WAITING FOR GLUSKABE: AN EXAMINATION OF MAINE'S COLONIALIST LEGACY SUFFERED BY NATIVE AMERICAN TRIBES UNDER THE MAINE INDIAN CLAIMS SETTLEMENT ACT OF 1980

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"*In the absence of justice, what is sovereignty but organized robbery?*"
—Saint Augustine (354-430 A.D.)

I. INTRODUCTION

Legends of the Wabanaki people tell of a mythical demigod named Gluskabe.[1] Immortalized through the cultural traditions of the Wabanaki—from the Mi'kmaq, Abenaki, and Passamaquoddy to the Maliseet and the Penobscot—Gluskabe appears as an integral component of each tribe's variation of the Creation Myth, as well as numerous other tales and stories.[2] Most prominently, Gluskabe is known for his role in creating the Penobscot River and divining proportion and harmony in the natural world, using his power to reduce the size of the once-giant land animals that proved too destructive to coexist with humankind.[3] After helping humankind to establish the first village, legend holds that Gluskabe retired to the southernmost portion of the land, into the sunset, awaiting the time when he would once again be called upon to restore balance to the natural world and defend his people in their hour of greatest need.

So begins the story of Gluskabe and the Water Monster (sometimes referred to as the Water Famine myth).[4] According to legend, the First People lived along the mighty Penobscot River and drew life from its cold, pristine waters, irrigating their crops, harvesting fish, and sustaining their health by the grace of its bounty. One day, the river's mighty current slowed to a sluggish trickle, and the river's cold, pristine waters were replaced by yellow, stinking puddles that would gather in the absence of the once mighty current. No rain or snow could replenish the river, and

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* J.D. Candidate, 2015, University of Maine School of Law. I would like to thank Professor Orlando E. Delogu for his valuable insight and wisdom, kindly shared and greatly appreciated. And, of course, Amanda: your unwavering love gives me purpose each day. *Weliwoni*.

1. Laura Redish & Orrin Lewis, Legendary Native American Figures: Wabanaki Confederacy (Wabenaki, Wobenaki), NATIVE LANGUAGES OF THE AMERICAS http://www.native-languages.org/wabanaki.htm (last visited Jan. 20, 2014) The Wabanaki Confederacy was a coalition of five Algonquian tribes- the Abenaki, Mi'kmaq, Penboscot, Passamaquoddy and Maliseet. *Id.* The spelling of Gluskabe's name varies greatly by source based on language and dialect, although the general structure and phonetics remain a common thread throughout the appearance of the name. Variations include: Glooscap, Glooskap, Klouscap, Gluskabi, Gluskonba, and many other, similar treatments all referring to the same legendary figure. *See Legendary Native American Figures: Glooskap (Glooscap)*, NATIVE LANGUAGES OF THE AMERICAS, http://www.native-languages.org/glooskap.htm (last visited Jan. 20, 2014)

2. Redish & Lewis, *supra* note 1. *See also* FRANK G. SPECK, PENOBSCOT MAN 52 (1997).

3. *See* SPECK, *supra* note 2, at 52, 82.

4. *See id.* at 209; AMERICAN INDIAN MYTHS AND LEGENDS 181-84 (Richard Erdoes & Alfonso Ortiz eds., 1984) [hereinafter ERDOES & ORTIZ].

the First People became sick, desperate for clean water.

Worried for the future of their tribe, the First People held a council and sent a man north from the village to follow the riverbed, to see if he could discover why the Great River had stopped flowing. The man set out and walked and walked until he came upon a strange and terrifying creature who, sitting in the riverbed, had halted the river's mighty current.

The man summoned his courage and asked the Water Monster to please move, so as to allow the river to flow as it once had. The Water Monster roared, shaking the nearby forest:

> *Do as you please, do as you please!*
> *I don't care, I don't care!*
> *If you want water, if you want water,*
> *Go elsewhere! Go elsewhere!*[5]

Fearing for his life, the man fled, returning to the First People with news of the Water Monster. The First People were terrified to hear the man's story. Seeing the people's fear, Gluskabe appeared. Gluskabe knew that he must restore the water to the people, for he was their protector. So, Gluskabe prepared for war; he made himself twelve feet tall. He painted his body as red as blood and adorned his head with two hundred eagle feathers. He painted yellow rings around his eyes and snarled his teeth fearsomely. He growled a thunderous war cry that shook the forests, and he fashioned a knife from a nearby mountain of flint.

Gluskabe went to where the Water Monster lay in the riverbed and demanded that the Water Monster restore the river to the First People. The Water Monster only laughed, and opened his mouth a mile wide so as to eat Gluskabe. Gluskabe wrestled with the Water Monster's powerful jaws and drew his knife, cutting open the belly of the Water Monster. As Gluskabe's blade opened the Water Monster, all the cold, pristine water that the river had once brought to the First People began to flow once more. Having returned life to his people by restoring the Great River, Gluskabe, the great warrior and protector, vanished into the forest until the day his people would next need him.

The story of Gluskabe and the Water Monster is perhaps more pertinent today than ever before. The legend teaches the importance of balance in nature and honors the Wabanaki cultural hero, and serves as an allegory for the contemporary struggles of the present-day descendants of the original storytellers who first breathed life into the heroic Gluskabe legend. The story of Gluskabe and the Water Monster addresses the consequences suffered by a society when its most precious resource and source of identity is jeopardized. This story also illustrates tribal sovereignty through collective decision-making and teaches the sanctity and importance of protecting tribal resources. Today, the story of Gluskabe and the Water Monster is more relevant than ever before because *it came true*.

In 1980, the State of Maine, by and through congressional approval, enacted the Maine Indian Claims Settlement Act (MICSA) as a means of quelling centuries-old paranoia about who in the state, between the tribes and the

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5. *See* ERDOES & ORTIZ, *supra* note 4 at 183.

government, had the right to proper title for vast expanses of land.[6] As a direct result of contentious debate between the two sides (as well as the perception that a decisive victory would have devastating implications for either party), the State and the Maine tribes negotiated and settled the land claims that had been at issue since the early 1970's when a Maine attorney named Tom Tureen sought to facilitate federal representation of the tribes in an effort to recover monetary damages from the State for both the Passamaquoddy and Penobscot tribes.[7]

As a result of the "compromises" forged under MICSA (and subsequent case law interpreting the Act), Maine tribes have been stripped of their status as sovereign nations—an injury not only to the efficacious operation of any system of governance, but a particularly crippling blow given the tribes' historic disenfranchisement in Maine.

This Comment argues that though MICSA allegedly strikes a compromise between the tribes and the State that seeks to honor tribal autonomy with respect to internal tribal matters in exchange for settlement of, and quieted title to, vast swaths of contested Maine land, it actually establishes an ambiguous legal regime under which the Maine Law Court has occasionally been forced to construe the Act narrowly, having the effect of unduly limiting tribal autonomy within the boundaries of MICSA. In other words, MICSA did not represent a "compromise in the truest sense," as some state officials posited,[8] but instead succeeded in entitling the State to ownership of unconscionably large swaths of land that the State desperately sought to legitimize, in exchange for: monetary awards disproportionately small in comparison to the value of relinquished lands; miniscule tribal reservation lands; and, extinguishment of full tribal sovereignty in exchange for a limited quasi-sovereign, quasi-municipal status. The ramifications of this quasi-sovereign, quasi-municipal status have been profound and devastating, infringing upon tribal autonomy, and weakening the identity of a people.

Part II of this Comment provides a brief examination and narrative of Native American interactions with both historic and contemporary society in the United States, so as to provide context for the unique relationship that governs discourse between the Maine tribes and the State. In so doing, this Comment characterizes the impact that MICSA has had as an assault upon the limited autonomy afforded to the tribes pursuant to their quasi-sovereign, quasi-municipal status. When examining tribal-societal interactions, this Comment focuses on the legal lineage of controlling Native lands from the Non-Intercourse Act of 1790,[9] to intervention by the United States Supreme Court in 1823, to the transfer of illegitimate title from the Commonwealth of Massachusetts to Maine upon entering the Union in 1820, up to the Federal District Court decisions which opened the floodgates to allow for

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6. *See* NEIL ROLDE, UNSETTLED PAST, UNSETTLED FUTURE: THE STORY OF MAINE INDIANS 45 (2004).

7. *See id.* at 19, 27.

8. *Proposed Settlement of Maine Indian Land Claims: Hearings on S. 2829 Before the Select Comm. on Indian Affairs*, 96th Cong. 37, 163 (1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT) (Me. State Law & Legis. Reference Library ed., 2008) (statement of Attorney General Richard Cohen recommending the adoption of the negotiated settlement agreement).

9. *See* 25 U.S.C. § 177 (2012).

litigation of the Land Claims issue in the 1970's.

Part III examines the evolution and history of the Maine Indian Land Claims issue and Settlement in order to establish the socio-political atmosphere from which the land claims arose. In doing so, Part III provides a comprehensive review of MICSA, including an analysis of the goals and intentions of both sides involved in the negotiation process; characterization of the tribes as federally-recognized, quasi-sovereign entities; and a review of the sections of MICSA that play the most prominent role in limiting tribal autonomy within these unique boundaries.

Finally, Part IV builds upon Part III's analysis of MICSA's provisions by arguing that MICSA has had—and, if left uncorrected, will continue to have—a devastating effect on the tribes' ability to meaningfully self-govern with regard to the "internal tribal matters" question. By examining the Law Court's oscillation between both narrow and broad interpretations of MICSA's "internal tribal matters" language, this Comment argues that the ambiguous language of section 6206 of MICSA, coupled with the posture of cases before the Court, has pressed the Law Court to reach inconsistent treatment of the "internal tribal matters" language. This Comment takes the position that, given such unsettled precedent, the Law Court should apply a definitively broad interpretation of MICSA's ambiguous language so as to permit tribal autonomy to the greatest extent possible consistent with both legitimate and far-reaching state interests, and the unique quasi-sovereign, quasi-municipal status of the tribes.

II. A BRIEF HISTORY OF COLONIAL, FEDERAL, AND STATE INTERCOURSE WITH NATIVE AMERICANS IN THE UNITED STATES, MASSACHUSETTS, AND POST-1820 MAINE

It is fitting that the first case to which many American law students are introduced in their studies is *Johnson v. M'Intosh*.[10] The lessons to which first-year law students are introduced in *M'Intosh* are "fitting" because *M'Intosh* serves as the legal, ethical, and moral framework upon which all heretofore, contemporary, and future American economic, political, and civil transactions are predicated and justified, regardless of legal interest or specialty.

Although interaction with the native people of North America began well before the issues that yielded the litigation of *M'Intosh*, the case serves as the best frame of reference to gauge the direction of both prior and future interactions with the tribes. Authored by one of the Court's most revered chief justices, John Marshall, *M'Intosh* arose out of a land dispute between two landowners, each with title to an overlapping portion of land in the Wabash River basin—located in present-day Illinois.[11] The dispute centered around one landowner's assertion of superior title to the land via direct sale from the Piankeshaw Indian tribe, and the other landowner's claim of better title to the same parcel of land via purchase from the American government.[12] As law students often learn in first-year Property

10. Johnson v. M'Intosh, 21 U.S. 543 (1823).

11. *Id*. at 549-51.

12. *See* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 62-68 (2010). Echo-Hawk explains that, unbeknownst to a majority of law students and scholars familiar with M'Intosh, the entire case was a "scam." Echo-Hawk reveals that the

courses, the Court's holding in *M'Intosh* established the "doctrine of discovery," a convention of Eurocentric colonialism which presupposed European supremacy in determining "absolute ultimate title" to "undiscovered lands" in the New World relative to the perceived illegitimacy of native land claims.[13]

The *M'Intosh* Court reasoned that a "right of occupancy" or "right of possession" was vested in the Native Americans, but that a superior right—the right to "absolute ultimate title"—had vested in the Crown upon the "discovery" of the Americas.[14] According to the Marshall Court, under the European laws of conquest, it was this "absolute right to title" that could extinguish the "mere right of occupancy" of the Native Americans, who had the right to occupy and possess the lands upon which they had lived since time immemorial, *only until* proclamation by the Crown extinguished these rights.[15] Making the inferential leap that this interpretation of European conquest laws was neatly supported and valid by default, Marshall next declared that because lands taken from the Native Americans under the doctrine of discovery granted superior, absolute right to title to the British, any land ceded by the British to the new American nation in the Post-Revolutionary Era transported with it this "absolute right" to the Americans.[16] Ultimately, this line of reasoning led Marshall to declare that title to American land was vested in the American government by way of absolute title to the first European conquerors.[17] Native Americans were adjudged by the Supreme Court to be forever "tenants whose occupancy can be terminated by purchase or conquest at the will of the American government," granting them only a "second-class property right" in the lands upon which they lived.[18]

A. European Conquest and the American Non-Intercourse Act of 1790

The *M'Intosh* decision, rendered in 1823, relied heavily upon the Marshall Court's interpretation of the European laws of conquest, which when examined, reflect very similar treatment of Native American property rights as those articulated in the Non-Intercourse Act of 1790.[19]

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parties involved were, in reality, hand-picked by Robert Goodloe Harper, an attorney and the son-in-law of a land investor with very similar land interests to the appellee in this matter (descendants of appellee had acquired land via forged authorizations of the British Crown in direct contravention of the Royal Proclamation of 1763, forbidding expansion into the unchartered land West of the present-day Appalachian Mountains). Since the Crown refused to recognize acquisitions predicated forged Royal authorization, Harper was hired to "set up" a case in which he would argue that direct purchase from the Native Americans in the area was more legitimate than title acquired under the rule of the Crown. To help facilitate a favorable outcome, Echo-Hawk explains that Harper negotiated with M'Intosh, who had acquired title from the U.S. (which had acquired title from the crown), to serve as the defendant in a "losing" case. The assumption being that Chief Justice Marshall would validate purchases of land directly from the tribes, over title derived from Royal conquest.

13. *Id.* at 73.

14. *M'Intosh*, 21 U.S. at 588-91; ECHO-HAWK, *supra* note 12, at 73.

15. *See M'Intosh*, 21 U.S. at 587; ECHO-HAWK, *supra* note 12, at 73.

16. *See* ECHO-HAWK, *supra* note 12, at 73.

17. *See id.*

18. *Id.*

19. The Non-Intercourse Act, detailed *infra*, was purposed by Congress to govern all discourse between the tribes and non-native citizens in America. The Act's most basic function was to provide to Congress the exclusive authority to transact land sales with the tribes. Under the auspices of the Act, no

Traditionally, the story of European conquest begins in the fateful year of 1492 when the Spanish Crown commissioned Christopher Columbus's explorations aimed at mapping a westward sea route to the East Indies—an excursion that would ultimately lead to the slaughter, disease, enslavement, and torture of some twelve million Native people throughout the Americas.[20] Throughout the nearly three centuries leading up to the American Revolution, the Native Americans who lived in North America transacted, traded, cohabitated, and fought with the European powers who established colonial outposts in the "New World."[21] However, in the year 1763, the English King, George III, perceived a need to quell rising tensions between the tribal nations and private landowners throughout the colonies; in an effort to remedy the quarrelsome and disjointed approach to tribal land acquisition at the time, King George issued the Royal Proclamation of 1763, which provided structure to European interactions with Native Americans concerning land transactions.[22] Under this decree, the English King forbade his countrymen (and by the doctrine of discovery, all other European settlers) from purchasing "Indian Land" from a "forbidden zone beyond the Allegheny Mountains," west of the area marked today by the Appalachian Trail.[23] The effect of this proclamation was that "British law [now] barred the purchase of Indian Land in the forbidden zone by anyone but the Crown."[24] The Royal Proclamation of 1763 remained in effect until the United States became an independent nation following the Revolutionary War.[25]

Several decades later, at the behest of newly-appointed Secretary of War and Maine-native, Henry Knox, the United States enacted the Non-Intercourse Act of 1790.[26] When Knox originally proposed the Act to President George Washington, he did so out of concern that relations between the states and many tribes were rapidly deteriorating—the result of ongoing confrontation and multiple treaties which had been signed between the states and the tribes, and which acted to unfairly dispossess the tribes of large swaths of land.[27] Seeking to avoid plunging the new nation and the tribes into a war not of the central government's "own choosing," Knox suggested that the tribes be treated as separate, sovereign nations and that no individual state or citizen be allowed to transact with them.[28] Heeding Knox's advice, Washington used his influence to induce congressional action on

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land transaction with any tribe, by any state or private citizen, was legally valid unless ratified by Congress. 25 U.S.C. § 177 (2012).

20. *See* ECHO-HAWK, *supra* note 12, at 15.

21. *See generally* WILBUR R. JACOBS, DISPOSSESSING THE AMERICAN INDIAN (1972); PAULEENA MACDOUGALL, THE PENOBSCOT DANCE OF RESISTANCE: TRADITION IN THE HISTORY OF A PEOPLE (2004).

22. *See* ECHO-HAWK, *supra* note 12, at 62-63.

23. *Id.* at 62.

24. *Id.*

25. Some historians argue that the Royal Proclamation of 1763 remains good law in Canada, given that no law has formally overturned it. Victory in the Revolutionary War, and detachment from British rule formally quashed the document's application in the United States in 1776. *Royal Proclamation, 1763*, INDIGENOUS FOUNDS., http://indigenousfoundations.arts.ubc.ca/home/government-policy/royal-proclamation-1763.html (last visited Jan. 21, 2014).

26. *See* ROLDE, *supra* note 6, at 22-24.

27. *See id.* at 23.

28. *Id.*

the matter, and after a year, Congress responded by enacting the Non-Intercourse Act on July 22, 1790.[29]

In effect, the Non-Intercourse Act of 1790 stipulated that the sale or exchange of lands held by Native American tribes, nations, or any members thereof, to individuals *or states*, without being executed under the authority of the United States (Congress), was null and void *ab initio*, and had no "validity in law or equity."[30] Thus, the Act granted Congress exclusive, unfettered authority to permit or deny the sale or exchange of any Native American land.[31] Although the original purpose of the 1790 Act may have been as Henry Knox intended (i.e., to steer the nation away from state-induced warfare with the tribal confederacies), the effect was to require Native Americans and third parties to obtain Congressional approval in order to be awarded valid legal status for all subsequent land transactions.

Though unforeseen at the time, this unequivocal provision would subsequently become the legal foundation upon which Native Americans in Maine would assert the largest, most groundbreaking land claims the world had ever seen, challenging the legitimacy of Maine's title to more than two-thirds of its state territory.

B. Brief History of Tribal Land Transactions in Massachusetts and Maine

Between the summers of 1794 and 1796, the Commonwealth of Massachusetts had contained its own so-called "Indian problem" by negotiating and signing treaties with the Passamaquoddy, Penobscot, and Maliseet people living in the northern district of the Commonwealth (what is present-day Maine).[32] In September 1794, the Passamaquoddy and the Maliseet—responding to growing concerns within the tribes that they would be left vulnerable to attack by the British (stationed in nearby New Brunswick and Nova Scotia) after allying themselves with the Americans during the Revolutionary War—entered into a treaty with the state of Massachusetts.[33] Under the terms of the 1794 treaty, the tribes agreed to relinquish *all* legal rights, claims, interests, and title in their land located in the northern district of the Commonwealth in exchange for 23,000 acres of reserved land, plus numerous small islands and tracts of land scattered about present-day Pleasant Point, Maine.[34]

The Commonwealth negotiated a similar agreement with the Penobscot Tribe two years later, in August of 1796.[35] Worn and weary from ongoing post-Revolutionary warfare with the lingering British presence in Penobscot Bay and the surrounding land area, the Penobscot Tribe suffered from an "impoverished state" of existence.[36] Using this to their advantage, the Commonwealth approached the chiefs of the Penobscot people to enter into a treaty similar to that signed by the Passamaquoddy and the Maliseet, two years earlier.[37] Though the Penobscot chiefs

29. *Id.*
30. 25 U.S.C. § 177 (2012). *See also* ROLDE, *supra* note 6, at 20, 24.
31. *See* ROLDE, *supra* note 6, at 20, 24.
32. *See* MACDOUGALL, *supra* note 21, at 112; ROLDE, *supra* note 6, at 15.
33. *See* ROLDE, *supra* note 6, at 13-14.
34. *Id.* at 15.
35. *See* MACDOUGALL, *supra* note 21, at 112.
36. *Id.*
37. *See id.*

had long refused to negotiate settlement with the Commonwealth in exchange assurances of American allegiance,[38] they were unable to resist the competing and equally destructive forces of American encroachment of tribal lands to the South and West, as well as intermittent skirmishes with the British who patrolled Penobscot Bay and the surrounding area. As a result, the chiefs of the Penobscot Tribe agreed to a treaty, similar in scope to the treaty signed by the neighboring Passamaquoddy and Maliseet in 1794.[39]

The "resources" acquired by the Penobscot in exchange for nearly all of their land were not sufficient to sustain the tribe's existence for any extended period of time.[40] As a result, the Tribe was again in dire straits, and, by the year 1818, the Penobscot again sold portions of what little remaining land they had (ceding to Massachusetts all of their islands in the Penobscot River north of Indian Island in Old Town, as well as four six-square-mile townships purposed for the production of sustainable timber harvesting) in exchange for basic necessities and foodstuffs.[41]

When Maine gained statehood in 1820, it continued to perpetuate the colonialist policies of Massachusetts; in 1833 Maine negotiated with the desperate and increasingly disenfranchised tribes to "purchase" four more townships from the Penobscot for a mere "fifty thousand dollars in a fraudulent transaction involving forged signatures."[42] These types of treaties—in which the State acquired large parcels of tribal lands (reserved to the tribes by the treaties of 1794 and 1796)—continued to occur until the Penobscot, Passamaquoddy, and Maliseet people were relegated to miniscule reservations located at Indian Island, Princeton/Pleasant Point, and Houlton, respectively.[43]

The Penobscot, Passamaquoddy, and Maliseet people, once free to inhabit and draw sustenance from all of Maine's lands, had been evicted to a handful of cloistered, segregated towns and territories. Although the Native people in Maine had proven their resilience by retaining their cultural identity and tribal sovereignty, true resistance to Maine's colonialist policies would lie dormant in the hearts of the tribes until the revelation that the land transfers of 1794, 1796, and those of the early-mid 1800's had not been ratified by Congress pursuant to the Non-Intercourse Act of 1790 and were thus invalid from their inception. This revelation gave way to the land claims issue of the 1970's.[44]

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38. *See id.* at 100-12.

39. *See id.* at 112. As a result, the Penobscot agreed to release all land claims in the northern district of Massachusetts (present-day Maine) that fell below Old Town Island (nearly two-hundred thousand acres), except for the islands themselves; as compensation, the Commonwealth provided the Penobscot with "one-hundred and fifty yards of cloth for blankets, four hundred pounds of shot, a hundred pounds of powder, a hundred bushels of corn, thirteen bushels of salts, thirty-six hats, a barrel of rum and the promise of an annual stipend consisting of similar items." PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND 78 (1985).

40. *See* BRODEUR, *supra* note 39, at 78.

41. *See id.*

42. *Id.*

43. *See id.*

44. *See* ROLDE, *supra* note 6, at 20.

C. Road to Restitution?: Paving the Path for the Maine Indian Land Claims

In 1964, a land dispute between members of the Passamaquoddy Tribe and a Maine citizen named William Plaisted precipitated a legal journey that would give rise to the Maine Indian Land Claims.[45] In the winter of that year, men hired by Plaisted began clear-cutting several acres of land on the edge of Lewey's Lake (near Indian Township) when several Passamaquoddy tribe members (who had not heard of any government-approved sale of the land) confronted them.[46] Eventually, the Passamaquoddies' suspicions that Plaisted had improperly acquired title to the lands were confirmed when Plaisted asserted that he had won title to the land from a non-tribal member in a poker game.[47] Upon discovery of Plaisted's illegal acquisition, the Passamaquoddy notified state officials, but the State failed to provide a remedy to the Tribe.[48] In response, the Passamaquoddy hired a Maine attorney named Don Gellers. Gellers advanced the theory that the Commonwealth of Massachusetts had violated the trust into which reservation lands had been placed for the Passamaquoddy under the Treaty of 1794.[49] Gellers brought suit on behalf of the Passamaquoddy against the Commonwealth of Massachusetts, and not against the State of Maine, because Maine had not waived its sovereign immunity and therefore was immune from suit without its consent, unless sued by the federal government or another state.[50] Gellers theorized that the Tribe could sue Massachusetts for reparations for violation of the Treaty of 1794, and that Massachusetts, in turn, would sue Maine for allowing Plaisted's acquisition of Passamaquoddy reservation land, thereby circumventing the obstacle posed by Maine's sovereign immunity.[51] Gellers ultimately sought, on behalf of the Tribe, one hundred and fifty million dollars as compensation for violation of the 1794 agreement.[52]

The Passamaquoddies' suit was interrupted when, in 1968, Gellers was forced to withdraw as counsel for personal reasons and the Tribe was once again without representation.[53] This changed in 1971 when the Tribe hired Thomas Tureen, a young attorney practicing in Calais, Maine who, at the time, was employed by the Indian Legal Services Unit of Pine Tree Legal Assistance.[54] It was Tureen, with the help of Francis O'Toole, a student at the University of Maine School of Law and editor-in-chief of the *Maine Law Review*, who advanced the simple but winning argument that neither the 1794 nor the 1796 treaties signed by the tribes were valid because the treaties had not been congressionally approved pursuant to

45. *See id.* at 10; BRODEUR, *supra* note 39, at 69.

46. *See* BRODEUR, *supra* note 39, at 69.

47. *Id.* at 71.

48. *See id.*

49. *Id.* at 81.

50. *Id.*

51. *See id.*

52. *Id.*

53. *See* ROLDE, *supra* note 6, at 17-18. Specifically, Gellers and a colleague were arrested for possession of marijuana. Upon his release on bail, Gellers fled the country for Israel, effectively ending his tenure as legal counsel for the Passamaquoddy.

54. BRODEUR, *supra* note 39, at 81-82.

the Non-Intercourse Act of 1790.[55]

Soon after the Passamaquoddy hired Tureen, news of his theory of the case spread to the Penobscot and Maliseet tribes, who joined the Passamaquoddy in seeking compensation, through a settlement, for lands amounting to nearly two-thirds of Maine's total landmass and carrying a collective value of nearly twenty-five *billion* dollars.[56] To address the same sovereign immunity issue faced by Gellers, Tureen sought to induce the federal government to sue the State of Maine *on behalf* of the tribes by petitioning the Bureau of Indian Affairs (BIA), thus circumventing the sovereign immunity deadlock.[57] Tureen's petition went without a reply for nearly five months—largely due to uncertainty at the BIA as to whether the Non-Intercourse Act even applied to the Eastern tribes, and Bureau's growing concerns as to the possible ramifications of such a monumental suit.[58]

Faced with a statute of limitations enacted by Congress in 1964 that estopped Indian Land claims from being brought after 1972, Tureen petitioned the Federal District Court, and argued to Judge Edward Gignoux that the question of whether or not the Non-Intercourse Act applied to the tribes in question was a "live justiciable controversy" under the Administrative Procedure Act.[59] Judge Gignoux agreed and ordered the Department of Justice to file claims for one hundred and fifty million dollars in reparations and damages on behalf of both the Passamaquoddy and Penobscot tribes, affirmatively eliminating the statute of limitations issue.[60] In 1975, Judge Gignoux heard the case in earnest and ruled that the Non-Intercourse Act of 1790 did in fact apply to the Maine tribes.[61] Consequently, Judge Gignoux ordered the Justice Department to file suit on behalf of the tribes against the State of Maine "as the heir to Massachusetts's responsibility."[62]

Thus, the native people who had inhabited the lands of present-day Maine since Gluskabe created the first village on the Penobscot River, would finally have their voices heard as a result of federal recognition of the legitimacy of the Maine Indian Land Claims.

III. SETTLEMENT OF THE MAINE INDIAN LAND CLAIMS

A. Striking a "Bargain": Negotiations, Prejudices, and the Cultivation of a Settlement

It is of no surprise, given the political magnitude and potential, negative repercussions faced by the State, that the instinctive response of many Maine politicians to the land claims was to deny their legitimacy, despite federal recognition. At the time, the two strongest opponents of the legitimacy of the tribal

55. *Id*. at 82. *See also* ROLDE, *supra* note 6, at 20-21.

56. *See* ROLDE, *supra* note 6, at 21, 31.

57. *See id.* at 25-26.

58. *See id.* at 26-27.

59. *Id*. *See also* 5 U.S.C. § 706(1) (2012).

60. *See* ROLDE, *supra* note 6, at 27.

61. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379-80 (1st Cir. 1975).

62. ROLDE, *supra* note 6, at 28. *See also id.* at 375.

land claims were newly-elected Governor James B. Longley and State Attorney General Joseph E. Brennan (who would succeed Longley as governor in 1978)—both expressed hearty disregard for the land claims issue by initially refusing to take political action on the matter.[63]

State leaders, however, were no longer able to turn a blind-eye to the gravity of the situation when, in 1976, Boston-based law firm, Ropes and Gray, "[announced] that it would no longer be able to give unqualified approval to municipal bonds issued within the disputed area."[64] Ropes and Gray was unwilling to provide bond ratings for lands for which true title was ambiguous, as a result of the land claims concerning over two-thirds of Maine's sovereign territory.[65] As a result, municipalities and the Maine Municipal Bond Bank were frozen in their efforts to liquidate bonds to fund the capital investments of Maine towns and cities.[66]

Although the fiscal gridlock posed a significant funding dilemma for Maine municipalities and financial institutions, the reactions of Maine homeowners most deeply shook the political and economic landscape. With over 350,000 non-tribal Maine residences and multiple, large-scale paper and timber companies implicated in the estimated twelve and one-half million acres comprising the tribal claims area, many Mainers feared that it would "soon . . . [be] impossible to transfer real estate or get mortgages[,]" and that affected businesses would be deprived of access to necessary capital resources.[67] For his part in the matter, Governor Longley made several public appearances, including a trip to Washington D.C., calling for a federal blockade of the tribal claims in the courts; demanding that claims be limited to monetary damages (equal to the fair market value of the disputed lands as they existed in the late eighteenth century); and publicly politicizing the "threat" that the land claims posed to Maine homes (although the tribes specifically and "repeatedly stated that they had no intention of taking anyone's home").[68]

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63. *See* ROLDE, *supra* note 6, at 29-38. Specifically, Rolde notes the extent to which neither man gave due credence to the tribal claims, explaining that Longley's response to a debriefing of the tribal claims by Attorney Tureen in Washington County in 1975 was to "[fall] asleep," while Brennan was equally lackadaisical, never appealing the First Circuit's affirmation of Judge Gignoux's decision in *Morton* to the United States Supreme Court. *See also* BRODEUR, *supra* note 39, at 96.

64. BRODEUR, *supra* note 39, at 97. *See also* ROLDE, *supra* note 6, at 31. Rolde notes that Ropes and Gray (which continues to serve a legal advisory role to issuers of New England municipal bonds) made the decision to withhold approval of municipal bonds because they *could not* provide a bond rating where tax liens were unenforceable under the cloud of whether or not the State held legitimate title to the lands in question.

65. *See* ROLDE, *supra* note 6, at 31. *See also* Appendix A for a depiction of the pre-settlement tribal lands to which the tribes asserted the State had acquired illegitimate title under the Massachusetts Treaties of 1794 and 1796, in contravention of the Non-Intercourse Act of 1790.

66. *See* ROLDE, *supra* note 6, at 31 (estimating that some $27 million worth of bond-backed spending was halted by the Ropes and Gray crisis). *See also* BRODEUR, supra note 39, at 97.

67. BRODEUR, *supra* note 39, at 97; *see* Granville Ganter, *Sovereign Municipalities? Twenty Years after the Maine Indian Claims Settlement Act of 1980*, *in* ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES 25, 29 (Bruce E. Johansen ed., 2004).

68. BRODEUR, *supra* note 39, at 97; *see Proposed Settlement of the Maine Indian Claims Settlement*: *Public Hearing on the Proposed Maine Indian Claim Settlement Before the Joint Select Committee*, 109th Legis., 2d Reg. Sess. 23-27 (Mar. 28, 1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT (Me. State Law & Legis. Reference Library ed., 2008) (statement of Tom Tureen, Counsel for the Tribes); MACDOUGALL, *supra* note 21, at 28; ROLDE,

As a show of good faith to assuage the rising concerns of the general citizenry, the tribes offered, in February of 1977, to drop their claims to two million acres of heavily-populated coastal territory in exchange for the federally-guaranteed right to sue either Maine or Massachusetts for the present-day fair market value of the land, plus trespass damages.[69] The tribes also offered not to pursue any claim against a private homeowner or small-property owner in the State.[70] Maine's congressional delegation responded by introducing identical bills in the House and Senate seeking to "extinguish all aboriginal title that might be held by the [Maine] tribes and to limit to monetary damages any claim that the Indians might bring."[71] The impasse, created by the State's "all or nothing" approach and refusal to negotiate, was soon broken however, when President Jimmy Carter intervened—expressing support that the matter be negotiated, not extinguished—and appointed retiring Georgia Supreme Court Justice, William B. Gunter, as his special representative to mediate and evaluate the claims.[72]

Negotiations moderated by Judge Gunter proved to be fruitless when the judge insisted that the matter not go to trial, urging instead that the federal government pay the tribes $25 million in damages; secure on their behalf some 100,000 acres of reservation lands; and make available for purchase by the tribes as trust lands another 400,000 acres of Maine land.[73] Neither side found the terms agreeable.[74] Seeking to resolve the issue once and for all, President Carter appointed a three-member negotiating team to reach an agreement with the tribes; the team members included: Eliot Cutler, an ex-aide to Senator Edmund Muskie; Leo Krulitz, an attorney with the Department of the Interior; and A. Stephens Clay, an attorney from D.C. and an associate in Gunter's private practice.[75]

The negotiation team's discourse with the tribes resulted in a proposed settlement agreement that promised the tribes $30 million in restitution; federally-guaranteed acquisition of 500,000 acres of protected trust lands; a $1.7 million annual federal stipend; and the requirement that fourteen large landowners, consisting primarily of paper companies, sell to the tribes some 300,000 acres of contested forest lands (valued at $112.50 per acre) for $5.00 per acre.[76] Given the absence of Maine legislators on the presidentially-appointed negotiation team, public outcry was sharp; many Mainers perceived the deal to be unfair, and some (likely provoked "by Governor Longley's fiery rhetoric") took their paranoia and outrage a step further, as "[g]unshops were emptied of weapons" in preparation for a land war that the tribes had neither threatened, nor desired.[77]

With tempers raging and portions of the State on the verge of social collapse, Governor Longley and Attorney General Brennan agreed to negotiate with the

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supra note 6, at 33; The Church World, *How Some Penobscot Indians View the Settlement*, *in* THE MAINE INDIAN LAND CLAIMS CASE: PRO AND CON 12 (Joseph Pecoraro ed., 1978).

69. BRODEUR, *supra* note 39, at 99; *see also* ROLDE, *supra* note 6, at 33.

70. BRODEUR, *supra* note 39, at 99.

71. *Id.*

72. *See* BRODEUR, *supra* note 39, at 100; ROLDE, *supra* note 6, at 35.

73. *See* BRODEUR, *supra* note 39, at 103; ROLDE, *supra* note 6, at 35.

74. *See* BRODEUR, *supra* note 39, at 103; ROLDE, *supra* note 6, at 35.

75. ROLDE, *supra* note 6, at 38.

76. *Id.* at 39-40.

77. *Id.* at 42.

tribes in an effort to reach a settlement and put the issue to rest.[78] Over the next two years, the State and the tribes exchanged figures and debated the relationship that would be forged, moving forward, between the tribes and the State. On March 28, 1980—after the present-day terms of MICSA had been agreed to and implemented in the final bill—a public hearing was held at the Augusta Civic Center to which numerous tribal members from the three tribes impacted by MICSA, as well as others from around New England, were invited.[79] The tribal members, some twenty-one in number, were told they would be allowed to speak following the afternoon recess.[80] Upon returning from break, the Joint Select Committee of the Maine Legislature heard the public opinion of these tribal members, and many others. The resounding message from the tribes was unanimous: MICSA was a bad deal; MICSA had been rushed; MICSA had not been subject to an acceptable, minimum quorum of non-representative tribal members for general tribal approval; and MICSA unduly limited tribal sovereignty.[81] In the heat of a land claims issue that the State had already postured so as to reap grossly disproportionate benefits, it had also sought to limit tribal sovereignty.

In the end, fear drove acceptance of MICSA as a viable solution to the land claims issue. Specifically, the State feared that, if the case did not settle, the tribes would enjoy a resounding victory in the federal courts, thereby stripping Maine of significant portions of its territory, and causing economic and political devastation.[82] In opposite but equal measure, the tribes feared that if presidential candidate Ronald Reagan was elected, he would make good on his promise to exterminate their federal claims altogether, which compelled them to settle under the purview of the Carter administration, perceived to be more supportive of their cause.[83] As such, on October 10th, President Carter signed into law MICSA as it exists today, and in December of that year, finalized the requisite appropriations bill that would fund MICSA.[84] After gaining congressional approval, MICSA became the first legitimately settled major land transaction between the Maine tribes and the State to be legitimately settled within the boundaries of the Non-Intercourse Act of 1790.

The Maine Indian Land Claims that had captivated the attention and aroused the fears of millions of Americans across the country and throughout the State of Maine had come to a close. Despite the inequity at play behind the legally invalid treaties signed during the warm summer months of the mid-1790s, the Passamaquoddy, Penobscot, and Maliseet had succumbed to perhaps the most

78. *See id.* at 43.

79. *See generally Proposed Settlement of the Maine Indian Claims Settlement*: *Public Hearing on the Proposed Maine Indian Claim Settlement Before the Joint Select Committee*, 109th Legis., 2d Reg. Sess. (Mar. 28, 1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT (Me. State Law & Legis. Reference Library ed., 2008).

80. *See id.* at 61.

81. *Id.* at 61-148 (statements of tribal members speaking out against MICSA).

82. *See* ROLDE, *supra* note 6, at 44.

83. *See id.* at 43-44.

84. BRODEUR, *supra* note 39, at 129-30.

unjust "compromise" yet struck with the federal and state governments.[85] If settlement under MICSA could be called a victory in any sense of the word, it was surely a pyrrhic victory, and nothing more. In exchange for a comparatively paltry monetary settlement, the tribes surrendered a right perhaps more sacred than title to ancestral lands: unfettered tribal sovereignty.

B. The Maine Indian Claims Settlement Act [86]

MICSA details numerous aspects of tribal-state relations, and sets forth the regulatory parameters by which each entity is permitted to act with regard to the other. Specifically, MICSA sets forth the powers and limitations of the tribes and the State in regard to a wide variety of social, political, and environmental issues ranging from the authority to levy and collect taxes;[87] to regulation of fish and wildlife[88] and the establishment of a Tribal School Board;[89] to tribal eligibility for State funding.[90] However, the primary effect of MICSA has been channeled by two provisions in particular, each bearing negatively on the tribes.

First, MICSA details the settlement-exchange of lands, from the tribes to the State of Maine.[91] In exchange for title to tribal lands, the State awarded the tribes monetary damages and developed a structure for regulating tribal lands under the Act.[92] This structure, as delineated in section 6205 of MICSA, defines the two ways in which tribal lands may be held: in reservation and in trust.[93]

Second, the Act defines the legal status of the tribe as a *functional municipality*[94]—a provision that, although perhaps facially unassuming, has had a deeply devastating effect on tribal sovereignty as interpreted by the Maine Supreme Judicial Court (Law Court). Before analyzing the effects of MICSA, however, this comment will briefly examine the Act's integral components.

1. Section 6205: Indian Territory

Pursuant to MICSA, the tribes retained title in a few, limited portions of the

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85. It should be noted that the Mi'kmaq Tribe was excluded from the Aroostook Band of Micmacs Settlement under MICSA "because historical documentation of the Micmac presence in Maine was not available at [the time of the settlement in 1980]." However, in 1991, a settlement with the tribe was agreed to that stipulated terms very similar to those applicable to the Maliseet tribe under MICSA. Pub. L. No. 102-171, 105 Stat. 1143 (codified as amended at 25 U.S.C. § 1721(b) (2012)). *See also* Ganter, *supra* note 67, at 26.

86. 30 M.R.S.A. §§ 6201-6214 (2011 & Supp. 2013).

87. *See id.* § 6208.

88. *See id.* § 6207.

89. *See id.* § 6214.

90. *See id.* § 6211.

91. *See id.* § 6205.

92. *See id.*

93. Perhaps the more commonly known of these two land types, "reservation lands" are ancestral lands of which the tribes have always retained control. These lands are inalienable from the tribe. "Trust lands" are lands held for the benefit of the tribes, by the federal government. Trust lands are distinct from reservation lands because they may or may not have been part of a given tribe's ancestral lands, but are nonetheless held for tribal use. Of primary difference is that trust lands may be bought (and absorbed into tribal territory), or sold. *See id.*

94. *See id.* § 6206.

State, as detailed under section 6205 of the Act, entitled "Indian Territory".[95] By explicitly naming those lands reserved to and placed in trust for the tribes, MICSA impliedly vests title in the State for the remainder of disputed lands. Although section 6205's apparent function is to serve as the means by which Maine quieted title to the majority of its present-day territory, it also serves an often over-looked ancillary purpose: it acknowledges the tribes' status as *special* municipalities.[96] Particularly, section 6205 specifically establishes and treats the tribal land holdings as special, distinguishing the Maine tribes from the status afforded to them under section 6206—that of municipalities.[97] Section 6205 is of significant importance to the landscape of MICSA case law because it establishes a clear fiduciary relationship between the tribes and the Secretary of the Interior and Bureau Affairs in governing the administration of tribal land holdings and acquisition.[98]

Under section 6205, two distinct types of land ownership are established for the Maine tribes: reservation and trust lands.[99] Former Tribal Representative to the Maine State Legislature and Penobscot Nation member, Donna Loring, best articulates the operative effect of section 6205:

> Our tribes hold land in several different ways. Our reservation lands are original homelands that we have never given up. They are protected by the federal government. We don't pay taxes in any form on our reservation land or land that we have placed in trust (both known as Indian Territory). Reservation land and trust land can't be sold outside of the tribe or alienated in any way from the tribe. In addition, the tribes have acquired land bought with the Land Claims Settlement Act money or other funds, and unless it is converted to trust land, the tribes pay state taxes on it and often municipal taxes, too. This is land they can sell, unless they put it into trust.[100]

Section 6205 details those lands, particular to each tribe, that are defined as "Indian territory" for the purposes of the Act.[101] Tribal territory is articulated separately for each tribe.[102] Specific to the Passamaquoddy, section 6205(1)(A) "reserves" to the Tribe the Passamaquoddy Indian Reservation lands originally reserved to the them under the agreement of 1794, as detailed by section 6203(5) of the Act.[103] Additionally, section 6205(1)(B), provides that:

> The first 150,000 acres of land acquired by the secretary for the benefit of the Passamaquoddy Tribe from [a detailed list of pre-determined parcels in unincorporated northern territories] to the extent that those lands are acquired . . .

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95. *See id.*

96. *See id.*

97. *See id.* §§ 6205-6206.

98. *See id.* § 6205.

99. *See id.*

100. DONNA M. LORING, IN THE SHADOW OF THE EAGLE: A TRIBAL REPRESENTATIVE IN MAINE 33 (2008).

101. *See* 30 M.R.S.A. § 6205.

102. *See id.*

103. *Id.* §§ 6203(5), 6205(1). Specifically, those lands reserved to the tribes under the 1794 agreement, and thus under section 6203(5) of MICSA, are: Indian Township in Washington County; Pine Island (a.k.a. "Taylor's Island," located in Big Lake, Washington County); 100 acres of land located on Nemcass Point, Washington County (a.k.a. Governor's Point); 100 acres of land located at Pleasant Point, Washington County; and fifteen islands in the St. Croix River. *Id.* § 6203(5).

> prior to January 31, 1991, are not held in common with any other person or entity and are certified by the secretary by January 31, 1991, as held for the benefit for the Passamaquoddy Tribe.[104]

As detailed by former-Representative Loring, any lands not purchased by the tribes in compliance with the deadlines and specific limitations set forth in MICSA may still be transacted, but are first subject to the approval of the Maine Indian Tribal-State Commission (an advisory body established under MICSA to uphold its provisions) and then must survive the legislative process, enacted into law as an amendment to the Act.[105]

MICSA's definition of lands reserved to, and held in trust for, the Penobscot Tribe is similar to that of the Passamaquoddy.[106] Collectively, the lands retained (and available for purchase as trust lands) by the Maine tribes following the enactment of MICSA are depicted in Appendix B.

After delineating the official tribal territory boundaries, section 6205 examines state and federal takings policies with regard to both tribal reservation lands and tribal territory. Takings of reservations lands are heavily restricted.[107] Takings of non-reservation tribal territory are treated similarly, but are slightly less restricted where a public entity seeks to affect a taking for a public utility.[108]

Lastly, section 6205(5) details the limitations placed on the tribes' ability to incorporate into tribal territory any lands acquired by the tribes after the enactment

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104. *Id.* § 6205(1)(B).

105. *See* LORING, *supra* note 100, at 33.

106. 30 M.R.S.A. §§ 6203(8), 6205(2). Like the Passamaquoddy, lands reserved to the Penobscot are the same as those reserved to the tribe by their agreement with the Commonwealth of Massachusetts in the Treaty of 1796 and subsequent agreements with the State of Maine. Specifically, those lands are: Indian Island (a.k.a. Old Town Island); all islands in (the Penobscot River) located northward of Indian Island; and any lands acquired by the tribe within Nicatow Island. *Id.* § 6203(8).

107. *See id.* § 6205(3). Section 6205 (3)(A) first defines takings policies with regard to reservation land, holding that takings of tribal reservation is permissible if: purposed for public use and the public entity or Public Utilities Commission proposing the taking can show "that there is no reasonably feasible alternative to the proposed taking." In determining reasonable feasibility of alternatives, the public body proposing the taking is required to compare available alternatives, specifically weighing the social and environmental impact; cost; and technical feasibility of the proposed taking. If a taking is affected, the public entity that commissioned the taking is required to acquire, at the election of the affected tribe(s): a parcel of land equal in value to the land taken; contiguous with the tribal reservation; and as nearly adjacent to the taken parcel as possible. Once acquired, said "replacement land" is automatically absorbed into the affected tribe(s)' reservation land without further approval from the State or other regulatory entity. Section 6205(3)(A) makes specific mention that: "[f]or the purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation."

108. *See id.* § 6205(3)(B). Under section 6205(3)(B), a public entity or the Public Utilities Commission may affect a taking of non-reservation tribal territory for the same purpose and under the same scrutiny detailed by subsection (3)(A); if land is taken the money received for the taken land is required to be reinvested within two years of the date upon which funds are received. If acquired land is of an area *not greater* than the land taken and in an unincorporated portion of the state, said land is automatically incorporated in the tribes' territory without further approval from the State or any other regulatory body. If, however, "replacement" land acquired with funds from the disposition of takings land is of an area *greater than* that of the parcel it is replacing, the affected tribe(s) must apportion a portion of the land equal in area to the lands taken within 30 days of acquisition, and said apportionment must be approved by the Secretary of the Interior prior to its inclusion in tribal territory. Federal takings of tribal territory receive identical treatment to the procedures detailed under section 6205(3)(B).

of MICSA.[109] Specifically, section 6205(5) forbids the addition of any non-section 6205(1)-(4) land to tribal territory without both the recommendation of the Maine Indian Tribal-State Commission and approval of the State.[110]

Having established the framework for the apportionment and regulation of tribal lands in section 6205, MICSA proceeds to define the powers, duties, and sovereign status of the tribes in section 6206.

2. Section 6206: Powers and Duties of the Indian Tribes Within Their Respective Indian Territories

The critical loss suffered by the tribes under MICSA stems from the ambiguous language of section 6206, particularly as it has been interpreted by the Law Court. Specifically, section 6206's ambiguous use of the phrase "internal tribal matters" has been interpreted by the Law Court as providing the judiciary with license to construe tribal activities as "sufficiently internal" on a continuum ranging from broad inclusions to narrow exclusions. Unfortunately, narrow interpretations of section 6206's "internal tribal matters" language have led to egregious limitations of tribal sovereignty, despite the tribes' qualified municipal status under MICSA.

Although settlement and concession of nearly all of the original lands claimed by the tribes (and invalidly held by the State) was the primary objective behind the enactment of MICSA, Maine officials were also concerned about the jurisdictional authority the tribes would have over their reservation and trust lands.[111] Indeed, in the months leading up to the settlement and enactment of MICSA, Maine Attorney General Richard Cohen expressed as "intolerable" the possibility that the State would be "unable to enforce [its laws on tribal] lands."[112] In response to the State's concern of creating "a nation within a nation" (as seen through the heightened sovereignty afforded to a large number of western tribes), the State conditioned its approval of MICSA on the inclusion of section 6206.[113]

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109. *Id.* § 6205(5).

110. *Id.*

111. *Proposed Settlement of the Maine Indian Claims Settlement*: *Public Hearing on the Proposed Maine Indian Claim Settlement Before the Joint Select Committee*, 109th Legis., 2d Reg. Sess. 6 (Mar. 28, 1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT (Me. State Law & Legis. Reference Library ed., 2008) (statements of Attorney General Richard Cohen positing that settlement of the land without jurisdictional authority over tribal territory would pose an "intolerable" threat to enforcing State laws against the tribes).

112. *Id.*

113. In spite of the heightened sovereignty afforded to a large number of western tribes and the resulting successful relationships between the states and tribes, Cohen's narrow view of tribal sovereignty prevailed and is embodied in section 6206 of MICSA. MICSA's broad restrictions on sovereignty stand in contrast to a great many relationships between western states and tribes. Some examples include: the Ogala Sioux of South Dakota, who enjoy full jurisdictional immunity over non-criminal activities conducted on Indian lands—as memorialized in South Dakota's State Constitution; the state of Oregon has recognized the economic importance of gaming to tribes within its borders and permits the establishment of casinos and gaming centers on tribal reservation lands; the state of Washington recognizes tribal corporations owned by tribal governments and constructed under tribal laws as immune from suit; and Colorado and Montana have already begun transitioning ownership and regulation of hydroelectric dams to local tribal authorities. Although perhaps less pervasive at the time of MICSA's inception, western trends in recognizing greater levels of tribal sovereignty and autonomy

Section 6206 governs the legal, political, and governmental sovereignty of the Maine tribes.[114] Divided into three subparts, section 6206 details: the general powers of the tribes; the tribes' power to sue and be sued; and the tribes' power to enact and enforce tribal ordinances.[115] Of greatest significance to the contemporary limitations placed upon the tribes is perhaps section 6206(1), which defines the tribes' sovereign status as equivalent to a state municipality.[116]

The language of section 6206(1) provides that:

> [T]he [tribes], within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities . . . of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters . . . shall not be subject to regulation by the State.[117]

In effect, section 6206 confers upon the tribes a reduced sovereign status from that which they enjoyed prior to the enactment of MICSA. Under the municipality model, the Maine tribes are no longer considered fully sovereign nations, but are instead limited to the authority possessed by Maine municipalities except where internal tribal matters are concerned.[118] As a result of the internal tribal matters exception and other regulatory authority enjoyed by the tribes (but not general municipalities), MICSA renders the tribes a quasi-municipality status.[119] In other words, under MICSA, the once-sovereign nations that formed the Wabanaki Confederacy are treated as the functional equivalents of a Maine town or city, except with regard to internal tribal matters.

Though the legislative intent behind section 6206 is clear, its language is ambiguous.[120] Because neither MICSA nor its legislative history describe exactly *how* to interpret the ambiguous "internal tribal matters" language of section 6206, that task has fallen to the Law Court which has applied a narrow construction of the language on multiple occasions, while at other times construing it more broadly. The Law Court's inconsistent precedent interpreting the critical "internal tribal matters" language in section 6206, both broadly and narrowly, may have fairly

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were not unknown and, to date, have produced favorable results for the tribes in conjunction with legitimate state interests. *See* Gabriel S. Galanda, *Washington Court Gets it "Wright"—Upholds Immunity for Tribal Corporations*, INDIAN GAMING, http://www.indiangaming.com/regulatory/view/?id=51 (last visited Feb. 6, 2014); Marci Krivonen, *Tribes in Western U.S. Use Water to Assert Sovereignty*, ASPEN PUB. RADIO (July 15, 2013, 2:45 PM), http://aspenpublicradio.org/post/tribes-western-us-use-water-assert-sovereignty; Letter from John Yellow Bird Steele, President of the Ogala Sioux Tribe, to Tracie L. Stevens, Chairwoman of the Nat'l Indian Gaming Comm'n 2 (Feb. 1, 2001), *available at* http://www.nigc.gov/LinkClick.aspx?fileticket=tZ1zc5-SXL8%3D&tabid=992; Richard Townsend, *Indian Sovereignty in Oregon* 14 (Aug. 2003), *available at* http://www.klamathbasincrisis.org/tribes/IndianSovereigntyOregon.pdf.

114. *See* 30 M.R.S.A. § 6206.

115. *Id.*

116. *Id.* § 6206(1).

117. *Id.* (emphasis added).

118. *See id.*

119. *Proposed Settlement of the Maine Indian Claims Settlement*: *Public Hearing on the Proposed Maine Indian Claim Settlement Before the Joint Select Committee*, 109th Legis., 2d Reg. Sess. 5-6 (Mar. 28, 1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT (Me. State Law & Legis. Reference Library ed., 2008).

120. *See generally id.*

resolved those cases that were before the Court, but it has left unresolved the appropriate scope of tribal autonomy that should be afforded to Maine's tribal entities, vis-à-vis the State, within the boundaries of MICSA.

In short, critical questions remain as to whether the historical denigration of tribal identity and sovereignty in Maine will continue, or whether a more generous conception of tribal sovereignty may be fashioned within the boundaries of MICSA.

IV. MAINE'S COLONIALIST LEGACY: A CRITIQUE OF MICSA AMBIGUITY AND THE RESULTING LIMITATIONS PLACED ON MEANINGFUL TRIBAL AUTONOMY

> *"Since Maine became a state in 1820, it has tried to make us disappear—and, when that didn't happen, it chose to make us invisible."*
>
> —Donna Loring, former Tribal Representative[121]

A. Navigating MICSA's Ambiguous "Internal Tribal Matters" Language: An 'All-or-Nothing' Discourse

Under the MICSA regime, it is undisputed that Maine tribes may not make a legal claim to complete sovereign immunity as a result of their quasi-sovereign, quasi-municipal status; however, determining whether tribal activity is "internal" (and thus immune from state interference) continues to be disputed. Despite MICSA's clarity in rendering a quasi-sovereign, quasi-municipal status upon the tribes, the Act is silent on what constitutes an "internal tribal matter" for the purposes of exclusion from State inference with a given tribal activity.[122] As a result of this ambiguity, MICSA, as noted, effectively creates a void within which the Law Court has been pressed to interpret the scope of the "internal tribal matters" question. The Court's adoption of both broad and narrow interpretations of MICSA may be traced to the posturing of specific cases before it and the ambiguity inherent in the Act. Of concern, however, is the threat that a narrow construction of MICSA poses to the future of permissible tribal autonomy within the boundaries of the tribes' designated quasi-sovereign, quasi-municipal status.

The Law Court has decided a limited number of cases which directly address the ambiguous "internal tribal matters" language in section 6206.[123] The collective effect of the case law concerning MICSA's "internal tribal matters" question is two-fold. Cases that construe the language broadly permit autonomous tribal decision-making;[124] whereas cases that construe the language narrowly constrict tribal decision-making.[125] This dichotomy is fashioned in an "all-or-nothing"

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121. LORING, *supra* note 100, at 11.

122. *See* 30 M.R.S.A. § 6206(1).

123. *See* Tomer v. Maine Human Rights Comm'n, 2008 ME 190, 962 A.2d 335; Francis v. Dana-Cummings, 2008 ME 184, 962 A.2d 944; Winifred B. French Corp. v. Pleasant Point Passamaquoddy Reservation, 2006 ME 53, 896 A.2d 950; Great N. Paper, Inc. v. Penobscot Nation, 2001 ME 68, 770 A.2d 574; Houlton Band of Maliseet Indians v. Boyce, 1997 ME 4, 688 A.2d 908; Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983).

124. *See, e.g.*, *Boyce*, 1997 ME 4, 688 A.2d 908; *Winifred B. French Corp.*, 2006 ME 53, 896 A.2d 950; *Dana-Cummings*, 2008 ME 184, 962 A.2d 944; *Tomer*, 2008 ME 190, 962 A.2d 335.

125. *See, e.g.*, *Great N. Paper, Inc.*, 2001 ME 68, ¶¶ 51-63, 770 A.2d 574; *Stilphen*, 461 A.2d at 489-90.

manner and construes tribal activities as either *entirely* internal (affecting *no* external entity) and thus permitted, or external (affecting some larger state interest) and thus impermissible. The effect of this dichotomy is troublesome because it does not allow the Law Court to view section 6206 in varying "shades of gray," as it should. Interpreting section 6206 in a sweeping "black and white" internal/external manner neglects the importance of giving deference to tribal autonomy that is consistent with legitimate, far-reaching state interests, to the fullest extent permissible under the quasi-sovereign, quasi-municipal status established under the Act.

This dichotomy also suffers from the fact that the Law Court has addressed only a limited number of cases that have presented the "internal tribal matters" issue. As a result, the Court has been compelled to construe the Act narrowly because of the particular posture of the case before it.[126] When examined in light of this consideration, the unsettled precedents of MICSA case law are both understandable and also provide an opportunity for the Law Court to definitively establish a broader interpretative standard—one that it has adopted in more recent decisions.[127]

B. Applying Section 6206: The Maine Law Court's Interpretation of Section 6206's Ambiguous "Internal Tribal Matters" Language

From 1983 to 2008, the Law Court has interpreted and applied section 6206 in six cases.[128] The court adopted a narrow interpretation of section 6206 in two of these cases.[129] As noted, the effect of these interpretations is troublesome because they limit the permissible scope of tribal autonomy.

The first case that arose from this line of decisions was *Penobscot Nation v. Stilphen*.[130] At issue in *Stilphen* was the legality of tribal beano games that, although held solely on tribal reservation lands of the Penobscot Tribe, conflicted with Maine's general prohibition against beano games operated without licensure issued by the Chief of the State Police.[131] Though acknowledging that it fell under none of the specifically-allowed entities to whom the Chief of Police was permitted to issue a valid beano license, the Tribe argued that the activity in question constituted an 'internal tribal matter' under section 6206 of MICSA because proceeds from beano gaming were being appropriated to fund their tribal government.[132] In interpreting MICSA's ambiguous language in section 6206(1),

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126. *See, e.g.*, *Great N. Paper, Inc.*, 2001 ME 68, ¶¶ 51-63, *Stilphen*, 461 A.2d at 490.

127. *See, e.g.*, *Tomer*, 2008 ME 190, 962 A.2d 335; *Dana-Cummings*, 2008 ME 184, 962 A.2d 944; *Winifred B. French Corp.*, 2006 ME 53, 896 A.2d 950.

128. *Tomer*, 2008 ME 190, 962 A.2d 335; *Dana-Cummings*, 2008 ME 184, 962 A.2d 944; *Winifred B. French Corp.*, 2006 ME 53, 896 A.2d 950; *Great N. Paper, Inc.*, 2001 ME 68, 770 A.2d 574; *Boyce*, 1997 ME 4, 688 A.2d 908; *Stilphen*, 461 A.2d at 490.

129. *See Great N. Paper, Inc.*, 2001 ME 68, 770 A.2d 574; *Stilphen*, 461 A.2d 478.

130. 461 A.2d 478.

131. *See id.* at 480-81. Under 17 M.R.S.A. §§ 314-315 (2012 & Supp. 2013), licensure by the Chief of Police to authorize legal beano gaming activities may only be granted "to volunteer fire departments, agricultural fair associations, and certain nonprofit organizations as well as to 'bona fide resort hotels' whose games return no profits to the hotels."

132. *See id.* at 482. The beano games in question generated approximately $50,000 in revenues for the Penobscot Nation, per month; the net profit of these revenues was used by the Tribe to fund various

the Law Court relied on canons of statutory construction and examined the relative unimportance of beano to the history and culture of the Penobscot people, ultimately holding that beano games conducted on tribal reservation lands were not matters "internal" to the tribe, and were therefore illegal under Maine law.[133]

As a matter of first impression, the *Stilphen* decision set the precedent for interpreting section 6206's "internal tribal matters" language. Therefore, in deciding whether or not the beano games were "internal tribal matters," the Law Court applied the *ejusdem generis* canon to the context and surrounding language found in section 6206, to ascertain the legislature's intent in the absence of a black-letter definition.[134] Applying *ejusdem generis* to the "internal tribal matters" language of section 6206 (which follows with a listing of matters specifically considered to be internal to the tribes),[135] the Law Court held that the examples provided by the Act were "fundamentally unlike" the operation of a beano game and that, as a result, the court's construction could not embrace within the adopted interpretation of "internal tribal matters."[136]

The Law Court's decision in *Stilphen* did not rest solely on principles of statutory construction. To tie their decision as closely to legislative intentions as possible, the Law Court also applied a historical and cultural analysis to the gaming activities in question.[137] Relying upon the body of legislative history preceding the enactment of MICSA, the Law Court established that only those matters that implicate areas of intimate cultural importance fall within the protected classification of an "internal tribal matter."[138] Applying this historic/cultural

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tribal governmental "programs, including snow and rubbish removal on the reservation, police and health services, and home improvement programs." *Id.* at 480.

133. *Id.* at 481.

134. *See id.* at 489. Black's Law Dictionary defines *ejusdem generis* as: "[a] canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." BLACK'S LAW DICTIONARY 556 (8th ed. 2004).

135. *See* 30 M.R.S.A. § 6206(1) (2012 & Supp. 2013).

136. *Stilphen*, 461 A.2d at 489. Specifically, the Law Court examined section 6206's qualification of the "internal tribal matters" terminology by applying the *ejusdem generis* canon to the following list: "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."

137. *Id.* at 490.

138. *Id.* In assessing the application and importance of the historical and cultural implications of an activity, the Law Court determined that: during pre-enactment negotiations governing the legislation of MICSA the Maine Attorney General understood the "internal tribal affairs" exception to have been drafted "in recognition of [the Indians'] unique cultural or historical interest." S. REP. NO. 96-957, at 50 (1980). The Law Court also relied upon the House Report, which provided protection for the tribes against "acculturation" "by providing for tribal governments . . . which control all such internal matters." H.R. REP. NO. 96-420, pt. 4, at 17 (1980). Further, the Court examined comment provided by Counsel to the Penobscot Nation whose interpretation of MICSA was that it accommodated "the Tribe's legitimate interest in managing their internal affairs, in exercising tribal powers in certain areas of particular cultural importance . . .." *Proposed Settlement of the Maine Indian Claims Settlement*: *Public Hearing on the Proposed Maine Indian Claim Settlement Before the Joint Select Committee*, 109th Legis., 2d Reg. Sess. 25 (Mar. 28, 1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT (Me. State Law & Legis. Reference Library ed., 2008). Additionally, the Court relied upon a report of the Joint Select Committee on the Indian Land Claims which indicated that section 6206's "internal tribal matters" exception from the application of state law was "in

significance standard, the Court held: "[b]eano has played no part in the Penobscot Nation's historical culture or development. It is not uniquely Indian in character. It is not a traditional Indian practice and has no particular cultural importance for the Nation."[139] Having found no historical or cultural importance to the Tribe, and given its application of *ejusdem generis* to define "internal tribal matters" in the absence of a clear legislative definition, the Law Court held that Maine law prohibited beano gaming by Tribe, thereby disallowing the Penobscot from further conducting their beano events.[140]

The *Stilphen* Court's analysis should be understood carefully. As the first case in which MICSA was interpreted, the Law Court was tasked with defining what activity constituted an "internal tribal matter" within the meaning of section 6206, where the Act was remarkably silent on this critical issue. As a result, the Court turned to traditional, tested methods of statutory construction to interpret the Act. The *Stilphen* decision is a symptom of the *type* and *timing* of the case. The Court was unable to apply a broad interpretation in *Stilphen* because beano was not traditionally perceived as historically or culturally significant to the Penobscot Tribe, at the time. Therefore, the Court was—for the first time—forced to consider the scope of tribal autonomy in regards to legitimate, far-reaching state interests. The Law Court thus weighed the State's legitimate and far-reaching interest in regulating gambling and gaming against the Tribe's right to exercise autonomy in its quasi-sovereign, quasi-municipal capacity and defensibly held in favor of the State.

In the twenty-five years following the *Stilphen* decision, the Law Court heard and decided five other cases centered around the "internal tribal matters" question— *Tomer*; *Dana-Cummings*; *Winifred B. French Corp.*; *Great N. Paper, Inc.*; and *Boyce*.[141] These cases, which both contrast and complement the Court's initially narrow interpretation of section 6206, provide the pool from which the Law Court's current, conflicting jurisprudence has arisen.

In *Boyce*, the Law Court was once again tasked with addressing whether or not Maine law could be applied to an activity for which "internal tribal matter" status was sought.[142] However, the holding in *Boyce* diverges from the *Stilphen* decision given the facts of the case. The facts of *Boyce* involved a dispute between the

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recognition of traditional Indian practices." *Joint Select Committee on Maine Indian Land Claims, Report to the 109th Legis. on LD 2037 "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory"* 109th Legis., 2d Reg. Sess. (Apr. 2, 1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT (Me. State Law & Legis. Reference Library ed., 2008). *See also Proposed Settlement of the Maine Indian Claims Settlement*: *Public Hearing on the Proposed Maine Indian Claim Settlement Before the Joint Select Committee*, 109th Legis., 2d Reg. Sess. 7 (Mar. 28, 1980) *reprinted in* 1 LEGISLATIVE HISTORY OF THE MAINE INDIAN LAND CLAIMS SETTLEMENT ACT (Me. State Law & Legis. Reference Library ed., 2008) (statement of Sen. Collins: "there are some exceptions [to full state jurisdiction] which recognize historical Indian concerns").

139. *Stilphen*, 461 A.2d at 490.

140. *See id.*

141. *Tomer*, 2008 ME 190, 962 A.2d 335; *Dana-Cummings*, 2008 ME 184, 962 A.2d 944; *Winifred B. French Corp.*, 2006 ME 53, 896 A.2d 950; *Great N. Paper, Inc.*, 2001 ME 68, 770 A.2d 574; *Boyce*, 1997 ME 4, 688 A.2d 908.

142. *See Boyce*, 1997 ME 4, ¶ 4, 688 A.2d 908.

Houlton Band of Maliseets and four members of the Tribe's six-person tribal council over the legitimacy of elected tribal officials' offices.[143] Specifically, a dispute arose between the defendants (who were removed from office as members of the tribal council) and the general members of the Maliseet Tribal Council.[144] As a result, the defendants prevented physical access to the Tribe's administrative building in protest of their removal from office.[145] Following the dispute, the Tribe elected four replacement members to the council and sought to enjoin the defendants from interfering with "tribal administration functions."[146] Although the superior court enjoined the defendants from preventing physical access to tribal administrative buildings, it refused to levy an injunction pertaining to the defendants' right to be a part of tribal government or, alternatively, recognizing the legitimacy of the newly-elected members of the council.[147]

On appeal, the Law Court ruled that the trial court had properly acted within the boundaries of MICSA by when it declined to address the legitimacy of the newly-appointed members; the Law Court classified the issue of the legitimacy of the newly-elected members as an "internal tribal matter" protected from State interference under section 6206 of MICSA.[148] In *Boyce*, the Law Court interpreted section 6206's ambiguous language more broadly than in *Stilphen* largely because of the contrasting facts between the two cases. Moreover, in the absence of a competing, legitimate state interest, the Law Court readily adopted a broad reading of section 6206, so as to permit the greatest possible extension tribal autonomy under the quasi-sovereign, quasi-municipal status afforded to the tribes by MICSA. Although the Law Court could have employed the *ejusdem generis* principle to reach a more narrow reading consistent with *Stilphen*, the Court chose not to apply it. Instead, the Law Court found—on a principle that reserved to tribal autonomy those activities not in contravention of some legitimate, far-reaching state interest (here the Tribe's election of council members)—that this activity qualified as an "internal tribal matter" under the protections afforded by section 6206.[149] Thus, the election was an "internal tribal matter." The Law Court's broad interpretation of section 6206 in *Boyce* stood in sharp contrast to the result reached in *Stilphen*, and seemed to signal how the Court intended to treat future interpretations of section 6206. However, this quickly dissipated following the decision in *Great Northern Paper* just a few years later, which considerably frustrated any temporary clarity on the matter.[150]

Four years after *Boyce*, and nearly two decades after *Stilphen*, the Law Court had heard and decided just two cases concerning section 6206. Up to that point, both the ambiguity and content of the cases before the Court had significantly shaped the landscape of section 6206 interpretation. As a result, the Court was pressed to establish a polarity in the way it interpreted the "internal tribal matters"

143. *See id.*
144. *See id.*
145. *See id.*
146. *Id.* ¶ 6.
147. *See id.* ¶¶ 4-9.
148. *See id.* ¶ 10.
149. *See id.*
150. *See* Great N. Paper, Inc. v. Penobscot Nation, 2001 ME 68, 770 A.2d 574.

language contained in section 6206, causing the legal landscape to be as uncertain as it had been prior to the *Stilphen* decision in 1983. This changed, however, when in 2001, an issue arose between the Great Northern Paper Company and several Maine tribes that required the Law Court to once again weigh in on the aperture through which section 6206 should be construed in assessing the "internal tribal matters" question.[151]

The facts of the *Great Northern Paper* case centered around clean water concerns in multiple watersheds that ran through, or were bordered by, tribal lands in Maine.[152] Specifically, three major pulp and paper companies—Great Northern Paper, Inc. (GNP), Georgia-Pacific Corporation (GP), and Champion International Corporation (CIC)—operated plants discharging wastewater into the aforementioned watersheds that they shared with the tribes.[153] Seeking to regulate widespread wastewater discharge within its borders, Maine petitioned the Environmental Protection Agency (EPA) to gain control over all wastewater discharge permits under the National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act.[154] Recognizing the widespread, negative impact of the pollutants on watersheds shared with the companies (e.g., the Penobscot River, St. Croix River, and Bay of Fundy—into which the St. Croix River empties), the tribes held several tribal council meetings, and employed several tribal officials to contact the EPA, "urg[ing] the EPA to conclude, in part, that the state is not entitled to regulate the water resources within [the tribes'] territories, because [the tribes] are entitled to be treated like a separate 'state.'"[155]

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151. *See generally id.*

152. *See id.* at ¶¶ 1-6.

153. *See id.* ¶ 3. The facts detail that GNP operated pulp and paper mills in Millinocket and East Millinocket, discharging their wastewater into the Penobscot River at a site approximately 66 miles upstream from the Penobscot Reservation at Indian Island. *See* General Distance by Land and River from Millinocket to Indian Island, GOOGLE MAPS, http://maps.google.com (follow "Get Directions" hyperlink; then search "A" for "East Millinocket, ME" and search "B" for "Indian Island, ME"; then follow "Get Directions" hyperlink and manipulate direction path for approximate distances by river). Also discharging wastewater into the Penobscot watershed was CIC, who operated a mill in Bucksport approximately 38 miles downstream of Indian Island. *See Great N. Paper, Inc.*, 2001 ME 68, ¶ 3, 770 A.2d 574; General Distance by Land and River from Bucksport to Indian Island, GOOGLE MAPS, http://maps.google.com (follow "Get Directions" hyperlink; then search "A" for "Bucksport, ME" and search "B" for "Indian Island, ME"; then follow "Get Directions" hyperlink and manipulate direction path for approximate distances by river). Additionally, GP operated a mill on the St. Croix River, approximately 30 miles upstream of the Passamaquoddy reservation located at Pleasant Point in Perry, Maine. *See Great N. Paper, Inc*., 2001 ME 68, ¶ 3, 770 A.2d 574; General Distance by Land and River from Mouth of St. Croix River to Pleasant Point Reservation, GOOGLE MAPS, http://maps.google.com (follow "Get Directions" hyperlink; then search "A" for "Pleasant Point, ME" and search "B" for "Woodland, ME"; then follow "Get Directions" hyperlink and manipulate directions path for approximate distances by river).

154. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 3, 770 A.2d 574.

155. *Id.* ¶ 4. In hindsight, the tribes might have been better advised to apply for full intervener status (as opposed to "State" status) in any and all state and/or federal regulatory proceedings purposed for issuing waste water discharge permits to paper companies discharging into waters that bordered or flowed through tribal lands. Full intervener status would likely have procured a more favorable result for the tribes: their standing to intervene is obvious; they would act as an advocate for the imposition of more rigorous standards; and, full intervener status would have better positioned the tribes to challenge weak standards and/or lax enforcement of adequate discharge standards, including claims for damages arising from violations of any permits issued.

Upon discovering the tribes' intentions to obtain "state" status from the EPA for regulatory discharge purposes under the Clean Water Act, GNP and the other companies served written document requests to leaders of the Penobscot and Passamaquoddy tribes.[156] In their requests, the companies sought any and all documents relating to tribal efforts to gain "state" status and regulatory control over water resources within or adjacent to tribal territory.[157] The companies stated that the purpose of their request was "'to educate [themselves] regarding issues affecting their discharge permits.'"[158] The companies also asserted that the requested documents were "public records" to which they were entitled under Maine's Freedom of Access Act (FOAA).[159] The tribes denied the companies' requests and replied that disclosure documents derived during private tribal council meetings under FOAA amounted to regulation of the tribes' "'governmental process, policies, and procedures,'" shielded from state interference under section 6206 of MICSA.[160]

The companies initiated an appeal of non-disclosure under 1 M.R.S.A. § 409(1), and argued, *inter alia*, that the tribes were acting in their municipal status under MICSA, and were thus bound to disclose public records under FOAA.[161] The Cumberland County Superior Court denied the tribes' consolidated motion to dismiss and granted the companies' motion for summary judgment, requiring the tribes to turn over the documents.[162] When the tribes failed to comply within the allotted time period under Title I, the Superior Court, upon review, found the tribes in contempt and granted full relief to the companies.[163] The tribes then appealed to the Law Court.[164]

Applying a *de novo* standard of review, the Law Court examined two issues: first, in what capacity were the tribes acting when contacting the EPA; and second, does FOAA apply to the tribes when acting in certain capacities with respect to internal tribal matters?[165]

Before the Court, the tribes argued that application of FOAA to tribal documents derived under the auspices of tribal council proceedings would amount to an impermissible infringement upon an "internal tribal matter" under section 6206 of MICSA.[166] The companies and State (who joined as a party in interest) countered by arguing that pursuant to section 6206 of MICSA, the tribes agreed to be bound to a municipal status, and as a result were bound to Maine's FOAA under 1 M.R.S.A. § 402, which defines the scope of FOAA to include Maine counties and

156. *Id.* ¶ 5.
157. *Id.* ¶¶ 5, 6.
158. *Id.* ¶ 6.
159. *Id.* ¶ 5; 1 M.R.S.A. § 402(3) (2012 & Supp. 2013).
160. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 7, 770 A.2d 574.
161. *Id.* ¶ 8. 1 M.R.S.A. § 409(1) (2013). Section 409(1) of Title 1 provides a legal right to trial where, in certain situations, the aggrieved party has been denied the right to inspect or enjoy disclosure of certain non-privileged documents.
162. *Id.* ¶ 9.
163. *See id.* ¶ 10.
164. *Id.*
165. *See id.* ¶¶ 44-45.
166. *See id.* ¶ 16.

municipalities.[167]

In its decision, the Law Court first acknowledged that neither FOAA nor MICSA explicitly mention of whether FOAA would apply to the tribes.[168] As a result, the Court delved into a brief history of MICSA—lending particular consideration to the municipal status-model that the Act imposed upon the tribes and around which "jurisdictional issues" were framed.[169] The Court detailed the provisions of MICSA (discussed *supra*) and explained that the tribes are similar to regular Maine municipalities in most ways.[170] In the same breath, however, the Court recognized that the tribes are not traditional municipalities; instead, the tribes enjoy special, "distinct" powers and exceptions to which standard municipalities are not privileged.[171]

Most important to the Court's analysis, however, was its classification of the multiple roles that the tribes may assume "distinct from municipal or governmental roles."[172] According to the Court, the tribes "may be recognized" in four distinct ways: "as a sovereign nation, a person or other entity, a business corporation, or a municipal government."[173] After classifying the manner and capacity in which Maine tribes may act, the Court proceeded to develop a four-part test for determining whether a state law is applicable to the tribes in light of section 6206 protections:

> (1) to what entities does the statute at issue apply; (2) are the Tribes acting in the capacity of such entities; (3) if so, does the Maine Implementing Act expressly prohibit the application of the statute to the Tribes generally; (4) if not, does the Maine Implementing Act prohibit or limit the application of the statute in the circumstances before the court.[174]

Applying this new four-part analysis, the Court examined each component in turn. First, the Court determined that because the legislature, in enacting FOAA, intended to open public proceedings (defined as "'the transactions of any functions affecting any or all citizens of the State by . . . [a] municipality'") to the general public, records of municipalities' actions must be open to the public to assist in public business, and, therefore, Maine municipalities fall within the applicative

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167. *Id.* ¶ 9.

168. *Id.* ¶ 11.

169. *Id.* ¶¶ 23-37.

170. *See id.* ¶ 38. Here, the court explains that, like most municipalities, the Maine tribes are subject to qualified, not sovereign immunity. The Maine tribes are empowered to enact municipal ordinances, and are entitled to state financial assistance, as are all other municipalities.

171. *Id.* ¶¶ 39-41. Specifically, the court makes reference to tribal privileges under MICSA discussed *supra*, which includes authority to set tribal fish and wildlife regulations, establish tribal school committees in a fashion distinct from those in standard municipalities; and exclusive jurisdiction over child protective proceedings pursuant to the Indian Child Welfare Act of 1978.

172. *Id.* ¶ 40.

173. *Id.* ¶ 41. Here, the court specifies its meaning, explaining that a tribe: acts as a "sovereign nation" when receiving federal funds and assistance and under the meaning of the Uniform Interstate Family Support Act; is treated as a person or business/corporation (who may sue or be sued) when acting under a "business capacity"; or may act as a municipality (of which the court makes no specific definition).

174. *Id.* ¶ 42.

boundaries of FOAA.[175] Second, the Court surmised that when the tribes initiated a discourse with the EPA seeking treatment as a "state" for the purposes of shared regulatory authority (setting NPDES standards under the Clean Water Act), the tribes were acting in their governmental capacity "as municipalities."[176] The Court supported this assertion by concluding that "[t]hrough their communication with the federal government . . . the Tribes are unquestionably acting in their governmental capacities," which under MICSA meant the tribes were acting as a municipality.[177]

Having determined that FOAA applied to Maine municipalities, and that in this case the Maine tribes were acting in their role as municipalities, the Court next decided whether MICSA expressly prohibited the application of FOAA to the tribes.[178] In answering this query, the Court determined that an assessment of the meaning of section 6206's "internal tribal matters" language was necessary.[179] In deriving the meaning of section 6206's ambiguous language, the Court forewent application of the *ejusdem generis* approach laid out in *Stilphen* (discussed *supra*), and instead utilized a five-part analysis described in the federal matter, *Akins v. Penobscot Nation*.[180] In rendering its final decision—that the tribes, in this case, carried out actions that extended beyond the protected sphere of "internal tribal matters"—the Law Court seemed to rely solely on the first factor of the *Akins* analysis, holding that "[w]hen the Tribes, in their municipal capacities, act or interact with persons or entities other than their tribal membership, such as the state or federal government, the Tribes may be engaged in matters that are not 'internal tribal matters.'"[181]

Ultimately, the Law Court affirmed the superior court's decision, ordering the tribes to turn over all documents of communications with the EPA, excluding, however, those documents that pertained to tribal minutes and notes.[182]

Returning to the spirit of *Stilphen* and given the posture of the case, the Law Court construed section 6206 narrowly and effectively disallowed the application of section 6206 immunities to these tribal activities. Despite taking an alternative approach to that adopted in *Stilphen* (applying *Akins* in lieu of *ejusdem generis* when interpreting section 6206 narrowly), the *effect* of the Court's ruling added to the tally of cases narrowly construing the Act.

Despite the *Great Northern* Court's detailed analysis, the real, underlying issue at the heart of the "internal tribal matters" question was not properly reached—by no fault of the Court, but by the folly of the tribes' counsel and the deceptively

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175. *Id.* ¶ 43 (citing 1 M.R.S.A. § 402(2)(C) (2012 & Supp. 2013).

176. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 43, 770 A.2d 574.

177. *Id.*

178. *See id.* ¶ 45.

179. *See id.* ¶ 46.

180. *See id.* ¶ 49; Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997). The *Akins* test for determining whether a given activity constitutes an "internal tribal matter" within the meaning of section 6206 considers: "(1) the effect on nontribal members, (2) & (3) the subject matter of the dispute, particularly when related to Indian lands or the harvesting of natural resources on Indian lands, (4) the interests of the State of Maine, and (5) prior legal understandings." *Great N. Paper, Inc.*, 2001 ME 68, ¶ 49, 770 A.2d 574.

181. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 54, 770 A.2d 574.

182. *Id.* ¶¶ 61-62.

effective tactics of the companies' counsel. In short, FOAA was a red herring.

The FOAA issue, around which the *Great Northern* case centered, was little more than a strategically placed decoy that diverted attention from the central issue of whether the tribes, as quasi-sovereign, quasi-municipal entities, should be afforded heightened consideration by the EPA and the State concerning wastewater management in watersheds shared by the tribes and the discharging corporations. When counsel for the tribes fixated too closely on the FOAA issue, the forest was lost for the trees, so to speak. FOAA was just one *component* around which the *Great Northern* decision should have centered. Instead, counsel for the tribes endeavored to challenge the companies on disclosure of documents collected by the tribes even after the superior court ruled to allow for non-disclosure of certain tribal documents which were entirely internal to tribal governmental practice, and thus had no basis for disclosure under FOAA.[183] Unfortunately for the tribes, the posture of the *Great Northern* case as a FOAA issue pressed the Court to decide the factual dispute in this context. As a result, the Court did not reach the ultimate issue implicated by the "internal tribal matters" question—whether the tribes should be afforded heightened consideration in wastewater management practices given their unique status and the importance of the impacted watersheds to their tribal history and culture (a la *Stilphen*'s historic cultural analysis). Instead, the case was diverted to a narrow issue to which a narrow interpretation was consequently applied.

In the aftermath of the *Great Northern* decision, the prevailing legal precedent was superficially tipped in favor of narrow interpretations of MICSA, but for reasons previously discussed, the Law Court had only truly interpreted the question of tribal autonomy in light of state interests, as an "internal tribal matter" twice, and had applied both narrow and broad interpretations. The Court would soon receive a chance to clarify the state of its case law precedent in a string of cases occurring in the late 2000s in which the Court readily applied broad interpretations of MICSA's ambiguous "internal tribal matters" language.[184]

The first of these cases, *Winifred*, arose out of a dispute between the Passamaquoddy Tribe and the *Quoddy Times* and *Bangor Daily News* after the Tribe refused to permit reporters to sit in on tribal council meetings concerning the establishment of a natural gas facility at Pleasant Point.[185] The news agencies filed suit, alleging FOAA violations, and advanced arguments similar to those successfully articulated by the paper companies in *Great Northern*.[186] After hearing argument, the superior court found for the Tribe, holding that the tribal council meetings were "not public proceedings that must be open to the public under FOAA."[187]

On appeal, the Law Court was once again tasked with interpreting the ambiguous language of section 6206 to determine whether or not the tribal

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183. *See id.* ¶ 10.

184. *See, e.g.*, Tomer v. Maine Human Rights Comm'n, 2008 ME 190, 962 A.2d 335; Francis v. Dana-Cummings, 2008 ME 184, 962 A.2d 944; Winifred B. French Corp. v. Pleasant Point Passamaquoddy Reservation, 2006 ME 53, 896 A.2d 950.

185. *See Winifred B. French Corp.*, 2006 ME 53, ¶¶ 2-3, 896 A.2d 950.

186. *See id.* ¶ 6.

187. *Id.*

activities at hand were sufficiently "internal" to the tribe so as to warrant MICSA's provision disallowing state interference with tribal activity.[188] Writing for the majority, Chief Justice Saufley (who also authored the majority opinion in *Great Northern*) applied part of the framework laid out in *Great Northern*, and held that because the Tribe was not acting in its municipal capacity, state law and FOAA were inapplicable to the Tribe.[189]

The *Winifred* decision stands out because it serves as the first "pure" view of the "internal tribal matters" question since the *Boyce* and *Stilphen* cases decided years earlier. This is because unlike the G*reat Northern* Court, the *Winifred* Court was free from the troublesome posture that confused functional issues with narrow, topical issues (i.e. the Tribe in *Winifred* was not claiming the status of a state and the FOAA argument was not a red herring). As such, the *Winifred* Court was presented with a question more directly related to the "internal tribal matters" question: whether or not the tribal activity in question was sufficiently internal (and posed no threat to legitimate, far-reaching state interests) so as to warrant the greatest possible allocation of tribal autonomy within the boundaries of the quasi-sovereign, quasi-municipal model. Once the Court was free to consider this issue alone, it was able to make the determination that, unlike the legitimate state interests contravened in *Stilphen*, no such activities existed to warrant a narrow, constrictive reading of section 6206.

Similar treatment of similar issues arose in the *Dana-Cummings* and *Tomer* cases.[190] In both *Dana-Cummings* and *Tomer* (as in *Boyce*), the disputes that precipitated litigation involved grievances between tribal members and tribal government.[191] *Dana-Cummings* involved a dispute between a member of the Passamaquoddy Nation and the Tribal Housing Authority (THA) at Pleasant Point.[192] Although the case is complex and has an extensive history, the basic facts center around the THA's repossession of tribal member Pamela Francis's home.[193] In response, Francis sued, and alleged, *inter alia*, trespass and illegal possession of property.[194] When the Law Court heard the case, the issue upon review was whether the dispute between Francis and the THA constituted an "internal tribal matter" within the meaning of section 6206.[195] After determining that all parties involved were indeed members of the Tribe and that adequate remedy was available to Francis through the Tribal Court, the Law Court held that the matter was sufficiently internal to the Tribe, thus warranting the protections of section 6206 and disallowing state interference with "internal tribal matters."[196]

The facts and holding of *Tomer* are similar. In *Tomer*, a member of the Penobscot Nation was employed by the Tribe and eventually discharged from his

188. *See id.* ¶ 8.

189. *Id.* ¶ 17.

190. *See, e.g.*, *Tomer*, 2008 ME 190, 962 A.2d 335; *Dana-Cummings*, 2008 ME 184, 962 A.2d 944.

191. *See Tomer*, 2008 ME 190, ¶ 2, 962 A.2d 335; *Dana-Cummings*, 2008 ME 184, ¶ 4, 962 A.2d 944.

192. *See Dana-Cummings*, 2008 ME 184, ¶ 4, 962 A.2d 944.

193. *See id.* ¶¶ 2-9.

194. *Id.* ¶ 3.

195. *Id.* ¶¶ 12-14.

196. *See id.* ¶ 21.

position.[197] As a result of his discharge, Tomer filed a complaint with the Maine Human Rights Commission alleging employment discrimination and retaliatory discharge.[198] The Commission dismissed Tomer's complaint, citing a lack of subject matter jurisdiction under section 6206 of MICSA, reasoning that the matter constituted an "internal tribal matter," and therefore could not state a claim upon which relief could be granted pursuant to 5 M.R.S.A. § 4612.[199] On appeal, the Law Court affirmed the Commission's dismissal.[200] The Law Court reasoned that because Tomer had the ability to bring a civil suit against the Tribe in court, rather than directly seeking redress through the Commission, there had been no "final agency action" under 5 M.R.S.A. § 8002(4).[201] Thus, the Law Court declined to overturn the Commission's dismissal of Tomer's complaint, and held through implication that the Commission's dismissal for lack of subject matter jurisdiction as a consequence of section 6206 protections was proper—the Tribe's termination of Tomer, an employee and member of the Tribe, constituted an "internal tribal matter" with which the State could not interfere.[202]

In sum, the Law Court acceded to a broader reading of section 6206 in the *Winifred*, *Dana-Cummings*, and *Tomer* decisions than it did in the *Stilphen* and *Great Northern* cases. This latest trilogy of cases in MICSA case law evidences a clear preference by the Law Court to afford maximum tribal autonomy within the boundaries of the quasi-sovereign, quasi-municipal model so long as the tribal activities in question are deemed sufficiently "internal" to the tribe(s) and do not pose a threat to legitimate, far-reaching state interests.

C. The MICSA Pendulum: Examining the Impact of the Law Court's Interpretation of Section 6206

The Maine Indian Claims Settlement (and the subsequent Act memorializing it into law) was a bad deal for the Maine tribes. Not only did the tribes relinquish title and legal rights to breathtakingly expansive tracts of their ancestral lands in Maine in exchange for a comparatively small financial settlement, but the tribes were also saddled with a reduced sovereign status through MICSA's application of the municipality model. As a result of the ambiguity inherent in section 6206, the Law Court has been pressed to issue a collection of opinions that adopt varying interpretations of the "internal tribal matters" question. Following the Court's seemingly mixed treatment of section 6206, no definitive precedent has been firmly established. While the Court has shown a willingness to limit tribal autonomy where tribal activities are found to be in conflict with clear and far-reaching statewide interests (à la *Stilphen*), it has also explicitly recognized that the tribes are not a conventional municipal entity (à la *Great Northern*). In a number of settings, the Court has afforded to the tribes more autonomous decision-making prerogative

197. *See Tomer*, 2008 ME 190, ¶ 2, 962 A.2d 335.

198. *Id.*

199. *See id.*; 5 M.R.S.A. § 4612 (2013). Section 4612 governs the procedures for litigating a complaint alleged under the Maine Human Rights Act.

200. *Tomer*, 2008 ME 190, ¶ 14, 962 A.2d 335.

201. *Id.*; 5 M.R.S.A. § 8002(4). Section 8002(4) delineates the definition for which decisions by an agency under the Maine Administrative Procedures Act constitutes a "final agency action."

202. *See Tomer*, 2008 ME 190, ¶ 14, 962 A.2d 335.

than ordinary municipalities might have received (as in *Boyce* and the *Winifred*, *Dana-Cummings* and *Tomer* "trilogy").

Despite limitations placed on their sovereign status under MICSA, the tribes are *not* standard municipalities. They are both quasi-sovereign and quasi-municipal. Further, they have received federal recognition, as memorialized by the duties and fiduciary relationship imposed upon the Secretary of Interior and Bureau of Indian Affairs in section 6205.[203] While certainly limiting the Maine tribes to the extent of extinguishing full sovereignty, MICSA specifically endows the tribes with powers that "regular" municipalities do not possess—most importantly the "internal tribal matters" exception detailed in section 6206.[204] As a result of their mixed status as quasi-sovereign, quasi-municipal entities, the Maine tribes deserve to be afforded the most expansive permissions of tribal autonomy possible within the boundaries of MICSA and consistent with legitimate state interests.

Although it will not serve as reparation for centuries of colonialist disenfranchisement suffered by the tribes, consideration of Maine tribes as discrete, insular groups (similar to suspect class classification)—by broadly interpreting MICSA—is both equitable and just. As previously discussed at length, MICSA was a contemporary agreement—it should not be interpreted to bind the tribes to historical forms of denigration suffered under centuries of colonialist legacy. MICSA not only limits the tribes' bargaining power by eviscerating their claim to vast holdings of valuable land, but it also imposes upon them a restrictive regime of limited sovereignty. If Maine citizens and the tribes are going to live together with dignity, MICSA should be tempered by an expansive reading of its ambiguous language.

Looking toward the future, the Law Court has an opportunity to speak clearly and espouse the broad interpretations it applied in the latter-MICSA cases. Given the paucity of definitive precedent in this regard, the Law Court's next decision concerning the "internal tribal matters" language could act as the clarion call to define how the Act should be interpreted. One must hope that the case will not be tainted with extraneous posturing or with issues that distract from the heart of the matter.

V. CONCLUSION

At best, MICSA represents a decidedly inequitable agreement between the Maine tribes and the State. At worst, MICSA serves as the contemporary mechanism by which the Maine tribes have been disenfranchised and stripped of both their bargaining power and ability to exercise tribal autonomy. Despite acknowledgement of the tribes' special quasi-sovereign, quasi-municipal status by the federal government, Congress, the Maine Legislature, and the Law Court, both the posture of MICSA case law and the ambiguity inherent in section 6206 have generated narrow interpretations of MICSA. Alternatively, the Law Court has evidenced a willingness to broadly interpret MICSA's ambiguous language in favor of deference to tribal autonomy where matters are sufficiently "internal to the tribe." The Court has not yet, however, had the opportunity to do so properly.

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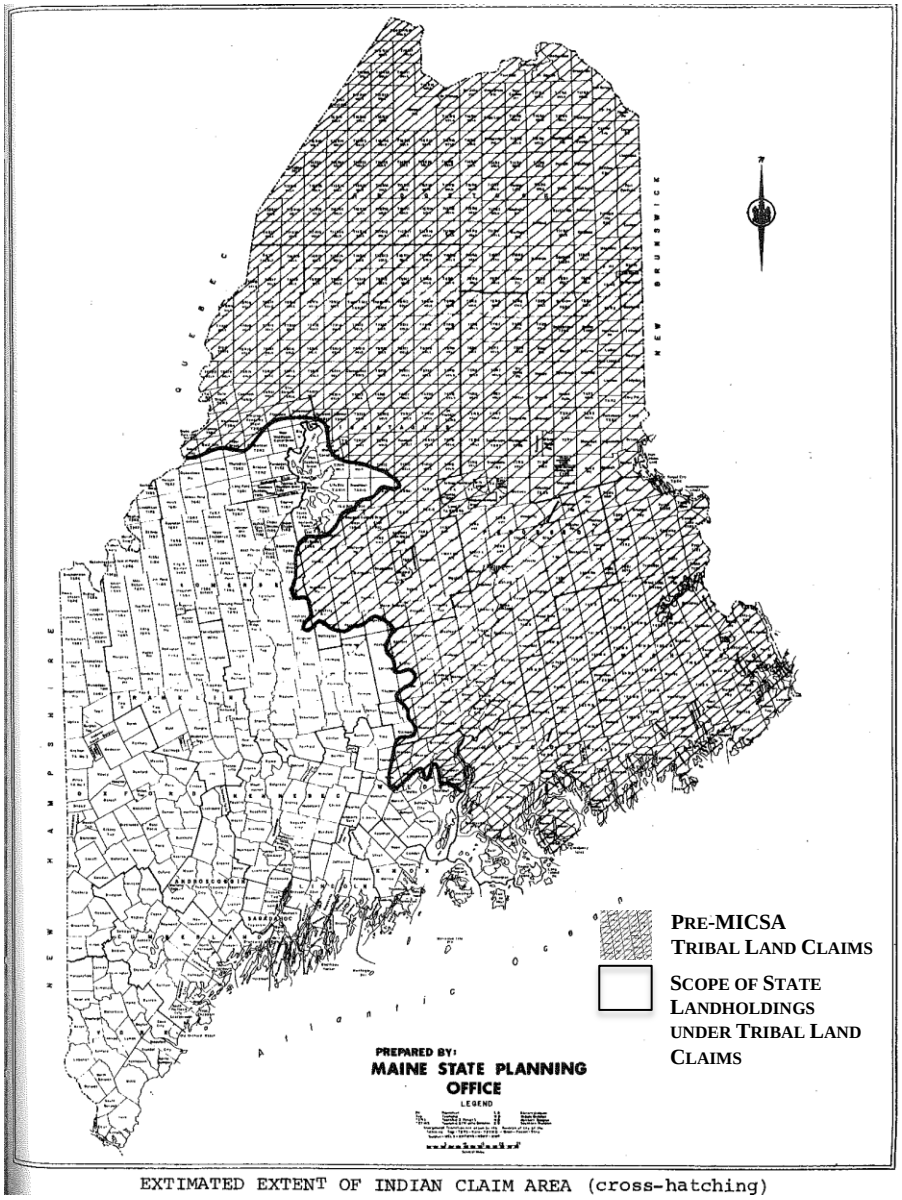
203. *See* 30 M.R.S.A. § 6205 (2012 & Supp. 2013).

204. *See id.* § 6206(1).

The Law Court's mixed interpretations of MICSA have created an opportunity for the Court to speak clearly on the issue in the future and afford a broad interpretation to section 6206's "internal tribal matters" language as they have done in near-recent MICSA cases. A broad interpretation would avoid "black and white" characterizations of tribal activities under MICSA, and thereby permit the Court to view MICSA's ambiguous language in varying "shades of gray" so as to breathe life into the tribes' quasi-sovereign, quasi-municipal status and salvage what little autonomy MICSA affords the tribes. Viewing the "internal tribal matters" question not merely as whether the tribal activities impact *any* entity outside of the tribal community, but instead focusing on whether the tribal activities may be effectuated so long as they are consistent with large-scale state interests, permits the Law Court to maximize tribal autonomy under the quasi-sovereign, quasi-municipal status established under MICSA. Due to the sensitive, discrete cultural values of—as well as the historical and contemporary disenfranchisement suffered by—the tribes, this treatment is more than warranted where tribal activities are sufficiently aligned with, and do not significantly disturb, legitimate and far-reaching state interests.

Since the beginning of time, when Gluskabe first created the mighty Penobscot River and helped the First People to establish a village along its banks, the Wabanaki have preserved their culture as a sovereign and resilient people. From the dawn of their civilization—when Gluskabe slew the Water Monster and saved the First People—to enduring centuries of harsh colonialist regimes, the Wabanaki have maintained their identity, but have done so at great cumulative cost. Now, their culture faces perhaps its most lethal threat yet in the form of MICSA. And though legends of the Wabanaki foretell a time when Gluskabe will once again return to save the First People, Maine's tribes can no longer wait for his return. The time for action is now, and the Law Court has an opportunity to provide an answer.

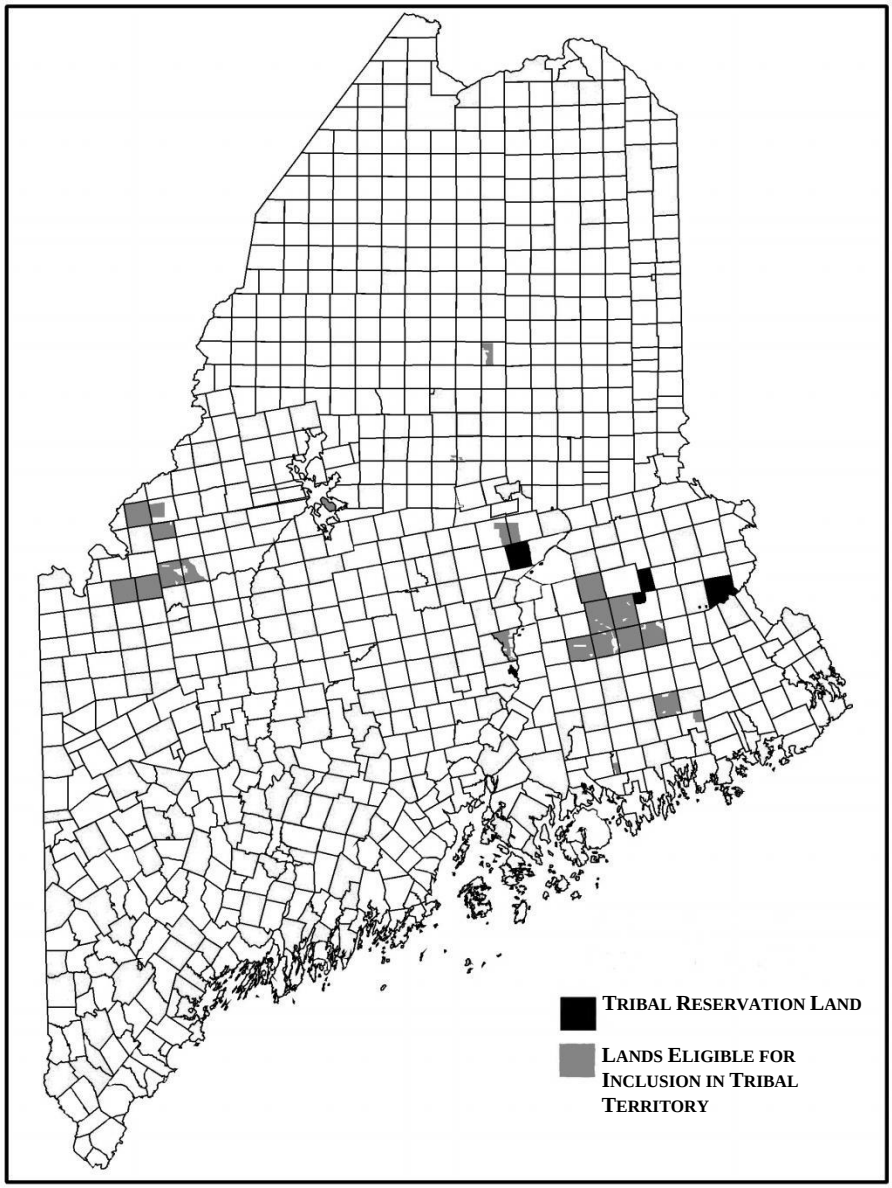
APPENDIX A[205]:
ESTIMATED EXTENT OF THE COLLECTIVE TRIBAL LAND CLAIM AREA



EXTIMATED EXTENT OF INDIAN CLAIM AREA (cross-hatching)

205. This map—provided courtesy of the Maine State Law and Legislative Reference Library archives—was originally produced by the now-defunct Maine State Planning Office for inclusion in materials provided to members of the Joint Select Committee on the Maine Indian Land Claims by State officials, circa 1979-1980. Here, the Author has manipulated the map so as to provide a reference key to identify the two depicted area types by shading.

APPENDIX B[206]:
LANDS RETAINED BY THE TRIBES UNDER MICSA



206. This map was created by the Author, utilizing a blank map of the State of Maine and computer imaging software to recreate the depicted parcel demarcations. Parcel demarcations were determined by careful reference to those explicitly mentioned in the Maine Indian Claims Settlement Act, as well as to maps present in 2 MAINE JOINT SELECT COMMITTEE ON INDIAN LAND CLAIMS, BACKGROUND INFORMATION ON INDIAN LAND CLAIMS (1980) (on file with University of Maine School of Law, Donald L. Garbrecht Law Library).