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Eli-Tpitahtomek Tpassuwakonol Waponahkik (How We, Native People, Reflect on the Law in the Dawnland)

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Cover Page Footnote

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WAPONAHKIK
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ABSTRACT

INTRODUCTION

I. ROOTS OF FEDERAL INDIAN LAW

- A. Evolution of the Law of Nations (a.k.a. the Doctrine of Discovery)*
- B. Establishment of a Spanish-Christian Hierarchy in the New World*
- C. English Application of the Doctrine of Discovery in North America*
- D. The Marshall Trilogy*
 - 1. Johnson v. M'Intosh*
 - 2. Cherokee Nation v. Georgia*
 - 3. Worcester v. Georgia*

II. EARLY AMERICAN-WABANAKI DEALINGS

- A. Background on the Wabanaki: the Original American Allies*
- B. The Treaty of Watertown and the American Revolution*
- C. Recognition of Wabanaki-American Relations in the New Country*
- D. Maine Statehood*
- E. Flouting Federal Law and the Maine Constitution*

III. THE SETTLEMENT ACT ERA

- A. 1975-1979: Application of Federal Common Law to Indian Law Disputes in Maine*
- B. The Settlement Acts*

IV. APPLICATION OF COMMON LAW DOCTRINES OF FEDERAL INDIAN LAW IN THE POST-SETTLEMENT ACT ERA

- A. Application of Federal Indian Common Law Doctrines After the Settlement Acts*
- B. Application of Indian Law Principles to Reserved Rights*
- C. Rules of Construction Applicable to Federal Indian Law*
- D. Ambiguities Regarding Treatment of Aboriginal Rights Under the Settlement Acts Must be Resolved Using Principles of Federal Indian Common Law*

CONCLUSION

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ABSTRACT

Multiple nations within the Wabanaki Confederacy, including the Maliseet Nation, Mi'kmaq Nation, Passamaquoddy Tribe, and Penobscot Nation, were signatories to the July 19, 1776 Treaty of Watertown, which was the first ever treaty entered into by the United States of America following the Declaration of Independence. Following the Treaty of Watertown, Wabanaki warriors served directly under General George Washington and made critical contributions in support of the Americans' Revolutionary War. Such contributions were made based on the Americans' promise that the Wabanaki Nations' lands, natural resources, and traditional ways of life would be forever protected by the fledgling United States. Unfortunately for the Wabanaki Nations, their Revolutionary War-era promises were largely disregarded as the Commonwealth of Massachusetts and then the State of Maine systematically oppressed their indigenous inhabitants by ignoring an emerging body of federal law, based on the Doctrine of Discovery, which was intended to protect those very indigenous people. This Article delves into this complex history by exploring the Doctrine of Discovery, historical dealings between the Wabanaki and the Americans, and the events and court cases leading up to the enactment of the Maine Indian Claims Settlement Act (MICSA), which resolved Wabanaki land claims against the State of Maine for the illegal taking of tribal lands. This Article then analyzes the legislative history and text of the MICSA and juxtaposes this record with federal common law interpreting the rights of federally recognized Tribal nations. Finally, this Article argues that federal common law interpreting the rights of Tribal nations should be relied upon when interpreting the scope of specific Wabanaki rights that were never ceded or relinquished in treaties or in the MICSA.

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INTRODUCTION

The Wabanaki Confederacy, including the Abenaki (Aponahki), Maliseet (Wolastoqay), Micmac (Mi'kmaq), Penobscot (Panawahpskek), and Passamaquoddy (Peskotomuhkati), played a critical role in support of the Americans during the Revolutionary War. Representatives of some of the Wabanaki Nations signed the Treaty of Watertown,¹ which was the United States' first diplomatic act as a self-declared sovereign nation, just days after the Declaration of Independence on July 19, 1776.² In it, the Wabanaki Nations committed vital resources, including military support, to the fledgling nation-state at a time when the war for independence against Great Britain was going poorly for the Americans.³

The Wabanaki Chiefs answered the Americans' call to arms at the urging of General George Washington.⁴ The Chiefs led their warriors to victory in battle with the British and sent warriors to serve directly under General Washington himself. In return, the Wabanaki Nations expected to be involved in treaty-making with the newly founded democracy so the United States would forever protect Wabanaki people, lands, and resources, as promised in the Treaty of Watertown.⁵ The Treaty of Watertown's promises of mutual defense, friendship, and assistance rung hollow in the years following the Revolutionary War, as the Wabanaki people were displaced from the vast majority of their traditional territories by the time Maine entered the Union in 1820.⁶ Nonetheless, the Wabanaki's critical contributions to the creation of the new American democracy and the forging of the northern border between the United States and Great Britain⁷ could not be overlooked; thus, treaties to protect certain lands and resources were executed with them.⁸ The People of the State of Maine then ratified a constitution that dutifully engrained these treaties into Maine's organic law upon the grand bargain, known as the Missouri Compromise, which facilitated the United States' continued economic dependency on human enslavement.

1. See Treaty of Watertown, Mass.-St. John's & Mickmac Tribes, July 19, 1776, https://www.maine.gov/history/PDF/Redact/Treaty_of_Watertown_1776.pdf [<https://perma.cc/W574-HKCK>] (last visited May 13, 2022) [hereinafter Treaty of Watertown].

2. *Id.*

3. *Id.*

4. See Letter from George Washington to the St. Johns Tribe (Dec. 24, 1776), in FREDERIC KIDDER & GEORGE HAYWARD ALLEN, *MILITARY OPERATIONS IN EASTERN MAINE AND NOVA SCOTIA DURING THE REVOLUTION* 58-59 (Frederic Kidder eds., 1867) [hereinafter Letter from GW to St. Johns Tribe]; *From George Washington to the Chiefs of the Passamaquoddy Indians, 24 December 1776*, FOUNDERS ONLINE NAT'L ARCHIVE, <https://founders.archives.gov/documents/Washington/03-07-02-0340> [<https://perma.cc/5MVT-2RH2>] (last visited May 13 2022) [hereinafter Letter from GW to Passamaquoddy Tribe].

5. See *Passamaquoddy Indian Papers: Collection No. 9014*, in CORNELL UNIV. LIBR., 1775-1912 [hereinafter Passamaquoddy Indian Papers].

6. See MICAH PAWLING, *WABANAKI HOMELAND AND THE NEW STATE OF MAINE: THE 1820 JOURNAL AND PLANS OF SURVEY OF JOSEPH TREAT* 277, 278 (2007); see also Treaty Between the Passamaquoddy Tribe and the Commonwealth of Massachusetts, Sept. 29, 1794, https://www.passamaquoddy.com/?page_id=1422 [<https://perma.cc/YW44-V7GA>] (last visited May 13, 2022).

7. See Passamaquoddy Indian Papers, *supra* note 5.

8. PAWLING, *supra* note 6, at 278.

This Article examines the vitality of the inherent indigenous rights reserved within, and connected to, the treaty agreements enshrined in the Maine Constitution. In doing so, this Article will explore the applicability of federal Indian common law doctrines to the federally recognized Wabanaki Nations located in what is now Maine. In particular, Section I of this Article summarizes the primary tenets of the body of law known as “federal Indian law,” including the Doctrine of Discovery and the Marshall Trilogy. Section II explores certain aspects of Wabanaki-American diplomatic, legal, and military interactions from the American Revolution through the 19th Century. Section III examines the period leading up to, and including, the Maine Indian Claims Settlement Act of 1980 (MICSA). Section IV analyzes cases that illustrate the divergent ways that federal and state courts applied doctrines of federal Indian common law in controversies involving the Wabanaki Nations in the years after MICSA. Finally, this Article concludes by arguing that federal Indian common law doctrines are applicable to an analysis of reserved, and never extinguished, Passamaquoddy rights.

I. ROOTS OF FEDERAL INDIAN LAW

Federal Indian law is the complex result of over two hundred years of federal law, including treaties, statutes, and court decisions, collectively known as common law. Many of these decisions rely on overtly and covertly racist themes that date back to the Roman Empire.

A. Evolution of the Law of Nations (a.k.a. the Doctrine of Discovery)

The inherently discriminatory nature of federal Indian law can be traced to the Roman Empire and Europe’s Middle Ages. The Roman Empire stretched across much of Europe and Asia and developed *jus gentium*, or the Law of Nations (commonly called the “Doctrine of Discovery”), to govern foreigners and provincial subjects in far-flung lands.⁹ The Roman Empire’s adoption of the Roman Catholic Church placed the Pope above the Roman Emperor in all Christian and secular affairs and gave Papal decrees the force of law within the Roman policy of the Roman Catholic Church.¹⁰ Although different European nation-states applied the Law of Nations in slightly distinct manners, application of this concept in the Roman Empire represented a link between conquered peoples, title to their land, and the sovereign power of the Emperor.¹¹ The Pope’s position above the Emperor reinforced the Christian themes of unity and hierarchy that created a basis for all Papal policy concerning the non-Christian indigenous inhabitants of the Americas.¹²

The themes of unity and hierarchy that were originally rooted in the Bible created a foundation for the Church’s influence over European nation-states and the foreign policy that was made applicable in the New World. In the Book of John,

9. Robert Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 252-53 (1986).

10. Robert Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 11-17 (1983).

11. *Id.*

12. *See id.* at 13-14.

Jesus told Peter, “[f]eed my sheep.”¹³ Generations of Christian scholars interpreted Jesus’ message to impose a duty on Peter and the Pope, God’s chosen vicar, to look after all human beings.¹⁴ This mandate created a hierarchical structure from God to Jesus, to the Pope, and to all human beings.¹⁵ It also instituted an order of unity that required all men to follow the word of the Pope above all else.¹⁶ In the 5th Century, European nation-states began to apply this original mandate from Jesus to Peter to ensure the sanctity of the Christian hierarchy in newly conquered lands.¹⁷ Finally, this mandate to justify the conversion of non-Christians was used by St. Augustine in the 6th Century to carry out a “just war” to enforce internal discipline within Christendom and the Crusades, which sought to reinforce and extend the influence of the Church’s hierarchy and unity.¹⁸

In 1199, Pope Innocent III wrote *Quod super his* to rationalize the Crusades against non-Christians and to outline the rights of such infidels and heathens.¹⁹ Innocent postulated in *Quod super his* that infidels possessed the natural law right to acquire property and govern themselves, but that the Pope retained the right to intervene in the affairs of such peoples if they rejected the Church’s message of hierarchy and unity.²⁰ He reasoned that Christ empowered the Pope, as a caretaker of such non-Christians, who “belong to Christ’s flock by virtue of their creation,” and concluded that the Pope “had jurisdiction over all men and power over them in law.”²¹ Innocent’s reasoning rationalized the subjection of non-Christians to inhumane treatment, violent means of conversion, and impaired rights, all to help achieve a vision of Christendom.²² *Quod super his* incorporated the Christian ideals of hierarchy and unity into a framework of rights held by all men. This framework was the basis of European colonial policy in the New World.

B. Establishment of a Spanish-Christian Hierarchy in the New World

The dynastic aspirations of the Spanish Crown in the 15th Century and “discovery” of the New World created a fertile basis for the employment of the principles of *Quod super his*. In 1493, Pope Alexander VI gave Spain title to a large portion of the New World with the expectation that Spain would extend the reach of the Christian-based kingdom into the Americas.²³ King Ferdinand of Spain then promulgated Christian-inspired rules to govern the New World in a proclamation entitled *Requerimiento*.²⁴ *Requerimiento* formally established Spain’s title to the New World from Pope Alexander VI and instituted a hierarchy that required the

13. *John* 21:17.

14. Williams, *supra* note 10, at 23-24.

15. *Id.*

16. *Id.* at 15.

17. *Id.* at 14.

18. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 30-32 (1990).

19. *Id.* at 44.

20. WILLIAMS, *supra* note 18, at 13-14.

21. *Id.* at 44 (quoting THE EXPANSION OF EUROPE: THE FIRST PHASE 191-92 (James Muldoon ed., 1977)).

22. *Id.*

23. Williams, *supra* note 10, at 46.

24. WILLIAMS, *supra* note 18, at 91-92.

indigenous inhabitants of the Americas to recognize the Catholic Church as superior to all men, the Pope as the Church's high priest, and the King and Queen as sovereign rulers of the Americas.²⁵ The *Requerimiento* also stated that a failure to recognize the Christian hierarchy would entitle Spain to force the obedience of America's indigenous inhabitants to the Church and would forfeit indigenous rights to self-governance.²⁶ Only forty years after Europeans landed in the Americas, King Ferdinand's proclamation was challenged by Franciscus de Victoria's 1532 essay "On the Indians Lately Discovered."²⁷

Victoria's essay was the first to apply natural law to the discourse on the inhabitants of the Americas and made the natural law assumption that all men have certain inherent rights as free and rational people.²⁸ The essay was broken up into three arguments. Victoria first argued that natural law gave all men the right to possess property and that the extinguishment of indigenous title to property only occurred if they lacked "reason."²⁹ Second, Victoria argued that the Pope did not have the authority to give Spain title to lands occupied by the discovered Indians because they were assumed to be free and rational people under natural law principles.³⁰ This point refuted the previously accepted Doctrine of Title by First Discovery.³¹ In his third point, Victoria postulated that the violation of the universally binding Law of Nations by indigenous inhabitants could justify a nation's conquest in the Americas and the impairment of indigenous rights.³² Victoria's argument that reason was a precondition for ownership assumed that it was the Pope's duty not only to introduce and enforce Christianity, but also to wage war against Indians if they were not faithful.³³ Victoria argued that the Law of Nations, which connected all nations and peoples by the virtues of natural law, imposed a duty to respect a nation's right to pass freely, carry out commerce, and spread Christianity.³⁴ Although Victoria rejected the Doctrine of Title by Discovery, he argued that the indigenous inhabitants of the Americas were subject to the binding principles of the Law of Nations upon contact and were subject to punishment for transgressions committed against its universal principles.³⁵

C. English Application of the Doctrine of Discovery in North America

While the Spanish Crown's policy in the Americas revolved around enforcing the hierarchical aims of the Catholic Church, Queen Elizabeth established the English Protestant Church in 1570 and charted her own course in the New World.³⁶ A substantial difference between the policies of Spain and England during the

25. *Id.*

26. *See id.*

27. Williams, *supra* note 10, at 70-85.

28. WILLIAMS, *supra* note 18, at 97.

29. *Id.* at 98.

30. *Id.* at 99.

31. *Id.* at 99.

32. *Id.* at 97.

33. *See id.* at 104-05.

34. *Id.* at 102.

35. *Id.* at 107.

36. *See id.* at 157-160.

colonial era was Queen Elizabeth's belief that reason was not the basis for rights and that property title derived from physical occupation of land.³⁷

In 1608, Lord Coke presided over *Calvin's Case* and wrote a legal opinion that laid out the rights possessed by non-English subjects under the dominion of the Crown.³⁸ Coke distinguished between the rights of "aliens in league" with England, such as France, Spain, and Germany, and infidel kingdoms, such as those discovered in the Americas.³⁹ Coke's opinion argued that aliens in league could own property and maintain actions to defend themselves, while infidels were perpetual enemies whose non-Christian ideals were a source of hostility that justified the use of force by the Crown.⁴⁰ Coke also wrote that the non-conformity of the infidels' laws with Christianity rendered them abrogated upon contact and thus, immediately subject to replacement with the supreme dominion of the Crown.⁴¹

Monarchs, explorers, and colonists used natural law foundations of the Law of Nations to justify the imposition of a European-based hierarchy over indigenous peoples.⁴² In their minds, application of the Law of Nations, which came to be known as the Doctrine of Discovery in the United States, legitimized the subversion of indigenous rights in the name of a "mythic vision quest of a higher law commanding and uniting all men."⁴³ Implicit in the application of these "universally" recognized principles was the assumed inferiority of the indigenous inhabitants of what is now called North America. Such assumptions heavily influenced Western concepts of property ownership and are engrained in American jurisprudence.

D. The Marshall Trilogy

The "Marshall Trilogy" includes three Supreme Court decisions penned by Chief Justice John Marshall between 1823 and 1832.⁴⁴ These three opinions galvanized the influence of the Doctrine of Discovery on American jurisprudence and resulted in several landmark principles that are the foundational elements of federal Indian law. The Marshall Trilogy developed three major common law doctrines: (i) Indian tribes are subject to the sovereign will of the United States, which, as the sovereign that displaced the previously dominant European nations, possesses plenary power over indigenous affairs (an evolution of the Doctrine of Discovery); (ii) Indian tribes are recognized under the United States Constitution as distinct sovereigns whose inherent authority to self-govern predates, and is independent of, the jurisdiction vested in the states; and (iii) the United States has

37. *Id.* at 158.

38. Williams, *supra* note 9, at 239-40.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 250-51.

43. *Id.* at 251.

44. The trilogy includes *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832).

assumed the role of a trustee and must protect federally recognized Indian tribes to whom the United States owes a special trust responsibility.⁴⁵

1. Johnson v. M'Intosh

Johnson was the first of the Marshall Trilogy opinions. Although *Johnson* addressed the issue of tribal property rights, it was one of the Supreme Court's first efforts to mask the inherently discriminatory policies of the United States' property system through the use of the Doctrine of Discovery and the portrayal of a benevolent and Christian federal government.⁴⁶

The issue in *Johnson* was whether Indian tribes possessed the power to alienate land to private individuals. Thomas Johnson purportedly acquired the land in question from the Piankeshaw Indians of Illinois through separate purchases in 1773 and 1775.⁴⁷ Subsequently, in 1818 William M'Intosh received a patent from the federal government for lands in Illinois that included Johnson's two tracts.⁴⁸ In holding that the sales made by the Piankeshaw to Johnson were ineffective to transfer a fee title, Marshall engaged in a discussion of the rights of Native Americans that inserted the discriminatory Law of Nations into American jurisprudence as the Doctrine of Discovery.⁴⁹

Marshall's opinion validated the inability of the Piankeshaw to transfer legitimate title to property through an explanation of the rights that natives retained after contact with Europeans.⁵⁰ Marshall wrote that all European nations acknowledged the principle that the discovery of lands inhabited by native people gave title to the discovering nation.⁵¹ The rights of the indigenous inhabitants were "in no instance, entirely disregarded; but were necessarily to a considerable extent, impaired."⁵² Marshall's opinion restated the conception that indigenous rights were espoused by colonial European powers and the Doctrine of Discovery's foundational principle that the discovery of land by a Christian sovereign necessarily impaired indigenous rights to complete sovereignty and to sell or dispose of land.⁵³ According to Marshall, the British Crown's "discovery" of North America and founding of the colonies vested the sovereign with ultimate dominion and title to all lands within colonial boundaries, with recognition of only a tribal right to occupancy, which was subject to extinguishment by the Crown.⁵⁴ The American Revolution and the establishment of the United States automatically transferred ultimate title to all lands

45. See generally *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832).

46. See DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 13 (1997).

47. *Johnson*, 21 U.S. at 553-54.

48. *Id.* at 560.

49. *Id.* at 567-68.

50. *Id.* at 568 ("Such, then, being the nature of the Indian title to lands, the extent of their right of alienation must depend upon the laws of the dominion under which they live.").

51. *Id.* at 567.

52. *Id.* at 574.

53. *Id.* at 574.

54. *Id.* at 587.

previously held by the Crown to the new federal government.⁵⁵ Marshall did not question the Law of Nations or the Doctrine of Discovery, noting that “if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”⁵⁶

After using the Doctrine of Discovery to justify the denial of full property rights to land occupied by Indian tribes in *Johnson*, Marshall resurrected the same themes in the rest of the Marshall Trilogy to declare the United States as the benevolent protector of indigenous people against intrusive state governments.

2. *Cherokee Nation v. Georgia*

Cherokee Nation v. Georgia involved a prayer for relief by the Cherokee Nation from state laws allegedly designed to “annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.”⁵⁷ Writing for the majority, Chief Justice Marshall held that the Supreme Court had no jurisdiction over the Cherokee Nation’s action.⁵⁸ Marshall interpreted the Commerce Clause⁵⁹ to mean that Indian tribes were not foreign nations or states within the meaning of the Constitution.⁶⁰ He explained that tribes were domestic dependent nations, rather than foreign nations, whose relationship to the United States “resemble[d] that of a ward to his guardian.”⁶¹

The Doctrine of Discovery was the legal foundation upon which Marshall rested his holding that tribes are domestic dependent nations and not foreign states.⁶² According to Marshall, the placement of Indian tribes within the jurisdictional boundaries and under the protection of the United States was an *ipso facto* function of the Doctrine of Discovery.

3. *Worcester v. Georgia*

In *Worcester v. Georgia*, the Supreme Court vacated Samuel Worcester’s conviction for violation of a state law that criminalized the act of “residing within the limits of the Cherokee nation without a license.”⁶³ Worcester, a citizen of Vermont, was a missionary who preached and translated scripture into the Cherokee

55. *Id.* at 584.

56. *Id.* at 591.

57. *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).

58. *Id.* at 20.

59. U.S. CONST. art. I, § 8, cl. 3 (“To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”).

60. *Cherokee Nation*, 30 U.S. at 15.

61. *Id.* at 10.

62. *Id.* at 13.

63. *Worcester v. Georgia*, 31 U.S. 515, 537 (1832).

language.⁶⁴ He argued that the Georgia law violated the Constitution and treaties between the United States and the Cherokee Nation.⁶⁵

To determine the constitutionality of the Georgia law, Chief Justice Marshall recited the Doctrine of Discovery with a focus on the jurisdictional primacy of the dominant “discovering” sovereign, as opposed to its chartered instrumentalities or political subdivisions.⁶⁶ Embedded within this power dynamic, Marshall wrote, was the principle that “the strong hand” of the national government served as a beneficial protector of the indigenous inhabitants “from intrusions into their country, from encroachments on their lands, and from those acts of violence.”⁶⁷ In this vein, treaties between the Cherokee Nation and the United States recognized the Cherokee right of self-government, albeit under the protection of the United States.⁶⁸ Marshall went on to summarize the body of federal law regarding the rights of sovereign Tribal nations as one that considered the rights and resources of sovereign Tribal nations to be “completely separated from that of states,” with all intercourse to “be carried on exclusively by the government of the union.”⁶⁹ He further wrote that the Constitution contemplated Tribal nations as “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial,” now subject to the protection of the United States.⁷⁰ Based on these principles, Marshall concluded that the Georgia law was void and in violation of federal law.⁷¹

The President in 1832, Andrew Jackson, is reported to have infamously said in response to *Worcester* that, “John Marshall has made his decision; now let him enforce it.”⁷² The removal of the Cherokee Nation along the Trail of Tears followed shortly thereafter.⁷³ In the northeastern United States, the Commonwealth of Massachusetts and then the State of Maine took their own unconstitutional approach to dealings with the Wabanaki Nations.

II. EARLY AMERICAN-WABANAKI DEALINGS

This Section provides background information on the Wabanaki Nations, their contributions to the American Revolution, and how the Commonwealth of Massachusetts and then the State of Maine treated them in the period leading up to the 1970s.

64. *Id.* at 538.

65. *Id.* at 521.

66. *Id.* at 552.

67. *Id.*

68. *Id.* at 556.

69. *Id.* at 557.

70. *Id.* at 559-61.

71. *Id.* at 562.

72. ROBERT T. ANDERSON, ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 73 (4th ed. 2008).

73. *Id.* at 72-74.

A. Background on the Wabanaki: the Original American Allies

The Wabanaki Confederacy historically consisted of five separate Tribal nations, located in what is now the Canadian Maritimes, Quebec, and New England. The Wabanaki have inhabited their ancestral territory since the glaciers began to recede and still share many linguistic and cultural similarities today.

The Wabanaki historically managed affairs among their own nations and between other confederacies, such as the Haudenosaunee Confederacy, pursuant to ancient understandings of interconnectedness and symbiosis among all living and natural beings. Traditional Wabanaki law instructs how the people are to coexist within a familial structure rooted in the natural world.⁷⁴ Among the Wabanaki Confederacy's principal nations, the Penobscot and the Passamaquoddy are the elder brothers and the Mi'kmaq and Maliseet are the younger brothers, with all other elements of the natural world (e.g., animals, plants, birds, fish) connected through similar understandings of kinship.⁷⁵ In the Passamaquoddy-Maliseet language, the word to describe a treaty is *lakatuwakon*, which means "kinship." In contrast, the English word "treaty" derives from the Latin word *tracatus*, which means handling, bargaining, or managing something.⁷⁶ The juxtaposition of the origins of these words lays bare the stark contrast between Wabanaki and European values.

The Wabanaki model of stewardship resulted in an extraordinarily healthy ecosystem that was highly attractive to explorers originating from Europe. Over the millennia, the Wabanaki sustained themselves upon a vast fresh water and marine environment that allowed all manners of plant, animal, and marine life to flourish. The identity and the name of the people came to reflect the places that they lived and the things that they did.⁷⁷ Europeans took note of the abundant populations of fish and the seemingly endless troves of virgin timber, and a geopolitical battle for control of the Dawnland commenced.⁷⁸ In particular, the French, the British, and then the Americans vied for positive diplomatic, military, and trade relationships with the Wabanaki Nations, whose military might was feared in Quebec, the Maritimes, and much of rural New England.⁷⁹

B. The Treaty of Watertown and the American Revolution

Before, during, and even after the Revolutionary War, British and American efforts to garner and maintain support from the Wabanaki persisted as the parties

74. KAYANESENH (PAUL WILLIAMS), *PESKOTOMUHKATIQ: THE JOURNEY CONTINUES 6-7* (Kanatio (Allen Gabriel) ed., 2016).

75. *Id.*

76. *Id.* at 6.

77. For example, the Passamaquoddy call themselves *Peskotomuhkati* which means the people who spear pollock, a fish that only lives in saltwater.

78. In the Passamaquoddy-Maliseet language, the Wabanaki people refer to themselves as the "people of the dawnland." See "Waponahkew," *PASSAMAQUODDY-MALISEET LANGUAGE PORTAL*, <https://pportal.org/dictionary/waponahkew> [<https://perma.cc/7BQD-PTAJ>] (last visited May 13, 2022).

79. See generally *The Catholic Indians and the American Revolution*, 4 AM. CATHOLIC HIST. RSCHS. 193, 193 (July 1908) (stating that the Micmacs, the Maliseet, the Passamaquoddy, and the Penobscot, commonly called the "Eastern Indians," "were an important factor in the events of the Revolutionary War" and "could have 'destroyed or driven away every inhabitant east of the Penobscot'"); see also *Passamaquoddy Indian Papers*, *supra* note 5.

executed multiple Peace and Friendship treaties on both sides of what became the border.⁸⁰ The British dispatched agents to doggedly pursue friendly relations with Wabanaki leaders,⁸¹ while the American colonial governments and then the Continental Congress, including General George Washington, consistently and actively sought support from Wabanaki interests.⁸² The Continental Congress took action to direct and fund the activities of John Allan, a diplomat among the Wabanaki and an army colonel, to establish positive trade and political relations with the Tribe.⁸³ Washington himself wrote letters to the Passamaquoddy and Maliseet Chiefs on Christmas Eve of 1776, the day before he led American forces in his iconic crossing of the Delaware River.⁸⁴

Ultimately, the Americans made the biggest international splash when, within weeks, they signed both the Declaration of Independence and the fledgling country's first Peace and Friendship treaty with foreign states—in this case, the Wabanaki Nations. Thus, the Wabanaki were the first nations to recognize the sovereignty of the United States. The primary objective of the negotiations, held in Watertown, Massachusetts, was for the Americans to secure military support through the immediate provision of Wabanaki warriors to General Washington's ranks and through the recruitment of additional fighters.⁸⁵ George Washington personally wrote to Wabanaki leaders to urge their presence at the treaty conference.⁸⁶

The Treaty of Watertown embodied parties' sovereign commitments of mutual defense, political alliance, and friendship.⁸⁷ In exchange for regional military and diplomatic clout, the United States offered to protect and aid the Wabanaki against

80. See Wicken, *Fact sheet on Peace and Friendship Treaties in the Maritimes and Gaspé*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1100100028599/1539609517566> [<https://perma.cc/AVP7-QZDN>] (last visited May 13, 2021) (discussing various treaties among the Wabanaki and the British Crown between 1760 and 1780); *The Catholic Indians and the American Revolution*, *supra* note 79, at 194-202; *see, e.g.*, Treaty of Watertown, *supra* note 1.

81. See Letter from Col. John Allan, Continental Army, to Major General William Heather, Continental Army (May 18, 1779), in FREDERIC KIDDER & GEORGE HAYWARD ALLEN, *MILITARY OPERATIONS IN EASTERN MAINE AND NOVA SCOTIA DURING THE REVOLUTION* 259-60 (Frederic Kidder eds., 1867); Richard I. Hunt Jr., *British-American Rivalry for the Support of the Indians of Maine and Nova Scotia, 1775-1783*, U. ME. ELEC. THESES & DISSERTATIONS, Jan. 1973, at 1, 61 [hereinafter Treaty of Watertown Minutes] (describing gifts given by the British to Maliseet Chiefs).

82. *The Catholic Indians and the American Revolution*, *supra* note 79, at 193-202, 206 (summarizing communications between Wabanaki and Continental leaders during the early part of the American Revolution); Letter from GW to St. Johns Tribe, *supra* note 4; Letter from GW to Passamaquoddy Tribe, *supra* note 4; *see also* *Speeches of the Caughnawaga, St. Johns, and Passamaquoddy Indians, 31 January 1776*, FOUNDERS ONLINE NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-03-02-0161> [<https://perma.cc/575X-669H>] (last visited May 13, 2022) (summarizing a January 31, 1776 meeting with General George Washington, the Passamaquoddy, and the Maliseet).

83. *The Catholic Indians and the American Revolution*, *supra* note 79, at 212-13 (instructions of the Continental Congress to Colonel John Allan, Agent of the Catholic Indians of St. Johns River and Nova Scotia).

84. Letter from GW to St. Johns Tribe, *supra* note 4; Letter from GW to Passamaquoddy Tribe, *supra* note 4.

85. See generally Treaty of Watertown Minutes, *supra* note 81, at 8-10.

86. *Id.* at 2-3 (detailing correspondence presented in the conference from February and October 1775 between Ambrose Bear (St. Aubin), a Maliseet Chief, and General George Washington, in which General Washington requested the presence of the Wabanaki at a treaty conference the following spring).

87. Treaty of Watertown, *supra* note 1, at art. 1-2.

not only the British, but also the “[s]ubjects of . . . Massachusetts Bay, or of any other of the United States of America.”⁸⁸ The ensuing alliance proved geopolitically significant and established the northern border of the United States by bisecting Wabanaki territory held by the Micmac, Maliseet, and Passamaquoddy.⁸⁹

The temporal proximity between the execution of the Declaration of Independence and the Treaty of Watertown was significant. The parties completed execution of the Treaty of Watertown on July 19, 1776 after days of negotiations, meaning the treaty parties were traveling to or already convened in Watertown when the execution of the Declaration occurred in Philadelphia.⁹⁰ In fact, on July 16, 1776, James Bowdoin, president of the Council of the Massachusetts Bay Colony, which negotiated the treaty for the Americans, shared news of the Declaration’s signing with individuals gathered at the Wabanaki treaty negotiations.⁹¹ Wabanaki reticence over the subject of American independence and the new country’s sovereign right to enter into diplomatic relations is apparent from the treaty notes⁹² and the text of the treaty itself.⁹³ In response to a reading of the Declaration and an explicit affirmation by the Americans of their newfound sovereign power to conduct diplomacy and wage war, Maliseet Chief Ambrose Bear responded, “[w]e like it well.”⁹⁴ Wabanaki interpreters then translated and read the text of the treaty before it was executed.⁹⁵

The Wabanaki instantaneously contributed military and diplomatic resources to the Americans’ revolutionary cause. Wabanaki negotiators for the Treaty of Watertown pledged hundreds of warriors for immediate service during the negotiations and agreed to engage in a recruitment effort among the Penobscot and Passamaquoddy in particular.⁹⁶ In subsequent written correspondence to the Wabanaki, General Washington reiterated his desires for peace and friendship with them and renewed his hope that more Wabanaki warriors would bolster the ranks of the Continental Army.⁹⁷ Wabanaki warriors ultimately served in the American Revolution in various ways in fulfillment of their treaty obligations.⁹⁸

88. *Id.* at art. 3.

89. Passamaquoddy Indian Papers, *supra* note 5.

90. *See generally id.*

91. Treaty of Watertown Minutes, *supra* note 81, at 10-11.

92. *See id.* (describing a reading of the Declaration and a discussion of the same, as well as Maliseet Chief Ambrose Bear’s responsive statement: “[w]e like it well.”).

93. *See* Treaty of Watertown, *supra* note 1 (“United States of America in General Congress Assembled have in the name, and by the Authority of the Good people of these Colonies Solemnly publish and declare, that these United Colonies are, and of Right ought to be free and Independent States; that they are absolved from all Allegiances to the British Crown; and that all political connection between them and the State of Great Britain is and ought to be dissolved; and that as Free and Independent States they have power to Levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and things which Independent States may of Right do.”).

94. Treaty of Watertown Minutes, *supra* note 81, at 11.

95. *Id.*

96. *Id.* at 9; *see also* Treaty of Watertown, *supra* note 1, at art. 8.

97. Letter from GW to St. Johns Tribe, *supra* note 4; Letter from GW to Passamaquoddy Tribe, *supra* note 4.

98. *See* Passamaquoddy Indian Papers, *supra* note 5 (summarizing Passamaquoddy and Maliseet efforts in the war); Notes of Col. John Allan (Nov. 13, 1778), in FREDERIC KIDDER & GEORGE HAYWARD ALLEN, MILITARY OPERATIONS IN EASTERN MAINE AND NOVA SCOTIA DURING THE REVOLUTION 257 (Frederic Kidder ed., 1867) (describing military expeditions involving Penobscot citizens); 159 Cong.

C. Recognition of Wabanaki-American Relations in the New Country

Early dealings between the Wabanaki and the recently victorious United States did not go as planned for the Wabanaki.⁹⁹ In the years just before and after the end of the Revolutionary War, the Wabanaki communicated with the Continental Congress through Colonel John Allan, who Congress appointed as Agent for Indian Affairs in the Eastern Department of the United States in the late 1770s.¹⁰⁰ In 1780, the Commonwealth of Massachusetts began purchasing supplies for Allan to provide to the Wabanaki, with “said sum to be charged to the United States.”¹⁰¹ The Commonwealth made such commitments of resources “in full confidence that Congress would be answerable for the same” because Congress had a practice of dealing with the Wabanaki since the country’s inception.¹⁰² Thus, the Wabanaki, Massachusetts, and Congress operated under the clear assumption that the tribes were under federal jurisdiction, albeit with direct support from Massachusetts.

In 1784, congressionally-appointed Indian Agent Colonel John Allan wrote to Maliseet and Passamaquoddy leaders regarding a border dispute over the line of demarcation between the United States and what was then Nova Scotia. In his letter, Allan noted the United States’ intention to ascertain proper boundaries that did not claim any native lands.¹⁰³ He assured the tribes that they could pursue their “suits on the several streams as usual,” without fear of harassment.¹⁰⁴ However, by the early 1790s, many feared that another war with Great Britain was inevitable, as the British had reportedly refused to relinquish certain military posts and were supplying Tribal nations in the western United States with weapons.¹⁰⁵ In the eastern United States, the Americans had declined to ratify wartime agreements with the Wabanaki nations regarding lands and military alliances. According to a 1793 report by

Rec. S4581 (daily ed. June 18, 2013) (statement of Senator Susan Collins regarding the historic significance of Passamaquoddy military contributions made during the Battle of Machias in 1775); COLIN G. CALLOWAY, *THE AMERICAN REVOLUTION IN INDIAN COUNTRY: CRISIS AND DIVERSITY IN NATIVE AMERICAN COMMUNITIES* 36 (1995) (noting Penobscot contributions to the United States’ Penobscot Bay Expedition, which occurred in the summer of 1779).

99. See Passamaquoddy Indian Papers, *supra* note 5.

100. See Letter from John Allan, Agent for Indian Affairs, U.S. Eastern Dept., to the Chiefs of the Meresheete and Passamaquoddy Tribes (Feb. 23, 1784), in *FREDERIC KIDDER & GEORGE HAYWARD ALLEN, MILITARY OPERATIONS IN EASTERN MAINE AND NOVA SCOTIA DURING THE REVOLUTION* 297-98 (Frederic Kidder ed., 1867); DONALD SOCTOMAH, *SAVE THE LAND FOR THE CHILDREN 1800-1850: PASSAMAQUODDY TRIBAL LIFE AND TIMES IN MAINE AND NEW BRUNSWICK* 1 (2009).

101. SOCTOMAH, *supra* note 100, at 1 (internal quotations omitted) (quoting Laws and Resolves of Massachusetts, 1781, Chapter 83, Page 177).

102. *Id.* (quoting Laws and Resolves of Massachusetts, 1781, page 807) (internal quotations omitted); *see also id.* at 2 (citations omitted) (stating that “[t]he President inform the Governor of Massachusetts that Congress, sensible of the importance of supporting the Eastern Indian Department under the superintendence of Col. John Allen [sic], approve of the care of the Executive of Massachusetts in making from time to time necessary provision of the same, and they are requested to continue such supplies and charge the same to the United States”).

103. Letter from John Allan, Agent for Indian Affairs, U.S. Eastern Dept., to the Chiefs of the Meresheete and Pasamaquoddy Tribes (Feb. 23, 1784), *supra* note 100.

104. *Id.* at 298.

105. See Col. Allan’s Report on the Indians of Maine and New Brunswick, in 1793, in *FREDERIC KIDDER & GEORGE HAYWARD ALLEN, MILITARY OPERATIONS IN EASTERN MAINE AND NOVA SCOTIA DURING THE REVOLUTION* 304 (Frederic Kidder ed., 1867).

Colonel Allan, the British used the opening to court the tribes, who threatened to pull out of their military and diplomatic alliances with the Americans if tribal lands were not protected.¹⁰⁶

In response, the Americans started to fulfill certain long overdue promises to the Wabanaki. Most significantly, the Massachusetts, Passamaquoddy, and Penobscot executed treaties to protect aboriginal title to the tribes' most important remaining land holdings, resolve simmering tensions between settlers and Wabanaki, and reserve certain other rights.¹⁰⁷ In particular, the Passamaquoddy Treaty of 1794 reserved explicitly defined land areas, including (i) numerous islands, (ii) the "privilege" to fish on both branches of the St. Croix River "without hindrance or molestation," and (iii) the "privilege" to utilize multiple carrying places for the purpose of accessing traditional fishing grounds in fresh and saltwater.¹⁰⁸ According to 1793 correspondence between Wabanaki Chiefs and Massachusetts, the reservation of lands on both fresh and saltwater in and around the St. Croix River watershed and access to fishing in the sea constituted "promises made in War."¹⁰⁹

In 1796, after execution of the Passamaquoddy Treaty of 1794, the border dispute between the United States and Nova Scotia complained about by the Passamaquoddy and Maliseet was finally resolved. The Passamaquoddy Tribe previously informed the Americans that it did not wish for its treaty-reserved lands and fishing areas to be bisected by the border. The Tribe even supplied Passamaquoddy guides to help navigate the area necessary to settle the international dispute.¹¹⁰ Despite Chief Neptune's attempts to persuade the boundary commission to adopt a border that would leave all Passamaquoddy hunting and fishing grounds in the United States, the Commission rebuffed him and settled on a line that

106. *Id.* at 315-16.

107. See Treaty Between the Passamaquoddy Tribe and the Commonwealth of Massachusetts, Sept. 29, 1794, *supra* note 6; Treaty Between the Penobscot and Massachusetts, Aug. 8, 1796, *in* Petition for a Writ of Certiorari, Penobscot Nation v. Frey, Nos. 16-1424, 16-1435, 16-1474, 16-1482, at 319a (*petition for cert. filed* Dec. 7, 2021).

108. Treaty between the Passamaquoddy Tribe and the Commonwealth of Massachusetts, Sept. 29, 1794, *supra* note 6. The treaty reserves "all those islands lying and being in Schoodic River, between the falls at the head of the tide, and the falls below the forks of said river where the north branch and west branch parts; being fifteen in number, containing one hundred acres more or less[;]" Indian Township "containing about twenty-three thousand acres more or less;" "Lire's Island lying in front of said township, containing ten acres more or less; together with one hundred acres of land lying on Nemcass Point adjoining the west side of said township;" "Pine Island lying to the westward of said Nemcass Point, containing one hundred and fifty acres, more or less;" an assignment "to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation and the privilege of passing the said river over the different carrying places thereon;" an assignment "and set off to said Indians ten acres of land more or less at Pleasant Point[;]" and "also a privilege of setting down at the carrying place at West Quoddy between the Bay of West Quoddy and the bay of Fundy, to contain fifty acres." *Id.*

109. Maliseet, Passamaquoddy, and Mi'kmaq Petition to the Commonwealth of Massachusetts (Mar. 27, 1793) (on file with authors); see Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 373 (1st Cir. 1975) (stating that the Passamaquoddy Tribe "pledged its support to the American Colonies during the Revolutionary War in exchange for promises by John Allan, Indian agent for the Continental Congress, that the Tribe would be given ammunition for hunting, protection for their game and hunting grounds, regulation of trade to prevent imposition, the exclusive right to hunt beaver, the free exercise of religion, and a clergyman").

110. See Passamaquoddy Indian Papers, *supra* note 5; John Allan's Report on the Negotiation with the Passamaquoddy Tribe and the 1794 Treaty (Nov. 28, 1794) (on file with authors).

effectively divided Passamaquoddy territory between the United States and Canada. Wabanaki efforts to protect reserved lands and resources reappeared when Maine vied for statehood in 1820.

D. Maine Statehood

Maine became a state in 1820 as part of a national bargain intended to stave off a civil war over slavery.¹¹¹ This grand bargain, the Missouri Compromise, occurred in 1820 because the United States was breaking under the weight of slavery and there were two states, with diametrically opposed views on slavery, who wished to be admitted to the Union.¹¹² Mainers made various attempts to achieve statehood prior to 1820, but they all failed until the fragility of the American democracy was so obvious that a deal became necessary to preserve the balance of voting power in Congress between slave states and free states.¹¹³

The Act of Congress that specifically authorized Maine's separation from Massachusetts noted Massachusetts's consent to the separation and Maine's adoption of a constitution.¹¹⁴ The original version of Maine's Constitution required the state to "assume and perform all the duties and obligations" of Massachusetts under the treaties entered into with the Wabanaki, including the Passamaquoddy and Penobscot nations.¹¹⁵ According to the First Circuit, "[t]he Maine Constitution, with the above quoted provision relating to the Indians, was read in the [United States] Senate, referred to committee, and finally declared by Congress to be established."¹¹⁶ Massachusetts paid Maine \$30,000 as consideration for fulfillment of the treaty obligations,¹¹⁷ and the Maine Legislature ordered the Secretary of State to maintain Penobscot and Passamaquoddy treaties "on file in the Secretary's office . . . as evidence of their title to their lands, and their claims against the State."¹¹⁸ The tribes undoubtedly felt that the explicit reference to their treaties in the Maine Constitution

111. See Robert E. Hall, *Maine's Admission to the Union (1920)*, in *SPRAGUE'S JOURNAL OF MAINE HISTORY* 8-14 (John Francis Sprague ed., 1920).

112. *Id.*

113. See generally Hall, *supra* note 111, at 8-14; An Act of Separation, 3 Stat. 544 (1820) (ratifying an act of Massachusetts that sought to legally separate Maine from Massachusetts); The Missouri Compromise, 3 Stat. 545 (1820) (repealed 1954); *Missouri Compromise: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/missouri-compromise> [<https://perma.cc/Y2FM-MVN4>] (last visited May 13, 2022).

114. An Act for the Admission of the State of Maine into the Union, ch. 19, 3 Stat. 544, 544 (1820).

115. Me. Const. art. X, § 5. Section 5 is effective but is omitted from printing. Me. Const. art. X, § 7; see also Me. Const. art. X, § 5 ("The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arises from treaties, or otherwise; and for this purpose shall obtain the assent of said Indians, and their release to this Commonwealth of claims and stipulations arising under the treaty at present existing between the said Commonwealth and said Indians.").

116. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 374 (1st Cir. 1975).

117. See GOVERNOR'S MESSAGE, Resolves, 4th Leg., Jan. Sess. 293, 301 (Me. 1824).

118. SOCTOMAH, *supra* note 100, at 122.

would protect their hunting and fishing rights.¹¹⁹ Nonetheless, Maine showed a total lack of regard for the rights of the Wabanaki until fallout from 1970s federal court decisions forced the state's begrudging acknowledgment of the tribes' inherent sovereignty.

Historical records reflect that Wabanaki lands and resources, in particular, were subject to active exploitation by Maine almost as soon as the state entered the Union.¹²⁰ Further, Maine's legislative record includes numerous examples of how the state alienated treaty-reserved natural resources, including lands and timber, without tribal consent¹²¹ and in direct contravention of both the state constitution and federal law, which both prohibited the alienation of tribal lands without proper consent.¹²² According to the First Circuit's tally in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, between 1820 and 1975, the state enacted approximately 350 laws to regulate all facets of Passamaquoddy life, including agriculture, housing, basic necessities such as blankets and wood, educational services, health care, housing, infrastructure such as roads and water, and legal representation.¹²³ Upset with the violation of their treaty rights, which the Passamaquoddy felt that they had earned during the American Revolution, Passamaquoddy representatives specifically challenged their treatment by Maine in the courts of public opinion and of law but to no avail.¹²⁴ Instead, Maine's highest court charted a bizarre deviation from the recently decided Marshall Trilogy to fashion a unique blend of paternalism and racism intended to justify Maine's subjugation and oppression of the Wabanaki.

E. Flouting Federal Law and the Maine Constitution

From 1820-1975, Maine courts used inflammatory language while repeatedly ignoring principles of federal Indian law to justify holdings that blatantly violated the rights of the Wabanaki. The first of these cases was *Murch v. Tomer*,¹²⁵ which

119. See John Francis Sprague, *Indian Treaties of Maine*, in SPRAGUE'S JOURNAL OF MAINE HISTORY 183, 188 (1920) (also quoted in compilations of Passamaquoddy history created by the Passamaquoddy Tribal Historian).

120. See, e.g., *id.* at 36-49 (providing a timeline from January 1821 to January 1825 which, among other things, lists state actions that violated tribal property rights); Francis J. O'Toole & Thomas N. Tureen, *State Power and the Passamaquoddy Tribe: "A Gross National Hypocrisy?"*, 23 ME. L. REV. 1, 10-11 (1971) (listing Maine laws passed without Passamaquoddy consent which authorized the leasing of tribal lands for 999 years, authorized the sale of timber and hay from tribal lands, and "granted road, rail and utility rights-of-way" through tribal lands).

121. See Francis J. O'Toole & Thomas N. Tureen, *State Power and the Passamaquoddy Tribe: "A Gross National Hypocrisy?"*, 23 ME. L. REV. 1, 10-11 (1971).

122. Me. Const. art. X, § 5; An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177).

123. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d at 374 (1st Cir. 1975).

124. See SOCTOMAH, *supra* note 100, at 36 (transcribing the petition of Passamaquoddy citizen Captain Deacon Sockabasin, which complained about the negative impact of the destruction of fish, game, and timber stock on the Passamaquoddy people's ability to sustain themselves); Louis Mitchell, Representative of the Passamaquoddy Tribe, Speech to the Sixty-Third Maine Legislature 1-8 (Mar. 9, 1887) (transcript available at Wabanaki.com).

125. *Murch v. Tomer*, 212 Me. 535, 535 (1842) (involving the question of whether a Penobscot citizen could be sued in Maine courts).

was decided just ten years after *Worcester v. Georgia* rejected Georgia's attempt to regulate affairs within Cherokee territory.¹²⁶ In *Murch*, the Supreme Judicial Court of Maine, sitting as the Law Court, wrote "[i]mbecility on their part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least of abstract principles of the rights of man."¹²⁷ The Law Court's disregard for the humanity of native people in *Murch* was just a preview of how the court would interpret native property rights.

In *Penobscot Tribe of Indians v. Veazie*,¹²⁸ decided in 1870, Maine's highest court struck down a Penobscot effort to recover possession of islands in the Penobscot River. The Penobscot claimed to have reserved the islands in question through a 1796 treaty with Massachusetts and challenged possession of the islands by the heirs of Veazie, who claimed to have received the land from a private citizen in 1837.¹²⁹ The court rejected the Penobscot's claim through a misapplication of the Doctrine of Discovery and the holding of *Johnson v. M'Intosh* in a manner that presaged the very land claims that would later roil Maine in the 20th Century:

[A] title derived from the government is superior to one derived from the aborigines; and that if it should now be held otherwise, and it should also be held that the statute of limitations is no bar to a recovery under an Indian title, a door would be opened to endless litigation, and thousands of titles, now considered perfectly secure, would be instantly destroyed.¹³⁰

And, just like that, Maine's highest court disregarded the treaties engrained in its own constitution. The court clearly understood the Doctrine of Discovery insofar as it applied to the primacy of a colonial government's title vis-à-vis a "discovered" tribe, but the court failed to appreciate the distinction between a nation-state and a political subdivision thereof.

Just a few years later, in 1875, Maine took an even more unusual step with respect to the Passamaquoddy and Penobscot treaties that it was constitutionally obligated to uphold. As though the *Veazie* case and the related *Granger* case¹³¹ forever erased all Wabanaki rights in Maine, the Maine Constitution was amended to omit from printing, but not to remove, Article X, Section 5, which addresses the Wabanaki treaty obligations. Significantly, as the Maine Constitution currently provides, "this [omission from printing] shall not impair the validity of acts under those sections; and said section 5 [concerning treaties] shall remain in full force, as part of the Constitution."¹³² Although no one knows exactly why the treaty provision remains an unprinted part of the Maine Constitution,¹³³ its omission paved the way

126. *Worcester v. Georgia*, 31 U.S. 515 (1832).

127. *Murch*, 212 Me. at 538.

128. *Penobscot Tribe of Indians v. Veazie*, 58 Me. 402, 408 (1870).

129. *Id.* at 406-08.

130. *Id.* at 406-07.

131. *Granger v. Avery*, 64 Me. 292, 296 (1874) (holding that the Passamaquoddy had no claim to islands reserved to the tribe in its 1794 treaty because the Commonwealth of Massachusetts separately deeded the islands to a private citizen).

132. Me. Const. art. X, § 7.

133. See Colin Woodard, *The Passamaquoddy's Land Claim Case Takes Shape*, PORTLAND PRESS HERALD (July 5, 2014), <https://www.pressherald.com/2014/07/05/the-passamaquoddys-land-claim-case-takes-shape/> [https://perma.cc/6CL3-8636].

for more state actions that utterly disregarded the treaty-reserved rights of the Passamaquoddy.

In 1892, in *State v. Newell*, the Law Court upheld the conviction of Peter Newell, a member of the Passamaquoddy Tribe, for killing two deer in violation of state law.¹³⁴ Mr. Newell claimed his actions were lawful on account of the Tribe's expressly reserved hunting, fishing, and fowling rights in its treaties and argued that those treaties had been incorporated into the Maine Constitution.¹³⁵ Based upon this, Newell reasoned that the state legislature could not regulate his hunting and fishing rights.¹³⁶ The court, with full vigor, dismissed any privileges based on the treaties because the Passamaquoddy Tribe was *functus officio*:

One [sic] party to [the treaties], the Indians, have wholly lost their political organization and their political existence. There has been no continuity or succession of political life and power They cannot make war or peace; cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves They are as completely subject to the State as any other inhabitants can be.¹³⁷

The court, in effectively denying the existence of the Passamaquoddy Tribe, also turned a blind eye to the historic alliances of the Passamaquoddy and the United States by finding the Treaty of 1794 was “simply a grant by the commonwealth to the Passamaquoddy tribe of Indians of certain lands, and the privilege of fishing in the Schoodiac river, in consideration of their releasing all claims to other lands in the commonwealth.”¹³⁸ And the court determined that “[c]learly the defendant gains no right to hunt under that grant.”¹³⁹ The state likely viewed its victory in *Newell* as a triumphant precedent-setting decision that would forever obstruct the ability of the Wabanaki to wield sovereign rights in Maine.¹⁴⁰ The decision resulted in a number of major violations of Passamaquoddy property rights over the ensuing decades, including but not limited to: the flooding of the Passamaquoddy community at Indian Township to build a dam, the annexation of other lands at Indian Township and Pleasant Point to build Routes 1 and 190, and the conveyance of tribal treaty lands to powerful corporations and private citizens.¹⁴¹ However, such confidence would ultimately be misplaced as the decisions of Maine's highest court regarding tribal rights were incorrect as a matter of law, and the Passamaquoddy knew it.

III. THE SETTLEMENT ACT ERA

Maine successfully maintained its colonial domination over the Wabanaki until the 1960s and 1970s. In 1975, the U.S. Court of Appeals for the First Circuit ruled

134. *State v. Newell*, 84 Me. 465, 24 A. 943 (1892).

135. *Id.* at 466, 24 A. at 943.

136. *Id.*

137. *Id.* at 468, 24 A. at 944.

138. *Id.*

139. *Id.*

140. See Joint Tribal Council of the Passamaquoddy Tribe v. *Morton*, 528 F.2d 370, 380 (1st Cir. 1975) (rejecting Maine's argument that *State v. Newell* preempted the United States' ability to maintain a trust relationship with the Passamaquoddy Tribe).

141. See Woodard, *supra* note 153.

in a historic decision that the Passamaquoddy Tribe was an Indian tribe to whom the United States owed a special trust responsibility.¹⁴² In finding that the United States was obligated to protect Passamaquoddy interests pursuant to the Non-Intercourse Act, the First Circuit applied the Indian canon of construction, which instructs “that statutes or treaties relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians would naturally understand them, and never to the Indians’ prejudice.”¹⁴³ The court then interpreted the Non-Intercourse Act as applying to the Passamaquoddy even though the federal government did not formally recognize the Tribe.¹⁴⁴ The decision prompted the United States to establish federal relations with and bring land claims on behalf of the Passamaquoddy and Penobscot.¹⁴⁵

The First Circuit’s decision in *Joint Tribal Council of the Passamaquoddy Tribe* ushered in a new era in Maine in which all principles of federal Indian law, including common law doctrines, applied to the newly federally recognized Wabanaki Nations.

A. 1975-1979: Application of Federal Common Law to Indian Law Disputes in Maine

Maine’s anti-Indian animus continued in another First Circuit case, *Bottomly v. Passamaquoddy Tribe*, which was a private contract dispute case.¹⁴⁶ *Bottomly* involved the question of whether the Passamaquoddy Tribe possessed the power of sovereign immunity from lawsuit, which is an inherent attribute of sovereignty possessed by Tribal nations.¹⁴⁷ As *amicus curiae*, Maine attempted to argue, without any supporting legal authority and in contravention of federal Indian common law, that tribal sovereignty is not an inherent right, but rather is “dependent on a showing that it had been granted to the tribe by the federal government through explicit recognition or implicitly through a course of dealing.”¹⁴⁸ The state’s argument amounted to a claim that the Passamaquoddy were an “ethnic association” because they are “merely remnants or fragments” of a former independent tribe.¹⁴⁹ But Maine’s attack proceeded to incorporate racial stereotypes by claiming only those “fierce warring tribes of the frontier” enjoy sovereignty because the federal government had to treat them differently due to their warlike nature.¹⁵⁰ The First Circuit wholly rejected this argument finding that the “state seems to us to fundamentally misconceive basic principles of federal Indian law.”¹⁵¹ The First Circuit applied federal Indian common law principles which—contrary to Maine’s

142. *Joint Tribal Council of the Passamaquoddy Tribe*, 528 F.2d at 379.

143. *Id.* at 380 (citing *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975)).

144. *Id.* at 380-81. Maine intervened and pointed to *State v. Newell* for the proposition that the Passamaquoddy was not a tribe to whom the United States had any trust responsibility, but the court easily rejected that argument. *Id.*

145. See *United States v. Maine*, No. 1969-ND (D. Me.) (the Penobscot land claims case); *United States v. Maine*, No. 1966-ND (D. Me.) (the Passamaquoddy land claims case).

146. *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979).

147. *Id.* at 1061-62.

148. *Id.* at 1065.

149. *Id.* at 1062-64.

150. *Id.* at 1064.

151. *Id.* at 1065.

contention—do not permit state action or “[t]he mere passage of time with its erosion of the full exercise of the sovereign powers of a tribal organization” to constitute “an implicit divestiture” of inherent tribal sovereignty.¹⁵² Thus, the court held that the Passamaquoddy retained its inherent sovereign immunity from suit.

Influenced by the First Circuit’s decisions in *Joint Tribal Council of the Passamaquoddy Tribe* and *Bottomly*, Maine’s highest court exhibited acceptance of federal Indian common law for the first time in *State v. Dana*.¹⁵³ In *Dana*, the court addressed whether a significant federal Indian law statute, the Major Crimes Act, preempted the State of Maine’s exercise of criminal jurisdiction over tribal members alleged to have committed arson on treaty-reserved Passamaquoddy reservation lands.¹⁵⁴ The Law Court held that Indian country could exist in Maine and that the Passamaquoddy might actually be a “bona fide” tribe protected under federal law, “which was not fully recognized by the Superior Court when it failed to arrest the judgments of conviction now before us.”¹⁵⁵

As Congress recognized in its final committee reports on the land claims settlement in 1980, the U.S. Court of Appeals for the First Circuit established that “the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States”¹⁵⁶ and that they were “entitled to protection under federal Indian common law doctrines.”¹⁵⁷ These rulings increased pressure on simultaneously unfolding efforts to negotiate a settlement of Passamaquoddy, Penobscot, and Maliseet land claims because, by the late 1970s, the United States filed land claims cases against the State of Maine on behalf of the Passamaquoddy and Penobscot.¹⁵⁸

B. The Settlement Acts

Efforts to settle the land claims began in earnest in 1977 after President Jimmy Carter intervened. At that time, the legal claims of the Passamaquoddy, Penobscot, and Maliseet covered as much as two-thirds of the State of Maine.¹⁵⁹ The claims complicated the ability of private landowners to alienate land due to clouded title and obstructed the capacity of municipalities in the state to issue municipal bonds within the claimed area.¹⁶⁰ The combination of threats of violence against the tribes as part of a “land war,” economic uncertainty from the land claims, and the loss of the state’s legal control over tribal lands in Maine gave the state significant incentive to resolve the claims expeditiously.¹⁶¹ As a result, the overall settlement embodied two general

152. *Id.* at 1065-66.

153. *State v. Dana*, 404 A.2d 551 (Me. 1979).

154. *Id.* at 552.

155. *Id.* at 552.

156. S. REP. NO. 96-957, at 14 (1980); H.R. REP. NO. 96-1353, at 14 (1980).

157. S. REP. NO. 96-957, at 13 (1980).

158. See *United States v. Maine*, No. 1969-ND (D. Me.) (the Penobscot land claims case); *United States v. Maine*, No. 1966-ND (D. Me.) (the Passamaquoddy land claims case).

159. S. REP. NO. 96-957, at 11 (1980); H.R. REP. NO. 96-1353, at 11 (1980).

160. H.R. REP. NO. 96-1353, at 14 (1980); Joseph G.E. Gousse, *Waiting for Gluskabe: An Examination of Maine’s Colonist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 536, 546 (2014).

161. See Gousse, *supra* note 160, at 546-47 (characterizing public outcry against the proposed settlement).

goals: (i) forever end Maliseet, Passamaquoddy, and Penobscot land claims in Maine; and (ii) ensure that the state would have jurisdiction over all facets of Wabanaki affairs with few exceptions.

The land claims settlement exists in two complementary statutes (collectively referred to as the “Settlement Acts”). President Carter signed the MICSA into law in October 1980. MICSA ratified and rendered effective a state law enacted in the same year, referred to as the Maine Implementing Act (MIA), which generally memorialized a jurisdictional agreement between the State of Maine and the Maliseet, Passamaquoddy, and Penobscot with respect to their existing reservations and new land to be acquired with federal funds by the terms of MICSA. The Settlement Acts generally sought to: (i) extinguish the tribes’ title to the lands that were the subject of *United States v. Maine*, including all lands and natural resources ceded to Massachusetts and Maine without federal approval as required by the Indian Non-Intercourse Act (the “land claims”); (ii) appropriate federal dollars to induce the tribes to enter the settlement; (iii) approve the MIA, including its extension of state jurisdiction over the tribes; and (iv) delineate the contours of the tribes’ relationship with the United States.¹⁶² Public hearings regarding the settlement, which were held by state legislators in Maine prior to the enactment of the MIA, evinced strong tribal opposition to the deal, in part because of the impression among tribal members that the settlement would amount to a “‘destruction’ of the sovereign rights and jurisdiction” of the settling tribes.¹⁶³

The resulting legislative record for MICSA contains specific responses to how the Settlement Acts would affect the sovereignty of the tribes, their resources, and their cultures. Instead of destroying the “sovereign rights and jurisdiction” of the tribes, the legislative record instead shows Congress’ intent to protect the sovereignty of the settling tribes, particularly with respect to internal tribal matters and hunting and fishing rights, which the legislative reports characterized as “expressly retained sovereign activities.”¹⁶⁴

In particular, the final committee reports specifically addressed the extent to which the MICSA ratified, preserved, and extinguished aboriginal title associated with the transfers and reservations of lands and resources covered by the various treaties.¹⁶⁵ To this point, the reports provide that “the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources¹⁶⁶ which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them.”¹⁶⁷ This significant statement from the committee

162. NICOLE FRIEDERICHS ET AL., *THE DRAFTING AND ENACTMENT OF THE MAINE INDIAN CLAIMS SETTLEMENT ACT* 8 (2017).

163. H.R. REP. NO. 96-1353, at 14 (1980); S. REP. NO. 96-957, at 14 (1980).

164. H.R. REP. NO. 96-1353, at 15; S. REP. NO. 96-957, at 14.

165. *See* Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 4(a)(1), 94 Stat. 1785, 1794 (1980).

166. Section 3(b) of MICSA defines “land or natural resources” as including “any real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights.” *Id.* § 3(b).

167. H.R. REP. NO. 96-1353, at 18; *see also* S. REP. NO. 96-957, at 18 (“[T]he Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved

reports must be juxtaposed with section 4 of MICSA, in which Congress deemed “any treaty, compact, or statute of [Massachusetts and Maine] . . . to have been made in accordance with the Constitution and all laws of the United States.”¹⁶⁸ MICSA went on to state that “Congress hereby does approve and ratify any such [treaty, compact, or statute].”¹⁶⁹ “Committee reports on a bill are [an] authoritative source for determining legislative intent.”¹⁷⁰ The express terms of the MICSA also established a baseline principle under which federal laws generally applicable to tribes, tribal members, and tribal lands, would apply in Maine unless such application would affect or preempt Maine law.¹⁷¹ Section 16(a) of the MICSA provides that “[i]n the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern.”¹⁷² In light of this provision and the fact that, under the United States Constitution, MIA could not be effective without the consent of Congress, the First Circuit held that the construction of MIA presents questions of federal law.¹⁷³

In sum, by preserving the reservations and transfers of rights embodied in the treaties, and affirmatively approving the state jurisdiction over the tribes through the MIA, the MICSA embodied a distinctly federal Indian law approach to solving a complex legal problem that arose from the state’s false assumption of jurisdiction over the tribes until 1975.

IV. APPLICATION OF COMMON LAW DOCTRINES OF FEDERAL INDIAN LAW IN THE POST-SETTLEMENT ACT ERA

This Section first examines select cases that involved the application of federal Indian common law doctrines to resolve questions arising under the Settlement Acts and then explores how such doctrines should also be applicable to the treaty-reserved and never ceded rights enshrined in the Maine Constitution and ratified in MICSA.

A. Application of Federal Indian Common Law Doctrines After the Settlement Acts

Maine courts wasted little time reverting to legally incorrect, backward-looking conceptions of tribal sovereignty following enactment of the Settlement Acts. In the 1983 case *Penobscot Nation v. Stilphen*,¹⁷⁴ the Law Court seized upon its first opportunity to disregard federal Indian law, arrest economic development on the Penobscot reservation, and claw back the gains in tribal sovereignty under the guise

to them in their treaties with Massachusetts and not subsequently transferred by them.”). *But see* Maine Indian Claims Settlement Act, § 12, 94 Stat. at 1796-97 (providing a general discharge of the State of Maine’s obligations “arising from any treaty or agreement with, or on behalf of any Indian nation”).

168. Maine Indian Claims Settlement Act, § 4(a)(1), 94 Stat. at 1787.

169. *Id.*

170. *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997) (explaining why the First Circuit “look[s] to the Committee Report[s] . . . concerning the Settlement Act”).

171. Maine Indian Claims Settlement Act, § 6(h), 94 Stat. at 1794.

172. *Id.* at § 16(a).

173. *See Penobscot Nation*, 130 F.3d at 485; *Penobscot Nation v. Fellecer*, 164 F.3d 706, 708 (1st Cir. 1999).

174. *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983).

of statutory interpretation.¹⁷⁵ The Penobscot Nation sought an injunction against the State Attorney General to prevent enforcement of the state bingo law as well as a declaratory judgment that its on-reservation bingo games were exempt from state jurisdiction as an “internal tribal matter” within the meaning of MIA. After concluding a tribe is not eligible to hold a state bingo license, the Law Court outlined applicable common law precedents, which it felt defined the universe of what constituted “inherent sovereign authority.”¹⁷⁶ After conveniently ignoring the Indian canon of construction regarding statutory ambiguity,¹⁷⁷ the court proclaimed, “we are unable to find a case on all fours with the controversy we are asked to resolve today.”¹⁷⁸ The Law Court’s preconceived agenda was on full display as it adopted the state’s amicus brief arguments, which were rejected in *Bottomly*.¹⁷⁹ The court stated:

[E]ven in *Worcester v. Georgia* the Indians’ right of self-government existed only “because it had been recognized and allowed to continue in the relevant treaty” Under this view, the federal precedents are of little help to a court faced with a claim of inherent sovereignty by a tribe that has had little or no historical relationship with the federal government In fact, because of the dearth of federal contract [sic] with Maine Indians and their long and intricate historical relationship with the State of Maine, it was long doubted whether they constituted “bona fide tribes” under federal Indian law.¹⁸⁰

The court went on to engage in explicit fear-mongering, similar to opponents of desegregation, in a discussion about the prospect of the Penobscot Nation destroying communities under the claim of inherent sovereignty by “selling drugs” and making “a myriad of other forbidden and even criminal practices legal so long as they turned a profit for the Nation.”¹⁸¹

The court announced its justification for ignoring federal Indian common law by declaring:

[T]he federal [MICA] and state [MIA] . . . have independently defined the sphere within which the tribe can operate free of state regulation, and that [bingo] cannot be considered an “internal tribal matter” within that narrow sphere.¹⁸²

The court’s finding of an “independently defined sphere” to create an analytical framework that excludes federal Indian common law was essential for its “internal tribal matters” analysis. Ironically, MIA’s employment of the phrase “internal tribal matter” is open-ended, as the phrase is not defined and is only explained through reliance on a broad non-exclusive list of topics such as membership, residency on

175. *Id.*

176. *Id.* at 482-84.

177. *See supra* note 143 (discussing the First Circuit’s application of the Indian canon of construction in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*); *see infra* note 195 (discussing rules of construction applicable to Indian law questions).

178. *Penobscot Nation*, 461 A.2d at 484.

179. *See supra* notes 147-52 (discussing the First Circuit’s rejection of the same argument advanced by the state in *Stilphen*).

180. *Penobscot Nation*, 461 A.2d at 484, 487.

181. *Id.* at 486, 489.

182. *Id.* at 482.

the reservation, use of settlement funds, tribal organization, and government.¹⁸³ Within this ambiguous definition, the court stated that the phrase “internal tribal matters” has no relevance to the phrases “internal and social relations,” “internal affairs,” or “tribal self-government,” as such phrases are used in the federal Indian common law because “[o]ne would be rash to equate this phrase with such terms . . . merely because of a partial language overlap.”¹⁸⁴ Unsurprisingly, the federal cases the Law Court cited that used those terms ruled in favor of exclusive tribal jurisdiction.¹⁸⁵

Finally, the court applied the *ejusdem generis* rule to hold that the Nation’s bingo hall is dissimilar from the subject matters listed in the MIA definition.¹⁸⁶ However, it does not strain the principles of logic to find that the MIA definition applies to the on-reservation domestic affairs of the tribe, which would include on-reservation economic development, like the Penobscot’s bingo hall. Ultimately, *Stilphen* represents judicial activism at its worst, a court choosing an outcome—exclusive state jurisdiction—and then casting about for the plausible theory to support the outcome. Fortunately, the First Circuit would later have the opportunity to repudiate *Stilphen*’s approach to the construction of the Settlement Acts.

In *Akins v. Penobscot Nation*, the First Circuit considered the definition of “internal tribal matters” and determined that the tribal court of the Penobscot Nation held exclusive jurisdiction over a dispute regarding a tribal timber harvesting policy.¹⁸⁷ The court concluded that the permitting policy was an “internal tribal matter” primarily because the matter involved a dispute between tribal members and the economic use of on-reservation natural resources.¹⁸⁸ In addition, the court announced a list of considerations that weighed in favor of the dispute qualifying as an internal tribal matter, which included: (i) the policy regulated only tribal members and not non-members, (ii) the policy regulated the commercial use of lands acquired with MICSA funds, (iii) the permit fees were paid to the Penobscot Nation, (iv) no interests of the State of Maine were implicated, and (v) the issuance of stumpage permits had been consistently viewed under the law as an internal tribal matter.¹⁸⁹ The First Circuit’s analysis rejected the Law Court’s exclusion of federal Indian common law to determine internal tribal matters under the MIA by stating: “we also do not agree that reference to such [federal Indian] law is never helpful in defining

183. 30 M.R.S. § 6206(1) (2021).

184. *Stilphen*, 461 A.2d at 489.

185. See *United States v. Kagama*, 118 U.S. 375, 382, 384-85 (1886) (using the phrase “internal and social relations”); *Williams v. Lee*, 358 U.S. 217, 221–23 (1959) (acknowledging that the “internal affairs of the Indians” should remain “exclusively within the jurisdiction of whatever tribal government” exists when declaring that the state did not have jurisdiction over a crime committed); *McClanahan v. State Tax Comm’n of Az.*, 411 U.S. 164, 179, 181 (1973) (determining that a state’s imposition of income taxes upon reservation members violated principles of tribal self-government).

186. *Stilphen*, 461 A.2d at 489 (“By the familiar *ejusdem generis* rule, a general term followed by a list of illustrations is ordinarily assumed to embrace only concepts similar to those illustrations.”).

187. *Akins v. Penobscot Nation*, 130 F.3d 482, 483, 490 (1st Cir. 1997).

188. *Id.* at 489-90.

189. *Id.* at 486-87.

what is an internal tribal matter.”¹⁹⁰ It importantly then highlighted that “[g]eneral federal Indian case law support[ed its] conclusion.”¹⁹¹

The First Circuit ruled in favor of the Penobscot Nation again in *Penobscot Nation v. Fellencer*,¹⁹² a case of claimed racial discrimination by a former employee of the Nation’s government.¹⁹³ The court held the termination of a non-Indian, former employee of the tribal government could not be challenged in state court pursuant to the Maine Human Rights Act.¹⁹⁴ Following the precedent in *Akins*, the First Circuit adopted several federal Indian canons of construction, stating:

[S]pecial rules of statutory construction obligate us to construe “acts diminishing the sovereign rights of Indian tribes . . . strictly,” “with ambiguous provisions interpreted to the [Indians’] benefit.”. These special canons of construction are employed “in order to comport with the[] traditional notions of sovereignty and with the federal policy of encouraging tribal independence,” and are “rooted in the unique trust relationship between the United States and the Indians.”¹⁹⁵

Recently, in 2021, the Law Court resolved an internal tribal matters question and relied on basic doctrines of federal Indian common law to rule in favor of tribal interests. In *Moyant v. Petit*, the Law Court reviewed an internal tribal matter question involving a non-Indian plaintiff who sought damages against the Passamaquoddy Tribe for improvements made under a campsite lease between the Tribe and a tribal member on tribal land.¹⁹⁶ The court determined that the matter did not fit “squarely” within MIA’s definition of internal tribal matters and proceeded to apply the *Akins* factors.¹⁹⁷ One might have expected the Law Court to find that the dispute did not qualify as an internal tribal matter because the plaintiff was non-Indian. However, the court ruled in favor of tribal jurisdiction, holding that almost all of the *Akins* factors “support the determination that this dispute is an ‘internal tribal matter.’”¹⁹⁸ Notably, the court found the plaintiff’s non-Indian status was not determinative of whether the issue was an internal tribal matter.¹⁹⁹ The court referenced the seminal federal Indian law cases *Santa Clara Pueblo v. Martinez*²⁰⁰ and *Iowa Mutual Insurance Company v. LaPlante*,²⁰¹ stating:

Tribal jurisdiction does not disappear simply because a person who is not a member of the Tribe is involved in a dispute, especially when the action is against the Tribe and a tribal member concerning tribal land. It is difficult to conceive of a more appropriate forum for this case than the tribal court.²⁰²

190. *Id.* at 489.

191. *Id.*

192. *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999).

193. *Id.*

194. *Id.*

195. *Id.* at 709 (internal citations omitted).

196. *Moyant v. Petit*, 2021 ME 13, 247 A.3d 326.

197. *Id.* ¶ 11.

198. *Id.* ¶ 13.

199. *Id.*

200. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

201. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

202. *Moyant*, 2021 ME 13, ¶ 14, 247 A.3d 326.

The Law Court clearly grounded its holding in *Moyant* in federal Indian common law doctrines.

The First Circuit, and recently the Law Court, apply federal Indian common law principles to resolve disputes under the Settlement Acts. The principles applied by these courts flow from a broader body of federal common law, which affirm and support the proposition that the establishment of a reservation by treaty, statute, or agreement may also include implied rights to hunt, fish, and gather both on and off-reservation. The existence of these common law rights comes from federal cases addressing the extinguishment of aboriginal title.

B. Application of Indian Law Principles to Reserved Rights

Aboriginal title or Indian title is a right of a Tribal nation to possess and occupy lands and may only be alienated by the tribe to the federal government through purchase or conquest.²⁰³ In *Mitchel v. United States*, the Supreme Court confirmed the equal footing on which Tribal nations held their lands by favorably comparing aboriginal title to the “fee simple of the whites.”²⁰⁴ Extinguishment of aboriginal title also terminates hunting, fishing, and gathering rights grounded in that title, “except where such rights are expressly or impliedly reserved in a treaty, statute or executive order.”²⁰⁵ There are likely no parcels of land upon which aboriginal title has not been extinguished. Nonetheless, tribes and individual Indians continue to bring claims that a specific aspect of aboriginal title, such as the right to engage in hunting, fishing, trapping, and gathering, remains extant.²⁰⁶ Thus, aboriginal use rights, like subsurface mineral rights or utility easements, are severable and may not terminate with extinguishment of aboriginal title, unless such extinguishment is express.²⁰⁷

Aboriginal rights may be established independent of title to such lands if the claim shows use of such rights is continuous and exclusive for a long period of time and is adverse to other users and claimants.²⁰⁸ A claim of aboriginal rights is not defeated by “[t]he fact that such right of occupancy finds no recognition in any statute or other formal governmental action.”²⁰⁹ Therefore, tribes retain their aboriginal rights unless otherwise relinquished by treaty, abandoned, or extinguished by statute.²¹⁰

The exercise of aboriginal rights by Tribal nations and their citizens predates the existence of the United States and derives from historic tribal use, occupation, and

203. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

204. *Mitchel v. United States*, 34 U.S. 711 (1835).

205. *Confederated Tribes of Chehalis Indian Rsrv. v. Washington*, 96 F.3d 334, 341 (9th Cir. 1996).

206. MATTHEW L. M. FLETCHER, *PRINCIPLES OF FEDERAL INDIAN LAW* 94 (2017).

207. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

208. *See, e.g., Pueblo of Jemez v. United States*, 790 F.3d 1143, 1163 (10th Cir. 2015); *Native Village of Eyak v. Blank*, 688 F.3d 619, 626 (9th Cir. 2012).

209. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).

210. *See* COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* § 18.01 (Nell Jessup Newton et al. eds., 2017). The Settlement Acts authorize tribal members to exercise on-reservation sustenance fishing subject to the oversight of the state of Maine Commissioner of Inland Fisheries and Wildlife, but there is no express extinguishment of aboriginal use rights. 30 M.R.S. § 6207(4) (2021).

possession of territory by tribal entities.²¹¹ The right includes both traditional and so-called modern means of harvesting the resources subject to the right.²¹² The extermination of tribes and rapid seizure of tribal lands extinguished aboriginal title across most of the United States, but many tribes that survived the American genocide expressly reserved and protected their rights through a federal action, typically a treaty, statute, or Executive Order.²¹³ “Depending on the legal system and the type of use, these rights have been called ‘common law aboriginal rights,’ ‘usufructuary rights,’ ‘off-reservation rights,’ ‘reserved rights,’ ‘unextinguished rights,’ ‘inherent rights,’ ‘non-territorial aboriginal title’ and ‘customary rights.’”²¹⁴

If such “reserved rights” are recognized by Congress, they then become vested property interests subject to the Takings and Just Compensation Clause of the Fifth Amendment of the Constitution.²¹⁵ These rights generally provide for a tribal member’s ability to engage in certain activities beyond the exterior boundaries of a treaty reservation and in areas that the tribe previously occupied or used.²¹⁶ The reserved rights doctrine also mandates interpretation of Indian treaty provisions as reserving to the Indians any rights not expressly granted or conveyed by them.²¹⁷ The reserved rights doctrine corresponds directly to international law, which holds that the sovereign rights of treaty-making nations are fully preserved except to the extent that they are expressly waived or conditioned.²¹⁸ Under the reserved rights doctrine, exclusive on-reservation hunting, fishing, and gathering rights are “implied” from the establishment of a reservation, whereas on ceded lands, tribal nations may also retain hunting and fishing rights.²¹⁹

Decisions of the Supreme Court strike a balance between the ability of tribal members to exercise off-reservation reserved rights and the need for a state to enforce conservation measures. A state may enforce certain kinds of conservation and public

211. See *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823) (the legal relationship between the United States and tribes is premised on the idea that tribes are “the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and use it according to their own discretion”); *Mitchel v. United States*, 34 U.S. 711, 713 (1835) (“One uniform rule seems to have prevailed in the British provinces in America by which Indian lands were held and sold, from their first settlement, as appears by their laws—that friendly Indians were protected in the possession of the lands they occupied, and were considered as ow[n]ing them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.”).

212. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1430 (W.D. Wis. 1983); *United States v. Washington*, 384 F. Supp. 312, 402 (W.D. Wash. 1974).

213. COHEN, *supra* note 210, at § 18.01.

214. Guy Charlton, *The Law of Native American Hunting, Fishing and Gathering Rights Outside of Reservation Boundaries in the United States and Canada*, 39 CAN.-U.S. L.J. 68, 71 (2015).

215. See FLETCHER, *supra* note 206, at 102.

216. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175-76, 184 (1999); *United States v. Winans*, 198 U.S. 371, 379 (1905); FLETCHER, *supra* note 206, at 97.

217. *Winans*, 198 U.S. at 381 (“[T]he treaty was not a grant of rights to the Indians, but a grant of right from them – a reservation of those not granted.”).

218. See *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (Chief Justice Marshall noted the international law basis of tribal sovereignty).

219. See *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196-97.

safety measures on tribal members exercising off-reservation treaty rights,²²⁰ but there are limits on the extent to which a state can impede access to treaty-guaranteed resources that are located off-reservation. For example, the Supreme Court recently affirmed a Ninth Circuit decision which held that a state had infringed upon a treaty right to take fish at off-reservation fishing places through its refusal to remove obstacles to fish passage that made it impracticable or impossible for a tribal member to take fish in a meaningful quantity.²²¹ Where fishing places are specified by treaty, a state may not prevent access to those places for fishing either through physical obstructions or license fees.²²² This means that “[n]either states nor private property owners may bar tribal access to areas subject to treaty hunting, fishing, and gathering rights.”²²³ Still, a state may regulate reserved treaty rights where a state can “demonstrate that its regulation is a reasonable and necessary conservation measure . . . and that its application to the Indians is necessary in the interests of conservation.”²²⁴ Nonetheless, in the absence of off-reservation treaty rights, a tribal member outside of Indian country will be subject to state law just like anyone else.²²⁵

C. Rules of Construction Applicable to Federal Indian Law

First, treaties are federal laws that preempt conflicting state laws, and only Congress has authority to abrogate treaties or extinguish treaty rights by a clear and unambiguous statement.²²⁶ The Supreme Court has explained that “[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them . . . [and] [t]hese rights need not be expressly mentioned in the treaty.”²²⁷ When interpreting language within a treaty, the Supreme Court follows the original meaning and may not “favor contemporaneous or later practices instead of the laws Congress passed.”²²⁸ If an ambiguous statutory term or phrase emerges, the Court may look beyond the written words to the larger context that frames the treaty, including the history, the negotiations, and the practical construction adopted by the parties to determine the original meaning.²²⁹ Courts must interpret treaties liberally, resolving uncertainties in favor of the Indians, and must “give effect to the terms as

220. *See* *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (holding that a reserved treaty right could not be taken away or abridged by a state but that a state regulation affecting reserved rights may be enforced against tribal members where the regulation is a reasonable and necessary conservation measure).

221. *See* *United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017).

222. WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 554 (7th ed. 2019) (citing *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. Washington*, 315 U.S. 681 (1942)).

223. COHEN, *supra* note 210, at § 18.04(f) (citing *United States v. Winans*, 198 U.S. 371, 381-82 (1905)).

224. *Antoine v. Washington*, 420 U.S. 194, 207 (1975); *see also* *Puyallup Tribe v. Dep’t of Game (Puyallup I)*, 391 U.S. 392, 398 (1968).

225. CANBY, *supra* note 222, at 555.

226. *Washington State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1014 (2019); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68 (1903).

227. *United States v. Dion*, 476 U.S. 734, 738 (1986).

228. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020); *see also* *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring).

229. *Dion*, 476 U.S. at 740-45; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).

the Indians themselves would have understood them.”²³⁰ The rules are not only applicable to the interpretation of treaty rights, but also federal statutes ratifying agreements with tribes, such as the MICSA.²³¹

In *Washington State Department of Licensing v. Cougar Den, Inc.*, Justice Gorsuch’s concurrence provided a rationale for the Court’s rules of construction regarding the Yakama Treaty of 1855:

After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations “English words were translated into Chinook jargon . . . although that was not the primary language” of the Tribe. After the parties reached agreement, the U.S. negotiators wrote the treaty in English—a language that the Yakamas couldn’t read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.²³²

The Settlement Acts are rife with ambiguities, and Justice Gorsuch demonstrates why any court interpreting the MICSA or MIA must apply the Indian canon of construction—a critical principle of federal Indian common law that is used to interpret the intent and understanding of ambiguities as understood by a tribal party.

D. Ambiguities Regarding Treatment of Aboriginal Rights Under the Settlement Acts Must be Resolved Using Principles of Federal Indian Common Law

We finally reach the fundamental question of whether aboriginal rights either reserved or never relinquished by the Wabanaki Nations still exist. Nowhere in the Settlement Acts or in case law interpreting Wabanaki rights does one see consideration of how the native signatories understood the original meaning of their treaties or how they understood the treatment of those treaties within the MICSA. Section 4(a)(1) of the MICSA ratified and approved transfers made by the tribes within the treaties as though such transfers were initially made in accordance with federal law. However, this section ratifies these transfers without specific reference to the rights reserved to the tribes therein or other rights that the tribes never ceded. This is a curious omission given the monumental significance of such rights to the Passamaquoddy Tribe in particular.

As if to explain this very silence, the committee reports explicitly state that “the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources²³³ which were reserved to them in their treaties with

230. *Cougar Den, Inc.* 139 S. Ct. at 1016 (Gorsuch, J., concurring) (quoting *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196); see also *McGirt*, 140 S. Ct. at 2468.

231. *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (“The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.”).

232. *Washington State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019).

233. Section 3(b) of MICSA defines “land or natural resources” as including any “real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights.” Maine Indian Claims Settlement Act, Pub. L. No. 96-420, § 3(b), 94 Stat. 1785, 1794 (1980).

Massachusetts and not subsequently transferred by them.”²³⁴ According to the First Circuit, such statements in final committee reports “are [an] authoritative source for determining legislative intent.”²³⁵ When one applies the Indian law doctrine that Tribal nations retain aboriginal rights unless otherwise relinquished by treaty, abandoned, or extinguished by statute, Congress’s decision to address this issue in the committee report rather than MICSA makes sense.²³⁶ This rule illustrates that Congress did not need to explicitly deal with such rights because they existed as a function of Indian law to the extent recognized by Congress. Importantly, in this case, Congress was explicitly aware of the treaties entered into between Passamaquoddy and Penobscot going back as far as 1820, when the United States Senate was read the treaty provision of the Maine Constitution during deliberations over the Act of Separation between Massachusetts and Maine.²³⁷ Thus, Congress’s consideration and approval of the Act of Separation constituted congressional recognition of the aboriginal and reserved rights contemplated in the Maine Constitution.

During negotiations, Passamaquoddy negotiators understood that their rights were not subject to relinquishment or extinguishment unless done so expressly. Wayne Newell, a member of the Passamaquoddy Tribe’s negotiating team for the Settlement Acts, stated with respect to this concept that, “I also start with the premise that unless we give up a right, specifically give it up, it’s still ours; we retain it by just historical purposes, our aboriginal inheritance.”²³⁸ Additionally, one of the lead negotiators for the State, Maine Attorney General Richard Cohen, stated in 1997: “[i]t is my recollection that salt water rights and issues were not discussed during the Settlement negotiations.”²³⁹ In other words, Congress did not need to mention rights reserved by the tribes or not otherwise transferred, because those rights were acknowledged by Congress and were never understood to be transferred.

More direct statutory support for the notion that rights tied to the treaties were expressly contemplated in the Settlement Acts comes from the MIA. Section 6204 of the MIA provides in pertinent part: “all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . shall be subject to the laws of the State.”²⁴⁰ The MIA defines “Laws of the State” as including “the Constitution” among other sources of law.²⁴¹ Since 1980, Maine officials have pointed to section 6204 as though Wabanaki life is under the thumb of the state and as though the laws of Maine affirmatively reject the existence

234. H.R. REP. NO. 96-1353, at 3794 (1980); S. REP. NO. 96-957, at 18 (1980). *But see* Maine Indian Claims Settlement Act, § 12, 94 Stat. at 1794 (providing a general discharge of the State of Maine’s obligations “arising from any treaty or agreement with, or on behalf of any Indian nation”).

235. *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997).

236. *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).

237. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 374 (1st Cir. 1975) (“The Maine Constitution, with the above quoted provision relating to the Indians, was read in the [U.S.] Senate, referred to committee, and finally declared by Congress to be established.”).

238. DONALD SOCTOMAH, *PASSAMAQUODDY AT THE TURN OF THE CENTURY: 1890-1920* 15 (2002).

239. ME. INDIAN TRIBAL STATE COMM’N, *ASSESSMENT OF THE INTERGOVERNMENTAL SALTWATER FISHERIES CONFLICT BETWEEN THE PASSAMAQUODDY AND THE STATE OF ME.* 143 (2014).

240. 30 M.R.S. § 6204 (2021).

241. *Id.* § 6203(4).

of treaty rights. To be fair, lawyers, judges, and elected officials in the state have relied on this concept in legal opinions, court briefings, and public statements since the Law Court began erroneously ruling against tribal treaty rights in the 1870s. So, they are just repeating what Maine has falsely held as true for over a century. However, this logic is fundamentally flawed.

The Maine State Constitution, which reigns supreme over all laws, regulations, and court decisions that form the body of Maine law, expressly recognizes the “validity” of such treaties even though the state decided to stick its proverbial head in the sand when the treaty provision was omitted from printing.²⁴² One could push back on the validity of the treaties by referencing MICSA’s statement that the statute “constitute[s] a general discharge and release of all obligations of the State of Maine . . . arising from any treaty . . . with, or on behalf of any Indian nation.”²⁴³ However, such an argument would not alter the text of the Maine State Constitution, which explicitly provides that omission of the treaty provision from the official printed version of the constitution “shall not impair the validity of acts under [that section of the constitution].”²⁴⁴ Thus, any stipulations in the Settlement Acts that the “lands and natural resources” of the tribes are subject to the “Laws of the State” must refer to the treaties embedded in Maine’s organic law.

Turning to how one must interpret reserved and never ceded aboriginal rights, the Passamaquoddy identify themselves in their own language as the “people who spear pollock,” a fish that only lives in the saltwater.²⁴⁵ So, the identity of the Passamaquoddy people revolves around the act of harvesting marine resources for food. In its 1794 Treaty, the Passamaquoddy Tribe specifically reserved lands and rights deemed necessary for survival of the people.²⁴⁶ This included the reservation of what is now Indian Township, which sits immediately adjacent to the St. Croix River.²⁴⁷ The Treaty also “assigned” to the Passamaquoddy the right to fish in both branches of the St. Croix River “without hindrance or molestation and the privilege of passing the said river over the different carrying places thereon.”²⁴⁸ In addition, the Tribe was “assigned” a tract of land called “Pleasant Point” or *Sipayik*, which means, “place on the edge of the water” in the Passamaquoddy-Maliseet language. Pleasant Point sits next to what is now called Passamaquoddy Bay, which is still home to numerous traditional foods for the Passamaquoddy, including eels, whales, cod, lobster, pollock, and numerous other marine resources. The Treaty also recognized the Passamaquoddy Tribe’s “privilege of setting down at the carrying

242. Me. Const. art. X, § 7.

243. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785, 1796-97 (1980).

244. Me. Const. art. X, § 7.

245. See *Peskotom*, PASSAMAQUODDY-MALISEET LANGUAGE PORTAL, <https://pmportal.org/dictionary/peskotom> [<https://perma.cc/7DCN-ZVY5>] (last visited May 13, 2022) (defining “peskotom” as “pollock” in the English language); *Peskotomuhkati*, PASSAMAQUODDY-MALISEET LANGUAGE PORTAL, <https://pmportal.org/dictionary/peskotomuhkati> [<https://perma.cc/XTF4-U9Z4>] (last visited May 13, 2022) (defining “Peskotomuhkati” as “Passamaquoddy” in the English language).

246. See Treaty between the Passamaquoddy Tribe and the Commonwealth of Massachusetts, Sept. 29, 1794, *supra* note 6.

247. *Id.*

248. *Id.*

place at West Quoddy between the Bay of West Quoddy and the [B]ay of Fundy, to contain fifty acres.”²⁴⁹

Each of these aforementioned references either explicitly or impliedly reserved the right to fish in fresh or saltwater. Lands located along waterways and saltwater were not reserved so tribal members would have to paddle their birch bark canoes into the high seas in some of the most dangerous tides in the western hemisphere, which happened to be in their backyard.²⁵⁰ Rather, the Tribe reserved these lands because they boasted access to sustenance in the form of fish and game use for familial consumption and trade to acquire other necessities in life. To conclude otherwise would entirely subvert the Passamaquoddy Tribe’s intent and understanding when it entered the 1794 Treaty.

Correspondence and notes from before execution of the 1794 Treaty demonstrate the immense significance of Pleasant Point and access to saltwater, in particular, for the Passamaquoddy People. In fact, a 1793 report delivered to Massachusetts legislators reflected that the Passamaquoddy rejected any deal that did not include land at Pleasant Point.²⁵¹ The Passamaquoddy considered possession of “a place of residence on the Sea Shore” to be fulfillment of promises made during the Revolutionary War.²⁵² Thus, a people whose name derives from the harvest of marine resources specifically sought to preserve their access to such resources by entering into the 1794 Treaty, which was acknowledged in Congress and engrained in the Maine State Constitution.

CONCLUSION

Under Federal Indian law, ambiguities are to be resolved in favor of the tribe, and extinguishment of treaty rights requires a clear and unambiguous statement by Congress. The MICSA and MIA are ambiguous, and neither terminated Wabanaki treaties. Even if Maine successfully oppressed and terrorized the Wabanaki for over a century, Justice Gorsuch reminds us that “[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”²⁵³ The State of Maine has made the exact opposite argument since the 19th Century as part of the State’s longstanding attempts to subvert and oppress the Wabanaki people. Such arguments ring especially hollow when one considers that the rights proclaimed by the Wabanaki were forged with blood that was spilled on the battlefield of the American Revolution at the request of General George Washington.

249. *Id.*

250. See *Old Sow Whirlpool*, BAY OF FUNDY, <https://www.bayoffundy.com/about/old-sow-whirlpool/> [<https://perma.cc/L9G2-4GUP>] (last visited Mar. 20, 2022) (explaining that the Bay of Fundy is the home of the second largest whirlpool in the world, named Old Sow, which is known to form large funnels).

251. MA. COMM’RS REP. OF THE PASSAMAQUODDY TRIBE, Resolve 1793, ch. 129, at 4 (Feb. 28, 1794) (original papers in the Massachusetts State Archives summarizing Passamaquoddy Chief Francis Joseph Neptune’s assertion that “no other lands would be acceptable to them but a hundred acres of land at a place called pleasant point”).

252. MALISEET, PASSAMAQUODDY, AND MI’KMAQ PETITION TO THE COMMONWEALTH OF MA., Resolve 1792, ch. 185, at 2 (Mar. 27, 1793).

253. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

