behalf of the Tribes or Maine, anticipated the incessant litigation involving the meaning of the Acts.⁷⁴ In fact, the Settlement Acts created the Maine Indian Tribal-State

66. Joseph G.E. Gousse, Comment, *Waiting for Gluskabe: An Examination of Maine's Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 536 (2014).

67. See Woodard, *supra* note 4 (explaining that, in the context of the EPA's disapprovals, the Tribes hope that Maine can recognize and respect Tribal cultural traditions).

68. Second Amended Complaint, *supra* note 17, at 15.

69. DEP's POSITION, *supra* note 9, at 3.

70. Congress added § 518 to the CWA in 1987, which allowed qualifying Indian tribes to apply for TAS status under the CWA. 33 U.S.C. § 1377(e) (2012); Second Amended Complaint, *supra* note 17, at 38–39.

71. Second Amended Complaint, *supra* note 17, at 39.

72. *Maine v. Johnson*, 498 F.3d 37, 43 n.5 (1st Cir. 2007).

73. See DEP's POSITION, *supra* note 9, at 3 (suggesting that the Tribes may have secretly sought increased WQS from the EPA).

74. See Nell Gluckman, *Tense Relationship Between Wabanaki Tribes, State of Maine Dissected by Scholars During Panel at UMaine*, BANGOR DAILY NEWS (Mar. 21, 2014, 4:32 PM), <http://bangordailynews.com/2014/03/21/politics/tense-relationship-between-wabanaki-tribes-state-of->

Commission (Commission) as an advisory body to help with the implementation of the Settlement Acts.⁷⁵ The Commission serves as an intergovernmental organization directed to:

[C]ontinually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State and shall make such reports and recommendations to the Legislature, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation as it determines appropriate.⁷⁶

The Commission has the important task of evaluating the effectiveness of the Settlement Acts.⁷⁷ However, the Settlement Acts limit the scope of the Commission's authority in respect to these relationships to "reports and recommendations" to the Legislature and Tribes.⁷⁸ As such, the Settlement Acts, as currently written, do not provide a mechanism for fostering a strong relationship between the Tribes and Maine.⁷⁹ These differing views in how the Settlement Acts apply to water resource regulation ultimately left the door open for the federal government to step in and assert its own interests in protecting water quality on Indian lands in Maine.

I. STEPPING IN: EPA'S RATIONALE FOR THE DISAPPROVALS

A. The Federal Trust Responsibility

The EPA based its decision to disapprove Maine's WQS for waters on Indian lands in large part on the federal government's trust responsibility to tribes.⁸⁰ The federal government's trust responsibility to Indian tribes flows from the common law doctrine first articulated in *Cherokee Nation v. State*

maine-dissected-by-scholars-during-panel-at-umaine/ (discussing the disappointment of Reuben Butch Phillips, a representative for the Penobscot Nation during negotiations for the Settlement Acts, who said, "[a]lmost every single day since 1980, I regret not pressing some of the issues that we are now fighting").

75. ME. STAT. tit. 30, § 6212(1) (2016).

76. *Id.* § 6212(3).

77. *Id.*

78. *Id.*

79. See Friederichs, *supra* note 59, at 497 (discussing how in 2007, Maine was involved in lawsuits with all four of the federally recognized Tribes in Maine, over the meaning and scope of the Settlement Acts).

80. EPA's Analysis, *supra* note 12, at 12–13.

of Georgia in 1831.⁸¹ In that case, Chief Justice Marshall stated that a tribe's "relations to the United States resemble that of a ward to his guardian"; the tribes look up to the government for protection and rely upon its oversight and power.⁸² Because the guardian and ward model was based on 19th century notions derived from colonialist policies, courts modified it over time into a trust relationship in which tribes are the "beneficiary and the United States the trustee."⁸³ The Supreme Court characterized this relationship as an affirmative fiduciary duty, duty of protection, and moral obligation—akin to that of a trustee to a beneficiary—with the same attendant responsibilities.⁸⁴ The trust relationship can develop through formal exchanges between tribes and the federal government, such as treaties, executive orders, agreements, and statutes.⁸⁵

Federal courts have given the United States considerable flexibility in applying the trust doctrine to protect tribal resources.⁸⁶ Moreover, because of its common law roots, the government requirement to apply the trust responsibility is sometimes unclear—especially with regard to environmental protection.⁸⁷ In such cases, unless a clear statutory fiduciary duty exists, courts are unlikely to compel the federal government to act on the trust responsibility to protect tribal interests.⁸⁸ Federal agencies appear free to choose to act on the trust responsibility when they find the trust relationship implicit in a statute or regulation.⁸⁹

81. Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 291 (2000).

82. *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

83. Barnum, *supra* note 2, at 1194.

84. James T. Johnson, Comment, *Treaty Fishing Rights and Indian Participation in International Fisheries Management*, 77 DENV. U. L. REV. 403, 407 (1999). See also Paula Goodman Maccabee, *Tribal Authority to Protect Water Resources and Reserved Rights Under Clean Water Act Section 401*, 41 WM. MITCHELL L. REV. 618, 662 (2015) (elaborating that the Supreme Court described the trust responsibility as the requirement to fulfill the understandings and expectations that arise over the entire course of the relationship between the federal government and federally recognized tribes).

85. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" – How Long a Time is That?*, 63 CALIF. L. REV. 601, 614–15 (1975).

86. Goodman, *supra* note 81, at 301.

87. See Barnum, *supra* note 2, at 1195 (explaining the complex relationship of the federal government to tribes in the environmental protection context because the government "must play multiple roles, acting as regulator and decision-maker as well as trustee").

88. See *United States v. Navajo Nation*, 556 U.S. 287, 295–96 (2009) (explaining the requirement of a "specific rights-creating or duty-imposing" statute or regulation in order to hold the federal government liable under the trust responsibility for money damages).

89. Barnum, *supra* note 2, at 1197–98.

The first acceptance of a federal trust relationship with Maine's Tribes did not occur until the 1970s.⁹⁰ Before that time, the federal government viewed the Trade and Intercourse Act, which required Congressional ratification of agreements with tribes, as inapplicable to tribes in the original 13 colonies.⁹¹ However, the Maine Tribes successfully proved this belief wrong in 1975 in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*.⁹² The ruling in *Morton* essentially required the federal government to acknowledge that it has a trust responsibility to Maine's Tribes.⁹³ Pursuant to the EPA's relationship with the Tribes, the four Tribes are federally recognized; they have their own sovereign governments that the EPA works with on a regular basis, and the EPA consults with the Tribes when making particular decisions that could impact tribal interests.⁹⁴ Additionally, in 2014, the DOI reaffirmed the trust responsibility to tribes by explaining that federal agencies should work with tribes to "the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, and treaty and similarly recognized rights."⁹⁵

The Settlement Acts provide the framework through which federal agencies can work with the federally recognized Tribes in Maine.⁹⁶ As part of the Settlement Acts, the Tribes ceded much of their civil and criminal

90. The contours of why this occurred are beyond the scope of this Note. Essentially, the Trade and Intercourse Act of 1790 established the first trust relationship with Maine's Tribes, since it prohibited the sale of Indian lands without the approval of the federal government. Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790). However, until the 1970s, the government assumed that the Trade and Intercourse Act did not apply to tribes with territories within the original 13 colonies. Barnum, *supra* note 2, at 1165 n.30. This finally changed when the Passamaquoddy Tribe began bringing legal claims for their ancestral lands, which culminated in the First Circuit finding that the Trade and Intercourse Act did apply to Maine's Tribes, thus creating a federal trust relationship. See *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975) (finding the claim that the Trade and Intercourse Act did not apply to the Passamaquoddy Tribe erroneous because, once Congress established a trust relationship with the Tribes, Congress alone can determine when that relationship shall cease).

91. Barnum, *supra* note 2, at 1165 n.30.

92. *Morton*, 528 F.2d at 380.

93. DOI Letter, *supra* note 28, at 10–11.

94. EPA's Analysis, *supra* note 12, at 13. Maine contends that the statutory provisions in the Settlement Acts revoked the federal government's trust responsibility with the Tribes. *Id.* However, the EPA rejects this argument. See *id.* (explaining that the Settlement Acts impact the jurisdictional framework through which the EPA works to address the Tribes' interests, but does not extinguish the EPA's ability to address those interests through the trust responsibility).

95. THE SEC'Y OF THE INTERIOR, ORDER NO. 3335, at 5 (2014), <http://elips.doi.gov/ELIPS/DocView.aspx?id=4037&searchid=af4b8ec1-8655-42d1-9f45-fe05f334df3e&dbid=0>.

96. EPA's Analysis, *supra* note 12, at 13.

jurisdiction to the State.⁹⁷ Maine argues that because the Tribes abrogated their rights to the State, the federal government's trust responsibility cannot extend to civil matters, such as defining WQS.⁹⁸ The Tribes did give up a considerable amount of their jurisdictional authority through the Settlement Acts, but what they gained in return was federal recognition and land.⁹⁹ Therefore, the Settlement Acts clearly established a federal trust relationship for the Tribes and for the Tribes' land.¹⁰⁰

The Tribal lands are critical to the EPA's position, because the Indian lands at issue are held in trust by the federal government.¹⁰¹ From the federal government's perspective, federal agencies, such as the EPA, have a fiduciary obligation to protect these resources.¹⁰² Accordingly, when the EPA considered the approval of WQS on Indian lands, the agency acted on its fiduciary duty and considered the implications of those standards on the Tribes' trust resources.¹⁰³ Uncovering which resources are held in trust, and why those resources were set aside for the Tribes, guided the EPA's ultimate decision to disapprove Maine's WQS on Indian lands.¹⁰⁴

The EPA ultimately found that the Settlement Acts confer authority on Maine to set WQS on Indian lands.¹⁰⁵ However, the EPA also found that the Settlement Acts codified the Tribes' right to fish for sustenance, which the EPA should consider when fulfilling its duties under the CWA.¹⁰⁶ Therefore, the scope of the EPA's trust responsibility to the Maine Tribes must fall within the statutory contours of the Settlement Acts and the CWA. Understanding the legal scope of the EPA's decisions requires an analysis of the EPA's authority under the CWA to disapprove WQS, as well as an analysis of why the EPA disapproved Maine's human health criteria standards.

97. See ME. STAT. tit. 30, § 6202 (2016) (explaining that under the Maine Implementing Act, Tribal lands and populations are subject to the civil and criminal laws of the State).

98. EPA's Analysis, *supra* note 12, at 7–8.

99. Barnum, *supra* note 2, at 1171.

100. DOI Letter, *supra* note 28, at 3.

101. *Id.*

102. *Id.* at 11. See Maccabee, *supra* note 84, at 662 (explaining that “[f]ederal agencies accept that the federal government has a fiduciary obligation to protect resources held in trust for [T]ribes”).

103. EPA's Analysis, *supra* note 12, at 4.

104. February, 2015 Letter, *supra* note 7, at 4.

105. EPA's Analysis, *supra* note 12, at 7.

106. *Id.* at 4.

B. EPA's Authority to Disapprove Water Quality Standards

Under the CWA, unless otherwise revoked, all states are responsible for “reviewing, establishing, and revising water quality standards.”¹⁰⁷ WQS consist of: (1) the water’s designated uses, such as public water supply, recreation, and propagation of fish; (2) the specific “criteria” specifying, in either numerical or narrative form, the amounts of various pollutants that can be in the water before impairing designated uses; and (3) anti-degradation provisions that protect existing uses and limit degradation of high-quality waters.¹⁰⁸ The designated use defines the particular goals for a water body and the criteria work to protect that use.¹⁰⁹ At the very least, the specific water quality criteria for any water body must be sufficient to protect the water body’s designated use(s).¹¹⁰ States must adopt standards that will ultimately “protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.”¹¹¹ Unless a state can show otherwise, all WQS must, at a bare minimum, set criteria that will allow a water body to be both fishable and swimmable.¹¹²

When a state revises an existing WQS or proposes a new WQS, the state must submit it to the EPA Administrator for approval.¹¹³ The Administrator then has the affirmative duty to consider whether the criteria proposed by the state are protective of the designated uses for the water body, and whether the standards protect the public health or welfare and serve the purposes of the CWA.¹¹⁴ According to the EPA’s regulations, when it reviews state WQS for approval or disapproval, the review involves, among other considerations: first, a determination of whether the state adopted designated uses consistent with the requirements of the CWA;

107. 40 C.F.R. § 131.4(a) (2015).

108. *Id.* § 131.2; EPA’s Analysis, *supra* note 12, at 33.

109. U.S. ENVTL. PROT. AGENCY, WATER QUALITY STANDARDS HANDBOOK 1, 4 (1994), <http://www2.epa.gov/sites/production/files/2014-10/documents/handbook-chapter2.pdf>.

110. 40 C.F.R. § 131.5(a)(2).

111. § 131.3(i). To serve the purposes of the Act, a state’s WQS must provide water quality that will protect the propagation of “fish, shellfish, and wildlife” and provide for “recreation in and on the water” where attainable. WATER QUALITY STANDARDS HANDBOOK, *supra* note 109, at 1. *See also* 40 C.F.R. § 131.10(j) (establishing that states must conduct an attainability analysis if the state sets a WQS that will not provide for waters to be fishable or swimmable).

112. 40 C.F.R. § 131.10(a).

113. 33 U.S.C. § 1313(c)(2)(A) (2012). *See also* 40 C.F.R. § 131.21(a)–(b) (explaining the EPA’s authority to review and approve or disapprove a state’s WQS).

114. 33 U.S.C. § 1313(c)(2)(A) (2012). *See also* Puget Soundkeeper All. v. EPA, No. C13-1839-JCC, 2014 WL 4674393, at *5 (W.D. Wash. Sept. 18, 2014) (order on motion for summary judgment) (explaining the “mandatory duty either to approve or disapprove” the water quality standards that a state submits to the EPA).

and second, whether the state adopted criteria that protect the designated uses based on sound scientific rationale.¹¹⁵ If the EPA determines that the standards adopted by the state are consistent with these requirements, then it will approve the WQS.¹¹⁶ However, if the EPA finds the standards are not consistent with the above requirements, then the EPA can take over and promulgate new or revised standards consistent with the CWA.¹¹⁷ As such, the CWA and the EPA's own regulations demonstrate that the ultimate determination of whether standards are sufficient for a particular water body resides with EPA.¹¹⁸

C. EPA's Disapproval of Maine's Human Health Criteria on Indian Lands

The Maine Department of Environmental Protection (DEP) develops and proposes new and revised WQS for Maine's waters.¹¹⁹ Between 2003 and 2014, the Maine DEP periodically submitted new or revised WQS to the EPA for review.¹²⁰ As discussed above, the EPA failed to affirmatively address Maine's proposed standards on waters in Indian lands during that time.¹²¹ In response to the EPA's inaction, Maine requested that the EPA approve the WQS for all of the State's waters in 2013, including those on Indian lands, and then filed suit against the EPA in 2014.¹²² The EPA's delay was due, in part, to uncertainty regarding Maine's jurisdiction to set WQS in the Tribes' lands.¹²³ The EPA concluded that the Settlement Acts did provide Maine sufficient jurisdiction to set WQS in Indian lands.¹²⁴ The EPA's February, 2015 letter constituted the Agency's decision for all of Maine's WQS submissions from 2003 through 2014 as applied to Indian lands.¹²⁵

115. 40 C.F.R. § 131.5(a). There are a total of five criteria laid out under § 131.5(a), however, only those listed above with their applicable number are implicated in this discussion.

116. *Id.* § 131.5(b).

117. *Id.*

118. Barnum, *supra* note 2, at 1199.

119. EPA's Analysis, *supra* note 12, at 1.

120. *Id.*

121. *See supra* note 63 and accompanying text (discussing Maine's frustration with the EPA's failure to act on the WQS for Indian lands).

122. Complaint, *supra* note 14, at 1–2.

123. EPA's Analysis, *supra* note 12, at 4.

124. *Id.*

125. *Id.*

In a practical sense, when evaluating new or revised WQS, the EPA undertakes a two-step process.¹²⁶ First, the EPA reviews and may act on proposed designated uses.¹²⁷ Then, if the EPA approves the designated uses, the EPA considers whether the proposed water quality criteria are adequate to protect the specific designated uses.¹²⁸ In this case, the EPA first reviewed and approved Maine's proposed surface water classifications and corresponding designated uses for all waters on Indian lands.¹²⁹ All of these classifications have one important feature in common: "fishing" constitutes a designated use in each.¹³⁰ The EPA harmonized the Settlement Acts and the CWA to interpret the "fishing" designated use to mean, "sustenance fishing" for the waters on Indian lands.¹³¹ The EPA failed to cite any case law, statute, or regulation directly authorizing it to "read in" a designated use set by a state.¹³²

After interpreting the sustenance fishing use for the waters on Indian lands, the EPA proceeded to determine whether Maine's proposed water quality criteria were sufficiently protective.¹³³ WQS protect against the effects of toxic pollutants on humans through the adoption of numerical human health criteria.¹³⁴ Because toxins suspended in the water will accumulate in fish, when considering a designated use of "fishing," states must extrapolate numeric human health criteria using applicable human fish consumption rates.¹³⁵ The rate reflects the grams of fish per day that a human consumes. From the fish consumption rate, the state calculates the relative health risks to fish consumers, such as the relative cancer risk, based on set numeric criteria for toxic pollutants.¹³⁶

126. *See id.* at 15–16 (discussing the process of first approving designated uses, and then determining whether the criteria submitted are protective of the designated uses).

127. *Id.*

128. *Id.*

129. *Id.* at 4.

130. *See* ME. STAT. tit. 38, §§ 465(1)(A)–(4)(A) (2015) (outlining the uses, in descending order of most-protected to least-protected, for Classes AA, A, B, and C freshwaters in Maine); *id.* §§ 465-B(1)(A)–(3)(A) (outlining the uses, in descending order of most-protected to least-protected, for Classes SA, SB, and SC estuarine and marine waters in Maine); *id.* § 465-A(1)(A) (outlining the uses for lakes and ponds in Maine).

131. EPA's Analysis, *supra* note 12, at 30.

132. *See id.* (failing to cite direct authority for its action). *See also* DOI Letter, *supra* note 28, at 7 ("[DOI is] not aware of any case law addressing an identical situation to the one raised by Maine's proposed WQS.").

133. EPA's Analysis, *supra* note 12, at 31.

134. *Human Health Water Quality Criteria and Methods for Toxics*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/wqc/human-health-water-quality-criteria> (last updated Mar. 22, 2017).

135. EPA's Analysis, *supra* note 12, at 35.

136. *Id.* at 36.

States do have flexibility in choosing which populations the criteria are designed to protect.¹³⁷ States can base the fish consumption rate on the “general population of fish consumers” to apply a statewide fish consumption rate, or the state can base its criteria on specific geographic regions with smaller high-consumption subpopulations.¹³⁸ This flexibility permits states to make scientifically informed risk management decisions regarding its population.¹³⁹ In the WQS Maine submitted to the EPA, Maine chose to focus the fish consumption rate on the statewide population, and used 32.4 grams per day, with an associated cancer risk level of one in one million.¹⁴⁰ Maine considered the Tribes a highly consuming subpopulation and determined that, even though the Tribes consume more fish, the statewide rate of 32.4 grams per day minimized the cancer risk level to Tribal populations to no greater than 1 in 10,000.¹⁴¹

The EPA concluded that the Settlement Acts determine how the EPA and Maine must analyze the potential effects that the toxic pollutants have on the Tribal population in the Tribes’ lands.¹⁴² Considering this difference in protection, and acting on its federal trust responsibility to the Tribes, the EPA concluded that it would be inconsistent with the Settlement Acts to treat Tribal members as a subpopulation for waters on Indian lands.¹⁴³ Based on a peer-reviewed study, the EPA concluded that the Maine Tribes historically consumed between 286 to 514 grams of fish from Maine waters per day.¹⁴⁴ In this context, the EPA disapproved Maine’s human health criteria for waters on Indian lands—the criteria were not based on “sound

137. U.S. ENVTL. PROT. AGENCY, METHODOLOGY FOR DERIVING AMBIENT WATER QUALITY CRITERIA FOR THE PROTECTION OF HUMAN HEALTH 2–6 (2000), <https://nepis.epa.gov/Exe/ZyPDF.cgi/20003D2R.PDF?Dockey=20003D2R.PDF> [hereinafter EPA 2000 METHODOLOGY]. In June 2015, the EPA finalized its updated guidance document for ambient water quality criteria to protect human health. Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 Fed. Reg. 36,986, 36,986 (June 29, 2015). Among other changes, the updated guidance document displays the EPA’s focus on ensuring the protection of human health through fish consumption rates that more accurately reflect the rates at which certain populations consume fish from inland and near-shore waters of the United States. U.S. ENVTL. PROT. AGENCY, HUMAN HEALTH AMBIENT WATER QUALITY CRITERIA: 2015 UPDATE (2015), <http://www2.epa.gov/sites/production/files/2015-10/documents/human-health-2015-update-factsheet.pdf>.

138. EPA’s Analysis, *supra* note 12, at 35.

139. EPA 2000 METHODOLOGY, *supra* note 137, at 2–6.

140. EPA’s Analysis, *supra* note 12, at 37.

141. *Id.* at 36–37.

142. *See id.* at 32 (“It is possible to harmonize these two statutory frameworks by recognizing that the State’s designated fishing use under the CWA must include the concept of sustenance fishing as provided for in the [S]ettlement [A]cts.”).

143. *Id.* at 32.

144. *Id.* at 42.

scientific rationale” and ultimately not protective of the designated use of sustenance fishing in the Tribes’ waters.¹⁴⁵ Understanding the legal support for the EPA’s disapprovals requires an analysis of the Tribes’ rights to fish for sustenance reflected in the Settlement Acts.

II. HOLDING ON: HOW THE TRIBES RETAINED SUSTENANCE FISHING RIGHTS

A. The Settlement Acts

Since long before Europeans arrived, fishing for sustenance on ancestral lands was an essential part of the Penobscot Nation, Passamaquoddy, Aroostook Band of Micmac, and Houlton Band of Maliseet’s livelihood and cultural heritage.¹⁴⁶ The intervening centuries following colonization contained numerous land transactions and other less-civilized means of disenfranchising the Tribes of nearly all of their lands.¹⁴⁷ In the 1970s, the Penobscot Nation and Passamaquoddy Tribe attempted to regain much of their ancestral lands through legal suits claiming a right to “between five and eight million acres” in Maine.¹⁴⁸ As discussed below, the Settlement Acts resolved these land claims starting in 1979, and by 1991 all four Tribes were federally recognized with a land base deliberately set aside to preserve the Tribes’ sovereignty and culture.¹⁴⁹

The Settlement Acts essentially occurred in two waves. First, the Maine legislature passed the Maine Implementing Act (MIA) in 1979 to settle the land claims of the Penobscot and Passamaquoddy—which Congress ratified in the Maine Indian Claims Settlement Act (MICSA) in 1980.¹⁵⁰ These two Acts primarily dealt with the Penobscot Nation and Passamaquoddy Tribe, setting aside both reservation and trust land, but also

145. *Id.*

146. *See Gousse, supra* note 66, at 536 (explaining that, according to creation legends in all of these Tribes, “the First People lived along the mighty Penobscot River and drew life from its cold, pristine waters, irrigating their crops, *harvesting fish*, and sustaining their health by the grace of its bounty”) (emphasis added).

147. *Id.* at 536 n.1.

148. PAUL BRODEUR, *RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND* 99 (1985).

149. *See Gousse, supra* note 66, at 538 (elaborating that the “compromise” made in the Settlement Acts extinguished full Tribal sovereignty and limited the Tribes to a limited “quasi-sovereign, quasi-municipal status”).

150. ME. STAT. tit. 30, §§ 6201–6214 (2016); 25 U.S.C. §§ 1721–1735 (2012). Additional settlement acts include the state-law Micmac Settlement Act (MSA), ME. STAT. tit. 30 §§ 7201–7207 (2016), and the federal Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, § 2(a)(4), 105 Stat. 1143, 1143 (1991) (codified as amended at 25 U.S.C. § 1721(b) (2012)).

providing provisions permitting trust land to be set aside for the Houlton Band of Maliseet Indians.¹⁵¹ In 1981, Maine amended the MIA to set aside trust land for the Houlton Band of Maliseet.¹⁵² Then, in 1989, the Maine legislature passed the Micmac Settlement Act (MSA), which embodied an agreement with the Aroostook Band of Micmacs.¹⁵³ Congress codified the MSA by passing the Aroostook Band of Micmacs Settlement Act (ABMSA) in 1991 to provide the Micmacs with the same trust land agreement secured for the Maliseets in the MICA.¹⁵⁴ These different Acts treat sustenance practices differently—depending first on the specific Tribe, and second on whether the land is reserved or held in trust.¹⁵⁵ Regardless of the type of land, the Acts’ language, Congressional intent, and the federal reserved rights doctrine support the EPA’s argument that the Tribes retained a right to carry on cultural traditions and fish for sustenance.¹⁵⁶

B. Finding Fishing: The Purpose of the Indian Lands

Of the four Tribes, the Penobscot Nation and Passamaquoddy Tribe are the only two with reservation lands.¹⁵⁷ These two Tribes also hold “explicit sustenance fishing rights.”¹⁵⁸ The language in the MIA, ratified by Congress in the MICA, states:

Sustenance fishing within the Indian reservations.
Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.¹⁵⁹

The limitation discussed in § 6207(4) is triggered only if the State makes an independent finding that the Tribes’ sustenance practices are diminishing fish stocks outside of the Tribes’ reservations, which Maine

151. ME. STAT. tit. 30, § 6202.

152. EPA’s Analysis, *supra* note 12, at 5.

153. ME. STAT. tit. 30, § 7202.

154. EPA’s Analysis, *supra* note 12, at 5.

155. *Id.* at 23–24.

156. *Id.* at 25.

157. Gousse, *supra* note 66, at 550–51.

158. *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181, 218 (D. Me. 2015) (order on cross-motion for summary judgment).

159. ME. STAT. tit. 30, § 6207(4) (2016).

has never done.¹⁶⁰ Importantly, the plain language of § 6207(4) reserves the right of the Penobscot Nation and Passamaquoddy Tribe to fish for sustenance on their reservation lands.¹⁶¹ This language supports the EPA's finding that Tribal members should be the "target population" for Maine's human health criteria on the reservation lands.¹⁶² For example, in *Atkins v. Penobscot Nation*, the First Circuit interpreted the MIA and the MICSA as forcing courts to only consider Tribal interests when assessing the use of natural resources within the Penobscot Nation's reservation lands.¹⁶³ In the current case, the natural resources in question are the quality of water and the health of fish, which the Passamaquoddy and Penobscot Nation Tribal members have a clear statutory right to enjoy for sustenance.¹⁶⁴ As such, it appears reasonable for the EPA to conclude that these Tribes warrant the "target population" designation for regulations concerning water resources on their reservation lands.

The language Congress used to provide sustenance fishing rights in federal trust lands is not as clear as the language found in MIA § 6207(4). Given this ambiguity, it is important to analyze the federal Indian law background, which shapes Maine's and Congress's trust land legislation.¹⁶⁵ The reserved rights doctrine is particularly informative in this context.¹⁶⁶ When congressional grants of lands to federal tribes are ambiguous on the topic of water rights, the reserved rights doctrine implicitly grants the tribes reserved rights in water.¹⁶⁷ To determine the scope of the reserved rights, courts generally look to Congress's underlying purpose for setting aside the

160. *See id.* § 6207(6) (explaining the scope of the limitation in § 6207(4) and placing the burden of proof on the State to prove that the practices are harming fish stocks outside the reservation lands).

161. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) (explaining that the plain language should be used, because when the "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear").

162. *See Atkins v. Penobscot Nation*, 130 F.3d 482, 484, 486–88 (1st Cir. 1997) (finding that the use of natural resources on Penobscot reservation lands constituted an "'internal' Tribal matter" under the MICSA, concerning only members of the Tribe).

163. *Id.* at 486.

164. *See* ME. STAT. tit. 30, § 6207(4) (containing the language: "members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance . . .").

165. *See* Maria E. Hohn, *Determining Water Quality Standards on Tribal Reservations: A Cooperative Approach to Addressing Water Quality Under the Clean Water Act*, 11 U. DENV. WATER L. REV. 293, 301–02 (2008) (discussing the importance of the reserved rights—or the Winters Doctrine—as providing a legal basis for a tribe's water rights).

166. *Id.*

167. *Id.*

tribal land.¹⁶⁸ The rights set aside for a tribe will “exist to the extent that the waters are necessary to fulfill the primary purposes of the reservation.”¹⁶⁹

Prior to the passage of the Settlement Acts, in 1968 the Supreme Court looked to legislative history to find that lands ceded to the Menominee Tribe authorized the Tribe to maintain their culture through a “way of life which included hunting and fishing.”¹⁷⁰ Under the MICSA, the purpose of the land acquisition fund for the Penobscot Nation, Passamaquoddy, and Maliseets was to “acquire land or natural resources” for the Tribes.¹⁷¹ The MICSA defines “land or natural resources” to include “water and water rights, and hunting and fishing rights.”¹⁷² While the language in the MICSA § 1722(b) vests the water rights, the legislative history for the MICSA clarifies congressional intent in allocating sustenance fishing rights to the Tribes.¹⁷³ Senate reports pertaining to the MICSA acknowledge that these three Tribes “are riverine in their land-ownership orientation.”¹⁷⁴ These reports clarify Congress’s intent to ensure that the Tribes have land to maintain their sovereignty and cultural integrity.¹⁷⁵ As a riverine people, an essential component of the Tribes’ culture was—and remains—fishing for sustenance in their waters.¹⁷⁶ As such, congressional intent in setting aside the lands included an implicit right to fish for sustenance.

The Aroostook Band of Micmacs did not obtain trust lands until the early 1990s through the ABMSA and the MSA.¹⁷⁷ Congress found that the Micmacs should obtain the same settlement that the Maliseets gained from the MICSA.¹⁷⁸ Senate reports for the ABMSA also displayed congressional intent to provide for a “subsistence base” for the Micmacs, while acknowledging the Tribe’s “undaunted collective will toward cultural survival.”¹⁷⁹ Such evidence of congressional intent under the reserved rights doctrine supports a finding that the Micmacs, just like the Maliseets, received an implicit reserved right to fish for sustenance on their trust lands.

168. *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983).

169. *John v. United States*, 720 F.3d 1214, 1231 (9th Cir. 2013).

170. *Menominee Tribe v. United States*, 391 U.S. 404, 405–06 (1968).

171. 25 U.S.C. § 1724(d) (2012).

172. *Id.* § 1722(b).

173. EPA’s Analysis, *supra* note 12, at 19.

174. S. REP. NO. 96-957, at 11 (1980).

175. *Id.* at 17.

176. *See Gousse*, *supra* note 66, at 536 (discussing the legendary importance of rivers to Maine’s Tribes and how harvesting fish to sustain the Tribes’ health was essential to survival).

177. EPA’s Analysis, *supra* note 12, at 5.

178. Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, § 2(a)(5), 105 Stat. 1143, 1143 (1991) (codified as amended at 25 U.S.C. § 1721(b) (2012)).

179. S. REP. NO. 102-136, at 9 (1991).

Regarding the trust lands, under the MIA and the MICSA, both the Penobscot and Passamaquoddy appear to have more clearly established sustenance fishing rights than the Maliseets, as well as the Micmacs under ABMSA.¹⁸⁰ Senate reports further explain that the Tribes “have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well.”¹⁸¹ These “certain ponds” pertain to those smaller than ten acres in size.¹⁸² Additionally, the MIA codifies the Penobscot Nation and Passamaquoddy’s rights to engage in sustenance fishing in larger ponds, as well as streams and rivers, in or alongside the trust lands.¹⁸³ Specifically, the MIA created and entrusted the Maine Indian Tribal-State Commission with the exclusive authority to establish fishing regulations in such waters.¹⁸⁴ When the Commission promulgates regulations for these waters, it must consider the needs of the Tribes to “establish fishery practices for the sustenance of the [T]ribes or to contribute to the economic independence of the [T]ribes”¹⁸⁵ The congressional intent to allow the Penobscot and Passamaquoddy Tribe nearly exclusive control over fishing in their trust lands further supports the need to consider these populations as the “target” when calculating human health criteria.

The reservation lands for the Penobscot and Passamaquoddy clearly provide the right to fish for sustenance.¹⁸⁶ The language and legislative history of the MICSA also suggest that the Penobscot and Passamaquoddy retained the right to fish for sustenance on their trust lands.¹⁸⁷ Additionally, both the Maliseets and Micmacs obtained reserved rights in water with the purpose of protecting their culture through a right to fish for sustenance.¹⁸⁸ Taken together, the language, congressional intent, and the reserved rights doctrine support the EPA’s finding that both the reservation and trust lands

180. EPA’s Analysis, *supra* note 12, at 22.

181. S. REP. NO. 96-957, at 16–17 (1980).

182. ME. STAT. tit. 30, § 6207(1) (2016).

183. EPA’s Analysis, *supra* note 12, at 22.

184. ME. STAT. tit. 30, § 6203(1) (2016).

185. *Id.* § 6207(3).

186. *See id.* § 6207(4) (containing an explicit provision allowing for sustenance fishing).

187. *See* 25 U.S.C. § 1722(b) (2012) (defining lands to include both “water rights” and “fishing rights”).

188. *See* *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) (explaining that while the Hoopa-Yurok Settlement Act did not explicitly grant sustenance fishing rights, the legislative history made clear that granting the land would not divest the Tribe of their fishing rights, but rather permit them to carry on their culture by preserving their fisheries).

ensure a right for Maine's Tribes to fish for sustenance.¹⁸⁹ The Settlement Acts collectively support the EPA's assertion that on Indian lands, Maine must consider the Tribes as the "target population" because of their sustenance fishing rights.

III. LOSING POWER: WHY MAINE SHOULD CONSIDER A COMPROMISE

Maine's response to sue the EPA over the disapprovals is not surprising given the power and jurisdiction at stake in this dispute.¹⁹⁰ Maine's relationship with the Indian Tribes in the State is both novel and nationally unique.¹⁹¹ The level of authority Maine has over the Tribes, including the regulation of natural resources, is markedly different from almost anywhere else in the United States.¹⁹² Maine argues that the Settlement Acts intentionally avoided the type of "two-tiered" system—or a nation within a state—that represents the relationship between federally recognized tribes and other states.¹⁹³ Because of Maine's current power, it is understandable why Maine contends that the EPA's finding of a sustenance fishing use for Indian lands creates a "special status or rights with respect to water or fish quality" not envisioned by the Settlement Acts.¹⁹⁴

Additionally, from Maine's vantage point, one can see why the EPA's actions appear to "usurp" Maine's role as a state under the CWA. However, Maine's powers over the particularly complex and important issues in this case are opaque. The potentially negative effects of legal precedent justifying the EPA's interpretation and application of the Settlement Acts to WQS should give Maine pause. As such, Maine's important interests in preserving its regulatory jurisdiction vis-à-vis the Tribes—and limiting federal intrusion into its relationship with the Tribes—are likely better

189. EPA's Analysis, *supra* note 12, at 24–25.

190. See Final Brief of Petitioners at 34–35, *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007) (Nos. 04-1375, 04-1363) (explaining Maine's opposition to greater environmental regulations as part of *Maine v. Johnson* because the State was interested in ensuring that the industries on the Penobscot River would not be regulated by stricter restrictions on protecting the environment).

191. *Akins v. Penobscot Nation*, 130 F.3d 482, 483 (1st Cir. 1997) (explaining that the relationship between Maine and the Maine Tribes is not governed by the usual laws regarding state and tribal jurisdiction because both federal and state statutes define the relationship).

192. See *Maine v. Johnson*, 498 F.3d 37, 42 (1st Cir. 2007) (noting that the status of the Passamaquoddy and Penobscot Nation Tribes in Maine is markedly different than the "status of Indian tribes in other states").

193. Second Amended Complaint, *supra* note 17, at 15.

194. *Id.*

served through cooperating with the EPA and Tribes and seeking an out-of-court compromise.

A. Distinguishing Maine v. Johnson

Maine's legal claims against the EPA rely substantially on the holding in *Maine v. Johnson*.¹⁹⁵ As discussed above, Maine believes that the First Circuit's holding in *Johnson* clarified its near plenary power to regulate natural resources on the trust and reservation lands of the Tribes.¹⁹⁶ The issue in *Johnson* was whether Maine had authority under the Settlement Acts to regulate NPDES permits for two facilities wholly within the reservation lands of the Penobscot and Passamaquoddy.¹⁹⁷ Upon delegating authority to Maine under the NPDES program, the EPA withheld permitting jurisdiction for both Tribal discharges within reservation lands.¹⁹⁸ Maine challenged the EPA's decision to withhold jurisdiction and the Tribes challenged the EPA's grant of jurisdiction to 19 non-Tribal facilities that drained into the Tribes' lands.¹⁹⁹ The First Circuit ultimately held that Maine had regulatory authority over the 19 non-Tribal facilities, as well as the two Tribal facilities, because the regulation of discharges did not fall within the "internal Tribal matters" exemption provided for in the Settlement Acts.²⁰⁰ Alternatively, the central issues in this case—the Tribes' right to fish for sustenance and the EPA's authority under the federal trust doctrine—were not explicitly addressed in the *Johnson* case.²⁰¹

First, in *Johnson*, the entire case revolved around regulatory jurisdiction and the "internal Tribal matters" exemption under the MIA.²⁰² The Tribal right at issue in *Johnson* was the right to regulate discharges, or more broadly, Tribal sovereignty relating to internal regulation and self-governance.²⁰³ Nothing in the EPA's 2015 decision to disapprove Maine's human health criteria on Indian lands suggests that the EPA based its

195. *See id.* at 2–49 (referring to the *Johnson* holding on 31 different occasions while laying out its legal claims against the EPA's decision).

196. *See supra* note 25 and accompanying text (discussing how Maine views the application of the *Johnson* decision to this conflict).

197. *Johnson*, 498 F.3d at 40.

198. *Id.* at 41.

199. *Id.*

200. *Id.* at 46.

201. *Id.* at 47–48.

202. *Id.* at 40.

203. *Id.* at 42 (describing the Tribes' arguments over regulatory authority as based in "their inherent sovereignty").

decision on the “internal Tribal matters” exemption.²⁰⁴ In the current case, the Tribes’ rights at issue pertain to sustenance fishing—rights which were not addressed in *Johnson*. Even though *Johnson* interprets the Settlement Acts’ provisions in Maine’s favor, the provisions addressing sustenance fishing do not provide Maine unbridled regulatory authority over these practices.²⁰⁵

The *Johnson* court explicitly declined to consider whether the provision of the MIA granted a right to the Penobscot and Passamaquoddy to take fish for sustenance.²⁰⁶ *Johnson* did note that the Penobscot and Passamaquoddy are subject to the laws of Maine “with very limited exceptions”; however, the grant of sustenance fishing rights pursuant to § 6207(4) of the MIA is one of those exceptions.²⁰⁷ Section 6207(4) explicitly states: “Notwithstanding . . . any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance”²⁰⁸ The powerful language in the MIA pertaining to sustenance fishing rights suggests that Maine’s reliance on *Johnson*, in this case, is not as powerful when the issue pertains to sustenance fishing.

Second, in *Johnson*, the First Circuit refused to consider one of the issues raised by this case: whether the EPA can act on its trust responsibility to the Maine Tribes under the CWA.²⁰⁹ When discussing the EPA’s argument that it has no federal trust responsibility to protect the Tribes’ rights to fish for sustenance, the First Circuit called the issue “quite different” than the presently litigated issue.²¹⁰ Because the EPA had yet to rule on any state-issued NPDES permits on that ground, the First Circuit found that the issue was not ripe for review.²¹¹ Critical to the current case, the *Johnson* court stated: “If Maine is wise in its exercise of its new

204. See EPA’s Analysis, *supra* note 12, at 10–11, 17–27 (discussing the provisions of the Settlement Acts pertaining to sustenance fishing that the EPA relied on in its decision, which do not rely at all on the provisions dealing with “internal Tribal matters”).

205. See ME. STAT. tit. 30, § 6207(4) (2016) (including language granting the Penobscot Nation and Passamaquoddy Tribe the right to fish for sustenance on their reservation lands).

206. See *Johnson*, 498 F.3d at 47–48 (explaining that the issue of whether the EPA could reject NPDES permits based on the trust responsibility and the Tribes’ sustenance fishing rights was not addressed by the court: “[i]n all events, we take no view today as to the ultimate resolution of these potential issues”).

207. *Id.* at 42.

208. ME. STAT. tit. 30, § 6207(4) (2016).

209. *Johnson*, 498 F.3d at 47–48.

210. *Id.* at 48.

211. *Id.* at 47–48.

authority, quite possibly these questions will not need to be resolved.”²¹² Since the *Johnson* decision in 2007, Maine’s alleged failure to take the Tribes’ concerns to heart—and exercise its regulatory jurisdiction wisely—pushed the EPA to act on its trust responsibility and disapprove the human health criteria on Indian lands.

The EPA’s authority under the federal trust doctrine to disapprove WQS on Indian lands is a central issue in this analysis.²¹³ As discussed in Part I, federal courts provide government agencies considerable flexibility in applying the federal trust doctrine to protect tribal rights.²¹⁴ Courts interpret the federal trust doctrine as imposing a fiduciary duty concerning “any Federal government action” relating to Indian tribes.²¹⁵ The EPA’s disapproval of WQS constitutes a federal government “action.”²¹⁶ Further, the trust responsibility extends to the protection of rights reserved in agreements with Indian tribes that Congress ratified.²¹⁷ As the Supreme Court held in *Antoine v. Washington*, when considering whether a fiduciary duty to protect a right exists, the proper inquiry is whether the tribe “acquired federally guaranteed rights by congressional ratification of [an] Agreement.”²¹⁸ In this case, at the very least, Congress guaranteed rights to the Penobscot Nation and Passamaquoddy Tribe to fish for sustenance on their reservation lands.²¹⁹ As such, for at least two important issues required to resolve this case, the *Johnson* decision provides little support to Maine’s assertion that the EPA acted unlawfully.

B. Interpreting Sustenance Fishing: Penobscot Nation v. Mills

A recent court decision appears to further weaken Maine’s position in this conflict. In December 2015, the United States District Court for the District of Maine decided a separate lawsuit between Maine and the Penobscot Nation involving the sustenance fishing provision in the MIA,

212. *Id.* at 48.

213. See DOI Letter, *supra* note 28, at 10–11 (discussing why the federal trust relationship counsels the EPA to consult with Maine’s Tribes and protect their sustenance fishing rights).

214. Goodman, *supra* note 81, at 301.

215. Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981) (emphasis in original) (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).

216. See Miss. Comm’n on Nat. Res. v. Costle, 625 F.2d 1269, 1277 (5th Cir. 1980) (characterizing the disapproval of state WQS as an agency “action”).

217. *Antoine v. Washington*, 420 U.S. 194, 204 (1975).

218. *Id.* at 205.

219. See *supra* note 159 and accompanying text (discussing provisions in the MICA codifying the sustenance fishing rights of the Passamaquoddy and Penobscot).

which the court in *Johnson* declined to consider.²²⁰ *Penobscot Nation v. Mills* represented the first time a federal court directly interpreted § 6207(4) of the MIA, and the court did not interpret the provision in Maine's favor.²²¹ In *Penobscot Nation v. Mills*, Maine argued that § 6207(4) granted members of the Penobscot Nation sustenance fishing rights *only* if they fished with "one foot on the island."²²² Because the water is not part of the reservation, Maine argued, the Nation did not have a right to fish for sustenance under the MIA unless members fished from the shores of their island reservations.²²³ The court rejected this interpretation as inconsistent with the legislative intent of the MIA.²²⁴

The court stated that it "cannot allow the State to sidestep interpretation of section 6207(4)" and that the court needed to "clarify the scope of the sustenance fishing right guaranteed under MIA."²²⁵ Even though the court found that the reservation lands only included the islands themselves, it interpreted the Penobscot Nation's sustenance fishing right to exist for the entire 60-mile stretch of the Main Stem of the River from Indian Island north to Millinocket.²²⁶ Because of the inherent conflict in granting a right to the Penobscot Nation in waters outside of its reservation lands, the court found § 6207(4) ambiguous.²²⁷ Ultimately, the court found that the legislature intended to protect the Penobscot Nation's sustenance fishing rights for the entire Main Stem, and stated that the court "cannot adopt an interpretation of section 6207(4) that diminishes or extinguishes the Penobscot Nation's retained right to sustenance fish" ²²⁸ In affording a broad interpretation to the sustenance fishing right in the MIA, this holding supports one of the EPA's central positions: the sustenance

220. *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181, 218 (D. Me. 2015) (order on cross-motion for summary judgment). This case involved disputes over the exact boundary of the Penobscot Nation's reservation land as well as the Penobscot Nation's right to fish for sustenance in the "Main Stem" of the Penobscot River. *Id.* at 185. The Main Stem stretches approximately 60 miles from Indian Island (near Bangor) and north to the confluence of the West and East Branches of the Penobscot River (near Millinocket). *Id.* at 186. The Penobscot Nation and the United States claimed that the reservation included the waters of the Penobscot River, while Maine claimed that the reservation only included the islands in the River. *Id.* at 185. The court ruled in Maine's favor on the boundary dispute, finding that the MIA clearly stated that the reservation lands only included the islands and not the Main Stem. *Id.* at 218. However, the court also rejected the State's argument pertaining to sustenance fishing. *Id.* at 219.

221. *Id.* at 222.

222. *Id.* at 220.

223. *Id.* at 216.

224. *Id.* at 224.

225. *Id.* at 220.

226. *Id.* at 222–23.

227. *Id.* at 222.

228. *Id.*

fishing rights in the Settlement Acts dictate that the Tribes should be the target population when Maine establishes human health criteria for waters on Indian lands.²²⁹ As such, the holding in *Penobscot Nation v. Mills* dilutes Maine's arguments to the contrary, and Maine should be more willing to find an out-of-court compromise.

C. Deference to the EPA's Actions

A full court battle becomes even less appealing for Maine when considering the deference that the EPA receives from courts when reviewing WQS. The EPA is the primary agency administering the CWA.²³⁰ Courts will not disrupt agency decisions based on highly scientific technical regulations, unless there is no rational basis for the agency's decision.²³¹ As such, the EPA's action on its mandatory duty to either approve or disapprove WQS is subject to the arbitrary and capricious standard of review under the Administrative Procedure Act (APA).²³² In such cases, the EPA's determination receives considerable deference.²³³

In *El Dorado Chemical Co. v. EPA*, the Eighth Circuit dealt with one of the primary arguments Maine makes against the EPA in this case: that the EPA usurped a state's role in setting WQS.²³⁴ At issue in *El Dorado* was whether the EPA violated the CWA when disapproving Arkansas' WQS.²³⁵ The EPA concluded that the proposed criteria were not protective of downstream-designated uses, and disapproved the newly proposed standards.²³⁶ There was debate about whether the CWA and the EPA's governing regulations permitted the EPA to consider downstream-designated uses.²³⁷ The Eighth Circuit ultimately found that the CWA itself supported the EPA's broad considerations when acting on new or revised WQS—finding that, “[t]he CWA endorses a holistic approach to the

229. EPA's Analysis, *supra* note 12, at 2.

230. See *supra* note 114 and accompanying text (discussing the EPA's mandatory duty regarding the approval or disapproval of water quality standards).

231. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (explaining that courts should carefully examine the administrative record to determine if an agency decision “was based on a consideration of the relevant factors and whether there has been a clear error of judgment”).

232. See *NRDC v. EPA*, 806 F. Supp. 1263, 1272 (E.D. Va. 1992) (reviewing the EPA's approval of Virginia's and Maryland's water quality criteria for dioxin under the arbitrary and capricious standard of review); Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

233. *NRDC*, 806 F. Supp. at 1272.

234. *El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 957 (8th Cir. 2014).

235. *Id.*

236. *Id.* at 958.

237. *Id.*

nation's waterways."²³⁸ In this case, the EPA interpreted ambiguities in the CWA and found that sound scientific rationale requires Maine to treat Tribal populations on Indian lands as the target population for their waters.²³⁹ In doing so, the EPA engaged in a reasonable interpretation of its authority and acted to ensure that the human health criteria protect the Tribes' health.

Importantly, the Supreme Court recently held: "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail."²⁴⁰ According to the APA, an agency decision is arbitrary and capricious if:

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²⁴¹

In this case, Maine claims that Congress did not intend the EPA to consider the Tribes' right to fish for sustenance under the Settlement Acts when reviewing Maine's human health criteria.²⁴² However, as discussed above, the federal trust responsibility compelled the EPA to consider the Tribes' rights on their own lands, especially the Penobscot and Passamaquoddy on their reservation lands. In addition, the DOI is the federal agency charged with administering and interpreting the Settlement Acts, and clearly found the federal trust relationship counsels protection of Tribal fishing rights in Maine.²⁴³ In the DOI's January 2015 letter to the EPA, it affirmed that the Tribes' fishing rights under the Settlement Acts are "well-founded" and clean water is essential to permit the Tribes to carry on their traditions and culture.²⁴⁴ For instance, the Penobscot Nation's ability to take fish near or on their reservation is essentially nullified

238. *Id.* at 959.

239. EPA's Analysis, *supra* note 12, at 2.

240. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013).

241. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

242. *See* Second Amended Complaint, *supra* note 17, at 9 (inferring that absent a congressional mandate to the contrary, the EPA may not consider special circumstances pertaining to Tribal rights).

243. *See* Gousse, *supra* note 66, at 550 (naming the DOI as the agency responsible for administering the Settlement Acts in Maine); DOI Letter, *supra* note 28, at 1 (responding to the EPA's request for guidance in interpreting the Settlement Acts with respect to tribal fishing rights and WQSs).

244. DOI Letter, *supra* note 28, at 11.

because of dioxin from paper mills, fish consumption advisories, and a nearly complete wipeout of the Tribal fishery.²⁴⁵ These findings suggest that “an important aspect of the problem” that the EPA needed to consider was the Tribes’ ability to safely eat fish for sustenance.²⁴⁶ The CWA’s “broad purpose” justifies the deference the EPA receives in its interpretation.²⁴⁷ As such, Maine’s arguments against the EPA’s action under the CWA lose considerable weight in light of the deference received by the EPA.

IV. DIRIGO: BUILDING TRUST, RESPECT, AND MOVING FORWARD

Maine’s state motto is “dirigo,” which is Latin for: “I lead” or “I direct.”²⁴⁸ In many respects, the tensions between the Tribes and the State exist because there is a lack of clear leadership—and clear direction—for how Maine and the Tribes can coexist under the Settlement Acts. The Tribes mistrust Maine’s exercise of regulatory power through the Settlement Acts. Over time, Maine lost trust in the Tribes’ motives, because of actions such as “undisclosed” consultations with the EPA on water quality issues.²⁴⁹ For any meaningful long-term solution to flow from this current conflict, Maine should seriously consider the potential consequences posed by continuing to neglect the Tribes’ sustenance fishing rights on their lands. Regardless of the outcome in this case, the broader fight over Tribal water rights in Maine will continue unless leaders from both Maine and the Tribes emerge and work toward a compromise.

A. Consequences Without Compromise

Maine responded to the EPA’s WQS decisions with a lawsuit, rather than compromising with the EPA and Tribes. If Maine looked across the country to Washington State, it would have seen what consequences could flow from that decision. In September 2015—before Maine filed its

245. *See id.* (describing the threats posed to the cultural traditions of Maine’s Native Americans if WQS fail to account for tribal fishing).

246. *Motor Vehicle Mfrs. Ass’n of the U.S.*, 463 U.S. at 43; William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 835 (2004).

247. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992).

248. *Dirigo*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/dirigo> (last visited May 11, 2017).

249. *See* DEP’S POSITION, *supra* note 9, at 3 (suspecting that undisclosed communications from the tribes influenced the EPA).

amended complaint in this case—the EPA proposed to promulgate new human health criteria for Washington State, based in large part on fishing rights for Washington’s federally recognized tribes.²⁵⁰ In the EPA’s proceeding in Washington, the EPA made clear that it prefers for the State to take cooperative action and adopt protective human health criteria—rather than having the criteria imposed on the State by the EPA.²⁵¹ The EPA’s firm policy toward protecting sustenance fishing rights was clear from the Washington proceeding, where it stated: “Where a population exercising such uses has a legal right to do so, the criteria protecting such uses must be consistent with such right.”²⁵²

Maine was on notice that its inaction could lead to the EPA promulgating WQS in Maine—an outcome that would further frustrate the State’s concerns over federal intrusion into its regulatory jurisdiction.²⁵³ Unfortunately, for Maine—and regulated entities discharging into Maine’s waters—the State’s failure to address the EPA’s and the Tribes’ WQS concerns, pushed the EPA to take the same approach as in Washington.²⁵⁴ The fear of further federal intrusion became a reality for Maine in December 2016, when the EPA promulgated rules setting final WQS for waters on Indian lands protecting the Tribes’ health and their sustenance fishing rights.²⁵⁵ Instead of pursuing a battle in court, Maine could have learned from the EPA’s disapprovals and sought a compromise that limited the EPA’s intrusion into its relationship with the Tribes. In the future, Maine can protect its interests in limiting federal intrusion on its regulatory jurisdiction if it works more collaboratively with the Tribes, and directly addresses the Tribes’ concerns.

250. Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. 55063, 55063 (proposed Sept. 14, 2015) (to be codified at 40 C.F.R. pt. 131).

251. *Id.*

252. *Id.* at 55067.

253. See Second Amended Complaint, *supra* note 17, at 50 (claiming that the EPA “usurped” Maine’s authority under the CWA in its disapprovals).

254. The EPA proposed a rule setting WQS on Indian lands in Maine to protect sustenance fishing in April 2016, and published the final rule on December 19, 2016. See Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466, 92466 (Dec. 19, 2016) (to be codified at 40 C.F.R. pt. 131) (discussing the industries, municipalities, and stormwater management districts that the rule would affect).

255. *Id.* at 92472 (discussing how the rules focus on protecting the Tribes’ sustenance fishing rights).

B. Empowering a Leader and Ending the War Over Water Quality

Maine's relationship with the Tribes is unique, but conflicts between federally recognized tribes and state governments over water are by no means unique to the State.²⁵⁶ The currents running through all state-tribal conflicts often include a lack of respect, trust, and communication.²⁵⁷ Across the United States, many state legislatures do not fully understand the cultural and governmental status of Indian tribes, while many tribal leaders and members mistrust the states because of historical dealings.²⁵⁸ Such a dynamic is unhealthy for all parties involved.²⁵⁹ As seen in Maine, these tensions often lead to each side getting locked into its particular position—making a court battle appear inevitable.²⁶⁰ However, the opportunity to avoid litigation abounds if mechanisms exist to allow the parties to “look to their substantive interests” to communicate and build trust, “rather than simply asserting traditional positions.”²⁶¹

Maine and the Tribes can address the mutual lack of respect, trust, and communication highlighted by this current conflict through a more structured and forthright dialogue surrounding the critical issues of Tribal culture and rights under the Settlement Acts.²⁶² Maine currently has a body in place that—with a clearer objective and greater authority—could provide a forum for this dialogue and emerge as a leader in these conflicts: the Maine Indian Tribal-State Commission.²⁶³ As discussed above, the Commission consists of both Tribal and State representatives; serves to review the effectiveness of the Settlement Acts; and promulgates fishing

256. NAT'L CONFERENCE OF STATE LEGISLATURES, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 7 (2009), http://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations/Govt_to_Govt_Models_of_Cooperation_Between_States_and_Tribes_2002.pdf. See also Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L.J. 195, 205–13 (2015) (explaining various state-tribal conflicts and legal battles over water rights from Montana, Arizona, Washington, and Wyoming).

257. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 256, at 7.

258. See *id.* at 6–7 (explaining that the particular mechanism through which relations take place is not as important as providing a forum for discussion).

259. *Id.* at 9.

260. *Id.* at 7, 9.

261. Anderson, *supra* note 256, at 239.

262. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 254, at 6–7 (describing how mechanisms that increase communication between states and tribes can increase understanding, respect, and trust).

263. ME. STAT. tit. 30, § 6212(1) (2016).

rules for certain ponds, rivers, and streams adjoining Indian lands.²⁶⁴ While the Commission does what it can with the resources that the State sets aside, the budget is small, and the Commission has no real power other than promulgating fishing regulations and publishing reports.²⁶⁵

The limited role that the MIA sets up for the Commission does not permit the Commission to adequately educate government officials and Tribal members about the difficult issues on both sides.²⁶⁶ The perceived failure to take the Commission's and Tribes' concerns seriously, especially surrounding sustenance fishing rights, opened the door for the EPA to step in and act on its trust responsibility to the Tribes. One way of limiting federal intrusion into Maine's relationship with its Tribes would be to bolster the Commission's role in Maine and use it to foster a "true dialogue" on these important issues.²⁶⁷ The Commission could serve as a forum for both State officials and Tribal leaders to discuss and work out these issues.²⁶⁸ Providing the Commission with more authority could help educate both sides on the complex issues at play, and hopefully lead to more reasoned and effective resolution of the conflicts outside of court.

Elevating the status of the Commission could occur through a narrow amendment to the MIA under § 6212(3) expanding the "responsibilities" of the Commission.²⁶⁹ The new responsibilities could include requirements that the State and Tribal governments consult directly with the Commission and establish the Commission as a neutral facilitator for Tribal-State issues under the Settlement Acts. Resolving tribal-state issues is often hindered, as it was in this case, through a lack of attention, leadership, and real commitment to compromise.²⁷⁰ Maine's current fish consumption rate, based on a statewide target population, is less protective of the Tribes'

264. See *supra* note 183 and accompanying text (explaining the Commission's role in reviewing the effectiveness of the Settlement Acts); *supra* note 184 and accompanying text (explaining the Commission's role in promulgating fishing regulations).

265. About MITSC, ME. INDIAN TRIBAL-STATE COMM'N, <http://www.mitsc.org/about.php> (last visited May 11, 2017).

266. See Douglas Rooks, *Debate Heats Up Over Rights of State to Limit Tribal Fishing of Pricey Eels*, SUN JOURNAL (July 27, 2014), <http://www.sunjournal.com/news/maine/2014/07/27/debate-heats-over-rights-state-limit-tribal-fishing-pricey-eels/1563762#.WJtOhVV6G3o.email/> (explaining how the Legislature failed to act on a Commission report about how the Legislature impermissibly passed laws without the consent of the Tribe).

267. See Friederichs, *supra* note 59, at 520 (explaining that resolving the underlying issues in state-tribal relations requires a "true dialogue" between the state and the tribe).

268. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 256, at 6–7 (identifying some of the benefits of mechanisms that increase communication).

269. ME. STAT. tit. 30, § 6212(3) (2016).

270. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 256, at 7 (stating that tribal-state relationships succeed when there is commitment to cooperation and compromise).

health because the Tribes have a right to and have historically consumed more fish than the general population.²⁷¹ With greater opportunity for Tribal members to make their case to the State, and to educate State officials on the Tribal issues, the current conflict might have been avoided.

Other states have taken steps to improve communication and cooperation between tribal and state governments by creating or expanding the role of state-tribal bodies.²⁷² Many of these bodies, as in Maine, were created through legislation.²⁷³ Minnesota, for example, has the Minnesota Indian Affairs Council.²⁷⁴ The Council serves as the official liaison between the State government and the 11 tribal governments within the State.²⁷⁵ The Council's mission "is to protect the sovereignty of the 11 Minnesota Tribes and ensure the well-being of American Indian citizens throughout the State of Minnesota."²⁷⁶ Among other duties, the Council plays a central role in developing state legislation that may affect tribal populations, and it administers "programs designed to enhance economic opportunities and protect cultural resources"²⁷⁷ The broad mission of the Indian Affairs Council helps facilitate open communication between tribal and state governments and provides "a forum for states and tribes to get together and get tribes more involved in policymaking."²⁷⁸ As such, there are more successful models for Maine to consider if the legislature chooses to elevate the position of the Commission.²⁷⁹

Given the political climate in Maine, however, even this small step appears to be challenging.²⁸⁰ Yet, when looking at the shift occurring in Maine's economy and the collaborative efforts currently underway at

271. See *supra* note 136 and accompanying text (discussing the difference in cancer-risk levels calculated for the Tribes and the general population based on fish consumption rates).

272. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 256, at 25.

273. *Id.*

274. *About Us*, STATE OF MINN. INDIAN AFFAIRS COUNCIL, <http://mn.gov/indianaffairs/aboutus.html> (last visited May 11, 2017).

275. *Id.*

276. *Id.*

277. *Id.*

278. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 256, at 27–29 (quoting former Indian Affairs Council Executive Director Joe Day, who feels that since the Council's creation in 1963 it has "accomplished a lot").

279. See *id.* at 27–32 (providing examples of other successful models for state-tribal bodies from Minnesota, Oklahoma, Oregon, and Indiana).

280. See Woodard, *supra* note 4 (quoting Maine's governor and representatives that collectively called the EPA's decision "outrageous"—suggesting a lack of respect to the Tribal rights at issue in this case).

restoring the Penobscot River, there are a few glimmers of hope.²⁸¹ If Maine and the Tribes are willing to look toward the future, they will see the economic benefits offered by improved state-tribal relations in the management of natural resources—such as fish.²⁸² Since the Settlement Acts, large industrial pulp and paper companies historically presented the biggest opposition to increased environmental protection in Indian lands.²⁸³ However, the mills that were historically the greatest source of pollution in Maine’s waters are shutting down at an accelerating rate.²⁸⁴

In 2011, the number of people employed by Maine’s pulp and paper industry declined from over 10,208 in 2001, to just 5,723 in 2011, and those numbers are likely to continue dropping as domestic paper companies struggle to compete on the international stage.²⁸⁵ Presently, there are approximately 8,000 members of Maine’s federally recognized Tribes.²⁸⁶ As such, the continuous closing of mills makes it difficult to argue that protecting the interests of the pulp and paper industry for the sake of jobs is far greater than the interest in protecting the rights and health of Tribal populations. Furthermore, the Maine Department of Labor predicts that in 2022, the service-producing industry will account for 87% of all jobs, while goods-producing jobs, such as those at pulp and paper mills, will comprise only 13%.²⁸⁷ While the loss of these jobs is nothing to celebrate, Maine should consider the economic opportunities that cleaner water and healthier fish populations could have on growing the State’s economy into the future.

With the shift toward a tourism and service-based economy, the restoration efforts underway in the Penobscot River provide a useful insight into how Maine and the Tribes could collaborate in the future. The Penobscot River Restoration Project is an “unprecedented collaboration . . . [between] the Penobscot . . . Nation, seven conservation groups,

281. See ME. DEP’T OF LABOR, MAINE WORKFORCE OUTLOOK: 2012 TO 2022, at 10, http://www.maine.gov/labor/cwri/publications/pdf/Maine_Workforce_Outlook_2012_to_2022.pdf (charting the shift in Maine’s employment structure towards service-providing jobs).

282. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 256, at 4 (explaining how tribal-state partnerships can greatly enhance economic development and pointing to studies that show how tribal economic growth contributes significantly to surrounding communities).

283. See Rodgers, Jr., *supra* note 246, at 834 (explaining the history of large-scale pollution violations by paper mills on the Penobscot River, as well as how these facilities incessantly oppose more stringent environmental regulations in Indian lands).

284. *Id.*; Patrick Whittle, *Maine Paper Mill Closings Take Their Toll*, BOS. GLOBE (Nov. 28, 2014), <https://www.bostonglobe.com/metro/2014/11/28/decline-maine-paper-mills-hurts-middle-class/HfQYlktLVEADfIcSsaBUwJ/story.html>.

285. Whittle, *supra* note 284.

286. The Associated Press, *supra* note 61.

287. ME. DEP’T. OF LABOR, *supra* note 281, at 10.

hydropower companies” and state and federal agencies, to restore sea-run fish to the Penobscot River watershed.²⁸⁸ While the focus of the project is removing dams to restore access to habitat, the viability of the fish species, particularly the Atlantic salmon, depends in large part on the quality of the water in the river.²⁸⁹ There have been tremendous improvements in the water quality of the Penobscot River over the last 30 years, but the fish are still unsafe to eat in quantities to which the Tribes are entitled.²⁹⁰ Collaborating with the Tribes on protecting water quality on Indian lands will naturally lead to greater protections for the water quality of the Penobscot River. Over time, if a river like the Penobscot can be restored, it could lead to increased tourism and benefits to local citizens, businesses, and recreational and commercial fishermen.²⁹¹

CONCLUSION

The continuous tensions between Maine and the Tribes over water quality compelled the EPA to invoke its trust responsibility.²⁹² By stepping into the war between Maine and the Tribes, the EPA attempted to harmonize the CWA and the Settlement Acts in a manner that protected federal interests and the Tribes’ rights.²⁹³ Unfortunately, the EPA’s action further divided the Tribes and the State on the issue of water quality regulation on Indian lands.²⁹⁴ While the current conflict between Maine and the Tribes over water quality regulation is nothing new, it does follow a familiar pattern.²⁹⁵ More than anything else, this current dispute highlights the fundamental flaws in how Maine and the Tribes interact. The Tribes feel that Maine does not adequately protect their interests in natural

288. *The Project*, PENOBSCOT RIVER RESTORATION TR., <http://www.penobscotrivers.org/content/4003/the-project> (last visited May 11, 2017).

289. *Wide-Ranging Benefits*, PENOBSCOT RIVER RESTORATION TR., <http://www.penobscotrivers.org/content/4033/wide-range-benefits?ext=> (last visited May 11, 2017).

290. EPA’s Analysis, *supra* note 12, at 3.

291. *Wide-Ranging Benefits*, *supra* note 289.

292. *Maine v. Johnson*, 498 F.3d 37, 48 (1st Cir. 2007).

293. See DOI Letter, *supra* note 28, at 1 (assisting the EPA in determining Native American’s rights under the Settlement Acts with respect to state WQS).

294. See *supra* note 61 and accompanying text (discussing the growing divide between Maine and the Tribes).

295. Since 1999, when Maine first applied for delegated authority to administer discharge permitting under the CWA, Maine, the EPA, and the Tribes have been in multiple lawsuits pertaining to water quality regulation in Indian lands. See *Johnson*, 498 F.3d at 40 (explaining that this case, culminating in 2007, began in 1999); Complaint, *supra* note 14, at 1 (explaining that Maine filed this Complaint in Federal Court because of the EPA’s “failure to approve or disapprove” Maine’s WQS on Indian lands).

resources, culture, and traditions—while Maine feels that the Tribes precipitated federal intrusion into Maine’s regulatory jurisdiction through secretly communicating with the EPA and other federal agencies.²⁹⁶ The current tension between Maine and the Tribes traces itself back to the land claims of the 1970s, and the relationship has been uneasy ever since.²⁹⁷ Given the ill will that has accrued between Maine and the Tribes through the decades, a viable, long-term solution to the conflict over water quality in Indian lands is unlikely without a willingness of leaders from each side to listen, learn, and compromise. Elevating the position of the Maine Indian Tribal-State Commission has the potential to respect both State and Tribal interests, rebuild trust, and limit the instinct for Maine and the Tribes to resort to the courts.

—Patrick Marass*†

296. See Second Amended Complaint, *supra* note 17, at 39 (alleging “secret communications” with the EPA regarding water quality standards).

297. See Gousse, *supra* note 66, at 538.

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