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**Water Quality and (In)Equality: The Continuing Struggle to Protect Penobscot Sustenance Fishing Rights in Maine**

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Since 2015, the United States Environmental Protection Agency (“EPA”), the State of Maine, and the Penobscot Nation of Maine have been engaged in litigation over Maine’s proposed Water Quality Standards (“WQS”) to be issued pursuant to the Clean Water Act. The EPA rejected some of the State’s proposed WQS because they were not adequate to protect the right of members of the Penobscot Nation to fish for sustenance. The EPA took the position that waters where tribes exercise fishing rights must have WQS that are sufficient to ensure that tribal members can harvest fish for sustenance without endangering their health through exposure to dangerous levels of mercury and other toxins. Moreover, in determining permissible pollutant levels, fish consumption rates should not be determined on the basis of current consumption rates, which are suppressed due to health concerns, but rather on the basis of unsuppressed fish consumption rates. The EPA’s decision was bolstered by the importance of fishing to cultural preservation and the federal government’s trust responsibility toward the Penobscot Nation.

Maine’s challenge to the EPA’s action, Maine v. Wheeler, is ongoing. Maine officials characterized the EPA’s decision as providing illegitimate special protection for Penobscot fishing. In reality, the EPA was simply trying to facilitate the effectuation of existing tribal fishing rights, recognized in federal and state law. Under the current Administration, the EPA is reconsidering its 2015 decision. This Article explores the legal dispute over Maine’s proposed WQS as the latest chapter in the struggle of the Penobscot Nation to vindicate the right to fish for sustenance on the waterways that have supported the Nation since time immemorial.
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Warning! Guidelines for eating fish from Penobscot Territory Waters

To prevent possible harm from mercury, dioxins, and PCBs due to eating freshwater fish, we offer this advice: All children under 8 and women who are nursing, pregnant or could become pregnant . . . should eat NO FISH from Penobscot Nation Territory waters and other Maine inland waters.¹

INTRODUCTION

Since 2015, the United States Environmental Protection Agency (“EPA”), the State of Maine, and the Penobscot Nation of Maine have been engaged in litigation over the EPA’s decision to disapprove some of Maine’s proposed Water Quality Standards (“WQS”) to be issued pursuant to the Clean Water Act. The EPA took this action because some of the State’s proposed WQS were not adequate to protect the right of members of the Penobscot Nation to fish for sustenance.² Both state and federal legislation protect tribal sustenance fishing rights in Maine.³ Nevertheless, there are fish consumption advisories in effect in the State that severely


limit the exercise of sustenance fishing rights.\textsuperscript{4} Clearly, if the fish are not safe to eat regularly, the right to fish for sustenance is rendered meaningless.\textsuperscript{5}

Relying on an opinion letter from the Solicitor of the Department of the Interior,\textsuperscript{6} the EPA took the position that waters where tribes exercise fishing rights must have WQS that are sufficient to ensure that tribal members can harvest fish for sustenance without endangering their health through exposure to dangerous levels of mercury and other toxins.\textsuperscript{7} Moreover, the EPA concluded that in determining the levels of various pollutants that should be permissible in view of tribal fish consumption rates, fish consumption rates should not be determined on the basis of current consumption rates.\textsuperscript{8} Contemporary rates have been suppressed due to fear of adverse health impacts from regular consumption.\textsuperscript{9} For tribal fishing to receive the protection guaranteed by the law, WQS must be based on unsuppressed fish consumption rates.\textsuperscript{10} The EPA supported its decision by stressing the importance of fishing to cultural preservation and the federal government’s trust responsibility toward the Penobscot Nation and other tribes.\textsuperscript{11}

Maine government officials objected vociferously to this development, accusing the EPA of outrageous behavior.\textsuperscript{12} Maine’s federal court challenge to the EPA’s action, \textit{Maine v. Wheeler},\textsuperscript{13} is ongoing. Maine officials have publicly decried the possibility of two tiers of protection for waters in Maine.\textsuperscript{14} Maine’s objection, in essence, is to tribes getting some

\begin{itemize}
\item \textsuperscript{4} \textit{Guidelines for Eating Fish from Penobscot Territory Waters}, supra note 1.
\item \textsuperscript{7} \textit{Id.} at 10–11. \textit{See also} Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. 55,063, 55,067 (Sept. 14, 2015) (explaining the dangerous levels of mercury).
\item \textsuperscript{8} Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. at 55,066 (Sept. 14, 2015).
\item \textsuperscript{9} \textit{Id.} at 55,063.
\item \textsuperscript{10} \textit{Id.} at 55,065–66 (emphasis added).
\item \textsuperscript{11} Marass, supra note 3, at 874, 886.
\item \textsuperscript{12} Colin Woodard, \textit{Maine to Sue EPA Over Tribal Water Pollution Decision}, PORTLAND PRESS HERALD (Mar. 21, 2015), https://www.pressherald.com/2015/03/21/maineto-sue-epa-over-tribalwater-pollution-decision/.
\item \textsuperscript{13} No. 1:14-cv-00264-JDL, 2018 WL 6304402 (D. Me. Dec. 3, 2018).
\item \textsuperscript{14} Colin Woodard, \textit{LePage Calls EPA’s Tribal Waters Ruling ‘Outrageous’}, PORTLAND PRESS HERALD (Mar. 2, 2015), https://www.pressherald.com/2015/03/02/mainegovernoron-epas-tribalwaters-ruling-its-an-outrage/.
\end{itemize}
sort of “special protection” for their (disputed) fishing rights. In other words, the State is objecting to a perceived preference for tribal fishing as against other designated uses of Maine’s waters. Maine’s argument thus amounts to an objection to perceived unequal, preferential treatment for tribes. Maine’s characterization of the EPA’s action as inequitable and discriminatory has a hollow ring when viewed in light of the State’s historical mistreatment of the Maine tribes. The State’s perspective also ignores the fact that the EPA is simply trying to facilitate the effectuation of existing tribal fishing rights, which have been recognized by state and federal law because of fishing’s crucial role in sustaining the existence of the Maine tribes and their culture.

This Article explores the legal dispute over Maine’s proposed WQS as the latest chapter in the struggle of the Penobscot Nation to vindicate the right to fish for sustenance on the waterways that have supported the Nation since time immemorial. The Article begins with a brief discussion of the Penobscot and Passamaquoddy tribes of Maine and of the unequal treatment that they have long received from both the state and federal governments. It will discuss the state and federal action—and inaction—which led to considerable loss of tribal land. Legal claims brought to seek redress for the taking of tribal lands in violation of federal law led to a land claims settlement agreement, which was embodied in federal and state legislation, as examined in Part II. This legislation acknowledges and guarantees tribal sustenance fishing rights.

Part III of the Article focuses on the EPA’s action with regard to Maine’s proposed WQS and the resulting Maine v. Wheeler litigation. Contrary to Maine’s characterization of the EPA’s action as “special treatment” for the Penobscot Nation, the action is properly understood as a belated effort to protect the exercise of the tribe’s legally guaranteed sustenance fishing rights. In the absence of WQS that are stringent enough to ensure that fish are safe for consumption as a key part of tribal members’ diet, tribal fishing rights become worthless. Under the current Administration, however, the EPA is now reconsidering its 2015 action, once more putting in jeopardy the viability of tribal sustenance fishing in Maine.

The Conclusion offers final thoughts on the continuing struggle of

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the Penobscot Nation to vindicate the right to continue the fishing that has
been at the center of tribal life and culture for countless generations.

I. THE PENOBSCOT AND PASSAMAQUODDY TRIBES: SURVIVING
   DISCRIMINATORY TREATMENT

   *Penobscot people have resided upon Penobscot Waters and have
depended upon fish, plants, and wildlife from those waters for their physical,
cultural, and spiritual survival from time immemorial.*¹⁸

   *Passamaquoddy have lived and flourished within our homeland at the least since the time when the Laurentide Ice
Glaciers melted away from this part of North America, about 10 to 14 thousand years ago . . . . Nature provided everything
the Passamaquoddy people needed to thrive.*¹⁹

The Penobscot and Passamaquoddy Tribes (the “tribes”) each have
reservations in the state of Maine.²⁰ Ordinarily, designating an area as a
reservation brings into play federal Indian law principles, which recognize
that the reservation is subject to tribal governance and limit the
applicability of state law. Relying on retained inherent tribal sovereignty,
tribes across the United States operate court systems, regulate land use,
provide social services, maintain law and order, protect natural resources
and the environment, and carry out other basic governmental functions on
their reservations. Historical developments, culminating in federal and
state legislation to settle tribal land claims have, however, created a more
complex jurisdictional picture in Maine and have complicated efforts to
protect tribal fishing rights.

A. Tribal Lands and the Deep Roots of Tribal Fishing

The Penobscot Nation and the Passamaquoddy Tribe, as they are
officially recognized by the federal government,²¹ are descendants of the
Wabanaki peoples who have inhabited the northern New England area

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¹⁸ *Penobscot Nation Water Quality Standards,* PENOBSCOT NATION,
²¹ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of
called Wabanakis—meaning “Dawnland”—for thousands of years.22 The tribes have reservations and trust lands in central and coastal Maine.23 The Passamaquoddy Tribe has two main locations: the Pleasant Point Reservation (on Passamaquoddy Bay in Perry, Maine) and the Indian Township Reservation (near the St. Croix River in Princeton, Maine).24 The Penobscot Nation is based on over two-hundred islands in the Penobscot River, with the main reservation located at Indian Island, near Bangor in the center of Maine.25 The Penobscot River is New England’s second largest river system, draining approximately one-quarter of the State.26 Indian Island is located in the southern portion of the river, which is known for its salmon run (the largest Atlantic salmon run in the United States).27 Because of Indian Island’s location in the downstream portion of the Penobscot River Watershed, the Penobscot Nation is vulnerable to cumulative adverse impacts from many point and non-point sources of pollution to the river.28

Archaeologists have found evidence that the Wabanaki peoples fished with nets and spears as long ago as the Early Archaic period, dating back to 10,000 years before the present day.29 By the Late Archaic period, dating back to 6,000 years BP, the Wabanaki fishers were also using hooks, lines, and weirs.30 Europeans visiting Wabanaki lands, beginning in 1605, commented on tribal fishing, noting the focus on fishing on rivers in the early spring and in the fall, and on ocean fishing in the summer.31 In short, inland fishing and marine fishing have been an important part of Penobscot and Passamaquoddy life for many thousands of years.

The tribes’ ties to water and fishing are even embedded in what they call themselves. The Passamaquoddy Tribe’s name comes from “pest mohkatiyk,” meaning “pollock-spearer” or “those of the place where...
pollock are plentiful.32 The Penobscots traditionally referred to themselves as the “people of where the river broadens out,” a reference to the extensive Penobscot watershed.33 Water references and river-based sustenance practices also permeate the Penobscot Nation’s language, culture, and belief-systems, including tribal creation stories and family names that are based on the fish in the Penobscot River.34

B. “Treaties,” Continuing Land Loss, and the Derelict Trustee

During the American Revolution, the Penobscot and Passamaquoddy tribes, along with other Wabanaki tribes of Maine, sided with the American colonies.35 A July 1776 tribal delegation visited George Washington, acknowledging American independence and offering assistance.36 Support for the American cause did not, however, lead to governmental protection of the rights of the tribes after the war ended. Massachusetts (and Maine, after its separation from Massachusetts) entered into several agreements, termed “treaties,” with tribal representatives. These arrangements were made in blatant disregard of federal law.37 The U.S. Constitution establishes treaty-making and dealings with tribal nations as functions of the national government.38 In addition, the federal Trade and Nonintercourse Act (“Nonintercourse Act”), first enacted in 1790,39 provides that transfers of tribal property interests are not


34 See Opposition of the Penobscot Nation to EPA’s Motion for Stay of the Proceedings Pending the Court’s Decision on EPA’s Motion for Voluntary Remand at 3, Maine v. Wheeler, No. 1:14-ev-00264-J02, 2018 WL 6304402 (D. Me. Dec. 3, 2018) [hereinafter Penobscot 2018 EPA Motion Opposition] (stating that Penobscot family names include, for example, Neptune (eel), Penewit (yellow perch), and Sockalexis (sturgeon)).


36 Id.

37 See infra note 38 (providing the constitutional provisions that explain why these arrangements disregard federal law).

38 See U.S. CONST., art. II, § 2 (“[The President] shall have power, by and with the advice and consent of the Senate, to make treaties . . . .”); id. art. I, § 8 (“The Congress shall have power to . . . regulate Commerce . . . with the Indian tribes”).

valid without federal approval. Nevertheless, Massachusetts entered into a 1794 agreement with the Passamaquoddy Tribe that reserved lands (about 23,370 acres) and fishing rights to the tribe, while purportedly ceding the rest of tribal territory. Islands in the Penobscot River were reserved for the Penobscot Nation, along with implicit fishing rights, under agreements signed by the tribe with Massachusetts (1796 and 1818) and Maine (1820). The minutes of the treaty councils that culminated in the 1820 treaty demonstrate the Penobscots’ reliance on the government of Maine’s commitment to fulfill the promises made by Massachusetts and their hope that “the new State may always be governed and ruled by good men.”

Penobscot representatives also expressed concern about the adverse impact of white actions on tribal fishing: “[T]he white people take the fish in the river [with weirs and dip nets] so that they no get up to us . . . They are all gone before they get to us." Whites’ profligate hunting practices also threatened the tribe’s wellbeing: “[T]he white men come and spoil all the game. They catch all the young ones and the old ones. We take the old ones and leave the young ones till they grow bigger . . . “ Governor William King told the Penobscts that “the injury they have done your fishery[] will be attended to,” and expressed the wish of the new State’s leaders “to consider you as their Children, [and] that you [and] your tribe may always be prosperous and happy.” The concerns raised in 1820 about the adverse impact of non-Indians’ actions on fish and other resources that are crucial to tribal survival foreshadowed the even greater concerns facing the Penobscot Nation two-hundred years later.

Even after the signing of the 1796, 1818, and 1820 agreements—which purported to protect the tribes’ rights on greatly reduced tribal land bases—losses of land continued. After Maine became a state, having made the promises described above and having committed in its constitution to

https://digitalmaine.com/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1010&context=mitsc_docs
42 SCULLY, supra note 39, at 5; see also Smith, supra note 35, at 409 (explaining that at the time when what was then the District of Maine was soon to become a separate state, a Massachusetts statute provided that the “new State shall . . . assume and perform all the duties and obligations of the Commonwealth, toward the Indians within said District of Maine, whether the same shall arise from treaties, or otherwise . . . .” (citation omitted)).
44 Id. at 280.
45 Id.
46 Id. at 281.
47 Id. at 284.
uphold the treaties, the state government authorized the sale and lease of Penobscot and Passamaquoddy lands, without tribal consent and without compensating the tribes for all of the taken land. The tribes thus suffered discriminatory treatment at the hands of the state of Maine. Other residents of the state could count on protection of their legal rights, or would at least have avenues to seek legal redress for violation of their rights. Tribes and individual tribal members, however, were deprived—seemingly without recourse—of rights to their land and resources, despite the treaty guarantees.

Moreover, despite the violation of federal law that these takings of tribal land without federal approval entailed, federal officials failed to intervene. Although the United States entered into treaties with other tribes that had favored Great Britain in the American Revolution, such as the Cherokee Nation, the Maine tribes were ignored. Furthermore, the federal government provided few services to the Maine tribes, leaving it to Maine to provide “special services to the Indians residing within its borders.” The tribes thus experienced, at the hands of the federal government, unequal treatment vis-à-vis other tribes with whom the United States had an active (albeit not always appropriately protective) relationship. The Penobscot and Passamaquoddy tribes, along with other Maine tribes, were largely left at the mercy of the state government. Like other tribes, the Maine tribes confronted a situation that fit the description of state-tribal relations identified by the U.S. Supreme Court in United States v. Kagama: they received from the State “no protection [and] because of the local ill feeling, the people of the State[,] . . . are often their deadliest enemies.”

II. THE LAND CLAIMS SETTLEMENT AND ITS IMPACT: EQUALITY TEMPERED BY INEQUALITY

The Penobscots have never surrendered their freedom and do not now or in the future as long as the waters of the Penobscot River flows, as long as the birch of the Penobscot forest shall grow, as long as the sun rises in the east and sets in the west, ever surrender their freedom.

After years of living with the repercussions of federal neglect and
illegal land losses engineered by the State, the Penobscot Nation and the Passamaquoddy Tribe sought redress for the continuing violations of their rights. Their efforts ultimately led to federal and state legislation that acknowledged and secured crucial tribal rights, yet also created a complex jurisdictional structure that continues to frustrate the efforts of the Maine tribes to survive and flourish in their homelands.

A. Seeking Redress for the Consequences of Past Inequitable Treatment

Fed up with the failure of the state and federal governments to protect Penobscot rights and address tribal grievances, the Penobscot Nation turned to the United Nations in search of assistance. In a May 1957 petition addressed to United Nations Secretary General Dag Hammarskjold, the Penobscot Nation and people affirmed “among the powers of the earth the separate and equal station to which the laws of Nature and Nature’s God entitle them” and affirmed the tribe’s “equality as a nation among the nations of the world.”53 The petition advised the Secretary General that the Penobscot Nation believed that “the United Nations is the tribunal in which its rights as a nation should be asserted.”54 The petition, which preceded by over a decade the United Nations’ first efforts to take the rights of indigenous peoples seriously,55 did not provoke any offer of assistance from the United Nations. Rather, the tribe was advised that whether the United States, which was sent a copy of the petition, took any action “depends on its own decision.”56

The Passamaquoddy Tribe, for its part, sought redress in the U.S. federal court system. Following the refusal of the Secretary of the Interior to initiate a lawsuit against Maine on the Tribe’s behalf, the Tribe sued the United States in Joint Tribal Council of the Passamaquoddy Tribe v. Morton.57 In seeking the federal government’s assistance, the Tribe asserted grievances against Maine that included divesting the Tribe of most of its territory in the 1794 treaty, taking land that was guaranteed by the treaty, and denying tribal fishing rights.58 Federal government officials had refused the Tribe’s request to sue on its behalf in spite of the fact that the Commissioner of the Bureau of Indian Affairs had been in favor of

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53 Letter from Governor Francis Ranco et al., Chief of Penobscots, to Dag Hammarskjold, Sec’y Gen. of the United Nations, (May 25, 1957), in Smith, supra note 35, at 420.
54 Id.
55 See Smith, supra note 35, at 422 (noting that it was not until 1971 that the United Nations began to take tribal complaints seriously).
56 See id. at 421 (discussing the response sent to the tribe by the United Nations Division of Human Rights). The tribe sent the petition to the U.S. Congress, President, and the Supreme Court. Id. at 420.
57 Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 370 (1st Cir. 1975).
58 Id. at 374.
granting the Tribe’s request. The United States argued that it had no obligation to assist the Tribe because there was no treaty between the United States and the Tribe. As a result, the United States claimed, there was no trust relationship between the United States and the Tribe. Rather, Maine and Massachusetts had acted as trustees for the Tribe’s property.

In 1975, the Court of Appeals for the First Circuit held that the Passamaquoddie Tribe is a tribe within the language of the Nonintercourse Act. The court noted that “the Passamaquoddies were a tribe before the nation’s founding” and that “there is no evidence that the absence of federal dealings was or is based on doubts as to the genuineness of the Passamaquoddies’ tribal status.” The fact that some voluntary assistance had been rendered to a tribe by a state did not cut off existing federal duties to the tribe. Moreover, Congress’s past failures to provide aid when requested did not demonstrate congressional intent that the Nonintercourse Act should not apply. In short, the federal government’s neglect of the Tribe simply showed that it was neglectful, not that the neglect was legal, or that the United States had an excuse for continuing neglect.

The First Circuit went on to uphold the district court’s conclusion that the Nonintercourse Act established a trust relationship between the Tribe and the United States. It is “beyond question,” the court stated, that the Act “imposes upon the federal government a fiduciary’s role with respect to protection of the lands . . . covered by the Act.” The Act’s purpose of acknowledging and guaranteeing tribes’ right of occupancy cannot be a “meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.”

Finally, the court held that the United States had not withdrawn its protection from the Tribe such as to sever the trust relationship. Once Congress establishes a trust relationship, only Congress can determine when the relationship ends, and any withdrawal of trust obligations must be “plain and unambiguous.” Although the federal government had been “largely inactive” and had at times refused tribal requests for assistance, this conduct, the court explained, is “quite different from broadly refusing

59 Id. at 372.
60 Id. at 372–73.
61 Id.
63 Joint Tribal Council, 528 F.2d at 379.
64 Id. at 377–78.
65 Id. at 378.
66 Id. at 379.
67 Id.
68 Id. at 380.
69 Id.
ever to deal with the Tribe." The court found, in essence, that the trustee’s neglect of duties did not destroy them. The neglect simply indicated that the trustee had not fulfilled the legal obligations owed to the beneficiary of the trust relationship. The court’s various conclusions amounted to a finding that the Passamaquoddy Tribe stood on equal footing with other tribes as to its status as a tribe and the federal government’s corresponding responsibilities. The unequal treatment to which the Tribe had been subjected could no longer be maintained.

Within months of the decision, the Department of Justice announced that it would sue Maine (as well as large landholders) on the Passamaquoddy and Penobscot tribes’ behalf to challenge the validity of the purported land cessions that had not been federally approved.

Following several years of negotiations aimed at reaching a settlement of the Tribes’ claims, facilitated by President Jimmy Carter, the parties reached an agreement. The Tribes approved the agreement and the Maine legislature adopted it in 1979 as an “Act to Implement the Maine Indian Claims Settlement” (“Maine Implementing Act”).

B. The Maine Indian Claims Settlement Act

Congress enacted the Maine Indian Claims Settlement Act of 1980 (“MICSA”) to give legal force to the settlement agreement. The tribes included in the settlement legislation were the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. MICSA approved prior land transfers from these tribes that had been made in violation of federal law and extinguished any other claims that any Indian tribes might have in Maine. MICSA affirmed that the Passamaquoddy Tribe, Penobscot Nation, and Houlton Band of Maliseet Indians are federally recognized tribes, entitled to rights that flow from that recognition. MICSA also ratified the terms of the Maine Implementing Act, which defined the Passamaquoddy and Penobscot territories to include their existing reservations and lands.

70 Id.
71 Id. at 379.
72 Penobscot 2018 EPA Motion Opposition, supra note 34, at 3.
73 Id. at 3–4.
78 Id. § 1723(c).
that were to be acquired for each tribe. The state and federal statutes are often referred to together as the “Settlement Acts.”

The Maine Implementing Act included a provision that is at the heart of the EPA’s challenged decisions as it expressly recognized the reserved fishing rights of the Passamaquody and Penobscot tribes. The provision, entitled “Sustenance fishing within the Indian reservations,” affirms that “the members of the Passamaquody Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance.”

The fishing rights acknowledged in the Settlement Acts were based on treaty guarantees that the Settlement Acts upheld. The 1794 treaty with Massachusetts reserved Passamaquody fishing rights in the St. Croix River (called the Schoodic River at the time), guaranteeing “to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation.” The 1818 and 1820 Penobscot treaties (with Massachusetts and Maine, respectively) did not need to expressly reserve fishing rights because the treaties did not cede the Penobscot River to the states. Rather, they only granted to non-members the right to “pass and repass” the River, while explicitly retaining islands in the River. Given the Penobscots’ reliance on fishing, this provision impliedly reserved the fishing grounds without which the islands would have been of little value to the tribe.

Congress explicitly acknowledged the significance of water resources to the Maine tribes when MICSA was enacted. The House and Senate reports on the legislation, for example, noted that “[t]he aboriginal territory of the Penobscot Nation is centered on the Penobscot River” and that the

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81 ME. REV. STAT. tit. 30, § 6205 (2018). The reservations of the two tribes were defined in id. § 6203(5) (Passamaquody Indian Reservation) and id. § 6203(8) (Penobscot Indian Reservation).

82 See, e.g., DOI Solicitor Letter, supra note 6, at 1–2 (defining the statutes collectively as the Settlement Acts).

83 ME. REV. STAT. tit. 30, § 6207(4) (2018). The right to fish free of state regulation is subject to limitation only in the case of conservation necessity. Id. § 6207(6). The Tribes’ reservations include the lands that they reserved under state treaties that have not been transferred away, as well as lands within their reservation that are reacquired by the Tribes or by the Secretary of the Interior on their behalf. Id. §§ 6203(5) (Passamaquody), 6203(8) (Penobscot).

84 Me. State Dep’t of Indian Affairs, A Compilation of Laws Pertaining to Indians (Jan. 1973). See also DOI Solicitor Letter, supra note 6, at 3 (noting that the St. Croix River was known as the Schoodic River in 1794).


86 DOI Solicitor Letter, supra note 6, at 3.
Nation is “riverine in [its] land-ownership orientation.”

Provisions of the Settlement Acts that provide for land to be held in trust for the Tribes and recognize tribal regulatory roles call to mind basic principles of federal Indian law. Other provisions, however, are out of line with these principles, as they subject tribal lands to state jurisdiction to a greater extent than is usually the case. These provisions have also played a role in the EPA’s challenged decisions on Maine water quality standards.

The Maine Implementing Act, ratified by MICSA, provides that state law, including environmental law, generally applies to tribal lands. Internal tribal matters, however, are excepted from this provision and are not subject to state interference. The Passamaquoddy and Penobscot tribes are to be regarded as having the powers of, and subject to the duties of, municipalities.

Further complicating the jurisdictional picture in the current litigation over water quality standards in Maine, MICSA provides that U.S. laws generally applicable to tribes and their lands apply in Maine, but not those that would affect state laws relating to environmental matters and land use. The EPA has explained that “the settlement acts significantly revise in Maine the jurisdictional arrangement that more typically exists elsewhere in the United States among Indian tribes, a state, and the federal government.” With regard to environmental programs specifically, “[o]utside Maine, EPA has typically excluded Indian country from EPA-approved state environmental programs based on the absence of state jurisdiction in Indian country.”

Other provisions of the Settlement Acts focused on providing a measure of redress for past mistreatment of the Maine tribes and disregard

88 See 25 U.S.C. § 1725 (2012) (omitted by Supp. IV 2017) (stating that tribes are subject to state and federal civil and criminal jurisdiction and describing the distinct jurisdiction the tribes have).
89 See infra notes 104–106.
90 See ME. REV. STAT. tit. 30, § 6204 (2018) (stating that all tribes are “subject to the laws of the State”).
91 The exceptions relate to the Passamaquoddy and Penobscot tribes. See id. § 6206(1) (stating “internal tribal matters” are not subject to state regulations); id. § 6206(3) (noting the tribes’ exclusive jurisdiction over members’ violations of tribal ordinances within tribal territories); id. § 6207(1)–(2) (stating the tribes may regulate hunting, trapping, or other taking of wildlife, and taking of fish for any purpose within ponds of 10 acres or less falling wholly within their territory, by all persons).
92 Id. § 6206(1).
94 ENVTL. PROT. AGENCY, RESPONSES TO PUBLIC COMMENTS RELATING TO MAINE’S JANUARY 4, 2013, SUBMISSION TO EPA FOR APPROVAL OF CERTAIN OF THE STATE’S NEW AND REVISED WATER QUALITY STANDARDS (WQS) THAT WOULD APPLY IN WATERS THROUGHOUT MAINE, INCLUDING WITHIN INDIAN TERRITORIES OR LANDS 8 (Jan. 30, 2015) [hereinafter EPA RESPONSES TO PUBLIC COMMENTS].
95 Id. at 10.
of their rights. MICSA set up a Land Acquisition Fund to be used to acquire land or natural resources for each of the three tribes to rebuild land bases lost through illegal transfers.96 Part of the land acquired for the Passamaquoddy and Penobscot tribes was to be recognized as part of their “Indian Territor[ies].”97 Specifically, the first 150,000 acres acquired for each tribe were to be held in trust by the United States for the benefit of the respective tribe.98 The trust lands acquired for each tribe, along with the land reserved for each tribe by past agreements with Maine and/or Massachusetts, were to together make up each tribe’s “Indian Territory.”99 By establishing that the newly acquired lands in the Indian Territories would be protected as trust land—the predominant way in which tribal land is held in the United States100—this MICSA provision seemed to be setting up for the Penobscot and Passamaquoddy tribes the same kind of land and jurisdictional regime enjoyed by most tribes. Recognition of reservations provides tribes with land bases on which they can support their members, exercise governmental authority, and preserve their cultures. In the case of the Tribes, preserving their culture was one of Congress’s purposes in ensuring a land base for each of them.101

Fishing rights were addressed explicitly in other statutory provisions. The Maine Implementing Act provided for the right of sustenance fishing, subject to exclusive tribal regulatory authority, on ponds of less than ten acres within their territories (which include trust lands outside their

96 25 U.S.C. § 1724(c)-(d) (2012) (omitted by Supp. IV 2017). The fund held $900,000 for the Houlton Band and $26,800,000 for each of the other two tribes. Id. § 1724(d).

97 Id.

98 Id. Arrangements for the Maliseets required further Maine input, but MICSA provided that land bought for them would be held in trust. Id. The Maliseets thus faced lingering inequality vis-à-vis the other two tribes whose rights were addressed by the statute. The focus in this Article is on the Passamaquoddy and the Penobscot tribes.


100 See Frequently Asked Questions, U.S. Dep’T of the Interior, Indian Affairs, https://www.bia.gov/frequently-asked-questions (last visited Jan. 30, 2019) (“Approximately 56.2 million acres are held in trust by the United States for various Indian tribes and individuals.”); see also U.S. Dep’T of the Interior, Secretarial Order No. 3335 (Aug. 20, 2014), https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf (“The Department likewise has recognized its obligations as a trustee towards Indian tribes and individual Indian beneficiaries and has been vested with the authority to perform certain specific trust duties and manage Indian affairs . . . . The BIA became the principal actor in the relationship between the Federal Government and Indian Tribes, and later Alaska Native Villages, exercising administrative jurisdiction over tribes, individual Indians, their land and resources.”).

reservations). The Act recognized an additional tribal regulatory role as to specified waters on and adjoining the Tribes’ territories, which are regulated by an intergovernmental body, the Maine Indian Tribal-State Commission, composed of members appointed by the Tribes and the State.

The interpretation of the fractured jurisdictional picture created by MICSA was at the heart of a 2007 decision by the Court of Appeals for the First Circuit in a case impacting protection of tribal waters. In Maine v. Johnson, the court held that pursuant to the provisions of MICSA, Maine has authority to issue permits under the Clean Water Act’s National Pollution Discharge Elimination System (“NPDES”) program for discharges into waters throughout the state, even for discharges within Indian territories. The court described MICSA as making “Maine law generally applicable to all of the Maine tribes and tribal lands save that, in the case of the [Passamaquoddy and Penobscot] tribes, the Maine Implementing Act . . . give[s] those tribes municipal powers and reserves tribal authority over internal tribal matters.” This interpretation of MICSA treated state authority as being more extensive than is normally the case where tribes and tribal lands are at issue.

C. A Glass Half Empty or Half Full?

Maine officials often emphasize what the Tribes gained from MICSA. They are less eager to acknowledge what Maine gained: the extinguishment of tribal claims to approximately 60% of the state and the removal of accompanying clouds on title to the land. In addition, as demonstrated by Maine v. Johnson, the state received authority over tribal lands in Maine that is greater than the authority that states can claim under the foundational principles of Indian law.

*supra*
the early years of the United States’ existence, strictly limit state jurisdiction over reservation lands.

For the Passamaquoddy and Penobscot Tribes, MICSA provided a larger recognized land base (in the wake of unlawful land losses), fishing rights guarantees, and formal federal recognition of their tribal status. At the same time, however, MICSA created unnecessary repetition of a new form of inequality for the Tribes. For example, in the past, state defiance of federal law and federal neglect of the responsibility to enforce the law and protect tribal rights meant that the Tribes were treated unequally vis-à-vis other state residents and other tribes. MICSA imposed explicit principles of disparate treatment between the Maine tribes and tribes elsewhere in the United States.

First, MICSA provided for state jurisdiction over tribal lands to an extent that is out of line with federal Indian law, thus subjecting tribal lands in Maine to a degree of state power against which other tribes are protected. The characterization of the tribes as municipalities is at odds with the longstanding recognition of tribes as nations-within-a-nation. Secondly, MICSA imposed limitations on the application in Maine of the federal laws that are generally applicable to tribes and their lands. Thus, once again, the Tribes were denied full equality with other tribes. As Professor Nicole Friederichs has noted, after the enactment of MICSA, the Tribes “find themselves in a class separate from the majority of the more than five-hundred federally recognized Indian tribes in the United States.”

It is important, however, to emphasize that in spite of the unusual provisions contained in MICSA, the Tribes still share much in common with tribes throughout the United States that have not been subjected to MICSA-like provisions. They are still tribes. By being acknowledged as such, they enjoy, as sovereigns, a government-to-government relationship with the United States. They are entitled to protection of their rights pursuant to the federal government’s trust responsibility toward tribes. As the EPA has recognized, “the trust responsibility towards the Maine Indian Tribes continues to operate . . . even under the settlement acts.”


114 Friederichs, supra note 110, at 498.

115 EPA RESPONSES TO PUBLIC COMMENTS, supra note 94, at 8.
special status of the Tribes is reflected in the MICSA provision
establishing that (aside from specific exceptions) U.S. laws generally
applicable to tribes and their lands do apply in Maine.\textsuperscript{116} Moreover, the
Maine Implementing Act explicitly recognizes that internal tribal matters,
and the Tribes’ rights to engage in subsistence fishing on their reservations,
are off limits from state interference.\textsuperscript{117} As explored below, the EPA relied
on the Tribes’ sovereign status and the trust responsibility owed to the
Tribes under federal law, along with the provisions of MICSA, in its
review of Maine’s proposed water quality standards as to waters in Indian
territories and lands. In so doing, the EPA raised the ire of Maine
government officials, who preferred to focus on the disparate treatment,
rights-limiting aspects of the Settlement Acts when analyzing tribal rights.

III. THE CONTINUING STRUGGLE FOR EQUALITY & WATER QUALITY:
MAINE V. WHEELER

If third parties are free to directly and significantly pollute
the waters and contaminate available fish, thereby making
them inedible or edible only in small quantities, the right to
fish is rendered meaningless. To satisfy a tribal fishing right
to continue culturally important fishing practices, fish cannot
be too contaminated for consumption at sustenance levels.\textsuperscript{118}

A. The EPA: Protecting Water Quality to Effectuate Tribal Fishing Rights

Maine has assumed responsibility under the Clean Water Act
(“CWA”) for setting water quality standards (“WQS”) within the state,
subject to triennial review by the EPA. WQS embrace three elements:
designated uses of each waterway or water body, consistent with the goals
of the CWA; criteria, expressed in narrative statements and in numerical
concentration levels, that specify the amount of specified pollutants that
may be present in a water body and still protect its designated uses; and
anti-degradation provisions.\textsuperscript{119}

Subsequent to the enactment of MICSA, Congress amended the CWA
to provide opportunities for tribes to administer some CWA programs on
their reservations. Interested tribes go through a regulatory process to
obtain “treatment in a similar manner as a state,” or “TAS” status, as to a
particular CWA program for which TAS status is available, such as the

\textsuperscript{118} DOI Solicitor Letter, supra note 6, at 10.
WQS program. Tribes with TAS status as to the WQS program can set WQS as to waters on their reservation, subject to EPA approval. The EPA retains authority to directly implement CWA programs in Indian country, including setting WQS, in the absence of tribal assumption of a

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120 33 U.S.C. § 1377(c) (2012). In 2014, the EPA proposed a reinterpretation of the Clean Water Act’s TAS provision, 33 U.S.C. § 1251, based on a suggestion made by the National Tribal Water Council in 2013, under which the provision would be interpreted as a delegation of authority to tribes. The EPA explained the proposal in the Federal Register as follows:

Since 1991, EPA has followed a cautious approach that requires applicant tribes to demonstrate inherent authority to regulate waters and activities on their reservations under principles of federal Indian common law. The Agency has consistently stated that its approach was subject to change in the event of further congressional or judicial guidance addressing tribal authority under section 518 of the Clean Water Act. Having received such guidance, EPA proposes to conclude definitively that section 518 includes an express delegation of authority by Congress to eligible Indian tribes to administer regulatory programs over their entire reservations. This reinterpretation would eliminate the need for applicant tribes to demonstrate inherent authority to regulate under the Act, thus allowing tribes to implement the congressional delegation of authority unhindered by requirements not specified in the statute. The reinterpretation would also bring EPA’s treatment of tribes under the Clean Water Act in line with EPA’s treatment of tribes under the Clean Air Act, which has similar statutory language addressing tribal regulation of Indian reservation areas.


121 The EPA has explained the significance of TAS status as follows:

Tribes with TAS for the water quality standards program can: [e]stablish water quality goals to protect reservation water resources[, e]nsure that facilities within or upstream from the reservation protect the tribe’s EPA-approved water quality standards applicable to tribal waters[, and d]esignate uses of water bodies that may include cultural or traditional purposes.


122 “Indian country” is a term of art referring to land within Indian reservations and certain other Indian lands. The term has been defined by statute as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

role under the TAS concept. Thus, a tribe with EPA approval to run a WQS program on its reservation can protect what matters to the tribe by establishing designated uses and accompanying criteria to protect those uses. None of the Maine tribes have been approved for TAS status to run a WQS program,\(^{123}\) and in view of the complexities created by MICSA, their eligibility has been a matter of dispute. In the absence of tribal WQS programs in Maine, the EPA acted to protect the designated use of tribal sustenance fishing by disapproving some of Maine’s proposed WQS as being inadequate for waters in Indian territories and lands.\(^{124}\)

In reviewing and approving Maine’s proposed WQS revisions, the EPA repeatedly took the position (dating back at least to 2004) that its approvals of Maine’s WQS revisions were limited in scope.\(^{125}\) The EPA’s approval letters stated that the approvals did not extend to waters within Indian territories and lands (hereinafter “Indian lands”);\(^{126}\) that it was taking no action to approve or disapprove the state’s WQS with respect to those lands;\(^{127}\) and that the EPA would retain responsibility (under §§ 303(c) & (d) of the CWA) for waters within Indian lands.\(^{128}\) This approach was consistent with the EPA’s questioning of Maine’s authority to implement the WQS program in tribal waters. The EPA maintained that states are not authorized to implement the program in federally recognized tribal territories until the EPA makes “clear findings on the record

\(^{123}\) In 2012, the Penobscot Nation requested that the EPA determine whether the Tribe qualifies under the TAS provisions for the purposes of seeking NPDES permit program approval for discharges into the Penobscot River. Letter from Kirk E. Francis, Chief, Penobscot Nation, to H. Curtis Spalding, Reg’l Adm’r, Envtl. Prot. Agency (May 29, 2012). Also, in October 2014, the Tribe applied to administer the WQS program on part of the Penobscot River; the EPA deferred deciding on the matter. ENVTL. PROT. AGENCY, ANALYSIS SUPPORTING EPA’S FEBRUARY 2, 2015 DECISION TO APPROVE, DISAPPROVE, AND MAKE NO DECISION ON, VARIOUS MAINE WATER QUALITY STANDARDS, INCLUDING THOSE APPLIED TO WATERS OF INDIAN LANDS IN MAINE 13 (Feb. 2, 2015) [hereinafter EPA Decision Support Document]. The Tribe adopted water quality standards in 2014, and according to the Penobscot Nation’s website, the EPA still has not taken action on the application. Penobscot Nation Water Quality Standards, PENOBSCOT NATION, https://www.penobscotnation.org/departments/natural-resources/water-resources/penobscot-nation-water-quality-standards (last visited Feb. 25, 2019).

\(^{124}\) See infra notes 125–29 (explaining how the EPA made limited approvals as it questioned Maine’s authority to implement WQS programs).

\(^{125}\) EPA Decision Support Document, supra note 123, at 1 (noting that in decisions from 2004 to 2013, the EPA limited its approvals of WQS to waters outside of Indian lands).

\(^{126}\) Id. (“In its decisions from 2004–2013 following review of such WQS, EPA limited its approvals of the new or revised WQS to state waters outside of Indian territories and lands in Maine Indian lands . . . .”).

\(^{127}\) Id. (“[EPA] explicitly refrained from taking any action on the WQS for waters in Indian lands.”).

\(^{128}\) Id. at 29 (discussing the EPA’s authority to review and approve or disapprove new or revised state WQS under Section 303).
approving the state standards to apply in Indian country.”

In 2014, Maine filed suit against the EPA for its failure to approve or disapprove Maine’s WQS as to waters within Indian lands. In February 2015, the EPA informed the Maine Department of Environmental Protection (“Maine DEP”) that the EPA had concluded that Maine has authority to adopt WQS that are applicable to waters in the state’s Indian territories and lands (“Indian lands”). The EPA reached this conclusion on the basis of the “unique jurisdictional formula” that Congress established in Maine; in the absence of the Settlement Acts, Maine would not have had such authority (which would instead belong to the EPA or to a tribe with TAS status). Maine’s authority to set WQS is not, however, unconstrained; the EPA, “informed by the operation of the Indian settlement acts,” imposed constraints that “will require that WQS in tribal waters protect the Tribes’ sustenance fishing of those waters.”

The EPA approved many of Maine’s proposed WQS, both for waters in Indian lands and for waters throughout the state, but also disapproved certain WQS for all waters in Indian lands. The EPA was concerned about human health criteria revisions related to mercury, arsenic, and other toxic pollutants. Certain other new or revised WQS were neither approved nor disapproved.

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131 Letter from Curtis H. Spalding, Regional Administrator, Env'tl Prot. Agency, to Patricia W. Aho, Me. Dept’ of Env'tl Prot. at 1 (Feb. 2, 2015) (“As discussed in the attached Decision Support Document . . . , EPA has concluded that the State of Maine has the authority to adopt WQS that are applicable to waters in Indian lands.”) [hereinafter EPA Decision Letter].


133 Id. The EPA identified the waters covered by the decision, which it also referred to as “Indian waters,” as including “waters adjacent to land held in trust by the Secretary of the Interior and lands in the Tribes’ reservations as defined in the Settlement Acts.” Id. at 6. The EPA acknowledged that there was some uncertainty “over what waters are associated with Indian lands in Maine in a few locations;” particularly in view of then-ongoing litigation over the boundaries of the Penobscot Nation’s reservation. Id. at 7. In Penobscot Nation v. Mills, the tribe, supported by the United States, took the position that the reservation includes the waters of the main stem of the Penobscot River, while the State claimed that it did not. Penobscot Nation v. Mills, 861 F.3d 324, 327 (1st Cir. 2017). In June 2017, a panel of the First Circuit Court of Appeals sided with Maine on this issue in a split decision. Id.

134 See EPA Decision Letter, supra note 131, at 2–4 (listing various approvals for classifications and designated uses; criteria; and general provisions).

135 See id. at 4–5 (listing various disapprovals for classifications and designated uses; criteria; and general provisions).

136 See id. at 3–4 (setting forth water quality criteria provisions as it relates to human health and toxic substances).

137 See id. at 4–5 (citing revisions which the EPA would not make at the time the letter was sent); id. at 2 n.3 (explaining how the EPA undertook to review and to approve or disapprove, as soon as possible, all remaining proposed WQS applicable to waters on Indian lands).
The EPA’s description of its decision on Maine’s WQS submission makes apparent the complexity of the EPA’s task: “EPA has . . . filtered the body of general federal Indian common law through the lens of MICS, recognizing its unique requirements, while understanding at the same time that the statute operates against the backdrop of federal Indian common law.”\(^{138}\)

The EPA also approved the State’s surface water classifications and corresponding designated uses for waters in Indian lands.\(^{139}\) The EPA looked to the sustenance fishing-related provisions of the Maine Implementing Act and interpreted Maine’s “fishing” designated use, as applied to tribal waters, to mean “sustenance fishing.”\(^{140}\) Specifically, the EPA explained that the State classifications and associated designated uses for waters in Indian lands include a designated use of “fishing,” which the EPA “interprets to include sustenance fishing consistent with [the] Tribes’ sustenance practices in waters on their lands.”\(^{141}\) In addition, the EPA approved a “specific sustenance fishing use for the inland waters [of the Tribes’ reservations] . . . .”\(^{142}\) The EPA explained that because the CWA requires that water quality criteria protect designated uses, such uses must be approved in order to evaluate the adequacy of the proposed criteria.\(^{143}\)

In discussing its approval of sustenance fishing as an approved designated use of tribal waters, the EPA noted that a clear purpose of setting aside land in the Settlement Acts was to provide a permanent land base on which the Tribes “could continue their unique cultures.”\(^{144}\) For the Tribes, a critical element of cultural survival is the ability to exercise sustenance fishing and other sustenance living practices.\(^{145}\)

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\(^{138}\) EPA Responses to Public Comments, supra note 94, at 21.

\(^{139}\) See EPA Decision Support Document, supra note 123, at 4 (“Because EPA has not yet approved any of Maine’s WQS for waters in Indian lands, EPA is first approving the State’s classifications and associated designated uses for these waters.”).

\(^{140}\) See EPA Decision Letter, supra note 131, at 2 (discussing EPA approval of the state’s surface water classifications and corresponding designated uses for waters in Indian lands and approval of sustenance fishing-related provisions of the Maine Implementing Act as an explicit designated use for certain waters in Indian lands); ME. REV. STAT. ANN. tit. 30 § 6207(4) (2018) (providing for the right of Passamaquoddy and Penobscot tribal members to take fish for individual sustenance within the boundaries of their reservations); ME. REV. STAT. ANN. tit. 30 § 6207(9) (2018) (defining the term “fish” as used in this section).


\(^{142}\) Id.

\(^{143}\) See id. at 4–5 (“EPA has determined that Maine’s human health criteria, however, do not adequately protect the designated use of sustenance fishing in the waters in tribal lands and, therefore, do not comply with the CWA’s requirement that criteria protect the uses of the waters to which they apply.”).

\(^{144}\) Id at 2.

\(^{145}\) See id. (“A critical element of tribal cultural survival is the ability to exercise sustenance living practices, including sustenance fishing.”); id. at 17–18 (explaining the purpose for the EPA’s recognition and approval of “sustenance fishing” was to ensure “maint[en]ance [of] their existence as a traditional culture”).
for waters in Indian lands therefore must be adequate to protect the use of the waters for sustenance fishing.

Based on this reasoning, Maine’s human health criteria (“HHC”) as they apply to waters in Indian lands had to be disapproved because they did not protect designated uses such as sustenance fishing.\(^\text{146}\) The necessity of adequately protecting the sustenance fishing designated use meant that Maine needed to revisit “its analysis supporting the human health criteria that determine how clean the waters must be to allow the Tribes to safely consume fish for their sustenance.”\(^\text{147}\) Two specific aspects of the analysis needed to be changed. First, in the new analysis, the tribal population exercising the sustenance fishing use must be treated as the target population. For sustenance fishing in waters on their own lands, “[the Tribes] are the population for which that land base was established and set aside” the EPA explained, rather than a high-consuming sub-population for whom greater levels of risk would be tolerated.\(^\text{148}\) Consequently, tribal members must be considered the target population for the purpose of determining whether Maine’s HHC “are adequate to protect the tribes’ health, including determining the appropriate fish consumption rate applicable in [waters on Indian lands] and weighing the risk level to which tribal members should be exposed.”\(^\text{149}\)

Second, Maine’s use of data to develop fish consumption rates also required a new examination. The data that Maine uses to determine tribal sustenance consumers’ fish consumption rate must, the EPA explained, “reasonably represent tribal consumers taking fish from tribal waters and fishing practices unsuppressed by concerns about the safety of the fish available for them to consume.”\(^\text{150}\) Evaluated by this standard, Maine’s data for developing fish consumption rates for its proposed WQS was flawed. The data failed to include information about tribal members’ sustenance fishing practices in their own waters and did not represent consumption levels unsuppressed by pollution concerns. The EPA pointed to the report produced by a joint tribal-EPA project called the Wabanaki Traditional Cultural Lifeways Exposure Scenario (“Wabanaki Lifeways Study”) as the source of the best available data representing “unsuppressed sustenance fishing practices of tribal members fishing in tribal

\(^{146}\) See id. at 3 (“EPA is disapproving Maine’s human health criteria because they are not protective of human health for the target population.”). The EPA also declined to approve or disapprove certain other WQS, such as ammonia criteria for all waters in Indian lands. Id.
\(^{147}\) Id. at 2; see also id. at 34–42 (explaining the EPA’s analysis of the adequacy of Maine’s HHC for waters in Indian lands).
\(^{148}\) Id. at 3.
\(^{149}\) Id. at 35; see also id. at 35–37 (discussing the analysis supporting the EPA’s conclusion that the Tribes must be treated as the target population for setting risk levels for waters in Indian lands).
\(^{150}\) Id. at 3 (emphasis added).
According to its authors, the project report was intended:

[T]o reflect the lifeways of people fully using natural resources and pursuing traditional cultural lifeways, not lifeways of people with semi-suburban or hybrid lifestyles and grocery-store diets. Present-day environmental conditions may not allow many people to fully engage in a fully traditional lifestyle until resources are restored, but this is still an “actual” and not “hypothetical” lifestyle.\(^{152}\)

The Wabanaki Lifeways Study indicated, for example, that fish consumption values of 286–514 grams per day represent tribal sustenance fishing use; Maine’s HHC are based on a consumption rate of 32.4 grams per day.\(^{153}\)

To address the EPA’s disapprovals, Maine needed to develop, and submit within ninety days, new HHC “for waters in Indian lands that protect tribal sustenance fishers as the target general population and are based on a fish consumption rate that represents unsuppressed sustenance fishing by tribal members.”\(^{154}\) If Maine failed to do so, the EPA would be required to step in and promulgate appropriate HHC for waters in Maine’s Indian lands.\(^{155}\) In subsequent letters in 2015, the EPA informed Maine of additional approvals and disapprovals of proposed WQS revisions as waters in Indian lands. A March 2015 letter disapproved proposed ammonia criteria for aquatic life and the cancer risk level for arsenic,\(^{156}\) and a June 2015 letter disapproved the proposed pH criterion for fresh waters and tidal water temperature criteria.\(^{157}\)

More stringent WQS standards aimed at protecting fishing rights undoubtedly would have an impact outside of Indian lands—a fact that apparently stoked the anger of Maine officials, along with private parties that were discharging contaminants into affected Maine waters.\(^{158}\) As the EPA explained, any National Pollutant Discharge Elimination System (NPDES) permits issued by Maine must ensure that the WQS that apply to

\(^{151}\) Id.; see also id. 37–42 (discussing the fish consumption rates used by Maine and the Wabanaki Lifeways Study).

\(^{152}\) WABANAKI LIFEWAYS STUDY, supra note 22, at 2.

\(^{153}\) EPA Decision Support Document, supra note 123, at 3.

\(^{154}\) Id. at 42.

\(^{155}\) Id.


\(^{158}\) Colin Woodard, Maine to Sue EPA Over Tribal Water Pollution Decision, PRESS HERALD (Mar. 21, 2015), https://www.pressherald.com/2015/03/21/maine-to-sue-epa-over-tribal-water-pollution-decision/.
waters in Indian lands are adequately protected.\textsuperscript{159} As a result, discharges into waters upstream from Indian lands that were permitted in accordance with existing WQS might no longer pass muster. The possibility of more stringent WQS in certain stretches of the Penobscot and St. Croix rivers, for example, reportedly “alarmed paper companies and riverside municipalities,” which do not welcome the prospect of having to improve pollution control.\textsuperscript{160} Non-tribal communities and industrial polluters located along the rivers have degraded water quality for over a century, threatening the survival of cultures and waterways that are essential to tribal identity.\textsuperscript{161}

While objectionable to those who were alarmed by the EPA’s disapproval of Maine’s WQS as to tribal waters, the EPA’s decision was grounded in advice received from the Solicitor of the Department of the Interior.\textsuperscript{162} The Solicitor explained in a January 2015 letter that the Tribes have federally protected fishing rights, which are upheld and guaranteed by the Settlement Acts,\textsuperscript{163} that fishing rights assume—and require—access to fishable waters\textsuperscript{164} with adequate water quality\textsuperscript{165} to be meaningful and that the trust relationship between the United States and tribes also counsels protection of fishing rights.\textsuperscript{166} Furthermore, the Interior Department Secretary had recently reaffirmed the trust responsibility and directed federal agencies to “ensure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected.”\textsuperscript{167} In sum, based on the foregoing considerations, the EPA had no choice but to take the Tribes’ fishing rights into account in evaluating the adequacy of Maine’s proposed WQS.\textsuperscript{168}

B. Maine: Decrying Protection of Water Quality as Fostering Inequality

Although Maine agreed with the EPA’s conclusion about the State’s

\textsuperscript{159} EPA Decision Support Document, \textit{supra} note 123, at 11.

\textsuperscript{160} Woodard, \textit{supra} note 158.


\textsuperscript{162} EPA Decision Support Document, \textit{supra} note 123, at 3. The EPA sought the Department of the Interior’s views regarding the Maine tribes’ fishing rights and the relationship between tribal fishing rights in Maine and water quality because the Department is charged with administering MICSA in Maine. \textit{Id}.

\textsuperscript{163} DOI Solicitor Letter, \textit{supra} note 6, at 2–3.

\textsuperscript{164} \textit{Id}. at 5.

\textsuperscript{165} \textit{Id}. at 10.

\textsuperscript{166} \textit{Id}.


\textsuperscript{168} DOI Solicitor Letter, \textit{supra} note 6, at 1.
authority to set WQS on all Maine lands, the EPA’s rejection of some proposed WQS amounted to pouring fuel on a fire. Reacting to the EPA’s February 2015 decision, Maine’s then-governor, Paul LePage, opined that the EPA’s decision to disapprove certain WQS categories “reads more like an elaborate and results-oriented rationalization than it does an objective assessment of the merits.” Governor LePage characterized the EPA’s decision as “retribution” against Maine for being willing to “take a stand against” the EPA in the longstanding dispute over water regulation in Maine. He termed the EPA’s ninety-day deadline for submitting revised WQS “outrageous” and expressed his intention to make sure that the record of the EPA’s “handling of this matter gets the public airing that it so justly deserves.”

Similarly, Maine Attorney General Janet Mills accused the EPA of creating a “double standard” by concluding that water quality protections applied to tribal waters “must be based on factors such as fish consumption rates and risk levels that are different from those already approved by EPA” that were used for the rest of the state. This “differential treatment,” she claimed, violated MICSA, under which (she argued) “all Mainers and Maine waters are treated the same for environmental purposes.” Mills also described the EPA’s action as creating “a two-tiered regulatory system that elevates the water regulatory goals of Maine’s Indian tribes over the rest of Maine.”

The Attorney General’s stance ignores the fact that state law, in the form of MICSA, specifically recognizes tribal fishing rights. This recognition amounts to no more than an empty promise unless water quality is adequate for safe, regular fish consumption. The Attorney General emphasized the benefits that tribes received from MICSA, including money with which the tribes acquired “approximately 300,000 beautiful and productive acres throughout the state,” without mentioning the fishing rights that were also guaranteed by the statute.

Finally, the Attorney General boastfully claimed that “Maine’s stringent water [quality] standards uniformly protect all Maine citizens,

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170 Id.
171 Id.
173 Id.
including members of Maine’s tribes.”

If Maine’s WQS were as robust as the Attorney General claimed them to be there would be no need for the existing warnings that advise against consumption of fish from certain Maine waters, beyond limited quantities. These warnings are based on concerns over mercury, dioxins, and PCBs in Maine fish. The Maine DEP has warned, in fact, that mercury levels in Maine fish “are among the highest in North America,” necessitating a statewide fish advisory. A study has shown that the Penobscot River is still contaminated by mercury that was discharged as long as fifty years ago. Warnings also exist because of dioxin and PCB contamination. Understandably concerned because of these warnings, the Penobscot Nation has advised that pregnant women and children under age eight should not eat any fish from Penobscot Nation Territory waters and other inland waters; all others should limit their consumption to as few as one meal per month (depending on the type of fish and fishing location).

Instead of revising its WQS as needed to protect tribal sustenance fishing rights, Maine amended its complaint to challenge the EPA’s disapprovals of its proposed WQS for waters within Indian territories and lands (“Indian Waters”) and the EPA’s conclusion that sustenance fishing is a designated use of Indian waters in the state. Maine faulted the EPA for recognizing sustenance fishing as a designated use of waters; for


178 See Me. Ctr. for Disease Control & Prevention, The Maine Family Fish Guide: Advice from the Maine Center for Disease Control and Prevention, ME. DEP’T OF HEALTH & HUMAN SERVS. 1, 4 (2019), https://www.maine.gov/dhhs/me/cdc/environmental-health/ehhp/fish/documents/meffguide.pdf (advising pregnant and nursing women, women who may get pregnant, and children under age eight to not eat any swordfish, shark, king mackerel, or tilefish and cautioning others to limit consumption to just two meals per month because of high mercury levels).


analyzing this designated use in the context of the tribal population; and for interpreting the subsistence fishing use as requiring unsuppressed tribal fish consumption rates based on historical consumption rates. The State argued that to the extent the EPA claimed that the federal trust responsibility provided a basis for its decisions, the trust responsibility justification would not apply in Maine.

Maine sought an order setting aside the EPA’s disapprovals of Maine’s proposed WQS; declaring that all Maine WQS approved by the EPA for non-Indian waters must also be approved for Indian waters; and declaring that the “EPA may not lawfully base any disapproval of Maine’s WQS on any distinctions between Indian Waters and non-Indian Waters, or between Maine’s tribal population and its general population.” In short, in Maine’s view, protecting waters on the basis of the legally guaranteed sustenance fishing rights being exercised there amounts to unlawful unequal treatment.

C. The EPA’s Response: Protecting Water Quality, Denying Inequality

1. Enforcing the Provisions of the Settlement Acts

Maine’s stance in Maine v. Wheeler echoes the statements made by state officials in their vehement opposition to the EPA’s effort to require WQS that are stringent enough to allow the Tribes to exercise their legally recognized fishing rights without risking their health. These rights were guaranteed by state agreements and by the Settlements Acts. In consideration of such guarantees, the Tribes ceded substantial lands in the eighteenth and nineteenth centuries and agreed to the settlement of substantial land claims in the twentieth century. Today, when forced to confront the impact of lax water quality standards on the exercise of tribal fishing rights, Maine seeks to treat the fishing rights as of no consequence and to continue to allow degradation of Indian Waters.

By acting to facilitate the meaningful exercise of tribal fishing rights, the EPA was doing no more than upholding the law, as embodied in MICSA and in federal common law principles. Because the Settlement Acts recognized that certain Maine waters are to be used for sustenance fishing, the EPA was obligated to require that water quality standards are adequate for that use. Past failures to adequately protect water quality, which have suppressed consumption rates, are no excuse for continuing failures to do so. Moreover, once the tribes were officially recognized as

\[\text{Id. at 4–5.}\]
\[\text{Id. at 40.}\]
\[\text{Id. at 54–55.}\]
\[\text{See supra Parts I and II.}\]
\[\text{Id.}\]
such, and a trust land regime was created for them, the United States was obligated to deal with them on a government-to-government basis and to respect, and protect, their rights.  

The EPA’s actions were also in keeping with Congress’s intentions with respect to the Tribes’ lands and tribal fishing, as embodied in MICSA. As the EPA has explained, “a fundamental purpose behind creation of the [Passamaquoddy and Penobscot] Tribes’ reservations was to protect the sustenance fisher[ies] . . . . [T]his Congressional purpose supports EPA’s decision to insist on criteria that protect the sustenance fishing rights associated with waters” in the Tribes’ reservations.\(^{189}\) Given that the EPA’s solicitousness toward tribal fishing rights is consistent with Congress’s purpose in enacting MICSA, Maine’s characterization of the EPA’s conduct as unlawful and capricious clearly is off base.

It is also worth emphasizing how the EPA’s decisions with respect to Maine’s proposed WQS are similar in kind to what the EPA regularly does in evaluating WQS. The Clean Water Act “generally obligates EPA to consider and comply with the requirements of the [Clean Water Act] in assessing impacts of state and EPA decisions on the interests and welfare (in this instance human health, specifically) of persons in light of the goals” of the Act.\(^{190}\) In this instance, the persons in question happen to be tribal members exercising fishing rights guaranteed by federal and state law. Seen in this light, Maine’s claims that the EPA has acted in an extraordinary manner—to impose a double standard—make little sense. Ken Moraff, regional director of the EPA’s Office of Ecosystem Protection, made this point in responding to the “double standard” claim:

> Every water body in Maine has a set of standards that apply to it that reflect the uses of that water body. . . . There are specific water bodies in Maine where tribal members have rights that are granted to them by state and federal law for sustenance fishing. So[,] the water quality standards for those waters have to protect those rights.\(^{191}\)

As Moraff explained, the EPA just needs “Maine to do what we ask every state to do, which is to meet the basic requirements of the Clean Water Act . . . . So we’re hopeful we have a chance to sit across the table and talk these issues through.”\(^{192}\) From this perspective, it was Maine’s

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\(^{188}\) See supra Part II.

\(^{189}\) EPA Responses to Public Comments, supra note 94, at 41.

\(^{190}\) Id. at 11.


\(^{192}\) Id.
conduct, rather than the EPA’s, that was extraordinary.

2. *Responding to Maine’s Recalcitrance for the Benefit of All Maine Residents*

In the face of Maine’s refusal to correct its flawed WQS, the EPA proposed federal WQS to protect sustenance fishing rights.\(^\text{193}\) After receiving comments that showed widespread support for its proposed WQS,\(^\text{194}\) the EPA published the final rule (the “Maine Rule”) in December 2016.\(^\text{195}\) The Maine Rule incorporated a fish consumption rate that represents a tribal fish consumption level “unsuppressed by pollution concerns as well as new data and scientific information on exposure and pollutant toxicity.”\(^\text{196}\)

The EPA explained in the final rule that for any Maine waters where sustenance fishing is a designated use, new or revised human health criteria for the protection of human health were necessary to meet the CWA’s requirements.\(^\text{197}\) The EPA explicitly rejected Maine’s argument that its approach would give Maine tribes “greater rights with respect to water quality than the rest of Maine’s population.”\(^\text{198}\) The EPA was not granting rights to anyone, but rather was “simply promulgating WQS in accordance with the requirements of the CWA—*i.e.*, identifying the designated use for waters in Indian lands, and establishing criteria to protect the target population exercising that use.”\(^\text{199}\) Because of the Settlement Acts, “the designated use is sustenance fishing, the tribes are the target population, and the EPA has selected the appropriate [Fish Consumption Rate] of that

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\(^{193}\) Proposal of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 23,239, 23,239 (proposed Apr. 20, 2016) (to be codified at 40 C.F.R. pt. 131) (“EPA proposes human health criteria . . . to protect the sustenance fishing use in those waters in Indian lands and for waters subject to sustenance fishing rights . . . based on a fish consumption rate that represents an unsuppressed level of fish consumption by the four federally recognized tribes.”).


\(^{195}\) Id. at 92,466. The final rule became effective on January 18, 2017. *Id.*

\(^{196}\) U.S. ENVTL. PROT. AGENCY, FACT SHEET: FINAL RULE ON CERTAIN FEDERAL WATER QUALITY STANDARDS APPLICABLE TO MAINE 2 (Dec. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/maine_wqs_final_rule_fact_sheet_508c.pdf. To protect Maine tribal sustenance fishers, the EPA used a fish consumption rate of 286 grams per day (rather than the 32.4 grams per day rate on which Maine’s WQSs were based). *Id.* The federal WQS established by the Maine Rule apply to NPDES permits for new discharges affecting Indian waters and to renewals of existing NPDES permits (which are generally valid for five years). Reply Memorandum in Support of EPA’s Motion for a 90-Day Stay of Proceedings at 3 n.2, Maine v. Pruitt, No. 1:14-cv-264 (D. Me. May 11, 2017).

\(^{197}\) See Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. at 92,466 (explaining that the EPA was finalizing water quality standards for certain waters under Maine’s jurisdiction, including human health criteria).

\(^{198}\) *Id.* at 92,475 (quoting comments from Janet T. Mills, the Maine Attorney General).

\(^{199}\) *Id.* at 92,475–76.
target population." This approach is consistent with Maine’s own approach to protecting “the target population for its fishing designated use (recreational fishers) that applies to waters outside Indian lands.”

Further highlighting the illogical nature of Maine’s “unequal treatment” claim, the EPA noted that non-Indians would also benefit from the EPA’s action. The “great majority of the waters subject to the [Human Health Criteria] are rivers and streams that are shared in common with non-Indians . . . or that flow into or out of waters outside Indian lands.” All users of the affected waters can benefit from their improved quality.

Comments submitted on the proposed rule indicated agreement with the EPA’s perspective. Every individual who commented, including many non-Indians, supported the EPA’s proposed action. None of them expressed “concern that the tribes [were] being accorded a special status or that this action [would] in any way disadvantage the rest of Maine’s population.” Instead, the comments ranged “from a profound recognition of the need to honor commitments made to the tribes in the Indian settlement acts to an acknowledgement that everyone in Maine benefits from improved water quality.”

As the EPA was promulgating WQS to protect sustenance fishing rights, the Penobscot Nation, as well as the Houlton Band of Maliseet Indians, filed a motion to intervene as defendant in the ongoing litigation. Intervention was necessary, the Penobscot Nation explained, because the tribe “has a substantial interest in ensuring that its members can safely exercise their sustenance fishing rights confirmed by Congress in MICSA.” Because Maine was challenging the EPA’s protection of those rights, “the Nation’s federally protected interests are directly at issue.” The motion highlighted tribal reliance since aboriginal times on “fish, eel, muskrat, fresh water clams and other food sources from the Penobscot River.” These “subsistence practices on the Penobscot River

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200 Id. at 92,476.
201 Id.
202 Id.
203 Id.
204 Id.
205 Id.
206 Id.
207 Unopposed Motion of the Penobscot Nation to Intervene (With Incorporated Memorandum of Law), Maine v. McCarthy, No. 1:14-cv-264 (D. Me. Dec. 21, 2016) [hereinafter Penobscot Motion to Intervene]. The Houlton Band of Maliseets’ motion to intervene as defendant was also filed in December 2016. Houlton Band of Maliseet Indians’ Motion to Intervene and Incorporated Memorandum of Law at 2, Maine v. McCarthy, No. 1:14-cv-264 (D. Me. Dec. 20, 2016).
208 Penobscot Motion to Intervene, supra note 207, at 5.
209 Id.
210 Id. at 2.
are engrained in tribal culture.”\textsuperscript{211} Moreover, at the time of the Settlement Acts, Penobscot families residing at Indian Island relied upon food sources from subsistence practices for three to four meals each week.\textsuperscript{212} The case presented “substantial issues . . . affecting the water quality standards that will apply to the [Nation’s] reservation sustenance fishery.”\textsuperscript{213} The EPA could not be depended on to adequately represent the Penobscots’ interest in the litigation—an assertion that proved to be painfully accurate—because it was the “interest of a unique Indian people within their aboriginal homeland.”\textsuperscript{214} The tribe explained that whereas “federal administrations change and so do their priorities,” the tribe’s “discrete and focused priorities within the Penobscot River do not.”\textsuperscript{215}

D. Presidential Elections Have Consequences (Maine Hoped): Pushing for a Do-Over

The outcome of the 2016 presidential election apparently gave Maine officials hope that there was a chance for a do-over as to the EPA’s efforts to protect tribal sustenance fishing rights. In February 2017, Maine petitioned EPA Administrator Scott Pruitt to reverse course on part of the EPA’s decision—namely, the part concluding that some of Maine’s proposed WQS were inadequate.\textsuperscript{216} Maine asked the EPA to reconsider and withdraw all portions of its 2015 letter actions, except for the recognition of Maine’s statewide environmental regulatory authority, and to repeal the Maine Rule.\textsuperscript{217}

In May 2017, the EPA successfully sought a stay in the proceedings pending in the Maine federal district court.\textsuperscript{218} In arguing for the stay, the EPA stated that “the administrative petitions that EPA has received in this case coincide with the change in administrations, and the incoming EPA officials are entitled to determine what course the EPA should take with respect to those petitions.”\textsuperscript{219} The tribes argued in vain that any further delay would pose a threat to their members because of their sustenance

\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 1. The motion explained that the reservation includes a sustenance fishery for tribal members in the Penobscot River from Indian Island northward. Id.
\textsuperscript{214} Id. at 6.
\textsuperscript{215} Id. at 7.
\textsuperscript{216} Letter from Paul R. LePage, Governor, State of Me., to Scott Pruitt, Adm’r, Envtl. Prot. Agency (Feb. 27, 2017) [hereinafter Maine Petition to EPA] (writing regarding the EPA’s partial withdrawal of EPA letter actions and repeal of the EPA’s final rule on Maine’s water quality standard).
\textsuperscript{217} See id. (asking for the repeal or withdrawal of the EPA’s final rule, titled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466 (Dec. 19, 2016)).
\textsuperscript{219} Id.
fishing.\textsuperscript{220}

In December 2017, the EPA reported to the district court that “after careful consideration,” the agency had decided “not to withdraw or otherwise change any of the decisions that are challenged” in the case.\textsuperscript{221} At this point, it looked as if Maine had failed in its efforts to persuade the EPA to abandon its protection of sustenance fishing rights.

Although at that time the EPA was not viewing the situation as Maine preferred, the State did receive endorsement of its views from the State of Idaho and from the Federal Water Quality Coalition, both of which filed amicus briefs urging the court to grant Maine’s requested declaratory relief.\textsuperscript{222} Idaho’s brief accused the EPA of engaging in a “nationwide policy push” that threatened “the states’ paramount authority to designate and protect the uses of their waters.”\textsuperscript{223} In its petition to the EPA, Maine also raised this claim of a nationwide effort by the EPA to protect tribal fishing rights when reviewing WQS.\textsuperscript{224}

Idaho’s brief included as an exhibit a January 2017 letter from the EPA to the Idaho Department of Environmental Quality, related to the state’s own ongoing dispute with the EPA over its proposed human health water quality criteria.\textsuperscript{225} The EPA concluded that Idaho had not adequately explained “how its revised human health criteria are protective of tribal members exercising their treaty-reserved fishing rights” or provided adequate justification for the fish consumption rate that it utilized, “including how that rate reflects subsistence fish consumption levels [and] accounts for information that suggests consumption is suppressed.”\textsuperscript{226}

Apparently, Idaho officials were as incensed as Maine officials at the EPA’s efforts to uphold tribal legal rights by insisting on WQS that protect sustenance fishing.

In May 2018, the EPA provided the court with a new letter from the Solicitor of the Department of the Interior addressing tribal fishing rights

\textsuperscript{220} The original stay was for ninety days. \textit{Id.} The court granted the EPA an additional stay for 120 days in August 2017. Adam Lidgett, \textit{EPA Says It Won’t Change Challenged Tribal Water Rules}, Law360 (Dec. 11, 2017, 4:49 PM), https://www.law360.com/environmental/articles/993375.


\textsuperscript{224} Maine Petition to EPA, \textit{supra} note 216, at 4.


\textsuperscript{226} \textit{Id.}
in Maine and their impact on WQS. The 2018 letter confirmed a number of important conclusions of the 2015 Solicitor’s Opinion Letter: the Penobscot Nation and the Passamaquoddy Tribe have federally protected, expressly reserved fishing rights; “to be rendered meaningful, these fishing rights by necessity include some subsidiary rights to water quality;” and the “EPA could take into account [these] rights when evaluating the adequacy of WQS in Maine.”

In the summer of 2018, however, it began to appear that Maine’s efforts to extract a “do over” commitment from the EPA were at last bearing fruit. In June 2018, Maine and the EPA told the court that they were working on a settlement.

The negotiations, which failed to result in a resolution, were held without inviting participation by the parties whose rights were at issue, namely, the tribal defendants. In July, the EPA filed a motion for a voluntary remand of its February 2015 decisions on the grounds that it intended to revise them. Specifically, the EPA planned to change, and not defend, its decision to “interpret . . . Maine’s fishing designated use in its WQS to mean sustenance fishing” in reservation and trust land waters and its decision to disapprove Maine’s HHC as not sufficiently protective of sustenance fishing designated uses in Indian waters. In seeking a remand of its decision, the EPA cited its “inherent authority to reconsider past decisions.” With “new officials in place,” the EPA had “reassessed the wisdom of the policies reflected in its February

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228 Id. at 2. On the other hand, the 2018 letter stated that the Solicitor’s Office was “unable to identify with similar clarity federally protected tribal fishing rights for the Houlton Band.” Id. at 3. The Solicitor reached the same conclusion for the Aroostook Band of Micmacs. Id. The letter also expressed some reservations about the usefulness of the Wabanaki Lifeways Study, given the broad period that it covered, and cautioned that it “was not intended to identify contemporary tribal fish consumption patterns.” Id. at 4.
229 See Joint Motion for a Thirty-Day Extension of all Deadlines in the Briefing Schedule to Accommodate Settlement Discussions at 2, Maine v. Pruitt, 1:14-cv-264-JDL (D. Me. June 26, 2018), ECF No. 132 (“EPA and Maine have recently held settlement discussions and have reached a framework for fruitful discussions which has the strong potential to result in a complete and final settlement of all of Maine’s claims that are pending before the Court.”).
230 See Amended Motion of the Penobscot Nation and the Houlton Band of Maliseet Indians for Reconsideration of Order Amending Scheduling Order at 3, Maine v. Pruitt, 1:14-cv-264-JDL (D. Me. June 29, 2018), ECF No. 135 (“The Tribes have not been apprised of or involved in any settlement discussions to date . . . ”).
231 EPA’s Motion for a Voluntary Remand, Motion for Stay of the Proceedings Pending the Court’s Decision on EPA’s Motion for Voluntary Remand, and Incorporated Memorandum of Law at 1, Maine v. Wheeler, 1:14-cv-00264-JDL (D. Me. July 27, 2018), ECF No. 139.
232 Id. at 1–2.
233 Id. at 3.
The EPA’s sudden change of heart at this point was curious. No new relevant facts or evidence had emerged since the 2015 decisions were made, or since the EPA’s December 2017 statement that, after careful consideration, it had decided not to change the challenged decisions. Furthermore, although the EPA’s motion mentioned three political appointees whose hiring allegedly made reconsideration appropriate, they had all been in their jobs for months before the motion was filed.

It is difficult to envision any factor other than politics, in the form of the current Administration’s openness to a persistent complaint by a Republican governor, as motivating the EPA’s remand request. Apparently, Maine’s explicit “special advantages for Indians” and implicit “not treating other (i.e., white) people fairly” claims had finally found a sufficiently receptive audience. The EPA has been cagey about what changes may be made to the challenged decisions, claiming that the agency “has not yet decided exactly how it will change the challenged decisions,” and noting that the Maine tribes can express their views during the comment period on remand and can ultimately challenge any EPA decision which they believe violates their rights in court.236 At that point, the Maine Tribes would be able to “raise any available arguments regarding EPA’s statutory authority and any alleged trust responsibility to the Tribes.”237

The EPA also argued that a Penobscot assertion that the reconsideration decision is politically motivated should be rejected and gave part of the credit for the decision to “Maine’s merits brief, which further crystalized the issues.”238

In reaction to the EPA’s about-face, the Penobscot Nation moved to file a counterclaim against Maine.239 The Tribe explained that its counterclaim “involves the establishment” of the principle that “the right of the Tribe to take fish . . . within its historic treaty reservation,” as enshrined in the Settlement Acts, “is an expressly retained sovereign right, protected under principles of federal Indian law as a treaty right.”240 In addition, the counterclaim “would establish that the Settlement Acts require Maine to

234 Id. at 4. The Penobscot Nation opposed the requested remand. Opposition of the Penobscot Nation to EPA’s Motion for Voluntary Remand at 4, Maine v. Wheeler, 1:14-cv-00264-JDL (D. Me. Sept. 28, 2018), ECF No. 155 [hereinafter Penobscot Opposition to Remand].
235 Id. at 7 n.5.
237 Id.
238 Id. at 13. The Penobscot Nation asserted that the EPA’s motion for remand “does not attempt to cloak the fact that the decision to reconsider its position is entirely politically motivated.” Penobscot Opposition to Remand, supra note 234, at 7.
240 Id. at 1.
recognize and protect this unique Penobscot sustenance fishing right within its reservation waters of the Main Stem of the Penobscot River” in any action by Maine to establish WQS.\textsuperscript{241}

The counterclaim was essential to protect the Tribe’s “critical interests as a unique riverine Indian tribe that has relied upon the Penobscot River for sustenance fishing since time immemorial, a practice that is essential to its cultural survival.”\textsuperscript{242} The Tribe requested from the court declarations and orders that (1) the Penobscot River’s Main Stem “warrants different environmental regulatory treatment from other Maine waters” in recognition of the rights of the tribe’s members “to be free from pollution that would frustrate its unique culture, including tribal sustenance living practices and fishing rights”; and (2) the provisions of the Settlement Acts codifying tribal members’ “reserved sovereign aboriginal right . . . to take fish for sustenance within the Main Stem . . . includ[ing] a right to be free of water pollution in the Main Stem . . . that would frustrate that right.”\textsuperscript{243}

Maine supported the EPA’s motion for a voluntary remand, but argued further that the EPA’s challenged decisions should also be vacated.\textsuperscript{244} The Penobscot Nation, on the other hand, opposed the motion for voluntary remand and argued against vacating the challenged decisions.\textsuperscript{245}

In December 2018, the district court responded favorably to the EPA’s request for a voluntary remand.\textsuperscript{246} The court rejected the Penobscot Nation’s argument that the remand would interfere with the tribe’s ability to vindicate its rights,\textsuperscript{247} while also rejecting Maine’s argument that the court should vacate the EPA’s February 2015 decision while the EPA reconsiders it.\textsuperscript{248} The court provided that the Maine Rule would remain in effect during the remand period\textsuperscript{249} and stayed the case until December 3, 2019.\textsuperscript{250}

\begin{itemize}
\item \textsuperscript{241} Id. at 1–2.
\item \textsuperscript{242} Id. at 2.
\item \textsuperscript{243} Answer of the Penobscot Nation to Second Amended Complaint & Counterclaim at 40, Maine v. Wheeler, No. 1:14-cv-264-JDL (D. Me. Dec. 6, 2018), ECF No. 141.
\item \textsuperscript{244} Reply Memorandum in Support of EPA’s Motion for a Voluntary Remand, supra note 236, at 1.
\item \textsuperscript{245} Penobscot Opposition to Remand, supra note 234, at 1. The Houlton Band also filed a brief opposing remand and arguing against vacating the challenged decisions. Houlton Band of Maliseet Indians’ Motion to Intervene and Incorporated Memorandum of Law at 2, Maine v. McCarthy, No. 1:14-cv-264-JDL (D. Me. Dec. 20, 2016), ECF No. 67.
\item \textsuperscript{246} Maine v. Wheeler, No. 1:14-cv-00264-JDL, 2018 WL 6304402, at *3 (D. Me. Dec. 3, 2018) (remanding the case only if the EPA’s February 2015 decision is vacated by the court).
\item \textsuperscript{247} Id. (noting that the Tribes have failed to specify how the questions of statutory interpretation relate to the issues).
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id. at *2.
\item \textsuperscript{250} Id. at *4. The court also granted the Penobscot Nation’s motion to amend its answer to Maine’s complaint to add a counterclaim. Id.
E. **Gubernatorial Elections Can Have Consequences, Too (The Maine Tribes Hope)**

In January 2019, Janet Mills, who had been a vocal critic of the EPA’s rejection of Maine’s proposed WQS standards to protect tribal sustenance fishing, took office as Governor of Maine.\(^{251}\) As Governor-elect, Mills had pledged to work “to find new ways to partner with the indigenous nations of Maine.”\(^{252}\) In a seeming acknowledgement of, and attempt to distance herself from, her past adversarial stance toward tribal rights and interests, she noted that as Attorney General her job had been to represent the state in litigation, and that she did not always get to choose the matters handled by her office.\(^{253}\) Her role as Governor would be very different and she pledged that, in that role, her first priority would be to “improve communication and trust between the four Tribes, the state, and local governments” so that they could work together “to improve the lives, opportunities and wellbeing of all of our people.”\(^{254}\) She highlighted past instances in which she had stood with tribes rather than against them, such as in opposing past EPA efforts to end regulation of mercury and airborne toxins, which greatly threaten Maine lakes and rivers, and offshore drilling proposals, “because of the devastation any oil spill would bring to our fisheries, to our tourism industry and to sacred Tribal lands at Pleasant Point.”\(^{255}\) State government would, she said, “be a partner with Tribal governments, not an enemy of them.”\(^{256}\)

Penobscot Nation Tribal Ambassador Maulian Dana, who attended Mills’ inauguration, expressed “great hope for continued effort to reach common ground and attempt to mend the bonds between the indigenous nations of Maine and the governing entities.”\(^{257}\) During the inauguration ceremony, in which Mills invited tribal leaders to participate, Mills invoked the name of Penobscot Nation Chief Joseph Attean, the tribe’s first elected chief.\(^{258}\)

Mills has already taken some concrete steps to try to repair Maine’s relationship with tribal governments and members. In April 2019, Mills signed legislation to change the name of the Columbus Day holiday to

\(^{251}\) Kevin Miller & Scott Thistle, *Janet Mills Sworn in as Governor, Declares ‘We are All in This Together,’* PORTLAND PRESS HERALD (Jan. 3, 2019), https://www.pressherald.com/2019/01/02/janet-mills-to-become-governor-tonight/.


\(^{253}\) Id.

\(^{254}\) Id.

\(^{255}\) Id.

\(^{256}\) Id.


\(^{258}\) Id.
Indigenous Peoples’ Day.259 Joined by tribal leaders at the signing ceremony, Mills characterized the legislation as “another step in healing the divisions of the past, in fostering inclusiveness, in telling a fuller, deeper history, and in bringing the State and Maine’s tribal communities together to build a future shaped by mutual trust and respect.”260 She observed: “I believe we are stronger when we recognize where we have erred. I believe we are stronger when we seek a fuller and deeper understanding of our history. I believe we are stronger when we lift up the voices of those harmed and marginalized in the past.”261

Mills is also working on revitalizing the Maine Indian Tribal-State Commission, which was created pursuant to the Settlement Acts but has not had a full slate of members since 2013.262 The Governor also has appointed a former Penobscot Tribal Council member, Donna Loring, as Senior Advisor on Tribal Affairs.263 These actions by Governor Mills suggest a willingness to consider a different path than her predecessor (and Mills herself, as Maine Attorney General) pursued where tribal rights and interests are concerned.

Of course, none of these developments relate directly to the ongoing dispute over water quality and tribal sustenance fishing rights in Maine. There are some indications, however, that there may be movement in the direction of a resolution. In April 2019, the EPA filed a required status report with the district court in which it reported that the EPA, Maine, and the tribal-intervenors “are currently engaged in discussions to explore the possibility” of Maine “taking a new approach to addressing sustenance fishing through a combination of legislative and regulatory actions.”264 The report listed a number of meetings involving the EPA, Maine, and the four federally recognized Maine tribes that had already taken place and stated that all parties to the litigation “are actively engaged in and support this effort.”265 In view of these developments, the EPA is not yet issuing


260 Id.

261 Id.


265 Id. at *2.
proposed revised decisions.\(^{266}\)

**CONCLUSION**

When Congress set aside trust lands . . . those lands were set aside specifically to allow tribal members to continue their traditional way of life. But that way of life is threatened. The river is polluted and subject to fish advisories that warn people not to eat fish they catch from the river lest they risk cancer and other diseases. Tribal members are left with the dilemma of whether to continue sustenance fishing and imperil their health, or to forgo sustenance fishing and imperil their culture.\(^{267}\)

Since 2015, the EPA, Maine, and the Penobscot Nation have been engaged in litigation over whether Maine will be required to establish Water Quality Standards under the Clean Water Act that will be adequate to protect the right of members of the Penobscot Nation to fish for sustenance. Sustenance fishing rights are protected by both state and federal legislation, an acknowledgment of the fact that fishing for sustenance has been a central part of Penobscot life from time immemorial. Fish consumption advisories in effect in the State have severely limited tribal members’ ability to exercise sustenance fishing rights. Such rights are meaningful only if fish can be regularly consumed without fear of serious adverse health impacts. The EPA consequently decided to reject standards proposed by Maine that were inadequate to protect sustenance fishing rights. When Maine refused to revise its proposed standards, the EPA stepped in and promulgated Water Quality Standards for Indian waters in Maine.

The EPA resisted pressure from Maine to reconsider its decision for several years, even after a new presidential administration took office. Maine’s persistence finally appeared to pay off in the summer of 2018, when the EPA announced plans to revise its decision. The EPA has yet to put forth a proposed revised decision.

The election of Maine Governor Janet Mills has sparked hope that Maine will at last work with the Penobscot Nation and the other Maine tribes to address their need for waters that are clean enough to fish for sustenance. It remains to be seen whether Governor Mills, who once decried the EPA’s water quality protections for Maine tribal waters as “differential treatment,” is truly willing to respect tribal rights and to work with the Maine tribes, in partnership, to safeguard the waters of Maine for

\(^{266}\) Id.

\(^{267}\) Houlton Band of Maliseet Indians’ Motion to Intervene and Incorporated Memorandum of Law, *supra* note 245, at 1.
all those who depend on them, both today and for generations to come.