

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

PENOBSCOT NATION,

Plaintiff,

V.

Civil Action No. 1:12-cv-00254-CZS

JANET T. MILLS,  
Attorney General for the State of Maine,  
*et al.*,

## Defendants

## STATE DEFENDANTS' MOTION TO AMEND ANSWER AND COUNTERCLAIM

Defendants Janet T. Mills, Chandler Woodcock and Joel T. Wilkinson, pursuant to Fed.R.Civ.P. 15(a)(2), by and through their undersigned attorneys, hereby move to amend their answer and counterclaim, as set forth in *Exhibit A*, hereto (with changes underlined), for reasons more fully set forth below.

The State Defendants are concerned that neither Plaintiff's second amended complaint nor the United States' proposed complaint express the true nature and extent of the Plaintiff's claims to the Main Stem of the Penobscot Nation as revealed by Plaintiff's actions over the last several years. For this reason, we proposed State Defendants' amended answer to ensure that all of Plaintiffs' claims to the river are before this Court.

We have contacted the parties regarding this motion. We forwarded the proposed amended answer to Plaintiff's counsel who stated that Plaintiff will contest the motion. Counsel for Intervenor City of Brewer, *et al*, do not object.

## Introduction

Both the Plaintiff, and the United States in its pending Motion to Intervene, have presented this case as one primarily about whether members of the Penobscot Indian Nation (“PIN”) may engage in sustenance fishing in the Main Stem of the Penobscot River. It is critical for the Court to understand that there is no actual controversy on this point. Neither PIN nor the United States has alleged that the State has interfered with this practice or threatened to do so, nor could they because such an allegation would have no factual basis. The State of Maine, its agencies, fish and game wardens and other officials have never interfered with or attempted to interfere with PIN members engaging in sustenance fishing in the Main Stem. To the extent PIN members wish to practice sustenance fishing in the Main Stem, they may do so today and hereafter without any threat of State interference, just as they have since the 1980 Settlement Acts. If this case were actually a controversy concerning sustenance fishing in the Main Stem, it would be easily resolved.

Instead, this case is an attempt to re-litigate the boundaries of the Penobscot Indian Reservation, employing the contrived and seemingly innocuous issue of sustenance fishing, in order to achieve a radical realignment of the jurisdictional relationship between PIN and the State that is predicated upon Reservation boundaries. Plaintiff’s theory is: (1) The state and federal Settlement Acts grant PIN sustenance fishing rights within the “Reservation”; (2) The intent of these laws was to allow such sustenance fishing to occur within the Main Stem of the River; and (3) Therefore, the scope of the Reservation must necessarily include the Main Stem. This deceptively appealing syllogism has no merit for many reasons, including that the “Penobscot Indian Nation Reservation” is expressly and unambiguously defined within these same laws as “*consisting solely*” of the islands within the River. 30 M.R.S.A. § 6203(8). But

putting those substantive arguments aside for the moment, what is important for present purposes is that the Court appreciate the true nature of this case and what is actually at stake.

If the Court declares that the Reservation includes the River, PIN will argue that it possesses proprietary rights in, and broad regulatory authority over, the entire 60-mile river segment. This does not require speculation, because PIN has already asserted these rights in recent confrontations with non-tribal recreational users of the River, in communications with State officials, in filings with the U.S. Environmental Protection Agency prior to the filing of this suit, and in a filing with the Federal Energy Regulatory Commission dated July 11, 2013. *Exhibit B-D*, hereto. Of note, while Plaintiff objects to the present motion to amend, Plaintiff claims sovereignty over the waters, beds and banks of the Penobscot River in a filing with the EPA, not voluntarily shared with the State. *Exhibit C*, at 4. These assertions of rights and authority are flatly contradicted by the painstakingly negotiated and intricately drafted jurisdictional provisions that are the foundation of the Settlement Acts. PIN's positions would also dramatically upset the settled expectations of Maine citizens, municipalities and other stakeholders who have reasonably ordered their lives on the assumption that Congress meant what it said when it defined the Penobscot Indian Reservation as "*consisting solely*" of islands within the Main Stem. PIN's pleadings have thus far concealed from the Court its true ambitions for control over the Main Stem, and that is where the actual controversy lies. Therefore, in order to ensure that the Court considers the issue of the Reservation's boundaries within the proper context, State Defendants now move to amend their answer and counterclaim. Regardless of who is right or wrong on the issues of who and what Plaintiff may or may not regulate on the Main Stem, one thing is clear: it is the responsibility of all parties to ensure that all of the controversies occurring on the Main Stem arising from this disagreement are before the Court to

be resolved. Plaintiff's apparent effort to limit this Court to only the issues it wants resolved arising out of this controversy and not involve those landowners who have an indispensable interest in this dispute ignores the reality of the problems Plaintiff has chosen to create on the river.

### **The Nature of the Proposed Amendments**

A. PIN's game wardens and officials have recently asserted to recreational users of the River and to State officials that PIN possesses jurisdiction to regulate the following activities on any portion of the Main Stem: (1) fishing and hunting by nontribal members, (2) navigating (*i.e.*, boating) by tribal and nontribal members, and (3) water quality monitoring and sampling by State employees. In addition, PIN has asserted a right to exclude nontribal members from the Main Stem. Specifically, PIN's wardens and officials have asserted that nontribal members require a permit from PIN to be present on the Main Stem, and that PIN "will be aggressively enforcing" this position. *Exhibit B*, hereto. PIN's wardens have also summonsed or threatened to summons nontribal members for engaging in the above-mentioned activities. Amending the counterclaim to clarify that these issues are before the Court will not prejudice the Plaintiff because these assertions of authority and control by PIN over the Main Stem are based on the same expansive interpretation of the PIN Reservation that is reflected in the Second Amended Complaint. The parties have also agreed to extend the deadlines in the Scheduling Order, so no prejudice will arise from any inability to conduct discovery.

B. PIN wardens appear to have summonsed at least one nontribal member to tribal court for alleged violations of tribal hunting ordinances on the Main Stem. Even if PIN had jurisdiction to regulate hunting, fishing, boating and other activities on the Main Stem, the 1980 Settlement Acts are clear that alleged violations of those regulations by nontribal member are to

be resolved in *State*, not tribal, court. 30 M.R.S.A. § 6209-B(1). The Penobscot Nation Tribal Court has no jurisdiction over nontribal members. *Id.* Plaintiff would not be prejudiced by this amendment because the issue presented is purely one of statutory interpretation, and therefore requires no additional discovery, other than PIN providing copies of such summonses.

C. State Defendants move to add the affirmative defense of failure to join indispensable parties. In particular, Maine's common law dictates the owners of land along a nontidal navigable river, such as the Main Stem, own the land beneath the river to the thread. *See, e.g., Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207 (1910); *Brown v. Chadbourne*, 31 Me. 9, 19 (1849); *Bradley v. Rice*, 13 Me. 198, 201 (1836). In addition, the 1980 Settlement Acts extinguished tribal and aboriginal claims in Maine, and confirmed any "transfers of land or natural resources" "from, by, or on behalf of the ...Penobscot Nation...or any of [its] members" including those involving aboriginal title. 25 U.S.C. § 1723. "Transfer" is broadly defined as follows:

"transfer" includes but is not limited to any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources.

25 U.S.C. § 1722(n). Although PIN has thus far failed to articulate the specific basis for its claim, it appears to be based upon a claim of ownership of, or other proprietary interest in, the bed of the Main Stem. Therefore, the riverside owners, including the State of Maine, are both necessary and indispensable parties. Fed. R. Civ. P. 19; *Maritimes & Northeast Pipeline, LLC v. 16.66 Acres of Land*, 190 F.R.D. 15, 18-19 (D. Me. 1999) (Brody, J.).

WHEREFORE, State Defendants respectfully ask this Court to grant this motion to amend their answer and counterclaim.

Dated: August 26, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 26th day of August, 2013, I electronically filed the above document with attachments with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties.

Dated: August 26, 2013

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