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## Getting the Green Light: Renewable Energy as an Internal Tribal Matter

J. Shinay  
*University of Maine School of Law*

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# GETTING THE GREEN LIGHT: RENEWABLE ENERGY DEVELOPMENT IN MAINE AS AN INTERNAL TRIBAL MATTER

J. Shinay

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## GETTING THE GREEN LIGHT: RENEWABLE ENERGY DEVELOPMENT IN MAINE AS AN INTERNAL TRIBAL MATTER

J. Shinay\*

### ABSTRACT

For over forty years the Wabanaki people of Maine have had their sovereignty diminished as a result of the Maine Indian Claims Settlement Act (MICSA), an arrangement with the state and federal government unlike any other tribal sovereignty arrangement in the United States. The MICSA was born from a decades-long debate over land rights and resource rights in Maine, culminating in a “compromise” that avoided political conflict at the expense of Wabanaki sovereignty. Under the MICSA, the Wabanaki do not have sovereign status, instead only holding sovereign control over those matters the state deems “internal tribal matters.” Among the many aspects of self-governance affected by this lack of sovereignty is an inability to exert full autonomous control over natural resources on Wabanaki lands and waters. Renewable energy is an example of one such resource that could provide immense benefits to the Wabanaki people by allowing increased independence from the state and a source of additional income. Through a review and re-interpretation of the MICSA’s history and case law, this Comment seeks to redefine the definition of internal tribal matters to encompass the development of renewable energy projects contained within Wabanaki lands if created with the intent of directly supporting Wabanaki communities. This new test for determining internal tribal matters is then applied to hypothetical utility scale and small-scale renewable projects to determine when the Wabanaki could proceed with development as sovereigns without oversight from the state. This Comment will conclude with a brief discussion of the broader issues inherent in the current status of the Wabanaki under the MICSA with an eye towards a more comprehensive solution and grant of full sovereignty.

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## INTRODUCTION

In 1980, native tribes located in the State of Maine, collectively referred to as the Wabanaki,<sup>1</sup> were faced with planning for an uncertain future.<sup>2</sup> After almost two hundred years without clarity regarding questions of legal status of the Wabanaki and their lands within Maine,<sup>3</sup> a joint federal and state settlement collectively referred to as the Maine Indian Claims Settlement Act (MICSA) answered these questions all at once.<sup>4</sup> This settlement left the Wabanaki with new lands and the theoretical freedom to modernize their community infrastructure while still maintaining their cultural roots.<sup>5</sup> Although in many ways “start[ing] from scratch,”<sup>6</sup> the Wabanaki were finally able to establish their own criminal laws, their own courts, and their own lands.<sup>7</sup> The Wabanaki hoped at the time that the MICSA would usher in “a rebirth of an Indian nation in the State of Maine” that would allow a better life to be built for future generations.<sup>8</sup>

These efforts were soon complicated, however, due to the uncertain status of Wabanaki sovereignty post-MICSA. The MICSA effectively stripped the Wabanaki of their sovereign status and created a relationship between the federal, state, and tribal governments unlike those seen with any other tribe in the United States.<sup>9</sup> The Wabanaki were subjected to state law except for sustenance fishing, hunting on tribal lands, and those matters considered “internal tribal matters.”<sup>10</sup> The MICSA did not give an explicit definition of the scope of internal tribal matters, making determinations of when the Wabanaki have autonomy from the state to enact their

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1. *Who We Are*, WABANAKI ALL., <https://wabanakialliance.com/who-we-are/> [<https://perma.cc/E44S-ZVHD>] (last visited Dec. 8, 2023). Four distinct tribes are recognized within the borders of Maine: the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Mi'kmaq Nation. *Id.*; John Sanders, *A Tiny Fish and a Big Problem: Natives, Elvers, and the Maine Indian Claims Settlement Act of 1980*, 57 WM. & MARY L. REV. 2287, 2298 (2016). For the sake of consistency and completeness in this Comment, unless referring to one of the tribes specifically, the term “Wabanaki” will be used to refer to the Maine tribes as a whole.

2. See Paul Brodeur, *Annals of Law (Indian Land Claims)*, NEW YORKER, Oct. 11, 1982, at 145.

3. See Joseph G.E. Gousse, *Waiting for Gluskabe: An Examination of Maine's Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 542–48 (2014).

4. See generally L.D. 2037 (109th Legis. 1980) (codified at 30 M.R.S. §§ 6201–14); H.R. 7919, 96th Cong. § 5 (1980) (codified at 25 U.S.C. §§ 1721–35). Note that while the federal and state components of the settlement are sometimes referred to separately under their own names, in this Comment the entire agreement will collectively be referred to as the “MICSA.” Where relevant, specific reference will be made to clarify which portion of the settlement is being referred to.

5. See Brodeur, *supra* note 2, at 149 (describing post-1980 attempts to use funds to both modernize plumbing and electrical systems as well as research linguistic traditions).

6. *Id.* at 150.

7. *Id.*

8. *Id.*

9. Matthew D. Manahan & Catherine R. Connors, *Water, Tribal Claims, and Maine's Not-So-Settled Settlement Acts*, 31 NAT. RES. & ENV'T 24, 24 (2016).

10. 30 M.R.S. §§ 6204, 6206(1), 6207(1) (2023). In 2021, the MICSA was also amended to allow the Passamaquoddy Tribe to administer their own regulations related to the Safe Drinking Water Act. 30 M.R.S. § 6207-A(1) (2023). Note that this is an extremely specific power and does not affect more general rights of regulation under the Clean Water Act. See discussion *infra* Section III.A.2.

own regulations and laws ambiguous.<sup>11</sup> Complicating the matter, the Wabanaki would not be protected by the vast majority of federal Indian laws that would otherwise restore some of their inherent rights and status as a nation.<sup>12</sup> Although the MICSA was an improvement over the Wabanaki's previous land situation, the creation of a quasi-sovereign, quasi-municipal status profoundly affected the identity and independence of the Wabanaki.<sup>13</sup>

One arena where this confusion over Wabanaki sovereignty is likely to cause issues is the determination of who regulates renewable resources on Wabanaki land. The United States currently has a vast, untapped potential for renewable resources.<sup>14</sup> Tribal land across the country is abundant in renewable resources like wind, solar, and biomass.<sup>15</sup> In recognition of this, the federal government has awarded significant grants for tribal energy projects since 1992, underscoring the perceived value of renewables on tribal land.<sup>16</sup>

Maine's own ambitious renewable goals suggest energy expansion very well may attempt to reach into Wabanaki lands. In June 2019, Governor Janet Mills signed legislation requiring Maine's electricity needs to be 100% sourced through renewables by 2050.<sup>17</sup> The state's research suggests that reaching this goal will necessarily include finding new "portfolios of resources" to harness.<sup>18</sup> This push for a broader renewable portfolio suggests a strong likelihood that the market will expand into tribal territories in the near future regardless of how directly the Wabanaki are involved in its development.

For now, energy production on Wabanaki lands is progressing slowly. Although the Wabanaki have made attempts at utility-scale renewables,<sup>19</sup> no large-scale

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11. Gousse, *supra* note 3, at 538.

12. See L.D. 2004, § 21 (131st Legis. 2023).

13. See *id.*; 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, 1168 (2010).

14. ADRIA BROOKS, U.S. DEPT. OF ENERGY, RENEWABLE ENERGY RESOURCE ASSESSMENT INFORMATION FOR THE UNITED STATES iii (2022).

15. ANELIA MILBRANDT ET AL., NAT. RENEWABLE ENERGY LAB'Y, TECHNO-ECONOMIC RENEWABLE ENERGY POTENTIAL ON TRIBAL LANDS (2018). Studies by the U.S. Department of Energy show impressive technological potential for energy output on tribal land. See U.S. DEPT. OF ENERGY, OFF. OF INDIAN ENERGY, DEVELOPING CLEAN ENERGY PROJECTS ON TRIBAL LANDS: DATA AND RESOURCES FOR TRIBES 3 (2012); BROOKS, *supra* note 14, at iii (stating 9% of renewable energy potential can be found within ten miles of tribal land); Michael Maruca, Comment, *From Exploitation to Equity: Building Native-Owned Renewable Energy Generation in Indian Country*, 43 *WM. & MARY ENV'T L. & POL'Y REV.* 391, 402 (2019) (stating 10% of all energy resources in the United States are located on tribal land).

16. Pilar M. Thomas, *Developing Energy Resources and Other Economic Projects on Tribal Lands*, in *EMERGING ISSUES IN TRIBAL-STATE RELATIONS: LEADING LAWYERS ON ANALYZING THE ECONOMIC, CULTURAL, AND POLITICAL TRENDS AFFECTING TRIBAL-STATE INTERACTIONS* 1, 3 (2016).

17. *Renewable Portfolio Standards*, STATE OF ME. GOVERNOR'S ENERGY OFF., <https://www.maine.gov/energy/initiatives/renewable-energy/renewable-portfolio-standards> [<https://perma.cc/F825-G6XP>] (last visited Dec. 7, 2023).

18. ENERGY & ENV'T ECON., INC. & THE APPLIED ECON. CLINIC, STATE OF MAINE RENEWABLE ENERGY GOALS MARKET ASSESSMENT 5 (2021) (sponsored by the Maine Governor's Energy Office).

19. See *Penobscot Tribe - 2012 Project*, OFF. OF INDIAN ENERGY POL'Y & PROGRAMS, <https://www.energy.gov/indianenergy/penobscot-tribe-2012-project> [<https://perma.cc/3A2P-XWTN>] (last visited Dec. 8, 2023); *Passamaquoddy Tribe Plans \$120M Wind Farm in Washington County*, BANGOR DAILY NEWS

projects have come to fruition due to stringent state and federal permitting requirements and increased costs associated with connecting to the state power grid.<sup>20</sup> A lack of sufficient infrastructure within Wabanaki communities inevitably complicates this process.<sup>21</sup> Small-scale renewable projects may also run into regulatory issues that foreclose total energy independence.<sup>22</sup> Assuming renewable energy on Wabanaki lands is inevitable, full Wabanaki control over development and regulation of these renewables could allow communities to step closer to the full Wabanaki independence envisioned in the early years of the MICSA. Although the legal precedents for Wabanaki sovereignty under the MICSA are far from ideal, there is a strong possibility that the current working definition of internal tribal matters encompasses at least some Wabanaki development of renewable energy resources within their own territory, and under their own regulations.

This Comment argues that small-scale renewable energy development on Wabanaki land falls into the internal-tribal-matters language under section 6206 of the MICSA and can thus be regulated under the Wabanaki's reserved sovereign powers. Part I provides background on the complex history of the MICSA and reviews the renewable regulations in Maine that the Wabanaki may seek to avoid. Part II broadly describes the effect of the MICSA on Wabanaki rights and sovereignty. Part III attempts to solidify the evolving definition of internal tribal matters into a framework and analyze energy regulation in context of this framework to determine how the development of renewable resources should be viewed under the MICSA. Finally, in acknowledgement that the limited sovereignty under the MICSA will always be problematic for true Wabanaki independence and that there is room for this framework to change, Part IV will briefly discuss some other considerations and prospective legislation that, while beyond the scope of this Comment, could return broad sovereign powers to the Wabanaki and eliminate the need to make the internal-tribal-matters argument entirely.

## I. BACKGROUND

### *A. Wabanaki Status in Maine and the Enactment of the MICSA*

The MICSA's enactment represented the end of a legal battle over land rights that lasted a decade, itself a culmination of a centuries-old debate regarding who held proper title to large swaths of traditional Wabanaki land across the State of Maine.<sup>23</sup> Resolving these land rights was, as noted by President Jimmy Carter, "an intolerable

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(Jan. 26, 2012), <https://www.bangordailynews.com/2012/01/26/news/passamaquoddy-tribe-plans-120m-wind-farm-in-washington-county>; *Penobscot Nation - 2018 Project*, OFF. OF INDIAN ENERGY POL'Y & PROGRAMS, <https://www.energy.gov/indianenergy/penobscot-nation-2018-project> [<https://perma.cc/C5WY-64DT>] (last visited Dec. 8, 2023).

20. Zoom Interview with Eric Nicolau, Penobscot Indian Nation Enters. (Jan. 5, 2023).

21. See Donna M. Loring et al., *One Nation, Under Fraud: A Remonstrance*, 75 ME. L. REV. 241, 245 (2023) ("No tribal community in Maine has infrastructure comparable to that of the closest towns.").

22. See *infra* Section I.B.

23. Gousse, *supra* note 3, at 537–38.

situation” for all parties involved.<sup>24</sup> Although the MICSA was intended to settle these Wabanaki land disputes “once and for all in a fair and equitable manner,”<sup>25</sup> hindsight shows that the MICSA was deficient in many ways, reaching a settlement that prioritized “money first, land second, [and] sovereignty last.”<sup>26</sup> An understanding of the complex history of the MICSA is thus crucial to any analysis of the internal-tribal-matters argument and the current state of Wabanaki sovereignty.

There was a complete lack of clarity regarding the federal legal status of the Wabanaki people within Maine for almost two hundred years.<sup>27</sup> Tribes in the United States as a rule are not automatically recognized by the federal government and thus must be formally recognized by the Office of the Assistant Secretary of Indian Affairs.<sup>28</sup> For the majority of American history, the Wabanaki were not federally recognized.<sup>29</sup> In fact, the Wabanaki had little to no contact with the federal government whatsoever, instead falling under the “protection and welfare” of the State of Maine.<sup>30</sup> This arrangement created doubt as to whether the Wabanaki would even be considered “bona fide tribes” under federal Indian law.<sup>31</sup>

Even before Maine was given statehood, the treaties between the Wabanaki and Massachusetts created additional confusion as to Wabanaki rights. The Commonwealth of Massachusetts first established treaties with the Wabanaki people, specifically the Penobscot Nation, Passamaquoddy Tribe, and Maliseet Band, between 1794 and 1796.<sup>32</sup> The earliest of these treaties relinquished all rights and interests of the Passamaquoddy Tribe and Maliseet Band in the land that is today Maine in exchange for 23,000 acres of reserved land and numerous other smaller land holdings.<sup>33</sup> The Penobscot Nation signed a similar treaty while under threat from American encroachment and continuing post-revolutionary threats from British

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24. Jimmy Carter, *Remarks at the Bill Signing Ceremony for the Maine Indian Claims Settlement Act of 1980*, THE AM. PRESIDENCY PROJECT (Oct. 10, 1980), <https://www.presidency.ucsb.edu/documents/remarks-the-bill-signing-ceremony-for-the-maine-indian-claims-settlement-act-1980>.

25. *Id.*

26. A. Tallchief, *Money vs. Sovereignty: An Analysis of the Maine Settlement*, 6 AM. INDIAN J. 19, 21–22 (1980).

27. See *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 374 (1st Cir. 1975) (describing that the lack of clarity over Wabanaki recognition and lands began in 1792).

28. Off. of Fed. Acknowledgment (OFA), *OFA Home*, U.S. DEP'T. OF THE INTERIOR, BUREAU OF INDIAN AFFS., <https://www.bia.gov/as-ia/ofa> [<https://perma.cc/RHM2-R6NG>] (last visited Dec. 8, 2023); Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4636–37 (Jan. 28, 2022). Although a regulatory procedure currently exists for tribal recognition under 25 C.F.R. § 83.1 et seq., more tribes have been recognized instead through executive or congressional action. *Department of the Interior Announces Final Federal Recognition Process to Acknowledge Indian Tribes*, U.S. DEPT. OF THE INTERIOR (Sept. 29, 2021), <https://www.doi.gov/pressreleases/department-interior-announces-final-federal-recognition-process-acknowledge-indian-tribes>.

29. See *Morton*, 528 F.2d at 373–75 (outlining the Wabanaki’s lack of federal recognition from 1776 up to the filing of the instant suit).

30. *Id.* at 374.

31. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 487 (Me. 1983).

32. Gousse, *supra* note 3, at 542–43; *Morton*, 528 F.2d at 374.

33. Gousse, *supra* note 3, at 542.

warships.<sup>34</sup> In both cases, these reserved lands proved too small to support the immediate economic needs of the Wabanaki, forcing them to sell even more land to Massachusetts and, eventually, Maine.<sup>35</sup>

When Maine became its own state in 1820, its constitution gave the state exclusive control over the Wabanaki.<sup>36</sup> The federal government refused to recognize the Wabanaki tribes, allowing Maine to regulate tribal affairs through its own laws for almost 160 years.<sup>37</sup> The Wabanaki during this time were not recognized as separate nations in any political sense, in direct contrast to the sovereign identity of tribes in other states.<sup>38</sup> Without federal recognition, the Wabanaki were unable to establish land over which any jurisdiction could be exercised, receive funding from the Bureau of Indian Affairs, or claim inherent sovereignty.<sup>39</sup>

The status of the Wabanaki would change dramatically in the second half of the twentieth century as a result of a land rights dispute. Modern controversy over Wabanaki land rights began with a 1964 dispute between members of the Passamaquoddy Tribe and a Maine citizen clear cutting trees from Passamaquoddy trust land without permissions.<sup>40</sup> The lack of an appropriate response from the state for this improper use of Wabanaki trust lands<sup>41</sup> sparked a series of debates, culminating in the claim that the original Massachusetts treaties were invalid as they had not been congressionally approved pursuant to the Non-Intercourse Act of 1790 (NIA).<sup>42</sup> The NIA prohibited the sale of tribal lands without the express approval of

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34. *Id.* at 542–43.

35. *Id.* at 543.

36. *Morton*, 528 F.2d at 374. The original Maine Constitution specifically provided that Maine “shall assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine.” ME. CONST. art. X, § 5 (omitted 2015). For many years, official printings of the Maine Constitution did not include these provisions. ME. CONST. art. X, § 7; *Sections of the Maine Constitution Omitted From Printing*, ME. STATE LEGISLATURE, <https://legislature.maine.gov/lawlibrary/sections-of-the-maine-constitution-omitted-from-printing/9296/> [<https://perma.cc/UC6D-ZM8H>] (last visited Dec. 12, 2023). However, voters recently chose to reinstate these sections in all future printings of the Maine Constitution. See *Mainers Overwhelmingly Support Question 6*, WABANAKI ALL., <https://www.wabanakialliance.com/question6-passes/> [<https://perma.cc/RW3A-7L3C>] (last visited Dec. 6, 2023).

37. See *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶¶ 20–21, 770 A.2d 574, 581 (2001); see also *Manahan & Connors*, *supra* note 9, at 24; *Loring*, *supra* note 21, at 245.

38. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 22, 770 A.2d at 581.

39. See *Federal Recognition: Politics and Legal Relationship Between Governments: Hearing before the Committee on Indian Affairs*, 112th Cong. 7 (2012) (statement of Bryan Newland, Senior Policy Advisor, Office of the Assistant Secretary for Indian Affairs) (explaining federal recognition gives tribes “authority to establish a land-base over which to exercise jurisdiction [and] provide government services to tribal citizens”); *What is a Federally Recognized Tribe?*, U.S. DEPT. OF THE INTERIOR, INDIAN AFFS. (Oct. 2, 2020), <https://www.bia.gov/faqs/what-federally-recognized-tribe> (stating federal recognition allows access to funding and services from the Bureau of Indian Affairs and creates inherent rights of sovereignty).

40. Gousse, *supra* note 3, at 544. While this is generally considered the origin point for the tribal land claims that necessitated the MICSAs, contemporary reporting of the time suggests that at least some individuals had been attempting to bring light to the issue since 1957. Brodeur, *supra* note 2, at 76.

41. Although tribal members were able to receive audience with the Governor and the Attorney General, they were told that the State would be unable to intervene and that any claims would need to be settled in court. Brodeur, *supra* note 2, at 78.

42. Gousse, *supra* note 3, at 544–45.



Congress.<sup>43</sup> States evolving from the original colonies had largely ignored the NIA, believing it did not limit their ability to contract with the tribes.<sup>44</sup> If the Wabanaki could successfully prove the NIA applied, they would be able to lay claim to twelve and a half million acres of ancestral territory, nearly two-thirds of the entire State of Maine.<sup>45</sup>

With this argument in hand, the Wabanaki first asked the Bureau of Indian Affairs (BIA) to file a protective action against the State to reclaim all improperly transferred lands.<sup>46</sup> The federal government denied the request and refused to recognize any formal relationship with the Wabanaki.<sup>47</sup> The Wabanaki responded by filing suit in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* against the Secretary of the Interior, Roger Morton, and other government officials seeking protective action and a declaratory judgment that the NIA applies to the Wabanaki.<sup>48</sup> After a series of amendments and appeals,<sup>49</sup> the First Circuit held for the Wabanaki, agreeing that the NIA applies to Maine tribes based on its plain meaning and the fact that the federal government “never sufficiently manifested withdrawal of its protection so as to sever any trust relationship.”<sup>50</sup> The *Morton* court was clear, however, that this was a narrow holding that did not foreclose future factual consideration of Wabanaki relief from tribal land transactions with Maine.<sup>51</sup> After *Morton*, the Wabanaki could now claim a recognized federal trust relationship and proceed with their land claims cases against the State.<sup>52</sup>

The *Morton* decision quickly sent a shockwave through the legal world, all but ensuring suit by the Wabanaki to return millions of acres of land and sparking claims in other states that tribal land sales could also be found invalid if not properly following the NIA.<sup>53</sup> The stakes of this potential litigation were highest in Maine due to the possible risk of the court independently resolving ownership of the millions of acres of land claimed by the Wabanaki.<sup>54</sup> Municipal bond issuers responded to this threat by refusing to provide bond ratings for lands with now ambiguous titles.<sup>55</sup> More than twenty-seven million dollars in local bonds were thus cancelled or delayed.<sup>56</sup> Additionally, title companies refused to underwrite

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43. Brodeur, *supra* note 2, at 85.

44. *Id.*

45. Sanders, *supra* note 1, at 2309; Brodeur, *supra* note 2, at 81.

46. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 23, 770 A.2d 574.

47. *Id.*

48. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 372 (1st Cir. 1975); Brodeur, *supra* note 2, at 96.

49. See Brodeur, *supra* note 2, at 86–101 (describing a contemporary account of the complex jurisdictional and standing issues involved in *Morton* and the long series of revisions, protective actions, arguments, and branching cases that led to the landmark First Circuit decision).

50. *Morton*, 528 F.2d at 378–80.

51. *Id.* at 376.

52. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 25, 770 A.2d 574.

53. See Sanders, *supra* note 1, at 2309 (“The decision paved the way for further [Wabanaki] litigation . . . .”); Manahan & Connors, *supra* note 9, at 24 (“[The NIA theory] led to a cascade of similar lawsuits by other tribes in other states.”).

54. See Brodeur, *supra* note 2, at 101–02.

55. See *id.* at 102 (“Ropes & Gray let it be known that it would no longer be able to give unqualified approval to municipal bonds issued within the disputed area.”).

56. *Id.*

insurance for transactions in disputed territories, which effectively halted people living within the disputed territories from transferring real estate or securing a mortgage.<sup>57</sup> Many Maine citizens, now made aware of the disputes and fearing their lands might soon be taken, began arming themselves in “preparation for a land war.”<sup>58</sup> The Wabanaki attempted to quell these fears by publicly stating they did not intend to take anyone’s home and offering to drop two million acres of contested coastal property from their suit.<sup>59</sup> Nevertheless, paranoia continued to grow among misinformed Maine citizens.<sup>60</sup> Despite attempts to the contrary, state leaders were now forced to face the repercussions of *Morton*.

Given these pressures, Maine’s Governor James B. Longley, Maine Attorney General Joseph E. Brennan, and eventually President Carter all intervened to assist in reaching a settlement.<sup>61</sup> Settlement efforts began in 1977, but the first three proposed settlements were rejected amidst negative reactions from Maine lawmakers.<sup>62</sup> Although this debate was fueled by a variety of disputes,<sup>63</sup> of central concern to lawmakers was whether or not the Wabanaki would retain sovereignty.<sup>64</sup> State officials expressed a strong position that Maine would under no circumstances allow the Wabanaki to become a “nation within a nation.”<sup>65</sup> All parties finally reached a settlement in 1980, despite imperfect terms, due in part to concerns from both sides that time was running out.<sup>66</sup> The settlement was approved through the enactment of the Maine Implementing Act,<sup>67</sup> which was then incorporated into the Federal Maine Indian Claims Settlement Act of 1980.<sup>68</sup> Collectively, these statutes created what is now known as the Settlement Acts, hereinafter referred to simply as the MICSA.<sup>69</sup>

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57. Manahan & Connors, *supra* note 9, at 24.

58. See NEIL ROLDE, UNSETTLED PAST, UNSETTLED FUTURE: THE STORY OF MAINE INDIANS 42 (2004) (“Gun shops were emptied of weapons, hastily bought by panicked property owners fearful of losing their land and homes.”).

59. Gousse, *supra* note 3, at 547.

60. See ROLDE, *supra* note 58, at 42.

61. Gousse, *supra* note 3, at 546–47.

62. See *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 26, 770 A.2d 574; see also Brodeur, *supra* note 2, at 114 (stating Governor Longley’s reaction to an early formation of the settlement was to characterize it as “something that could be expected to emanate from Red China”).

63. See Brodeur, *supra* note 2, at 114–43 (providing contemporary review of all the issues surrounding the settlement, including the role of election cycles and the Maine paper companies in the final settlement form).

64. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 27, 770 A.2d 574.

65. Gousse, *supra* note 3, at 552.

66. See *id.* at 548. Both sides were motivated by fear, with the state concerned that an adverse result would cause a systemic collapse and the tribes concerned that the impending election of Ronald Reagan and concerning language in recent Supreme Court decisions could exterminate their claims altogether. *Id.*; see also Brodeur, *supra* note 2, at 141 (“If we didn’t get a settlement while [Carter] was still President, we might very well not get one at all.”).

67. P.L. 1979, ch. 732 (codified at 30 M.R.S. §§ 6201–14).

68. Maine Indian Claims Settlement Act, Pub. L. No. 96-420 § 2(b)(3), 94 Stat. 1785, 1786 (1980) (codified at 25 U.S.C. § 1721).

69. Manahan & Connors, *supra* note 9, at 24.

While the MICSA has often been called a “compromise in the truest sense,”<sup>70</sup> any victory for the Wabanaki was “surely a pyrrhic victory.”<sup>71</sup> The MICSA created a relationship between the federal government, the State of Maine, and the Wabanaki unlike any seen elsewhere in the United States.<sup>72</sup> In exchange for the right and funds for the Wabanaki to purchase title to their ancestral lands, Maine held fast to its hardline stance against sovereignty—there would be no “nation within a nation.”<sup>73</sup> With few exceptions, section 6204 of the MICSA subjects the Wabanaki to the laws and taxes of Maine just like any other citizen.<sup>74</sup> This is in stark contrast to all other federally recognized tribes which retain their original sovereignty, unless otherwise dictated by Congress.<sup>75</sup> The Wabanaki voiced concerns over the loss of sovereignty at the time the MICSA was enacted, but too late to change its results.<sup>76</sup> With the Wabanaki in a likely unwinnable “collision course” with state interests<sup>77</sup> and facing legal precedents that threatened to reverse any existing victories,<sup>78</sup> they were forced to give in to the state’s desires and accept section 6204’s limit on sovereignty. The Wabanaki were left with an understanding of tribal rights and jurisdiction incomparable to any other tribe in the United States.<sup>79</sup> As a result of this diminished status, the Wabanaki have been unable to gain the level of economic and infrastructure independence seen in other tribal nations.<sup>80</sup> Forty years later, any victories gained by the Wabanaki in land rights are thus tainted by the loss of their sovereignty and inability to fully maintain autonomy from Maine’s laws and regulations.<sup>81</sup>

### *B. Energy Development in Maine Generally*

Renewable energy provides a timely example of one area where section 6204’s application of Maine’s laws to the Wabanaki prevents the development of a fully independent community. Even if the Wabanaki people’s energy goals align with

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70. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 28, 770 A.2d 574.

71. Gousse, *supra* note 3, at 549.

72. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983).

73. Gousse, *supra* note 3, at 549; *Great N. Paper, Inc.*, 2001 ME 68, ¶¶ 29, 31, 36, 770 A.2d 574.

74. 30 M.R.S. § 6204 (2023).

75. Brodeur, *supra* note 2, at 124.

76. Nicole Friederichs, *The Growing List of Reasons to Amend the Maine Indian Jurisdictional Agreement*, 75 ME. L. REV. 331, 349 (2023); *Great N. Paper, Inc.*, 2001 ME 68, ¶ 33, 770 A.2d 574; *see also* Tallchief, *supra* note 26, at 20 (“The treaty could have changed the relationship between the Indian nations and the federal and state governments, with a recognition of full Indian sovereignty. The tribes should have settled for nothing less.”).

77. Brodeur, *supra* note 2, at 127.

78. Most notably, the Supreme Court’s decision in *Wilson v. Omaha Indian Tribe* threatened to extinguish all of the Maine tribes’ claims, stating that a statute similar to the NIA, the Indian Trade and Intercourse Act of 1834, did not apply to state land as it only applied to “Indian Country.” *Id.* at 136.

79. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 34, 770 A.2d 574.

80. Michael-Corey Francis Hinton, *Symposium Keynote: “Isolation and Restraint: Maine’s Unique Status Outside Federal Indian Law,”* 75 ME. L. REV. 226, 237 (2023); *see also* Brodeur, *supra* note 2, at 127 (describing the “devastating social, psychological, and economic consequences” that have historically fallen upon tribes when losing their sovereignty).

81. *See* Hinton, *supra* note 80, at 228 (“In all the stories [about the Settlement Acts], one thing remained constant: the tribes lost in the end.”).

those of the state, the issue is not the reasonableness of the state's regulatory structure but rather that state oversight over renewable development would infringe upon Wabanaki sovereignty and prevent the establishment of their own regulatory standards. While the Wabanaki may in some cases need to follow federal renewable regulations and any federal Indian law regulations made applicable within Maine,<sup>82</sup> this Comment will focus specifically on the Maine state laws that could be avoided if sovereignty can be argued.

Maine has implemented fairly stringent renewable development regulations and requirements, in no small part due to the state's ambitious goal of utilizing 100% renewable power by 2050.<sup>83</sup> To ensure these goals are met, all new utility level renewable development must be certified, approved, awarded, and registered with the state through a competitive process.<sup>84</sup> In addition, any utility scale renewable development must follow title 35-A of the Maine Revised Statutes, which regulates public utilities throughout the state.<sup>85</sup> While a full analysis of utility regulation in Maine is beyond the scope of this Comment, some of the utility regulations that may complicate Wabanaki renewable development include, but are not limited to: the requirement of state authorization for the sale or lease of public utility land;<sup>86</sup> the levying of a monetary penalty for any violations of title 35-A;<sup>87</sup> the ability of the state to totally revoke a utility's ability to autonomously operate;<sup>88</sup> and limitations on the expansion of small rural electrical cooperatives.<sup>89</sup> Furthermore, establishing a new public utility for a small community may be totally rejected by the state if competing with any existing utilities providing similar services.<sup>90</sup> These examples of the Maine regulatory scheme suggest Wabanaki communities will face immense hurdles on their way to successful and autonomous energy development.

Further regulation specific to wind and solar create additional barriers to renewable development by the Wabanaki. These laws may, for example, require connecting even small-scale solar projects to the grid in service of the state's energy goals,<sup>91</sup> prevent wind permitting based on "scenic character" of a proposed development area,<sup>92</sup> and require evaluations of the effect of wind turbines on noise

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82. *See Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1996) (holding the Wabanaki will be exempt from federal Indian Law unless Congress has specifically made the relevant statute applicable within Maine).

83. 35-A M.R.S. § 3210(1-A)(B) (2023).

84. *Maine Renewable Portfolio Standards (RPS)*, ME. PUB. UTILS. COMM'N GOVERNOR'S ENERGY OFF., <https://www.maine.gov/mpuc/regulated-utilities/electricity/renewable-programs/rps> [<https://perma.cc/6VAQ-G6CN>] (last visited Dec. 8, 2023); 35-A M.R.S. § 712; *see also* Susan Faloon, *Maine Public Utilities Commission Selects Renewable Energy Projects in Second Competitive Procurement*, ME. PUB. UTILS. COMM'N (June 29, 2021), <https://www.maine.gov/tools/whatsnew/index.php?topic=puc-pressreleases&id=5089377&v=article088>.

85. *See generally* 35-A M.R.S. §§ 101–10210. Note that the definition of "public utility" is quite comprehensive, suggesting that even a small-scale utility providing power to one community could fall under this definition. *Id.* § 102(13).

86. *Id.* § 1101.

87. *Id.* § 1508-A(1).

88. *Id.* §§ 1511–12.

89. *Id.* § 2103; *see also id.* §§ 3701–72 (regulating Rural Electrification Cooperatives generally).

90. *Id.* § 2105(1).

91. *Id.* § 3474(2)(A).

92. *Id.* § 3452.

levels or light refraction.<sup>93</sup> The added expense of evaluations and permitting under these laws may prevent a project from coming to fruition at all.<sup>94</sup> Additional requirements also exist under the Maine Department of Environmental Protection's regulations and procedures, further adding to the cost and time necessary to start a new renewable project.<sup>95</sup>

While smaller-scale development could avoid much of the above-described regulation, these projects will also be subject to state oversight. Small "consumer-owned" projects, for example, must be limited to only 150 customers to be exempt from the public utility requirements.<sup>96</sup> "Community-based" projects provide for some flexibility from regulation, but will still require connection to the larger grid and will be limited in their total net generating capacity.<sup>97</sup> Development as a "small power producer" forecloses the sale of electricity entirely.<sup>98</sup> Finally, in what might be the most appealing option for Wabanaki communities, the state does provide the ability for a community to create a "microgrid" without becoming a public utility.<sup>99</sup> Even this is not a catch-all solution, however, as a microgrid still requires commission approval and adherence to a strict list of size and output requirements.<sup>100</sup> Going the route of a small-scale development thus eases the regulatory burden but will still require strict oversight from the state and added expense connected to that oversight.

With this context in mind, an argument must be made that the Wabanaki can develop their own energy policies and regulations to allow full Wabanaki control over any renewable projects on their lands. Bearing in mind that lawyers and legal scholars continue to disagree on the implications of the MICSA's language over forty years after its enactment, the following section will attempt to develop an accurate framework of which land and sovereignty rights can be claimed by the Wabanaki and which powers are still reserved by the state.

## II. TRIBAL RIGHTS AND SOVEREIGNTY UNDER THE MICSA

The MICSA delineates tribal rights in a manner unlike those seen anywhere else within the United States.<sup>101</sup> The Wabanaki received many of the rights and privileges they requested in the years leading to the ratification of the MICSA, specifically

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93. *Id.* § 3456.

94. See Interview with Eric Nicolar, *supra* note 20.

95. See, e.g., *Solar Decommissioning*, ME. DEPT. OF ENV'T. PROT., <https://www.maine.gov/dep/land/solar-decommissioning/index.html> [<https://perma.cc/SF7D-4XRP>] (last visited Dec. 8, 2023) (requiring a specific process for decommissioning solar power projects—a decommissioning plan and financial assurance); *Friends of Me.'s Mountains v. Bd. of Env't Prot.*, 2013 ME 25, ¶ 5, 61 A.3d 689 (stating a notice and comment period was triggered under the Maine Administrative Procedure Act by public concern over a wind installation permit).

96. 35-A M.R.S. § 3504. Note that "consumer-owned" projects refer to any transmission and distribution utility wholly owned by its consumers. *Id.* § 3501(1).

97. *Id.* § 3603. Note that "community-based" projects refer to locally produced and owned generating facilities. *Id.* § 3602(1).

98. *Id.* § 3305. Note that a "small power producer" refers to a municipally owned power facility with a limited capacity. *Id.* § 3303(9).

99. *Id.* § 3351(2).

100. *Id.* § 3351(3).

101. See ROLDE, *supra* note 58, at 48–49.

federal recognition of their tribal status and the ability to purchase and confirm title to designated reservation lands.<sup>102</sup> These two major benefits came with one great cost: the Wabanaki expressly conceded that, with limited exceptions, they would lose their sovereign status and be subject to the laws of Maine.<sup>103</sup> An overview of these three major effects of the MICSA on Wabanaki rights and privileges follows.

### A. Land Rights

The bulk of the text of the MICSA settled the tribal land claims that originally sparked the dispute between the state and the Wabanaki.<sup>104</sup> Under the MICSA, \$81.5 million was appropriated to allow the Wabanaki to purchase a combined three hundred thousand acres of land within Maine.<sup>105</sup> This process allowed the tribes to quickly regain control over large tracts of their ancestral lands.<sup>106</sup> The MICSA also described how Maine tribal land would be held.<sup>107</sup> Based on the regulatory framework of the MICSA, tribal land in Maine can be held in a federal Indian reservation in trust or in fee.<sup>108</sup>

The majority of lands acquired using MICSA funds are designated as reservation land, alternatively described in the MICSA as “Indian Territory.”<sup>109</sup> Reservation lands are those areas specifically reserved for the Wabanaki and protected by the federal government in trust.<sup>110</sup> These reservation lands cannot be alienated from the Wabanaki and are not taxable.<sup>111</sup> The percentage of the total funds allotted varied somewhat between each individual group privy to the settlement, but in all cases the funds were held in trust by the federal government to be distributed directly to the Wabanaki for their land purchases.<sup>112</sup> The first 150,000 acres of reserved land to be acquired by each tribe was predetermined and described in the Maine Implementing Act.<sup>113</sup> The Passamaquoddy Tribe additionally acquired as reservation the lands originally reserved for them under the 1794 agreement with Massachusetts.<sup>114</sup> The

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102. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996).

103. 30 M.R.S. § 6204.

104. *See id.* §§ 6205–6205-A.

105. Brodeur, *supra* note 2, at 144.

106. *Id.* at 144–45. Some of the early acquisitions included eastern timberlands traditionally used as Penobscot hunting and trapping grounds, the bulk of the Carrabassett Valley area surrounding Sugarloaf Mountain, a five-thousand-acre blueberry farm that quickly became the largest producer of Maine blueberries, and the bulk of the six thousand acres in Indian Township that were taken during the original 1794 treaty with Massachusetts. *Id.*

107. Gousse, *supra* note 3, at 549.

108. *See Tribal Lands in Maine*, WABANAKI ALL., <https://www.wabanakialliance.com/tribal-lands-in-maine/> [https://perma.cc/8J25-Q9CD] (last visited Dec. 12, 2023).

109. *See* 30 M.R.S. § 6205.

110. *Id.* § 6204.

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

112. Maine Indian Claims Settlement Act, Pub. L. 96-420, § 5(b)(1), 94 Stat. 1785, 1788 (1980) (codified at 25 U.S.C. § 1724). \$900,000 was held in trust for land acquisitions for the Houlton Band of Maliseet Indians, and the Passamaquoddy and Penobscot Tribes each had \$26,800,000 held in trust for their land acquisitions. *Id.* § 5(b)(1), (d)(1)–(3).

113. 30 M.R.S. § 6205; *see also* § 6205-A (describing the lands acquired by the Houlton Band after the initial approval of the MICSA).

114. *Id.* § 6203(5).

MICSA thus averted the panic that had overtaken land owners by “impliedly vest[ing] title in the State for the remainder of disputed lands.”<sup>115</sup> To prevent future land claim disputes, all future transfers of land to the Wabanaki are deemed automatically in accordance with the Trade and Intercourse Act of 1790 and any other applicable federal constitutional and statutory requirements.<sup>116</sup>

The remaining funds allotted to the Wabanaki under the MICSA can be administered for additional land purchases by the Secretary of State “in accordance with reasonable terms established by the Passamaquoddy Tribe or the Penobscot Nation, respectively.”<sup>117</sup> Unless these purchased lands are converted into trust land, they are considered to be held in fee by the Wabanaki tribes in their roles as municipalities and can therefore be taxed.<sup>118</sup> Any conversion of acquired lands into trust land requires explicit approval by the state and inclusion in the Maine Act.<sup>119</sup> Since 1980, the Passamaquoddy Tribe and the Penobscot Nation have each acquired over one hundred thousand acres in trust through this process.<sup>120</sup> Any lands not converted to trust lands and transferred in fee to a person who is not a member of any tribe or nation reverts to its prior status and is no longer considered Indian territory.<sup>121</sup>

The Maine Implementing Act further protects Indian territory under the MICSA by including strict requirements for any takings under the laws of the state.<sup>122</sup> Any public entity proposing a taking must find “no reasonably feasible alternative to the proposed taking” using a balancing test laid out in the Maine Implementing Act and must hold a public hearing under the procedures in the Maine Administrative Procedure Act.<sup>123</sup> If the land being taken includes a public utility, however, this determination is made by the Public Utilities Commission (PUC).<sup>124</sup> It has been suggested that the specific inclusion of the PUC in the MICSA’s language may make it slightly easier to justify the taking of a portion of Indian territory if housing a public utility.<sup>125</sup>

The land acquisition portions of the MICSA have allowed both the Penobscot Nation and Passamaquoddy Tribe to establish large reservation communities.<sup>126</sup> The Penobscot Nation is now centered north of Bangor on the Indian Island Reservation, which consists of over fifty-five thousand acres of trust land within the Penobscot

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115. Gousse, *supra* note 3, at 550.

116. Maine Indian Claims Settlement Act, Pub. L. 96-420, § 4(a)(1), 94 Stat. 1785, 1788 (1980) (codified at 25 U.S.C. § 1723). Lands acquired that are within any city, town, village, or plantation must also be approved by the legislative body of said city, town, village, or plantation. *Id.*

117. *Id.* § 5(b)(1).

118. LORING, *supra* note 111, at 33.

119. 30 M.R.S. § 6205(5).

120. Dale T. White, *Indian Country in the Northeast*, 44 TULSA L. REV. 365, 372 (2008).

121. 30 M.R.S. § 6205(5).

122. *Id.* § 6205(3).

123. *Id.*

124. *Id.*

125. See Gousse, *supra* note 3, at 551 (suggesting takings are “slightly less restricted where a public entity seeks to affect a taking for a public utility”).

126. See *Tribal Lands in Maine*, *supra* note 108 (containing a rough map of all tribal land holdings in Maine).

River.<sup>127</sup> In addition, the Penobscot Nation holds the bulk of the islands on the Penobscot River north of Indian Island to the river's intersection with the Mattawamkeag River.<sup>128</sup> The Passamaquoddy Tribe holds two large reservations on the eastern side of the state: Pleasant Point, containing 330 acres of trust land, and Indian Township, containing 108,900 acres of trust land.<sup>129</sup> While far short of the original claims of land made prior to the MICSAs, the Wabanaki have thus amassed land sufficient to develop their own communities.

### B. Federal Recognition

The MICSAs clarified the nearly two hundred years of ambiguity regarding the status of the Wabanaki “in the eyes of the federal government” by explicitly awarding federal recognition.<sup>130</sup> Although *Morton* had already stated the Wabanaki could claim federal status,<sup>131</sup> federal recognition was not formally confirmed until the signing of the federal component of the MICSAs.<sup>132</sup> Formal recognition meant that the Wabanaki could finally access many of the immunities and privileges afforded to federal tribes, “open[ing] the floodgate for the influx of millions of dollars in federal subsidies.”<sup>133</sup>

Because of the unique nature of Wabanaki sovereignty described in the following section, however, the Wabanaki are not subject to “the full measure of control Congress has generally exercised over similar Indian tribes.”<sup>134</sup> In most cases, federal Indian law will be pre-empted by the civil, criminal, and regulatory laws of Maine.<sup>135</sup> Despite gaining federal recognition, the MICSAs therefore prevents the Wabanaki from relying on federal Indian law precedents, as any federal law enacted after the MICSAs shall not apply “unless such provision . . . is specifically made applicable within the State of Maine.”<sup>136</sup> This has become

127. *Penobscot Nation*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/bia/ois/tribal-leaders-directory/tribes/penobscot> [<https://perma.cc/G2N5-2CMD>] (last visited Dec. 8, 2023); *U.S. Domestic Sovereign Nations: Land Areas of Federally-Recognized Tribes*, BUREAU OF INDIAN AFFS., <https://biageospatial-internal.geoplatform.gov/indianlands/> [<https://perma.cc/42QU-48YG>] (last visited Dec. 8, 2023); White, *supra* note 120, at 372.

128. *U.S. Domestic Sovereign Nations*, *supra* note 127.

129. *Id.*; White, *supra* note 120, at 372.

130. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 36, 770 A.2d 574.

131. *See Joint Tribal Couns. of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975).

132. *Maine Indian Claims Settlement Act*, Pub. L. No. 96-420, § 2, 94 Stat. 1785, 1785 (codified at 25 U.S.C. § 1721). Initially, only the Passamaquoddy and Penobscot tribes were parties to the rights and limitations of the MICSAs. *See ROLDE*, *supra* note 58, at 45. Later, the Houlton Band of Maliseets were also added as “beneficiaries” of the new law. *Id.* at 49. A separate settlement was reached with the Aroostook Band of Micmacs in 1991 to include them in the MICSAs. *Maine Indian Claims Settlement Act*, Pub. L. No. 96-420, § 2, 94 Stat. 1785, 1875 (codified at 25 U.S.C. § 1721).

133. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996).

134. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 40, 770 A.2d 574.

135. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 (Me. 1983).

136. *Maine Indian Claims Settlement Act*, Pub. L. No. 96-420, § 16(b), 94 Stat. 1797 (codified at 25 U.S.C. § 1735); *see also Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1996) (holding the Gaming Act does not apply to the Maine tribes as it was explicitly pre-empted by the MICSAs requiring the tribes to agree to the burdens of the laws of Maine). A recent attempt was made to restore Wabanaki access to most federal Indian law, but this bill failed after a veto from Governor Mills. *See generally* L.D. 2004 (131st Legis. 2023).



particularly problematic in relation to Wabanaki attempts to set up gaming facilities under federal Indian law,<sup>137</sup> suggesting any similar attempts to claim sovereignty over renewable resources under federal Indian law precedents will most likely fail under current legal understandings.<sup>138</sup>

### C. Loss of Sovereignty

Despite some wins in land gains and federal status, reaching the compromise of the MICSA came at a severe cost to the Wabanaki: the functional loss of total sovereignty. The MICSA explicitly removes sovereignty by applying all Maine laws to the Wabanaki.<sup>139</sup> Under section 6206 of the Maine portion of the MICSA, Wabanaki communities are designated as “municipalities” for most purposes.<sup>140</sup> This municipal role means the Wabanaki must presumptively follow all Maine state laws, including the developmental and environmental laws and regulations that apply to municipalities.<sup>141</sup> Despite some key exceptions,<sup>142</sup> section 6206 largely eliminates Wabanaki ability to fully self-govern the use of their lands and resources.<sup>143</sup>

Though it is perhaps surprising that the Wabanaki would have accepted the inclusion of section 6206, it was likely necessary to reach *any* compromise.<sup>144</sup> The addition of this sovereign-stripping language to the MICSA was a direct result of Maine leaders refusing to create a “nation within a nation” at the time of enactment.<sup>145</sup> It is also clear that the general ramifications of this municipal model were understood by the Wabanaki, even if not desired, at the time of enactment.<sup>146</sup> Regardless of whether this “compromise” was just or its implications fully understood, however, the result is that today “with very limited exceptions, the

137. See generally Sharon M. Wheeler, *Is the Die Cast? Indian Casino Gambling in Maine*, 50 ME. L. REV. 143 (1998) (contemporaneously discussing the legal implications of the Law Court’s refusal to apply the federal Gaming Act in *Passamaquoddy Tribe v. Maine*).

138. See Michael-Corey F. Hinton & Erick J. Giles, *Eli-Tpitahatomek Tpsakuwakonol Waponahkik (How We, Native People, Reflect on the Law in the Dawnland)*, 74 ME. L. REV. 209, 231–32 (2022) (describing the Maine courts’ history of disregarding federal Indian Law in their decisions).

139. 30 M.R.S. § 6204 (2023).

140. *Id.* § 6206(1). Note that in addition to functioning as a sovereign or municipality, tribes can also function as a “business corporation” for purposes of contracting with non-tribal parties. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 40, 770 A.2d 574. In this case the tribes must follow the Maine Business Corporation Act and are taxed and regulated like any other corporation. *Id.*

141. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 38, 770 A.2d 574.

142. For example, the tribes retain exclusive law enforcement and jurisdiction over certain matters and maintain exclusive regulatory power over fish and wildlife resources. 30 M.R.S. §§ 6207, 6209–10 (2023).

143. See Gousse, *supra* note 3, at 553 (“[S]ection 6206 confers upon tribes a reduced sovereign status from that which they enjoyed prior to the enactment of [the] MICSA.”).

144. See *id.* at 552 (suggesting the Wabanaki may have lost the entirety of their land and recognition claims without the inclusion of section 6206).

145. *Id.*

146. *Great N. Paper, Inc.*, 2001 ME 68, ¶ 32, 770 A.2d 574. Members of the tribes were, in fact, quite vocal about their opposition to the loss of jurisdiction at the time of enactment, suggesting the implications of the MICSA were immediately understood. See *id.* at ¶ 33; see also Tallchief, *supra* note 26, at 20 (“The tribes will have less sovereignty than other Indian tribes located in the United States. The tribes in Maine will become virtually ‘creatures’ of the state.”).

[Wabanaki are] subject to the laws of Maine,” in direct contrast to the sovereign status of tribes in all other states.<sup>147</sup>

There is one glimmer of broader sovereignty within the MICSA. Section 6206(1) of the state component of the MICSA provides the ability for the Wabanaki to maintain their sovereign control over anything “within their respective Indian Territories” deemed an “internal tribal matter.”<sup>148</sup> The inclusion of this language likely reflects Congress’s intent to protect for the Wabanaki “expressly retained sovereign activities,” particularly those related to harvesting natural resources.<sup>149</sup> Section 6206 includes a non-exhaustive list of what may constitute an internal tribal matter: “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.”<sup>150</sup> Thus, the Wabanaki will not be required to follow state law and may proceed under their own policies if they can prove that an action is an internal tribal matter under section 6206’s language.<sup>151</sup>

The interpretation of what constitutes an internal tribal matter thus remains a central question in defining the boundaries of Wabanaki sovereignty. Neither the MICSA nor its legislative history explicitly defines the term or indicates if the list of examples in section 6206 is exclusive.<sup>152</sup> In the years following the MICSA, state and federal case law slowly developed some guidance for how to define internal tribal matters, but the issue remains far from clear. Part III will thus discuss in what contexts the Wabanaki have or have not managed to claim sovereignty under the banner of internal tribal matters, how these interpretations have been applied to natural resources up to this point, and how the court is likely to view renewable resource development under this jurisprudence.

### III. DEFINING “INTERNAL TRIBAL MATTERS” IN THE CONTEXT OF RENEWABLE RESOURCE DEVELOPMENT

What constitutes an internal tribal matter under section 6206 has undergone near constant interpretation since the enactment of the MICSA. Despite this, an overall lack of clarity within the case law provides the opportunity to further interpret the scope of sovereignty the Wabanaki may be able to claim under the MICSA’s language.<sup>153</sup> This section will attempt to find within this jurisprudence a common framework for the internal-tribal-matters analysis that can be applied to renewable development and argue that under this framework, the Wabanaki can maintain full legal autonomy over some of their renewable energy projects.

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147. *Akins v. Penobscot Nation*, 130 F.3d 482, 484–85 (1st Cir. 1997).

148. 30 M.R.S. § 6206(1) (2023).

149. Hinton & Giles, *supra* note 138, at 230 (quoting H.R. Rep. No. 96-1353, at 15 (1980)).

150. 30 M.R.S. § 6206(1) (2023).

151. *See Akins*, 130 F.3d at 485.

152. Gousse, *supra* note 3, at 553.

153. *See id.* at 554–55 (describing the general ambiguity of the internal-tribal-matters language and jurisprudence).

*A. Interpreting Internal Tribal Matters Under the MICSA*

In *Penobscot Nation v. Stilphen*, the Law Court's first opportunity to interpret section 6206, the court defined two initial concepts establishing the scope of Wabanaki sovereignty moving forward: (i) the MICSA creates a relationship between the State of Maine, the Wabanaki, and the federal government distinct from all other tribal relationships in the United States and (ii) internal tribal matters is not a legal term of art comparable to other federal Indian law terms.<sup>154</sup> The *Stilphen* court determined that issues of internal tribal matters would thus be reviewed independent of previous federal Indian law, instead using the language of the MICSA and previous Maine precedents to resolve issues on a case-by-case basis. Courts would also consider if an action in question could be related through the common *ejusdem generis* rule to section 6206's list of general matters that fall within the internal-tribal-matters exception.<sup>155</sup> While this general scope has not changed post-*Stilphen*, the question of whether the *ejusdem generis* rule must be loosely or strictly applied to the list of illustrations in section 6206 was left unresolved, leading to much interpretive debate over the last forty years. The following section will review the varied judicial interpretations to conclude that there is a specific two-part, multi-factor framework that can be relied upon in defining what constitutes an internal tribal matter.

*1. Law Court Jurisprudence on Internal Tribal Matters*

The earliest Law Court interpretation of internal tribal matters chose to apply the rule of *ejusdem generis* strictly, finding an action must be directly embraced by the list of general terms to be solely within the regulatory purview of the tribes.<sup>156</sup> The *Stilphen* court, in addition to establishing the above-noted lack of connection between section 6206 and federal Indian law, determined that the list of matters in section 6206(1) would not prevent the State from enforcing its gambling laws over the Wabanaki.<sup>157</sup> The Penobscot Nation argued actions intended to raise money for tribal operations and services, here in the form of beano games, would fall into the definition of "tribal government."<sup>158</sup> The court disagreed with this broad interpretation, reasoning a mere connection to financing legitimate tribal services and programs was insufficient to consider beano games internal tribal matters.<sup>159</sup> However, the court still left some room for broader interpretation of section 6206(1) by suggesting the exercise of autonomous tribal control over any matters playing a significant role in the Penobscot Nation's "historical culture or development" might also be considered an internal tribal matter.<sup>160</sup>

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154. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983). For example, the Law Court states that "internal tribal matters" cannot be equated to accepted terms of art like "internal and social relations," "internal affairs," or "tribal self-government," "merely because of a partial language overlap." *Id.* (citation omitted).

155. *Id.*

156. *Id.*

157. *Id.* at 481.

158. *Id.* at 482.

159. *Id.* at 490.

160. *Id.*

Before the Law Court had the opportunity to revisit the issues raised in *Stilphen*, the First Circuit had a chance to articulate what method it felt should be used to define internal tribal matters.<sup>161</sup> In *Akins v. Penobscot Nation*, a member of the nation who was not a resident of Maine sued the Penobscot Nation to contest a Tribal Council stumpage permitting requirement that would allow permits to only those who could claim citizenship in both the Penobscot Nation and the State of Maine.<sup>162</sup> The U.S. District Court for the District of Maine dismissed *Akins*'s suit, claiming the stumpage policy was an internal tribal matter to which Maine law does not apply and thus could not be contested under any state law that would warrant the exercise of diversity jurisdiction.<sup>163</sup>

On appeal, the First Circuit used the opportunity to review the history of the MICSA and section 6206(1).<sup>164</sup> In direct contrast to the *Stilphen* court's strict application of *ejusdem generis* to the matters listed in section 6206(1), the *Akins* court found the list provides only "limited guidance" as to the definition of internal tribal matters due to the use of the word "including."<sup>165</sup> As such, the "specific categories are exemplars and not exclusive."<sup>166</sup> Instead of relying exclusively on the language of the statute, the court thus looked to five factors to weigh the interests of the Wabanaki against those of the state to determine if the stumpage policy was an internal tribal matter.<sup>167</sup> Those factors included (i) whether the policy regulated only tribal members; (ii) whether the policy involved the use of lands acquired with funds received under the MICSA; (iii) whether the policy concerned the harvesting of a natural resource from that land; (iv) whether the policy, on its face, implicated or impaired any interest of the state; and (v) whether prior understandings, legal or otherwise, suggested that the policy in question constituted a historical tribal matter.<sup>168</sup>

Applying these factors, the *Akins* court held that the issuance of stumpage permits and the development of a stumpage policy are internal tribal matters under the MICSA.<sup>169</sup> Central to the First Circuit's decision was the MICSA's focus on ensuring that the Wabanaki have economic power over managing the natural resources on their lands, provided that management did not interfere with the state's own explicit interests in land use or conservation, as well as the wholly "intra-tribal"

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161. *Akins v. Penobscot Nation*, 130 F.3d 482, 483 (1st Cir. 1997).

162. *Id.* at 483–84.

163. *Id.* at 484.

164. *Id.* at 484–85.

165. *Id.* at 486.

166. *Id.*

167. *Id.* at 486–87.

168. *Id.* Note that the fifth factor was not clearly delineated by the *Akins* court and is sometimes described as a test of exclusively precedential legal understandings. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 49, 770 A.2d 574. Although *Akins* focused primarily on legislative history to determine the meaning of internal tribal matters, *Akins* did not explicitly reject *Stilphen*'s emphasis on historical importance of an action, suggesting that historical contexts can also be included in the weighing process. *Id.* at 487–88; *see also* *Penobscot Nation v. Stilphen*, 461 A.2d 478, 490 (Me. 1983) (holding beano was not an internal tribal matter when it was "not a traditional Indian practice and has no particular cultural importance for the Nation.").

169. *Akins*, 130 F.3d at 488.

nature of the dispute.<sup>170</sup> In coming to this decision and establishing this new test, the *Akins* court was clear that future cases would require a similarly robust examination of the five factors to determine if future policies or actions would be considered an internal tribal matter.<sup>171</sup>

In *Great Northern Paper, Inc. v. Penobscot Nation*, the Law Court formally adopted the *Akins* test as its framework for determining internal-tribal-matters issues, and also recognized several threshold issues that must be established before an *Akins* balancing test can commence.<sup>172</sup> The court was tasked with determining whether the Maine Freedom of Access Act (MFAA), applicable to the state's municipalities and governments, applied to the Penobscot Nation and Passamaquoddy Tribe.<sup>173</sup> The court considered four threshold questions to determine if state law applied to the Wabanaki in this instance: (i) to what entities did the statute apply, (ii) whether the Wabanaki acted in the capacity of such an entity, (iii) whether the MICSA prohibited the application of the statute to the Wabanaki generally, and (iv) whether the MICSA prohibited the application of the statute under the instant circumstances.<sup>174</sup> The court quickly dealt with questions one and two, and found that the Penobscot Nation and Passamaquoddy Tribe were acting as municipalities in this instance.<sup>175</sup> The court then stated that the determination of questions three and four would require an internal-tribal-matters analysis and thus the application of the *Akins* factors.<sup>176</sup>

Based on the *Akins* factors, the court concluded that Wabanaki "methods of convening and engaging in government will in most instances be matters 'internal' to the Tribe," but decisions made in the course of tribal governance that interact with or affect persons or entities other than those within the tribes, may not be an internal tribal matter.<sup>177</sup> More specifically, interactions with the outside public that could limit the state's authority and affect the state's relationship with federal agencies would not be considered internal to the Wabanaki and any related communications would therefore be subject to the MFAA.<sup>178</sup> In making this decision, the court in *Great Northern Paper* placed great weight on the *Akins* factors one and four—namely, whether a policy related to exclusively tribal issues and if a policy implicated the state's interests.<sup>179</sup> Although *Great Northern Paper* reiterated that the Wabanaki agreed to "significant limitations on their sovereignty," the court's adoption of the *Akins* factors provided an opening for the Wabanaki to argue sovereignty in scenarios where they were not explicitly engaging in self-governance of some kind.<sup>180</sup>

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170. *See id.*

171. *See id.* at 487 ("Generalizations are no less treacherous today . . . [w]e tread cautiously and write narrowly, for the problems and conflicting interests presented by this case will not be the same as the problems and interests presented by the next case.").

172. *See Great N. Paper, Inc.*, 2001 ME 68, ¶ 49, 770 A.2d 574.

173. *Id.* ¶ 1.

174. *Id.* ¶ 42.

175. *Id.* ¶¶ 43–44.

176. *Id.* ¶¶ 48–49.

177. *Id.* ¶¶ 50–54.

178. *Id.* ¶ 55.

179. *Id.* ¶ 50 (finding that tribal governance focused entirely on Indian territory and resources is not a matter of interest to the state at large).

180. *Id.* ¶¶ 58, 60.

Cases following *Great Northern Paper* have affirmed the use of the *Akins* balancing test while further refining what threshold questions are required before an *Akins* balancing test can be conducted. In *Francis v. Dana-Cummings*, the Law Court chose to apply the *Akins* factors when a claim did not “fit squarely within any of the examples” listed in section 6206(1).<sup>181</sup> Although the case involved a lease dispute between the Passamaquoddy Housing Authority and a Passamaquoddy member, the issues of the case did not technically deal with the “right to reside” within the reservation generally, making the application of section 6206(1) ambiguous.<sup>182</sup> After application of the *Akins* factors, the court held that the wholly internal nature of the dispute to Passamaquoddy land and Passamaquoddy members suggested that the lease was an internal tribal matter over which the Passamaquoddy Tribe had exclusive jurisdiction.<sup>183</sup>

In *Moyant v. Petit*, the most recent state court case dealing with the internal-tribal-matters issue, the Law Court determined the *Akins* test was the proper procedure to determine if a non-tribal member’s lease of land was an internal tribal matter because the conflict involved ambiguous issues related to non-tribal members’ right to reside on tribal property.<sup>184</sup> Applying the factors to the facts of the case, the court held that the non-member status of the plaintiff weighed against the first *Akins* factor—that the policy only affected members of the Wabanaki.<sup>185</sup> Despite this, the court determined this fact did not outweigh the internal nature of the dispute given its relation to Wabanaki lands and resources, stating that it was “difficult to conceive of a more appropriate forum for this case than the tribal court.”<sup>186</sup> Ultimately, the application of the *Akins* factors in this case suggested that issues related to the use of Wabanaki lands can be considered internal tribal matters even when involving non-tribal members if the issues are still ambiguously within the language of section 6206(1).<sup>187</sup> *Francis* and *Moyant* suggest that issues that are unambiguously within the language of section 6206 may not require an *Akins* balancing test, although the court will sometimes go over the *Akins* test to further support a finding that the plain language of 6206(1) is unambiguous.<sup>188</sup>

The Law Court declined to apply the *Akins* factors when the issues did not involve the Wabanaki acting in their municipal role.<sup>189</sup> In *Winifred B. French Corp. v. Pleasant Point Passamaquoddy Reservation*, the court based its decision entirely on what type of entity the Passamaquoddy Tribe was acting as while taking an

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181. *Francis v. Dana-Cummings*, 2008 ME 184, ¶¶ 14, 19, 692 A.2d 944.

182. *Id.* ¶¶ 13–14.

183. *Id.* ¶¶ 20–21.

184. *Moyant v. Petit*, 2021 ME 13, ¶¶ 11–12, 247 A.3d 326.

185. *See id.* ¶¶ 12–13.

186. *Id.* ¶ 14.

187. *See id.* (“Tribal jurisdiction does not disappear simply because a person who is not a member of the Tribe is involved in a dispute, especially when the action is against the Tribe and a tribal member concerning tribal land.”).

188. *See In re Child. of Mary J.*, 2019 ME 2, ¶¶ 11–16, 199 A.3d 231 (holding there was no internal tribal matter based on the plain language of section 6206(1) and using the *Akins* factors as a way to support this broad understanding of the statute).

189. *Winifred B. French Corp. v. Pleasant Point Passamaquoddy Rsrv.*, 2006 ME 53, ¶¶ 10, 17, 896 A.2d 950 (declining to determine if an issue is an internal tribal matter when Passamaquoddy Tribe was acting as a corporation).

action.<sup>190</sup> Because the Passamaquoddy were acting as a corporate entity, not as a municipal entity, section 6206(1)'s exceptions did not apply at all.<sup>191</sup> Although this case dealt specifically with state laws that applied only to municipalities, the MICSA and additional case law support the reading that the internal-tribal-matters exception will apply only to the Wabanaki acting in their municipal role<sup>192</sup> and that the Wabanaki do not receive sovereign status when acting as a corporation.<sup>193</sup>

Looking at this series of cases interpreting the concept of internal tribal matters, a specific framework can be established that outlines how the Law Court is likely to view internal tribal matters moving forward. Although the court has never applied this specific framework, the framework may provide a narrower understanding than could be argued broadly under the language of the MICSA and reflects the full variety of issues that have been raised throughout internal-tribal-matters jurisprudence. The framework thus contemplates any and all roadblocks that might prevent an affirmative internal-tribal-matters finding. If an action can arguably pass this test, there is therefore a strong likelihood that the court will accept it as an internal tribal matter.

Analysis of the internal-tribal-matters issue can be viewed as a two-part, multi-factor test. First, the following threshold questions must all be answered in the affirmative: (i) whether the action occurred within Indian territory, (ii) whether the action ambiguously fell within the matters listed in section 6206(1), and (iii) whether the Wabanaki acted in their capacity as a municipality.<sup>194</sup> If the answer to all three questions is yes, a balancing test must be conducted using the five factors laid out in *Akins* to see whether Wabanaki interests weigh in favor of sovereignty. As this framework implies, determinations of internal tribal matters are very narrowly reviewed by the court. In many cases the Wabanaki are thus at a disadvantage as a highly specific case-by-case analysis of facts may be the difference between sovereignty and subjugation under state law. Though far from ideal, the internal-tribal-matters framework is nevertheless the primary method by which sovereignty can currently be argued under the MICSA. As of this writing, the court has not had the opportunity to determine if section 6206's definition of internal tribal matters would encompass renewable resource development. Thus, the next section examines the adjacent issue of water rights as a point of comparison, both to highlight deficiencies when this framework is applied to natural resources and to help predict how the Law Court may view resource development in general.

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190. *Id.* ¶ 17.

191. *Id.* ¶¶ 10, 17.

192. 30 M.R.S. § 6206(1) (2023) (placing the exceptions to section 6204's application of state laws to the Wabanaki specifically within the context of the provision establishing their role as municipalities).

193. *See* *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶¶ 40–41, 770 A.2d 574 (explaining that the Wabanaki be treated like any other corporation subject to the laws of the state when acting in that capacity).

194. Note that while this threshold question is not specifically noted in the jurisprudence, it is explicitly within the text of section 6206(1) and thus must be true to find an internal tribal matter. 30 M.R.S. § 6206(1) (2023). The *Akins* balancing test also involves considering the use of Wabanaki land, but in that context treats it not as a dispositive question but rather a factor in balancing the interests involved in the action.

## 2. Internal Tribal Matters Applied to Water Rights

The above jurisprudence was recently tested to determine whether the Wabanaki maintained sovereignty over one of their most valuable resources: water. As water and fishing resource rights are likely the closest adjacent issues to Wabanaki rights over renewable resources, a brief analysis of how the MICSA was applied to water rights can provide a benchmark for how sovereignty over natural resource management in general may be viewed. Two major issues surrounding Wabanaki sovereignty over natural resources were decided through these water cases: under what circumstances might the Wabanaki bypass Maine's environmental regulations under section 6206, and on what lands can the Wabanaki claim this sovereign status?

These disputes regarding water and fishing rights dealt with two separate but interrelated matters: whether the Wabanaki can generally self-regulate outside of Maine's Water Quality Standards (WQS) and whether the Penobscot Nation specifically owns or has the right to use the main stem of the Penobscot River for sustenance fishing.<sup>195</sup> A 2003 EPA decision initially suggested the Wabanaki would hold some sovereignty over the regulation of navigable waters within their territories.<sup>196</sup> In this decision, the EPA concluded that Maine's WQS plan would not apply to two Wabanaki-owned facilities located on Wabanaki land that discharge into navigable waters falling within Wabanaki territory, stating that these discharges had no material effect on larger state interests and thus their regulation constituted an "internal tribal matter" over which the state lacked authority.<sup>197</sup> The Wabanaki petitioned the court to find that this EPA decision extended authority to the Wabanaki to regulate any source of pollution within their own territories under the internal-tribal-matters language.<sup>198</sup> Simultaneously, the State brought a petition for review disputing the EPA's finding that water regulation constituted an internal tribal matter in any scenario.<sup>199</sup>

These petitions for review would ultimately be decided in the consolidated case of *Maine v. Johnson*.<sup>200</sup> The First Circuit referenced *Akins* and the text of the MICSA in its decision, acknowledging that the Wabanaki are subject to Maine law with "very limited exceptions."<sup>201</sup> The *Johnson* court held that, in this case, Maine's explicitly asserted authority and interest over WQS regulation meant there was no ambiguity in the application of section 6206(1), and thus no need to apply the *Akins* factors.<sup>202</sup> Although the discharge source points at issue were owned by the Wabanaki, located

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195. See generally Allison M. Dussias, *Water Quality and (In)Equality: The Continuing Struggle to Protect Penobscot Sustenance Fishing Rights in Maine*, 51 CONN. L. REV. 801 (2019) (discussing the legal dispute over Maine's WQS and the interplay of the WQS with Wabanaki fishing rights); Patrick Marass, *Balancing the Fishes' Scales: Tribal, State, and Federal Interests in Fishing Rights and Water Quality in Maine*, 41 VT. L. REV. 853 (2017) (analyzing the various interests involved in the WQS conflict and the interplay with the Penobscot Nation's claim of owning the main stem of the Penobscot River).

196. State Program Requirements; Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System Program, 68 Fed. Reg. 65,052, 65,066 (Oct. 31, 2003).

197. *Id.*

198. *Maine v. Johnson*, 498 F.3d 37, 41 (1st Cir. 2007).

199. *Id.*

200. *Id.*

201. *Id.* at 42 (quoting *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997)).

202. *Id.* at 45.



on Wabanaki land, and presumably drained into Wabanaki waters, the *Johnson* court felt the state's explicitly asserted interests and the dissimilarity between pollutant discharge and the given examples of internal tribal matters under section 6206(1) meant that WQS regulation would not be considered an internal tribal matter.<sup>203</sup> After *Johnson*, a successful argument of ambiguity under section 6206 will thus need to argue either direct connection to one of the given examples in the statute or a total lack of conflict with any explicit state interest.

The issue of where the Wabanaki can claim sovereign rights over their waters was dealt with in *Penobscot Nation v. Frey*.<sup>204</sup> After a statement by then Attorney General William J. Schneider that the Penobscot Nation held the right to regulate hunting and fishing on the islands in the Penobscot River but did not hold jurisdiction over the river itself, the nation sought declaratory relief to determine the boundaries of their sovereign rights to the river.<sup>205</sup> Notwithstanding an expansive historical and legislative inquiry,<sup>206</sup> the decision of the district court rested primarily on statutory construction. The court found that the MICSA's grant to the Wabanaki of "land and natural resources" clearly did not include ownership of the Penobscot River's main stem.<sup>207</sup> The court also stated that a broader reading that diminished or extinguished the Penobscot Nation's statutory right to use the river for sustenance fishing would not make legal or historical sense.<sup>208</sup> In essence, the district court held that the Penobscot Nation could continue to use the river, but did not own any part of it as part of their Indian territory.<sup>209</sup> On appeal, the First Circuit acknowledged that there could be some ambiguity in interpreting the statute, but that "context, history, and clear legislative intent" required affirmation of the finding the nation did not own any part of the river.<sup>210</sup> The holdings of these cases thus suggest that the interpretation of what lands fall under Wabanaki control as Indian territory will be carefully prescribed by the courts under the language of the MICSA.

Though *Johnson* and *Frey* add additional layers to the internal-tribal-matters framework as applied to the regulation of natural resources, these cases are not dispositive of renewable resource regulation being deemed an internal tribal matter. *Johnson* suggests that an action will not pass the threshold step of ambiguity within the listed matters of section 6206(1) if the action directly conflicts with an explicit state interest and cannot be directly connected to anything within the statutory language that would preclude such a specifically stated interest.<sup>211</sup> *Frey* does not

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203. *Id.*

204. *Penobscot Nation v. Frey*, 3 F.4th 484, 488 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022). Note that the procedural history of this case is somewhat confusing due to a series of rehearings, and thus the lower court decision is instead found under the name *Penobscot Nation v. Mills*.

205. *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181, 185–86 (D. Me. 2015). Note that Janet Mills is named as defendant in the case as she held the position of Attorney General at the time the claim was brought. *Id.* at 185.

206. *See generally id.* at 187–212.

207. *Id.* at 217–18.

208. *Id.* at 222.

209. *Id.* at 223.

210. *Penobscot Nation v. Frey*, 3 F.4th 484, 488 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022).

211. *See Maine v. Johnson*, 498 F.3d 37, 45 (1st Cir. 2007) ("If the internal affairs exemption negated so specific a ground of state authority, it is hard to see what would be left of the compromise restoration of Maine's jurisdiction.").

alter the analysis of the internal-tribal-matters issue necessarily, but does suggest that the explicit definitions in the MICSA of what is considered Indian territory will likely dictate what can and cannot be regulated as an internal tribal matter.<sup>212</sup> These water rights cases thus add context to how the existing internal-tribal-matters framework may be applied to Wabanaki developed renewables and provide further narrowing of the threshold questions that must be answered before *Akins* balancing can be conducted.

### *B. Renewable Energy Development as an Internal Tribal Matter*

Based on the above jurisprudence, renewable resource development will trigger *Akins* balancing if the development's inclusion under section 6206 is ambiguous, if the project is developed within Indian territory, and if the Wabanaki act in their role as a municipality. If these threshold issues are established, the *Akins* factors will further determine if the action is an internal tribal matter based on a balancing test. Those developing utility-scale, grid-connected projects will likely face an uphill battle arguing exemption from state regulation due to the explicit state interests in utility-scale renewable development and management, the possibility of the development encroaching on non-Wabanaki land, and the likely use of a corporate rather than municipal approach to the development. Small-scale projects wholly on Wabanaki land designed exclusively by and for Wabanaki communities, however, present a more ambiguous issue that would necessitate the application of the *Akins* factors. If Wabanaki interests outweigh the interests of the state under *Akins*, these projects likely constitute internal tribal matters and can therefore avoid state regulation.

#### *1. Utility-Scale Projects*

Despite the broad appeal of utility-scale renewable development, the current internal-tribal-matters framework is likely too narrow to allow the Wabanaki to independently regulate projects of this scale.<sup>213</sup> Utility-scale renewable development is extremely appealing due to its ability to provide both energy and income to a community.<sup>214</sup> The Penobscot Nation and the Passamaquoddy Tribe have both attempted to develop large-scale utility wind farms with these exact goals in mind.<sup>215</sup> Although these projects acquired funding, there is no evidence that either was able to move past the state permitting and approval phases to actual construction. These failures suggest that, even with the MICSA's grant of federal recognition and the access to federal subsidies coming with that recognition, such development is

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212. *Frey*, 3 F.4th at 488 (“The plain text of the definition of Reservation in MIA and MICSA plainly and unambiguously includes certain islands in the Main Stem but not the Main Stem itself.”).

213. Note that this Comment only suggests that this is the most likely outcome of applying the internal-tribal-matters argument to utility scale renewables in a common development case. Creative developers of projects that seek to work around the limitations of the internal tribal matters analysis described in this section could possibly pursue an argument that full Wabanaki autonomy over regulation is warranted.

214. See *Thomas*, *supra* note 16, at 4 (“[Large renewable] projects represent revenue, jobs, and possibly power for tribal governments and tribal communities.”).

215. See *Penobscot Tribe – 2012 Project*, *supra* note 19; *Passamaquoddy Tribe Plans \$120M Wind Farm in Washington County*, *supra* note 19.

currently physically or economically infeasible due to the current regulatory scheme. Unfortunately, utility-scale renewable development likely does not pass the threshold questions of the internal-tribal-matters framework due to direct conflicts with explicit state interests and the risk of involving non-tribal entities and lands.

The main issue preventing utility-scale projects from constituting an internal tribal matter is a direct conflict with explicit state interests. As seen in *Johnson*, evidence that a Wabanaki action directly impinges upon explicit state interests suggests that the issue is not ambiguously within section 6206(1)'s internal-tribal-matters language.<sup>216</sup> The state has explicitly stated its affirmative assertion of regulatory control over anything falling within the definition of "public utility."<sup>217</sup> Public utility is defined broadly and likely encompasses any utility scale development within the state.<sup>218</sup> Furthermore, the state's goal of becoming 100% renewable by 2050 suggests that the state may attempt to assert an explicit interest in harnessing and controlling any development of large-scale utility renewables, as these may be integral to their renewables portfolio of new clean energy contracts.<sup>219</sup> Given this current status of the state's interest in renewable utility development, it would be difficult to argue that Wabanaki development of utility-scale renewables would not explicitly conflict with this interest, directly mirroring the issues that prevented Wabanaki regulation of water in *Johnson*.<sup>220</sup>

Even if a creative argument could be made that Wabanaki development of utility-scale renewables does not conflict with explicit state interests, any project of this scale will likely require connection to non-tribal land and the wider electric grid to be economically viable. The plain language of section 6206(1) makes it clear that the internal-tribal-matter exception applies only within "Indian territories."<sup>221</sup> Thus, any connection to or use of non-Wabanaki lands or facilities would place a development outside the realm of internal tribal matters.

Furthermore, the size and siting requirements of utility-scale development may necessitate expansion outside of those lands that the Wabanaki holds in trust. There is case law suggesting Wabanaki lands not held in trust may not be considered Indian territory in some circumstances.<sup>222</sup> These cases were specific to the application of federal law within Wabanaki territory and thus are not dispositive of a broader

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216. Compare *Johnson*, 498 F.3d at 45 (finding no Indian control over waters when the state "affirmatively asserts" authority as to both tribal and non-tribal discharges), with *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997) (finding the absence of a state-asserted law to heavily weigh in favor of stumpage permits being an internal tribal matter), and *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 50, 770 A.2d 574 (finding issues of tribal governance to be of no interest to the state at large).

217. 35-A M.R.S. § 101 (2023).

218. *Id.* § 102(13) (defining "public utility" as "every gas utility, natural gas pipeline utility, [electric] transmission and distribution utility, telephone utility, water utility and ferry, as those terms are defined in this section, and each of those utilities is declared to be a public utility.").

219. See *Renewable Portfolio Standards*, *supra* note 17; see also 35-A M.R.S. § 3210(1-A).

220. See discussion *supra* Section III.A.2.

221. 30 M.R.S. § 6206(1) (2023).

222. See *Kimball v. Land Use Regul. Comm'n*, 2000 ME 20, ¶ 27, 745 A.2d 387 (holding land parcel not "Indian territory" when the legislative process of placing land in trust is not completed); *Forrest Assocs. v. Passamaquoddy Tribe*, 1998 ME 240, ¶ 18, 719 A.2d 535 (holding federal statute does not apply when the land is not held in trust by the federal government).

understanding of what may constitute “Indian Territory” under section 6206(1).<sup>223</sup> Nevertheless, the existence of these decisions, and *Frey*’s precedent that the definition of Indian territory should be narrowly construed,<sup>224</sup> demonstrates that any development on land held in fee runs a risk of not falling within section 6206(1).<sup>225</sup>

Even if it can be argued that Wabanaki fee land constitutes Indian territory, the continued ability for the Wabanaki to self-regulate utility-scale projects sited on fee land will be precarious. The MICSAs states that the transfer of any land in fee to any person “who is not a member of the respective tribe or nation” will remove its status as Indian territory.<sup>226</sup> Any project sited on fee land will therefore exist in a state of limbo where a change in ownership could, overnight, trigger enforcement of any state regulations previously avoided.

Utility-scale projects may face even more issues if the larger scale necessitates partnerships with outside corporations, as was attempted in the uncompleted Passamaquoddy wind farm.<sup>227</sup> Involvement of outside parties does not necessarily preclude development being an internal tribal matter, instead functioning as a factor in the *Akins* balancing test.<sup>228</sup> In fact, leases with outside parties will almost certainly also be considered internal tribal matters based on *Moyant*.<sup>229</sup> However, the Wabanaki may wish to act in their corporate role when entering into agreements with these outside entities to shield them from liability. If this is the case, any actions or agreements made in that corporate role would not be considered internal tribal matters because this would fail the threshold question of municipal status.<sup>230</sup>

Finally, while not part of the internal-tribal-matters framework per se, it is worth noting that the risk of a taking will loom over any utility-scale development on Wabanaki land. Generally, the MICSAs drastically limits the ability of the state to exercise its eminent domain power over any Indian territories.<sup>231</sup> However, section 6205(3) singles out the Public Utilities Commission (PUC) as an entity that can independently conduct a balancing test, with input from the surrounding non-tribal communities, to justify a taking of Indian territory.<sup>232</sup> As a result, even if a project is successfully argued as an internal tribal matter, utility-scale development could be

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223. *Kimball*, 2000 ME 20, ¶ 27, 745 A.2d 387; *Forrest Assocs.*, 1998 ME 240, ¶ 18, 719 A.2d 535.

224. *Penobscot Nation v. Frey*, 3 F.4th 484, 488 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022).

225. 30 M.R.S. § 6205(5) (2023) (stating no lands will be considered “Indian Territory” if not approved by both the local and state Legislatures).

226. *Id.*

227. *See Passamaquoddy Tribe Plans \$120M Wind Farm in Washington County*, *supra* note 19.

228. *See Moyant v. Petit*, 2021 ME 13, ¶ 13, 247 A.3d 326 (2021) (explaining that the status of plaintiff as a nonmember of the tribe did not preclude, but only slightly weighed against, an internal-tribal-matters finding).

229. *Id.* at ¶ 14.

230. *See Winifred B. French Corp. v. Pleasant Point Passamaquoddy Rsrv.*, 2006 ME 53, ¶¶ 15, 17, 896 A.2d 950 (explaining that there is no need to determine if the internal-tribal-matters exception applies when the reservation is acting in a corporate role); *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 40, 770 A.2d 574 (describing how the Wabanaki acting in a corporate role are subject to the laws of the state). Note that there is some precedent that sovereignty could extend to corporate forms, but this has only been seen in federal case law. *See Rassi v. Fed. Program Integrators, LLC*, 68 F. Supp. 3d 288, 293 (D. Me. 2014) (finding that sovereign immunity of the Penobscot Indian Nation would extend to a Penobscot corporation had they not waived immunity in their operating agreement).

231. 30 M.R.S. § 6205(3) (2023).

232. *Id.*

at risk of takings by the PUC with only a subjective and possibly biased balancing test for protection.

The above analysis indicates that, absent extremely creative development, utility-scale renewable development will likely not pass the threshold questions of the internal-tribal-matters analysis and thus will not reach the *Akins* balancing stage. Although utility-scale development may still provide for the Wabanaki an ideal opportunity for economic development, the burden of the MICSA's sovereignty provisions in this case prevent the Wabanaki from attaining full autonomy over their own developments of this scale. If sovereign control over energy production is a primary goal, however, smaller and more localized approaches to renewables may still provide the opportunity for the Wabanaki to develop outside of state regulation and create fully independent energy infrastructures.

## 2. Small-Scale Projects

The Penobscot Nation has recently embarked on a small-scale renewable project that can function as an example of the type of project the Wabanaki people might develop without the burdens of state regulation.<sup>233</sup> This project, which has taken advantage of the federal funding available for tribal renewable development, seeks to fully electrify a new community center on Indian Island through rooftop solar.<sup>234</sup> This specific project does intend to take advantage of the state's net metering program as a source of income and therefore will need to follow the regulations for that program.<sup>235</sup> However, research into the energy development capacity of this project suggests that similar projects could, if bypassing solar regulations, preserve and use all of its generated electricity exclusively within the Indian Island community.<sup>236</sup> If renewable projects like this are scaled for the exclusive purpose of powering and assisting Wabanaki communities, contained fully within reservation lands, and owned and built by the Wabanaki in their municipal role, these projects would require *Akins* balancing and may be internal tribal matters.

In contrast to utility-scale projects, the smaller scale and internal nature of community renewable projects makes it much easier to argue that there is no direct conflict with explicit state interests. Although *Akins* suggested that the existence of any on-point state laws regarding land use and environmental protection would usually create a state assertion of interest that supersedes Wabanaki rights,<sup>237</sup> the section of the MICSA cited for this contention does not support such a broad conclusion.<sup>238</sup> The correct analysis, then, is not the mere *existence* of a stated

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233. See *Penobscot Tribe – 2018 Project*, *supra* note 19; David Pardilla, *Penobscot Indian Nation New Tribal Administration Building*, PENOBSCOT NATION (Dec. 2018), <https://www.energy.gov/sites/prod/files/2018/12/f58/16-Penobscot-Nation.pdf>.

234. *Penobscot Tribe – 2018 Project*, *supra* note 19.

235. See *id.*

236. See *id.* The project proposal notes that the solar panels could provide 120,000 kWh, and also states that the current energy needs of the tribal government is about 850,000 kWh. *Id.* This suggests that, with the appropriate infrastructure, all of the energy produced could be diverted into the community as opposed to net-metered out to the broader state grid.

237. *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997).

238. 30 M.R.S. § 6204 (2023) (stating that Indian natural resources would be subject to the laws of the state “[e]xcept as otherwise provided in this Act.”).

interest, but instead whether the Wabanaki interest *explicitly conflicts* with the state's specifically stated interest.<sup>239</sup>

A strong assertion can be made that small-scale renewable projects within Indian territory do not directly conflict with explicit state interests in supporting renewable development. Although *Johnson* stated that the internal-tribal-matters argument would not generally displace environmental regulation,<sup>240</sup> this type of Wabanaki development would arguably not displace existing regulations. The primary statute on point that describes the state's renewable policy does not describe a broad interest in regulating all renewables across Maine, but rather a generalized goal of *encouraging* renewables.<sup>241</sup> This is in direct contrast to the broad and comprehensive water discharge policies at issue in *Johnson*.<sup>242</sup> In fact, if all of the energy produced in small-scale renewable projects is directly supporting Wabanaki communities, these projects would align with the state's goal of encouraging "indigenous" renewable development.<sup>243</sup> Without the economic burden of state regulation, these projects could also allow reservations to become fully energy independent, actively aligning with the state's goal of becoming 100% independent from non-renewable resources by 2050.<sup>244</sup>

Determining conflict with the state's explicit interest in regulating "public utilities" is a bit more difficult due to the broad language defining a public utility. However, *Johnson* suggested that issues arguably close to the "statutory borderline" or within the same "character" as those listed in section 6206(1) would trigger *Akins* balancing.<sup>245</sup> If renewable projects are scaled with the primary goal of powering Wabanaki government buildings and reservation communities, a claim can be made that the development could fall within the explicit "tribal governance" exception in section 6206(1).<sup>246</sup> Indeed, *Great Northern Paper, Inc.* suggested this exact outcome by stating the management of "tribal resources" could fall under the definition of tribal governance.<sup>247</sup> Fully internal renewables have the primary purpose of generating resources that have a direct link to the administration of tribal services and programs.<sup>248</sup> This suggests that unlike the discharge of pollutants into navigable waters<sup>249</sup> or the use of beano games generally to raise funds,<sup>250</sup> the development of renewable resources can be fairly categorized as of the same character as other tribal governance issues. Therefore, energy projects with the exclusive goal of providing

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239. See *Maine v. Johnson*, 498 F.3d 37, 45 (1st Cir. 2007) (finding that state interests supersede when *specifically* stating a ground of state authority identical to that claimed by the Wabanaki).

240. *Id.*

241. See 35-A M.R.S. § 3210(1-B) (2023) (stating renewable policy to be "encourag[ing] the generation of electricity from renewable and efficient sources and diversify[ing] electricity production.").

242. See *Johnson*, 498 F.3d at 45 (stating that Maine explicitly asserted authority to regulate *all* water discharge).

243. 35-A M.R.S. § 3210(1) (2023).

244. *Id.* § 3210(1-A)(B).

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

246. 30 M.R.S. § 6206(1) (2023).

247. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 50, 770 A.2d 574.

248. *Contra Penobscot Nation v. Stilphen*, 461 A.2d 478, 490 (Me. 1983) (holding that mere economic benefit is an insufficient "link" to tribal services and programs to be considered tribal governance).

249. *Contra Johnson*, 498 F.3d at 46.

250. *Contra Stilphen*, 461 A.2d at 490.

energy resources to the Wabanaki arguably will not necessarily be foreclosed by the state's interests in regulating public utilities.<sup>251</sup>

There is also a much lower risk of issues related to the Indian territory threshold question when development is on a smaller scale. By their nature, small-scale renewables designed to provide energy sources directly to the Wabanaki people would be entirely internal to Indian territory. Unlike utility-scale renewables, these smaller projects would actually be more effective if sourced near their final point of delivery. By siting projects exclusively on lands held by the Wabanaki, there will be no conflicts related to the use of externally owned lands. Furthermore, these projects likely do not need to be connected to the larger utility grid to be effective, avoiding connections with external state entities and lands that could negate an internal-tribal-matters finding.<sup>252</sup>

However, some issues with small-scale renewable developments may still exist if constructing these projects on fee land as opposed to trust land. As described above, *Kimball* and *Forrest Associations* suggest that lands held in fee may not be considered part of Indian territory, and *Frey* suggests that lands not explicitly listed within the MICSA may not be Indian territory.<sup>253</sup> Projects are therefore more likely to pass the threshold issues if kept to trust lands explicitly encompassed in the MICSA's definition of Indian territory. Because small-scale renewables would likely be designed to service Wabanaki reservation communities exclusively, however, avoiding development on fee land should be more feasible than it is with utility-scale development; thus, these issues are diminished.

Communities pursuing small-scale renewables might avoid the need to partner with outside developers or find funding, allowing those communities to function exclusively in their municipal role. The Penobscot Community Center project, for example, is funded exclusively through federal grants and the Penobscot Nation's own funds.<sup>254</sup> The Wabanaki would, in such scenarios, be able to act as a municipality rather than a corporation and thus avoid any issues related to corporate form.<sup>255</sup> External funds can still be leveraged if desired, however, as the Wabanaki can still receive some outside funding from developers without negating internal tribal matter status as long as they are acting in their municipal role and the project is developed within Indian territory.<sup>256</sup>

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251. An argument could also be made that, if a renewable project is exclusively within Indian territory, it is not "public" in the strictest sense. This argument may become circular, however, as it may require a finding of sovereignty to avoid the "public" designation. Thus, finding explicit grounding within section 6206(1) is likely a better path.

252. See *Great N. Paper, Inc.*, 2001 ME 68, ¶ 54, 770 A.2d 574 (stating that acting or interacting with non-tribal entities weighs against a finding that an action is internal).

253. See *supra* Section III.B.1.

254. *Penobscot Tribe – 2018 Project*, *supra* note 19; *Pardilla*, *supra* note 233.

255. See, e.g., *Winifred B. French Corp. v. Pleasant Point Passamaquoddy Rsrv.*, 2006 ME 53, ¶¶ 15, 17, 896 A.2d 950; *Great N. Paper, Inc.*, 2001 ME 68, ¶ 40, 770 A.2d 574; *Rassi v. Fed. Program Integrators, LLC*, 68 F. Supp. 3d 288, 293 (D. Me. 2014).

256. See *Moyant v. Petit*, 2021 ME 13, ¶ 14, 247 A.3d 326 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)) (stating that tribes maintain authority over activities on reservation land regardless of involvement of non-tribal members); *Francis v. Dana-Cummings*, 2008 ME 184, ¶ 17, 962 A.2d 944 ("[N]ot all actions affecting non-Indians would necessarily fall outside the definition of 'internal tribal matters.'").

Finally, there is little to no risk of takings involved in small-scale renewable projects. Because these projects may not need to be classified as public utilities and will not be built to service lands outside of Wabanaki reservations, it will be significantly more difficult for the state to argue that there is “no reasonably feasible alternative” to a taking under the balancing test described in section 6205.<sup>257</sup> Furthermore, if an argument is successfully made that renewables could fall under the tribal governance language of section 6206(1), the projects would likely not be public utilities and thus could not be taken by the PUC.

Based on the above analysis, small-scale development can pass the threshold questions of the internal-tribal-matters framework and thus will require an *Akins* balancing test to determine their internal tribal matter status.

### 3. Applying the *Akins* Factors to Small-Scale Projects

Analysis of the five *Akins* factors suggests that the interests involved in small-scale renewable development would balance in favor of the Wabanaki and thus any such project would be considered an internal tribal matter.<sup>258</sup> First, development of these resources would regulate only members of the tribe as the energy production would be both internal to Wabanaki lands and distributed exclusively for Wabanaki benefit. Some interaction with outside developers and other non-Wabanaki parties may weigh slightly against an internal-tribal-matters argument on this factor but would not be dispositive.<sup>259</sup>

Second, policies and regulations created for energy development by the Wabanaki would apply only to Indian territory. If energy is kept internal to the Wabanaki lands, there should be no immediate connection to other state resources and no concerns that the Wabanaki renewable developments would be considered public utilities intended to benefit the state as a whole.

Third, small-scale renewable development clearly concerns the harvesting of natural resources from the land. Although this portion of the test was likely intended to protect traditional rights over fish, game, and timber, in the modern era renewables and other energy resources must be fairly encompassed by this definition for the Wabanaki to have full control over their own internal resources.

The fourth factor, the implication or impairment of an interest of the state, weighs somewhat against these developments being internal tribal matters. However, as described above, there is a strong argument that Wabanaki interests in becoming energy independent would actually support state interests.<sup>260</sup> To this end, allowing the Wabanaki to have full regulatory control over small-scale renewable development as an internal tribal matter may implicate an interest of the state, but cannot be fairly said to dramatically impair that interest. Therefore, even if found to weigh against an internal-tribal-matters finding, this factor is not strong enough to overcome the others.

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257. See 30 M.R.S. § 6205(3)(A) (2023).

258. For the list of *Akins* factors, see *supra* Section III.A.1.

259. See *Moyant*, 2021 ME 13, ¶ 13, 247 A.3d 326.

260. See *supra* Section III.B.



Finally, and perhaps most persuasively, the independent development of Wabanaki resources for the benefit and support of Wabanaki communities is without question grounded in history and is supported by existing case law on internal tribal matter interpretations. While the MICSA removed Wabanaki jurisdiction in many areas, it explicitly reserves Wabanaki protection and control over natural resources central to Wabanaki culture, reflecting the historical importance of these resources to Wabanaki communities and ways of life.<sup>261</sup> The inclusion of tribal organization and governance within the explicit list of items deemed internal tribal matters further supports the position that the MICSA intended to protect the autonomy of Wabanaki community affairs.<sup>262</sup> Energy and infrastructure security are central to the strength of Wabanaki communities and resources, and thus should be seen as a logical outgrowth of existing resource and governance rights. In this way, small-scale renewable development is arguably grounded in the historical understanding of internal tribal matters.

Furthermore, while existing jurisprudence has previously rejected internal-tribal-matters arguments concerning water resources and development that directly implicate state interests, a strong argument can be made that small-scale renewables more closely align with those cases with internal-tribal-matters findings. As in *Moyant* and *Francis*, small-scale renewable projects implicate issues related exclusively to Wabanaki lands, Wabanaki peoples, and Wabanaki resources.<sup>263</sup> Unlike *In re Children of Mary J* and *Johnson*, completely internal energy development would in no way explicitly conflict with state interests.<sup>264</sup> Finally, as expressed in *Great Northern NPaper* and unlike the beano games in *Stilphen*, the establishment of internal energy sources by the Wabanaki in their municipal capacity would serve to directly support governmental services and community development beyond mere economic gain, falling squarely into the definition of “self-governance” protected by the internal-tribal-matters language.<sup>265</sup> Combined with the previous *Akins* factors weighing primarily in favor of the Wabanaki, this precedential grounding provides the final confirmation that small-scale renewable development would be considered an internal tribal matter.

When creating the balancing test for establishing internal tribal matters, the *Akins* court clearly stated that generalizing these issues was “treacherous.”<sup>266</sup> The court knew that the problems dealt with in its opinion would evolve over time and present themselves differently in future cases.<sup>267</sup> By creating an open-ended test for

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261. See 30 M.R.S. § 6207 (2023) (reserving regulation of fish and wildlife resources for the Wabanaki).

262. *Id.* § 6206(1); see also *id.* §§ 6209-A to 6210 (reserving law enforcement authority and jurisdiction for internal civil and criminal cases for the Wabanaki).

263. See *Moyant*, 2021 ME 13, ¶ 14, 247 A.3d 326; *Francis v. Dana-Cummings*, 2008 ME 184, ¶ 20, 962 A.2d 944.

264. *Contra In re Children of Mary J*, 2019 ME 2, ¶ 16, 199 A.3d 231; *Maine v. Johnson*, 498 F.3d 37, 46 (1st Cir. 2007).

265. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 60, 770 A.2d 574. *Contra Penobscot Nation v. Stilphen*, 461 A.2d 478, 490 (Me. 1983) (holding that mere economic gain was insufficient to constitute an internal tribal matter under the self-governance exception).

266. *Akins v. Penobscot Nation*, 130 F.3d 482, 487 (1st Cir. 1997).

267. *Id.*

evaluating internal tribal matters, *Akins* provided a way to adapt to technological and cultural shifts that would redefine Wabanaki rights and sovereignty. Renewables, now at the forefront of energy development and community autonomy, represent the exact scenario contemplated in *Akins*. Unlike any previous Wabanaki resource or governance issue, it is only through the balancing of the *Akins* factors in light of Wabanaki history and precedent that the internal-tribal-matters status of renewables can be fairly evaluated. Applying the *Akins* factors to the issue at hand, it seems clear that the Wabanaki should have total sovereignty over their internal renewable resources and should be able to dictate their own regulatory frameworks for the development of small-scale renewables.

#### IV. ALTERNATIVES TO THE INTERNAL-TRIBAL-MATTERS ANALYSIS

With the primary argument of this Comment now concluded, it would be an error not to acknowledge the numerous advancements currently being advocated across the state that would negate or significantly lessen the need to use the internal-tribal-matters framework to assert sovereignty. Ideally, small and complex gains under the MICSA would instead give way to a total revision of the MICSA's settlement framework with the goal of restoring full Wabanaki sovereignty.<sup>268</sup> As eloquently expressed by the Penobscot Nation and restated in *Akins*, the Wabanaki people are "not a museum piece and may not be relegated to historic roles."<sup>269</sup> With this in mind, Wabanaki advocates and leaders have recently sought to either amend or rescind entirely the MICSA and change the current legal status of the Wabanaki people to mirror the sovereignty of other tribes within the United States.

In 2022, Representative Jared Golden attempted to amend the MICSA to allow all future federal Indian laws to apply to the Wabanaki.<sup>270</sup> Golden's attempt would not have directly amended the sovereignty issues in the MICSA but would have allowed the Wabanaki to function as a sovereign regarding any rights the federal government extends to tribes nationally, most notably gambling rights.<sup>271</sup> This bill did not move forward due to a lack of support.<sup>272</sup> A bipartisan version of this bill was revived in the state legislature in 2023 as L.D. 2004: An Act to Restore Access to Federal Laws Beneficial to the Wabanaki Nation.<sup>273</sup> L.D. 2004 would have applied both proactively and retroactively to any federal Indian legislation, ensuring that the Wabanaki would gain the full benefit of any federal Indian policy.<sup>274</sup> Although this bill passed with broad support in both the house and senate, it died after failing to overturn a veto from Governor Janet Mills.<sup>275</sup> Although this was a crushing blow, it

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268. Hinton, *supra* note 80, at 238–39.

269. *Id.*; *Akins*, 130 F.3d at 487.

270. Colin Woodward, *Prospects Fade for Federal Bill to Expand Rights of Maine Tribes*, PORTLAND PRESS HERALD (Sept. 15, 2022), <https://www.pressherald.com/2022/09/15/prospects-fade-for-federal-bill-to-expand-maine-tribes-rights/>.

271. *Id.*

272. *See id.*

273. L.D. 2004 (131st Legis. 2023).

274. *131st Legislature Bill Tracker*, WABANAKI ALL., <https://wabanakialliance.com/131st-bill-tracker/> [<https://perma.cc/5NXA-LZSQ>] (last visited Dec. 8, 2023).

275. *Id.*

suggests that strong bipartisan support may soon allow for increased Wabanaki autonomy.

Another argument that has been advanced is that Maine's treatment of the Wabanaki is in violation of international human rights standards.<sup>276</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) requires all indigenous people to have rights of self-governance and the right to be consulted on all policies affecting their communities.<sup>277</sup> Although Maine has explicitly supported the UNDRIP in a joint resolution, several of the cases discussed in Section III.A. of this Comment were decided in direct conflict with these apparent rights.<sup>278</sup> Consequently, much of the state's treatment of the Wabanaki and the case law denying internal tribal matter sovereignty must be revisited to ensure compliance with the UNDRIP standards.<sup>279</sup>

Finally, an argument recently put forward by Attorneys Michael-Corey F. Hinton and Erick J. Giles states that, despite the explicit statutory language in the MICSA, the Wabanaki never intended to abdicate their sovereign rights.<sup>280</sup> The original treaties made with the Wabanaki peoples of Maine and the early United States federal government contained reservations of sovereignty ratified in the Maine Constitution, and the federal component of the MICSA contains no language explicitly removing the power of these earlier treaties.<sup>281</sup> Furthermore, there is ample evidence that the Wabanaki did not understand at the time that these earlier treaties would not remain in effect.<sup>282</sup> Silence on the part of Congress therefore suggests that original federal recognition of sovereignty was never abdicated or, in the alternative, miscommunication with the Wabanaki regarding their sovereignty created an ambiguity that, according to federal Indian law principles, should be resolved in favor of the Wabanaki.<sup>283</sup> If either of these arguments is successful, the MICSA's total removal of sovereignty is contrary to federal law and the Maine Constitution.<sup>284</sup> These arguments, along with the other arguments in this Part, advance an outcome far superior to any internal-tribal-matters analysis—total and complete sovereignty and the elimination of the “compromise” forced upon the Wabanaki during the negotiations of the MICSA.

#### CONCLUSION

This Comment explored one way that the Wabanaki can use MICSA's current legal framework to regain a small amount of independence through small-scale renewable development. Ultimately, however, small steps towards sovereignty like this are insufficient to right a decades-long wrong. The history of the MICSA is one

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276. Nicole Friederichs, *A Reason to Revisit Maine's Indian Claims Settlement Acts: The United Nations Declaration on the Rights of Indigenous Peoples*, 35 AM. INDIAN L. REV. 497, 498 (2011).

277. *Id.* at 498; see also Matthew L. M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 305, 328 (2023).

278. Friederichs, *supra* note 276, at 497.

279. *Id.* at 499.

280. Hinton & Giles, *supra* note 138, at 238–39.

281. *Id.* at 239–40.

282. *Id.* at 238.

283. *Id.* at 239–41.

284. *Id.* at 241.

fraught with confusion of the issues, concessions made in moments of panic, and unclear language that courts still struggle to interpret almost fifty years later. Tribal law experts are thus left to argue for Wabanaki rights with minimal guidance and within a system that was broken from the start. As seen in this Comment's attempt to apply one possible framework of existing internal tribal sovereignty, the outcome of this history often leaves little to no room to argue Wabanaki sovereignty over the types of projects that would bring not only autonomy, but also economic prosperity to Wabanaki communities.

If one attempts to work within this problematic framework of sovereignty, it can be reasonably argued that small-scale renewables are internal tribal matters entirely within the Wabanaki's regulatory control. Although the ability to independently develop utility-scale renewables would do much more to broadly assist Wabanaki communities, energy independence through small-scale projects could at least assist Wabanaki communities in taking a step towards their original vision of an independent nation. Until the MICSA is altered or repealed, however, these gains will never allow the Wabanaki to reach the levels of sovereignty held by all other tribes in the United States. Ideally, the case-by-case, internal-tribal-matters analysis should be abandoned for an improved framework that provides broad sovereignty like that seen in other states. Although in this case, the internal-tribal-matters exception may work in favor of the Wabanaki people in one small way, it will always prove an insufficient solution to the full development of communities independent from the regulations of the State of Maine.

