

STATE OF MAINE  
WASHINGTON, SS.

DISTRICT COURT  
DISTRICT FOUR  
DIV. OF NO. WASHINGTON  
DOCKET NOS. 96-957, et. al.

State of Maine,  
Plaintiff,

v.

Allie Beal, et. al.,  
Defendant.

## ORDER

This matter is before the Court on Defendants' Motion to Dismiss based on lack of jurisdiction over the subject matter pursuant to M.R. Civ. P. 12(b)(1). After a thorough review of the evidence and arguments, this Court finds that it has jurisdiction in accordance with the Maine Indian Claims Settlement Act (herein referred to as the Implementation Act), 30 M.R.S.A. § 6201-6214.

The State of Maine issued citations to thirteen members of the Passamaquoddy Tribe (the Tribe) for violating various marine resources laws such as clamming in a closed area, possessing undersized clams, and selling clams and scallops without a license. These violations occurred off the Tribe's reservation. Defendants maintain that the Tribe has retained its aboriginal fishing rights, stemming from its strong cultural and historical ties to salt-water fishing activities, notwithstanding the passage of the Implementation Act. Defendants alternatively contend that salt-water fishing regulation of Tribal members constitutes an "internal tribal matter" which is exempted from State control under the Implementation Act.

FILED MAR 27 1998

The current dispute arises out of a settlement agreement between the Tribe, the State, and the federal government, which was codified on both the federal and state level. The settlement purports to resolve claims made by the Passamaquoddy Tribe and the Penobscot Nation to almost two-thirds of Maine's land mass. These claims were asserted in the early 1970's and culminated in an agreement in 1980.

The federal act, entitled the Maine Indian Claims Settlement Act (herein referred to as the Settlement Act), 25 U.S.C.A. § 1721-1735, ratified the State's Implementation Act which, in turn, implemented the federal act. Federal Indian law provides that Indian rights can only be terminated by the federal government. Thus, while this Court must look to the Implementation Act for the applicable law, its provisions are only valid to the extent that they have been provided for by the Settlement Act.

#### I. RETAINED ABORIGINAL FISHING RIGHTS

Both the Implementation Act and the Settlement Act are silent on the express issue of salt-water fishing rights. Because Indian tribes possess inherent sovereignty, agreements delineating Indian rights do not affirmatively grant rights; rather, they either terminate or reserve rights. Defendants argue that because salt-water fishing rights were not expressly terminated by either Act, they were retained by implication. The State refutes this contention, maintaining that the plain language of the Implementation Act terminated whatever salt-water fishing rights the Tribe inherently possessed.

This Court assumes, without deciding, that the Passamaquoddy Tribe

possessed aboriginal fishing rights prior to the Implementation and Settlement Acts. The Settlement Act, however, subjects the Passamaquoddy Tribe to the jurisdiction of the State of Maine to the extent provided in the State's Implementation Act. 25 U.S.C.A. § 1725(b)(1). The Implementation Act states, in relevant part, that all Indians and natural resources owned by them "shall be subject to the laws of Maine and to the civil and criminal jurisdiction of the courts except as otherwise provided in the Act." 30 M.R.S.A. § 6204 (emphasis added). Because the Act does not provide an exemption from the State's marine resources laws, the State argues that the laws Defendants have allegedly violated have been legally invoked.

In evaluating the State's reliance on the above-quoted language of the Implementation Act as providing jurisdiction to the State, this Court is bound by prior judicial interpretation and discussion of the Implementation Act. In Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 787 (1996), the First Circuit stated that the settlement was designed to transform the legal status of the Tribe and to create a unique relationship between state and tribal authority. Likewise, in Penobscot Nation v. Stilphen, 461 A.2d 478, 488 (Me. 1983), the Law Court found that, "the legislative history of both acts makes it clear that they were intended to change the relationship between tribal and state authority from what it had been up until 1980."

In addition, counsel for the Passamaquoddy Tribe and the Penobscot Nation stated at a public hearing before a state legislative committee that, "[i]n the end what we wound up with was a blueprint for a governmental relationship between

Indians and non-Indians alike - unlike that which exists anywhere else in the United States." Id.

At odds with the above pronouncements differentiating the current relationship between the State and the Tribe from traditional notions of Indian law, Defendants nonetheless urge this Court to analyze the Implementation Act in the same manner as other courts have interpreted past Indian treaties. Defendants assert the proposition that the federal government acts as a trustee to the Indians; thus, courts should presume that Congress' intent toward them is benevolent and should construe treaties as protecting Indian rights and in a manner favorable to Indians. F. Cohen, Handbook of Federal Indian Law 221 (1982 ed.). Moreover, Defendants advocate that a treaty with Indians should be interpreted as "unlettered people" understood it, and in a "just manner where power is exerted by the strong over those to whom they owe care and protection." United States v. Winans, 198 U.S. 371, 380-81 (1905).

This Court finds that accepting a plain language interpretation of the Implementation Act does not result in an adherence to "technical rules" without regard to how the Passamaquoddy Tribe understands the Act. See Passamaquoddy v. Morton, 528 F.2d 370, 380 (1st Cir. 1975)(statutes relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians understood them). The record and precedent reveal that the settlement was a result of years of

negotiation between represented and informed parties.<sup>1</sup>

...the Tribe and the State negotiated the accord that is now memorialized in the Settlement Act as a covenant to govern their future relations. Maine received valuable consideration for the accord...[t]he Tribe also received valuable consideration, including land, money, and recognition. Having reaped the benefits, the Tribe cannot expect the corollary burdens imposed under the Settlement act to disappear merely because they have become inconvenient.

Passamaquoddy Tribe, 75 F.3d at 794.

While this Court is mindful of, and sensitive to, the integral role that salt-water fishing activities has historically played in the survival and cultural identity of the Passamaquoddy Tribe, the Court finds that the intent of the agreement was to give full meaning to the jurisdictional provision stating that the Tribe shall be subject to the laws of Maine unless otherwise provided. If all of the Tribe's inherent rights had to have been expressly abrogated, then the blanket provision allowing for the Tribe to be governed by the laws of the State would be devoid of meaning. The evidence concerning the change in the legal relationship produced by the agreement demonstrates that the blanket provision was meant to be substantive. This Court finds that the codified agreement terminated any inherent salt-water fishing rights

---

<sup>1</sup> At the public hearing at which the Tribe's counsel addressed the state legislative committee, referred to above, it was also stated that with regard to marine resources in coastal areas, the Tribe would have only the authority of a municipality, thereby allowing it to enact shellfish conservation ordinances. The Attorney General expressed this same sentiment in a memorandum to the Joint Select Committee on Indian Land Claims which was included in the legislative record. This Court expresses no opinion as to whether or not regulation of the tidal flats within the reservation is an "internal tribal matter," or whether the Tribe would be treated as a municipality in this regard pursuant to the Implementation Act. This Court notes the exchange concerning marine resources only for its evidentiary value which suggests that the Tribe did have notice that its salt-water fishing activities would be affected by the Act.

concerning non-reservation lands that the Tribe possessed prior to the its passage. Accordingly, the Implementation Act applies to salt-water fishing rights, and Maine law will apply unless "otherwise provided in the Act."

## II. INTERNAL TRIBAL MATTER

The Act provides that "internal tribal matters" shall not be subject to regulation by the State. 30 M.R.S.A. § 6206. Defendants maintain that salt-water fishing regulation of Tribal members is an internal tribal matter even though the violations occurred off the reservation.<sup>2</sup>

Once again, case law provides an analytical framework within which this Court is obliged to address the issue. The court in Akins v. Penobscot Nation, 130 F.3d 482, 486 (1st Cir. 1997) developed specific criteria, listed below, for determining what constitutes an internal tribal matter.

- 1) The policy purports to regulate only members of the tribe, and interests of non-tribal members are not at issue;
- 2) the policy deals with the very land that defines the territory of the Tribe;
- 3) the policy concerns control over the natural resources of that land;
- 4) the policy does not implicate or impair any interest of the State of Maine;
- 5) the outcome is consistent with prior legal understanding.

The court commented that the analysis differs from that which would be used in claims against the majority of other Indian tribes in the country because the statute itself, not federal common law, must guide the determination. *Id.* at 484. The court,

---

<sup>2</sup> This Order is expressly limited to off-reservation violations and has no application to the conduct of Tribal members on the tidal flats located within the reservation.

in narrowing the application of its opinion, specifically pointed out that what was not at issue in that case was a dispute between Maine and the Tribe over the attempted enforcement of Maine's laws. *Id.* at 488 (holding that a tribal law regulating the issuance of stumpage permits to Tribal members on the reservation was an internal tribal matter). This Court now addresses the very situation which the *Akins* court sought to distinguish from its holding in that case.

These criteria were reaffirmed in Penobscot Nation v. Fellencer, Civ. No. 97-231-B, (D. Me., March 13, 1998), in which the Penobscot Nation sought to preclude application of the Maine Human Rights Act to an employment decision concerning a non-tribal member hired by the Nation. The court found that the employment matter was not "internal" primarily because of its effect on the interests of a non-tribal member.

Turning to the application of the criteria to the facts at hand, Defendants argue that only Tribal members' interests are affected in this situation. However, the laws at issue regulate a limited natural resource that is to be shared by the citizens of Maine and/or others with legal fishing rights. If Tribal members are utilizing these resources, then non-tribal members' interests in sustaining these resources are affected. For example, if the Tribe adopted a regulation concerning commercial fishing which allowed Tribal members to fish when non-tribal members could not, non-tribal fishermen's competitive and financial interests would be affected. Likewise, if Tribal members were allowed to dig clams on the flats of a neighboring municipality in contravention of that municipality's

ordinance,<sup>3</sup> then the interests of the other members of that municipality would be compromised.

With regard to the next two criteria, whether reservation lands and/or natural resources from that land are at issue, neither concern is implicated by the alleged violations. Defendants ask this Court to find that the Tribe's extensive historical use of this resource, in waters surrounding the reservation, plays a large part in satisfying these criteria. However, this Court must decline to make this finding in light of the unique partitioning of authority between the State and the Tribe established in the Implementation Act.<sup>4</sup>

This Court finds that the fourth criteria weighs heavily against a finding that salt-water fishing rights are an internal tribal matter due to the State's interest in enforcing a comprehensive regulatory scheme aimed at preserving Maine's fishing resources. This interest can be paralleled to that in Polloncer wherein the court stated that, "the Nation's action here threatens to undermine an extensive state scheme for protecting citizens of Maine against discrimination." Id.

Finally, the fifth criteria presents the Court with competing claims that federal case law supports the position of each side. This Court follows the reference

---

<sup>3</sup> 12 M.R.S.A. § 6671 provides authority to municipalities to enact shellfish conservation ordinances in accordance with statutory standards

<sup>4</sup> Consistent with the State's position that the Tribe does not have jurisdiction over fishing violations committed off the reservation is the fact that the Passamaquoddy Tribal Court has jurisdiction over criminal misdemeanors and civil small claims only to the extent that the crimes are committed, or the claims arise, on the reservation.



in Akins and Fellencer to White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980), in which the U.S. Supreme Court states: "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." See Akins, 130 F.3d at 490; Fellencer, *supra*. The opposite circumstances exist here where the conduct occurred off the reservation, and the interests of both non-tribal members and the State are implicated.

Looking at what constitutes an internal tribal matter as a whole, Defendants understandably are adamant that the self-governing provisions of the Implementation Act were designed to guard against "acculturation" of the Tribe and to prevent a disruption of the Tribe's cultural integrity. (D. Brief at 32, citing Reports of the House and Senate Committees). Defendants maintain that salt-water fishing rights are an integral part of the Tribe's culture, and that allowing external regulation to impose on their tribal practices is precisely what the internal tribal matters provision was intended to prevent.

This Court recognizes that case law exists which suggests that the historical and cultural importance of a matter should be a large consideration in determining if it is "internal." See Stilphen, 461 A.2d 478, 484 (Me. 1983). However, Defendants' arguments and reliance on the historical and cultural aspects of the Tribe's fishing activities have been weakened by Akins and Fellencer:

[w]hile the historical and cultural importance approach may remain appropriate in some, albeit limited, circumstances . . . the Court is persuaded

10

that it is not helpful here where other considerations are relevant and where the subject matter of the suit does not appear on its face to be 'uniquely Indian.'

Pellencer, supra. The Court finds this language to be dispositive of this portion of Defendants' argument. While salt-water fishing is an important part of the Tribe's history, it is not a uniquely Indian activity. Fishing is also of crucial importance to all citizens of Maine, and it is in their capacity as citizens of Maine that the Implementation Act has bound tribal members to abide by Maine's marine resources laws. In this manner, the interests of the Tribe and the rest of the State are combined in an effort to preserve coastal resources for all interested parties.

Based on the foregoing, the Order will be: Motion to Dismiss DENIED.

Dated: March 27, 1998



DISTRICT COURT JUDGE