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The Growing List of Reasons to Amend The Maine Indian Jurisdictional Agreement

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THE GROWING LIST OF REASONS TO AMEND THE MAINE INDIAN JURISDICTIONAL AGREEMENT

Nicole Friederichs

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THE GROWING LIST OF REASONS TO AMEND THE MAINE-INDIAN JURISDICTIONAL AGREEMENT

Nicole Friederichs*

ABSTRACT

The Passamaquoddy Tribe and the Penobscot Nation brought their lands claims against the State of Maine in an effort to reclaim taken lands, to ensure that they could self-determine their futures and to hold on to their cultures and languages. What they faced were a state and federal governments opposed to such a goal. With favorable court decisions in hand, the Tribes began the long process of negotiating for the financial restitution of those claims. They learned, however, that restitution—the recovery of a small portion of their traditional territories—would only be possible if an agreement was made with the State on jurisdiction.

Through that jurisdictional agreement, the State of Maine sought to ensure that the Tribes remained under state law and that the principle of inherent tribal sovereignty be made meaningless to the understanding of the agreement. Congress knew of these goals and, arguably, in breach of its trust responsibility towards native nations, did very little to protect the tribes' sovereignty when it considered and approved the agreement in 1980. Instead, Congress added features to the jurisdictional arrangement severely limiting the applicability, in Maine, of current and future federal laws benefiting tribes and native peoples. And, it did so without the consent of the tribes located within Maine.

In addition to recognizing how economic and political realities influenced why an agreement on jurisdiction was negotiated as part of a settlement for the illegal taking of indigenous lands, this Article adds to the growing list of reasons why the jurisdictional arrangement between each of the tribes located within Maine and the State of Maine must be amended.

INTRODUCTION

On the first day of hearings before the United States Senate Select Committee on Indian Affairs on legislation which would settle land claims made by the Passamaquoddy Tribe and Penobscot Nation (collectively “the Tribes”)¹ the

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1. There are four federally recognized tribes located within the borders of the State of Maine: Penobscot Nation, the Passamaquoddy Tribe at Sipayik and at Indian Township, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs (also known as the Mi'qmaq Nation). Each of the four federally recognized tribes is subject to settlement acts, but it was the Penobscot and Passamaquoddy which were part of the negotiations leading to the settlement acts discussed in this article, specifically the state Act to Implement the Maine Indian Claims Settlement, P.L. 1979, ch. 732, §§ 1–31 (codified at 30 M.R.S. §§ 6201–6214 (2022)), and the federal Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721–1735). The Houlton Band of

Attorney General for the State of Maine described the proposed jurisdictional agreement between the State and the two tribes. He believed that the agreement would “avoid in Maine the types of devisive [sic] controversy that has so marked tribal/State relations in the Western States and has resulted in so much litigation and ill-will.”² The proposed jurisdictional agreement was embodied in a Maine State law called “An Act to Implement the Maine Indian Claims Settlement” (Maine Implementing Act or MIA) which the State of Maine passed in April 1980.³ The proposed jurisdictional agreement, which the federal government had to validate under federal Indian law principles, was unusual in several ways.⁴ It was unusual because the agreement would (i) treat the Tribes similarly to municipalities, and (ii) subject them to Maine state law, but carve out tribal authority over “internal tribal matters.”⁵ Later, a third component would be added by Congress severely limiting the application of federal laws to the Tribes, creating an even more unusual arrangement. The Maine Implementing Act was ratified by the United States on October 10, 1980, when President Carter signed the Maine Indian Claims Settlement Act (MICA) into law.⁶

Ironically, MICA and the related MIA (collectively the Settlement Acts) have not avoided the litigation and ill-will that Richard Cohen and others had hoped. Instead, the relationship has been a poor one. Since 1980, Maine and the four

Maliseet Indians is subject to parts of the federal Maine Indian Claims Settlement Act and a subsequent federal act, the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986, Pub. L. No. 99-566, 100 Stat. 3184 (1986) (codified at 25 U.S.C. § 1724). The Maine Implementing Act was later amended to address the jurisdictional relationship between the Maliseet Band and the State. An Act to Amend the Maine Implementing Act with Respect to the Houlton Band of Maliseet Indians, P.L. 1981, ch. 675 (codified at 30 M.R.S. §§ 6206-A, -B (2022)). The Aroostook Band of Micmacs was federally recognized in 1991 and has separate settlement acts. The state act is known as “The Micmac Settlement Act,” P.L. 1989, ch. 148, §§ 3, 4 (codified at 30 M.R.S. §§ 7201–7207 (2022)), and the federal act is known as the “Aroostook Band of Micmac Settlement Act,” Pub. L. No. 102-171, 105 Stat. 1143 (1991) (codified at 25 U.S.C. § 1721). The research and analysis in this article addressing the non-application of federal laws is relevant to each of the four federally recognized tribes. However, the research and analysis on the municipality status and internal tribal matters applies only to the Penobscot Nation and the Passamaquoddy Tribe. It is for this reason, and the fact that these two tribes initiated and led the negotiations with the State from the very beginning, that the term “Tribes” refers to the Penobscot Nation and the Passamaquoddy Tribe.

2. *Proposed Settlement of Maine Indian Land Claims: Hearing on S. 2829 Before the Select Comm. on Indian Affs.*, 96th Cong. 160 (1980) (statement of Richard Cohen, Me. Att’y Gen.) (hereinafter Senate Hearings).

3. P.L. 1979, ch. 732, §§ 1–31 (codified at 30 M.R.S. §§ 6201–6214 (2022)).

4. A foundational principle of federal Indian law is that Congress has plenary and exclusive power over Indian affairs. See *Lara v. United States*, 541 U.S. 193, 200 (2004) (“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”). This means that states have no authority over Indian affairs unless Congress recognizes or delegates that authority. As an example, one of the first laws enacted by the First Congress was the Trade and Intercourse Act of 1790, which required prior approval by the United States of any sale or conveyance of Indian lands, including to states. Act to Regulate Trade and Intercourse with the Indian Tribes (Trade and Intercourse Act of 1790), 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177 (2022)).

5. See 30 M.R.S. § 6206(1).

6. Pub. L. No. 102-171, 105 Stat. 1143 (1991) (codified at 25 U.S.C. §§ 1721–1735); see also *supra* note 4 (describing federal Indian law’s principle of congressional plenary power).

tribes located within its territorial boundaries have been regulars in state and federal courts litigating different aspects of the settlement, but primarily disagreeing over which sovereign has jurisdiction.⁷ The jurisdictional agreement has also been the subject of several state legal opinions⁸ and numerous legislative hearings.⁹ In 1996, Maine's legislature created the Task Force of State-Tribal Relations, the primary purpose of which was to improve the relationships between the State and the Maine Indian Tribal State Commission (MITSC) and between the State and the four tribes.¹⁰ One Maine governor established a work group in 2006 to address the problems arising from the settlement,¹¹ which continued its work as a legislative body. In 2015, the Tribes withdrew their representatives to the State's legislature,¹² and subsequently issued a declaration, along with the Aroostook Band of Micmacs, that they "do not recognize the authority of the State of Maine . . . to define [their] sovereignty or culture or to interfere with [their] self-governing rights."¹³ In 2019, Maine's legislature created a task force to explore changes to the MIA.¹⁴ One the major pieces of legislation to come out of that task force did

7. See, e.g., *Penobscot Nation v. Stilphen*, 461 A.2d 478, 480–81 (Me. 1983); *Houlton Band of Maliseet Indians v. Boyce*, 1997 ME 4, ¶ 1, 688 A.2d 908; *Penobscot Nation v. Fellencer*, 999 F. Supp. 120, 122 (D. Me. 1998), *rev'd*, *Penobscot Nation v. Fellencer*, 164 F.3d 706, 707 (1st Cir. 1999); *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 1, 770 A.2d 574; *Winifred B. French Corp. v. Pleasant Point Passamaquoddy Rsrv.*, 2006 ME 53, ¶ 7, 896 A.2d 950; *Francis v. Dana-Cummings*, 2008 ME 184, ¶ 1, 962 A.2d 944; *Tomer v. Me. Hum. Rts. Comm'n*, 2008 ME 190, ¶ 1, 962 A.2d 335; *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 784 (1996); *Maine v. Johnson*, 498 F.3d 37, 41 (1st Cir. 2007); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73, 74–75 (1st Cir. 2007); *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 43 (1st Cir. 2007); *Penobscot Nation v. Frey*, 3 F.4th 484, 488 (1st Cir. 2021).

8. See, e.g., *Op. Me. Att'y Gen.* 1984-23; *Op. Me. Att'y Gen.* 2003-7; *Op. Me. Att'y Gen.* 2013-1; *Op. Me. Att'y Gen.* 1987-13; *Op. Me. Att'y Gen.* 1984-7; *Op. Me. Att'y Gen.* 1988-3; *Op. Me. Att'y Gen.* 2008-12.

9. See, e.g., *An Act To Establish a Formal Tribal Consultation Process with the State: Hearing on L.D. 1392 before J. Standing Comm. on Judiciary*, 129th Legis. (2020) (testimony on Michael Kebede, policy counsel for the ACLU of Me.); *An Act To Require the Attorney General To Consult with Federally Recognized Indian Tribes before Issuing an Opinion on Federal Legislation Affecting the Maine Indian Claims Settlement Act of 1980: Hearing on L.D. 308 before the J. Standing Comm. on Judiciary*, 126th Legis. (2013) (testimony of Rep. Ralph Chapman); *An Act To Provide for the Aroostook Band of Micmacs Certain Rights Regarding Hunting, Fishing and Wildlife Management: Hearing on L.D. 1399 before J. Standing Comm. on Inland Fisheries & Wildlife*, 126th Legis. (2013) (testimony of Henry John Bear, Maliseet Tribal Rep.); *An Act To Open the St. Croix River to River Herring: Hearing on L.D. 72 before Comm. on Marine. Res.*, 126th (2013) (testimony of Rep. Katherine Cassidy).

10. The Task Force of State-Tribal Relations was created by Maine's 117th Legislature. *Comm. Amend. A to L.D. 1667*, No. H-856 (117th Legis. 1996). MITSC is a quasi-state agency created by the MIA.

11. *Me. Exec. Order No. 19* (July 10, 2006).

12. Kevin Miller, *Tribes Bolt Legislature as Rift with State Grows*, PORTLAND PRESS HERALD (May 27, 2015), <https://www.pressherald.com/2015/05/26/tribal-representatives-withdraw-from-legislature-as-tensions-with-lepage-grow/>.

13. Colin Woodard, *Tribes will no Longer Recognize Maine's Authority to Define their Rights*, PORTLAND PRESS HERALD (May 27, 2015), <https://www.pressherald.com/2015/05/27/maine-tribes-will-no-longer-recognizing-authority-of-state-officials/>.

14. Joint Order, *Establishing the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act*, H.P. 1307 (129th Legis. 2019).

not have the support of the Governor and died at the end of legislative session.¹⁵ Additionally, at the end of 2022, a federal bill, which would have lifted the prohibition of federal laws benefiting Indian tribes from applying in Maine, failed to garner the support of both U.S. Senators from Maine and Maine's Governor.¹⁶

This "divisive" relationship arises, in large part, from the text of the Settlement Acts. But why? If there was a negotiated "agreement" that took years to finalize between the tribal, state, and federal governments, why has there been so much disagreement? The answer depends, in part, on who is answering the question. For some, it is not a question of a disagreement, but rather it is one side to a deal complaining about the deal after the fact. For others, the disagreement is about how the Settlements Acts are being interpreted.¹⁷

Over the past forty years, lawyers, academics, historians, and government institutions have tried to provide greater understanding of the negotiations in an effort to find workable solutions moving forward. For example, the MITSC has held multiple public forums, released several reports on the implementation of these acts, and offered recommendations on how they could be improved.¹⁸ Over a dozen law review articles have been written on the Settlement Acts, most of them addressing how Maine's (and the courts') interpretations of the Settlement Acts differ from that of the Tribes.¹⁹ Several books and papers have been published, offering more in-depth historical accounts of the 1970s negotiations, as well as useful understandings into the larger political, social, legal, and economic context of the time.²⁰

This Article seeks to build upon these reports, studies, books, hearings, and tasks forces, by sharing recent archival and legislative research of the Settlement Acts. The goal is to contribute to the growing understanding of the problematic foundation of the Settlement Acts and to add to the increasing list of compelling reasons why the *jurisdictional elements* of the Settlement Acts must be amended—or scrapped altogether. To be clear, this Article does not address the aspects of

15. L.D. 1626 (130th Legis. 2021).

16. Colin Woodard, *Prospects Fade for Federal Bill to Expand Rights of Maine Tribes*, PORTLAND PRESS HERALD (Sept. 15, 2022), <https://www.pressherald.com/2022/09/15/prospects-fade-for-federal-bill-to-expand-maine-tribes-rights/>.

17. Eric Russell, *30 Years Later: Deal a One-Sided Document, Says Penobscot Nation Chief* BANGOR DAILY NEWS (Oct. 8, 2010), <https://www.bangordailynews.com/2010/10/08/news/bangor/30-years-later-deal-a-onesided-document-says-penobscot-nation-chief/>.

18. The Maine Indian Tribal State Commission's website includes a library of its various reports, research studies and meetings. ME. INDIAN TRIBAL-STATE COMM'N, *Wikhikonikiwam: MITSC Library*, <https://www.mitsc.org/library> [https://perma.cc/5EB3-A5A4].

19. See, e.g., Joseph G.E. Gousse, Comment, *Waiting For Gluskabe: An Examination of Maine's Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 538 (2015); Nina J. Cifollillo, *Legal Barriers to Tribal Jurisdiction over Violence Against Women in Maine: Developments and Paths Forward*, 73 ME. L. REV. 352, 355 (2021); Joseph Paul Mortelliti, Note, *Whose Standards Control? Maine v. McCanhy and the Federal, State, and Tribal Battle over Water Quality Regulation*, 6 MICH. J. ENV'T. & ADMIN. L. 523, 528 (2017); Michael-Corey F. Hinton & Erick J. Giles, *Eli-Tpitahatomek Tpaskuwakonol Waponahkik (How We, Native People, Reflect on the Law in the Dawnland)*, 74 ME. L. REV. 209, 209 (2022).

20. See, e.g., PAUL BRODEUR, *RESTITUTION* (1985); NEIL ROLDE, *UNSETTLED PAST, UNSETTLED FUTURE: THE STORY OF MAINE INDIANS* (2004); Maria L. Girouard, *The Original Meaning and Intent of the Maine Indian Land Claims: Penobscot Perspectives* (May 2012) (M.A. thesis, University of Maine).

MICSA that settled the *land claim*, but only focuses on the jurisdictional parts of both the federal and state Settlement Acts.

The recent archival research, commissioned by MITSC, was conducted in 2016 by the author of this article and two researchers affiliated with the Human Rights and Indigenous Peoples Clinic at Suffolk University Law School (Clinic).²¹ The Clinic was charged with researching specific sections of the bill as part of an on-going effort to bring greater awareness and understanding of the Settlements Acts to state and federal officials as well as to the general public.²² In 2017, MITSC publicly released the Clinic's report on the research.²³ Portions of that report and research are featured within this Article, specifically the sections on the non-application of federal laws, the treatment of internal tribal matters, and the adoption of a municipality model for the Tribes.²⁴ Unlike that report, however, this Article attempts to analyze those findings drawing on the trust responsibility, the Indian canons of construction, and the duty to consult.

This Article contends the following.

First, Maine's goal to "ensure that the [T]ribes remained under Maine law and did not take on the substantial attributes of sovereignty,"²⁵ was well understood by Maine's congressional delegation, and Congress, as a result, should have done more under its trust responsibility to the Tribes to protect their inherent tribal sovereignty.

Second, there was no shared understanding between the Tribes and the State regarding the concepts of "internal tribal matters" and the use of the municipality status found in the State Implementing Act.²⁶ This created ambiguity (triggering

21. NICOLE FRIEDERICHs ET AL., THE DRAFTING AND ENACTMENT OF THE MAINE INDIAN CLAIMS SETTLEMENT ACT (2017). Professor Amy Van Zyl-Chavarro and Attorney Kate Bertino were the two other researchers and co-authors of the report. *Id.*

22. MITSC asked the Clinic to focus on four areas of the drafting of MICSA from April 1980 to September 1980:

1. Section 1723 focusing on the force and reservation of rights under the implicated treaties,
2. Sustenance and protected sustenance practices,
3. Definition of internal tribal matters, and
4. Sections 1735(b) and 1725(h) addressing the application of federal law.

Id. at 3. Over 2,000 pages and 200 documents were collected from primarily congressional archival records. *Id.* at 3–4. These documents were subsequently reviewed and analyzed, yielding approximately ninety-seven documents which specifically address these sections and topics. *Id.* at 3.

23. FRIEDERICHs ET AL., *supra* note 21.

24. The archival research conducted by the Clinic in 2016 focused only "on relevant federal government sources, such as congressional committees, federal departments and individual senators." *Id.* at 6. The vast majority of documents found within those sources were from federal and state officials, and only about half a dozen materials were tribal governments.

25. Memorandum to Sen. William S. Cohen from Timothy Woodcock (Aug. 28, 1980), <https://maineindianclaims.omeka.net/items/show/58> [<https://perma.cc/SAZ8-89E2>] (summarizing the disagreement between the U.S. Department of the Interior and the State of Maine regarding the status of Tribes as municipalities under the MIA).

26. 30 M.R.S. § 6206(1) (2022) (emphasis added).

the Indian canons of construction) and resulted in numerous tribal-state conflicts, litigation, and confusion.

Third, MICSA's prohibition of the application of future federal laws to the Tribes was added to the bill at the last minute without proper notice, resulting in a discriminatory impact of these sections by preventing the Tribes in Maine from accessing federal programs.

This Article begins with a brief history leading up to the Settlement Acts, including the political, legal, and economic context during which the negotiations took place. Part II introduces the unique jurisdictional arrangement in detail, specifically the "internal tribal matters" language and the municipality status of the Tribes,²⁷ and suggests that diverging understandings of the MIA existed while Congress was drafting and enacting MICSA. Part III addresses the addition of the non-application of federal law to the each of the tribes in Maine and the impact it has had on them. Finally, Part IV reiterates a generally accepted proposal that significant changes are needed to the jurisdictional agreement to avoid more "litigation and ill-will."²⁸

I. HISTORY AND CONTEXT

A. *The Land Claim and Subsequent Negotiations Efforts*

The history of the Tribes' land claim is long and complex and has been recounted in several published materials,²⁹ but it is necessary to briefly provide some historical context before examining the drafting of the Settlement Acts. In 1972, the Passamaquoddy Tribe initiated its land claim by bringing suit against the U.S. government in federal court, arguing that the U.S. government had a trust responsibility to the tribe and therefore must bring suit against the State of Maine on their its behalf.³⁰ In 1975, the Maine federal district court agreed with the tribe,³¹ and that decision was subsequently affirmed by the Court of Appeals for the First Circuit.³² The bases of the land claim were the Non-Intercourse Act, a federal law which provides that any transfer of lands by an Indian tribe must be approved by the U.S. government for it to be valid, and the Treaty of 1794, entered into by the Commonwealth of Massachusetts (which governed the then-District of Maine)

27. *Id.*

28. Senate Hearings, *supra* note 2, at 160.

29. See, e.g., sources cited *supra* notes 19, 20. See generally, e.g., Joseph Hall, *Was the "S" for Silent?: The Maine Indian Land Claims and Senator Edmund S. Muskie*, 50 ME. HIST. 5 (2016) (exploring Maine Senator Muskie's involvement with the Indian land claims during the 1970s).

30. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 653 (D. Me. 1975) ("On February 22, 1972 representatives of the Passamaquoddy Tribe wrote to the Commissioner of the Bureau of Indian Affairs, Department of the Interior, and requested that the United States Government, on behalf of the Tribe, institute a suit against the State of Maine, as a means of redressing the wrongs which arose out of the alleged unconscionable land transactions in violation of the Nonintercourse Act.").

31. *Id.* at 660.

32. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

and the Passamaquoddy Tribe.³³ The treaty transferred lands from the Tribe in Maine to the Commonwealth without any federal involvement or approval.³⁴

Shortly before the federal district court issued its decision in 1972, the leadership of the Penobscot Nation reached out to one of the Passamaquoddy's attorneys to ask if it should also file a land claim.³⁵ After some discussion, the Penobscot Nation sent a letter to the U.S. Department of Justice, (similar to one sent by the Passamaquoddy Tribe before filing its land claim) calling on the Justice Department to file a lawsuit against Maine for the Penobscot Nation's own loss of land under its own treaties with the Commonwealth of Massachusetts.³⁶ Although continuing the claim in court was one option, the two Tribes worked towards a financial settlement, with the goal of obtaining a substantial land base.³⁷ Soon after the First Circuit's decision, the two Tribes selected negotiating team members from within their communities to work alongside their legal counsel.³⁸ Over the next four years, the negotiations focused primarily on financial restitution and purchase of lands, not jurisdiction. It was during this time that the White House intervened in the negotiations.³⁹ In 1977, President Carter appointed former Judge William Gunter to facilitate the negotiations, though his recommendations were rejected by the parties in July 1977.⁴⁰ At one point, the White House formed a three-member Task Force, which did not include any Maine legislators, to assist in reaching an agreement.⁴¹ In early 1978, the White House Task Force and the Passamaquoddy and Penobscot Tribes entered into a Joint Memorandum of Understanding which outlined the proposed terms of the land settlement.⁴² Over the next few months, both U.S. Senators from Maine "urged state officials to give [the White House plan] serious consideration" but with no success.⁴³ Subsequently, Senator Bill Hathaway of Maine made his own attempt to bridge the divide by releasing his own plan to settle the claim in October 1978, but soon thereafter was voted out of office and replaced by Senator William Cohen.⁴⁴ Each of these proposals offered different financial amounts to the Tribe, and identified who would pay (federal or state governments), and how much land would be purchased.⁴⁵

33. See *Morton*, 388 F. Supp. at 651–52.

34. *Id.* at 652–53 ("The stipulated record clearly shows that the Commonwealth of Massachusetts and the State of Maine, rather than the Federal Government, have assumed almost exclusive responsibility for the protection and welfare of the Passamaquoddies.").

35. See BRODEUR, *supra* note 20, at 93.

36. See *id.* at 87–88 (describing the Passamaquoddy letter).

37. See Girouard, *supra* note 20, at 42–43; ROLDE, *supra* note 20, at 30. According to the Tribes' attorney, Tom Tureen, "[a] negotiated settlement had always been a major part of our game plan It was inconceivable to me that rational people could allow a case of this magnitude to be ultimately resolved in court." BRODEUR, *supra* note 20, at 96.

38. Girouard, *supra* note 20, at 39–40.

39. BRODEUR, *supra* note 20, at 100; ROLDE, *supra* note 20, at 35.

40. ROLDE, *supra* note 20, at 35.

41. ROLDE, *supra* note 20, at 38; BRODEUR, *supra* note 20, at 105.

42. BRODEUR, *supra* note 20, at 106.

43. See *id.* at 107–13.

44. See ROLDE, *supra* note 20, at 43.

45. See Brodeur, *supra* note 20, at 112–13.

In August 1979, the Tribes' negotiating committee, along with the lawyer representing the major paper and timber companies, presented a "salvaged settlement package to the members of the Maine congressional delegation . . .".⁴⁶ According to the Tribes' attorney, who is quoted in a 1983 book on the Tribes' land claims process, the Maine congressional delegation "refused to go along with the latest proposal until it was approved by the State of Maine, which, in turn, refused to sanction it until the questions of who would have legal jurisdiction over the two tribes was worked out."⁴⁷ Approximately two months later, talks began on jurisdiction.⁴⁸

In addition to the toll that the grueling nature of the land claim and the negotiations took on the Tribes and the State, both sides found themselves having to consider different economic and political realities. The State faced unfavorable municipal bond ratings in parts of Maine that were subject to the Tribes' land claims, making it difficult to raise funds for necessary government works.⁴⁹ The Tribes faced the likelihood that Ronald Reagan, who did not support a settlement to the land claim in Maine, would become the newly elected U.S. President.⁵⁰ These economic and political realities put pressure on the State and the Tribes to finalize an agreement quickly, and from the Tribes' perspective, definitely before the presidential election in November 1980.⁵¹

In the minds of members of the Tribes' negotiating team, there were also other fears and considerations. As part of her master's thesis, Penobscot citizen Maria Girouard interviewed several members of that negotiating team around 2008 about their experiences and intentions during the settlement process. The threat of termination was on the minds of some of them. As Girouard explains, "[w]hile the [federal] termination policy is most often viewed as an element of the 1950's, its effects terrorized Indians for decades and termination proposals continued well into the 1960's."⁵² And, termination of the Tribes' rights was threatened at least once during the 1970s negotiations. Relying on the reporting from *The Wabanaki Alliance*, a newspaper which provided information on the land claims from tribal perspectives, Girouard writes,

[i]n July 1977, Gunter acknowledged the severe economic problems associated with the land claims case and suggested the possibility of "congressional extinguishment of the legal rights of the Indians in Maine if they did not acquiesce" to his proposal for settlement. Because of this imminent threat of

46. See *id.* at 115.

47. *Id.* The book also addresses the Mashpee Wampanoag Tribe's land claim. *Id.* at 3–65; see also Letter to Sen. John Melcher, from Thomas Tureen (Sept. 06, 1980) ("[T]he Tribes were asked by the Maine Congressional Delegation to reach an agreement with the State of Maine concerning jurisdictional matters.") <https://maineindianclaims.omeka.net/items/show/42> [<https://perma.cc/B4TM-Y3FM>].

48. See BRODEUR, *supra* note 20, at 115, 117.

49. See ROLDE, *supra* note 20, at 31.

50. See Girouard, *supra* note 20, at 8, 53, 55.

51. See Colin Woodard, *Bombshells, Compromises Greet an Unfolding Crisis*, PORTLAND PRESS HERALD (July 13, 2014), <https://www.pressherald.com/2014/07/13/bombshells-compromises-greet-an-unfolding-crisis/>.

52. See Girouard, *supra* note 20, at 44.

termination in a hostile environment, *negotiators of the settlement believed that the [tribal negotiators] did the best that they could in negotiating a settlement for their tribe without going too far.*⁵³

It is within this context that the final set of negotiations began in late 1979 through March 1980, culminating in the MIA. The MIA was essentially a jurisdictional agreement, and did not address the land claim itself. It would now be Congress that would take the reins, finalizing the financial and land aspects of the claim. As noted above, the MIA was not valid until approved by Congress under its plenary power over Indian affairs. The primary tasks that Congress had in drafting the federal counterpart to the state act were: (i) to extinguish title that was the subject of the land claims; (ii) to provide funds for the settlement; (iii) to ratify the MIA; and (iv) to outline the relationship between the tribes and the federal government, and the applicability of federal law.

B. Tribal Sovereignty and Trust Responsibility at the Time of the Settlement Acts

It was during the early 1970s that the federal policy towards native nations and peoples shifted once again. Though without devastating effects on tribal nations and lingering threats felt by native peoples, the termination era ended and now began a new federal policy of self-determination. No longer did the U.S. government seek to assimilate native peoples by ending the government-to-government relationship it had with tribes. Instead, the U.S. government adopted a policy of tribal self-determination, “constitut[ing] the strongest expression of Congressional and Executive branch support for the development of tribal governments, reservation economies, and Indian peoples, as well as recognition of the importance of tribal sovereignty.”⁵⁴ President Richard Nixon’s “Self-Determination Without Termination” speech to Congress in 1970 articulated this new policy⁵⁵ and Congress enacted new laws promoting tribal sovereignty and decreasing federal oversight.⁵⁶

The United States Supreme Court issued two major decisions in 1978 affirming tribal sovereignty, *United States v. Wheeler*, and *Santa Clara Pueblo v. Martinez*.⁵⁷ It also decided *Oliphant v. Suquamish Tribe*, that same year, limiting the scope of inherent tribal sovereignty by holding that tribes did not have criminal jurisdiction over non-Indians.⁵⁸ In Maine, one case that is of particular relevance for understanding the larger legal context around tribal sovereignty in Maine at the time of the negotiations is *State v. Dana*.⁵⁹ In *Dana*, Maine’s highest court had to

53. *Id.*, at 45 (emphasis added) (citations omitted). Girouard also relied on personal interviews with Andrew Akins, and James Sappier, two of the Penobscot Nation negotiation team members.

54. MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 80 (2017).

55. President Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970) (transcript available at <https://www.presidency.ucsb.edu/documents/special-message-the-congress-indian-affairs> (last visited Apr. 27, 2023)).

56. See, e.g., Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

57. *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

58. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978).

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

decide whether the federal “Major Crimes Act of 1885, prevented the State of Maine from exercising jurisdiction over the crime of arson as allegedly committed by two Passamaquoddy Indians on certain land in Maine inhabited by Indians known as the ‘Passamaquoddy Tribe.’”⁶⁰ Relying on the determination that the land on which the crime occurred was “Indian country,” the Supreme Judicial Court held that Maine’s laws did not apply on the Passamaquoddy reservation.⁶¹

Part of this shift from termination to self-determination constituted a recommitted adherence to the trust responsibility by the U.S. government. The trust relationship between the United States and native nations is not only one of the basic principles of federal Indian law, but one of its cornerstones.⁶² As described by Matthew Fletcher, the trust relationship “obligates and authorizes the federal government to protect tribal and Indian property rights, preserve and enhance tribal self-governance, guarantee law and order in Indian country, and provide government services to Indian people.”⁶³

The negotiations between the Tribes and the State of Maine took place during this transitional policy period when nationally a new commitment to promoting and protecting tribal sovereignty was announced and a recommitment to the trust responsibility was made. Locally, Maine’s highest court handed down a decision which recognized the Tribes’ sovereignty on their lands over that of the State’s,⁶⁴ propelling the State to negotiate an agreement on jurisdiction with the Tribes after several years of stalling on the land claim. The Tribes found themselves straddling the termination and self-determination policy periods, making sure they got land back while not pushing too hard.

C. The Role (and Absence) of the U.S. Department of the Interior During the Land Claim Settlement Process

As the federal agency charged with upholding the Federal trust responsibility to Indian tribes and Native Alaskans, the United States Department of the Interior (DOI or Interior) had been part of the land claim and settlement process in Maine since almost the very beginning. Even before the Passamaquoddy Tribe filed suit against the Secretary of the Interior in June 1972 seeking a declaratory judgment that DOI must file an action against Maine under the Non-Intercourse Act, letters were sent to DOI Secretary Rogers Morton “urging him to take quick action on the Passamaquoddy’s petition.”⁶⁵ After the First Circuit affirmed the lower court’s holding that DOI did in fact have a trust responsibility towards the Passamaquoddy Tribe and therefore must file suit against Maine, DOI lawyers began exploring how to proceed. The Solicitor of the Department of the Interior, Leo Krulitz, was part of the White House’s Task Force from 1977 to 1978 which drafted the Joint Memorandum of Understanding.⁶⁶ Following the Joint Memorandum, DOI

60. *Id.* at 552.

61. *Id.*

62. 1 FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §5.04 ([4])(a) (2019).

63. FLETCHER, *supra* note 54, at 133.

64. *See Dana*, 404 A.2d at 552–53.

65. BRODEUR, *supra* note 20, at 89.

66. *Id.* at 105.

Solicitor Krulitz remained involved trying to solve funding related issues.⁶⁷ DOI was also involved in finalizing the federal settlement act, MICSA, as evidenced by numerous memos and DOI tackling a range of issues such as extinguishment, funding, and jurisdiction.⁶⁸

Of interest, however, is DOI's absence in the negotiations process from November 1979 to March 1980, which is when the negotiations on jurisdiction took place and were finalized with the passage of the MIA. Following a statement by Interior Secretary Cecil Andrus during the Senate hearing about DOI's concerns and questions over the MIA's jurisdictional arrangement, Senator Cohen asked Andrus about the extent of DOI's involvement:

Has not the Department of the Interior, or some of its attorneys, been working in conjunction with either counsel for the tribes or in connection with the State in developing this settlement, or have you been totally excluded? Have you had no role of participating so that we come on this first day of hearings saying these issues have not been dealt with, and that there is a problem as far as treating tribes as municipalities, and it is a problem as far as . . . funds or general revenue sharing which has not been contemplated? What has been the role of [DOI] in this particular settlement?⁶⁹

Secretary Andrus responded that DOI's role "has been very active all the way through except from about late November 1979 till March 1980. There was kind of a little void in communication there."⁷⁰ He suggested that the lack of DOI involvement "probably caused some of these questions to be raised at a later date" but there were "open lines of communication now."⁷¹ Senator Cohen responded by noting that the "brief hiatus . . . introduced an entirely new relationship between the

67. *Id.* at 112.

68. See, e.g., Memorandum from Bob Lipschutz, White House Counsel, to Leo Krulitz, Solic. of Dep't of Interior (July 11, 1979), <http://maineindianclaims.omeka.net/items/show/33> [https://perma.cc/CD9G-YKG6]; Memorandum to Eliot Cutler, White House, Off. of Mgt. & Budget; Douglas Huron, Assoc. Couns. to the President; Edwin Kneeder, Dep't of Just.; & Tim Vollmann, Dep't of Interior, from Kay Oberly, Dep't of Just. (July 18, 1978), <http://maineindianclaims.omeka.net/items/show/35> [https://perma.cc/U2TP-HG3Y]; Letter from Diane Greenberg, Dep't of Interior, to Sen. Edmund Muskie (Sept. 7, 1979) <http://maineindianclaims.omeka.net/items/show/38> [https://perma.cc/99P9-94SW]; Memorandum from Tim Vollmann, Dep't of Interior, to Leo Krulitz, Solic. of Dep't of Interior (July 31, 1979) <http://maineindianclaims.omeka.net/items/show/39> [https://perma.cc/K9JJ-CQGG]; Memorandum from Tim Vollmann, Dep't of Interior, to Thomas Tureen (July 16, 1979), <http://maineindianclaims.omeka.net/items/show/44> [https://perma.cc/TF76-4B7V]; Letter from Andrew Akins, Penobscot-Passamaquoddy Tribal Planning Bd., to Forrest Gerard, Dep't of Interior (Apr. 11, 1978), <http://maineindianclaims.omeka.net/items/show/47> [https://perma.cc/TN97-5YKH]; Memorandum to Suzan Harjo, Cong. Liaison for Indian Affs., from Tim Vollmann, Dep't of Interior (July 7, 1977) (attaching then-current draft of Maine Indian Claims Settlement bill) <http://maineindianclaims.omeka.net/items/show/48> [https://perma.cc/P99D-L5QC]; Memorandum to Eliot Cutler, White House, Off. of Mgt. & Budget; Douglas Huron, Assoc. Couns. to the President; Edwin Kneeder, Dep't of Just.; & Tim Vollmann, Dep't of Interior, from Kay Oberly, Dep't of Just., (July 11, 1978) (with draft of Maine Indian Claims Settlement legislation attached) <http://maineindianclaims.omeka.net/items/show/49> [https://perma.cc/76CR-QCNG].

69. Senate Hearings, *supra* note 2, at 38 (statement of Sen. Cohen).

70. *Id.* (statement of Sec'y Andrus).

71. *Id.*

State and tribes as not recognized in any other State in the country.”⁷² Secretary Andrus replied that he did not think the flaws were fatal and that they would continue to work with the parties to solve them.⁷³

Senator Cohen initiated a similar line of questioning to Maine Attorney General Cohen during the hearing later in the day. The Senator asked, “[W]hy was not the Department of the Interior involved in negotiating those particular sections that established this unique relationship as a municipality?”⁷⁴ Attorney General Cohen responded that when he assumed the Office of the Attorney General of Maine, he was told that, “before Congress got involved and before Washington got involved, . . . the State should go back and do their negotiations and work out all the jurisdictional aspects, and then come back.”⁷⁵ Attorney General Cohen added that he met with Secretary Andrus, and that DOI “certainly knew the negotiations were going on.”⁷⁶ He added that he “never heard anything about Interior wanting to be involved in the development of any particular provisions until this morning.”⁷⁷ Senator Cohen ended the exchange by stating that it would have been helpful if DOI had been involved with regards to the tax code, to which Attorney General Cohen agreed.⁷⁸

It is against this backdrop that the Tribes and the State negotiated their jurisdictional agreement, faced with different types of pressures and threats. And it was during the early years of the self-determination era that Congress and DOI began their work on MICSAs, a federal law which approved the jurisdictional agreement and added a new element to it. It turned out, MICA did not reflect nor meet those new self-determination policy goals.

II. THE HAND-OVER TO CONGRESS

A. The Jurisdictional Relationship: Tribes Are Like a State Municipality Subject to State Law with Carve-Outs for “Internal Tribal Matters”

The “unique” jurisdictional relationship embodied in the Settlements Act has three inter-related elements. First, the MIA treats the Penobscot Nation and Passamaquoddy Tribe like municipalities with the power to enact ordinances and collect taxes, and also subjects them to Maine state law. Second, the MIA recognizes the Tribes’ authority—or according to the State, grants the Tribes authority—over “internal tribal matters,” a never-before-used term to ensure certain areas of tribal jurisdiction are not subject to state jurisdiction. And, finally, MICA prohibits the application of federal laws enacted to benefit tribes to the tribes in Maine. This section of the article focusses on the first two elements.

It is section 6206(1) of the MIA which provides for the municipality status and internal tribal matters:

72. *Id.* (statement of Sen. Cohen).

73. *Id.* at 38–39 (statement of Sec’y Andrus).

74. *Id.* at 171 (statement of Sen. Cohen).

75. *Id.* at 171–72 (statement of Att’y Gen. Cohen).

76. *Id.* at 172.

77. *Id.*

78. *Id.* (statements of Sen. Cohen & Att’y Gen. Cohen).

[T]he Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a *municipality of and subject to the laws of the State*, provided, however, *that internal tribal matters*, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections, [and] the use or disposition of settlement fund income . . . shall not be subject to regulation by the State.⁷⁹

Other sections of the MIA also address the scope of the Tribes' jurisdiction. For example, section 6204—which states that the Tribes are “subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other persons or lands”⁸⁰—and sections 6209-A and -B recognize limited tribal court jurisdiction over criminal and civil matters involving members of the Tribes.⁸¹ But it is section 6206(1) that has been subject to most of the disagreements over interpretation.

B. Disagreement Over Jurisdictional Framework Begins Soon After Its Adoption

Just two years after MICA was enacted, the State of Maine and the Penobscot Nation (Nation) began litigating the meaning of “internal tribal matters” in the first of many cases.⁸² Relying on section 6206(1), the Nation sought to prevent the application of state law on its operation of beano (or bingo) games of chance on its lands.⁸³ The games generated funds for tribal government services, “including snow and rubbish removal on the reservation, police and health services, and home improvement programs.”⁸⁴ In *Penobscot Nation v. Stilphen*, the Penobscot Nation presented its interpretation of this section in court for first time. The Nation argued that by way of section 6206(1), “which gives the tribe authority over ‘internal tribal matters’ free from state regulation, it retains all of the inherent powers that, according to federal law, are recognized as an attribute of an Indian tribe’s historical quasi-sovereignty.”⁸⁵ Essentially, the interpretation of section 6206(1), specifically the internal tribal matters language, must be informed by the principle of inherent tribal sovereignty.

Both the trial court and, on appeal, Maine’s Supreme Judicial Court, rejected this interpretation of the MIA. Instead, they favored the State’s interpretation of the jurisdictional agreement, an interpretation which would be favored repeatedly by the State and the courts over the next four decades. In describing the judicial and legislative history of the recently ratified settlement, the lower court stated,

79. 30 M.R.S. § 6206(1) (2022) (emphasis added).

80. 30 M.R.S. § 6204 (2022).

81. 30 M.R.S. §§ 6209-A, -B (2022).

82. See *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489–90 (Me. 1983).

83. *Id.* at 480. This was before the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), which subsequently would be held not to apply to the Maine tribes under section 16(b) of MICA. Pub. L. No. 96-420 § 16(b), 94 Stat. 1785, 1797 (1980).

84. *Stilphen*, 461 A.2d at 480.

85. *Id.* at 482.

[t]he legislative history of the state and federal legislation codifying the settlement supports the conclusion that the State of Maine and the Congress did not give the Indians the kind of broad power which would support the Plaintiff's contention. During the debate in the Maine Legislature, opponents voiced their fears of creating a "nation within a nation" and of excluding Maine Indians from state jurisdiction. Proponents of the bill assured their colleagues that its passage would not create a divided sovereignty. As one State Representative said, the act "is consistent with this state's essential interest in state sovereignty and equal treatment under Maine law."⁸⁶

On appeal, Maine's highest court went a step further, rejecting the Nation's argument that the principle of tribal sovereignty should inform or define "internal tribal matters":

We conclude, first, that the Nation's inherent sovereign powers would in any event not include the right to run a beano game in violation of state law, and, second, that the federal and state acts have independently defined the sphere within which the tribe can operate free of state regulation, and that beano cannot be considered an "internal tribal matter" within that narrow sphere.⁸⁷

Since *Stilphen*, this section of the MIA has been litigated five more times in Maine's state courts⁸⁸ and three times in federal court.⁸⁹

86. *Penobscot Nation v. Stilphen*, No. CV82-576, 1983 Me. Super. LEXIS 16, at *15–16 (Feb. 4, 1983) (citations omitted).

87. *Stilphen*, 461 A.2d 478 at 482.

88. See *Houlton Band of Maliseet Indians v. Boyce*, 1997 ME 4, 688 A.2d 908; *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, 770 A.2d 574; *Winifred B. French Corp. v. Pleasant Point Passamaquoddy Rsr.*, 2006 ME 53, 896 A.2d 950; *Francis v. Dana - Cummings*, 2008 ME 184, 962 A.2d 944; *Tomer v. Maine Me. Human Hum. Rights Rts. Comm'n*, 2008 ME 190, 962 A.2d 335.

89. See *Penobscot Nation v. Fellecer*, 164 F.3d 706 (1st Cir. 1999); *Passamaquoddy v. Maine*, 75 F.3d 784 (1996); *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). In *Johnson*, the First Circuit was faced with Maine's challenge to the decision of the U.S. Environmental Protection Agency (EPA) to exclude from the state's regulation of discharge permitting, "two tribal-owned facilities located on tribal lands and discharging into navigable waters within the southern tribes' territories." *Johnson*, 498 F.3d at 40. The EPA reasoned that the "discharges from these facilities were 'immaterial' and had no 'substantial effect[] on non-members'" and that the Tribe's "regulation was an 'internal tribal matter' over which the State lacked adequate authority." *Id.* (citing 68 Fed. Reg. 65,052, 65,066 (Nov. 18, 2003)). The First Circuit disagreed with EPA's interpretation of the Settlement Acts. Relying on the municipality status, the Appeals Court stated that

[t]he Settlement Act contains an explicit statement that the [Tribes] are to be treated as municipal corporations. This status . . . is effectively a grant of local police powers. But in Maine (as elsewhere) municipal authority can be overridden by comprehensive state-wide law: home rule authority gives way in areas "preempted by comprehensive state-wide schemes."

Id. at 44 (citations omitted). The court went on to interpret internal tribal matters as not preventing the regulation authority of the State over the Tribes' discharge facilities located on their lands. *Id.* at 44–45. The Tribes, who had intervened in the case, again raised their inherent tribal sovereignty as a block to the State's regulatory authority and argued that internal tribal matters should be interpreted "broadly" to include the regulation of "discharges into navigable waters." *Id.* at 44. The Office of the Attorney General of the State of Maine has also issued several opinions on the topic. The most recent example is a 2013 opinion on whether the State has the authority to regulate Passamaquoddy tribal members'

In 1995, MITSC issued its first report on the Settlement Acts. The report's introduction began, "[d]uring the fourteen years since the settlement, there have been spirited debates about state versus tribal jurisdiction in many areas, including land use regulation, tribal courts, fish and wildlife enforcement, and educational funding, to mention a few."⁹⁰ It explained that in those years since the Settlement Acts were adopted, some clarifying amendments to the MIA were made, but several "difficult questions" remained, many of them about "jurisdiction over tribal lands."⁹¹

The following year, the Task Force of State-Tribal Relations, created by the State's legislature, held a series of hearings in the State and on each of the four native communities, and collected personal reflections on the Settlements Acts.⁹² The Task Force's final report was entitled, "At Loggerheads-The State of Maine and the Wabanaki." Among its findings were:

1. . . . There is fear among tribal members that, through the Settlement Act, the State is trying to assimilate and acculturate the Tribes. Related to this fear are strong feelings about the sovereignty of the Tribes. Sovereignty is the biggest issue affecting the relationship between the State and the Tribes. Conversely, some state officials are concerned that sovereignty is being used to extend geographic and legal authority beyond the terms agreed upon in the Settlement
2. . . . Tribal members generally believe the Settlement has not been effective. Some believe the Settlement should be abolished, while others feel it should be made to work
3. . . . The Tribes and the State have fundamentally different views about the basic intent of the Settlement. The tribal view is "unless we gave it up, we retain it." The State view is "unless we gave it to you, you don't have it." . . .
4. . . . The State tends to view the Settlement as the central defining document for its relationship with the Tribes. The Tribes often cite traditional values, aboriginal rights, Indian common law, and treaties that existed prior to the Settlement as areas shaping their relationship with the State
5. . . . Tribal-state relations are extremely strained.⁹³

saltwater fishing. Op. Me. Att'y Gen., 2013-01. Relying on cases like *Stilphen* and *Johnson*, and the municipality and internal tribal matters language of the Settlement Acts, then-Attorney General Janet Mills, now Governor Mills, concluded that the State does have that authority. *Id.*

90. DIANA SCULLY, *Maine Indian Claims Settlement: Concepts, Context, and Perspectives* 1 (1995).

91. *Id.* at 16.

92. The Task Force of State-Tribal Relations was created by Maine's 117th Legislature. Comm. Amend. A to L.D. 1667, No. H-856 (117th Legis. 1996).

93. TASK FORCE ON TRIBAL-STATE RELATIONS, *AT LOGGERHEADS—THE STATE OF MAINE AND THE WABANAKI* 17–22 (1997) (emphasis added) (hereinafter *AT LOGGERHEADS*). The report includes an analysis of issues discussed at MITSC meetings from 1983 to 1996. *Id.* at 16. Among the most common topics were tribal-initiated state legislation, tribal jurisdiction, and the relationship with the State. *See id.*

C. Signs That the State and Tribes Did Not Have a Shared Understanding of Key Components of the Jurisdictional Agreement That Existed During Congress's Review

It is in part because of this decades-long disagreement over the meaning of “internal tribal matters” that MITSC commissioned the Clinic to conduct the archival research in hopes that it might reveal how Congress understood that term. Unfortunately, the Congressional archives offered little in the way of gaining a better understanding of the term and the jurisdictional agreement generally.⁹⁴ The reason for this may be that the parties and Congress did not see a need for clarification; the agreement had been finalized three months earlier. That said, what the legislative record and archival documents did reveal is that in 1980 there already existed a difference in how each side understood the agreement.⁹⁵ This divergence in the understanding of the jurisdictional agreement raises concerns over whether Congress had an awareness of that lack of shared understanding and whether it and DOI did enough to address it.

As illustrated in the 1983 *Stilphen* case and in the 1997 report from the Task Force on State-Tribal Relations, the difference of interpretation centers on the understanding of tribal sovereignty and its application to the Settlement Acts. Reviewing the many documents authored by the State and reading over the testimony of state officials during the drafting of MICSA, Maine relied almost solely on the language of the municipality status to describe the rights of Tribes and regarded the municipality and internal tribal matters framework as a *grant* of power to the Tribes. Relying on the few documents found from tribal sources, and the few times tribal representatives testified before Congress, the Tribes, on the other hand, spoke of their sovereignty. What follows are examples of this divergence.

1. The State of Maine Regarded the Jurisdictional Agreement as a Grant of Powers to the Tribes

In an August 1980 letter to the Senate Committee, Maine Attorney General Richard Cohen drew a parallel between the “powers, duties and rights” of the Tribes and the authority a municipality was to have over its internal affairs:

In drafting and negotiating the Maine Implementing Act, the Tribes and State agreed that the powers, duties and rights of the Tribes in Maine would be defined by reference to the powers, duties and rights of municipalities in Maine, (See Section 6206(1) of the Maine Implementing Act). Because municipalities are an important and essential unit of government in Maine and, under principles of “home rule” in the Maine Constitution, are accorded significant power of self-

94. The Clinic initially retrieved 2,000 pages (approximately 200 documents) from the various archives as possibly addressing the topics identified by MITSC. See FRIEDERICHs ET AL., *supra* note 21 at 3–4. From those 200 documents, only 97 were found to be on point. *Id.* at 3. Many more hundreds of pages reviewed at the archives dealt exclusively with the land settlement. See *id.*

95. See discussion *infra* Sections II.C.1, II.C.2.

government, this approach was believed to be an important element of the [Maine] Implementing Act.⁹⁶

In another letter, the Maine Attorney General described the agreement in which the Tribes “are *given* certain rights and authority within [their] 300,000 acres of ‘Indian territory.’ To the *extent that these rights and authority exceed that given any Maine municipality*, they do so only to a limited extent and in recognition of traditional Indian activities.”⁹⁷ And, as it related to the State’s sovereignty, the Attorney General added that the MIA “*recovers back for the State* almost all of the jurisdiction over the existing reservations that has been lost as a result of recent Court decisions.”⁹⁸

In his testimony to Congress, Maine Governor Joseph Brennan repeated his predecessor’s ultimatum that never would there be “a nation within a nation in Maine.”⁹⁹ He then added, “[b]y threatening the Indian territories as municipalities, this settlement provides that our Indian citizens would be on a substantially equal footing with their fellow citizens in other towns and cities”¹⁰⁰ This idea of equality between native peoples and Maine citizens was repeated in the Maine Attorney General’s letter to the Senate Committee. Rejecting the suggestion that the MIA provided “Indians with preferential treatment,” the State Attorney General replied, “[t]o the contrary, we believe the [MIA] establishes a measure of equality between Indian and non-Indian citizens normally not existing in other States.”¹⁰¹ Further, at the hearing on the MIA in March 1980, the Maine Attorney General stated, “[t]he legal relationship between the State and the Tribes is unique and may become a model to which other states may look in the future. It is based on the principle that all Maine laws must apply to all land and citizens within the State and that we must live under one system of laws which governs us all.”¹⁰²

2. The Tribes Often Referenced Sovereignty When Discussing the Jurisdictional Agreement

Representatives of the Tribes spoke in different terms, terms that one would expect when addressing the rights of federally recognized Indian tribes and native nations located within the United States. At the Senate hearing, the Chair of the Tribes’ negotiation team spoke about their tribal sovereignty: “Unlike the United States, which regards Indian tribes as possessing all aspects of sovereignty except those which have explicitly been taken from them, the State of Maine has always

96. Letter from Richard Cohen, Me. Att’y Gen., to Sen. John Melcher (Aug. 22, 1980), *reprinted in* AUTHORIZING FUNDS FOR THE SETTLEMENT OF THE INDIAN CLAIMS IN THE STATE OF MAINE, S. REP. NO. 96-957, at 49 (2d Sess. 1980) (emphasis added), http://lldc.mainelegislature.org/Open/Rpts/kf8208_z99m231_1980.pdf [https://perma.cc/EP6T-LVVZ].

97. Letter from Richard Cohen, Me. Att’y Gen., to Sen. John Melcher *reprinted in* Senate Hearing *supra* note 2, at 145, 148 (emphasis added).

98. *Id.* at 149 (emphasis added).

99. Senate Hearings, *supra* note. 2, at 139 (statement of Gov. Joseph Brennan).

100. *Id.*

101. Letter from Richard Cohen, Me. Att’y Gen., to Sen. John Melcher, *supra* note 97, at 149.

102. Statement of Richard Cohen, Me. Att’y Gen., to Me. Joint Select Comm. on Indian Land Claims 14 (Mar. 18, 1980), <https://maineindianclaims.omeka.net/items/show/77> [https://perma.cc/6BPL-SP46].

taken the position that our tribes have no inherent sovereignty and can exercise only those powers of self-government that Maine gives us.”¹⁰³ Equating sovereignty with internal affairs, the Penobscot leader added that “Maine has stopped far short of recognizing our legitimate right to manage our own internal affairs.”¹⁰⁴ Following the Chair’s testimony, other tribal leaders confirmed their support for the MIA and MICA.¹⁰⁵

Where tribal sovereignty was widely discussed was when native peoples, primarily citizens of the Tribes, voiced their concerns or opposition to the jurisdictional agreement. Several Penobscot and Passamaquoddy individuals testified both at the State and Senate hearings, sharing their disagreement with the MIA.¹⁰⁶ Some, as one court did, may regard this opposition as evidence that the Tribes did “give up” their sovereignty.¹⁰⁷ However, as more fully discussed below, a tribe’s acceptance of limitations on its sovereignty does not mean that a tribe’s inherent sovereignty no longer exists. It is possible, even likely, that the tribal representatives understood the internal tribal matters as protecting their sovereignty. Although there are few contemporaneous accounts, there are numerous reports, hearings, interviews, and statements, some by members of the Tribe’s negotiating team, which discuss the agreement in similar terms.¹⁰⁸

It is at this point that introducing what is “[p]erhaps the most basic principle of all Indian law” is necessary to illustrate how the State’s perception of the tribes’ rights conflicts with that foundational principle. The principle is that tribal sovereignty is not a *grant* of powers to tribes from another sovereign; tribal sovereignty is inherent to tribes.¹⁰⁹ “[S]upported by a host of decisions, . . . those powers lawfully vested in an Indian nation are *not, in general, delegated powers granted* by express acts of Congress, but rather ‘inherent powers of a limited

103. Senate Hearings, *supra* note 2, at 175 (statement of Andrew Akins).

104. *Id.*

105. *See, e.g., id.* at 176–78. Terry Polchies, representing the Houlton Band of Maliseet Indians and speaking at the hearing, seemed to indicate that the Band’s authority over “internal tribal affairs” included authority over child welfare, especially in relationship to the Indian Child Welfare Act. *See id.* at 442.

106. *See, e.g.,* Senate Hearings, *supra* note 2, at page 419 (statement of Julia Coti) (“I don’t want to see my people lose their sovereign rights.”); Memorandum of Robert T. Coulter, Indian L. Res. Ctr. (Mar. 13, 1980) <https://maineindianclaims.omeka.net/items/show/75> [<https://perma.cc/N5CQ-G7QY>]; *Report, Hearing Transcript and Related Memoranda of the Joint Select Committee on Indian Land Claims: L.D. 2037 Before Joint Comm. on Indian Land Claims*, 109th Legis., 2d Reg. Sess. 73–74 (Me. 1980) (statement of Sam Sapiel) http://lldc.mainelegislature.org/Open/LegRec/109/Joint/LegRec109vY80_11_Appendix_IndianLandClaims_Pt1.pdf [<https://perma.cc/R5EQ-WENB>].

107. *See* Great N. Paper, Inc. v. Penobscot Nation, 2001 ME 68, ¶ 36, 770 A.2d 574.

108. *See, e.g.,* Girouard, *supra* note 20, at 63 (tribal negotiators discussing the municipality concept); ME. INDIAN TRIBAL-STATE COMM., FINAL REPORT OF THE TRIBAL-STATE WORK GROUP 7 (2008) (“Butch Phillips [a member of the Penobscot Nation negotiating team] stated at the August 20, 2007 meeting that the Tribes sought the protections afforded under the internal tribal matters language so they could protect the activities most important to an Indian. He explained that the Tribes wanted to avoid anyone ever again telling them what to do on their lands. In the most basic sense, the much disputed and litigated term ‘internal tribal matters’ which appears in § 6206 of MIA was intended to protect the Tribes from outside interference in how they wish to live.”); AT LOGGERHEADS, *supra* note 93, page at 21 (“[W]e are first and foremost a Tribe.”).

109. *See, e.g.,* COHEN, *supra* note 34, § 4.01[1][a].

sovereignty which has never been extinguished.”¹¹⁰ The State’s characterization of the jurisdictional agreement as a grant of authority to the Tribes is simply not legally correct.

Tribal sovereignty is also about independence from other sovereigns, including from the states. Tribes and their citizens do not generally see themselves as part of a state. The U.S. trust responsibility, referred to as a “measured separatism,” by Professor Charles Wilkinson, includes the “protection for individual Indians and tribal governments from interference by state and local governments, and provide private persons and entities as well.”¹¹¹ From one of its very first cases addressing the rights of native nations, the Supreme Court described tribes as “distinct political communities.”¹¹² Drawing again on *Wheeler*, tribes, “[a]lthough physically within the territory of the United States and subject to ultimate federal control, . . . nonetheless remain ‘a separate people, with the power of regulating their internal and social relations.’”¹¹³ The State of Maine’s reliance on equality as a reason for the MIA’s jurisdictional agreement harks back (not very far) to the termination policy period when assimilation of native nations and peoples was a goal.¹¹⁴

3. The Federal Government’s Response to the Jurisdictional Agreement

The reception by Congress and the Department of Interior to the agreement was generally positive with a few initial reservations expressed. Recall that although DOI was very involved in the land portion of the settlement, it was not part of the Tribal-State negotiations on jurisdiction. DOI reviewed the agreement well after both sides voted on it. The first available assessment of the jurisdictional agreement by DOI is Secretary Andrus’s testimony at the hearing on July 1, 1980.¹¹⁵ He referred to the jurisdictional relationship between the State and the Tribes as “novel,”¹¹⁶ but then later stated that “the respective authority of the State and tribes would not be radically different from the jurisdictional relationship which exists among other States and tribes.”¹¹⁷ Interior Secretary Andrus also expressed concerns about the agreement, saying that: DOI’s “foremost concern . . . is the lack of clarity in defining the role of the Federal Government as trustee to the tribes.”¹¹⁸ He explained that “the relationship in this settlement proposal is not always clear” and suggested “reworking of the relevant language” and “spell[ing] out [the jurisdictional relationships] in the Federal legislation.”¹¹⁹

110. *Id.* (emphasis added) (citing to *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978)).

111. FLETCHER, *supra* note 54, at 134 (citing CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987)).

112. *Worcester v. Georgia*, 31 U.S. (1 Pet.) 515, 557 (1832).

113. *Wheeler*, 435 U.S. at 322 (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)).

114. See COHEN, *supra* note 62, § 1.06 (2019) (identifying assimilation as one of the goals of the U.S. policy of termination of tribes).

115. Senate Hearings, *supra* note 2, at 37–38.

116. *Id.* at 37.

117. *Id.*

118. *Id.*

119. *Id.* DOI Secretary Andrus understood that other exceptions to State jurisdiction would include the “use of settlement fund income, certain tribal ordinances concerning hunting and fishing, and

Beyond limiting the application of federal laws to the Tribes, as discussed in Part III, it does not appear that DOI or Congress further defined the role of the federal government. Only one amendment implicating the MIA's jurisdictional agreement was made to the original draft of the federal bill. During the hearing, Secretary Andrus explained that "Maine municipalities derive their powers from their individual charters, [and] the two tribes have no constitutions or charters, or even a traditional governmental structure"¹²⁰ In an effort to "clarify the jurisdictional relationships,"¹²¹ DOI suggested that the federal legislation "be amended to provide for the development of tribal constitutions."¹²² An amendment was eventually added to the federal bill providing for the creation of tribal constitutions.¹²³ Section 7 of the federal legislation provided that

[t]he Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument must be consistent with the terms of this Act and the Maine Implementing Act.¹²⁴

The State accepted the amendment, though believed it was not necessary.¹²⁵

The Department of the Interior devoted more time to an issue unrelated to jurisdiction, namely, the impact on federal funding, which also triggered the MIA's municipality status. Given that the Tribes may be eligible for state funds as municipalities, Interior and Congress were concerned on about impacts to federal funding, which the Tribes would be eligible for as federally recognized tribes.¹²⁶ This problem was addressed in numerous letters and meetings,¹²⁷ and eventually was resolved without any substantial amendments to the federal bill.¹²⁸

jurisdiction over minor crimes by Indians, Indian child custody proceedings, and domestic relations matters of tribal members." *Id.*

120. *Id.* at 38.

121. *Id.*

122. *Id.*

123. See Letter from Ralph Reeser, Dep't of Interior, to Sen. John Melcher (July 17, 1980) <https://maineindianclaims.omeka.net/items/show/70> [<https://perma.cc/SLY3-8CXB>]; Draft of the Maine Indian Claims Settlement Act Bill (July 21, 1980) <https://maineindianclaims.omeka.net/items/show/50> [<https://perma.cc/P38S-K3LR>].

124. 25 U.S.C. 1726(a).

125. Letter from Richard Cohen, Me. Att'y Gen., to Cecil Andrus, Sec'y of Interior 7-8 (July 21, 1980) <https://maineindianclaims.omeka.net/items/show/30> [<https://perma.cc/YLA8-XTSP>].

126. See, e.g., Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 25. In an August 22, 1980, congressional memorandum, employees for the Bureau of Indian Affairs (a subdivision of DOI) explained that "[t]he jurisdictional provisions of the [MIA] and the bill are still in disagreement." Memorandum to the House Comm. on Interior & Insular Affs. from Frank Ducheneaux, Special Couns. for Indian Affs., & Michael Jackson, Minority Consultant for Indian Affs. (Aug. 22, 1980) <https://maineindianclaims.omeka.net/items/show/10> [<https://perma.cc/U44S-3W98>].

127. See, e.g., Letter to Sen. John Melcher, from Thomas Tureen, *supra* note 47, at 1-3; Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 25; Senate Hearings, *supra* note 2, at 132-33.

128. See AUTHORIZING FUNDS FOR THE SETTLEMENT OF THE INDIAN CLAIMS IN THE STATE OF MAINE, S. REP. NO. 96-957, at 40-44 (2d Sess. 1980) http://lldc.mainelegislature.org/Open/Rpts/kf8208_z99m231_1980.pdf [<https://perma.cc/8SPR-W9QE>].

In the archival documents and MICSA's legislative history, there are examples of Congress and the Department of the Interior echoing both the State's and the Tribes' understandings of the jurisdictional agreement. In response to a question about whether the MIA constitutes a destruction of the Tribes' sovereign rights, a senate report stated, "[i]n view of the 'homerule' powers of municipalities in Maine, this also constitutes a significant *grant of power to the Tribes*."¹²⁹ Recall how Maine regarded the MIA: the Tribes "are *given* certain rights and authority within [their] 300,000 acres of 'Indian territory.' To the *extent that these rights and authority exceed that given any Maine municipality*, they do so only to a limited extent and in recognition of traditional Indian activities."¹³⁰

Later, however, the same senate report recognized that the municipality status accorded to the Tribes was "for funding purposes,"¹³¹ which reflected how the tribal negotiators understood the adoption of the municipality framework.¹³² As part of the same answer to the question about whether the MIA constitutes a destruction of the Tribes' sovereign rights, the report stated that "rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, *the settlement strengthens the sovereignty of the Maine Tribes*."¹³³ This characterization by Congress is reminiscent of how the Tribes viewed the MIA, recognizing their sovereign authority over internal affairs.¹³⁴ The House Report on the bill repeated much of this same language, sometimes word-for-word.¹³⁵

Congress did little to address the different understandings of the jurisdictional agreement by the State and the Tribes. In fact, it seems Congress may have reinforced the divergence. It might be possible that Congress and the Department of the Interior did not notice the difference in how the State and the Tribes spoke about the agreement. But as the next section introduces, what it is clear is that Congress understood what the State truly sought to accomplish with the jurisdictional agreement; namely, that the principle of tribal sovereignty would have no place in Maine, and that the State would continue to assert its own sovereign authority over the Tribes' lands and waters, while "granting" minimal powers to the Tribes.

129. *Id.* at 15 (emphasis added).

130. Senate Hearings, *supra* note 2, at 148 (emphasis added).

131. AUTHORIZING FUNDS FOR THE SETTLEMENT OF THE INDIAN CLAIMS IN THE STATE OF MAINE, S. REP. NO. 96-957, at 44 (2d Sess. 1980), http://lldc.mainelegislature.org/Open/Rpts/kf8208_z99m231_1980.pdf [<https://perma.cc/M59G-RLEE>].

132. Girouard, *supra* note 20, at 63.

133. AUTHORIZING FUNDS FOR THE SETTLEMENT OF THE INDIAN CLAIMS IN THE STATE OF MAINE, S. REP. NO. 96-957, at 14 (2d Sess. 1980) (emphasis added), http://lldc.mainelegislature.org/Open/Rpts/kf8208_z99m231_1980.pdf [<https://perma.cc/PEJ7-DFPL>]. The Tribes have repeatedly relied upon this statement when litigating the meaning of the Settlement Acts in court—they rely on it for support when arguing that the principle of inherent tribal sovereignty should inform how the Settlement Acts are interpreted. *See, e.g.,* Maine v. Johnson, 498 F.3d 37, 42 (1st Cir. 2007).

134. Senate Hearings, *supra* note 2, at 175 (statement of Andrew Akins).

135. *See, e.g.,* H.R. REP. NO. 96-1353, at 15 (1980).

4. Congress Understood That Maine's Reason for the Municipality Concept Was to Ensure That the Tribes "Did Not Take on the Substantial Attributes of Sovereignty"

One of the most surprising archival documents found was an August 28, 1980, memorandum to Senator Cohen drafted by his staff attorney, who was working on the bill.¹³⁶ The context of the memorandum was the funding issue related to the municipality standard raised by DOI. It stated,

The municipality concept was adopted because it was believed to be the *best device to ensure that the tribes remained under Maine law and did not take on the substantial attributes of sovereignty* which characterize many of the tribes in the West. The municipality construct was also seen as the best way of tieing [sic] *the tribes irrevocably to Maine law*: a body of law with a substantial history of case law behind it. By endowing the tribes with the characteristics of municipalities, *the State believed* it was avoiding the creation of a "nation within a nation" which [former Maine] Governor Longley had so vigorously decried.¹³⁷

This description is very similar to one made on March 20, 1980, found in another memorandum from the staff attorney to Senator Cohen with an attached copy of the pending bill which would become the MIA.¹³⁸ The memorandum noted, "*Maine has done very well in ensuring continued jurisdiction over the land.*" The Tribes are vested with 'municipality' status in administering these lands with all the rights and obligations that status holds for more conventional municipalities."¹³⁹

These accounts of the State's intentions and goals are alarming. They describe that in 1980, the State did not want tribal sovereignty to serve as the foundation of the Tribes' authority. Instead, the goal was to use the municipality concept to ensure that the Tribes were "irrevocably [tied] to Maine law,"¹⁴⁰ and that Maine would assert "continued jurisdiction over the land."¹⁴¹ If these accounts accurately describe the State's goals for and understanding of the MIA, why did state officials think they could or should treat the tribes in Maine differently from other tribes? Did state officials believe that the Penobscot Nation, Passamaquoddy Tribe at Sipayik and at Indian Township, Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs are so different from other tribes that the full scope and breadth of their inherent tribal sovereignty under federal Indian law should not be recognized? The answers to these questions are beyond the scope of this Article but are asked because their likely answers are also part of why the Settlements Acts need to be amended.

These accounts of why the municipality standard was adopted clearly contrast with how the Tribes interpreted the agreement. The Tribes maintained that the municipality framework was adopted to "ensure that tribal governments would be

136. Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 25.

137. *Id.* (emphasis added).

138. Memorandum to Sen. William S. Cohen from Timothy Woodcock (Mar. 20, 1980) <https://maineindianclaims.omeka.net/items/show/73> [<https://perma.cc/W6DU-9G6F>].

139. *Id.* (emphasis added).

140. Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 25.

141. Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 138.

‘eligible for funding for schools and road maintenance and other funding that might come up,’ and not “that the [T]ribes [would] become a sub-political entity of the State of Maine.”¹⁴² As one tribal negotiator stated, “We did not agree to become a municipality. We did not give up our nationhood.”¹⁴³ Putting aside the stark difference between how the State and the Tribes understood this aspect of the jurisdictional agreement, there is another important question to consider: if Congress was aware of the State’s goals or understood the State’s interpretation as articulated in the two memoranda, why did Congress not do more to protect the Tribes’ sovereignty? And, by not protecting the Tribes’ sovereignty, did Congress and the Department of the Interior breach their trust relationship with the Tribes?

D. The Reasons Why Federal Indian Law Principles Exist Are the Reasons Why They Must be Used to Interpret the Settlement Acts

1. In Spite of the Indian Canons of Construction, the State’s Interpretation of the Settlement Acts Has Been Favored

The divergence in interpretations of the Settlement Acts by the State and the Tribes supports the use of the Indian law canons of construction. It also highlights why the canons were established by the Supreme Court in the first place.¹⁴⁴ The canons are to be used when interpreting treaties, agreements, statutes, and executive orders.¹⁴⁵ As applied specifically to legislation, the canons of statutory construction provide the following rules of interpretation: (i) statutes are to be liberally construed in favor of the Indians and (ii) ambiguities are to be resolved in favor of the Indians.¹⁴⁶ If one were to treat the MIA and MICA as an agreement, like a treaty, they should be “be construed as the Indians would have understood them.”¹⁴⁷ The reason for the canons is found in the relationship between the United States and native nations; it is to “mediate the problems presented by the nonconsensual inclusion of Indian nations into the United States.”¹⁴⁸

The courts that have reviewed the Settlement Acts have almost always refused to adopt the canons of construction; they conclude that either the canons do not apply because the Settlement Acts are not treaties or because the text and the legislative history are not ambiguous.¹⁴⁹ The most recent example is *Penobscot Nation v. Frey*. The issue before the First Circuit in *Frey* was whether the Penobscot Indian Reservation included the surrounding waters and submerged lands constituting the riverbed of the main stem of the Penobscot River.¹⁵⁰ Relying on the Settlement Acts, the appeals court concluded that the waters did

142. Girouard, *supra* note 20, at 63.

143. *Id.* at 65.

144. COHEN, *supra* note 62, § 2.02[2]; FLETCHER, *supra* note 54, at 156–57.

145. See COHEN, *supra* note 62, § 2.02[1].

146. COHEN, *supra* note 62, § 2.02[1].

147. See *id.*

148. *Id.* § 2.02[2] (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393–417 (1993)).

149. See, e.g., *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

150. *Penobscot Nation v. Frey*, 3 F.4th 484, 487 (1st Cir. 2021).

not.¹⁵¹ The Nation argued that canons must be used when interpreting the Settlement Acts.¹⁵² The First Circuit rejected this argument, holding that the agreement is not a “treaty.”¹⁵³

Even assuming for a moment that the MIA and MICSA are not agreements (which seems unlikely given that the parties negotiated a settlement to a land claim and agreed to specific terms regarding land, natural resources, and jurisdiction, much like in earlier treaties), the other canons come into play. On its face, the text of section 6206(1) is not clear. That is supported by the fact that the tribal, state, and federal governments did not share an understanding of what “internal tribal affairs” encompassed at the time of enactment. Section 6206(1) includes a list of areas over which the Tribes have authority: “membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income”¹⁵⁴ Under the statute those areas “shall not be subject to regulation by the state.”¹⁵⁵ The State and the Tribes interpret the meaning of this section quite differently, especially when including the issue of the municipality status in the mix.

When faced with interpreting section 6206(1), reviewing courts usually resort to describing the context of the land claim and the concessions that were made to support their interpretations. Recall how the trial court in *Stilphen* described the land claim:

During the debate in the Maine Legislature, opponents voiced their fears of creating a “nation within a nation” and of excluding Maine Indians from state jurisdiction. Proponents of the bill assured their colleagues that its passage would not create a divided sovereignty. As one State Representative said, the act “is consistent with this state’s essential interest in state sovereignty and equal treatment under Maine law.”¹⁵⁶

Viewing the settlement in this manner allowed the court to conclude that operating a bingo game to raise funds for government services was not an “internal tribal matter.”¹⁵⁷

As highlighted above, that is just one way of looking at the agreement and the larger context. From the Tribes’ perspective, their sovereignty remains intact. Their intention was not to become a municipality of the State nor to be treated equally like other municipalities. They saw themselves as separate sovereign entities, seeking to exercise their self-determination and serve their peoples. The

151. *Id.* at 488.

152. *Id.* at 502.

153. *Id.* at 503.

154. 30 M.R.S. § 6206(1).

155. *Id.*

156. *Penobscot Nation v. Stilphen*, No. CV82-576, 1983 Me. Super. LEXIS 16, at *15–16 (Feb. 4, 1983) (citations omitted). Compare *id.*, with *Penobscot Nation v. Fellencer*, 164 F.3d 706, 707–08 (1st Cir. 1999) (explaining that, “[a]s the language of the Implementing Act and the federal legislative history make clear, the critical phrase to analyze in determining the scope of tribal sovereignty is ‘internal tribal matters,’” and holding that the nation’s employment termination decision was an “internal tribal matter”).

157. *Stilphen*, 1983 Me. Super. LEXIS 16, at *23.

compromise that was made was to limit the breadth of their sovereignty to more internal matters in exchange for rebuilding their land base, their nation, and their economies. From this position, the Tribes retain their sovereignty. It is not too far of a stretch to argue that raising funds for government services to be provided on the reservation to tribal citizens is an internal tribal matter.

As evidenced by the multiple case filings, testimonies at state and federal hearings, and public statements, this is how the Tribes continue to view the MIA and interpret section 6206(1).¹⁵⁸ Relying on the canons, not only must the ambiguity found in section 6206(1) be resolved in favor of the Tribes, that section of the MIA must also be liberally construed in their favor.

2. Congress and the Department of the Interior's Trust Responsibility Toward the Tribes

The trust relationship between tribes and the federal government has evolved over time. The origins of the relationship are found in the early Cherokee cases which regarded tribes as wards and the United States as their guardian and protectorate.¹⁵⁹ Today's "modern understanding" requires, the United States to "protect," "preserve," "and enhance tribal self-governance," among other things.¹⁶⁰ In this era of self-determination, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."¹⁶¹ Although MICSA did not have such a statement (the only times the trust relationship was mentioned was in relation to payments and how the federal government did not meet its responsibilities prior to the land claim), the courts addressing the Tribes' land claims in the 1970s acknowledged the existence of such a relationship.¹⁶²

Professor Matthew Fletcher synthesizes well the scope of the United States' "duty to preserve tribal self-governance and autonomy;"¹⁶³ the "most critical aspect" of the United States' obligations under the trust relationship is to protect tribes from "interference by state and local governments."¹⁶⁴ The Supreme Court's decision in *Worcester v. Georgia* is a leading example of this aspect of the trust responsibility.¹⁶⁵ In *Worcester*, the State of Georgia had passed a series of state laws which it sought to impose on the Cherokee Nation.¹⁶⁶ In this seminal decision, the Supreme Court held that Georgia did not have the authority to impose its laws within Cherokee lands:

158. See, e.g., Complaint Injunctive Relief Requested, *Penobscot Nation v. Schneider*, No. 12CV00254, 2012 WL 3643187 (D. Me. Aug. 20, 2012).

159. See, e.g., Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1215–23 (1975).

160. FLETCHER, *supra* note 54, at 133; see also Chambers, *supra* note 159, at 1242–46.

161. COHEN, *supra* note 62, § 5.04.

162. See *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 373 (1st Cir. 1975).

163. FLETCHER, *supra* note 54, at 134.

164. *Id.*

165. *Worcester v. Georgia*, 31 U.S. (1 Pet.) 515, 530 (1832).

166. *Id.*

The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.¹⁶⁷

In addition to protection from state government, the federal responsibility to preserve tribal self-governance includes the “necessary corollary . . . to safeguard and support tribal governments.”¹⁶⁸

As applied to the Tribes in 1980, Maine’s congressional delegation understood how the State interpreted the MIA and what its goals were.¹⁶⁹ With a few limited exceptions, Maine sought to essentially maintain the status quo and assert its authority over the Tribes.¹⁷⁰ Through the language it used to describe the jurisdictional agreement, it was also clear that the State did not fully appreciate or understand, or did not want to, the scope of inherent tribal sovereignty or did not want to as it related to the tribes in Maine.¹⁷¹ And although Congress and DOI expressed some concerns over the agreement, or anticipated concerns from fellow Senate Committee members, both did very little to protect the Tribes’ rights to self-governance and autonomy.¹⁷² When examining their actions against the United States’ trust responsibility towards the Tribes, arguably the United States did not meet that responsibility when enacting MICSA.

So, what could have been done differently? Though appreciating the complexity of the situation, Congress could have declined to condition its acceptance of the brokered land settlement on a prior agreement with the State. If this was not politically feasible, DOI could have been involved in the negotiations of the jurisdiction agreement to more substantially protect the Tribes’ sovereignty. Even if the same jurisdictional agreement was presented to Congress, Congress and DOI could have taken steps to provide greater clarity on the meaning of section 6206(1) by devoting more time to it during the hearings and more clearly articulating that its’ interpretation must be grounded in the Tribe’s sovereignty pursuant to federal Indian law’s foundational principle of inherent tribal sovereignty. And, jumping ahead to the next section discussing MICSA’s non-application of federal laws to the Tribes, Congress could have objected to the inclusion of 1725(h) and not inserted section 1735(b) just before it voted on the bill. If Congress had taken any of these actions, it would have represented an effort

167. *Id.* at 520.

168. FLETCHER, *supra* note 54, at 134.

169. Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 25.

170. See *supra* Section II.C.1 (describing the State’s understanding of the jurisdictional agreement); AUTHORIZING FUNDS FOR THE SETTLEMENT OF THE INDIAN CLAIMS IN THE STATE OF MAINE, S. REP. NO. 96-957, at 14–15 (2d Sess. 1980), http://lfdc.mainelegislature.org/Open/Rpts/kf8208_z99m231_1980.pdf [<https://perma.cc/43ZN-UXYR>] (describing some of the rights retained by the Tribes); Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 25 (articulating that the State’s goal was to “ensure that the tribes remained under Maine law and did not take on the substantial attributes of sovereignty”).

171. See *supra* Section II.C.1.

172. See *supra* Section II.C.3.

to protect, preserve, and enhance the Tribes' self-governance under the federal trust responsibility.

III. CONGRESS ADDS ADDITIONAL FEATURE TO JURISDICTIONAL AGREEMENT: THE NON-APPLICATION OF FEDERAL LAWS TO THE TRIBES

A. Looking Back and Looking Ahead: Federal Laws Benefiting Indian Tribes Do Not Apply in Maine

The third aspect of the unique jurisdictional arrangement is not in the State Implementing Act, but was added during the drafting and passage of the federal Maine Indian Claims Settlement Act. This third feature limits the application of federal laws to each of the tribes in Maine,¹⁷³ and has resulted in stagnant economic growth for the tribes in Maine when compared to other Indian tribes nationally.¹⁷⁴ Sections 1725(h) and 1735(b) of MICSA created a framework for determining when federal law applies to the Tribes and when it will not. Section 1725(h) provides that federal laws existing in 1980 which accord special status to the Tribes and affect or preempt Maine state laws do not apply to the Tribes.¹⁷⁵ Using very similar preemption language, section 1735(b) ensures that federal laws adopted after MICSA may also not apply, unless Congress explicitly named the Tribes when adopting a new bill benefiting Indian tribes.¹⁷⁶

When MITSC commissioned Suffolk's Human Rights and Indigenous Peoples Clinic to conduct the archival research in 2016, it included both of these sections in the scope of work because of their far-reaching impact not only the Penobscot and Passamaquoddy tribes, but also the Maliseets and Miqmaq Nations (collectively "the Wabanaki Nations"). All four native nations are subject to these sections in MICSA.¹⁷⁷ The far-reaching impact of these sections is described in greater detail below, but one example of a federal law not applicable in Maine under section 1735(b) is the Indian Gaming Regulatory Act of 1988.¹⁷⁸ In a challenge brought by the Passamaquoddy Tribe at against the State of Maine, the First Circuit concluded that the Indian Gaming Regulatory Act did not apply in Maine.¹⁷⁹ The Court again drew on a characterization of the settlement in ways that favor that of the State:

[T]he Settlement Act rid the State of all Indian land claims and submitted the [Tribes] and their tribal lands to the State's jurisdiction. In addition, section [1735](b) . . . gave the State a measure of security against future federal incursions upon these hard-won gains. . . . The Tribe received fair consideration for its agreement: the Settlement Act confirmed its title to designated reservation lands,

173. See 25 U.S.C. §§ 1725(h), 1735(b).

174. JOSEPH P. KALT ET AL., THE HARVARD PROJECT ON AM. INDIAN ECON. DEV, ECONOMIC AND SOCIAL IMPACTS OF RESTRICTIONS ON THE APPLICABILITY OF FEDERAL INDIAN POLICIES TO THE WABANAKI NATIONS IN MAINE (2022).

175. 25 U.S.C. § 1725(h).

176. 25 U.S.C. § 1735(b).

177. See 25 U.S.C. §§ 1725(h), 1735(b). Both sections limit the application of federal law benefiting Indian tribes in "the State of Maine." *Id.*

178. See generally Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721.

179. Passamaquoddy Tribe v. Maine, 75 F.3d 784, 789 (1st Cir. 1996).

memorialized federal recognition of its tribal status, and opened the floodgate for the influx of millions of dollars in federal subsidies.¹⁸⁰

The Indian Gaming Regulatory Act is one of approximately 150 federal laws which benefit Indian tribes that has no application in Maine.¹⁸¹

1. Looking Back: Section 1725(h)

The final iteration of section 1725(h) provides in full:

Except as otherwise provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.¹⁸²

Unlike section 1735(b), a version of section 1725(h) was part of the original draft of MICA, first appearing as section 6(g) and then later as section 6(h).¹⁸³ The original version of this section provided for a prohibition of all federal laws in Maine benefiting Indian tribes, except that the Tribes and the Houlton Band would be eligible for federal financial benefits like other tribes in the United States.¹⁸⁴ In June 1980, the White House noted “major uncertainty [of] which [federal] laws . . . apply to Maine” and about whether the three tribes would be able to administer federal programs if the Indian Self-Determination Act didn’t apply.¹⁸⁵ In July 1980 at the Senate hearing, Interior Secretary Andrus noted that the original provision “would have made inapplicable every provision of federal law codified in title 25,

180. *Id.* at 787 (citations omitted).

181. SUFFOLK UNIV. L. SCH., HUM. RTS. & INDIGENOUS PEOPLES CLINIC, FEDERAL LAWS ENACTED AFTER OCTOBER 10, 1980 FOR THE BENEFIT OF INDIANS OR INDIAN NATIONS 2 (2019) <https://legislature.maine.gov/doc/3616> [<https://perma.cc/UJL9-CKYM>].

182. 25 U.S.C. § 1725(h).

183. See Letter from James A. Joseph, Acting Sec’y of Interior, to Sen. Morris K. Udall (Aug. 25, 1980) in Transcript of Markup Session for Maine Indian Claims Settlement Bill H.R. 7919 (Sept. 17, 1980) <http://maineindianclaims.omeka.net/items/show/24> [<https://perma.cc/75SZ-9CRN>].

184. Senate Hearings, *supra* note 2, at 20. The text of the original section provided,

Except as provided in this Act, the laws of the United States which relate or accord special status or right to Indians, Indian nations, tribes, and bands of Indians, Indian Lands, Indian reservations, Indian country, Indian territory, or lands held in trust for Indians, shall not apply within the State of Maine: *Provided, however,* That [the Tribes] and the Houlton Band . . . shall be eligible to receive all the financial benefits which the United States provides to [tribes].

Id.

185. Issues Involving the Proposed “Maine Indian Claims Settlement Act of 1980” (June 9, 1980) in Memorandum from James Case 4 (June 13, 1980) <https://maineindianclaims.omeka.net/items/show/6> [<https://perma.cc/4QRZ-S863>].

except financial benefits.”¹⁸⁶ And again in August, referring back to an earlier version of the section, DOI noted, “[w]e found this provision troublesome and confusing in that Federal financial benefits to Indian tribes would be divorced from general Federal statutes applicable to Indians.”¹⁸⁷

In an attempt to clarify the section, DOI suggested enumerating which laws would be excluded from applying.¹⁸⁸ In an undated document entitled “Proposed Changes to S.2829,” a draft of the bill included a list of federal laws that would be excluded from application to the Tribes of Maine. Among the federal laws to be excluded in Maine were the power to appoint traders with Indians; two sections of the Clean Air Act; Historic Preservation; section 8(d) of the Drinking Water Act, which addresses Indian water rights; and the section of the Insecticide, Fungicide, and Rodenticide Act authorizing the EPA to enter into cooperative agreements with Indian tribes.¹⁸⁹

Many of the laws in this proposed enumerated list by the Department of the Interior were federal environmental laws. This concentration on environmental laws reflected how section 1725(h) was discussed in the Senate Hearing. During the hearing, Senator Cohen asked DOI Attorney Tim Vollmann whether the section “provides the tribes with sufficient protection.”¹⁹⁰ Recall that the original version of this section, which was before the Senate during the time of the hearing, provided for a blanket prohibition in Maine of all federal laws benefiting tribes.¹⁹¹ Mr. Vollmann responded that DOI had discussed the section with the State and the Tribes, and that the Department was “troubled by the language.”¹⁹² He went on to identify the purpose of the section, “to which all parties agree[d]:” to prevent the application of “certain environmental statutes . . . ; for example, those that would give tribes enforcement authority that would affect non-Indians in Maine.”¹⁹³ Mr. Vollmann ended by stating that he was “sure that [DOI could] work with the State and the tribes to work out language that would be satisfactorily clear and not give rise to future litigation.”¹⁹⁴

The Tribes’ attorney was also questioned about section 1725(h) during the July hearing, and more broadly about the “general body of Federal Indian law.”¹⁹⁵ The attorney did not address section 1725(h) directly, and but instead commented on the general body of Federal Indian law. He explained that “the general body of

186. Senate Hearings, *supra* note 2, at 135.

187. Letter from James A. Joseph, Acting Sec’y of Interior, to Sen. Morris K. Udall, *supra* note 183.

188. See Letter from Reid Peyton Chambers to Cecil Andrus, Sec’y of Interior 4 (July 15, 1980) <https://maineindianclaims.omeka.net/items/show/64> [<https://perma.cc/YQ3M-M8F4>]. The Houlton Band of Maliseet Indians “strongly” preferred the DOI approach that specific federal provisions be excluded, rather than a blanket exclusion. *Id.*

189. See Proposed Changes in S. 2829, at 9 (undated) <https://maineindianclaims.omeka.net/items/show/98> [<https://perma.cc/469V-UJGF>].

190. Senate Hearings, *supra* note 2, at 47 (statement of Sen. Cohen).

191. *Id.* at 20 (proposed text).

192. *Id.* at 47 (statement of Tim Vollmann).

193. *Id.*

194. *Id.*

195. *Id.* at 181 (statement of Tom Tureen).

Federal Indian is excluded in part because that was the position the State held to in the negotiations.”¹⁹⁶ Although, the Tribes’ attorney added,

[t]he tribes were concerned about basic Federal protections which they had not had before the recent round of court cases. So it is also true that the tribes are concerned about the problems that existed in the West because of the pervasive interference and involvement of the Federal Government in the internal tribal matters.¹⁹⁷

It seems, however, that in the following weeks the suggestion of listing the specific federal laws that would not apply in Maine was not adopted. According to an August 25, 1980 letter from DOI to Chairman Udall, DOI and the State and Tribes reached an agreement on the language which was close to the final iteration of section 1725(h). In that letter, DOI listed examples of which federal laws would not apply: “among others, . . . the Indian trader statutes and the provision of the Clean Air Act Amendments of 1977 which permits Indian tribes to designate air quality standards.”¹⁹⁸ These are two of the five laws enumerated earlier in the proposed list. The Clean Air Act was also the example used in the Senate Report to exemplify which federal laws would not apply in Maine “because otherwise [it] would interfere with State air quality laws.”¹⁹⁹

Although, the apparent and initial impetus for including section 1725(h) in MICSA was to ensure that federal *environmental* laws, which would give the Wabanaki Nations enforcement authority over non-Indians, would not apply, the final version of the section broadened its scope. The Department of the Interior’s suggestion to enumerate the federal laws that would not apply was rejected or abandoned for reasons unknown. In the end, the full breadth of federal laws benefiting native nations was severely limited in Maine.

2. Looking Ahead: Section 1735(b)

Section 1735(b), sometimes referenced as section 16(b) in accordance with the session law, provides even stronger language in terms of rejecting the application of federal laws:

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision

196. *Id.*

197. *Id.* at 182.

198. Letter from James A. Joseph, Acting Sec’y of Interior, to Sen. Morris K. Udall *supra* note 183 (citations omitted).

199. AUTHORIZING FUNDS FOR THE SETTLEMENT OF THE INDIAN CLAIMS IN THE STATE OF MAINE, S. REP. NO. 96-957, at 31 (2d Sess. 1980), http://lldc.mainelegislature.org/Open/Rpts/kf8208_z99m231_1980.pdf [<https://perma.cc/X88A-BQ7V>].

of such subsequently enacted Federal law is specifically made applicable within the State of Maine.²⁰⁰

Section 1735(b) was not part of the original MICSAs bill and not one document addressed its subsequent inclusion. The first-time section 1735(b) is included in draft of the Senate bill was on September 17, 1980, more than two months after the July hearing and just five days before the full House and the Senate voted on the bill.²⁰¹ In fact, there was no section 16 until approximately September 5, 1980. In response to a concern expressed by the State regarding construction of MICSAs, a new section 16 was added providing that, in the event of a conflict of interpretation between the MIA and MICSAs, MICSAs would control.²⁰² About two weeks later, sub-section 16(b) (now 1735(b)) would be added to a section entitled “Construction” with subsection 16(a) governing conflicts in interpretation.²⁰³

The Clinic 2017 Report to MITSC on the research findings observed that “the exact origin of §1735(b) remains unclear.”²⁰⁴ Recently, however, a Penobscot Nation elder who was part of the negotiation team testified to the U.S. House of Representatives Subcommittee on Indigenous Peoples on H.R. 6707, a bill which would remove sections 1725(h) and 1735(b) from MICSAs.²⁰⁵ In response to a question from Representative Raúl Grijalva about whether “it [was] correct that sections 6(h) and 16(b) of the Maine Indian Claims Settlement Act were part of

200. 25 U.S.C. § 1735(b).

201. See Maine Indian Claims Settlement Act of 1980, S. 2829, 96th Cong. § 16(b) (1980) (as reported to the Senate, Sept. 17, 1980). A review of the Senate bill and the House bill revealed that, at one time the word “materially” was inserted before “affect or preempt” in reference to the application of Maine state laws. The version of the bill that the Senate Select Committee on Indian Affairs reported to the full Senate on September 17, 1980, contained the final language of section 1735(b), except that this version included the word “materially.” *Id.* In the final version of the bill that the House Committee on Interior and Insular Affairs reported to the full House two days later, section 1735(b) no longer contained the word “materially.” Maine Indian Claims Settlement Act of 1980, H.R. 7919, 96th Cong. § 16(b) (1980) (as reported to House, Sept. 19, 1980). One undated draft of the bill obtained from the Records of Suzan Harjo contains a version of this section (then referred to as section 16(b)) that is worded more simply than the final version: “The provisions of a federal act adopted after this Act shall modify or alter the provisions of this Act, and the Maine Implementing Act only if such later Act contains an express provision making it applicable within the State of Maine.” Amendment to S. 2829 in the Nature of a Substitute 29 (Undated) <https://maineindianclaims.omeka.net/items/show/36> [https://perma.cc/CX9M-9SSF]. Given the inclusion of other sections in this draft, it is highly likely that this document was produced in September. That approach to limiting the application of future federal laws in Maine was not taken. Instead, a decision was made, by whom it is unclear, to prevent the application of future federal laws which “affect or preempt” state laws, unless it is “specifically made applicable within the State of Maine.” Pub. L. No. 96-420, § 16(b), 94 Stat. 1785, 1797 (1980) (codified at 25 U.S.C. § 1735(b)).

202. See Memorandum to Sen. William S. Cohen from Timothy Woodcock (Sept. 5, 1980) <https://maineindianclaims.omeka.net/items/show/57> [https://perma.cc/HG3J-2BDF].

203. See Maine Indian Claims Settlement Act of 1980, S. 2829, 96th Cong. §§ 16(a)–(b) (1980).

204. FRIEDERICHs ET AL., *supra* note 21 at 26. Reading through the multiple archives in 2016, it felt like section 1735(b) did come out of thin air.

205. *Supplemental Testimony in Response to the Questions for the Record Posed During Hearing Before the H. Nat. Res. Subcomm. on Indigenous Peoples of the U.S.*, 117th Cong. 13 (2022) (testimony of the chiefs of the Wabanaki Nations), <https://docs.house.gov/meetings/II/II24/20220331/114558/HHRG-117-II24-20220331-QFR64764.pdf> [https://perma.cc/BJS7-JEFD].

detailed negotiations between the Maine Tribal Nations and the State in 1980,” the elder responded,

I was under the impression that it was public knowledge that Senator Cohen of Maine added that language during the mark up session or the final vote in the Senate, I can’t remember which one. We, the Tribal Governors and the Negotiation Committee were gathered outside the Senate Chamber when Tom Tureen came to us and told us that Senator Cohen had added the clause. We responded (I paraphrase) “he can’t do that – we didn’t agree to that”. [sic] But, at that late hour, we were powerless to oppose it.²⁰⁶

B. Impact of Non-Application of Federal Laws on Tribes Has Meant a Denial of Federal Rights

This type of limitation of federal law to federal tribes is uncommon. Federal authority, specifically congressional authority, is plenary in governing the relationships between the three sovereigns. Other Indian settlement acts have been interpreted to preclude preemption of a federal law,²⁰⁷ but most tribes are not subject to the blanket preclusive framework established in MICSA. The absence of documents discussing the reasoning behind section 1735(b) leaves much room for guesswork and the motivation for section 1725(h)—to prevent the application of federal environmental laws—seems to contradict the final text. It may be that these sections were part of the State’s goal of ensuring that the “tribes remained under Maine law and did not take on the substantial attributes of sovereignty.”²⁰⁸ Instead of trying to decipher the motivation behind these sections, the focus should be on the impact that these sections have had on all four tribes in Maine, and the fact that section 1735(b) was added at the very last minute with essentially no consultation with the Tribes.

Taking the second concern first, it is clear that section 1735(b) was not afforded any real attention, nor was there any meaningful consultation with any of the tribes located within Maine. Indeed, the section was added months after the tribal communities voted on the proposed agreement.²⁰⁹ Drawing on principles of international human rights law, a government’s duty to consult with native and indigenous peoples “before adopting and implementing legislative . . . measures that may affect them” is a corollary obligation to indigenous peoples’ right to participation.²¹⁰ Consultations with indigenous peoples must be made “in good

206. *Id.*

207. Following a First Circuit decision, which held that under the Rhode Island Indian Claims Settlement Act, the Narragansett Tribe had concurrent jurisdiction over the Indian Gaming Regulatory Act (IGRA), Rhode Island Senator Chaffee successfully amended the Rhode Island Settlement Act to explicitly provide that IGRA did not apply to the Narragansett Tribe. See *Narragansett Indian Tribe v. Nat’l Indian Gaming Comm’n*, 158 F.3d 1335, 1337–38 (D.C. Cir. 1998).

208. Memorandum to Sen. William S. Cohen from Timothy Woodcock (Aug. 28, 1980) *supra* note 25.

209. See Maine Indian Claims Settlement Act of 1980, S. 2829, 96th Cong. § 16(b) (1980) (as reported to the Senate, Sept. 17, 1980).

210. G.A. Res. 61/295, at 16, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); see also Nicole Friederichs, *A Reason to Revisit Maine’s Indian Claims Settlement Acts: The United Nations Declaration on the Rights of Indigenous Peoples*, 35 AM. INDIAN L. REV. 497, 517–19

faith” and with the goal of “obtain[ing] their free, prior and informed consent.”²¹¹ There is no evidence that with the adoption of section 1735(b), the United States met its obligation to consult with the Tribes. The archival research did not reveal any evidence of a meeting or communication with the Tribes on the section’s proposed inclusion. The suggestion that no such duty existed in 1980 does not relieve the United States from that obligation. International human rights law permits such an inter-temporal application of a law when the effects of a violation of such a law continue to exist.²¹² As detailed below, the Wabanaki Nations continue to suffer the effects of section 1735(b).

In response to a 2019 request from the State of Maine’s Task Force on Changes to the Maine Indian Claims Settlement Implementing Act, the Clinic studied the impact of section 1735(b) on the Wabanaki Nations.²¹³ Specifically, the Clinic was asked to research federal laws enacted after October 10, 1980 for the benefit of Indians and Indian nations.²¹⁴ To be clear, the Clinic did not conduct a legal analysis under section 1735(b) when deciding whether to include a law in the scope of its research. In other words, the Clinic did not attempt to answer the question of whether a law was “for the benefit of Indians [or] Indian nations”²¹⁵ and “would affect or preempt the application of the laws of the State of Maine.”²¹⁶ The Clinic identified 151 federal laws covering a wide range of areas related to native nations’ self-determination, cultural, property, and education rights which may not apply to the Wabanaki Nations because of the prohibition established in section 1735(b).²¹⁷ For example, major federal Indian legislation was enacted or amended during this 40 year period, including the Indian Civil Rights Act,²¹⁸ Indian Self-Determination Act,²¹⁹ American Indian Religious Freedom Act,²²⁰ Indian Gaming Regulatory Act,²²¹ Native American Graves Protection and Repatriation Act,²²² Indian Tribal Economic Development and Contract Encouragement Act,²²³ American Indian Probate Reform Act,²²⁴ Esther Martinez Native American Languages Preservation Act,²²⁵ Tribal Law and Order Act,²²⁶ and Violence Against Women Act.²²⁷

(2011) (describing in more detail the duty to consult and its relationship to the rights to self-determination and participation).

211. G.A. Res. 61/295 *supra* note 210.

212. *See* Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. ¶ 167 (2002).

213. SUFFOLK UNIV. L. SCH., *supra* note 181.

214. *Id.*

215. 25 U.S.C. 1735(b).

216. *Id.*

217. SUFFOLK UNIV. L. SCH., *supra* note 181.

218. Pub. L. No. 111-211, 124 Stat. 2258 (2010).

219. Pub. L. No. 103-413, 108 Stat. 4250 (1994).

220. Pub. L. No. 103-344, 108 Stat. 3125 (1994).

221. Pub. L. No. 100-497, 102 Stat. 2467 (1988).

222. Pub. L. No. 101-601, 104 Stat. 3048 (1990).

223. Pub. L. No. 106-179, 114 Stat. 46 (2000).

224. Pub. L. No. 108-374, 118 Stat. 1773 (2004).

225. Pub. L. No. 109-394, 120 Stat. 2705 (2006).

226. Pub. L. No. 111-211 §§ 201–231, 124 Stat. 2258, 2261–74 (2010).

227. Pub. L. No. 113-4, 127 Stat. 54 (2013).

In 2022, the Harvard Project on American Indian and Economic Development built upon this research, analyzing and calculating the economic impact that sections 1725(h) and 1735(b) have had, not only on the Wabanaki Nations but, also local communities in Maine.²²⁸ Describing this framework as a “subjugation of the Wabanaki Nation’s self-governing capacities,” the authors of the Harvard report concluded that the non-application of federal laws “block[s] economic development to the detriment of both tribal and nontribal citizens, alike.”²²⁹ One of the most striking findings was the increase of income for citizens of Wabanaki Nations compared to the increase of income for the average native person who is a resident of a tribal reservation in a lower 48 state (excluding Maine).²³⁰ For those native peoples living on reservations outside of Maine, income increased by more than 61% from 1989 to 2018,²³¹ reflecting “a remarkable period of sustained economic development [that] took hold in Indian Country in the late 1980s.”²³² In contrast, Wabanaki citizens, whose governments are “constrained to operate without full access to federal policies and funding of other tribes in the Self-Determination Era, have seen a 9% increase in real per capita incomes.”²³³

The report also discussed the impact on Maine as a whole: “[t]he unrealized opportunities measure in the hundreds of millions of dollars of GDP for the state, representing support for thousands of jobs held by Mainers and tens of millions of dollars going into Maine’s tribal, state, and local treasuries.”²³⁴ The authors ended by predicting that “[s]ticking with the status quo means all sides leave economic opportunities ‘on the table,’ and ongoing cycles of intergovernmental conflict, litigation, recrimination, and mistrust will continue.”²³⁵

Recognizing this impact, a member of Maine’s congressional delegation proposed legislation to overturn these two provisions of MICSA. On February 11, 2022, U.S. Representative Jared Golden introduced H.R. 6707, the Advancing Equality for Wabanaki Nations Act.²³⁶ The bill would remove section 1735(b) from MICSA.²³⁷ In June 2022, the bill was reported favorably out of the Committee on Natural Resources,²³⁸ after the Subcommittee on Indigenous Peoples of the United States held hearings during which each tribal leader testified on the impact of these sections.²³⁹ This bill, however, lacked support from U.S. Senator

228. KALT ET AL. *supra* note 174.

229. *Id.* at i. In 2012, the United Nations Special Rapporteur on the Rights of Indigenous Peoples commented on the situation in Maine, similarly concluding that the Settlement Acts “create structural inequalities that limit the self-determination of Maine tribes.” James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in the United States*, U.N. Doc. No. A/HRC/21/47/Add.1, at 36 (Aug. 30, 2012).

230. KALT ET AL. *supra* note 174, at 16.

231. *Id.* at 16 fig.3.

232. *Id.* at 15.

233. *Id.* at 16.

234. *Id.* at 55.

235. *Id.*

236. H.R. 6707, 117th Cong. (2022).

237. *Id.* § 2.

238. H.R. Rep. No. 117-599 (2022).

239. Memorandum from the Subcomm. for Indigenous Peoples Republican Staff on Legis. Hearing on H.R. 4715, H.R. 5715, & H.R. 6707, at 1–2 (Mar. 28, 2022),

Angus King of Maine and Governor Janet Mills, both of whom prefer that the State and the tribes negotiate an agreement.²⁴⁰ In December 2022, at the end of the 117th Congress, the bill died in the legislature and it was unclear what the future for the bill would be.²⁴¹ If passed, H.R. 6707 would be an example of Congress fulfilling its trust responsibility towards the Wabanaki Nations. Adding section 1735(b) in the first place was not.

CONCLUSION

Tribes have often had to make difficult choices about their futures; choosing between options which were not ideal.²⁴² Sometimes, there were no decisions to be made; laws and policies were imposed upon them.²⁴³ As an outsider reading over the materials and historical accounts of the land claim and the subsequent settlement, one could characterize the situation the Tribes found themselves in during that period as including both a difficult choice and the imposition of laws upon them. They brought the land claim in an effort to reclaim taken lands, to ensure that they could self-determine their futures and hold on to their cultures and languages. What they faced were a state and federal governments opposed to such a goal. With favorable court decisions in hand, and now with some federal support, the Tribes began the long process of negotiating for the financial restitution of those claims. They learned, however, that restitution—the recovery of a small portion of their traditional territories—would only be possible if an agreement was made with the State on jurisdiction. A difficult choice had to be made, and made quickly, before political winds shifted against them.

The value of recognizing the difficulty of that choice, and its place in the long history of choices made by tribes just to survive, is that it forces a reexamination of why the Tribes were put in that position in the first place. Why did the State refuse to negotiate a settlement to the land claim without an agreement on jurisdiction? And why did Congress refuse to move forward with settling the land claim without state approval? Again, answers to these questions are beyond the scope of this

https://naturalresources.house.gov/uploadedfiles/scip_legislative_hearing_memo_3.31.22.pdf
[<https://perma.cc/749E-FRTG>].

240. See Nicole Ogrysko, *Mills Urges Congress to Delay Federal Tribal Rights Bill, Citing Negotiations with Wabanaki*, ME. PUB. (July 8, 2022), <https://www.mainepublic.org/politics/2022-07-08/mills-urges-congress-to-delay-federal-tribal-rights-bill-citing-negotiations-with-wabanaki>.

241. David Sharp, *Bill That Would Have Given Maine Tribes Benefits of Future Federal Law Is Blocked*, PBS NEWSHOUR (Dec. 21, 2022), <https://www.pbs.org/newshour/nation/bill-that-would-have-given-maine-tribes-benefits-of-future-federal-law-is-blocked>.

242. There are many examples of the difficult decisions tribal leaders have had to make about their futures over the past four centuries. One well-known example is the decision Cherokee leaders had to make following the Supreme Court's decision *Worcester v. Georgia*, eventually leading to the Trail of Tears. Journalist Rebecca Nagle describes the history leading up to that decision and the difficulty of the choice that Cherokee leaders had to make: leave their homelands for a reservation in the Indian territory or stay and fight. See *This Land*, Crooked Media, Season 1, episodes 1-10 (2019) <https://crooked.com/podcast-series/this-land/>.

243. See, e.g., An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, Pub. L. No. 49-105, 24 Stat. 388-91 (1887) (General Allotment Act or Dawes Act).

article, but the likely answers are also part of why the Settlement Acts need to be amended.

This Article illustrates that there are problems with the agreement itself. The State of Maine's goal of adopting the municipal framework was to avoid the "substantial attributes of [tribal] sovereignty" and tie the Tribes "irrevocably to Maine law."²⁴⁴ Presumably, relying solely on tribal sovereignty and the body of federal Indian law to determine the jurisdictional relationship between the tribes and the State as well as the jurisdictional reach of the tribes, was too frightening for the State of Maine. Congress, which understood this goal, and the Department of the Interior should have done more to protect the sovereignty of the Tribes by clarifying in MICSA the meaning of the MIA. Additionally, Congress should not have added the two sections of MICSA prohibiting federal laws from applying in Maine. Through these failures, Congress and DOI breached their duties to protect tribal sovereignty. What also has been ignored or rejected is the Tribes' understanding of the Settlement Acts. The State had its goals, but so did the Tribes. When it really counts, the State and the courts have favored the State's narrative of the Settlement process and interpretation of the jurisdictional agreement. Courts must look to the canons of construction when interpreting the MIA and MICSA.

Moving forward, the principle of tribal sovereignty must serve as the foundation of each of the four tribes' jurisdiction. The continued federal policy of self-determination, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples affirming the right to self-determination, and the native nation building movement have only reinforced the primacy of inherent tribal sovereignty. It is these concepts, norms, and principles which should be relied upon with a goal of reaching a shared understanding of them. And, it is these concepts, norms and principles which should underlie any future negotiations between the State and the tribes in Maine to find mutually beneficial solutions to the conflicts arising from the interpretation of the MIA and MICSA.

244. Memorandum to Sen. William S. Cohen from Timothy Woodcock, *supra* note 25.

