

## TREATMENT AS TRIBE, TREATMENT AS STATE: THE PENOBSCOT INDIANS AND THE CLEAN WATER ACT

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“[T]he Penobscot Tribe of Indians [is declared] to be enemies, rebels and traitors to his Majesty.”

Proclamation of War, Colony of  
Massachusetts, Council Chamber  
in Boston, November 3, 1755\*\*

“The Indians say, that the [Penobscot] river once ran both ways, one half up and the other down, but, that since the white man came, it all runs down, and now they must laboriously pole their canoes against the stream . . . .”

Henry David Thoreau, July 1848\*\*\*

“Ten thousand eagles flew that day as all the world stood still. The eagles flew above those clouds. Perhaps some day . . . we will.”

Donna M. Loring, Penobscot Tribal  
Representative, Maine State Legislature,  
2002\*\*\*\*

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\*\* Reprinted in FRANK G. SPECK, *PENOBSCOT MAN: THE LIFE HISTORY OF A FOREST TRIBE IN MAINE*, at xix (Octagon Books 1976) (1940).

\*\*\* *Ktaadn, and the Maine Woods*, UNION MAGAZINE OF LITERATURE AND ART, July 1848, reprinted in HENRY DAVID THOREAU, *THE MAINE WOODS* 32 (Joseph J. Moldenhauer ed., Princeton Univ. Press 1972).

\*\*\*\* Representative Donna Loring, Memorial Day Speech to the American Legion Post in Richmond (May 27, 2003) (quoting Donna M. Loring, *Ten Thousand Eagles*), at <http://www.maine.gov/tools/whatsnew/index.php?topic=Portal+News&id=1298&v=Article>. Ms. Loring is a member of the State House of Representatives pursuant to an unusual law going back to the early days of statehood. See ME. REV. STAT. ANN. tit. 3, § 1 (West 1983).

## I. INTRODUCTION: THE “UNMENTIONED”

Congressional specialists have limited vision. They work their own committees and police their specialized turfs happily oblivious to the outside world. Their intense ideologies find comfort in steering clear of complicated matters that promise only unwelcome entanglements.

One of the unwelcome entanglements of the contemporary legislative process is the historical reality of the Indian tribes. Indian law is known to be arcane, difficult, hard to crack on a casual basis. Congressional staffers not schooled in Indian law have a positive aversion to it. Knowing little about it, the best strategy is to avoid it. The remarkable consequence is that Indian tribes are *not* often mentioned in celebrated and thoroughly modern Congressional enactments—among them, the Occupational Safety and Health Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the Employment Retirement Income Security Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.<sup>1</sup>

Powerful ambitions drove these statutes and many like them. None were so ambitious as to give a thought to how these measures would land on the Indian tribes.

This basic strategy of not mentioning Indian tribes proved attractive in the environmental field. The tribes were functionally left out of the Clean Air Act of 1970, the Federal Water Pollution Control Act Amendments of 1972, and the 1973 amendments to the Endangered Species Act.<sup>2</sup> This selective omission by Congress was not easily achieved since the tribal presence on all three legislative domains was conspicuous and obvious. Tribes won slight mention in these laws.<sup>3</sup> They were not part of the federal-state “partnership” that was the prevailing regulatory model.

A conspicuous exception to the rule of keeping mum on Indian tribes appeared in the 1976 Resource Conservation & Recovery Act (“RCRA”) that is part of the old Solid Waste Act.<sup>4</sup> For purposes of RCRA, tribes are “municipalities.”<sup>5</sup> They were treated as “municipalities” so they could bene-

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1. Tribes are not mentioned in the public accommodation provisions of the ADA but are excluded from the employment provisions. 42 U.S.C. § 12111(5)(B)(i) (2000). See also Jill A. Conrad, *The 9th Circuit Approach to Applying Federal Labor and Employment Law to Indian Tribes*, WASHINGTON STATE BAR NEWS, Nov. 2002, available at

<http://www.wsba.org/media/publications/barnews/archives/2002/nov-02-circuit.htm> (last modified June 13, 2003). For the decision that allows Indian tribes to be swept up accidentally in *statutes of general applicability*, see *Federal Power Commission v. Tuscarora*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (observing that “[g]reat nations, like great men, should keep their word”).

2. See 42 U.S.C. §§ 7401-7671q (2000); 33 U.S.C. §§ 1251-1387 (2000); 16 U.S.C. §§ 1531-1544 (2000).

3. A “person” includes a “municipality” under the Clean Water Act and a “municipality” includes an “Indian tribe.” 33 U.S.C. § 1362(5)(4) (2000). The consequence is that tribes can sue and (possibly) be sued under the citizen suit provisions. The Clean Air Amendments of 1970 do not mention Indian tribes. The Endangered Species Act of 1973 authorizes cooperative agreements with any state. Tribes are not identified as states. This law does exempt Alaska natives from “take” provisions for subsistence activities, subject to Secretarial regulations. 16 U.S.C. § 1539(e) (2000).

4. See 42 U.S.C. § 6903 (2000).

5. *Id.* § 6903(13).

fit from the grant-dispensing framework of the Solid Waste Act. Tribes, like municipalities, were the frontline actors in getting rid of garbage. Congress was doing tribes a favor by allowing them to muster as “municipalities” under the Solid Waste Act.

Beware Congressional gifts to Indian tribes.

This “municipality” characterization was seized upon by Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia in *Backcountry Against Dumps v. EPA*<sup>6</sup> to invalidate agency approval of the plans of the Campo Band of Mission Indians to undertake regulation of a state-of-the-art landfill on the reservation just north of the Mexican border in San Diego County.<sup>7</sup> The court treated this issue as a mindless exercise in plain meaning. What it could understand was that a “municipality” was not a “state” and that only “states” could enjoy the splendors of full delegation.<sup>8</sup>

Not knowing the full consequences of its ruling could only be comforting to the three-judge panel in *Backcountry Against Dumps*. The effect of its decision was to validate an unethical campaign to stop at all costs an Indian project that had been studied ad nauseum. Michael Connolly, chairman of Campo’s Environmental Protection Agency, took this parting shot: “[*Backcountry Against Dumps*] committed a crime against us. To be apologetic and say that they didn’t know or they were just looking out for their families and their children . . . is wrong . . . .”<sup>9</sup> Connolly could not understand how the regional EPA could “take a middle road on that kind of thing.”<sup>10</sup>

Congress did not rush to correct the tribe’s “treatment as municipality” in RCRA. Many are content with the status quo fashioned accidentally by the ruling in *Backcountry Against Dumps*.

## II. TREATMENT AS STATE: GETTING MENTIONED

Slowly, “not mentioned” as a strategy for dealing with the Indian tribes has been squeezed out of the federal environmental laws. Even in law, doing nothing can have a limited life span if emergent circumstances require a response. The preferred model—detectable as of 1996 by the court in *Backcountry Against Dumps*—is to treat Indian tribes as states. This is a label of convenience as tribes are not states and perfectly content not to be so.<sup>11</sup> This

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6. 100 F.3d 147 (D.C. Cir. 1996).

7. *Id.* at 152.

8. *Id.* at 150.

9. DAN MCGOVERN, *THE CAMPO INDIAN LANDFILL WAR: THE FIGHT FOR GOLD IN CALIFORNIA’S GARBAGE* 263 (1995). McGovern is the former Regional Administrator of Region IX of the EPA.

10. *Id.*

11. The “Treatment as a State” terminology is now “Treatment in the Same Manner as a State,” which is a change in response to the tribes’ objection to “Treatment as State” language. Tribes steadfastly resist the honor of statehood. EPA Office of Water, American Indian Environmental Office, Resource Guide, *Chapter Three: EPA’s Approach to Environmental Protection in Indian Country*, <http://www.epa.gov/indian/resource/chap3.htm#86> (last visited Jan. 6, 2003). See also U.S. Environmental Protection Agency, Region 10, Tribal Operations Office, *The Environmental Exchange: A Resource Guide for Tribal Leaders of the Pacific Northwest and Alaska*, <http://www.nativeknowledge.org/db/files/envxchn2.htm> (last visited Jan. 31, 2004) (“The term ‘treat-

treatment-as-state strategy was developed by several Indian advocacy groups.<sup>12</sup> It was picked up and espoused by EPA staffers, including Mr. Leigh Price, Region VII EPA, who is generally recognized as the leading expert on the Clean Water Act and Indian tribes within the agency.<sup>13</sup> “Treatment as State” (“TAS”) is an attractive approach for filling in the gaps of the pollution laws since tribes have established governments, fixed territories, and longstanding commitments to protection of the environment.<sup>14</sup>

In 1987, the TAS provisions of the Clean Water Act emerged as section 518(e).<sup>15</sup> This is designated as “Treatment as States.”<sup>16</sup> It reads in part:

The Administrator is authorized to treat an Indian tribe as a State for purposes of title II [grants for construction of treatment works] and sections . . . 1254 [research, investigation, and training], 1256 [grants for pollution control programs], 1313 [water quality standards], 1315 [reports on water quality], 1318 [monitoring, entry, and inspection], 1319 [enforcement], 1324 [clean lakes], 1329 [non-point source management], 1341 [certification], 1342 [NPDES program], 1344 [dredge and fill], [and] 1346 to the degree necessary to carry out the objectives of this section, but only if—

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator’s judgment, of carrying out the functions to be exercised

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ment-as-a-State’ is somewhat misleading and may be offensive to some Tribes.”). Additionally, for the deep etiology of tribes as “states,” see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

12. See Natural Resources & Environmental Protection, *Survey on Tribal Actions to Protect Water Quality and the Implementation of the Tribal Amendments to the Clean Water Act*, at ii (1994) (on file with author); David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVTL. L. REP. 10,579 (1993); William C. Galloway, Note & Comment, *Tribal Water Quality Standards Under the Clean Water Act: Protecting Traditional Cultural Uses*, 70 WASH. L. REV. 177 (1995).

13. N. Bruce Duthu, *The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47, 55 n.34 (1996).

14. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996).

15. 33 U.S.C. § 1377(e) (2003).

16. *Id.*

in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.<sup>17</sup>

For purposes of section 518, a “Federal Indian Reservation” is defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.”<sup>18</sup> An “Indian tribe” is defined as “any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.”<sup>19</sup>

The legislative history of section 518(e) shows that the purpose of the law was to close the gaps in the usual federal-state delegations.<sup>20</sup> Inclusion of tribes in the normal process of delegation of authority could do away with no-man’s-lands of deregulation. It could shut the door on jurisdictional vacancies that allowed polluters to grow and prosper.

The TAS provisions have been implemented cautiously by the EPA. Currently, twenty-three tribes manage their own EPA-approved water quality standards program.<sup>21</sup> Several more tribes are in various stages of the delegation process.<sup>22</sup> Law that is creative, interesting, and effective is percolating within these processes. The Sokaogan Chippewa Indian Community defends its water resources with a spirit no state could possibly muster:

The purpose of this ordinance is to protect and maintain life on the Mole Lake Indian Reservation by enacting minimum standards for water on the Reservation. Water is a sacred thing to us, as it has always been to our most revered ancestors, through all time. It has been taught to us by our revered elders that water is sacred. It is our blood. It is the blood of our children and ancestors. It is the life-supporting blood of Mother Earth.<sup>23</sup>

The Miccosukee tribe rewrites the book with an ominous enforcement policy by stating: “[The tribe] vows that there will be no compromise with respect to discharges of pollutants which constitute a valid hazard to human

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17. *Id.*

18. *Id.* § 1377(h)(1).

19. *Id.* § 1377(h)(2).

20. Predictably, the legislative history captures the apprehensions of lawmakers about what the TAS provisions would enable the tribes to do. Specifically, questions were raised as to whether the TAS provisions would affect the quantity of water allocated to the tribes or expand the mechanisms available to the tribes to enforce their existing water rights on and off the reservation. *See* 133 CONG. REC. H168 (daily ed. Jan. 8, 1987) (statement of Rep. Morrison).

21. *See* Environmental Protection Agency, *Tribal Water Quality Standards*, <http://www.epa.gov/waterscience/standards/wqslibrary/tribes.html> (last modified Aug. 18, 2003).

22. *See id.*; Adam Wilmoth, *13 Tribes Seek Environment Regulatory Role*, THE OKLAHOMAN, Oct. 1, 2003, at 1.

23. SOKAOGON CHIPPEWA COMMUNITY WATER QUALITY STANDARDS § 151.01, [http://www.epa.gov/ost/standards/wqslibrary/tribes/chippewa\\_5\\_wqs.pdf](http://www.epa.gov/ost/standards/wqslibrary/tribes/chippewa_5_wqs.pdf) (last visited Nov. 2, 2003).

health or the preservation of the Everglades ecosystem contained within the Water Conservation Area 3-A and Everglades National Park.”<sup>24</sup>

This revival of water pollution law in Indian country is not universally admired. In fact, it is frequently resented. Each and every tribal delegation runs into stiff opposition—invariably from an offended state, often from polluters who have prospered in the shadows of the status quo.<sup>25</sup>

### III. TRIBES AS MOST DANGEROUS STATES: GETTING NOTICED

The tribes now acquiring jurisdiction to enforce the water pollution laws are states like none others in the history of the republic. They are mostly free of the stifling politics and industry domination that is the bureaucratic norm of state politics. One study of the Miccosukee Indians in the Everglades shows real differences between tribe and state in perspective, commitment, and legal posture.<sup>26</sup> The Miccosukee tribe is eager to intervene, slow to settle, quick to regulate, and anxious to enforce.<sup>27</sup> It acts like a sovereign and is proud of it.

Treating the tribe as a state does not make it so. The Miccosukee tribe is a “state” with quick moves, a strong environmental agenda, and ambitious environmental goals.<sup>28</sup> This “state” selects its lawyers for a gumption that is rare in the attorneys’ general offices of the staid states of the union.<sup>29</sup>

There is nothing in the early experience of section 518 to quell the suspicion that it is sponsoring a rebellion in the pollution-harboring preferences of “states as states.”

The first three decided cases under section 518 disclose the innovation implicit in the TAS model.<sup>30</sup> All three show the creative touch open to the tribes under the TAS provisions. All three mark a departure from state business-as-usual under the Clean Water Act. All three are important victories for the tribes.

#### A. City of Albuquerque v. Browner<sup>31</sup>

This case posed an unsuccessful attack on the EPA delegation to the Isleta Pueblo on the Rio Grande whose water quality standards included a “Primary Contact Ceremonial Standard.”<sup>32</sup> Claiming “swimmable” water

24. MICCOSUKEE ENVIRONMENTAL PROTECTION CODE, WATER QUALITY STANDARDS FOR SURFACE WATERS OF THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, [http://www.epa.gov/ost/standards/wqslibrary/tribes/fl\\_4\\_miccosukee.pdf](http://www.epa.gov/ost/standards/wqslibrary/tribes/fl_4_miccosukee.pdf) (last visited Nov. 2, 2003).

25. See William H. Rodgers, Jr., *The Miccosukee Indians and Environmental Law: A Confederacy of Hope*, 31 ENVTL. L. REP. 10,918, 10,919 (2001).

26. *Id.* at 10,918.

27. *Id.* at 10,921-27.

28. *Id.*

29. See *id.* at 10,920.

30. See *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001); *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

31. *Browner*, 97 F.3d at 415.

32. *Id.* at 429.

quality on the Rio Grande might be surprising to sophisticates of the river today. But “swimmable” water is no stranger to the Clean Water Act.<sup>33</sup> It was an essential concern of the Pueblo.<sup>34</sup>

*City of Albuquerque* is a complete victory for the Indian position. The court holds, first, that tribes may establish water quality standards more stringent than the federal standards.<sup>35</sup> It holds, second, that the “Primary Contact Ceremonial Use” standard can withstand vagueness and capriciousness objections.<sup>36</sup> It holds, third, that EPA approval of this religiously-based “Primary Contact Ceremonial Standard” did not offend the Establishment Clause.<sup>37</sup> It holds, fourth, that the EPA need not be embroiled in notice-and-comment rulemaking in the course of reviewing tribal-promulgated water quality standards.<sup>38</sup> It holds, fifth, that the dispute resolution process developed by the EPA for the tribes and the states was acceptable even though it did not allow third parties to initiate the process.<sup>39</sup>

*B. Montana v. EPA (Confederated Salish and Kootenai Tribes of the Flathead Reservation)*<sup>40</sup>

*Montana* was another unsuccessful challenge to an EPA decision granting TAS status to the tribes to promulgate water quality standards that apply to all sources of “pollutant emissions” within the reservation, whether on Indian or non-Indian lands.<sup>41</sup> In its decision document approving the delegation, the EPA carefully considered the question of whether the tribes had adequate jurisdiction over the waters that were within the boundaries of the Flathead reservation.<sup>42</sup> One finding that supported jurisdiction was the acknowledgement that the health and welfare of the tribe required the assertion of jurisdiction over all reservation lands, including those owned in fee by nontribal members.<sup>43</sup> This was backed up by a thirteen-page appendix

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33. An “interim goal” of fishable/swimmable water by July 1, 1983 was a celebrated “national goal” of the 1972 Amendments. See 33 U.S.C. § 1251(a)(2) (2000).

34. *Browner*, 97 F.3d at 419.

35. *Id.* at 423 (verifying that this position was “in accord with powers inherent in Indian tribal sovereignty”).

36. *Id.* at 427. The Act allows narrative standards. The standards were adequately supported by considerations of drought and the need to protect sensitive subpopulations. They are protected further by the deference owed the EPA and the need to avoid a judicial “second-guessing.” *Id.*

37. *Id.* at 428-29.

38. *Id.* at 424-25 (stating that the EPA’s role is limited). The same rule applies, of course, to state-promulgated water quality standards. Cf. William H. Rodgers, Jr., 2 ENVIRONMENTAL LAW: AIR AND WATER 273-75 (1986).

39. *Browner*, 97 F.3d at 427.

40. *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998).

41. See *id.* at 1141.

42. See Environmental Protection Agency, Decision Document: Approval of Confederated Salish and Kootenai Tribes Application for Treatment As a State Under Section 303 of the Clean Water Act [hereinafter Decision Document] (on file with author). This is the standard of 40 C.F.R. § 131.8(a)(3), which was adopted in Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64878 (Dec. 12, 1991) (adopting 40 C.F.R. Part 131).

43. See Decision Document, *supra* note 42.

showing how nonmember fee-lands polluted reservation waters.<sup>44</sup> The agency did not address the tribe's claim that section 518(e) on its face delegates authority to regulate all sources within the exterior boundaries of the reservation.<sup>45</sup>

The court in *Montana* upholds the EPA's delineation of inherent tribal authority over nonmembers within the reservation.<sup>46</sup> It saw the world as it was. The tribe's Flathead Lake was under assault by "feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills."<sup>47</sup> Waiting in line as actual or potential point sources were "wastewater treatment facilities, commercial fish ponds and hatcheries, slaughterhouses, hydroelectric facilities and wood processing plants."<sup>48</sup>

### C. *Wisconsin v. EPA (Mole Lake Band of Lake Superior Chippewa Indians)*<sup>49</sup>

This case affirms the EPA's delegation to treat the Sokaogon Chippewa Community as a "state" for purposes of water quality under section 303 of the Clean Water Act.<sup>50</sup> The reservation at issue was small (1850 acres), and none of it was owned in fee by nonmembers.<sup>51</sup> But the state made much of its "ownership" of the bed of Rice Lake, the largest water body on the reservation and a prime source of wild rice used by tribal members.<sup>52</sup> It feared the tribal TAS approval would "throw a wrench into the state's planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake."<sup>53</sup>

The *Wisconsin* decision is quite content to contemplate that the tribe would be able to regulate off-reservation activity with an on-reservation impact:

Once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state (*e.g.*, zinc and copper mining), to make sure that their activities do not result in contamination of the downstream on reservation waters (assuming for the sake of ar-

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44. *Id.* at A-1 ("Factual Analysis of Finding: Existing and future activities on non-member owned fee lands within the exterior boundaries of the Flathead Reservation have potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial.")

45. *Id.*

46. *Montana*, 137 F.3d at 1140-41.

47. *Id.* at 1140.

48. *Id.*

49. *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001); see Paul M. Pricker, *Wisconsin v. EPA: Tribal Empowerment and State Powerlessness Under § 518(e) of the Clean Water Act*, 5 U. DENV. WATER L. REV. 323 (2002).

50. *Wisconsin*, 266 F.3d at 750.

51. *Id.* at 745.

52. *Id.*

53. *Id.*



gument that the reservation standards are more stringent than those the state is imposing on the upstream entity).<sup>54</sup>

Similarly, the court in *Wisconsin* was comfortable with the generalized health-and-safety analysis that the EPA used to justify a delegation to all reservation lands.<sup>55</sup> It said:

Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities. Since a state has the power to require upstream states to comply with its water quality standards, to interpret the statutes to deny that power to tribes because of some kind of formal view of authority or sovereignty would treat tribes as second-class citizens.<sup>56</sup>

#### IV. TRIBAL VULNERABILITIES: THE CONSEQUENCES OF GETTING NOTICED

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed . . . .<sup>57</sup>

Tribes were once secure in their political authority, their sovereignty, and their geographical rule. But those times are fast fading. While tribes are all-powerful on some legal issues, they have become all-vulnerable on others. Each venture into non-Indian courts brings extravagant response. No state that brings a lawsuit runs serious risk that a court might hold that the state does not exist, that its territory is but a fraction of that imagined, and that its citizens are not who they purport to be. No state runs serious risk of court rulings that its founding documents are a fraud, that its chairman was not properly chosen, or that its lawmakers are common miscreants made readily answerable for their errors. Tribes, by contrast, are exposed to these risks all the time.<sup>58</sup> The smallest and meanest opponent can raise these ob-

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54. *Id.* at 748 (citing *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996)).

55. *Id.* at 750.

56. *Id.*

57. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

58. See Douglas B.L. Endreson, *The Challenges Facing Tribal Courts*, 79 JUDICATURE 142, 142-44

jections and usually does. Every man is a Custer under this dreadful legal system. He is able to challenge tribal existence and territory at his own whim and for his own reasons.

The Supreme Court has been the prime architect of this legal chaos, beginning markedly with its erroneous decision in *Montana v. United States*<sup>59</sup> that started the move toward race-based jurisdictional exceptions for non-Indians taking up residence in Indian country. This confusion has had a twenty-year lifespan. The High Court's contributions to the erosion of tribal sovereignty over this time are well known.<sup>60</sup> They will not be reviewed here except by way of example to put section 518 of the Clean Water Act in context.

An example is *South Dakota v. Yankton Sioux Tribe*,<sup>61</sup> where a landfill was built on non-Indian fee land within the boundaries of the original Yankton Reservation. This situation is not unusual. Tribes see this all the time— islands of adversaries; nonmember “defectors” on the reservation believing they are answerable to no one; the enemy within; and a good strategy for the state, too—put the dump inside Indian lands where it can do the least harm.<sup>62</sup>

Arguments unfolded as anticipated. The state was content with a “compacted clay liner” for this landfill.<sup>63</sup> This “protection” was next to nothing and was guaranteed to be a quick leaker. The tribe wanted something more. It sought a “synthetic composite liner”—closer to the double-liners that are conventional technology for this activity.<sup>64</sup> The Supreme Court worked diligently to save the freedom of this landfill. If it were located on the reservation, the tribe would not be kind to it. Neither would the federal government. So the Supreme Court took the reservation away from the landfill.<sup>65</sup> This is called a “diminishment” case.<sup>66</sup> The Yankton Sioux are the poorer for it.

The technique of the High Court in *Yankton Sioux* is not admirable. It shows a cavalier and small-minded approach that the Court would never use when calculating the boundaries of private owners. The technical legal

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(Nov.-Dec. 1995).

59. 450 U.S. 544 (1981).

60. E.g., David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights: Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Judith V. Royster & Rory Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989); Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, A Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RES. J. 90 (2002).

61. 522 U.S. 329 (1998).

62. See, e.g., Bill Donovan, *Navajo Tribe Embarks on a Long-term Cleanup*, HIGHCOUNTRYNEWS.ORG, Aug. 18, 1997, [http://www.hcn.org/servlets/hcn.Article?article\\_id=3563](http://www.hcn.org/servlets/hcn.Article?article_id=3563).

63. *Yankton Sioux Tribe*, 522 U.S. at 341.

64. *Id.* These cases are always about stiff regulation or lax regulation. The question of *who* regulates is a convenient cover for whether the regulation will be meaningful.

65. *Id.* at 358.

66. *Id.*

question was whether the Yankton Sioux sold their government authority when they were made to sell their “surplus” lands under an 1892 treaty.<sup>67</sup> This 1892 treaty gave every evidence of preserving the earlier 1858 treaty.<sup>68</sup> It said in a savings clause that “[n]othing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton Tribe of Sioux Indians and the United States.”<sup>69</sup> How could this not mean that the reservation boundaries were intact despite the addition of new owners? The High Court, per Justice O’Connor, detected an inconsistency between the Savings Clause and the sale.<sup>70</sup> Giving voice to the Savings Clause would “impugn the entire sale.”<sup>71</sup> The Court was also moved by the disclosure that Commissioner John J. Cole threatened the Indians that a loss of rations would mean “[n]ot one-fourth of your people could live through the winter.”<sup>72</sup> The Court drew the inference that the “intent” of the Savings Clause was to save the rations, not the reservation boundaries.<sup>73</sup> Somebody who knew Indians a little better might say that this threat of death would reinforce their purpose to save what they could of their 1858 treaty for their children. This High Court of law also said that the general rule that ambiguities are to be resolved in favor of Indian tribes is not a license to disregard a clear expression of intent.<sup>74</sup>

This *Yankton Sioux* “methodology” is easily transferable to tribal “treatment as state” under section 518. It recommends resisting all delegations with the argument that the place being polluted is not part of the “reservation.” It is, instead, part of a “state”—a true state, not a tribal place. Therefore, the offender must confess readiness to answer to the “state” as he sits within what disguises itself as an Indian reservation. Today, virtually all TAS delegations are resisted on this destructive and implausible ground of reservation “diminishment.” As a result, implementation of section 518(e) has faltered badly. In sixteen years, a mere twenty-three tribes have earned TAS status.<sup>75</sup>

The EPA estimates that “[t]ribal reservations without approved water quality standards account for as much land area as all of New England plus the State of New Jersey.”<sup>76</sup> Quite a “gap” in the fabric of protection, it is

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67. *Id.* at 333.

68. *Id.* at 336-39.

69. *Id.* at 338 n.1 (quoting Article XVIII of the 1892 treaty).

70. *Id.* at 345 (quoting *State v. Gregor*, 559 N.W.2d 854, 867 (S.D. 1997)).

71. *Id.* (quoting *State v. Gregor*, 559 N.W.2d 854, 867 (S.D. 1997)).

72. *Id.* at 347.

73. *Id.* at 346-47.

74. *Id.* at 349 (showing that the court was confident in this conclusion having just disregarded a clear expression of intent in the Savings Clause.) Bizarre. Judicial reasoning, they call it. Utterly unimpressive.

75. See Tribal Water Quality Standards, <http://www.epa.gov/waterscience/standards/tribal> (last visited Jan. 26, 2004); EPA, Region 10, Interim Draft Outreach and Consultation Plan: Federal Water Quality Standards for Water in Indian Country (Oct. 16, 2003), available at <http://www.epa.gov/waterscience/standards/tribal/2003outreach-consultationplan-10-16.pdf> [hereinafter Interim Draft].

76. Interim Draft, *supra* note 75, at 1.

called.<sup>77</sup> With TAS largely dysfunctional as a result of Supreme Court rulings on jurisdiction, the only avenue immediately available for on-reservation protection is a federally promulgated rule establishing water quality standards in Indian country.<sup>78</sup> Cautiously and gingerly, the EPA has talked of such a happening for several years.<sup>79</sup> The agency has now embarked (if that is the word) on a strategy of aimless (and endless) consultations on an Advance Notice of Proposed Rulemaking (“ANPRM”).<sup>80</sup> Close observers have witnessed the birth of an entirely new administrative procedure—an Advance Notice of an Advance Notice of Proposed Rulemaking (“ANANPRM”).

Meanwhile, legal life continues in Indian country, extending our tale to the Penobscot Indians of Maine.

## V. THE PENOBSCOT INDIAN NATION: A CASE STUDY ON WATER POLLUTION LAW AS TRIBAL SURVIVAL LAW

### A. *History of the Maine Tribes*

According to ethnographer Frank Speck, the “culture of the Penobscot is typical of the tribes east of the Piscataqua or the Saco River, and south of the St. Lawrence, which constitute the ethnic group known as the northeastern Algonkian or Wabanaki.”<sup>81</sup> They had a hunting and fishing economy and made good use of their woodlands.<sup>82</sup> “Passing from west to east,” Speck continues, “the tribes of this grouping include the present St. Francis Abenaki (formerly Norridgewock, Aroosaguntacook, Sokoki, and other remnants), the Wawenock, the Penobscot, the Malecite, the Passamaquoddy, and . . . the Micmac.”<sup>83</sup> These tribes have extraordinarily rich and varied histories, and they have kept good track of them. The circumstances of history and time have brought us today four federally recognized Indian tribes in Maine—the Penobscot Nation, the Passamaquoddy tribe, the Aroostook Band of Micmacs, and the Houlton Band of Maliseet Indians.<sup>84</sup>

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at 2 (stating that “[o]n Jan. 19, 2001, [EPA] Administrator Carol Browner signed a proposed rule to promulgate ‘core’ Federal standards in Indian country except where tribes ‘opt out’” and stating that “[o]n Jan. 22, 2001, EPA withdrew that proposal to allow Administrator Christine Whitman to review it”). By mid-2003, this initiative had “progressed” to the point of advance consultation on the advance notice of proposed rulemaking.

81. SPECK, *supra* note \*\*, at 21.

82. *Id.*

83. *Id.*

84. U.S. Department of the Interior, Bureau of Indian Affairs, Federally Recognized Tribes, [http://www.500nations.com/tribes/Tribes\\_Federal.asp](http://www.500nations.com/tribes/Tribes_Federal.asp) (last visited Feb. 22, 2004); *see also* The Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, 105 Stat. 1143 (Nov. 26, 1991); *Boudman v. Aroostook Band of Micmac Indians*, 54 F. Supp. 2d 44 (D. Me. 1999). The 1980 Settlement Act included the Houlton Band of Maliseet Indians. *See Houlton Band of Maliseet Indians v. Boyce*, 688 A.2d 908 (D. Me. 1997); *Houlton Band of Maliseet Indians v. Town of Houlton*, 950 F. Supp. 408 (Me. 1996).

Speck states that “[t]he Penobscot Indians refer to themselves as . . . [the] ‘[p]eople of the white rocks (country),’ or ‘[p]eople of where the river broadens out.’”<sup>85</sup> Into the mid-eighteenth century they ruled the entire Penobscot watershed—a massive area of 5,303,511 acres—with their family hunting territories.<sup>86</sup> One observer in 1764 took note of the Indians’ rules for beaver conservation that departed from the practices of the newcomers:

They said it was their custom to divide the hunting grounds and streams among the different Indian families; that they hunted every third year and killed two-thirds of the beaver, leaving the other third to breed; beavers were to them what cattle were to the Englishmen, but the English were killing off the beavers without any regard for the owners of the lands.<sup>87</sup>

The Penobscot Nation entered into treaties with the Colony of Massachusetts in 1693, 1699, 1713, 1717, 1725, 1726, 1749, and 1752.<sup>88</sup> The outbreak of the Seven Years’ War between France and Britain (1756-1763) claimed the Penobscots as an incidental political victim. In November of 1755, Massachusetts declared war on the tribe, directing his majesty’s subjects “to embrace all opportunities of pursuing, captivating, killing and destroying all and every of the aforesaid Indians.”<sup>89</sup> Bounties were payable out of the Province Treasury of forty pounds for every scalp of a male Indian and twenty pounds for females or males under the age of twelve.<sup>90</sup> There was no rush to collect as the Penobscots more than held their own in the skirmishes that ensued in the years following.<sup>91</sup>

By the time of the American Revolution, the Penobscots were an ally worth having in the military campaign against Great Britain. In courteous response to a delegation from the tribe, the Massachusetts Provincial Congress in 1775 enacted a resolve strictly forbidding trespass “or making

85. SPECK, *supra* note \*\*, at 7. The Passamaquoddy are the “[p]lace of the undertow people;” the Malecite are the “people of the beautiful river” (the St. John); and the Prince Edward Island Micmac are the “[p]eople of the white sandy country.” *Id.* at 16-18.

86. See DR. KENNETH M. MORRISON, OBSERVATIONS ON ASPECTS OF THE HISTORY OF THE PENOBSCOT NATION WHICH MAY BE RELEVANT TO *UNITED STATES V. MAINE*, CIV. NO. 1969 (D. ME. FILED JULY 14, 1972), in SUPPLEMENTAL PUBLIC COMMENTS OF THE PENOBSCOT NATION ON THE APPLICATION OF THE STATE OF MAINE TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR THE AUTHORIZATION TO ADMINISTER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (Aug. 21, 2000) [hereinafter SUPPLEMENTAL PUBLIC COMMENTS] (on file with author). This massive area of 8592 square miles down the middle of the State of Maine is the size of Massachusetts and Rhode Island combined. See Susan Hand Shetterly, *The River They Call Home*, AUDUBON, July-Aug. 2000, at 78 (on the river that has been “dammed and developed, polluted and poisoned” and the tribe’s role in restoring it).

87. SPECK, *supra* note \*\*, at 207 (quoting JOSEPH CHADWICK, AN ACCOUNT OF A JOURNEY FROM FORT POWNALL UP THE PENOBSCOT RIVER TO QUEBEC (1764)).

88. MORRISON, *supra* note \*\*, at 1-2.

89. See SPECK, *supra* note \*\*, at xix.

90. *Id.*

91. See Lee Sultzman, Abenaki History, <http://www.tolatsga.org/aben.html> (revised July 21, 1997).

waste” on lands adjacent to the Penobscot River “now claimed by our brethren the Indians of the Penobscot Tribe.”<sup>92</sup> This good will slowly slipped away. By 1794, the Passamaquoddies under treaty relinquished all claims to land within Massachusetts (that included the present-day State of Maine) save for holdings in and around the St. Croix River.<sup>93</sup> Two years later in 1796 the Penobscots gave up 200,000 acres for the usual recompense of blue cloth, shot and powder, corn, salt, and rum.<sup>94</sup> In two more legal bites (the first in 1818, the second in 1833), the Penobscots lost most of the rest.<sup>95</sup> They were confined—as they are today—to a number of islands (including Indian Island) in the Penobscot River above Old Town, about twelve miles north of Bangor.<sup>96</sup>

The State of Maine broke off from Massachusetts in 1820.<sup>97</sup> In 1831, the Penobscots petitioned Governor Smith, asking for help and “encouragement” and reciting that the Indians and the English people “equally love life.”<sup>98</sup> The Indians complained about encroachment on fishing grounds, unwelcome closures, and timber trespass.<sup>99</sup> The petition had this to say about the tribally-owned islands “from Old Town upwards”:

White people cut the timber and grass on some of them and pay nothing. Their cattle and sheep eat up all the [Indian] plants; thus they are so hurt and discouraged, they think they will never work more. Now we pray that all our Islands may be preserved and kept for the use of us, especially as far up the West Branch as opposite Moorehead Lake. Up the Piscataquis to Broad Eddy; and up the East Branch to its head or first ponds. So that if anybody’s creatures be found upon our islands doing any damage or injury, they may be treated and their owners prosecuted, just as if we were white people. Indians now can raise nothing. [Bad] men and their cattle do us much evil.<sup>100</sup>

The State of Maine responded to this grievance in 1833 by purchasing the last four remaining townships of the tribe.<sup>101</sup> Today, the Penobscot Na-

92. MORRISON, *supra* note 86, at 22. The lands protected included a corridor twelve miles wide.

93. PAUL BRODEUR, *RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND* 68-90 (1985). For more on the work of attorney Tom Tureen and his creative associates, see KIM ISAAC EISLER, *REVENGE OF THE PEQUOTS: HOW A SMALL NATIVE AMERICAN TRIBE CREATED THE WORLD’S MOST PROFITABLE CASINO* 63-88 (2000). See also Robert McLaughlin, *Giving It Back to the Indians*, ATLANTIC MONTHLY, Feb. 1977, at 70.

94. MORRISON, *supra* note 86, at 22.

95. The text of the 1818 treaty appears in SUPPLEMENT PUBLIC COMMENTS, tbl.2 (“Treaty made by the Commonwealth of Massachusetts with the Penobscot Tribe of Indians.”), June 29, 1818.

96. BRODEUR, *supra* note 93, at 82.

97. *Id.* at 78.

98. John Neptune & Joseph Soc Basin, Penobscot Tribe, PETITION, in SUPPLEMENTAL PUBLIC COMMENTS.

99. *Id.*

100. *Id.* ¶ 5.

101. MORRISON, *supra* note 86, at 32.

tion has more than 2000 members, with at least one fourth of them living on Indian Island.<sup>102</sup> The Nation owns 315 acres on the Indian Island Reservation, 200 islands in the Penobscot rivers, more than 55,000 acres of trust land, and more than 69,000 of fee-simple land.<sup>103</sup> It operates the Olaman Industries and runs several logging enterprises.<sup>104</sup>

The Penobscot Nation has had the good fortune of talented leadership. Former Governor Jerry Pardilla was the Executive Director of the National Tribal Environmental Council (“NTEC”).<sup>105</sup> Pardilla built NTEC into a formidable force with his strategic good sense and extraordinary skills with people.<sup>106</sup> Present Governor Barry Dana is eloquent and bold—determined to have the tribe show the way on environmental issues. The Penobscot representative in the state legislature, Donna Loring, is a bundle of creative energy who has won respect of friend and foe alike. The first tribal member to take and pass the state bar, Mark Chavaree, has stayed at home to work for the tribe because he can see nothing in private practice that resembles the challenge of saving his islands and his river.<sup>107</sup>

### B. *Revival of the Tribes of Maine*

The legal revival of the tribes of Maine is a contemporary Indian law fairy tale. It includes a happy accident—discovery of a “shoebox” copy of the 1794 treaty by the Passamaquoddy, Louise Sockabesin, and any number of deeds of defiance, imagination, and bravery by tribal members.<sup>108</sup>

A key fork in the legal road occurred when a young, brash, and thoroughly inexperienced attorney named Tom Tureen transformed the case from a “money” opportunity into a quest for restoration.<sup>109</sup> Tureen discovered—with the skip of a heartbeat that all would-be reformers know—the Indian Trade and Nonintercourse Act of 1790.<sup>110</sup> This act states that “no sale” of lands by Indians “shall be valid” unless “duly executed” under authority of the United States.<sup>111</sup> Tureen was not content with discovery of the means for restoring the State of Maine to its tribal sovereigns. He aspired to see it happen. He stubbornly refused to allow his case to become a cash cow for the Indian claims lawyers who circle the resting places of historic tribal misfortunes. As this young attorney said to Arthur Lazarus, Jr., of Fried &

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102. NORTHEAST WIGWAM, PENOBSCOT: WHERE THE ROCKS SPREAD OUT, <http://www.newwigwam.com/hpenobscot.html> (last visited Feb. 11, 2004).

103. *Id.*

104. *See generally* Penobscot Indian Nation Homepage, [www.penobscotnation.org](http://www.penobscotnation.org) (last visited Feb. 11, 2004).

105. Press Release, National Tribal Environmental Council, Executive Director Moves on to Greater Challenges, <http://www.ntec.org/archives/chadjerry.html> (modified June 30, 2003).

106. *See generally id.*

107. Based on several interviews by the author with tribal members and staffers.

108. BRODEUR, *supra* note 93, at 69.

109. *Id.* at 83-84.

110. 25 U.S.C. § 177 (2000).

111. *Id.*

Frank, one of the deans of Indian claims cases, “Mr. Lazarus, this is not an Indian Claims Commission case, this is a Nonintercourse Act claim.”<sup>112</sup>

Tureen and colleagues in the decades of the 1970s orchestrated a series of lawsuits that put much of the State of Maine in legal limbo.<sup>113</sup> It was an entrepreneurial extravaganza—made up of three parts politics, four parts opportunism, and occasional doses of good luck. With Tureen’s guidance, on February 22, 1972, the Passamaquoddy Governor, Francis Nicholas, *asked* BIA Commissioner Louis Bruce to *ask* the U.S. Department of Justice to initiate a lawsuit against the State of Maine for the return of land and for money damages.<sup>114</sup> The date of the request—February 22—was no accident. It is George Washington’s birthday, which is an appropriate occasion for a reminder of responsibilities to the first citizens.

On June 2, 1972, Tureen filed suit against the Secretary of Interior and others seeking a court order requiring the filing of a lawsuit by the United States to protect the Maine tribes from a soon-to-expire statute of limitations on their claims.<sup>115</sup> He got his court order from U.S. District Judge Edward T. Gignoux.<sup>116</sup>

In June and July of 1972, the Department of Justice filed a \$150 million claim on behalf of the Passamaquoddy, followed two weeks later by a similar claim on behalf of the Penobscots.<sup>117</sup> In the next few years tensions rose as the tribes accumulated favorable legal rulings.<sup>118</sup> In September of 1976, municipal bond counsel, Ropes & Gray of Boston, informed the state and municipalities of Maine that it could no longer give unqualified approval to municipal bonds covering the contested ground across the state.<sup>119</sup> This was a strong attention-getter. Tureen was soon heard to say that the \$150 million covered “only” the rent.<sup>120</sup> There was the further matter of indemnification—penciled out at \$25 billion according to his lawyerly calculations.<sup>121</sup> This was kerosene on the flames.

In January of 1977, the Department of Interior sent its “litigation report” to the Department of Justice on the Maine Indian Claims.<sup>122</sup> It recommended an ejectment action against 350,000 individuals and several large timber companies.<sup>123</sup> This was hardly the stuff for a drowsy response. Peter

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112. BRODEUR, *supra* note 93, at 84. *See also* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Lands: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17 (1979); Francis J. O’Toole & Thomas N. Tureen, *State Power and the Passamaquoddy Tribe: A Gross National Hypocrisy*, 23 ME. L. REV. 1 (1971).

113. BRODEUR, *supra* note 93, at 96-112.

114. *Id.* at 87-88.

115. *Id.* at 90.

116. *Id.* at 93.

117. *Id.*

118. *Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975).

119. BRODEUR, *supra* note 93, at 97.

120. *Id.*

121. *Id.*

122. *Id.* at 98.

123. *Id.*



Taft of Justice's Land Division told Judge Gignoux that the case was "potentially the most complex litigation ever brought in the federal courts."<sup>124</sup>

Maine's politicians were quick to the hustings, with responses ranging from bitter denunciation to calls to arms. There were the usual bills to extinguish aboriginal title and to limit the claim to monetary damages.<sup>125</sup> Senator William Cohen based his 1978 political campaign against incumbent William Hathaway on the inherent wrong of giving Maine "back to the Indians."<sup>126</sup> Repeatedly, the state's position was not "an inch of land or a single penny" of recompense.<sup>127</sup> Governor James Longley, in particular, did little to soothe the situation and much to aggravate it.<sup>128</sup> He paid no price for his obstinacy.

The principal initiatives for settlement came from the Carter Administration. In April of 1977, President Carter appointed Judge William B. Gunter of the Georgia Supreme Court as his "special representative" to evaluate the claims.<sup>129</sup> Judge Gunter was not much of a mediator, but he developed an estimate of real money and land (\$25 million and 200,000 acres) that helped the push toward eventual settlement.<sup>130</sup> Judge Gunter was succeeded by a White House Work Group (consisting of Eliot Cutler, Leo Krulitz, and A. Stephens Clay), which also moved the settlement along.<sup>131</sup>

Threatened by politics, slowed by law, and jeopardized by jealousies, settlement nonetheless happened. The legal milestones are recorded at the state level by the Maine Implementing Act of April 3, 1980 ("Implementing Act")<sup>132</sup> and at the federal level by the Maine Indian Claims Settlement Act of October 10, 1980 ("Settlement Act").<sup>133</sup> On December 12, 1980, President Carter signed the appropriations bill and thus loosened the federal funds that lubricated the arrangement.<sup>134</sup>

### C. *The Settlement Act and the Implementing Act*

The purpose of the Settlement Act was to afford "a fair and just settlement" of the Maine Indian land claims, to remove the "cloud on the titles" that the claims represented, and "to ratify the Maine Implementing Act."<sup>135</sup> In recognition of the "special services" provided the Maine Indians by the state since 1820, the State of Maine was excused from contributing finan-

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124. *Id.* at 99.

125. *Id.*

126. *Id.* at 111.

127. *Id.* at 115.

128. *Id.* at 115, 117.

129. *Id.* at 100.

130. *Id.* at 102-03.

131. *Id.* at 105-06.

132. ME. REV. STAT. ANN. tit. 30, §§ 6201-6214 (West 1996 & Supp. 2000).

133. 25 U.S.C. §§ 1721-1735 (2000).

134. BRODEUR, *supra* note 93, at 131.

135. 25 U.S.C. § 1721(a)(7), (b)(1), (b)(3) (2000).

cially to the claims settlement.<sup>136</sup> The contested land and natural resources are protected retroactively by language saying that any transfer “shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including but without limitation the Trade and Intercourse Act of 1790.”<sup>137</sup> Aboriginal title is extinguished.<sup>138</sup> A Maine Indian Claims Land Acquisition Fund is established with authority to acquire lands and resources.<sup>139</sup> The first 150,000 acres of land acquired for both the Passamaquoddy Tribe and the Penobscot Nation are to be held in trust by the United States.<sup>140</sup>

The tribes are federally recognized under the terms of the Settlement Act with responsibilities to govern their own affairs.<sup>141</sup> They are subject to the federal laws generally applicable to Indians.<sup>142</sup> They are also subject to the civil, criminal, and regulatory laws of the State of Maine,<sup>143</sup> in the tradition of what is commonly referred to as Public Law 280.<sup>144</sup> On the crucial question of tribal sovereignty, the legislative history of the Settlement Act has this to say:

While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with [recent court] decisions the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.<sup>145</sup>

Thus the Settlement Act revives the Maine tribes; strengthens them; recognizes them; gives them economic leverage; reinforces their inherent sovereignty; crafts ambiguous measures to deal with the forever ambiguous

136. 25 U.S.C. § 1721(a)(9) (2000). Memories are dim on the nature and value of these “special services.”

137. *Id.* § 1723(a)(1).

138. *Id.* § 1723(b), (c), (d).

139. *Id.* § 1724(c), (d).

140. *Id.* § 1724(d).

141. *Id.* §§ 1721, 1725, 1726 (defining “tribal organization”).

142. *Id.* § 1725(h) (stating that there is an exception for laws that accord “a special status or right” to Indians and preempt local laws, including those that relate to “land use or environmental matters”). These laws do not apply within Maine. The TAS provisions of the Clean Water Act are generally applicable laws that do apply.

143. *Id.* § 1725(a).

144. See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

145. See S. REP. NO. 96-957, at 14 (1980) (citing *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979)) (standing for the proposition that Maine tribes possess inherent sovereignty to the same extent as other tribes in the United States); *State v. Dana*, 404 A.2d 551 (Me. 1979) (standing for the proposition that the Maine Supreme Judicial Court had overruled its earlier decisions and adopted the “same view”).

question of how to reconcile tribal and state authority. Add to this one crucial provision of the Maine Implementing Act—it affirms tribal jurisdiction over “internal tribal matters” while it subjects them to the duties “of a municipality.”<sup>146</sup> There is the same word—“municipality”—that caused the trouble in *Backcountry Against Dumps*.<sup>147</sup>

#### D. The Water Pollution Regulatory Revival

Not surprisingly, the political revival of the “river people” presaged by the Implementing and Settlement Acts quickly showed up in the river. The Penobscot Indian Nation, in particular, developed an aggressive and effective monitoring program under the leadership of John S. Banks, director of the tribe’s Department of Natural Resources.<sup>148</sup> He supervises a staff of twenty-four and is especially active on the issue of dioxin in the water and is well known within the EPA for his advocacy on this topic.<sup>149</sup> The tribal monitoring program is meant to:

- Ensure that water quality standards are met and that licensed discharges are in compliance with permits;
- Gather data needed for the tribe’s role in hydroelectric relicensing;
- Identify nonpoint sources of pollution; and
- Upgrade river/tributaries classifications.<sup>150</sup>

The Penobscot Nation has eighty-four monitoring sites on the mainstem and the east and west branches of the Penobscot River.<sup>151</sup> It has thirty monitoring sites on tributaries of the Penobscot River, including the Mattawamkeag, the Pasadumkeag, and Piscataquis Rivers.<sup>152</sup> It monitors trust land

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146. ME. REV. STAT. ANN. tit. 30, § 6206(1) reads:

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

ME. REV. STAT. ANN. tit. 30, § 6206(1).

147. *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 149 (D.C. Cir. 1996).

148. Based on author interviews.

149. *Id.*

150. Press Release, Penobscot Nation, Department of Natural Resources, General Summary of Water Quality Monitoring Conducted on Penobscot Reservation and Trust Lands by Penobscot Nation Water Resources Program (last updated Nov. 15, 2000) (on file with author). Cf. BARRY MOWER, STATE OF MAINE, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIOXIN MONITORING PROGRAM: STATE OF MAINE 2001 (Aug. 2002), <http://www.maine.gov/dep/blwq/docmonitoring/dioxin/index.htm> (last visited Feb. 4, 2004).

151. *Id.*

152. *Id.*

lakes and ponds.<sup>153</sup> It uses biomonitoring (examining communities of aquatic insects) to determine water quality at eight to twelve sites per year.<sup>154</sup> It has an extensive ambient toxics monitoring program—looking for dioxins, furans, PCBs, chlorophenols, and trace elements (including mercury) in species of interest to tribal members.<sup>155</sup> It collects fish samples for the state’s Dioxin Monitoring Program and Surface Waters Ambient Toxics Program.<sup>156</sup> It has projects looking into the cause of algal blooms on the Penobscot River, the characteristics of sediments in the river, and nonpoint source pollution on trust lands and Indian Island.<sup>157</sup> It samples spring thaw to determine effects of acidity on fish.<sup>158</sup> The classifications of over four hundred miles of Penobscot River watershed were upgraded not long ago as a result of water quality data of the Penobscot Indian Nation.<sup>159</sup>

John Banks developed an expertise on dioxin because the tribe is confronting it literally in the shallows of the Penobscot River on its own reservation.<sup>160</sup> A major source is the Lincoln Pulp & Paper Company kraft mill (ironically named “Katahdin” after the tribe’s sacred mountain) that takes its water from the Mattanawcook stream discharging directly into the Penobscot, just upriver of the tribe’s home grounds on Indian Island.<sup>161</sup> A consent decree between the State and Lincoln was approved by the Superior Court in 1990.<sup>162</sup> It proved ineffectual and was regularly violated by Lincoln.<sup>163</sup> Sanctions took the form of a second consent decree, together with a \$131,000 penalty, signed by Maine’s Board of Environmental Protection in December of 1997.<sup>164</sup> The decree documents forty-seven instances of permit violation—many of them massive uncontrolled spills.<sup>165</sup>

Other pulp mills in Maine have come into conflict with the tribe. As explained by Murray Carpenter, each of three companies has paid penalties for water quality violations:

In October, 2000, Georgia Pacific was fined \$87,688 for illegal discharges to the St. Croix River, and other environmental violations. In August, 1999, Great Northern was fined \$37,559 for unlicensed discharges to the Penobscot River. In June 2000, Champion was fined \$800,000 for falsifying water quality records. One of its mills

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Murray Carpenter, *Sovereignty in Jeopardy*, PORTLAND PHOENIX, Nov. 9, 2001, at 12.

164. Recently, after several years of investigation, the EPA decided not to place the Lincoln facility on the Superfund list. *Penobscots Right to Question Motives of Agency’s Decision*, PORTLAND PRESS HERALD, Sept. 2, 2003, at 6A.

165. Carpenter, *supra* note 163.

had an entirely unpermitted discharge to a Penobscot tributary; at another, Champion had not done the mandatory testing for as much as a decade—state regulators literally found cobwebs in the sampling equipment—yet continued to submit false testing data. It was [the] Penobscot Nation water monitoring program that uncovered discrepancies leading to the state inspection.<sup>166</sup>

Meanwhile, the fishing rights for which the Penobscots labored long and hard in the settlement negotiations were thoroughly nullified. As a result of the dioxin in the river from the Lincoln mill, the Maine Department of Environmental Protection has issued an advisory warning against consumption of fish caught in these waters of the Penobscot, which has been operative since 1987.<sup>167</sup> This advisory warning is still in effect; however, there is no improvement in sight. It has been sixteen years since it was originally issued, and there has been a complete wipeout of the tribal fishery since that time.<sup>168</sup>

In several ways the Penobscot tribal presence was exerted on water pollution issues. On January 23, 1997, the EPA region issued a five-year National Pollutant Discharge Elimination System (“NPDES”) permit to Lincoln.<sup>169</sup> In this case, the tribe was agitating for stricter conditions and winning some points on appeal.<sup>170</sup> The state resisted by saying there was no trust responsibility between the United States and the Maine tribes.<sup>171</sup> On March 3, 1997, the Penobscots asked the Secretary of Interior to exercise his trust responsibility and evaluate the prospects of a natural resources damage action under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) against the pulp mills that had polluted the river.<sup>172</sup> Eventually, the Department of Interior responded fa-

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166. *Id.*

167. On the topic of fish advisories, there is no disagreement. The Tribe’s Department of Natural Resources has posted its own advisories all over Indian Island. Shetterly, *supra* note 86, at 84. *Cf.* Carpenter, *supra* note 163:

The Penobscot Nation advisories are more stringent, urging women and children to eat no freshwater fish at all, and everyone else to eat just one meal a month from the lower Penobscot. The pollution has even tainted those abundant Penobscot Bay lobsters; the state advises everyone not to eat lobster tomalley (liver) because of high dioxin concentrations.

*Id.*

168. By reason of the fishing advisories.

169. See generally David F. Mitchell & Ken Gallant, *Stakeholder Involvement in Watershed-Based Permitting: The Penobscot River Example*, <http://www.lagoonsonline.com/tmdl.pdf> (last visited Feb. 4, 2003).

170. See *In re Lincoln Pulp & Paper*, NPDES Appeal No. 00-8, Environmental Appeals Board, EPA, Order Dismissing Petition for Review (Oct. 25, 2000), <http://www.epa.gov/eab/orders/lincoln.pdf> (dismissing tribe’s petition for review that challenged dioxin and furan limits on grounds that the permit had been withdrawn with plans to reissue it to “address EPA’s subsequently issued ‘Cluster Rule’ for paper pulp mills”).

171. Interview with Kaighn Smith, Tribal Attorney with Drummond, Woodsum & MacMahon in Portland, Maine (Oct. 2001, Nov. 2001, and Dec. 2001).

172. *Id.*

vorably to the tribe.<sup>173</sup> The response was bad news for apprehensive pulp mill operators.

### *E. The Tactics of Clean Water Act Delegation*

Issues came to the fore in the year 2000. The State of Maine with the overt and enthusiastic support of the major polluters made application to the EPA, Region One, for authorization to administer the NPDES within Maine.<sup>174</sup> The state wanted it all—especially the contested territory on the Penobscot.<sup>175</sup> It included in its application an opinion of the Attorney General that the state had jurisdiction over water quality matters to the exclusion of *both* the tribe and the United States.<sup>176</sup>

The tribe's application for administration was not a diminishment strategy but an eradication strategy. The goal was to defeat unsavory and aggressive forms of water pollution control by removing all traces of the tribe that posed a threat—its territory, its sovereignty, and its trust relationship with the United States. The legal system invites full flowering of extremist legal arguments by the state attorneys general. Their constituents expect it and reward it. It costs little to deny all to an Indian tribe. Any state lawyer, however motivated, is free to assert casually that the tribe is defunct and its authority broken. There is no way for the tribes to return the favor. Reciprocity does not work in this dark corner of law. Prudence cannot breathe. It never will until the tribes develop their own theory to pay back Maine with a legal threat that it actually remains a part of Massachusetts.

Thus, the State of Maine, together with its associates, the pulp mills, had its legal brief mostly written.<sup>177</sup> Using Supreme Court precedents like *Yankton Sioux*,<sup>178</sup> the theory is “total war”—deny the tribe, diminish its territory, reject sovereignty, and eschew the trust relationship. There remained the question of the tactics. How best to initiate and conduct “total war”? These tactics are revealed by the experiences of a legal generation with the federal Freedom of Information Act (“FOIA”) and to a lesser extent the Federal Advisory Committee Act (“FACA”).<sup>179</sup> The innovation was first learned by public interest lawyers, but it spread quickly to the corporate defense bar: use FOIA to circumvent narrow agency discovery procedures; use FOIA to achieve the lawyers' dream of discovery prior to litigation

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173. Interview with Kaighn Smith, *supra* note 171 (stating that the Department of Interior Opinion is dated May 16, 2000).

174. See Letter from Paul Stern, Deputy Attorney General, to Stephen Silva, EPA (June 12, 2001), in SUPPLEMENTAL PUBLIC COMMENTS (providing position).

175. *Id.*

176. *Id.*

177. *Id.*

178. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

179. See WILLIAM H. RODGERS, JR., *HORNBOOK ON ENVIRONMENTAL LAW* § 1.7 (2d ed. 1994) (discussing tactical uses of FOIA and FACA).

(litigation never ends anyhow); and use FOIA to achieve the lawyers' hope of constant, incremental, and perpetual discovery.<sup>180</sup>

So the State of Maine and the pulp mills turned to FOIA to "preliterate" the pollution of the Penobscot.<sup>181</sup> They had much to fear from tribal alliances with the EPA and the Department of Interior. The State of Maine filed its FOIA suit against the EPA on May 16, 2000.<sup>182</sup> The State sought the entire documentary story pertaining to Maine tribes and natural resources. The State collected fourteen and a half linear feet of boxed documents in its quest to understand the subtleties of tribal life.<sup>183</sup> In the middle of this process, the EPA begged for mercy, protesting that "continuation of this effort on as broad a scale as your original request is of little benefit to you while imposing a costly drain on Agency resources that could be more productively used on other matters."<sup>184</sup>

But there is no mercy in "total war." The State was only following the lead of the pulp mills. The interesting freedom of information lawsuit was filed six days earlier, on May 10, 2000.<sup>185</sup> It was brought in the *state courts* to exploit the reference to "municipality" that had crept into the Implementing Act and Settlement Act.<sup>186</sup> The strategy was the brainchild of the litigators at Pierce Atwood, renowned as Portland's largest and most prestigious law firm, proud protectors of Maine's pulp and paper heritage.<sup>187</sup> The action was brought by three Maine paper companies (Great Northern Paper, Inc., Georgia-Pacific Corp., and Champion International Corp., now International Paper Company) to enforce section 408 of Maine's Freedom of Access Act.<sup>188</sup> This law gives "every person" the right to inspect and copy any "public record" during regular business hours of the records custodian.<sup>189</sup> As mere "political subdivisions" or "municipalities" of the state (often called "creatures" of the state), tribes would be standing in line with doors open under this theory.<sup>190</sup> The Penobscot Indian Nation would be just another Kennebunkport.

There are strange twists in water pollution law. The purveyors of pollutants are suddenly the aggrieved. They are seekers of the truth that is hidden in the files of their tormentors. Protectors of the waters are now the wrong-

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180. WILLIAM H. RODGERS, JR., *The Most Creative Moments in the History of Environmental Law: The Who's*, 39 WASHBURN L.J. 1, 7 (1999). The use of FOIA to defeat restrictive agency discovery rules was well known by the early 1970s. I resorted to the tactic myself to skirt the discovery rules of the Nuclear Regulatory Commission in the North Anna nuclear power plant litigation (that arose from discovery of a geological fault at the site). *Id.* at n.43.

181. Carpenter, *supra* note 163.

182. *Id.*

183. *Id.* (stating that the documents were transmitted on Aug. 2, 2001).

184. Letter from Carl F. Dierker, Regional Counsel, EPA, Region 1, to Paul Stern, Deputy Attorney General, State of Maine (Apr. 5, 2001) (on file with author).

185. Carpenter, *supra* note 163.

186. ME. REV. STAT. ANN. tit. 30, § 6206 (West 1964).

187. Carpenter, *supra* note 163.

188. ME. REV. STAT. ANN. tit. 1, § 408 (West 1964).

189. *Id.*

190. See *Harris Trust & Sav. Bank v. Barrington Hills*, 549 N.E.2d 578, 581 (Ill. 1989).

doers<sup>191</sup> charged with investigating orthodoxy and defaming the powers that be. The transformation is complete when attorneys for three of the megapolluters of the State of Maine ridicule the Indian tribes for “trying to evade existing state regulation and avoid their responsibilities as municipalities.”<sup>192</sup> The amazing thing about this legal ruse is that it worked. It could work because federal authorities would give state officers a free hand in defining their relationships with Indian tribes.

### F. *The Dance of Litigation*

On May 18, 2000, the tribes sought relief in federal court to relieve them of this information raid.<sup>193</sup> Four days later, the pulp mills sued in state court to secure enforcement.<sup>194</sup>

#### 1. *The Federal Litigation*

The federal courts failed to protect the tribes and showed an abysmal ignorance of the social forces at work. The technical justification for the staying of the federal hand was the so-called “well-pleaded complaint rule” that says that federal courts should not grant declaratory judgments to anticipate defenses in state actions.<sup>195</sup> In this case there was a state “freedom of access” lawsuit, defended on grounds that it would intrude upon federally protected tribal sovereignty. The comfortable and normal assumption of “our” federalism is that state courts eagerly will vindicate federal rights under the Supremacy Clause. Federal courts are an extravagance that Congress could cancel tomorrow according to the experts on federal jurisdiction.<sup>196</sup> In that event, only state courts would exist to uphold federally protected rights of Indians or anybody else.

Predictably, then, on July 18, 2000, Judge D. Brock Hornby granted the pulp mills’ motion to dismiss.<sup>197</sup> Judge Hornby cites the Wright, Miller, and Cooper treatise for the proposition that the Indian jurisdictional statute, 28 U.S.C. § 1362 (2000), should be limited to suits to protect federally derived real property rights.<sup>198</sup>

A better reading of 28 U.S.C. § 1362 is that it opens the federal courts unconditionally to the assertion of all federal claims or defenses by Indian tribes.<sup>199</sup> Federal judges dare not forget that the legal and social forces sur-

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191. GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 83-104 (1996).

192. Brief for Plaintiff at 21, *Great N. Paper v. Penobscot Nation*, 770 A.2d 574 (Me. 2001).

193. *Carpenter*, *supra* note 163.

194. *Id.*

195. *Penobscot Nation v. Georgia-Pacific Corp.*, 106 F. Supp. 2d 81, 82-83 (D. Me. 2000).

196. RICHARD H. FALLON ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 319-61 (5th ed. 2003).

197. *Penobscot Nation*, 106 F. Supp. 2d at 81.

198. *Id.* at 85; *see also* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 311-13 (1986).

199. Kaighn Smith, Jr., *Fighting for a Federal Forum in Indian Sovereignty Cases: A Primer*, 49



rounding Indian existence often tempt state authorities to assume the role of the tribes' "deadliest enemies."<sup>200</sup> The "well-pleaded complaint rule" sent hundreds of northwest fishing Indians to jail for decades until federal judges took action to protect tribal sovereignty and treaty rights.<sup>201</sup> The only way to stem the tide of hostile state orders was in the federal courts.

By statute, under the so-called McCarran Amendment, treaty water rights *must* be adjudicated in state courts.<sup>202</sup> Here is the best-known empirical test of whether the ideology of "our" federalism—and its doctrinal handmaiden, the "well-pleaded complaint rule"—is confirmed by the hard scrutiny of practical reality. The McCarran Amendment is a travesty of justice that has imprisoned the United States and the tribes in hostile state forums for decades.<sup>203</sup> It should be repealed tomorrow.

The facts of the Penobscot case cry out for federal protection. As trustee for the tribes, the United States could have pressed suit to prevent this encroachment on tribal authority, which is well within the scope of the Indian trust doctrine.<sup>204</sup> This state "access" law directly interferes with the consultative process that is the essence of the trustee-fiduciary relationship.<sup>205</sup> Indeed, the triggering event for the "informational" initiatives of the state and the mills was their discovery of EPA-Tribal Environmental Agreements

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FED. LAW. 37, 39-40 (2002).

200. *United States v. Kagama*, 118 U.S. 375, 384 (1886). And the Court has more recently acknowledged that there is a *good deal of force* to the view that "[s]tate courts may be inhospitable to Indian rights." *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 313 n.11 (1997) (Souter, J., dissenting) ("[T]he readiness of the state courts to vindicate the federal right[s] of Indian tribes] has been less than perfect[.]" ); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566-67 (1983); *see also Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 678 (1974) ("[S]tate authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."); Peter Nicolas, *American-Style Justice in the No Man's Land*, 36 GA. L. REV. 895, 966-83 (2000) (providing further elaboration on the "biased forum" tribes confront in the state courts).

201. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); CHARLES WILKINSON, *MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY* 49-56 (2000); *see also* Nicolas, *supra* note 200, at 1060-61 (describing the modification of the well-pleaded complaint rule) ("The simplest way to achieve this result is to modify section 1362 so that it applies to suits in which an Indian Tribe is a plaintiff *or* a defendant and where the federal issue arises by way of either a well-pleaded complaint or as a defense. Accordingly, when suit is brought against an Indian tribe in state court, the tribe can remove the case to federal court and have the suit adjudicated in a federal forum in the first instance." (footnote omitted)); *cf. id.* at 1054-72 (providing for Congressional solutions to the "biased" forum tribes face in state courts).

202. 43 U.S.C. § 466 (1982).

203. *See* Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433 (1994).

204. *See* Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994). However, the tribe asked for help and got no response from the U.S.

205. *See* Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 15 (2001) (reading narrowly the protection of consultative privilege and finding that it is overborne by the FOIA). The decision is unpersuasive and does not speak to the question of whether tribal trust-protected consultations are to be laid bare by state disclosure laws administered by unfriendly judges such as Robert Crowley. *See id.*

negotiated in 1999.<sup>206</sup> A more intrusive and cynical invasion of tribal prerogatives could not be imagined. The three paper companies sought access to a multitude of tribal government records, including computer files, related to the tribes' efforts to protect river resources or control water pollution.<sup>207</sup> The requests encompassed the entire contents of tribal government offices, and the corporations demanded on-site inspection.<sup>208</sup> The tribes' resistance to state court decisions favoring the corporations and rejecting tribal procedures and customs regarding access to records resulted in contempt citations and the arrest of tribal leaders.<sup>209</sup> In the end, unwilling to allow corporate representatives into the reservations, the tribes were forced to uproot the contents of their offices and deliver them off-site for examination by the corporations' lawyers.<sup>210</sup>

In a single swoop, Maine's "Freedom of Access" Act was applied to punish tribal efforts to petition their government (offensive on First Amendment and breach of trust grounds), exercise their own sovereign authority (wrong on breach of trust and Settlement Act grounds), protect their waters and natural resources (another improper intrusion on the trust), and lay the groundwork and develop an association with the EPA to combat water pollution (a violation of the Clean Water Act).<sup>211</sup>

The federal courts let all of these things happen. Judge Hornby's dismissal of July 18, 2000, was reaffirmed by him on September 26, 2000, denying a motion for reconsideration.<sup>212</sup> This dismissal was affirmed by the First Circuit, in an opinion by Chief Judge Michael Boudin, on June 20, 2001.<sup>213</sup> Judge Boudin saw a federal issue hiding in the case, but he decided the case on a completely different ground—*res judicata*.<sup>214</sup> In the lawsuit by the pulp mills in the state courts, the Honorable Robert Crowley had rushed to judgment—ordering the tribes to produce the documents immediately, holding the Governors in contempt and fining them one thousand dollars per

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206. Interview with Kaighn Smith, *supra* note 171.

207. See Complaint, Me. Super. Ct. (Cum. Cnty.), Docket No. CV-00-329, entered May 23, 2000.

208. See, e.g., Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Contempt and Entry of Final Judgment (Attachment) (Oct. 17, 2000) (Me. Super. Ct.) (on file with author); Defendants' Opposition to Plaintiffs' Requests [and] . . . Motion to Dismiss (Nov. 15, 2001) (Me. Super. Ct.) (on file with author).

209. See Pamela Ferdinand, *Maine Court Raises the Stakes in Fight Over Tribal Rights: Indian Leaders Ordered Jailed for Contempt*, WASH. POST, Nov. 11, 2000, at A3. See also Order on Plaintiffs' Motion for Contempt (Oct. 20, 2000) (Me. Super. Ct.) (on file with author).

210. See James M. McCarthy, "We're Hoping to Gain Respect," *Maine Tribes March 33 Miles to Augusta to Protest Erosion of Tribal Sovereignty*, TIMES RECORD (Brunswick, Me.), May 24, 2002, at 1, available at

<http://www.timesrecord.com/website/archives.nsf/56606056e44e37508525696f00737257/8525696e00630dfe05256bc30056382c?OpenDocument>.

211. See ME. REV. STAT. ANN. tit. 1, §§ 401-410 (West 1975).

212. *Penobscot Nation v. Georgia-Pacific Corp.*, 116 F. Supp. 2d 201, 202 (D. Me. 2000).

213. *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 325 (1st Cir. 2001).

214. See *id.* at 323 (refusing to decide "whether a federal claim can be conjured out of a lawsuit by the Tribes asserting that the threatened actions violate the internal affairs limitation contained in Maine Law [the Implementing Act] and purportedly ratified by a federal statute [the Settlement Act]").

day.<sup>215</sup> And the Maine Supreme Judicial Court was quick to affirm, beating the First Circuit to the punch with a ruling on May 1, 2001.<sup>216</sup>

The state courts won the race. It is as simple as that. A shameful example of “our” federalism at work. Tribal attorney Kaighn Smith of Drummond, Woodsum & MacMahon, Portland, Maine stated, “The very harm we sought to prevent—the assertion of state authority under the state access law—prevented the tribe from getting relief from that harm from the federal court.”<sup>217</sup> Smith added that it was “a merry-go-round of disappointment”<sup>218</sup> and that “[t]he federal court let the fox mind the chicken coop.”<sup>219</sup> The federal judiciary here was timid and cautious, paralyzed by the complexities of their lives. The judges were overcome by the subtleties of the “well-pleaded complaint rule.” They were smitten with caution, proud of their own restraint. Unfortunately, forgetful of the work of Judge Edward T. Gignoux.

Rash beats hesitance every time; careless wins out over cautious; and political conviction easily defeats agonizing cerebration. Thus to the Superior Court of Androscoggin County, and the courtroom of the honorable Judge Robert Crowley.

## 2. *The State Litigation*

Judge Crowley worked harder, faster, and with a surer hand than his federal counterparts. He had the “municipality” model firmly in his brain. He dealt with the tribes with the same dispatch he might extend to the authorities of the town of Kittery. On September 19, 2000, he ruled that the demand for documents did not offend the statutory protection for the tribal “internal affairs.”<sup>220</sup> He ordered the tribes to produce the documents immediately.<sup>221</sup> They refused. He responded with contempt proceedings by ordering “coercive imprisonment” of the tribal governors and a fine of one thousand dollars a day until the tribes came into compliance.<sup>222</sup> The Indians packed the courtroom that day, and they were “incredulous” at what they heard.<sup>223</sup> They could not believe the possibility that the chiefs were going to jail for refusing to turn over information about water quality to the paper companies—the same paper companies that had been polluting the Indian’s aboriginal rivers for decades.<sup>224</sup> Governors Barry Dana of the Penobscots and Richard Doyle of the Passamaquoddies were offended, stunned, and

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215. *Great N. Paper v. Penobscot Indian Nation*, No. CV-00-329, 2000 WL 33675350 (Me. Super. Sept. 19, 2000).

216. *Great N. Paper v. Penobscot Indian Nation*, 770 A.2d 574, 591 (Me. 2001).

217. Interview with Kaighn Smith, *supra* note 171.

218. *Id.*

219. *Id.*

220. *Great N. Paper*, 2000 WL 33675350.

221. *Id.* at \*5.

222. Carpenter, *supra* note 163.

223. *Id.*

224. *Id.*

more than a little apprehensive.<sup>225</sup> Dana wanted to know who the “true stewards” of the river were.<sup>226</sup> Doyle took wry comfort in the proximity of the Canadian border.<sup>227</sup> While last-minute compromises kept Dana and Doyle out of jail during pendency of appeals, they were firmly trapped in the wrong forum under the cloud of the “municipality” model.

On May 1, 2001, Maine’s Supreme Judicial Court affirmed Judge Crowley’s orders in essential particulars, protecting only internal agenda, notes, and minutes of tribal council meetings.<sup>228</sup> The opinion emphasizes the “unique” status of the Maine tribes, talks about Maine’s history of an “absence of established tribal sovereignty,”<sup>229</sup> and takes comfort in then Attorney General Richard S. Cohen’s assurance that the Settlement Act does not “create any nation within a nation.”<sup>230</sup> The overriding conviction is that the tribe agreed to the “municipality” model in the Implementing Act and the Settlement Act and that disclosure would be required under that compromise. The Penobscot tribe has never sought TAS status under the Clean Water Act but the very *fear of it* was reason enough to approve this corporate raid on tribal documents. The most revealing part of the court’s opinion is its expressed apprehension that the tribal acquisition of regulatory powers under the Clean Water Act necessarily would be detrimental to state interests:

We conclude that the effort of the Tribes to obtain a position on a par with state government regarding the regulation of water quality is [an instance where the Tribe is not engaged in internal tribal matters.] The Maine Implementing Act makes state laws regarding natural resources generally applicable to tribal lands. 30 M.R.S.A. § 6204. The Tribes’ efforts would, in many aspects, have a direct effect upon members of the public outside the borders of tribal lands and upon the Tribes’ relationships with the state, *see* 33 U.S.C.A. 1377(e) [the TAS provisions], could limit the state’s authority, and could affect the state’s relationship with federal agencies. The relationship between the state and the Tribes regarding the regulation of water quality within the state is a matter of the legitimate interest of the citizens of this state. Thus, the Tribes’ communications with the federal government or the state in the context of their water quality

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225. *Id.*

226. *Id.*

227. Both were featured speakers at the Eighth Annual Conference of the National Tribal Environmental Council, hosted by the Miccosukee Tribe, held in Miami on April 24-26, 2001. *See* [www.ntec.org/archives/2001participants.html](http://www.ntec.org/archives/2001participants.html).

228. *Great N. Paper v. Penobscot Indian Nation*, 770 A.2d 574 (Me. 2001).

229. *Id.* at 581.

230. *See id.* at 584.

authority are not matters ‘internal’ to the Tribes, and are subject to the public records provisions of the Freedom of Access Act.<sup>231</sup>

This ruling was the judgment that the First Circuit chose to accord preclusive effect.<sup>232</sup> Certiorari was sought<sup>233</sup> but was denied by the Supreme Court on November 13, 2001.<sup>234</sup> There followed a flurry of pleadings, with the Tribe seeking to stop at all costs the spectacle of the pulp mills’ lawyers walking triumphantly into the tribal offices on Indian Island and the aggrieved document-seekers demanding punitive sanctions.<sup>235</sup> Judge Crowley did not relent and ordered the Tribe to produce the documents.<sup>236</sup> They did so on May 24, 2002, with full Indian ceremony, display, and public objection.<sup>237</sup>

## VI. CONCLUSION

“Treatment as State” is a bold idea—as stirring an innovation as one can find in the legal history of the U.S. Indian tribes. It coincides splendidly with the tribes’ hard-won historical reputations for sovereignty, longevity, and autonomy. To make it work and to give it hope, tribes must be empowered to move effectively against all sources of pollution that threaten reservation properties. Section 518(e) should be read as delegating authority to regulate all sources with impacts on reservation.<sup>238</sup> Similarly, the Supreme Court should repudiate the recent and contrived line of authority—including *Montana* and *Yankton Sioux*<sup>239</sup>—that denies tribes’ inherent powers to regulate all property owners on reservation. The saddest and sorriest “mu-

231. *Id.* at 590. However, the court is incorrect in its conclusion that the tribes have sought TAS authority. See Defendant’s Motion for Reconsideration 8-11 (May 15, 2001) (on file with author).

232. *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 325 (1st Cir. 2001).

233. The questions presented for review on the Petition:

[1] Are the terms and conditions under which the non-Indian public, including corporations which have long been hostile to the Petitioner Tribes, can gain and enforce entry into the Tribes’ reservations to demand, inspect, and copy tribal records “internal tribal matters” reserved, under federal law, to the Tribes’ exclusive control and immune from state jurisdiction?

[2] Did the Maine Supreme Judicial Court err, in deciding in conflict with the decisions of the First Circuit, not to measure the Petitioner Tribes’ right to be free from state control over the non-Indian public’s intrusion into the reservations to demand, inspect, and copy tribal records in accordance with federal common law principles of inherent tribal sovereignty?

*Penobscot Nation v. Great N. Paper*, 770 A.2d 574 (Me. 2001), *petition for cert. filed* (Me. Aug. 29, 2001) (No. 01-381), <http://www.supremecourtus.gov/docket/01-381.htm> (last visited Jan. 27, 2004).

234. 534 U. S. 1019 (2001).

235. See Defendants’ Opposition to Plaintiffs’ Requests [and] . . . Motion to Dismiss, *supra* note 208.

236. Order on Motion to Dismiss and Motion for Costs, Civ. No. CV-00-329 (Jan. 30, 2002) (adopting the paper companies’ order virtually verbatim) (on file with author).

237. Tom Groening, *Thirty-three Mile Trek Protests State’s Control*, BANGOR DAILY NEWS, May 24, 2002, at 1A; Grace Murphy, *Tribes’ March to Protest Court Order*, PORTLAND PRESS HERALD, May 21, 2002, at 1B (“The tribes hope the delivery of the documents Friday following a two-day civil-rights march will end a lawsuit concerning access to the records and raise awareness about tribal sovereignty.”). For more, see the tribal website at [www.penobscotnation.org](http://www.penobscotnation.org).

238. *Cf.* Decision Document, *supra* note 42.

239. See *supra* note 60.

nicipality” in North America can tax and regulate properties within its boundaries despite transfers to distant and nonresident owners.

Refusal of the federal courts to protect the Penobscots and Passamaquoddies underscores why “treatment as state” in the federal environmental laws requires a further battery of legal protection. Tribal “treatment as state” is considered a grave threat by Maine’s political and judicial establishment. It is viewed as a provocative insult and as impudent and unwarranted intrusion of state authority. Many judges in the image of Robert Crowley populate the state superior courts and stand ready to repel these tribal pretenders. These judicial officers will do so unless the federal courts move to prevent it. No profiles in federal judicial courage were expended on behalf of the Penobscots and Passamaquoddies. No law forbade this form of judicial protection and some encouraged it. The Indian jurisdictional statute (28 U.S.C. § 1362) should be read as giving the tribes as broad an access to the federal courts as the United States would have suing on their behalf, although it may sound a trifle hollow to preach judicial activism in an age where each judicial appointment selects against this recommendation.

On the longer horizon there can be another imagined outcome. Congress chose to divest state courts of jurisdiction over labor controversies where their persistent behavior threatened the viability of the labor movement.<sup>240</sup> They could do the same on behalf of the tribes. State judicial decisions that repeatedly deny what “treatment as state” affirms have no place in the legal firmament.

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240. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2002).