

## **TRIBAL SOVEREIGNTY**

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I was requested to author an article on tribal sovereignty. With some reluctance I agreed. Considering entire books have been written on this subject, it is difficult to do justice to it in a single article. Nevertheless, my objective is to provide a brief discussion of this concept as it applies to Indian tribes generally. The major portion of this article will concentrate on the sovereignty of the Penobscot Nation (hereinafter referred to as the “Nation”), with particular focus on the changes wrought by the 1980 Maine Indian Claims Settlement Act. Finally, I will add my personal perspective on this subject.

### **I.**

It is a well established principle of the American legal system that Indian tribes possess sovereign powers separate and independent from the federal and state governments. This principle has its basis in a host of United States Supreme Court and lower federal court decisions too numerous to cite here. Although this concept of an independent tribal sovereignty is beyond question, that is where the clarity ends in this area of American Indian law. The extent and breadth of tribal sovereignty is not uniform and is largely specific to each individual tribe. The multitude of court cases that comprise federal Indian common law are a maze of sometimes contradictory and inconsistent decisions. Accordingly, it is difficult to establish any hard and fast rules when analyzing the scope of tribal sovereignty, rather this determination must be performed on a tribe by tribe basis.

One of the more fundamental reasons for this lack of uniformity is that there are more than five hundred federally recognized tribes within the United States. Each tribe has their own form of government, own distinct language and possess a unique culture and history. It will become evident in the subsequent discussion, that the sovereign powers exercised by a tribe are primarily based on its unique relationship with the federal government and the particular agreements entered into between the parties. Even if it is impossible to synthesize and aggregate the diverse legal decisions comprising federal Indian common law into a unified framework, there are certain principles and concepts that form the backdrop against which any analysis of tribal sovereignty must be viewed.

I will touch on some of the more relevant of these principles. As asserted by United States Supreme Court in United States v. Wheeler, 435 U.S. 313, 323 (1978):

Their [Indian tribes] incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign power; by statute, in the exercise of its plenary control, Congress has removed still others.

Felix Cohen, in his renowned work in this field, Handbook of Federal Indian Law, succinctly explains the impact of this federal-tribal relationship on tribal sovereignty as follows: “as a consequence of the tribe’s relationship with the federal government, tribal powers of self-government are limited by federal statutes, by the terms of the treaties with the federal government, and by restraints implicit in the protectorate relationship itself. In all other respects the tribes remain independent and self-governing political communities.” (p. 235, 1982 ed.). Implicit in this principle is that only the federal government has the authority to alter tribal sovereign powers, not the states. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

Another well established tenet of federal Indian law is that tribes retain all rights and powers not expressly ceded, United States V. Winans, 198 U.S. 371 (1904).

These doctrines can be traced to a series of U.S. Supreme Court cases in the early 1800's involving the Cherokee Nation and the State of Georgia authored by Chief Justice John Marshall and frequently referred to collectively as the "Marshall trilogy"; Johnson v. M'Intosh, 21 U.S. 543 (1823), Cherokee v. Georgia, 30 U.S. 1 (1831), and Worcester v. Georgia, 31 U.S. 515 (1832). Marshall founded his conception of tribal sovereignty on political theory and in international law regarding weaker nations allying themselves with stronger nations in a so-called protectorate relationship. In Worcester, Chief Justice Marshall reviewed the history of relations between Indian tribes and European nations, and later the United States, noting that from the outset the tribes were treated as sovereigns as evidenced by treaty making between the parties. In holding that Georgia laws did not apply within Cherokee territory, the Court concluded Indian tribes continue to possess powers of self-government and sovereignty subject only to the superior authority of the federal government.

The very fact of repeated treaties with them recognizes it, and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence - its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states", says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state". (pgs. 560-61).

The Marshall trilogy forms the foundation of all federal Indian law defining the relationship between Indian tribes and the United States government, and any study of this area should begin with a review of these cases as well as Cohen's Handbook.

One of the more noteworthy and least appreciated aspects of this enumeration of tribal sovereignty is the fact that it is not derived from the United States government, congressional acts, executive orders, treaties or any source external to the tribe. Tribal sovereignty is an inherent attribute of Indian tribes arising from their status as “distinct, independent political societies predating the existence of the United States”. Worcester at 559. As Cohen further articulates this idea, “perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by expressed acts of Congress, but rather ‘inherent powers of a limited sovereignty, which has never been extinguished.’” [citing Wheeler, Cohen, p. 231]. Accordingly, Indian tribes and their territories are deemed separate from the states of the union, with tribes possessing all those elements of sovereignty not inconsistent with their dependent status or expressly ceded or withdrawn in agreements with the federal government.

So what does this discussion have to do with an analysis of the Nation’s sovereignty? As indicated previously, any analysis of tribal sovereignty must be done on a tribe by tribe basis, and this body of federal Indian common law forms the background against which any such analysis must be performed. My focus is the Nation as it is the tribe with which I am most familiar. Further, it is because even amongst the four Maine tribes, there is no uniformity with regard to the extent of each tribe’s sovereign powers. Thus, it is difficult to talk in general terms about them. The Passamaquoddy Tribe’s powers are the most similar to the Nation’s, yet even in that instance, the Passamaquoddies have their own treaties which apply only to them and which influence any analysis.

## II.

Any examination of the Nation's sovereign powers, and those of the Passamaquoddy Tribe and the Houlton Band of Maliseets for that matter, involves a discussion of the terms of the Maine Indian Claims Settlement Act of 1980, codified at 25 U.S.C. §§1721 et. seq. and its companion legislation the Maine Implementing Act, 30 M.R.S.A. §§6201 et. seq. (hereinafter collectively referred to as the "Settlement Acts"). Initially, I want to address some widely held misconceptions concerning the Settlement Acts. The Settlement Acts, in general, did not create the powers currently exercised by the Nation. The Settlement Acts help to delimit and define those powers, but are not their source. In fact, the Settlement Acts actually resulted in a diminishment of the Nation's powers by transferring certain authorities to the State of Maine. As the previous discussion concerning the basis of tribal sovereignty indicates, the current sovereign powers of the Nation reflect its inherent sovereignty which has never been expressly ceded by the tribe nor extinguished by explicit federal action. This idea that the Nation possesses all sovereign powers except those specifically ceded by the tribe or expressly withdrawn by the federal government is the starting point for any analysis of tribal authority, and its importance cannot be overly stressed.

The lone exception to this general statement is that the Settlement Acts did grant to the Nation the rights and powers of a municipality in certain circumstances. This situation has led to another prevalent misconception, that the Nation merely became another municipality of the State of Maine as a consequence of the Settlement Acts. The relevant provision for purposes of this subject is Section 6206(1) of the Maine Implementing Act, which provides:

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.

The inclusion of this wording regarding municipal powers was intended to expand tribal authority but has been wrongly construed as a limitation on tribal authority. Such an interpretation cuts against the legislative history of the Settlement Acts. In the Senate Report under Special Issues, responding to a tribal concern that the Settlement Acts amounted to a destruction of tribal sovereign rights, the Congress, after outlining certain expressly retained sovereign powers of the tribes, stated:

*In addition, the Maine Implementing Act grants to the Passamaquoddy Tribe and Penobscot Nation the state constitutional status of municipalities under Maine law. In view of the “homerule” powers of municipalities in Maine, this also constitutes a significant grant of power to the Tribes. [emphasis added].*

These statements support the view that this section was intended to be an additional grant of authority to these tribes rather than a limitation placed on them. The basis for a contrary construction must be linked to the language of this section regarding the “duties, obligations, liabilities and limitations of a municipality”. That part must be read consistent with the remainder of that section, which interpreted as a whole evidences a duality of powers, one side of which is the municipal status created specifically pursuant to the terms of the Settlement Acts, and the other being our inherent character as an Indian tribe possessing all sovereign powers enumerated in the Settlement Acts as well as those never expressly ceded or withdrawn. If this

interpretation of the Nation as simply a municipality is accepted, then it results in not only a nullification of the “internal tribal matters” language but of the Nation as an Indian tribe. Stated otherwise, if the Nation’s powers are limited to those of a municipality there is no recognition of the Nation’s ability to control its internal tribal matters free from state interference, or our inherent sovereignty, and results in an abrogation of the primary prong of the Nation’s powers, that of an Indian tribe. This would be a result never intended by Congress and one to which the tribes never would have agreed.

This dual status was elucidated by the Senate Report in the Section by Section analysis of the Settlement Acts as follows:

The treatment of the Passamaquoddy Tribe and Penobscot Nation in the Maine Implementing Act is original. It is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.

The Nation does possess the rights and powers of a municipality for certain purposes, and it possesses all those powers of an Indian tribe expressly set forth in the Settlement Acts as well as those not explicitly ceded or withdrawn therein. Therefore, to clarify the “liabilities” language; when the Nation acts pursuant to this municipal capacity it does so subject to the same limitations and liabilities of a municipality of the State of Maine. Conversely, when the Nation exercises its retained sovereignty as an Indian tribe, it does so free of any such limitations and free of any state regulation at all. It is an appreciation of the Nation as an Indian tribe that is sorely lacking at all levels of the state, including its court system, and this deficiency is reflected by this misconception regarding municipal status.

Another erroneous perception that must be addressed is the belief that the state “gave” the Maine tribes the benefits they received by means of the Settlement Acts. This attitude has been pervasive in countless meetings with representatives of state government, and in many other non-tribal forums. During legislative hearings on various tribal initiatives over the years concerning the Maine Implementing Act, I have heard more than one state legislator express sentiments to the effect of “when are you people going to be happy with what we’ve already given you?” The Settlement Acts were the result of very demanding and difficult negotiations between representatives of the Federal government, the State of Maine, the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseets. The tribes received significant benefits as a result of the Settlement Acts. However, those benefits were provided by the Federal government not the State of Maine, and the tribes gave up much as a result of entering into these agreements. Many tribal people believe on balance we gave up too much. Moreover, anyone remotely familiar with the history of this process knows that the state was an extremely reluctant participant and ultimately contributed very little towards this “settlement”.

If one objectively looks at what each party contributed to or gave up pursuant to the Settlement Acts, it is difficult to understand this feeling on the part of many people within the state. It is my belief that the State of Maine and its non-Indian citizens should be grateful for the benefits they received by virtue of the Settlement Acts. First, the Settlement Acts avoided extended litigation which would have been extremely detrimental to the Maine economy, and the burden of which would have fallen primarily on Maine residents. This claim covered nearly 12.5 million acres of land on which more than 350,000 people lived at that time. The Congressional Committee involved with this claim described the potential impact as follows:



Estimates of the time it would take to litigate such a case range from five to more than fifteen years. In the meantime, according to testimony offered to this Committee, titles to land in the entire claim area would be clouded, the sale of municipal bonds would become difficult if not impossible, and property would be difficult to alienate.

(S. Rep. No. 96-957, 96th Congress, 2d Sess., at 13, quoting a 1977 Justice Department memorandum). The Settlement Acts also absolved the state of liability for claims of mismanagement of tribal land, resources and money within its control during the period it claimed ascendancy over tribal affairs, including the illegal sale of four townships the Nation reserved in its 1818 treaty with the Commonwealth of Massachusetts.

Also, the state captured a good measure of authority that it previously exercised in error over the tribes. Because the Maine tribes had never established a relationship with the federal government and were not federally recognized, the state historically exercised complete control of their affairs and resources. A series of court cases in the 1970's established that the state did not have authority to do so. These cases recognized the inherent sovereignty of the tribes and established that Maine had virtually no authority over the tribes, their lands, or affairs. These cases were pursued as part of the Maine tribal land claims and set the stage for recognition of the validity of these claims.

In Passamaquoddy v. Morton, 388 F. Supp. 649, 655-663 (D. Me.), aff'd. 528 F. 2d 370 (1st Cir. 1975), the U.S. District Court found that the Passamaquoddy Tribe, despite never having established a formal relationship with the federal government, was an Indian tribe within the meaning of the Indian Nonintercourse Act, 25 U.S.C. §177. Therefore, the federal government owed a trust obligation to the Passamaquoddies. The United States government could not refuse to bring suit on the tribe's behalf because of this lack of federal recognition, and the federal government did initiate a

claim against the State of Maine on behalf of both the Passamaquoddies and the Nation shortly thereafter. The U.S. Court of Appeals had another opportunity to consider its decision in Morton later that decade in Bottomly v. Passamaquoddy Tribe, 599 F. 2d 1061 (1st Cir. 1979). That case involved a claim by a Massachusetts attorney to entitlement to a percentage of any settlement received by the tribes. The Federal District Court dismissed this claim on grounds of the sovereign immunity possessed by the Maine tribes. On appeal, the state filed an amicus curiae brief setting forth a new set of arguments to challenge the Morton decision. The Appeals Court reaffirmed its decision in Morton that the Nonintercourse Act applied in Maine, and ruled moreover that the Maine tribes possess inherent sovereignty to the same degree as other tribes in the United States. This position was accepted by the Maine Supreme Judicial Court in State v. Dana, 404A 2d 551 (Me. 1979), in which the court held that the state had no authority to enforce criminal laws on reservation lands.

In a span of not quite five years, more than the one hundred fifty years of state control was found to have been improper and erroneous and was replaced by a recognition of extensive tribal sovereignty: a sovereignty that was never extinguished but had remained dormant during a period of state domination. By accepting the Settlement Acts, the tribes exercised their newly recognized sovereignty and agreed to state jurisdiction for certain circumstances. Consequently, through the Settlement Acts, the state regained some measure of that control it had wrongfully exercised for years. It should be noted that in line with federal Indian law, only through Congressional ratification of the Maine Implementing Act could this jurisdictional transfer be accomplished.

In summary, the tribes gave up valid claims against the state not only for illegal land transfers in violation of the Nonintercourse Act but also for breach of trust for its

mishandling of tribal lands and resources. In return the tribes were given a large sum of money, the total amount of which was provided by the federal government. Also, the tribes agreed to allow Maine certain jurisdiction over their territories, an arrangement facilitated by the federal government. Frankly, I am not exactly sure what the state “gave” to the tribes pursuant to the Settlement Acts. The only apparent contribution is that the state did agree to the inclusion within Indian territory of certain designated privately held lands to be acquired by the tribes pursuant to the Settlement funds. This inclusion allows the Nation to exercise authority over these lands that Maine previously exercised. The state’s actions subsequent to this agreement bring into question even the value of this contribution. In tribal dealings with the Maine since 1980, the positions taken by state leadership, if accepted, would result in the tribes having very little control over these lands for which we exchanged so much to obtain. In truth, the state gave very little to the tribes in the Settlement Acts, and it is questionable to many Indian people how much the tribes actually “gained” through these agreements.

### **III.**

The Settlement Acts by their terms provide for certain expressly retained tribal sovereign powers, namely exclusive jurisdiction over certain civil and criminal matters, and the exclusive authority to regulate hunting and fishing within Indian territory. However, the bulk of the retained sovereignty of the Nation specifically provided for in the Settlement Acts rests within the meaning of the phrase, “internal tribal matters” as set forth in Section 6206(1) cited above. The cases that have construed this simple phrase are few, and there are still inconsistencies in those decisions.

The first opportunity for a court to interpret the meaning of these words “internal tribal matters” arose in the context of a dispute concerning whether the Nation could conduct bingo games on its reservation free of state regulation. The Supreme Judicial Court of Maine in Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983) determined that such activities were not included within the meaning of internal tribal matters, and, therefore, the Nation was subject to state laws prohibiting them. The court in Stilphen also rejected the Nation’s contention that by virtue of this phrase, “it retains all the inherent powers that, according to federal law, are recognized as an attribute of an Indian tribe’s historical quasi-sovereignty”. Stilphen at 482.

After conducting an extensive survey of federal Indian common law, the court concluded first that even if it did apply to the Maine tribes, such common law did not prevent state intervention regarding bingo activities by Indian tribes. This conclusion was refuted by the U.S. Supreme Court four years later in the Cabazon decision cited earlier. In addition, the Maine Court held that any determination regarding the definition of “internal tribal matters” need not include application of this common law, instead such examination should be performed solely in reference “to the statute itself and to its legislative history”. Stilphen at 489. This rejection of the applicability of federal Indian common law to the Maine tribes was likewise misguided.

By failing to consider the common law, the Maine court failed to appreciate the Nation’s status as an Indian tribe possessing inherent sovereignty to the same degree as other tribes. Bottomly. The Court also overstated the changes to tribal sovereignty intended by the Settlement Acts. Congress, in ratifying the Settlement Acts, made clear that it intended to insure the sovereignty of the tribes. As cited earlier, the Senate Report stated that the Settlement Acts represent a “recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing”.

Interestingly, that report referred to federal Indian common law in support of this statement, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Congress, in response to tribal concerns that the Settlement Acts would lead to a destruction of their sovereignty and to their acculturation, stated in both the Senate Report and the House Report:

While the settlement represents a compromise in which state authority is extended over Indian territory, in keeping with these decisions [Bottomly and Dana] 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.

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Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters.

(S. Rep. No. 96-957, 96th Cong. 2d. Sess. at 14; H.R. Rep. No. 96-1353 at 14-15, reprinted in 1980 U.S.C.C.A.N. at 3790). Granted, the Settlement Acts resulted in a change in the relationship between the state and the Nation, but not to the extent found by the court in Stilphen. The court itself admitted the Settlement Acts were not models of clarity and “there was some disagreement as to whether the acts would limit or expand tribal powers.” Stilphen at 489.

The failure to appreciate the tribal aspect of the Nation’s character allowed the court to avoid certain canons of construction that should have been applied in this case. “The courts have required that treaties be liberally construed to favor Indians, that

ambiguous expressions in treaties must be resolved in favor of the Indians and the treaty should be construed as the Indians would have understood them.” (Cohen, p.222). As these canons of construction are further explained by Cohen, “generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited”. (Cohen, p. 225). These canons of construction originally arose in the context of treaty interpretation but by case law have been expanded to apply also to the interpretation of modern statutes. Parravano v. Babbitt, 70 F.3d 538, 545 (9th Cir. 1995). The court made a dubious determination that the Congress intended to wipe the slate clean with respect to the Maine tribes, and concluded their relationship with the state should be judged without regard to established case law concerning Indian tribes. It was an inappropriate characterization of the Maine tribes not fully supported by the legislative history and resulted in a questionable decision. This point is made more apparent by the ruling of the U.S. Supreme Court in Cabazon and by recent federal court judgments involving the Maine tribes.

In Mitchell v. Passamaquoddy Tribe, No. 89-0073-B (D. Me. Jan. 9, 1990), *aff’d* (D. Me. Feb. 1, 1990), the Federal District Court of Maine dismissed a race discrimination claim by a white police officer employee of the Passamaquoddy Tribe. This case was brought pursuant to 42 U.S.C. §1983, and the plaintiff argued that due to the terms of the Settlement Acts the actions of the tribe, like those of a municipality, should be deemed “under color of state law” for purposes of this claim. The court explicitly recognized the tribe’s sovereign non-municipal status in holding that “control over the hiring and firing of a member of the tribal police force, is ‘an internal tribal matter’, or more specifically, an integral part of tribal government as specified in 30 M.R.S.A. §6206(1).”, and hence such action was not state action for purposes of any such claim. Mitchell at 7. It is significant that the court relied on concepts of federal

Indian common law in making this determination. The court also specified that the “Passamaquoddy Tribe has not simply become a municipality of the State of Maine.” Mitchell at 6. The federal court took a much different direction in its analysis from that of the state court in Stilphen by recognizing the retained sovereignty of the tribe and the applicability of federal common law to establish the meaning of the words “internal tribal matters”. Not surprisingly, the result was much more deferential to tribal autonomy.

The identical issue of an employment decision of tribal government is currently being litigated in the State Superior Court in relation to an alleged violation of the Maine Human Rights Act by the Nation’s government. Unfortunately, the state court in this case displayed a disturbing lack of understanding of the sovereignty of the Nation. In refusing to dismiss this case due to a lack of state jurisdiction as an internal tribal matter within the meaning of the Settlement Acts, the state court not only repudiated the federal court decision in Mitchell, but also the opinion of the Maine Attorney General (July 25, 1984) and numerous decisions of the Maine Human Rights Commission.

Citing selected passages of legislative history and disregarding others put forth by the Nation in support of tribal sovereignty, the court relied heavily on Stilphen to conclude, “as a municipality, ... the Nation is subject to the requirement of the Maine Human Rights Act.” Fellencer v. Penobscot Indian Nation, (Decision and order denying Nation’s Motion to Dismiss) CV-95-275. The court did not reach the issue of whether this case involves an internal tribal matter which would exclude it from state regulation. Relying on dicta from Stilphen, the court created its own test for resolving this issue, asserting that internal tribal matters are “those matters that were historically or culturally significant or unique to the Nation”. Fellencer at 5. Since the court did not

have enough information on the record before it to apply this new test to these circumstances, it refused to grant the Nation's motion to dismiss.

In effect, the state court in Fellencer created an extremely narrow interpretation of this term which attempts to further shrink the Nation's sovereignty. Also, this ruling points out yet again the lack of understanding by the state and its representatives of the Nation's sovereignty. The danger with this test is twofold. First, it necessarily must be applied on a case by case basis, subjecting decisions of tribal government to state court scrutiny in virtually every case, a situation never intended by the Settlement Acts. Secondly, and more importantly, state court judges will be deciding those matters that are historically and culturally significant to the Nation. This is without question an intrusion into the internal tribal matters of the Nation. This newly created standard and the decision underlying it are patently wrong.

The final case concerning the interpretation of "internal tribal matters" is Akins v. Penobscot Nation, No. 97-1644, slip. op. (1st Cir. Nov. 17, 1997). This case involved claims by a tribal member that the Nation's government violated his constitutional rights by enacting a discriminatory wood harvesting policy regulating tribal contractors. The District Court, in dismissing the claim, held that such activity was an internal tribal matter and, therefore, within the exclusive jurisdiction of the Nation. The U.S. Court of Appeals in upholding this District Court decision established some very important concepts for interpreting this phrase. The court indicated the resolution of this issue is a question of federal law. Further, the appeals court, like the court in Mitchell, held federal Indian law should help to define this term. Such conclusions clearly contradict the reasoning of the state courts in Stilphen and Fellencer, and once again bring into question the correctness of those decisions. The Akins decision points out a significant split in the approach used by the federal and state courts in the



interpretation of this phrase. The federal courts have shown respect for tribal sovereignty and recognized the applicability of federal common law. Eventually that split will need to be resolved. Any such resolution will strongly influence the determination of the extent of the sovereignty possessed by the Maine tribes.

These decisions demonstrate that there is no clear understanding as to the intent of the words “internal tribal matters”. They do seem to indicate that the courts will review each situation involving this phrase on an individual basis. However, even the methodology for review is not well defined. The meaning of this term and the method for defining it will be accomplished over time through case law, and it must be acknowledged that we are early in such process. The extent of tribal sovereignty will very much be dependent on the outcome of these future cases. The Nation certainly intends to pursue the issue of its employment decisions being properly considered internal tribal matters. The Passamaquoddy Tribe is currently seeking to protect its salt water fishing rights. The noteworthy aspect of that situation is that the Settlement Acts do not discuss this subject of salt water fishing rights. It will be interesting to see how the courts address the issue of whether the tribe continues to possess those rights as part of its retained sovereignty.

As I have indicated in my earlier discussion, federal Indian common law indicates that tribes possess all sovereign rights except those inconsistent with their dependent nature, those specifically withdrawn by the federal government or expressly ceded by the tribes. The state, including its court system, seem to be of the mind that the Settlement Acts created a clean slate with respect to the Maine tribes, and that the intent of the Settlement Acts was to provide the tribes with only those powers specified therein. The tribes on the other hand believe that although the Settlement Acts certainly created a new relationship between the federal government, the State of

Maine and the tribes, in line with the common law, to the extent that any items were not specifically withdrawn or even discussed, those powers remain with the tribes. The resolution of this salt water fishing rights claim of the Passamaquoddies will likely indicate how the courts will rule on this issue of retained sovereignty. If the courts follow the canons of construction that apply to the Maine tribes as they apply to other Indian tribes within the United States, then any such ruling should be in favor of tribal sovereignty and tribal autonomy. Considering the history of the Maine tribes and their treatment at the hands of the state, it is difficult to predict the outcome of any such cases.

The sovereignty of the Maine tribes will depend on how the phrase “internal tribal matters” is ultimately interpreted and whether the courts are willing to recognize that the Maine tribes as Indian people continue to possess all those rights not specifically ceded by them or withdrawn by the federal government. The state will continue to argue that the Settlement Acts did withdraw all sovereign powers except those specifically mentioned therein, and the tribes will continue to disagree. How the inevitable litigation ultimately unfolds will largely determine the extent of the sovereign powers exercised by the Nation.

#### IV.

My discussion to this point has been very legalistic and has presented the legal perspective regarding those sovereign powers exercised by the Nation. Now I would like to offer my own thoughts with regard to this subject from a more philosophical standpoint. The very essence of tribal sovereignty is the ability to be self-governing and to protect the health, safety and welfare of our people within our own territory. We are a separate and distinct group of people with a unique history predating this

country. We struggle daily to retain our independence and retain those powers of self-government that make us an Indian tribe. Because, despite how people outside the tribe may perceive us, we are first and foremost an Indian tribe. The state and its leaders may attempt to define us as a municipality of Maine and to force us to conform to its ideas about who we are and those powers we possess. Regardless, we will continue to fight to preserve our sovereignty and our culture because that is what defines us as a distinct people.

This desire of the tribes to remain separate is one that has seemingly always clouded the relationship between Indian and non-Indian people. This idea runs counter to the concept of the great melting pot, but it is a fundamental characteristic of Indian people. It must find its basis in the differing worldview of Indian people. I have heard more than one state leader indicate bewilderment as to why the tribes want to be treated separately and differently from other people, and why we feel that we should have special rights. The fact is that we are separate people possessing special rights. The history of Indian/Non-Indian relations repeatedly has demonstrated this separateness, and the actions of the federal government towards its Indian citizens has ultimately confirmed it.

No matter how many times efforts have been made to eliminate this separation, whether through forced acculturation or termination of tribes, they have failed. Indian people remain a separate group from others within this country geographically, socio-economically, culturally, and, as the previous discussion illustrates, legally. The same system that justified the federal government taking tribal lands, exercising control over tribal resources and essentially controlling every aspect of tribal life is the same system that recognizes that Indian people are different and possess special rights and powers of self-government. The laws, effected through court cases, congressional action and

federal policy, that allowed these other things to occur also recognize the uniqueness and separateness of Indian people and the sovereign powers of their governments. It is interesting that when such rights become an inconvenience for the states and their non-Indian citizens they question the justification for Indian people possessing these special powers.

We as Indian people recognize that separateness and struggle to preserve our sovereign powers as part of what defines us as an independent group of people and helps protect our culture. To do otherwise would be to turn our back on the history that shaped us and allowed us to remain independent. Our ancestors experienced that same struggle, and out of respect for them, we continue the fight. We do so in the hope of retaining our culture in order to preserve something for our children, and to pave the way for them to continue on as the Penobscot Indian Nation. The Nation has controlled its territory for the benefit of its people for thousands of years, and when those people turn to tribal leadership looking for answers to the pollution of our waters, the degradation of our resources, threats to our health and safety, it is the duty and responsibility of tribal leadership to provide them with solutions. Our history makes clear to us that we can not depend on the federal or state governments to provide for our people. We must do so ourselves or the Penobscot Nation will cease to exist as a distinct people with a unique contribution to make to the larger society. This is the heart of what tribal sovereignty is to the Penobscot Nation and what it means to me as a member.

Those powers and rights that allow us to express that sovereignty are sacred, and we will continue to fight to safeguard those rights in honor of our ancestors and in order to preserve a future for our children. Failure to do so would surrender the very essence of who we are as a people. I realize there are those tribal members who feel

that we have already given up our sovereignty and that we are fighting a losing battle. Many others are disillusioned with the system and cynical towards those working to preserve our identity as an Indian tribe. Apathy is one of the most difficult things to overcome. The tribe is important to me, and its preservation and betterment are the things that motivate me. During those times when I question the correctness of the path that I have chosen, it is thoughts of those tribal members that came before me and those that will come after me that motivate me to continue on this path and realize the importance of doing so. The Nation, and its leaders, must continue to fight the good fight, and, hopefully, we can retain our inherent character as Indian people and in the process preserve a legacy for our future generations.

*February 8, 1998*