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THE GLASS EELING: MAINE'S GLASS EEL AND ELVER REGULATIONS AND THEIR EFFECTS ON MAINE'S NATIVE AMERICAN TRIBES

*Joseph O. Gribbin**

I. INTRODUCTION

Until recently, elvers and glass eels were not commercially popular aquatic creatures.¹ However, a tsunami and European ban depleted Asian supplies, which rapidly increased the demand for American elvers and glass eels.² The increased demand for elvers has driven their price from hundreds of dollars to thousands of dollars per pound.³ This increased profit margin has caused many additional individuals to begin fishing for elvers in states in which elvers are numerous and widespread, including Maine.⁴ The initial increase in elver fishing began in 2012. By 2013, the impact of the increased fishing began to produce adverse effects on the Maine elver fishery.⁵ Because of these effects, the state legislature passed emergency, sweeping legislation in early 2013, days before the elver season was scheduled to begin.⁶ Although this legislation, and the regulations established thereunder, are applicable to all individuals

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1. See Bill Trotter, *Passamaquoddy Tribe Issues 236 Elver Licenses as Prices Top \$2,000 Per Pound*, BANGOR DAILY NEWS (May 9, 2012), <https://bangordailynews.com/2012/05/09/business/passamaquoddy-tribe-issues-225-elver-licenses-as-prices-top-2000-per-pound/> [hereinafter Trotter, *Passamaquoddy Tribe Issues 236 Elver Licenses*].

2. Abby Goodnough, *Netting Tiny Eels and Big Profits*, N.Y. TIMES (Mar. 29, 2012), http://www.nytimes.com/2012/03/30/us/in-maine-fishing-for-tiny-eels-and-big-profits.html?_r=1&.

3. Trotter, *Passamaquoddy Tribe Issues 236 Elver Licenses*, *supra* note 1.

4. Goodnough, *supra* note 2.

5. Bill Trotter, *Maine Agrees to Reduce Lucrative Elver Landings*, BANGOR DAILY NEWS (Oct. 31, 2013), <http://bangordailynews.com/2013/10/31/business/maine-to-reduce-lucrative-elver-landings/> [hereinafter Trotter, *Reduce Lucrative Elver Landings*].

6. ME. REV. STAT. ANN. tit. 12, § 6302-A, *amended by* P.L. 2013, ch. 8, § 1 (emergency, effective March 21, 2013).

harvesting elvers within Maine, the laws and regulations have had several unfavorable effects on Maine Indian tribal members.⁷ These effects are based on confusion regarding the applicability of laws that establish certain rights of the Maine Indian tribes, bands, or nations, and their relationship with the sweeping elver laws established in 2013. This Comment discusses the relationship between the State of Maine and Maine's Native American tribes, and the intersection between the conversation of Native American heritage and the State's interest in environmental protection. Part II discusses the lifecycle of the American eel and what distinguishes glass eels and elvers from the eel's other life stages. Part III considers the recent increases in the popularity and value of elvers and glass eels. Part IV examines the peculiar rights of Maine's Native American tribes and nations, and the process by which those rights were created. Part V reviews the recent changes in elver regulations that occurred in Maine and along the Atlantic Coast. Part VI discusses the ways in which Maine's tribes have been impacted by the new regulations. Finally, Part VII determines whether the tribes and nations are excluded from the new regulations by determining whether they retained sovereignty over particular natural resources.

II. THE LIFECYCLE OF THE AMERICAN EEL

The American eel (*Anguilla rostrata*) undergoes numerous lifecycle changes throughout its life.⁸ Although used interchangeably, elvers and glass eels are terms used to describe two distinct life stages of the American eel.⁹ There are a total of six life stages of an American eel, including: egg, leptocephali (larvae), glass eels, elver, yellow eels, and silver eels.¹⁰ American eels die after only spawning once.¹¹

Throughout their lives, American eels move through a diverse variety of aquatic ecosystems. American eel spawning occurs in winter and early spring in the Sargasso Sea, located south of Bermuda and east

7. Abigail Curtis, *Two Men Found Guilty of Criminal Elver Fishing, Sentenced to Pay \$4,250*, BANGOR DAILY NEWS (Aug. 13, 2013), <https://bangordailynews.com/2013/08/13/news/midcoast/two-men-found-guilty-of-criminal-elver-fishing-fined-4250/> [hereinafter Curtis, *Men Found Guilty of Criminal Elver Fishing*].

8. See ATL. STATES MARINE FISHERIES COMM'N, INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN EEL 6-10 (2000), available at <http://www.asmfc.org/uploads/file/amEelFMP.pdf> [hereinafter INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN EEL].

9. See *id.* at 7-8.

10. *Id.* at 6-10.

11. *Id.* at 5.

of the Bahamas.¹² The term glass eels refers to when the eels are in the life stage that occurs subsequent to the larvae metamorphosis, occurring in the Atlantic Ocean, over the continental shelf, between six to twelve months after hatching.¹³ Glass eels weigh less than their larval counterparts, and “are transparent, with elongated, cylindrical bodies and usually range in length from 48 to 65 mm.”¹⁴

Glass eels attempt to move toward land, and are deemed elvers at the point at which they ascend into fresh water and gain pigment, typically a brownish color; however, the pigment is not usually dependent on the size.¹⁵ Elvers are generally larger than glass eels, ordinarily four inches or larger, with the largest elvers found in the northern Atlantic states.¹⁶ The size differential between elvers in southern and northern Atlantic states correlates with northern elvers having a slower developmental period, allowing them to grow larger, a process taking nearly a year.¹⁷ Elvers are nocturnal creatures that burrow during the day.¹⁸ During the latter part of their elver stage, between May and October, American eels migrate upstream, where they first metamorphose to yellow eels, and eventually mature into silver eels.¹⁹ American eels are able to absorb oxygen through both their skin and gills.²⁰ This ability allows the eels to move along land, especially in areas of extreme saturation, such as a mud or wet grass.²¹ Despite the larger size of yellow and silver eels, only elvers and glass eels garner high sale prices.²²

12. *Id.* at xii; *see also The Sargasso Sea, located entirely within the Atlantic Ocean, is the only sea without a land boundary*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://oceanservice.noaa.gov/facts/sargassosea.html> (last visited Jan. 11, 2014).

13. INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN EEL, *supra* note 8, at xi.

14. *Id.* at 7.

15. *Id.* at 8.

16. *Id.* at 8; U.S. FISH AND WILDLIFE SERV., AMERICAN EEL 1 (2011), *available at* <http://www.fws.gov/northeast/newsroom/pdf/Americaneel9.26.11.2.pdf>.

17. ATL. STATES MARINE FISHERIES COMM’N, AMERICAN EEL BENCHMARK ASSESSMENT: AMERICAN EEL STOCK ASSESSMENT PEER REVIEW 9 (2012), *available at* http://www.asmfc.org/uploads/file/AmericanEelBenchmarkStockAssessmentReport_May2012.pdf [hereinafter AMERICAN EEL STOCK ASSESSMENT PEER REVIEW].

18. INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN EEL, *supra* note 8, at 12.

19. *Id.* at 8.

20. U.S. FISH AND WILDLIFE SERV., *supra* note 16.

21. *Id.*

22. Trotter, *Passamaquoddy Tribe Issues 236 Elver Licenses*, *supra* note 1.

III. THE INCREASED POPULARITY AND DECREASING PRESENCE OF AMERICAN EELS

Elvers are popular in eastern Asian countries, such as Japan and South Korea,²³ where they are used primarily for food.²⁴ Domestically, elvers are primarily used for bait, while occasionally being found on high-end restaurants' menus.²⁵ Additionally, there are some Native American tribes that consume them, including the Passamaquoddy Tribe and Penobscot Nation.²⁶

The increase in demand for American eels has been brought on by a variety of factors. A European ban on eel fishing and an Asian tsunami have led to the depletion of the traditional elver and glass eel supplies available to the Asian market.²⁷ Maine and South Carolina are the only two Atlantic states that allow for the harvesting of juvenile American eels, making it a lucrative business for those individuals who have the legal ability to harvest and sell the eels.²⁸ A pound of elvers, on average, sells for around \$2,000.²⁹ Individuals can make between \$30,000 and \$40,000 in one night harvesting elvers and glass eels.³⁰ The increased demand and dwindling numbers of the American eel have caused the U.S. Fish and Wildlife Service (FWS) to investigate potential federal protection of the American eel under the Endangered Species Act,³¹ similar to action taken by the Committee on the Status of Endangered Wildlife, a Canadian wildlife agency, which declared the American eel "a species of special concern."³²

In addition to the increasing popularity of elvers and glass eels, the natural habitat of the American eel is being threatened by a variety of

23. Goodnough, *supra* note 2.

24. AMERICAN EEL STOCK ASSESSMENT PEER REVIEW, *supra* note 17, at iv.

25. *Id.*; Goodnough, *supra* note 2 (describing how the rise in price has caused some restaurants to remove elver dishes from their menus).

26. AMERICAN EEL STOCK ASSESSMENT PEER REVIEW, *supra* note 17, at iv.

27. Goodnough, *supra* note 2.

28. Judy Harrison, *Passamaquoddy's: Catch Quota Better Way to Protect Elver Than Fishing License Limit*, BANGOR DAILY NEWS (Mar. 31, 2013), <http://bangordailynews.com/2013/03/31/news/down-east/passamaquoddy-to-hold-press-conference-on-elver-fishing-controversy/?ref=inline>.

29. Goodnough, *supra* note 2.

30. *Id.*

31. 90-Day Finding on a Petition to List the American Eel as Threatened, 76 Fed. Reg. 60,431 (Sept. 29, 2011).

32. U.S. FISH AND WILDLIFE SERV., *supra* note 16, at 2; see *Species at Risk Registry: American eel*, CANADIAN WILDLIFE SERV., http://www.sararegistry.gc.ca/species/speciesDetails_e.cfm?sid=891 (last visited Mar. 13, 2014).

factors unrelated to human consumption or sale. Dams and other waterway-obstructing structures prevent elvers and yellow eels from moving upstream in order to mature.³³ Additionally, parasites foreign to the American eel habitat have begun to infest the swim bladders of American eels, an organ used for buoyancy.³⁴ This infestation has the potential to kill the eels by shutting down this vital organ.³⁵ Additionally, because of the slow maturation process of the American eel, these hazards can have a substantial negative impact on the long-term viability of certain eel populations.³⁶

IV. THE HISTORY AND RIGHTS OF MAINE'S NATIVE AMERICAN TRIBES

There are four federally recognized Native American groups³⁷ that inhabit Maine; they are the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs.³⁸ Agreements between the tribes and governmental entities date back to the eighteenth century, when the Passamaquoddy Tribe

33. U.S. FISH AND WILDLIFE SERV., *supra* note 16, at 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. The appropriate name by which to refer to the different groups and members of the Maine Native American tribes is unsettled. Courts have used various terms to refer to each subsection of the wider cultural group. *See, e.g.*, *Maine v. Johnson*, 498 F.3d 37, 44 (1st Cir. 2007) (“[N]on-Indian facilities”) (emphasis added); *Penobscot Nation v. Fellecker*, 164 F.3d 706, 710 (1st Cir. 1999) (“[M]any tribal members but only one non-tribal member.”) (emphasis added); *id.* at 712 (“[I]ndian courts”) (emphasis added); *United States v. Newell*, 658 F.3d 1, 4 (1st Cir. 2011) (“[A] federally recognized Indian tribe.”) (emphasis added); *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 9, 770 A.2d 574 (using the term “the Tribes” to describe the *Penobscot Nation* and *Passamaquoddy Tribe*). This Comment uses the following terms interchangeably: Native American(s), Indian(s), and member(s) to describe individuals within each larger socio-cultural grouping, and tribe(s), nation(s), and band(s) to describe the largest grouping of each socio-cultural subset.

38. ME. REV. STAT. ANN. tit. 30, § 6202 (2005); *see also* William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 826 (2004). The Penobscot Nation and Passamaquoddy Tribe are often collectively referred to as the “Southern Tribes.” *Johnson*, 498 F.3d at 39; Christine Malumphy & Randall Yates, *Muddying Tribal Waters: Maine v. Johnson, Internal Tribal Affairs, and Point Source Discharge Permitting in Indian Country*, 35 ECOLOGY L.Q. 263, 263 (2008).

reached initial accord with the Commonwealth of Massachusetts concerning the Passamaquoddy's tribal land.³⁹

A. Historical Interaction Between the Native Americans and Early American Government

The Penobscot Nation has traditionally inhabited a wide swath of land, covering over five million acres, encompassing the entire Penobscot watershed.⁴⁰ The Nation had developed a system of conservation and environmental regulation.⁴¹ The Nation's land was divided amongst Indian families, and each family was allowed to hunt and fish only within their land.⁴² In addition, the Nation's members only hunted beavers every three years, and only captured and killed two-thirds of the beaver population, in order to allow for regeneration of the supply in the interim.⁴³ Further, despite high bounties for the scalps of Nation members during times of war, the Nation "more than held [its] own in the skirmishes that ensued" against both colonial and British forces.⁴⁴

Eventually, the Nation allied with the colonial assault against Great Britain.⁴⁵ This assistance was rewarded when the Massachusetts government banned trespass or waste deposit on lands claimed by the Nation.⁴⁶ In 1790, Congress enacted the Non-Intercourse Act (NIA), which, among other constraints, "required that any land transfer from Indians of Indian Tribes be approved by the United States Congress."⁴⁷ However, the Massachusetts government, without Congressional approval, slowly began to take away, barter for, or buy portions of that land, until little was left of the Nation's land, save for a few islands in the Penobscot River, north of Bangor.⁴⁸ It was not until the 1970s that the

39. Cassandra Barnum, *A Single Penny, an Inch of Land, or an Ounce of Sovereignty: The Problem of Tribal Sovereignty and Water Quality Regulation under the Maine Indian Claims Settlement Act*, 37 *ECOLOGY L.Q.* 1159, 1165 (2010).

40. Rodgers, *supra* note 38, at 827.

41. *Id.*

42. *Id.*

43. *Id.* (stating that it was actually the English settlers who came and began excessively killing the wildlife within the Penobscot lands).

44. *Id.* (claiming that the bounties were as much as forty pounds for the head of a male over the age of twelve).

45. *Id.*

46. *Id.* at 827-28.

47. Whitney Austin Walstad, Note, *Maine v. Johnson: A Step in the Wrong Direction for the Tribal Sovereignty of the Passamaquoddy Tribe and the Penobscot Nation*, 32 *AM. INDIAN L. REV.* 487, 489 (2008).

48. Rodgers, *supra* note 38, at 828.

Southern Tribes discovered that the land had been improperly taken nearly two hundred years before.⁴⁹

B. Tension Between the Tribes and Federal and State Government

The discovery of documents that led to the determination that the lands had been improperly taken has been described as a “contemporary Indian fairy tale.”⁵⁰ The original discovery occurred when an attorney stumbled upon the NIA and refused to allow the well-established Indian claims lawyers to profit from the discovery.⁵¹ A majority of the land area of the State of Maine was involved in the litigation that followed the discovery of the NIA.⁵²

The Passamaquoddy asked that the Department of Justice (DOJ) initiate proceedings that would require the State of Maine to return the ill-gotten lands to the appropriate tribe or nation.⁵³ When no action was taken, a lawsuit was filed which required the Secretary of the Interior to bring a lawsuit “by the United States to protect the Maine tribes from a soon-to-expire statute of limitations on their claim.”⁵⁴ Because the NIA was explicit in its language, a United States District Court judge issued the court order.⁵⁵ Pursuant to the order, the DOJ filed multiple lawsuits on behalf of both the Penobscot and Passamaquoddy tribes, seeking recovery of their lands, many of which concluded in favor of the tribes.⁵⁶ Following a Department of Interior (DOI) report, one DOJ official said that the Tribes’ NIA lawsuits could “potentially be the most complex

49. *Id.* at 830.

50. *Id.* at 829.

51. *Id.* at 829-30 (stating that the attorney, Tom Tureen, wanted to see that the lands were returned to their respective owners, rather than to solely allow the Indian claims lawyers to make money from the plight of the tribal members).

52. *Id.* at 830.

53. *Id.*; see also PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND 87-88 (1985).

54. Rodgers, *supra* note 38, at 830. The tribes claimed, and courts agreed, that the NIA created a trust relationship between the tribes and the United States. Joint Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 660-61 (D. Me. 1975).

55. See Rodgers, *supra* note 38, at 830; BRODEUR, *supra* note 52, at 93.

56. Rodgers, *supra* note 38, at 830. One court determined, while issuing a declaratory judgment, that the NIA was not ambiguous and that the literal meaning of the NIA was to be applied to all Indian tribes, regardless of the fact that they were or were not a federally recognized tribe. Morton, 388 F. Supp. at 656. The same court also determined that the purpose of the law was to protect Indian lands because of a fear of “fraud and unfairness.” *Id.*; see also Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960).

litigation ever brought in federal courts,”⁵⁷ as the lawsuit risked the possibility of forcing hundreds of thousands of individuals and numerous large businesses from the lands in question.⁵⁸

The possibility of loss for thousands of Mainers made the lawsuits a political issue for many individuals running for office in Maine. In fact, many Maine politicians in the late 1970s built a campaign around the issue, often using the phrase “not ‘an inch of land or a single penny’” to show that they were not willing to cede any portion of Maine, either physical or financial, to the tribes.⁵⁹ These politicians included both the sitting governor and William Cohen, who would later become a United States senator.⁶⁰ Then-Attorney General Joseph Brennan expressed concern that allowing the Indians to regulate their own land would lead to overfishing and overhunting, which would affect the ability of non-tribal members to perform the same activities, because of a decrease in wildlife populations.⁶¹

The Carter administration made the first to attempt to settle with the Indians.⁶² Based on factors, including politics, law, and jealousy, settlement eventually occurred.⁶³ The Penobscot Nation, Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians reached an agreement with both Maine and the federal government regarding their property, governance, and similar rights.⁶⁴ The agreements had both positive and negative outcomes for the tribes. They “obtained federal recognition . . . and received almost . . . \$81.5 million,” while extinguishing all of their prior claims.⁶⁵ The Tribes’ “right to self governance was preserved to a limited extent,”⁶⁶ but Maine retained the ability to regulate the tribes “to

57. BRODEUR, *supra* note 53, at 99.

58. Rodgers, *supra* note 38, at 830.

59. *Id.* at 831.

60. *Id.*

61. Douglas Luckerman, *The Role of Jurisdiction in the quest for Sovereignty: Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands*, 37 NEW ENG. L. REV. 635, 640 (2003) (expressing that Brennan was concerned that without regulation, the Indian tribes would pose both environmental and nuisance-like problems).

62. Rodgers, *supra* note 38, at 831; *see also* Penobscot Nation v. Fellencer, 164 F.3d 706, 707-08 (1st Cir. 1999).

63. Rodgers, *supra* note 38, at 831. Some argue that settlement only occurred because of the unequal bargaining power between the government and the tribes and the political pressures surrounding the issue. Barnum, *supra* note 39, at 1169.

64. *See* 25 U.S.C. §§ 1721-35 (2012); ME. REV. STAT. ANN. tit. 30, §§ 6201-14 (2005 & Supp. 2012).

65. *Fellencer*, 164 F.3d at 708.

66. *Id.*

a greater degree than most states exercise over their Indian tribes.”⁶⁷ In 1980, both state and federal legislation were approved to rectify the agreement. The federal legislation is known as the Maine Indian Claims Settlement Act (Settlement Act),⁶⁸ and the Maine statute is commonly referred to as the Implementing Act.⁶⁹

C. The Settlement Act

The Settlement Act creates a relationship between the state of Maine and the tribes that is unique relative to other tribes throughout the United States.⁷⁰ The Act’s established purpose is to provide a settlement to the Maine Indian’s claims that is both “fair and just.”⁷¹ It gives over one hundred thousand acres of land to each of the Southern Tribes to be held in trust by the United States.⁷² As part of the settlement, the tribes were officially federally recognized but were still bound by the laws that apply generally to all Indian lands.⁷³ However, the Settlement Act follows the Implementing Act in so far as it does not affect Maine’s ability to govern the Indian tribes; it merely ratified that Maine had certain authority over the tribes.⁷⁴ The Act only allows the State of Maine to amend the jurisdictional powers of the Penobscot Nation if the Nation agrees to such an amendment.⁷⁵ The language of both acts is remarkably vague, despite the fact that the Supreme Court has previously required Congress be exceptionally clear when it “seeks to authorize state jurisdictional and regulatory authority over Indian tribes.”⁷⁶ Additionally, courts generally give great deference to the sovereignty of Native American tribes

67. *Id.*; see *Akins v. Penobscot Nation*, 130 F.3d 482, 484-85 (1st Cir. 1997).

68. 25 U.S.C. §§ 1721-35.

69. ME. REV. STAT. ANN. tit. 30, §§ 6201-14.

70. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 12, 770 A.2d 574; see also *Malumphy & Yates*, *supra* note 38, at 266; 25 U.S.C. § 1725(h) (exempting Maine and the tribes from any future federal legislation regulating other Indian tribes). The Settlement Act, unlike the Implementing Act, includes reference a wider range of Maine Indian tribes, like the Houlton Band of Maliseet Indians. See *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 45 (1st Cir. 2007). Some of these tribes negotiated separate settlements with Maine, solidified through alternative legislation. See *id.*

71. 25 U.S.C. § 1721(a)(7).

72. *Id.* at § 1724(d).

73. *Id.* at § 1725(h).

74. *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997); 25 U.S.C. §§ 1721(b)(3), (4) (2).

75. 25 U.S.C. § 1725(e)(1).

76. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 n.5 (1999); *Barnum*, *supra* note 39, at 1169 & n.52; cf. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376 (1976).

because of traditional federal policies of “tribal independence”⁷⁷ and the “unique trust relationship between the United States and the Indians.”⁷⁸

The Implementing Act was incorporated into the federal statute,⁷⁹ as Congress retains plenary power to legislate Indian affairs, and “only Congress can abrogate or limit an Indian Tribe’s sovereignty.”⁸⁰ The incorporation of the state law without the Settlement Act was an attempt by Congress at balancing the interests of Maine, including regulation within its borders, with the “inherent authority of the tribe[s] to self-govern.”⁸¹ In fact, according to the legislative history of the federal statute, Congress intended for the tribes to gain sovereignty that had been taken from them through early American history.⁸² Both houses of Congress assured the tribes they would retain some sovereignty, specifically ensuring that the tribes would “henceforth . . . be free from state interference in the exercise of their internal affairs.”⁸³

D. The Implementing Act

The Implementing Act generally states that the tribes, specifically the Southern Tribes, are subject to the laws of Maine, subject to certain narrow exceptions.⁸⁴ The Southern Tribes, within their reservations, are subject to Maine law, “provided . . . 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 . . . of settlement fund income shall not be

77. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

78. *Cnty of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985) (“[A]mbiguous provisions [should be] interpreted to [the tribe’s] benefit”); *accord Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (using a specific rule of statutory construction that requires interpreting strictly laws interfering with Indian rights).

79. 25 U.S.C. § 1721(b)(3) (2006); *see also Akins*, 130 F.3d at 484.

80. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999); *see U.S. CONST.*, art. I, § 8, cl. 3; *Morton v. Mancari*, 417 U.S. 535, 551-53 (1974). Even the passage of time is not seen as a reason to allow states to abrogate traditional tribal rights to self-governance. *See also F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW* 231 (1982 ed.).

81. S. REP. NO. 96-957, at 29 (1980) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

82. *Cf. S. REP. NO. 96-957*, at 14 (1980); H.R. REP. NO. 96-1353, at 14-15 (1980).

83. S. REP. NO. 96-957, at 14 (1980); H.R. REP. NO. 96-1353, at 14-15 (1980); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir. 1999).

84. *Akins*, 130 F.3d at 484-85 (“As to state law, the Penobscot Nation and Maine expressly agreed that, with very limited exceptions, the Nation is subject to the laws of Maine.”).

subject to regulation by the State.”⁸⁵ Thus, each tribe usually functions as a municipality, subject to the laws of Maine; but with regard to internal matters, each tribe functions as a sovereign entity.⁸⁶

E. The Internal Tribal Matter Standard

In determining whether or not a certain action is an internal tribal matter, the court must examine each issue on a case-by-case basis.⁸⁷ Courts have developed a five-factor test to determine if an action is an “internal tribal matter.” First, it is essential to resolve whether “the disputed policy regulate[s] only tribal members.”⁸⁸ Second, the policy must relate to “lands acquired by the Nation with federal funds received for that purpose, and the lands were considered [Indian territory].”⁸⁹ Additionally, a contributing factor is whether “the policy affect[s] the Nation’s ability to regulate its natural resources.”⁹⁰ Furthermore, the policy “at least on its face . . . [does] not implicate or impair the interest[s] of the State of Maine.”⁹¹ Finally, the activity must involve “an ‘internal tribal matter’ consistent with prior legal understandings.”⁹² The First Circuit added a sixth factor that looks to the statutory origins of the activity or regulation at issue.⁹³ Although the *Akins* test is not a binding determination of whether a specific action is considered an “internal tribal matter,” it does offer guidance in determining applicable regulations and statutes.⁹⁴ However, because *Akins* is not binding, it remains open to interpretation and is essentially a balancing test.⁹⁵

85. ME. REV. STAT. ANN. tit. 30, § 6206(1) (2005).

86. *Akins*, 130 F.3d at 485.

87. *Francis v. Dana-Cummings*, 2008 ME 184, ¶ 21 n.6, 962 A.2d 944.

88. *Fellencer*, 164 F.3d at 709; *Akins*, 130 F.3d at 486-87.

89. *Fellencer*, 164 F.3d at 709; *Akins*, 130 F.3d at 486-487.

90. *Fellencer*, 164 F.3d at 709; *Akins*, 130 F.3d at 486-487.

91. *Fellencer*, 164 F.3d at 709; *Akins*, 130 F.3d at 486-487.

92. *Fellencer*, 164 F.3d at 709; *Akins*, 130 F.3d at 486-487.

93. *Fellencer*, 164 F.3d at 712-13.

94. *Id.* at 709.

95. Opinion of the Department of Interior on the Effect of Maine Indian Claims Settlement Act on State of Maine’s Application to Administer National Pollutant Discharge Elimination System (NPDES) Program, Office of the Solicitor (May 16, 2000), *available at* <http://www.penobscotnation.org/dnr/Water/Legal%20Resources/Legal%20Documents/Department%20of%20Interior%20Opinions%20to%20the%20U.S.%20Environmental%20Protection%20Agency/19717.pdf> (finding that a balancing test was necessary and that the interests of the tribe in regulating the water quality of its water sources was more important than the adverse impact that it could have on non-tribal individuals and the state at large).

It has been established that the list of internal tribal matters within the Implementing Act is not an exhaustive list but merely illustrative of the types of matters which the tribes, and not the state, have authority to control.⁹⁶ “Internal tribal matters” does not have the same meaning as “internal and social relations,” “internal affairs,” or “tribal self-government.”⁹⁷

The Maine Supreme Judicial Court, sitting as the Law Court, used the statutory interpretation method of *ejusdem generis* in determining that the examples in the Implementing Act, while not exclusive, only included matters that are similar to those listed.⁹⁸ The Law Court opined that “internal tribal matters,” at the time of the implementation of the Settlement Act, protected the tribes’ “unique cultural or historical interest[s].”⁹⁹ In *Penobscot Nation v. Stilphen*, the Law Court determined that illegal beano games, the profits of which were used to fund the tribe, were not “internal tribal matters” because allowing this form of illegal activity “would make a myriad of other forbidden or . . . criminal practices legal so long as they turned a profit for the Nation.”¹⁰⁰ Because beano was not considered unique to the Indian character, or to their historical or cultural interests, beano was not determined to be an internal tribal matter.¹⁰¹ However, beano is distinct from those cases in which taxes have been upheld, because beano is only an internal tribal matter based on the future uses of the revenue, whereas the imposition of a tax is a direct action by the government.¹⁰² The court attempted to generally define an internal tribal matter as something that is Indian in character, is traditional Indian practice, or is “of a particular cultural importance.”¹⁰³ The running of a beano game by the Penobscot Nation was not in violation of the law solely because “that organization is not shown to have inflicted upon the public an evil that the law seeks generally to prevent.”¹⁰⁴ However, because beano was not a traditional “internal tribal

96. *Francis v. Dana-Cummings*, 2008 ME 184, ¶ 13, 962 A.2d 944; *see also Akins*, 130 F.3d at 486; *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983).

97. *Id.* (distinguishing *United States v. Kagama*, 118 U.S. 375, 381 (1886) (“internal and social relations”), *Williams v. Lee*, 358 U.S. 217, 221 (1959) (“internal affairs”), and *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 179 (1973) (“tribal self-government”).

98. *Stilphen*, 461 A.2d at 489 (Me. 1983).

99. *Id.* at 490 (citing S. Rep. No. 96-957).

100. *Id.* at 489.

101. *Id.* at 490.

102. *Id.* at 486 (interpreting the holding of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) to narrowly determine the meaning of “internal tribal matter”).

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

104. *Id.* at 487.

matter” and did not serve any particular cultural purpose, it was unlawful for the beano game to continue, despite the fact that there may not have been a measurable public harm.¹⁰⁵

F. Maine v. Johnson

Although the Penobscot Nation, and by analogy, the Passamaquoddy Tribe, were to be treated as municipalities, their status as such was not enough to override a statewide scheme of regulation that attempted to control discharge into certain waterways.¹⁰⁶ The potential regulation at issue in *Maine v. Johnson* would have required a state-issued permit to discharge certain substances into specific navigable waterways, including those discharges occurring within Indian territories.¹⁰⁷ The Environmental Protection Agency (EPA) allowed for the regulation of nineteen non-tribal facilities, but it did not allow the State to regulate two facilities located entirely on tribal land.¹⁰⁸

Both parties sought judicial review, arguing that the EPA had incorrectly applied the Settlement Act to the regulations at issue.¹⁰⁹ The Southern Tribes sought judicial review of the EPA decision, arguing that the Southern Tribes retained full authority to control the actions and effects that occurred on their land involving non-tribal individuals.¹¹⁰ The tribes sought to prevent other producing entities from discharging pollution into waters that ran through the tribes’ reservations, claiming that the State had no more than concurrent authority with the tribes to regulate their waterways.¹¹¹ The State argued that the EPA has rightfully determined that the non-tribal facilities could discharge into the river but “contend[ed] that the EPA erred in exempting the two tribal-owned facilities from the state[’s] permitting program.”¹¹²

The court held that Maine retained authority to regulate discharging facilities because the state generally had authority to regulate land and

105. *Id.* at 486.

106. *Maine v. Johnson*, 498 F.3d 37, 44 (1st Cir. 2007); *see also* Walstad, *supra* note 47, at 498 (describing how the *Johnson* case moved directly from the EPA decision to review by the First Circuit Court of Appeals).

107. *Johnson*, 498 F.3d at 39-40.

108. *Johnson*, 498 F.3d at 40; *see also* Malumphy & Yates, *supra* note 38, at 264.

109. *Johnson*, 498 F.3d at 41.

110. *Id.*

111. *Id.* at 43 & n.6 (explaining that the Southern Tribes sought authority by showing that 25 U.S.C. § 1727(f) and ME. REV. STAT. ANN. tit. 30, § 6206(3) provide certain “exclusive rights” to the state, and those rights not included are subject to state authority concurrent with the Tribe’s rights).

112. *Johnson*, 498 F.3d at 41.

waterways within tribal lands.¹¹³ The court rejected the Tribe's argument that concurrent jurisdiction existed.¹¹⁴ Further, the court asserted that, although concurrent jurisdiction did not exist, the Tribes' jurisdiction would have been superseded by the states if it had.¹¹⁵ The First Circuit distinguished *Johnson* from precedent, stating that in previous cases, the State of Maine had "disclaimed any interest in regulation or superintendence."¹¹⁶ The court opined that the discharging of certain pollutants into waters that *happened* to run through Indian territory is not of the same character as those examples listed in the Implementing Act, such as tribal elections, membership, or government.¹¹⁷ Because of this distinction, the State had the ability to regulate both the discharging entities within the tribal territory and those producers outside of tribal land.¹¹⁸

It has also been concluded that the Passamaquoddy Tribe retained no historical saltwater fishing rights after the enactment of the Settlement Act, and thus "internal tribal matters" did not include marine fishing rights.¹¹⁹ Although it has been determined that all regulation of natural resources is not an "internal tribal matter,"¹²⁰ this generalization is incorrect. The regulation of natural resources that occurs *solely* within the tribal territory can potentially be considered an internal tribal matter.¹²¹

113. *Id.* at 43. *But see* Walstad, *supra* note 47, at 505 (arguing that the court applied the canon of *noscitur a sociis*, a canon which is often confused with *ejusdem generis* because of their similar meaning and application).

114. *Id.*

115. *Id.*

116. *Id.* at 45 (distinguishing *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997) and *Penobscot Nation v. Fellencer*, 164 F.3d 706, 710-11 (1st Cir. 1999)).

117. *Johnson*, 498 F.3d at 46. The court went so far as to state that the language of the statutes was so unambiguous that a balancing test, as described in *Akin* and *Fellencer*, was not necessary. *See id.*; *Akins*, 130 F.3d at 488; *Fellencer*, 164 F.3d at 710-11.

118. *Johnson*, 498 F.3d at 46.

119. Op. Me. Att'y Gen. 13-01.

120. *Id.*

121. *Akins*, 130 F.3d at 490 (upholding a tribal regulation on a tribal members' ability to harvest timber from tribal land); *see also* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (giving wide-ranging power to tribes when the dispute is between tribe and a tribal member); *but see Johnson*, 498 F.3d at 46 (holding that the state could regulate discharge of pollutants into tribal waterways because the waterways were not "internal tribal matters.").

G. Tribal Fishing Rights

Tribal members have generally been allowed to fish for their own sustenance, provided that they do so with a valid sustenance license issued by the tribe, band, or nation.¹²² A fish is defined as “a cold blooded completely aquatic vertebrate animal having permanent fins, gills, and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water,”¹²³ or more generally, “all finfish, squid and shrimp, or other marine animal, except lobsters, crabs, shellfish, scallops and marine worms.”¹²⁴ The latter, more general, definition seems to include American eels. Sustenance is defined as “all noncommercial consumption or noncommercial use by any person within. . . [tribal lands] or at any location within the State by a tribal member, by a tribal member’s immediate family or within a tribal member’s household.”¹²⁵ Sustenance is not intended to include the selling of marine life.¹²⁶ Only those individuals who hold a sustenance license are exempted from certain generally applicable fishing laws and regulations.¹²⁷ Individuals who hold sustenance licenses are required to obey laws that apply to parties with state-issued licenses.¹²⁸ The only exceptions to this requirement are that tribal members with valid sustenance licenses may fish out of season, except for when fishing for sea urchins, and sustenance permit holders are not required to pay equipment or “gear” fees.¹²⁹ Sustenance fishing is only applicable to certain waterways that are located within the boundaries of the reservation; sustenance fishing within the bounds of the reservation seems plenary and is not limited by state law.¹³⁰ Sustenance fishing only includes those ponds that are entirely within the boundaries of the reservation; otherwise, the Commission has authority to regulate ponds that are not entirely within

122. ME. REV. STAT. ANN. tit. 12, § 6302-A(2) (Supp. 2012). The term Passamaquoddy translates to “those of the place where the pollock are plentiful.” Walstad, *supra* note 47, at 488 (defining the term and stating that this translation lends support to the claim that fishing and marine regulation are essential to Passamaquoddy tribal members).

123. ME. REV. STAT. ANN. tit. 30, § 6207(9) (2005).

124. ME. REV. STAT. ANN. tit. 12, § 6001(16) (2012).

125. ME. REV. STAT. ANN. tit. 12, § 6302-A(2) (Supp. 2012).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. ME. REV. STAT. ANN. tit. 30, § 6207(4) (2005); *see* *Akins v. Penobscot Nation*, 130 F.3d 482, 490 (1st Cir. 1997) (allowing tribes to regulate the resources within the bounds of the tribal land).

the reservation.¹³¹ Additionally, the Commission may regulate rivers, regardless of whether or not both sides of the river are within the reservation.¹³²

There have been questions about whether or not the Penobscot Nation has the ability to regulate the Penobscot River that surrounds its reservation.¹³³ The outcome of such a determination could have far-reaching consequences, for the tribes because of an inability to regulate the river, or for local businesses and municipalities that must change their practices to comply with tribal regulations.¹³⁴

V. THE REGULATION OF MAINE'S GLASS EEL FISHERIES

The harvesting of American eels is controlled by the Atlantic States Marine Fisheries Commission (ASMFC), which is a compact between the fifteen Atlantic states that coordinates conservation within shared waters.¹³⁵ The Stock Assessment Subcommittee, a branch of the ASMFC, found that poaching, or unlicensed fishing, was a "serious concern."¹³⁶ Because of the recent increase in elver harvesting, Maine's government has grown increasingly concerned about the durability and longevity of the elver fishery.¹³⁷

131. ME. REV. STAT. ANN. tit. 30, § 6207(3) (2005).

132. *Id.*

133. *Penobscot Nation v. Mills*, No. 1:12-cv-254-GZS, 2013 WL 3098042, at *3 (D. Me. June 18, 2013).

134. Mario Moretto, *Penobscot Nation Lawsuit Could Have Broad Effects for River Communities, Businesses, Says Attorney*, BANGOR DAILY NEWS (Sept. 18, 2012), <http://bangordailynews.com/2012/09/18/news/hancock/penobscot-nation-lawsuit-could-have-broad-effects-for-river-communities-businesses-says-attorney/?ref=inline> [hereinafter *Penobscot Nation Lawsuit*].

135. Press Release, Dep't of Marine Res., Department of Marine Resources Responds to Misinformation Regarding Elver Fishery and Passamaquoddy Tribe (April 2, 2013), available at www.maine.gov/dmr/rm/eel/elver/MaineElverMisinformation.htm.

136. ATL. STATES MARINE FISHERIES COMM'N, AMERICAN EEL BENCHMARK ASSESSMENT: TERMS OF REFERENCE & ADVISORY REPORT OF THE AMERICAN EEL STOCK ASSESSMENT PEER REVIEW (2012), [hereinafter ADVISORY REPORT OF THE AMERICAN EEL STOCK ASSESSMENT] available at http://www.asmfc.org/uploads/file/AmericanEelBenchmarkStockAssessmentReport_May2012.pdf.

137. Mario Moretto, *Tribe Says LePage Threatened Passamaquoddy Over Elvers During 'Enraged' Phone Call*, BANGOR DAILY NEWS (Apr. 2, 2013), <http://bangordailynews.com/2013/04/02/politics/tribe-says-lepage-threatened-passamaquoddy-over-elvers-during-enraged-phone-call/?ref=relatedBox> [hereinafter *'Enraged' Phone Call*].

Maine's elver fishing industry is one in which the regulations and governing laws are constantly changing, varying from year to year.¹³⁸ The Department of Marine Resources (DMR) is the department allocated to establish and enforce elver-fishing licenses and is required by statute to remain informed of the Maine Native American tribes' elver fishing activities.¹³⁹

Maine defines an elver as "a member of the species *Anguila rostrata* in that stage of its life cycle when it is less than 6 inches in length."¹⁴⁰ This could be read in two distinct ways, each of which has a profound effect on the type of fishing that can occur. One interpretation could read "that stage" to imply the "elver" stage of life, which occurs between the glass eel and yellow eel stages. This reading is likely incorrect, however, as elvers range in size and a change in size, from smaller than 6 inches long to greater than 6 inches and does not alone allow for the determination that an American eel is no longer an elver. The more likely reading is that all American eels below 6 inches long are considered elvers under Maine law.¹⁴¹ By omission of a definition of American eel stages that occur before the "elver" stage, one can assume that "elver" is a generic term for a small American eel.¹⁴²

Elver fishing in Maine is regulated by a myriad of specific statutes, ranging from the method of performing the "elver lottery" to the types of nets with which one can fish for elvers.¹⁴³ The elver season spans from noon on March 22nd to noon on May 31st.¹⁴⁴ A person may not fish for elvers between noon on a Tuesday and noon on a Wednesday and noon on a Saturday until noon on a Sunday, although said person may leave nets in the water if it is in a "condition that prevents the capture of elvers."¹⁴⁵

Four different types of elver fishing licenses are permitted in Maine, including a resident license for use of one device, a resident license for

138. See ME. REV. STAT. ANN. tit. 12, § 6505-A(2-A) (2005) (repealed 2006); ME. REV. STAT. ANN. tit.12, § 6302-A, amended by Pub. L. No. 301-451, ch. 8, § 2 (2013) (emergency, effective March 21, 2013) (repealing, in part, ME. REV. STAT. ANN. tit. 12, § 6505-A(2-B) (2005 & Supp. 2012)).

139. ME. REV. STAT. ANN. tit. 12, § 6302-A(3) (2013).

140. ME. REV. STAT. ANN. tit. 12, § 6001(13-F) (2012) (emphasis added).

141. *Id.*

142. *Id.* (defining words such as "elver" and "eel," while omitting language defining "glass eels").

143. See, e.g., ME. REV. STAT. ANN. tit. 12, 6505-A(2-B) (2013), amended by P.L. 2013, ch. 8, § 2 (emergency, effective March 21, 2013); ME. REV. STAT. ANN. tit. 12, § 6575-B(2-B) (2005 & Supp. 2012).

144. ME. REV. STAT. ANN. tit. 12, § 6575(1)..

145. *Id.* § 6575-A.

the use of two devices, a non-resident license for the use of one device, and a non-resident license for the use of two devices.¹⁴⁶ The law allows for the use of dip nets, eel traps, and fyke nets to fish elvers.¹⁴⁷ Violation of the fishing season, net type, or licensing requirements is considered a strict liability Class D crime and is punishable by a mandatory \$2,000 fine, of which none may be suspended.¹⁴⁸ The DMR Commissioner has traditionally had the ability to award elver licenses via a lottery, held on February 15th of each year, by which a person may either gain a license or the ability to use certain gear when fishing.¹⁴⁹ A person may not sell elvers, except to a person that has a valid elver dealer's license, and the transaction must be in a form by which both the seller and buyer are named, or with a receipt that contains the names of both parties.¹⁵⁰

The Southern Tribes have consistently had the ability to issue, within their tribes or nations, licenses that grant the same rights as those licenses issued through the regular statutory channels, be it a lottery or other method.¹⁵¹ In 2013, statutory language placed a strict limit on the amount of elver fishing licenses the tribes, specifically the Southern Tribes, could distribute to their members. The Penobscot Nation is limited to granting eight commercial elver-fishing licenses per calendar year, unless the Commissioner believes that the elver fishery can support the issuance of additional licenses.¹⁵² The Passamaquoddy Tribe has a far more complicated system, by which the Tribe may issue 200 licenses, including the following: 124 single-piece (fyke or dip net) licenses; 26 two-piece (fyke and dip nets) licenses; and 50 dip net licenses for fishing in the St. Croix River.¹⁵³

In late 2013 and early 2014, Maine began evaluating the process by which elvers are fished and by which elver licenses are granted.¹⁵⁴ This evaluation was brought about because of pressure from the ASMFC and

146. *Id.* § 6505-A(1)(A-D).

147. ME. REV. STAT. ANN. tit. 12, § 6505-A(5) (2005 & Supp. 2012).

148. *See id.* at §§ 6505-A(8-A), 6575(5), 6575-A(2).

149. ME. REV. STAT. ANN. tit. 12, § 6505-A(2-B), *amended by* P.L. 2013, ch. 8, § 2 (emergency, effective Mar. 21, 2013).

150. ME. REV. STAT. ANN. tit. 12, § 6575-H(1) (Supp. 2014).

151. ME. REV. STAT. ANN. tit. 12, § 6302-A(1) (Supp. 2014).

152. ME. REV. STAT. ANN. tit. 12, § 6302-A(3)(E), *amended by* P.L. 2013, ch. 8, § 1 (emergency, effective Mar. 21, 2013).

153. *Id.*; Bill Trotter, *Passamaquoddy Issue Far More Elver Licenses Than Allowed by Law*, BANGOR DAILY NEWS (Mar. 29, 2013), <http://bangordailynews.com/2013/03/29/news/hancock/passamaquoddy-issue-far-more-elver-licenses-than-allowed-by-law/?ref=relatedBox> [hereinafter Trotter, *Passamaquoddy Issue Far More Licenses*].

154. Trotter, *Reduce Lucrative Elver Landings*, *supra* note 5.

the risk that the entire Maine elver fishery would have to be shut down unless significant changes were made to its regulation.¹⁵⁵

There were many proposals about how to achieve specific goals set by the ASMFC, which, in major part, required the DMR to reduce elver landings by twenty-five to forty percent.¹⁵⁶ One proposal was to implement a statewide quota and introduce a ‘swipe’ card, which would track the amount of elvers sold to Maine dealers.¹⁵⁷ The information obtained from the cards would be entered into a statewide database, which would ensure that the State does not exceed its set quota.¹⁵⁸ The statewide quota would be 11,749 pounds and would take effect during the 2014 season.¹⁵⁹ A second proposal, written as emergency legislation, was specifically oriented toward tribal elver fishing.¹⁶⁰ Because of problems regarding the validity of licenses issued by the tribes, the Bill sought to clarify the process by which tribal licenses become effective¹⁶¹ and the punishment for a violation of the aforementioned process.¹⁶² The Bill requires that tribal members with tribal licenses use swipe cards to track their catches in order to ensure that each tribe’s quota is not exceeded.¹⁶³ The Bill only refers to tribal members and does not impose such filing requirements on non-tribal members, a distinction which is likely based on the fact that non-tribal members would receive their

155. Bill Trotter, *State Considering Issuing ‘Swipe’ Cards for Elver Fishermen*, BANGOR DAILY NEWS (Nov. 13, 2013), <http://bangordailynews.com/2013/11/13/business/state-considering-issuing-swipe-cards-for-elver-fishermen/> [hereinafter Trotter, ‘*Swipe’ Cards for Elver Fishermen*] (emphasizing that the reduction was mandatory).

156. *Id.*

157. *Id.* Passamaquoddy had originally suggested that quota be implemented in order to better regulate the elver fishing industry. *See also* Harrison, *supra* note 28.

158. Trotter, ‘*Swipe’ Cards for Elver Fishermen*, *supra* note 155 (stating that the card system may also reduce the amount of elver poaching and illegal elver sales).

159. Press Release, Atl. States Marine Fisheries Comm’n, Maine Implements First Ever Quota for Glass Eel Fishery (Feb. 7, 2014), *available at* http://www.asafc.org/uploads/file/52f52771pr05_MaineAmEelQuota.pdf [hereinafter ASMFC Press Release].

160. *See generally* L.D. 1625, 126th Sess. (Me. 2014). This bill was eventually signed into law by Governor Paul LePage on March 18, 2014, and is codified within the Maine law. *See* ME. REV. STAT. ANN. tit. 12, § 6302-B (Supp. 2014).

161. *Id.* §§ 6302-B(1)-(2).

162. *Id.* § 6302-B(3).

163. L.D. 1625, 126th Sess. (Me. 2014). The law does, however, allow the commissioner to establish similar rules for non-tribal members. ME. REV. STAT. ANN. tit. 12, § 6505-A(3-A).

licenses directly from the DMR.¹⁶⁴ The Bill's sponsor suggested the bill was merely clarifying the law, in order to avoid confrontations similar to those that occurred during the 2013 elver fishing season.¹⁶⁵ Other, less popular, suggestions were also put forth, including encouraging individuals to submit "photographs of license plates of people they believed were illegally harvesting . . . elvers."¹⁶⁶ Although its language was vague, the ASMFC accepted the DMR proposal that would implement a swipe card system and establish a statewide quota.¹⁶⁷ The ASMFC stated that the proposal, specifically the quota, "should allow for increased management flexibility and conservation of the [elver fishery]."¹⁶⁸

VI. THE EFFECTS OF THE 2013 REGULATIONS ON TRIBAL MEMBERS

The Passamaquoddy Tribe, prior to the opening of the 2013 elver-fishing season, issued around 575 elver-fishing licenses to its members, which far exceeds the 200 licenses prescribed by emergency

164. Bill Trotter, *Bill Would Require Department of Marine Resources Approval for Tribal Elver Licenses*, BANGOR DAILY NEWS (Jan. 16, 2014), <https://bangordailynews.com/2014/01/16/politics/bill-would-require-department-of-marine-resources-approval-for-tribal-elver-licenses/> [hereinafter Trotter, *Approval for Tribal Elver Licenses*] (expressing the concerns of the Southern Tribes, namely that the law discriminates against Native Americans and imposes a harsh punishment on a community with high unemployment and very little employment opportunity).

165. *Id.* ("We're not trying to single out any group, . . . [but] [w]e need to have a manageable fishery and we don't have that right now.")

166. Abigail Curtis, *Elver Harvesters a 'Renegade' Fishery? Not This Year, Fishermen are Cautioned by State Officials*, BANGOR DAILY NEWS (Mar. 1, 2014), <http://bangordailynews.com/2014/03/01/news/midcoast/elver-harvesters-a-renegade-fishery-not-this-year-fishermen-are-cautioned-by-state-officials/> [hereinafter Curtis, *'Renegade' Fishery*].

167. ASMFC Press Release, *supra* note 160 ("This quota . . . represents a 35% reduction from the 2013 Maine's [sic] glass eel harvest.")

168. *Id.* The new law specifically allows for six Passamaquoddy members to fish for elvers with fyke nets, while all other tribal members may receive a license to fish for elvers with dip nets. ME. REV. STAT. ANN. tit. 12, § 6302-A (3)(E-1) (2014), *amended by* P.L. 2014, ch. 485, § 2 (emergency, effective Mar. 18, 2014). A statewide quota was also implemented, which granted specific tribes a certain amount of the overall state quota. ME. REV. STAT. ANN. tit. 12, § 6302-B(1) (2014), *amended by* P.L. 2014, ch. 485, § 3 (emergency, effective Mar. 18, 2014). Non-tribal members have individual quotas, ranging from 7,566 to 9,688 pounds, depending on the type of license issued. 13-188 C.M.R. ch. 32, § 35 (2014); *see* ME. REV. STAT. ANN. tit. 12, § 6505-A(3-A) (2014), *amended by* P.L. 2014, ch. 485, § 7 (emergency, effective Mar. 18, 2014).

legislation.¹⁶⁹ The DMR determined that in order to comply with the law, the first 150 licenses would be considered valid, with all licenses numbered above 151 being considered invalid.¹⁷⁰

The regulations, which make certain actions criminal, have a disproportionate effect on the tribal members, especially the Passamaquoddy.¹⁷¹ This effect may be caused by the confusing and scattered regulations regarding tribal elver licensing and the inability to determine if a license is valid or invalid.¹⁷² Additionally, district attorneys and other legal officials who are involved in elver litigation remain unsure of the potential rights of tribal members and of how the Settlement and Implementing Acts interact with the elver fishing restrictions.¹⁷³ The Tribe has claimed that fishing is part of the Tribe's tradition and religion.¹⁷⁴

The Passamaquoddy were previously involved in negotiations with the DMR and the State to create legislation that would give the Passamaquoddy more authority over elver fishing within their boundaries.¹⁷⁵ The tentative agreement involved the tribe capping its total

169. ME. REV. STAT. ANN. tit. 12, § 6302-A(3)(E-1) (2013), *amended by* P.L. 2013, ch. 8, § 1 (emergency, effective Mar. 21, 2013); Bill Trotter, *District Attorney Says He May Dismiss Charges Against Passamaquoddy Elver Fishermen*, BANGOR DAILY NEWS (July 24, 2013), <http://bangordailynews.com/2013/07/23/news/bangor/da-to-dismiss-elver-charges-against-passamaquoddy-in-penobscot-county/> [hereinafter Trotter, *District Attorney Says He May Dismiss Charges*].

170. Harrison, *supra* note 28.

171. Trotter, *District Attorney Says He May Dismiss Charges*, *supra* note 169 (stating that “there are more than 30 criminal cases pending against members of the tribe”).

172. *Compare* ME. REV. STAT. ANN. tit. 12, § 6302-A(3), *amended by* P.L. 2013, ch. 8, § 1 (emergency, effective March 21, 2013), *with* ME. REV. STAT. tit. 30, §§ 6207 (4), (6); Bill Trotter, *Penobscot County District Attorney Dismisses Cases Against Passamaquoddy Elver Fishermen*, BANGOR DAILY NEWS (Nov. 14, 2013), <https://bangordailynews.com/2013/11/14/business/penobscot-county-district-attorney-dismisses-cases-against-passamaquoddy-elver-fishermen/> [hereinafter Trotter, *District Attorney Dismisses Cases*].

173. *Compare* Trotter, *District Attorney Says He May Dismiss Charges*, *supra* note 172, *with* Bill Trotter, *First Elver Cases Against Passamaquoddy Fishermen Dismissed on Technicality*, BANGOR DAILY NEWS, (Aug. 12, 2013), <https://bangordailynews.com/2013/08/12/news/state/first-elver-case-against-passamaquoddy-fisherman-dismissed-on-technicality/> [hereinafter Trotter, *First Elver Cases*], *and* Trotter, *District Attorney Dismisses Cases*, *supra* note 172.

174. Harrison, *supra* note 28.

175. Bill Trotter, *Tentative Agreement on Elver Licenses Between Passamaquoddy, State*, BANGOR DAILY NEWS (Jan. 29, 2014), <http://bangordailynews.com/2014/01/29/news/state/passamaquoddy-state-reach-tentative-agreement-on-elver-licenses/> [hereinafter Trotter, *Tentative Agreement on Elver Licenses*].

elver catch at 1,650 pounds, and, in return, the State agreed to allow the tribe to issue as many elver licenses as it deemed necessary.¹⁷⁶ The tribal members would only be allowed to use dip nets, rather than larger fyke nets, to catch the elvers.¹⁷⁷ However, before the agreement was formalized, the Maine Attorney General voiced concerns regarding the constitutionality of the proposal.¹⁷⁸ The Attorney General believed the agreement would violate the Equal Protection Clause of Maine's constitution, which would render it unenforceable.¹⁷⁹ The Tribe argued that because of their sovereignty, as determined within the Settlement and Implementing Acts, they were rendered immune from equal protection claims.¹⁸⁰

VII. POTENTIAL APPLICATION OF THE LAW

In order to evaluate the potential criminal liability of the tribal members, it is essential to determine if the laws apply to them.¹⁸¹ The Maine Supreme Judicial Court has held that it will not read a statute to conflict with another statute, if there is a reasonable alternative interpretation that allows for laws to coexist in harmony.¹⁸² There may still be a violation of the elver fishing laws, even if it is shown that the tribe did not substantially impact the elver fishery.¹⁸³

A court may give great deference to an agency's interpretation of the legal authority which it has been granted, so long as the legislative history and statute are silent as to the issue at hand; otherwise, the legislative history and statute are indicative and potentially binding.¹⁸⁴

In this case, although the statute establishes which tribe, nation, or band will receive a certain number of licenses, it may not have been within the DMR's jurisdiction to determine which of the 575 issued licenses were to be considered valid.

176. *Id.*

177. *Id.*

178. Bill Trotter, *Constitutional Issues Cause Department of Marine Resources to Pull Back from Passamaquoddy Elver Deal*, BANGOR DAILY NEWS (Feb. 13, 2014), <https://bangordailynews.com/2014/02/13/politics/constitutional-issues-cause-maine-department-of-marine-resources-to-pull-back-from-passamaquoddy-elver-deal/> [hereinafter Trotter, *Constitutional Issues*].

179. *Id.*

180. *Id.*; *but cf.* Penobscot Nation v. Fellencer, 164 F.3d 706, 713 (1st Cir. 1999).

181. Akins v. Penobscot Nation, 130 F.3d 482, 483 (1st Cir. 1997) (determining the meaning of "internal tribal matter" was essential in evaluating liability).

182. Penobscot Nation v. Stilphen, 461 A.2d 478, 481 (Me. 1983).

183. *See id.* at 487.

184. *See, e.g.,* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844-45 (1984).

“Internal tribal matters” generally “include matters concerning ‘action by the Nation *directly* affecting them’ and matters concerning ‘the . . . [n]ation’s historical culture or development.’”¹⁸⁵ To determine if elver fishing is an “internal tribal matter,” the five-factor test from *Akins* must be applied.¹⁸⁶ First, does “the policy purport[] to regulate only members of the tribe?”¹⁸⁷ The Passamaquoddy attempted to allow over 500 of their members to commercially fish for elvers.¹⁸⁸ The Tribe did not attempt to regulate non-tribal individuals and did not attempt to grant licenses to any individuals who were not tribal members.¹⁸⁹ The Tribes have previously been able to regulate access to the timber on tribal land, by either granting or denying permits and setting the terms upon which such permits may be granted.¹⁹⁰ Although the Tribe issued more licenses than the State claimed it had the ability to grant, the licenses only directly impacted the members of the tribe.¹⁹¹ This intra-tribal regulation is not dissimilar to the regulation of timber within the tribal lands.¹⁹² Although the elver fishery is potentially more lucrative than the timber industry, the factors, as stated by the First Circuit, only give weight to the impact of elver fishing on non-tribal members.¹⁹³ Although the tribal members collect enough elvers to garner a significant profit, the impact of their activities is minimal compared to that of non-tribal individuals.¹⁹⁴ Tribal

185. *Francis v. Dana-Cummings*, 2008 ME 184, ¶ 15, 962 A.2d 944 (quoting *Stilphen*, 461 A.2d at 489-90).

186. *Akins*, 130 F.3d at 486-87 (listing a five-factor test by which to determine if the action is an “internal tribal matter”). However, *Akins* expressly acknowledged that the circumstances of that case only called into question the ability of the Penobscot Nation to control resources within its bounds, when such resources were not contemporaneously regulated by either the United States or the State of Maine. *Id.* at 487-88 (“This is . . . a question of . . . allocation of substantive law to a dispute . . . where neither Congress nor . . . Maine . . . has expressed a particular interest.”). Despite this overt expression of specific application, the Law Court has applied the five-factor test “when[ever] it is asserted that a state law is applicable to the Tribes.” *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 42, 770 A.2d 574.

187. *Id.* at 486.

188. Trotter, *Passamaquoddy Issue Far More Licenses*, *supra* note 154.

189. *Id.*

190. *Akins*, 130 F.3d at 486 (stating that an action involving only tribal members and tribal lands lends itself to a conclusion that the action is an internal tribal matter).

191. Trotter, *Reduce Lucrative Elver Landings*, *supra* note 5.

192. *See generally Akins*, 130 F.3d at 482.

193. *Id.* at 486.

194. Jamie Bissonette Lewey, *Maine Must Keep Promises to Tribes, Protect Elvers Before They Disappear*, BANGOR DAILY NEWS (Feb. 2, 2014), <https://bangordailynews.com/2014/02/02/opinion/contributors/maine-must-keep-promises-to-tribes-protect-elvers-before-they-disappear/>.

members brought in over 1,600 pounds of elvers.¹⁹⁵ However, when compared to the general catch in Maine, 1,600 pounds is merely 10%.¹⁹⁶ From the quantity of elvers obtained by each group, it seems that non-tribal members have a far more significant impact on the fishery than their tribal counterparts. The fact that a tribal action only has a cursory effect on non-tribal members or only affects a small number of non-tribal members is a relevant factor.¹⁹⁷

Relatedly, the attempted regulation of tribal elver fishing “has to do with the commercial use of lands acquired by the [tribes] with the federal funds [they] received for [that] purpose as part of the settlement agreement.”¹⁹⁸ Assuming that Penobscot Nation and Passamaquoddy Tribe members only attempt to collect elvers within their individual tribal areas, it is likely that this prong of the *Akins* test is satisfied. In *Akins*, the court concluded that since the timber was only harvested from lands owned by the Penobscot Tribe, that timber regulation was an internal tribal matter.¹⁹⁹ Similarly, the Southern Tribes, if successful, would likely only have the ability to collect elvers within the bounds of their tribal lands. Otherwise, there would likely be an impact on the ability of non-tribal members to fish for elvers, which would weigh against the Southern Tribes in an evaluation of the *Akins* factors, specifically the first prong.²⁰⁰

Third, it must be determined whether the policy affects the tribe, nation, or band’s ability to control its natural resources.²⁰¹ Elvers are, by all accounts, a natural resource, regardless of the argument regarding what entity has the ability to regulate them.²⁰² There are diverse outcomes when evaluating this factor of the *Akins* test. Many courts have previously allowed tribes to regulate resources within their boundaries, while others have determined the State retains the ability to regulate

195. *Id.*

196. Curtis, ‘Renegade’ Fishery, *supra* note 166.

197. *Penobscot Nation v. Fellecer*, 164 F.3d 706, 710 (1st Cir. 1999) (distinguishing the termination of one non-tribal employee from *Stilphen*, in which beano games attracted, and thus had an effect on, a high number of non-tribal individuals).

198. *Akins*, 130 F.3d at 486.

199. *Id.* at 486-87 (concluding that the federal and state laws defined the land on which the timber-harvesting occurred, and thus the regulation of that land was physically an “internal tribal matter”).

200. *Fellecer*, 164 F.3d at 710 (giving weight to the fact that the action only involved one non-tribal individual, rather than a larger amount of those individuals).

201. *Akins*, 130 F.3d at 486.

202. U.S. FISH AND WILDLIFE SERV., *supra* note 16.

other resources.²⁰³ Even when natural resources were not involved, courts have determined that tribes retain the ability to perform certain actions that are in their best interest.²⁰⁴ This prong of the *Akins* test is likely satisfied and weighs in favor of the tribe because elvers are a natural resource which is within the tribal lands and one which the State is attempting to regulate.²⁰⁵ Because of the heavy deference granted to the tribal sovereignty, this prong seemingly weighs in favor of the tribes, which have for hundreds of years fished and hunted on their tribal lands.²⁰⁶ This traditional activity, in the spirit of the *Akins* test, seems to be an “internal tribal matter.”²⁰⁷

Fourth, a court would likely evaluate whether the policy of the tribe or other entity implicates or impairs the interests of the State of Maine.²⁰⁸ This is potentially the most problematic section of the *Akins* test for the Southern Tribes. Maine has established numerous regulations regarding the harvest and sale of elvers, with the laws changing annually.²⁰⁹ In prior cases, despite the fact that the Tribes have been permitted to regulate particular natural resources that exist on their tribal lands, the State was not attempting to regulate the same resource.²¹⁰ Although the interpretation of both the Settlement and Implementing Acts are to break in favor of the Indians if ambiguities exist, it has not always been the case that the statute has been determined to be ambiguous.²¹¹ The language of the Settlement Act includes an exemption for State law “relating to land use or environmental matters.”²¹² In resolving whether or not the State could regulate pollution discharge into waterways that travelled through tribal lands, the EPA determined that the state retained

203. *Compare Akins*, 130 F.3d at 490, and *Fellencer*, 164 F.3d at 713, with *Maine v. Johnson*, 498 F.3d 37, 48-49 (1st Cir. 2007).

204. *Fellencer*, 164 F.3d at 710 (upholding the termination of a community health nurse because the tribe retains the ability to choose the best nurse to fit its needs).

205. See ME. REV. STAT. ANN. tit. 12, § 6302-A(3), amended by P.L. 2013, ch. 8, § 1 (emergency, effective March 21, 2013); see *American eel*, 1, U.S. Fish and Wildlife Service, <http://www.fws.gov/northeast/newsroom/pdf/Americaneel9.26.11.2.pdf>.

206. See *Akins*, 130 F.3d at 488; Walstad, *supra* note 47, at 488.

207. *Fellencer*, 164 F.3d at 709-10.

208. *Akins*, 130 F.3d at 486.

209. See ME. REV. STAT. ANN. tit. 12, § 6505-A(2-A) (2005)(repealed 2006); ME. REV. STAT. ANN. tit. 12, § 6302-A(3), amended by P.L. 2013, ch. 8, § 1 (emergency, effective March 21, 2013) (repealing, in part, ME. REV. STAT. ANN. tit. 12, § 6505-A(2-B) (2005 & Supp. 2012)).

210. *Maine v. Johnson*, 498 F.3d 37, 45 (1st Cir. 2007) (citing *Akins*, 130 F.3d at 488, and *Fellencer*, 164 F.3d 710-11).

211. *Barnum*, *supra* note 39, at 1176.

212. 25 U.S.C. § 1725(h) (2012).

authority to promulgate environmental regulation because the clause in the Settlement Act would be rendered redundant if it did not provide for any actual exception.²¹³ In the past, courts have determined that certain areas of natural resource regulation are not internal tribal matters, for example “the regulation of water quality within the state is a matter of the legitimate interest of the citizens of [the] state.”²¹⁴ Although the harvesting of elvers has an impact on the general population of Maine, such effects are not as far-reaching as the regulation of freshwater within the state. This factor weighs heavily in favor of the State because of the specific language of the Settlement and Implementing Acts.

Lastly, it is essential to determine whether the tribal licensing and sanctioning of tribal members’ ability to fish is consistent with prior legal understandings of what constitutes an “internal tribal matter.”²¹⁵ First, the harvesting of elvers for subsistence by tribal members may not be acceptable under Maine law because an elver may not meet the definition of a “fish.”²¹⁶ The two State and federal statutes do not grant complete sovereignty to the tribes.²¹⁷ The EPA previously determined that because the State had exercised jurisdiction over certain aspects of the tribe, total sovereignty was not granted by either of the statutes.²¹⁸ Because the Indians had not retained total control over their lands and resources, “internal tribal matters” must have had a separate meaning that would include any activity in which the tribe could be involved.²¹⁹ This is a more limited definition of “internal tribal matter,” one that does not generally include the right of a tribe to total self-governance.²²⁰ Although the statutory list is not exhaustive, it is indicative of the type of actions that may be undertaken by the tribes without State involvement.²²¹ Many cases have evaluated “internal tribal matters” in

213. Approval of Application of Maine to Administer the National Pollutant and Discharge Elimination System [hereinafter Approval of Application of Maine], 68 Fed. Reg. 65,052, 65,057 (Nov. 18, 2003).

214. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 55, 770 A.2d 574.

215. *Akins*, 130 F.3d at 486.

216. *See* ME. REV. STAT. ANN. tit. 30, 6207(9) (2005).

217. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir. 1999). *See also* *Barnum*, *supra* note 39, at 1176 (referencing the fact that the EPA determined that there was not complete sovereignty in the tribes, because much of the language of the Settlement and Implementing Acts would be superfluous if the tribes had retained control over all resources and decisions).

218. Approval of Application of Maine, 68 Fed. Reg. at 65,060.

219. *Id.*; *see Barnum*, *supra* note 39, at 1180.

220. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983) (distinguishing *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 179 (1973)).

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

terms of the traditional and non-traditional roles of the tribes. The First Circuit determined that the Tribe's ability to determine its best interests in health care and to restrict harvesting of timber on tribal lands were both examples of "internal tribal matters" which fit within the traditional roles of the tribes.²²² However, *Stilphen* involved a type of activity that was not traditionally performed by members of the various tribes and nations.²²³ The fact that the Southern Tribes have, for centuries, fished within the waters of their respective lands suggests that the practice is essential to the cultural and historical character of their members.²²⁴ Additionally, the regulation the tribe seeks to enforce only concerns tribal members and, thus, the tribe may retain general authority over actions within its bounds.²²⁵ The ability of the Tribes to regulate fishing within their waterways remains consistent with prior legal interpretations of "internal tribal matters," as it is a traditional activity that only involves tribal members.

VIII. CONCLUSION

The rights of Maine's Indian tribes may not guarantee their ability to harvest elvers, when a state law, applicable to all citizens, has been established to inhibit their ability. However, these tribes may be able to overcome certain regulations that prohibit the fishing of elvers and other stages of the American eel's life cycle. If the tribes are successful in proving that elver fishing is a traditional practice of their culture, then they may be able to continue to fish for elvers in order to provide sustenance and cultural certainty to their tribes. Despite the wide range of this exception, it would likely only apply on the reservations, to tribal members. It is unlikely that the tribes would receive a blanket exemption from the law. Because the elver fisheries have been steadily declining due to many factors such as over-fishing, the Indians would likely not be able to fish in all rivers, ponds, and other waterways for the high-priced organisms. These exemptions, although possible, are not likely to be implemented. Although the fishing may be an "internal tribal matter," the

222. See *Fellencer*, 164 F.3d at 711 (allowing the termination of a community health nurse, because an Indian tribe is not an employer); *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997) (allowing the tribe to regulate timber harvest on tribal lands).

223. *Stilphen*, 461 A.2d at 490 (prohibiting the Penobscot tribe from operating a beano facility because it was not unique to their cultural heritage).

224. *Walstad*, *supra* note 47, at 488 (indicating that the Passamaquoddy were so named because of their location near plentiful sources of fish).

225. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). See also *Akins*, 130 F.3d at 486.

state could still retain authority to regulate it because of the effect that it has on the general sustainability of the Maine elver fishery. The most recent laws, enacted in 2014, attempted to clarify the status of tribal members within the wider elver fishing regulatory environment. These laws granted the tribes far more autonomy than they had in earlier seasons, namely 2013. However, the laws may not recognize the inherent sovereignty of Maine's tribes to continue to function in a traditional manner. Although tensions have partially subsided, the ever-changing landscape of elver regulation could cause friction at any time. The question of sovereignty of the tribes to fish is entirely dependent on the application of precedent and the extent to which elvers are considered a traditional cultural practice of the Southern Tribes. Until a court is faced with an issue of tribal sovereignty and considers its relationship with Maine's fishing regulations, the rights of the tribes hang in the balance, and tribal members are left to individually determine whether their actions are permitted or prohibited by law, a task that is far more difficult than it may initially appear.