



Wabanaki Legal News

Volume 2 Issue 1

A Newsletter of Pine Tree Legal Assistance

Winter 1998



Ice Storm '98 Information

The entire State of Maine was declared a disaster area from January 5 through January 25, 1998. If you had any losses during this period due to the ice storm, you may be covered by a variety of state or federal assistance programs. If your power was still out after January 25, the period of loss may be extended. You can apply for most types of assistance by calling the Federal Emergency Management Agency (FEMA) at 1-800-462-9029 or TTY 1-800-462-7585.

I. First Steps: A. File an insurance claim.

If you have insurance, FEMA requires you to file an insurance claim before registering for federal disaster assistance. If your insurance company covers your loss, you will have to reimburse FEMA for any money received from FEMA. If you have questions or complaints about your insurance company, call the Maine Bureau of Insurance Consumer Complaint and Question Line at 1-800-300-5000 or 624-8475 from 8 a.m. to 5 p.m.

B. Register with FEMA.

Once you have called your insurance agent, call FEMA. Have your social security number and the name and number of your insurance agent handy. The telephone call should take about 20 minutes. If necessary, an inspector will call to set up an appointment to look at the damage. It can take about a week to schedule the appointment. A check and award letter or a letter of denial is usually sent within a week of the inspection. ***Applications for Assistance from FEMA must be made by March 16, 1998.*** To check on the status of a claim already filed, call 1-800-525-0321.

C. Call the Maine Helpline.

Another number to call to get information on programs is the Maine Helpline number: 1-888-294-1645. The TTY number is 955-3323. This toll-free number has a recording which gives numbers for state, federal, or volunteer agencies that may help you.

D. Visit a Disaster Recovery Center.

You can get information about assistance programs from a Disaster Recovery Center. People at the Centers can answer questions, but they cannot process applications for assistance.

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Americorps attorneys to help Native American victims of abuse

Two attorneys have recently been hired to work out of the Pine Tree Legal Assistance office in Bangor. They are funded by the Americorps Program and are working on the Safer Families Project of Eastern Maine.

They will represent low-income members of the Penobscot and Passamaquoddy Tribes in Tribal Court who are victims of domestic abuse. They will also work with families in those tribes.

The attorneys are Tamar Perfit and Amey Gentile. Victims of domestic abuse or people with questions about the project can call either attorney at the Bangor office (207-942-8241) or E-mail: tperfit@ptla.org or agentile@ptla.org. You may also call the Native American Unit at 1-800-879-7463.

Starting in March, Tamar and Amey will be available to talk to people one hour before each scheduled Tribal Court session. You may also call to schedule an appointment with them at another time.



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Centers

Augusta:
9 a.m. to 7 p.m.
Monday - Saturday
Augusta City Center
First Floor Learning Gallery
16 Cony Street

Belfast:
9 a.m. to 7 p.m.
Monday - Saturday
National Guard Armory
Route 1

Bangor:
9 a.m. to 7 p.m.
Monday - Saturday
District Court Building
10 Franklin Street

Bridgton:
9 a.m. to 7 p.m.
Monday - Saturday
Town Hall Annex
45 North High Street

Gorham:
9 a.m. to 7 p.m.
Monday - Saturday
19 College Ave.

Lewiston:
9 a.m. to 7 p.m.
Monday - Saturday
Bates Mill Complex
35 Canal Street

Machias:
8 a.m. to 5:30 p.m.
Monday - Friday
8 a.m. to 4:30 p.m.
Saturday
Federal Building
51 Court Street

II. Assistance Programs: **A. FEMA:** You can get a FEMA award only for expenses not covered by insurance. Usually the award will be a low interest loan. If a loan is not available for a particular need or if you do not qualify for a loan, you may be eligible for a grant.

1. **Low interest Loans.** You can be eligible for a loan if you are a homeowner, renter, or business owner. These loans are to repair, replace or rebuild disaster damaged real estate or personal property.

2. **Individual and Family Grant Program.** This program helps with two types of needs. First, it provides grants for replacement or repair of nonstructural, essential items (such as bedding or appliances). Second, it covers expenses for protective measures taken to prevent loss to your home or personal property during the ice storm (such as a generator or heater bought during the storm to keep your pipes from freezing).

3. **Disaster Housing Assistance.** This program gives funding for repairs needed to make your home safe and habitable. It can also pay for temporary accommodations if your home became unlivable because of the storm.

4. **Veterans Benefits.** If you are a veteran and were unable to pay your mortgage because of the storm and that missed payment leads to foreclosure, call FEMA to see if you are eligible for assistance.

5. **Crisis Counseling.** Free counseling services will be provided by the Maine Mental Health and Retardation Department. In Cumberland County, call 1-800-870-9998. Call your nearest Pine Tree Office

to see if other numbers are available for your area.

6. **Free Legal Assistance.** The American Bar Association and the Maine Bar Association are setting up a toll-free number staffed by volunteer lawyers to help you with free legal advice about storm-related issues. The number to call is 1-800-310-6327. Leave a voice mail with your telephone number. A volunteer attorney will get back to you.

B. IRS: You can deduct storm-related losses on your 1997 tax return. Also, a FEMA grant is not usually included in gross income. Ask FEMA whether they are reporting any grant you receive as income to the IRS. To speed up your refund, simply write in red across the front page of your return that you live in a federally declared disaster area. Call the IRS at 1-800-829-1040 for more information.

C. USDA: If you are an established family farm operator, you can get an emergency loan to cover production and physical losses. The Disaster Set-Aside program allows current FSA borrowers who are current or not more than one installment behind on any Farm Loan Program loan to move one scheduled annual installment of each eligible loan to the end of the loan term. The Emergency Conservation Program provides funding for farmers to rehabilitate farmland damaged by the ice storm. Call the Maine State FSA Office at 990-9140 or the Maine Department of Agriculture at 287-3419 for more information.

D. State Programs: A number of filing deadlines for unemployment benefits and Food Stamps have passed by the publication date of this Newsletter. Other types of benefits available from the State include:

Loans from the Finance Authority of Maine for small businesses needing help recovering from the storm (call 1-800-228-3734);
Investigation of complaints about price gouging (call the Consumer Fraud Hotline at 626-8849);
The University of Maine has a free paper which answers questions about storm damage to trees (call 581-3229).

E. Cities and Towns: Cities and towns may be able to help with needs not covered by other programs. For example, a town's General Assistance fund or food pantry may provide for immediate, essential needs.

You can check our website at:
<http://www.ptla.org/icestorm.htm#top>
to get up to date information.





Attorney General Gets Consent Decree in Civil Rights Case

In October, 1997, the Attorney General's Office filed a complaint against Josh Cilley and Chris Smith of Princeton alleging that the two men violated the civil rights of certain members of the Passamaquoddy Tribe. The complaint ended with a consent decree against both defendants.

According to the Complaint, both men drove past the home of a Passamaquoddy family in Indian Township yelling derogatory racial slurs at the family. Chris Smith allegedly yelled a threat to burn the house down.

A few days later, the two men were passengers in a car when they drove past a Passamaquoddy woman driving her car in the opposite direction. Josh Cilley allegedly jumped out of the car with a baseball bat and struck and damaged the woman's car. He also allegedly yelled a derogatory racial slur at her.

The Consent Decree prohibits both men from assaulting, threatening, intimidating, coercing or harassing any one on the basis of race, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation. It also prohibits them from damaging any property or communicating in any way with the victims. Violation of the Consent Order will result in a possible jail sentence and fine.

If you believe your civil rights have been violated, call the Civil Rights Unit of the Department of the Attorney General at 626-8844. ☐



Native American Legal Briefs

New Brunswick Court upholds Micmac rights to harvest timber on Crown land

In a landmark decision, the Court of Queen's Bench in Bathurst, N.B. ruled that present day Indians have the right to cut trees on Crown land. Justice Turnbull of that Court decided that Dummer's Treaty of 1725 recognized that Indians in New Brunswick have land rights that include the harvesting of any and all trees on Crown land.

The case began when Thomas Paul, a Micmac Indian, and several other Indians cut three logs of bird's eye maple. The maple was on Crown land that had been licensed to Stone Consolidated (Canada) Inc. to cut timber. Mr. Paul was charged with harvesting the logs illegally.

In his decision, the judge stated, "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown." He also found that there is "a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians."

Since New Brunswick had originally been part of the Massachusetts Bay Colony, Justice Turnbull examined the early law of Massachusetts Bay.

Forestry companies in New Brunswick are concerned about the decision since it may be read to require companies to account for what they have taken off and used from Indian lands in the past and the present.

It is expected that the decision will be appealed.

Lending discrimination case settled: South Dakota Native Americans benefit

A recent Justice Department settlement with a Nebraska bank will benefit Native Americans in South Dakota living on or near the Pine Ridge Reservation. The settlement is designed to make sure that Native Americans are treated fairly when they ask for a loan and to compensate those who were treated unfairly in the past.

The Justice Department claimed that loan officers for the First National Bank of Gordon refused to make secured loans if the collateral was located on a Native American reservation. The Department also claimed that the bank had credit requirements for Native Americans which were not used for white applicants.

Under the settlement, the bank agreed to a number of conditions. Among these were the creation of a \$175,000 fund to be used to compensate

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We Want To Hear From You!

If you have comments, articles or ideas on how this newsletter can be helpful to you, please let us know.

Please send articles or letters to:

Wabanaki Legal News
Pine Tree Legal Assistance
Coe Building, 61 Main Street
Room 41
Bangor, ME 04401.



Tribal Sovereignty

By Mark A. Chavaree, Esq.

Mark is a member of the Penobscot Nation. He is a graduate of Old Town High School, Dartmouth College and Cornell Law School. Mark is currently Tribal Staff Attorney for the Penobscot Nation. He also serves on the Board of Directors for Pine Tree Legal Assistance.

Considering that entire books have been written on the subject of tribal sovereignty, it is hard to do justice to the subject in a single article. Nevertheless, I will try. The major portion of this article will look at the sovereignty of the Penobscot Nation, focussing particularly on the changes created by the 1980 Maine Indian Claims Settlement Act. Finally, I will add my own personal perspective on this subject.

I.

Under the American legal system, Indian tribes have sovereign powers separate and independent from the federal and state governments. The extent and breadth of tribal sovereignty is not the same for each tribe, however.

One of the main reasons for this lack of uniformity is that there are more than five hundred federally recognized tribes within the United States. Each tribe has its own form of government, its own distinct language, and its own unique culture and history. The sovereign powers exercised by a tribe are mostly based on its unique relationship with the federal government and any particular agreements entered into between the parties. While it is, therefore, difficult to state hard and fast rules about the scope of tribal sovereignty, there are still certain ideas that can be applied to all tribes.

I will touch on some of these ideas here. In his Handbook of Federal Indian Law, Felix Cohen explains tribal sovereignty as follows:

as a consequence of the tribe's relationship with the federal government, tribal powers of self-government are limited by federal statutes, by the terms of the treaties with the federal government, and by restraints implicit in the protectorate relationship itself. In all other respects the tribes remain independent and self-governing political communities.

Implicit in this principle is that only the federal government has the authority to change tribal powers, not the states. Another principle of federal Indian law is that tribes keep all rights and powers that they

have not expressly given up.

These ideas can be traced to three United States Supreme Court cases from the early 1800's involving the Cherokee Nation and the State of Georgia. The decisions were written by Chief Justice John Marshall and are often called the "Marshall trilogy." Marshall based his ideas of tribal sovereignty on political theory and international law about weaker nations allying themselves with stronger nations in a so-called "protectorate" relationship.

In one case, Marshall looked at the history of relations between Indian tribes and European nations, and later the United States. He noted that, from the beginning, tribes were treated as sovereigns, as shown by treaty making between the parties. In deciding that Georgia laws did not apply within Cherokee territory, Marshall concluded that Indian tribes have powers of self-government and sovereignty subject only to the superior authority of the federal government.

A very important, but often unappreciated, point is that tribal sovereignty does not arise out of the United States government, congressional acts, executive orders, treaties or any other source outside the tribe. As Felix Cohen puts it, "perhaps the most basic principle of all Indian law... is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by expressed acts of Congress, but rather 'inherent powers of a limited sovereignty, which has never been extinguished.'"

Indian tribes and their territories are separate from the states of the union. The tribes have all those elements of sovereignty not inconsistent with their dependent status or expressly given up or withdrawn in agreements with the federal government. These ideas form the background for any analysis of the extent of tribal sovereignty.

I now turn to an individual analysis of tribal sovereignty. My focus is on the Penobscot Nation as that is the tribe with which I am most familiar. Even among the four Maine tribes there is no uniformity over the extent of each tribe's sovereign powers. Thus, it is hard to talk in general terms about them. The Passamaquoddy Tribe's powers are the most similar to the Nation's, yet even there, the Passamaquoddies have their own treaties which apply only to them.

II.

Any examination of the Nation's sovereign powers, and those of the Passamaquoddy Tribe and the Houlton band of Maliseets for that matter,



involves a discussion of the terms of the Maine Indian Claims Settlement Act of 1980 and its companion legislation, the Maine Implementing Act. These acts are often called the "Settlement Acts." Initially, I want to address some widely held misconceptions about the Settlement Acts.

The Settlement Acts, in general, did not create the powers currently exercised by the Nation. The Settlement Acts help to delimit and define those powers, but are not their source. In fact, the Settlement Acts actually diminished the Nation's powers by transferring certain authorities to the State of Maine. Remember that the current sovereign powers of the Nation reflect its inherent sovereignty which has never been expressly ceded by the tribe nor extinguished by explicit federal action. This idea is the starting point for any analysis of tribal authority, and its importance cannot be overly stressed.

While generally the Settlement Acts did not create powers exercised by the Nation, there is an exception. The Settlement Acts did give the Nation the rights and powers of a municipality in certain circumstances. This fact has led to another common error, that the Settlement Acts turned the Nation into merely another municipality of the State of Maine.

The relevant provision of the law is Section 6206(1) of the Maine Implementing Act, which provides:

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

The inclusion of this wording about municipal powers was intended to expand tribal authority. It is wrongly believed to be a limitation on tribal authority. Reading this language as a limitation is inconsistent with the legislative history of the Settlement Acts. In the Senate Report under Special Issues, Congress responded to tribal concern that the Settlement Acts would destroy tribal sovereign rights. The Report states:

In addition, the Maine Implementing Act grants to the Passamaquoddy Tribe and the Penobscot Nation the state constitutional status of municipalities under Maine law. In view of the "home rule" powers of municipalities in Maine,

this also constitutes a significant grant of power to the Tribes. [emphasis added].

These statements support the view that this section was intended to be an additional grant of authority to these tribes, rather than a limitation placed on them.

Any argument for a different interpretation must be based on the language about the "duties, obligations, liabilities and limitations of a municipality." That language, however, must be read to be consistent with the remainder of that section. That section, interpreted as a whole, shows tribes have dual powers. One power is the municipality status created specifically under the terms of the Settlement Acts. The second is our inherent character as an Indian tribe possessing all sovereign powers named in the Settlement Acts as well as those never expressly ceded or withdrawn. Treating the Nation simply as a municipality not only ignores the "internal tribal matters" language but completely nullifies the Nation as an Indian tribe. In other words, if the Nation's powers are limited to those of a municipality, there is no recognition either of the Nation's ability to control its internal tribal matters free from state interference or of our inherent sovereignty. This would eliminate the primary prong of the Nation's powers, that of an Indian tribe. This result was never intended by Congress and would never have been agreed to by the tribes.

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

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

The Nation has the rights and powers of a municipality for certain purposes. It also has all those powers of an Indian tribe expressly set forth in the Settlement Acts, as well as those powers not expressly ceded or withdrawn. When the Nation acts in a municipal capacity, it is subject to the same limitations and liabilities of a municipality of the State of Maine. Conversely, when the Nation exercises its retained sovereignty as an Indian tribe, it is free of any such limitations and is free of any state regulation at all. Appreciation of the Nation as an Indian tribe is sorely lacking at all levels of the state, including its court system. This lack of appreciation comes from misunderstanding municipal status.

Another common error is the belief that the state "gave" the Maine tribes the benefits they got

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through the Settlement Acts. I have seen this attitude in countless meetings with representatives of state government, and in many other non-tribal forums. I have heard more than one state legislator say, in effect, "when are you people going to be happy with what we've already given you?"

The Settlement Acts resulted from very demanding and difficult negotiations between representatives of the federal government, the State of Maine, the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseets. The tribes got significant benefits from the Settlement Acts. However, those benefits came from the federal government, not the State of Maine, and the tribes gave up much for entering into those agreements. Many tribal people believe on balance we gave up too much. Moreover, anyone remotely familiar with the process knows that the state was an extremely reluctant participant and ultimately contributed very little towards this "settlement."

Looking at what each party contributed to or gave up under the Settlement Acts, it is hard to understand this feeling of many people in the state. I believe that the State of Maine and its non-Indian citizens should be grateful for the benefits they got from the Settlement Acts. First, the Settlement Acts avoided extended litigation which would have hurt the Maine economy badly. This burden would have fallen primarily on Maine residents. The claim covered nearly 12.5 million acres of land on which more than 350,000 people lived at that time. The Congressional Committee involved with this claim noted that it could take anywhere from five to fifteen years to litigate the claim. In the meantime, titles to land in the claim area would be clouded, sale of municipal bonds would become difficult if not impossible, and property would be difficult to sell. The Settlement Acts also freed the state of liability for claims of mismanagement of tribal land, resources, and money within its control during the period it claimed ascendancy over tribal affairs, including the illegal sale of four townships the Nation reserved in its 1818 treaty with the Commonwealth of Massachusetts.

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

These cases were pursued as part of the Maine tribal land claims and set the stage for recognition of the validity of these claims.

In a span of not quite five years, more than one hundred fifty years of state control was found by the courts to have been improper and erroneous and was replaced by a recognition of extensive tribal sovereignty: a sovereignty that was never extinguished but had remained dormant during a period of state domination. By accepting the Settlement Acts, the tribes exercised their newly recognized sovereignty and agreed to state jurisdiction for certain circumstances. Thus, with the Settlement Acts, the state regained some part of the control which it had wrongly exercised for years. It is important to remember that, under federal Indian law, this transfer of authority could only happen because Congress ratified the Maine Implementing Act.

In summary, the tribes gave up valid claims against the state. These claims were for illegal land transfers in violation of the Nonintercourse Act and for breach of trust in mishandling tribal lands and resources. In return, the tribes were given a large sum of money, provided totally by the federal government. Also, the tribes agreed to allow Maine to have certain jurisdiction over their territories, an arrangement facilitated by the federal government.

Frankly, I am not sure what the state "gave" to the tribes under the Settlement Acts. The only apparent contribution was the state's agreement to include within Indian territory certain designated privately held lands to be acquired by the tribes with Settlement funds. Thus, the Nation could exercise authority over these lands that Maine had previously exercised. The state's actions after this agreement, however, bring into question even the value of this contribution. The positions taken by state leadership since 1980 would, if accepted, mean that the tribes have very little control over these lands which we gave up so much to get. In truth, the state gave very little to the tribes in the Settlement Acts. Many Indian people question how much the tribes actually "gained" through these agreements.

III.

The Settlement Acts by their terms provide for certain expressly retained tribal sovereign powers. These are: exclusive jurisdiction over certain civil and criminal matters and exclusive authority to regulate hunting and fishing within Indian territory. However, the bulk of the retained sovereignty of the Nation specifically provided for in the Settlement Acts rests within the meaning of the phrase "internal tribal matters" used in Section 6206(1). The cases



that have interpreted this simple phrase are few, and there are still inconsistencies in those decisions.

The first case to interpret this phrase was Penobscot Nation v. Stilphen. That case was about whether the Nation could hold bingo games on its reservation without state regulation. The Supreme Judicial Court of Maine decided that such activities were not "internal tribal matters." Therefore, the Nation was subject to state laws prohibiting them. The Court also rejected the Nation's argument that the phrase means that the Nation "retains all the inherent powers that, according to federal law, are recognized as an attribute of an Indian tribe's historical quasi-sovereignty."

First, the court decided that, even if federal Indian common law were applied in this case, that law did not prevent state intervention in bingo activities by Indian tribes. That conclusion was rejected by the U.S. Supreme Court four years later in a case called California v. Cabazon Band of Mission Indians. In addition, the Maine Court decided that the definition of "internal tribal matters" need not depend on common law. Instead, the Court decided to look only at the statute itself and its legislative history. This rejection of the applicability of federal common law to the Maine tribes was also misguided.

By failing to consider the common law, the Maine Court failed to appreciate that the Nation is an Indian tribe possessing inherent sovereignty to the same degree as other tribes. The Court also overstated the changes to tribal sovereignty intended by the Settlement Acts. Congress, in ratifying the Settlement Acts, made clear that it intended to insure the sovereignty of the tribes. As noted earlier, the Senate Report stated that the Settlement Acts were a "recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." Interestingly, that Report referred to federal Indian common law in support of this statement.

In response to concerns that the Settlement Acts would destroy the tribes' sovereignty and lead to their acculturation, Congress stated in both the Senate Report and the house Report:

While the Settlement represents a compromise in which state authority is extended over Indian territory, in keeping with [federal cases] the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine tribes.

* * *

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

Granted, the Settlement Acts did change the relationship between the state and the Nation, but not to the extent found by the court in Stilphen. The court itself admitted that the Settlement Acts were not models of clarity and "there was some disagreement as to whether the acts would limit or expand tribal powers."

The court's failure to appreciate the tribal aspect of the Nation's character allowed it to avoid certain rules about statutory interpretation that should have been applied in this case. As Felix Cohen explains, "[t]he courts have required that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians and the treaty should be construed as the Indians would have understood them." These rules are further explained by Cohen: "generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." These rules were originally used for treaty interpretation. Under existing case law, these rules are also used to interpret modern statutes.

The Maine court made a dubious finding that Congress intended to wipe the slate clean with respect to the Maine tribes and concluded that the tribes' relationship with the state should be judged without looking at the established case law concerning Indian tribes. The court's decision in Stilphen relied on an improper characterization unsupported by the legislative history. The result is questionable law. This point becomes clear when you look at the United States Supreme Court decision in Cabazon and at recent federal court judgments involving the Maine tribes.

In Mitchell v. Passamaquoddy Tribe, the Federal District Court of Maine dismissed a race discrimination claim by a white police officer employee of the Passamaquoddy Tribe. The question raised in this case was whether the tribe's actions could be called "state action." The court decided that the tribe's actions were not state action. It found that "control over the hiring and firing of a member of the tribal police force, is an 'internal tribal matter', or more specifically, an integral part of tribal government as specified in 30 M.R.S.A. §2606(1)." Thus, the court recognized the tribe's sovereign non-

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municipal status. Significantly, the court relied on federal Indian common law in making its decision. The court also specified that the "Passamaquoddy Tribe has not simply become a municipality of the State of Maine." The federal court took a much different direction in its analysis than the state court in Stilphen. The federal court recognized the retained sovereignty of the tribe and applied federal common law to define the words "internal tribal matters." Not surprisingly, the result was much more deferential to tribal autonomy.

This same issue of an employment decision by a tribal government is now being litigated in the State Superior Court. That case concerns an alleged violation of the Maine Human Rights Act by the Nation's government. Unfortunately, the state court in this case has shown a disturbing lack of understanding of the Nation's sovereignty. The state court refused to dismiss the case as an internal tribal matter within the meaning of the Settlement Acts. This refusal rejects not only the federal court decision in Mitchell, but also a 1984 opinion of the Maine Attorney General and numerous decisions of the Maine Human Rights Commission.

This Superior Court case is called Fellencer v. Penobscot Indian Nation. In denying the Nation's motion to dismiss, the court selected passages of legislative history and disregarded others put forth by the Nation in support of tribal sovereignty. The court relied heavily on Stilphen to conclude, "as a municipality, ... the Nation is subject to the requirement of the Maine Human Rights Act." The court did not reach the issue of whether this case involves an internal tribal matter which would exclude it from state regulation. Relying on dicta from Stilphen, the court created its own test for deciding this issue. The court asserted that internal tribal matters are "those matters that were historically or culturally significant or unique to the Nation." Since the court did not have enough information on the record to apply this new test, it refused to grant the Nation's motion to dismiss.

The state court in Fellencer has created an extremely narrow interpretation of "internal tribal matters" which further shrinks the Nation's sovereignty. Also, this ruling shows yet again the lack of understanding by the state and its representatives of the Nation's sovereignty. The danger with the test created by the court is two-fold. First, it necessarily must be applied on a case by case basis, subjecting decisions of tribal government to state court scrutiny in virtually every case. This result was never intended by the Settlement Acts. Second, and more importantly, state court judges will be deciding which matters are historically and culturally significant to the Nation. This is without

question an intrusion into the internal matters of the Nation. This newly created standard and the decision underlying it are patently wrong.

The final federal case interpreting "internal tribal matters" is Akins v. Penobscot Nation. This case involved claims by a tribal member that the Nation's government violated his constitutional rights by enacting a discriminatory wood harvesting policy regulating tribal contractors. The District Court dismissed the claim. It decided that such activity was an internal tribal matter within the exclusive jurisdiction of the Nation. The United States Court of Appeals upheld this decision on appeal and established some important concepts for interpreting the phrase. First, the court stated that interpreting the phrase was a question of federal law. Further, the appeals court held federal Indian law should be used to define the term. These conclusions clearly contradict the reasoning of the state courts in Stilphen and Fellencer, and once again bring into question the correctness of those decisions.

The Akins decision points out a significant split in the approach used by the federal and state courts in the interpretation of this phrase. The federal courts respect tribal sovereignty and recognize the applicability of federal common law. Eventually that split will need to be resolved. This resolution will strongly influence the determination of the extent of the sovereignty of the Maine tribes.

These decisions show that there is no clear understanding of the meaning of the words "internal tribal matters." They do show that the courts will look at each situation involving this phrase on an individual basis. The meaning of the term and the method for defining it will develop over time in individual cases. We are early in this process. The extent of tribal sovereignty will depend on the outcome of these future cases. The Nation will certainly continue to insist that its employment decisions are internal tribal matters. The Passamaquoddy Tribe is currently seeking to protect its salt water fishing rights. The Settlement Acts do not discuss salt water fishing rights. It will be interesting to see how the courts decide whether the tribe continues to have those rights as part of its retained sovereignty.

As noted earlier, federal Indian common law shows that tribes have all sovereign rights except for those inconsistent with their dependent nature, those specifically withdrawn by the federal government, or those expressly ceded by the tribes. The state, including its court system, seems to think that the Settlement Acts created a clean slate with respect to the Maine tribes and that the Settlement Acts gave the tribes only powers specified within the Acts. The



tribes, on the other hand, believe that the tribes kept any powers that were not specifically withdrawn or even discussed in the Settlement Acts. The question of retained sovereignty will likely be addressed when the courts rule on the Passamaquoddies' salt water fishing rights claim. If the courts follow the rules about interpreting statutes that have been applied to tribes within the United States, any court ruling should favor tribal sovereignty and tribal autonomy. Considering the history of the Maine tribes and their treatment at the hands of the state, it is hard to predict the outcome of any such cases.

The extent of the sovereignty of the Maine tribes will depend on how the phrase "internal tribal matters" is finally decided and whether the courts are willing to recognize that the Maine tribes as Indian people continue to have all those rights not specifically ceded by them or withdrawn by the federal government. The state and the tribes will continue to disagree. How the inevitable litigation finally unfolds will largely determine the extent of the sovereign powers exercised by the Nation.

IV.

My discussion to this point has given the legal perspective of the sovereign powers exercised by the Nation. Now I would like to offer my own thoughts from a more philosophical standpoint.

The very essence of tribal sovereignty is the ability to self-govern and to protect the health, safety and welfare of our people within our own territory. We are a separate and distinct people with a unique history predating this country. We struggle daily to retain our independence and to retain those powers of self-government that make us an Indian tribe. Despite how people outside the tribe may see us, we are first and foremost an Indian tribe. The state and its leaders may try to define us as a municipality of Maine and to force us to conform to its ideas about who we are and what powers we have. Regardless, we will continue to fight to keep our sovereignty and our culture because that is what defines us as a distinct people.

This desire of the tribes to remain separate has always clouded the relationship between Indian and non-Indian people. This idea runs counter to the idea of the great melting pot, but it is a fundamental characteristic of Indian people. It finds its basis in the differing worldview of Indian people. I have heard more than one state leader express bewilderment over why the tribes want to be treated separately and differently from other people and why we feel that we should have special rights. The fact is that we are separate people with special rights. The history of Indian/non-Indian relations repeatedly

has shown this separateness. The actions of the federal government towards its Indian citizens has ultimately confirmed it.

Numerous efforts to remove this separation, whether through forced acculturation or termination of tribes, have failed. Indian people remain separate geographically, socio-economically, culturally, and, as the previous discussion illustrates, legally. The same system that justified the federal government taking tribal lands, exercising control over tribal resources and essentially controlling every aspect of tribal life is the same system that recognizes that Indian people are different and possess special rights and powers of self-government. The laws, effected through court cases, congressional action and federal policy, that allowed these other things to occur also recognize the uniqueness and separateness of Indian people and the sovereign powers of their governments. It is interesting that when such rights become an inconvenience for the states and their non-Indian citizens they question the justification for Indian people possessing these special powers.

We as Indian people recognize that separateness. We struggle to preserve our sovereign powers. They are part of what defines us as an independent group of people. They help protect our culture. To do otherwise would be to turn our backs on the history that shaped us and allowed us to remain independent. Our ancestors experienced that same struggle. Out of respect for them, we continue the fight. We do so in the hope of keeping our culture to preserve something for our children and to pave the way for them to continue on as the Penobscot Indian Nation.

The Nation has controlled its territory for the benefit of its people for thousands of years. When those people turn to tribal leadership looking for answers to the pollution of our waters, the degradation of our resources, threats to our health and safety, it is the duty and responsibility of tribal leadership to give them solutions. Our history makes clear to us that we cannot depend on the federal or state governments to provide for our people. We must do so ourselves or the Penobscot Nation will cease to exist as a distinct people with a unique contribution to make to the larger society. This is the heart of what tribal sovereignty is to the Penobscot Nation and what it means to me as a member.

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

There are tribal members who feel that we have
(Continued on next page)



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



Put Some Extra Money In Your Pocket Claim Your Earned Income Credit

You could be eligible!

Did you work in 1997? You may be eligible for the Earned Income Credit. If so, you'll owe less in taxes, and you could get cash back. Even if you don't owe income tax, you can get the EIC.

☐ Were you raising one child in your home in 1997? Did your family earn less than \$25,760? You can get up to \$2,210.

☐ Were you raising more than one child in your home in 1997? Did your family earn less than \$29,290? You can get up to \$3,656.

☐ If you weren't raising a child, did you earn less than \$9,770 in 1997? Were you between ages 25 and 64? You can get up to \$332.

Here's how you get it:

☐ If you were raising children in 1997, file federal tax return Forms 1040 or 1040A, **not** Form 1040EZ. **Be sure to attach Schedule EIC.**

☐ If you weren't raising children in 1997, just file any federal tax return.

Questions & Answers About the EIC:

What if I don't know how to file a tax return?

To get free help filing your tax return and for more information about the Earned Income Credit, call the IRS at 1-800-829-1040.

What if I haven't filed a tax return in a long while?

You can still get the EIC. If you were eligible, you can claim the EIC for three years back. Call the IRS to find out how. If you owe back taxes, the EIC may lower your tax bill. You

may also be able to work out a payment agreement.

Can I get a quick refund with my Earned Income Credit?

Yes. But it may not be your best choice.

Quick refunds take away money from your EIC. Remember, free tax help is available.

What if I'm not a U.S. citizen?

Many legal immigrants who are employed are eligible for the EIC. Getting the credit will not hurt your immigration status. If you are a Canadian-born Native American, you may be eligible.

I work and get public Assistance benefits. If I get the EIC, will I lose my other benefits?

In most cases, no. The EIC does not affect federal benefits like TANF, Food Stamps, SSI, Medicaid or housing.

Get FREE Help Filing Your Taxes!

VITA, a program of the IRS, helps people fill out their tax forms for free. VITA sites are open from late January through April 15. To find the VITA site near you, call 1-800-829-1040. Be patient -- the line is often busy.

Remember, paying for tax preparation takes money away from YOUR refund.

Avoid Income Delays!

Be sure to provide the correct name and Social Security number for each person listed on your tax return. ☐

Vita Sites Needed For 1998 Tax Year

VITA stands for Volunteer Income Tax Assistance. It is a free, IRS-sponsored program to help low-income workers, including anyone eligible for the EIC, fill out their tax returns. Using a VITA site allows low-income workers to get help filling out their tax returns without having to pay for tax preparation.

The IRS is always looking for additional VITA sites. If your tribe or organization would be interested in setting up a VITA site to help your members, call your Regional Taxpayer Education Coordinator. The number to call is a Massachusetts number: 1-617-565-4325. Ask to speak to Norma Morris or Judith Harwood.

The VITA sites for the 1997 tax year have already been set up. If you wish to set up a site, it would be for the 1998 tax year. It is best to call in September. The IRS will provide training to set up the site.



("Legal Briefs" continued from page 3)

those harmed by the bank; setting up a money management education program to show Native Americans how to establish and maintain credit with the bank; and taking steps to increase the pool of qualified Native Americans to be considered for employment as loan officers at the bank.

How can I tell if I am a victim of lending discrimination?

You probably won't hear anyone say, "We don't make loans to Native Americans." What you will hear is:

- ✓ Your debt-to-income ratios are too high.
- ✓ The appraisal said "inadequate collateral."
- ✓ You need more money down.

Any time you're denied a loan, or the terms and conditions are changed, you could be a victim of lending discrimination. Call and find out. Contact HUD at 1-800-669-9777. TDD 1-800-927-9275. Or call Pine Tree's Native American Unit, 1-800-879-7463.

Important Information for Canadian-Born Native Americans:

SSI and Food Stamps update:

Some Canadian-born Native Americans are being notified that they will lose benefits such as SSI and Food Stamps. When the Welfare Reform Act of 1996 was passed, Congress took benefits away from non-citizens, including legal aliens. The Notices sent to Canadian-born Native Americans treat this group as legal aliens. This group should not lose their benefits under this new law.

An amendment has now been passed to make clear that this law is not intended to apply to Canadian-born Native Americans who have applied for or are receiving SSI. Thanks to the help of Senator Snowe, an amendment in the United States Congress is pending to make it clear that the law does not apply to Canadian-born Native Americans receiving or applying for food stamps.

If you get a Notice trying to end your benefits, and want our help, call Pine Tree Legal Assistance right away. Our Toll-free number is **1-800-879-7463**. It is important to call immediately so that you can protect your right to appeal a denial of benefits.

Cross Border Rights:

A recent case made clear that while Canadian born Native Americans with at least 50% Indian blood do have the right to cross the border freely, this right is not always recognized by immigration officials. A Micmac woman from Indian Brook First

Nation in Nova Scotia recently discovered she had to enforce her right in order to get protection.

The woman was detained while crossing from British Columbia into the State of Washington. She was notified that she had to appear before an immigration judge for exclusion proceedings. Her case was transferred to Boston and set for a hearing last June. Pine Tree's Native American Unit helped her find two lawyers in Massachusetts to represent her without charge. At the hearing, evidence was presented that she had at least 50% Indian blood. The case was dismissed.

We wish to thank attorneys Robert F. Mills of Wynn & Wynn, Hyannis, Massachusetts and Johanna Flacks-Jatta for their willingness to take this case protecting these important rights. ☐

PINE TREE LEGAL ASSISTANCE

Pine Tree Legal Assistance is a non-profit organization which gives free legal help to poor people with civil (non-criminal) legal problems.

Due to federal budget cuts, Pine Tree has lost over half its staff. As a result, Pine Tree can help only a small number of people who call us. We have given high priorities to the following kinds of cases:

- Eviction from public housing
- Home foreclosures
- Domestic violence
- Problems with Medicare or Medicaid
- Loss, reduction or denial of government benefits (food stamps, AFDC, Social Security, unemployment, etc.)

If you are low-income and need legal help in one of these areas, call the nearest Pine Tree office. If you are a farm worker with employment problems, call the Farmworker Unit at **1-800-879-7463**.

Pine Tree cannot represent you in divorce, child custody, or child support cases. However, we can give you information about these cases.

Pine Tree also has a Native American Unit in Bangor. The number is **1-800-879-7463**. Call the Unit if you are a low-income Native American with problems in the following areas:

- Access to health services
- Discrimination
- Border crossing issues
- Indian Child Welfare Act Problems

The articles in this paper are meant to provide information,

NOT to give legal advice.

No one should interpret any law without the help of an attorney who has been told all the facts.



PINE TREE LEGAL ASSISTANCE OFFICE HOURS



OFFICES

39 Green St. **Augusta, ME**
Phone Intake: 622-4731
Hours: M-F 8:30-12:30

61 Main St. **Bangor, ME**
Phone Intake: 942-8241
Hours: M-F 8:00-3:00

City Hall 3d Fl. Conference Room
Lewiston, ME Mon. 1:00-4:00
Phone Intake: 784-1558
Hours: M-F 8:30-12:30

12 Cooper St. **Machias, ME**
Phone Intake: 255-8656
Hours: M-F 8:00-3:00

88 Federal Street **Portland, ME**
Phone Intake: 774-8211
Hours: M-F 8:30-12:30

373 Main St. **Presque Isle, ME**
Phone Intake: 764-4349
Hours: M-F 9:00-12:00

Native American Unit
 61 Main Street
 Bangor, ME
Intake: Tues, Thurs, Fri.
 (800)879-7463

Farmworker Unit
 61 Main Street
 Bangor, ME
Intake: Mon, Wed, Fri.
 (800)879-7463

Volunteer Lawyers Project
 88 Federal Street
 Portland, ME
Phone: 774-4348 or (800) 442-4293