UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION,

Plaintiff and Counterclaim Defendant,

and

UNITED STATES,

Intervenor,

v.

MAINE ATTORNEY GENERAL, *et al*.,

Defendants,

and

CITY OF BREWER, *et al*.,

Intervenors and Counterclaim Plaintiffs.

Docket # 1:12-cv-00254-GZS

MOTION OF STATE INTERVENORS[1] FOR JUDGMENT ON THE PLEADINGS AND INCORPORATED MEMORANDUM OF LAW

The question presented in these claims for declaratory judgment is whether the waters of the Penobscot River fall within the definition of Plaintiff's Indian Territory or Reservation, and, if so, whether the Plaintiff Penobscot Nation ("PN") may regulate non-tribal member activity in and on the River. The answers to these questions depend on the scope of PN's rights as set forth in the Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq*. (or "MIA") and the Maine Indian

[1] Movants are Intervenors and Counterclaim Plaintiffs the City of Brewer, the Town of Bucksport, Covanta Maine, LLC, the Town of East Millinocket, Great Northern Paper Company, LLC, Guilford-Sangerville Sanitary District, the Town of Howland, Kruger Energy (USA) Inc., the Town of Lincoln, Lincoln Paper and Tissue, LLC, Lincoln Sanitary District, the Town of Mattawamkeag, the Town of Millinocket, Expera Old Town, LLC, True Textiles, Inc., Veazie Sewer District, and Verso Paper Corp. Because these parties support the State's position, for clarity they will be referred to as "State Intervenors" herein.

Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 *et seq*. ("MICSA") (collectively the "Settlement Acts").

As discussed below, the Settlement Acts extinguished any PN claim to aboriginal title over the River. PN's Reservation, which the State holds in trust for PN, extends only to certain islands in the River, not the waters themselves, and the Settlement Acts give PN no authority to regulate non-tribal activities in or on the River.

DISCUSSION

I. A live controversy exists.

PN is currently claiming that its Reservation includes the waters of the Penobscot River, giving it the legal right to regulate non-tribal member use of those waters. (PN's Second Am. Compl. (ECF No. 8) ¶¶ 3-4, 6, 24, 27, 29-31, 33, 35, 37-39, 42, 53-54; PN's Opp'n to the State Defs.' Mot. to Am. Answer and Countercl. (ECF No. 47) at 8-11 (hereinafter "PN Opp.")). The Defendants and State Intervenors disagree. (State Intervenors' Answer (ECF No. 25), ¶¶ 3-4, 6, 24, 27, 29-31, 33, 35, 37-39, 42, 53-54; State Defs.' Am. Answer (ECF No. 59) ¶¶ 3-4, 6, 24, 27, 29-31, 33, 35, 37-39, 42, 53-54).

Thus, a live controversy exists over the boundaries of PN's Reservation and PN's ability to regulate non-tribal members' activities on and in the River. (*See also* Order on Pending Motions (ECF No. 57) at 2: "the Court is satisfied that there is a sufficient controversy to allow the Intervenors to proceed as defendants and counterclaimants in this action.")

II. The State of Maine, and the Commonwealth of Massachusetts before it, held, possessed, and/or exercised dominion over or control of the Penobscot River and the islands in the River occupied by PN and its members.

The First Circuit has discussed on multiple occasions the context in which the Settlement Acts were enacted. *See*, *e.g.*, *U.S. v. Newell*, 658 F.3d 1, 10 (1st Cir. 2011); *Maine v. Johnson*, 498 F.3d 37, 41-44 (1st Cir. 2007); *Aroostook Band v. Ryan*, 484 F.3d 41, 45 (1st Cir. 2007).

During the period leading up to the Settlement Acts in 1980, believing that it, and not the federal government, held responsibility over Indians in Maine, the State exercised dominion and control over the various tribes in Maine and the areas where they resided and fished.[2]

This relationship of State control over PN, its members, and the territory where they lived was inherited from the Commonwealth of Massachusetts when Maine became a state. As noted in some of the decisions cited above, PN and the Passamaquoddy Tribe entered into multiple treaties, including with the Commonwealth of Massachusetts before Maine became a state. Aside from purporting explicitly to transfer Maine territory from the tribes, the treaties provided that, *e.g.*, PN "should have, enjoy and improve" certain islands in the Penobscot River. *See Stevens v. Thatcher et al.*, 91 Me. 70, 39 A. 282, 282 (1897). As to even these islands, however, during the period prior to the Settlement Acts, the State exercised dominion and control.[3]

---

[2] *See*, *e.g.*, 22 M.R.S.A. §§ 4701-4836 (1964) (compilation of various laws relating to the tribes before abrogation by the Settlement Acts) (Public Document List (hereinafter "PD") Ex. 103); *Joint Trib. Coun. of Pass. Tr. v. Morton*, 528 F.2d 370, 374 (1st Cir. 1975) (noting that between 1820 and 1978 the State enacted various laws relating specifically to the Passamaquoddy Tribe, including 54 relating to improvement and protection of roads and water on its reservation); *Great Northern Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 21, 770 A.2d 574, 581 (describing the exercise of State authority over tribes and the area they resided, citing, *inter alia*, *Murch v. Tomer*, 21 Me. 535, 537 (1842): "We have in express terms extended our legislation over them; and over their territory[.]"). *See also State v. Newall*, 84 Me. 465, 24 A. 945 (1892) (holding that member of Passamaquoddy Tribe was subject to state hunting and fishing laws).

[3] *See Stevens*, 91 Me. 70, 39 A. 282 (affirming the ability of state to incorporate the islands in the Penobscot River within the town of its choosing); *see also* 22 M.R.S.A. § 4775 (1964) (repealed) ("The

This exercise of control was, as noted, pre-dated by similar exercise by the Commonwealth of Massachusetts before Maine became a state. *See, e.g.*, Mass. Resolves 1803 ch. 27 (appointing a superintendent of Indians affairs for the Penobscot Tribe, to approve or disapprove any bargains or contracts for the members' use and improvement of their lands or other property, to assist them in collecting their just dues and to prevent frauds upon them, and further resolving that all contracts made with said Indians for timber or wood shall be void without the Superintendent's approval) (PD Ex. 24).[4]

---

islands belonging to said [Penobscot] tribe may be leased by the commissioner [Maine Commissioner of Health and Welfare] for the benefit of such tribe …. If such lease is on credit, it shall be at the risk of the commissioner") (PD Ex. 103 at 451); *id*. § 4776 (prohibiting any member of the Penobscot tribe from selling any standing wood or timber growing on any islands or lands in the Penobscot River within the limits of the Indian reservation except to members of the tribe for firewood and prohibiting any lease of any portion of the lands on the islands within the limits of the reservation for such purpose to be cut and removed except with the consent and approval of the state commissioner) (PD Ex. 103 at 452); *id*. §§ 4777-78 (limiting conveyances of Penobscot land without approval of state commissioner and further providing that if any Penobscot Indian "carries off the growth faster than is necessary for cultivation, except by permission of the [state] commissioner, or commits strip or waste, he shall be dealt with as a trespasser") (PD Ex. 103 at 452-53); *id*. § 4779 (setting forth how water privileges associated with the islands were distributed) (PD Ex. 103 at 453); *id*. §§ 4780-81 (providing how state commissioner could allot unassigned Penobscot land on the islands in the Penobscot River per plans submitted to commissioner, with such lots limited by that plan and deemed "the property of the person to whom it is assigned during the pleasure of the Legislature") (PD Ex. 103 at 454); *id*. § 4787 (providing that the shores of the islands in the Penobscot River belonging to PN were to be leased for booming or hitching logs under orders of the state Department of Health and Welfare) (PD Ex. 103 at 456); *id*. § 4788 (providing that the state commissioner could lease any reserved privileges for mills, booms and fisheries for a term sufficiently long to induce persons to take them, with the rents paid into the State Treasury to be expended for the benefit of PN, under the direction of the state Department of Health and Welfare) (PD Ex. 103 at 456). *See also id.* § 4707 (contracts relating to the sale or disposal of trees, timber or grass on Indian lands void absent permission of state commissioner) (PD Ex. 103 at 439); *id*. § 4709 (Attorney General could in the name of Indian tribes maintain actions for money due any such tribe and for injuries done to tribal lands, with any sums recovered distributed by the state commissioner to the Indians of the tribe concerned "according to their usages, or be invested in useful articles") (PD Ex. 103 at 440); *id*. § 4711 (setting the amount paid for produce grown on tribal land after proof by the Indian to the satisfaction of the state commissioner of the number of bushels of each article raised on such land) (PD Ex. 103 at 441); *id*. § 4770 (non-tribal members could be removed from the Penobscot reservation upon notice given by tribal governor and state commissioner) (PD Ex. 103 at 448-49).

[4] Indeed, exercise of control over all PN territory and the extinguishment of any aboriginal title can be traced at least as far back as the Treaty of Portsmouth in 1713, when PN agreed to be "the Lawful Subjects of our Sovereign Lady Queen Anne and promising our hearty Submission and Obedience to the Crown of Great Britain" and agreed that "we [are] hereby submitting ourselves to be ruled and governed by Her Majesty's laws, and desire to have the Protection and Benefit of the same." Treaty of Portsmouth,

Massachusetts similarly exercised control and dominion over the entirety of the Penobscot River, as reflected in various and many laws regulating activities in and on the River.[5]

Thus, while the islands were treated as "belonging" to PN, this was in the capacity of subjugation to the ultimate authority of England, then Massachusetts, then the State of Maine. The Maine state commissioner and, before that, land agents, could lease territory, including the islands, for PN's benefit and otherwise controlled its use. As to any water privileges associated with the islands, as reflected in 22 M.R.S.A. § 4779, the Legislature provided that privileges noted in surveys as reserved to public use, except for a public farm subject to an allotment by a separate state statute, were not subject to assignment or distribution to members of the tribe, but rather were to remain for the benefit of the tribe. In short, the State, like its predecessors, controlled the islands for PN's benefit, as determined by the state commissioner and other state officials.

Nowhere does PN's Second Amended Complaint allege that the State did not exercise control or dominion over any territory, including, without limitation, the waters of the Penobscot River or any island on the River.

July 13, 1713, reprinted in *Penhallow's Indian Wars, A Facsimile Reprint of the First Edition*, (Edward Wheelock, Boston 1924) (PD Ex. 1 at 3, 5) ; *see also* Dummer's Treaty of 1725, Dec. 15, 1725, reprinted in *Collections of the Maine Historical Society*, Series One, Volume 3 (1853) (PD Ex. 2 at 17) ("We [are] submitting ourselves to be ruled and governed by His Majesty's laws and desiring to have benefit of the same.")

[5] *See*, *e.g.*, 1788 Mass Laws ch. 73 ("An Act to Prevent the Destruction and to Regulate the Catching of the Fish Called Salmon Shad & Alewives in the Rivers and Streams in the Counties of Cumberland and Lincoln, and to Repeal all Laws Heretofore Made for that Purpose") (PD Ex. 13); 1786 Mass. Laws ch. 22 ("An Act to Prevent the Destruction, and to Regulate the Catching of the Fish Called Salmon, Shad and Alewives in Kenebec River, and Several Other Rivers and Streams in the Counties of Cumberland and Lincoln") (PD Ex. 12); 1814 Mass. Laws ch. CXLIV ("An Act for the preservation of Fish in Penobscot River and Bay, and the several streams emptying into the same)" (PD Ex. 34); 1816 Mass Laws ch. XCIX ("An Act in addition to an act, entitled 'An Act for the preservation of Fish in Penobscot River and Bay, and the several streams emptying into the same.'") (PD Ex. 36). *See also Commonwealth v. Wentworth*, 15 Mass. 188 (1818) (discussing 1813 Mass. Laws c. CXLIV, 1810 Mass. Laws c. LXXXVIII, 1806 Mass. Laws ch. XXXIII, addressing state and town regulation of activities to protect fisheries in the Penobscot River).

DISCUSSION

I. The Settlement Acts extinguished any Plaintiff claim of aboriginal title; defined PN's Reservation as consisting of certain islands in the Penobscot River; and set forth PN's rights as to Indian territory, including its Reservation, which rights do not include the ability to regulate the activities of non-tribal members in or on the River.

In the 1970's, after centuries of control over Maine Indians and over historically tribal land, the Passamaquoddy Tribe asserted claims to "much of the entire territory of Maine." *See Johnson*, 498 F.3d at 41. The theory asserted was that certain treaties were invalid because they were not approved by Congress. *Id.*; *see Morton*, 528 F.2d at 380-81; *see also Great Northern Paper*, 2001 ME 68, ¶ 23; *State v. Dana*, 404 A.2d 551 (Me. 1979).

Ultimately, a settlement was reached that included PN, which is embodied in MIA and ratified in MICSA. *Newell*, 658 F.3d at 10.[6] For the purposes of this action, the relevant aspects of the settlement are, as described below: (A) the extinguishment of PN's claim to aboriginal title over any area controlled by the State; (B) the limit of PN's Reservation to certain islands in the Penobscot River and not the River itself, with no bestowal of title or ownership over the Reservation to PN; and (C) the lack of any provision in the Settlement Acts giving PN authority to regulate non-tribal activities in or on the Penobscot River.

A. The Settlement Acts extinguish all claims of PN's aboriginal title.

In return for monetary compensation and other rights described below, through the Settlement Acts, the tribes' claims to Maine territory "were extinguished." *See Newell*, 658 F.3d at 10; *see also Ryan*, 484 A.2d at 45 ("MICSA extinguished the land claims of *all* Indian tribes in Maine, by express provision.") (emphasis in original).

[6] Because MICSA's primary purpose is to ratify MIA, *see* 25 U.S.C. § 1721(b)(3) (listing as a purpose of MICSA "to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and … the Penobscot Nation"), the bulk of the terms of the agreement is set forth in MIA. To the extent there is an actual conflict between MIA and MICSA, MICSA applies. 25 U.S.C. § 1735(a).

In the findings and declarations provisions in MICSA, 25 U.S.C. § 1721(a)(1) & (3), Congress noted that the tribes, including PN, were "asserting claims for possession of lands within the State of Maine" and that PN "claimed aboriginal title to certain lands in the State of Maine." The purposes of MICSA included "to remove the cloud on the titles to land in the State of Maine resulting from Indian claims[.]" *Id.* § 1721(b)(1); *see also* 25 U.S.C. § 1723(a)(1) & (b) (extinguishing all aboriginal claims to any land or natural resources located anywhere within the State of Maine "transfer[red]" by or on behalf of any Indian, Indian nation, or tribe or band of Indians).

"Transfer" is defined in the Settlement Acts as "includ[ing] but is not necessarily 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 other conveyance; and any act, event or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or other natural resources." 25 U.S.C. § 1722(n); 30 M.R.S. § 6203(13).

"Land or natural resources" is defined in MIA as "any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, … water and water rights and hunting and fishing rights." 25 U.S.C. § 1722(b); 30 M.R.S. § 6203(3).

Thus, through these express provisions, any claim of PN to aboriginal title over any land or natural resources located in the State of Maine, including any claim to water rights, was extinguished not just in land or natural resources sold or transferred by treaty, but also in all land or natural resources over which the State or its predecessors had exercised dominion or control – *i.e.*, including the Penobscot River and its islands. Henceforth, PN is subject to state law, except

as exempted via affirmative provisions in the Settlement Acts. 30 M.R.S. § 6204 ("Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.")

B. The Settlement Acts define PN's Indian Territory and Reservation, and do not bestow any ownership over these areas on PN.

An acquisition fund in the amount of $54,500,000 was created so that "land or natural resources" could be bought for the tribes, as explained in MIA. 25 U.S.C. § 1724. Under MIA and MICSA, the first 150,000 acres of land or natural resources acquired for PN using the Acquisition Fund "within the area described in the [MIA] as eligible to be included within" PN's "Indian territory" could be included. PN would not and does not own this land or these natural resources; they are held in trust by the United States for the benefit of the tribe. 25 U.S.C. § 1724(d)(3). None of the areas identified in MIA to be eligible to be included as Indian territory to be purchased through the Acquisition Fund includes the Penobscot River, any islands on the River, or any water rights associated with the River. *See* 30 M.R.S. § 6205(2)(B).

Also falling within PN's Indian Territory is its Indian Reservation. 30 M.R.S. § 6205(2)(A). This Reservation is defined as:

> The islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island … and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act.

30 M.R.S. § 6203(8). *See also* 25 U.S.C. § 1722(i) (defining Penobscot Indian Reservation as "those lands as defined in the Maine Implementing Act"). Thus, the area defined as included in PN's Reservation relating to the Penobscot River consists "solely" of the "lands" defined in MIA, which are certain listed "islands." No "natural resources" or other rights are listed; only "solely" the islands themselves.

Just as the land acquired through the Acquisition Fund included in Indian territory is owned by the United States, held in trust for the tribes, the area defined as reservation is owned and held in trust for the tribes by the State. (*See* United States' Reply in Support of Motion to Intervene (ECF No. 46) at 7 ("Maine holds the underlying fee to Indian lands in the State") and *id*., n.7 ("no one disputes that Maine possesses the underlying fee to Indian lands within the State").) With any aboriginal claim to title extinguished, ownership of the Reservation lies with the State, just as ownership of PN's other Indian Territory lies with the United States.

The longstanding understanding that the State had always assumed responsibility for Maine Indians and held property for them is one reason why the general relationship between the State and PN under the Settlement Acts, unlike Indian-State relationships elsewhere, is that between the State and a municipality, with ultimate authority in the State, except over internal tribal matters expressly specified in the Settlement Acts, over which PN exercises control. Thus, MIA provides that except as otherwise provided in the Settlement Acts, "any lands or other natural resources owned by [PN and the other tribes], held in trust for [PN and the other tribes] by the United States or by any other person or entity shall be subject to the laws of the State" "to the same extent as any other person or lands or other natural resources therein." 30 M.R.S. § 6204. Within its Indian Territory, PN enjoys all the rights, privileges, powers and immunities

"of a municipality of and subject to the laws of the State" except for "internal tribal matters[.]" *Id*. § 6206(1).

Nowhere in the Settlement Acts is any title to any land or natural resources given to PN. Rather, the Acts provide PN with specific rights, both as to self-governance generally and, as more specifically described below, to act vis-a-vis its Indian territory and Reservation. Given that PN's Reservation includes only certain islands on the Penobscot River and not the River itself, it is unsurprising that, as noted below, none of these statutorily bestowed rights includes PN regulation of non-tribal members' activities on or in the River.

C. The Settlement Acts do not provide PN with any regulatory authority over non-tribal member use of any portion of the Penobscot River.

MIA sets forth in detail the scope of PN's authority. Nowhere does it provide that PN may regulate non-tribal member activity on or in the Penobscot River.

Section 6206, captioned "Powers and duties of the Indian tribes within their respective Indian territories," allows PN to exercise exclusive jurisdiction within its Indian Territory over tribal members' violation of ordinances adopted by the tribe. 30 M.R.S. § 6206(3). Thus, this authority is limited both to Indian Territory and to its own members.

Section 6207, captioned "Regulation of fish and wildlife resources," provides that PN has exclusive authority within its Indian Territory to promulgate and enact ordinances regulating hunting, trapping or other taking of wildlife and "[t]aking of fish on any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area." 30 M.R.S. § 6207(1). These ordinances are applicable to tribal and non-members alike. *Id*. In addition, within Indian territories, PN "may exercise … all the rights incident to ownership of land under the laws of the State." *Id*.

An inter-tribal state commission ("commission") has exclusive authority to promulgate fishing rules or regulations on any pond other than those identified in Section 6207(1) with 50% or more of the linear shoreline in Indian territory, or "any section of a river or stream both sides of which are within Indian territory" and "[a]ny section of a river or stream one side of which is within Indian territory for a continuous length of ½ mile or more." *Id*. § 6207(3).

All these rights provided to either PN or the commission are subject to limitation by the Commissioner of Inland Fisheries and Wildlife (IFW) if he or she determines that there is a reasonable likelihood that PN's ordinances, rules, or regulations or a commission regulation or lack thereof will cause a significant depletion of fish or wildlife stocks on lands or waters outside the boundaries of lands or waters subject to regulation by PN. *Id*. § 6207(6).

In multiple ways, these provisions confirm the extinguishment of PN's aboriginal title and its inability to regulate non-tribal use of the Penobscot River.

First, there would be no reason for Section 6207 to provide that tribes may exercise the rights incident to ownership within the boundaries of its Indian Territory if the tribes simply owned the land within Indian territory. Because these lands are held in trust for them, by either the federal or state governments, this text giving these rights as if they owned the property was needed.

Second, this section makes clear that the settling parties were conscious of the issue of how to deal with bodies of water with some association with Indian territory, and that tribal authority was precisely limned and limited as to the larger bodies of water even wholly within that territory, such as Great Ponds or rivers. If all or part of a river falls within Indian territory, then under Section 6207(3), fishing in that river is regulated not by PN, or the Passamaquoddy Tribe, but by the commission, subject to IFW's ultimate veto powers. There is no tribal

authority over fishing in any river, even if both sides of the River fall entirely within Indian territory. It is unclear on what basis PN is asserting that portions of the Penobscot River are subject to its exclusive regulatory authority, given this explicit language.

Nor does this section purport to give to the PN any regulatory authority over the River simply because its Reservation includes islands in the Penobscot River. If there had been any intent to give PN some authority over fishing or other activities in the Penobscot River by virtue of PN's Reservation being defined as including certain islands in the River, then this section of MIA would have so stated. Moreover, to be analogous to the provisions dealing with sides of rivers, such a provision might have given regulatory authority over fishing areas in the River near the islands not to PN, but rather to the commission. There was no need to discuss any tribal authority over fishing or any other activity at any part of the Penobscot River, however, because, as noted, Section 6203(8) only lists the islands themselves as within the Reservation, and not any portion of the River or any natural resource right associated with the River.

Also illuminating is MIA § 6207(4), which addresses sustenance fishing within Indian reservations. 30 M.R.S. § 6207(4). This provision provides that "[n]otwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6." This provision was needed because, with the State owning the reservation land; with all land subject to the regulatory authority of the State under Section 6204; and with tribes generally treated like municipalities under Section 6206, because the intent was to give the tribes a right to sustenance fishing within their reservations, the bestowal of such a right needed to be explicit. That right to sustenance fishing pursuant to Section 6207(4), however, confers no

authority to regulate fishing in the Penobscot River or of non-tribal fisherman. While PN's Reservation is defined as certain specified islands within the Penobscot River, it does not include the bed of the river or the water contained therein, and any sustenance fishing pursued by PN members in the river must occur from the Reservation islands. Sustenance fishing rights (subject to ultimate IFW authority) exist only within "the boundaries of [the tribes] respective Indian reservations." 30 M.R.S. § 6207(4). For PN, that boundary allows for fishing in ponds on certain islands and fishing in the Penobscot River from the banks of the Reservation islands, but the boundaries of the Reservation do not extend into the Penobscot River itself.

In sum, with the understanding that PN's Reservation includes islands in the Penobscot River but not any portion of the River itself, the provisions set forth in Section 6207 make sense: they specifically set out the tribes' rights to regulate fishing, expressly limited in Section 6207(1) to bodies of water less than ten acres in size wholly within their territories. If PN somehow had gained some regulatory ability over non-tribal members as to fishing or other natural resource rights on all or some portion of the vast Penobscot River, Section 6207 would have addressed that situation, through express delegation of regulatory authority to the commission or otherwise in Section 6207(3) or elsewhere.

More broadly, nowhere in the Settlement Acts is there any support for PN's apparent position that (1) its Reservation includes the entire Main Stem of the River (if not more); and (2) PN alone, not the commission or the State, may regulate rights such as fishing throughout whatever portion of the River PN claims is included in its Reservation.[7]

[7] Because the legal theory behind PN's claim of the main stem is unclear, it is unknown whether its theory, if accepted, would extend PN's exclusive regulatory authority beyond the 60-mile main stem area.

II. Because the Settlement Acts gave PN no authority to regulate non-tribal activities on or in the Penobscot River, this Court should issue a declaratory judgment so ruling.

It is unclear from PN's allegations what legal theory PN is pursuing when it claims that the River is located within and is a part of the Reservation, predicating an ability to regulate.

To the extent PN posits that it retained some aboriginal title to the River, as noted above, PN's claims of aboriginal title were extinguished under the Settlement Acts; replaced, aside from monetary consideration, with rights to self-governance and specified rights associated with its Reservation and Indian territory.

Perhaps PN is arguing that it somehow retained aboriginal title to some portion of the Penobscot River because, in its view, it never transferred title over the islands to the State within the meaning of "transfer" in MICSA and MIA, and the retention of this title gives it ownership and regulatory rights over the main stem. This argument, however, would have no basis. First, the fundamental point of the Settlement Acts was to extinguish all tribal claims to aboriginal title. Second, it is acknowledged at least by the United States that PN lacks fee ownership over the islands (*see supra* at 9). Third, ownership over the islands could not give PN ownership rights over the entire River or the 60-mile main stem. Fourth, if the islands had not been transferred, then there would have been no reason to define the islands as being included in the Reservation, with specific statutory rights associated with that inclusion, as opposed to separate aboriginal rights outside the unique Indian-State relationship set forth in the Settlement Acts. And fifth, under such a scenario, there would be some dividing line somewhere in the River itself between aboriginal Indian ownership and authority and State ownership and authority, which the Settlement Acts would have noted. Given the precision by which MIA notes the parameters of

Indian territory,[8] and how fishing rights are determined not by the tribes but by the commission even when a river lies entirely within Indian territory, it defies credulity to suggest that excluded from treatment in the Settlement Acts was some exclusive aboriginal ownership and control over some amorphous and undefined area of the River.

Alternatively, if PN is basing its claim to regulatory authority over some portion of the Penobscot River not on some alleged retained aboriginal title, but rather on something in the Settlement Acts that purportedly includes the River within its Reservation, nothing in the Acts so provides. Nothing in the Settlement Acts transfers any title in any land or natural resources to PN. Nothing in the Settlement Acts provides that PN may regulate, let alone has the exclusive regulatory authority it asserts, over the Penobscot River. Instead, the Settlement Acts define PN's Reservation and Indian territory – neither of which descriptions includes any reference to including the Penobscot River or any portion thereof – then describe various rights associated with the Reservation and Indian territory. And where the reservations and Indian territories of the tribes include shared bodies of water, the Settlement Act explains how a joint commission, with ultimate power in the IFW, holds authority, not the tribes.

What matters is what the Settlement Acts actually say. Nothing in them provides that any portion of the Penobscot River forms a part of PN's Reservation, or that PN may regulate the non-tribal use of any part of that River.

[8] *See, e.g.*, 30 M.R.S. § 6203(8) (2d and 3d paragraphs, referencing, *e.g.*, "a certain parcel of land located in Argyle, Penobscot County consisting of approximately 714 acres known as Argyle East Parcel and more particularly described as Parcel One in a deed from the Penobscot Indian Nation to the United States of America dated November 22, 2005 and recorded at the Penobscot County Registry of Deeds in Book 10267, Page 265").

CONCLUSION

For the reasons stated above, this Court should declare that PN's Reservation does not extend to any portion of the waters of the Penobscot River, and that PN has no regulatory authority over the Penobscot River. PN's Reservation, to which it does not hold title, includes certain islands in the Penobscot River, and PN may exercise authority over those islands as set forth in the Settlement Acts. But nothing in the Settlement Acts, or any other source, gives PN authority to regulate the Penobscot River itself.

DATED: April 13, 2015

/s/ Catherine R. Connors

Catherine R. Connors
Matthew D. Manahan
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100

Attorneys for State Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015, I electronically filed the foregoing document entitled Motion of State Intervenors for Judgment on the Pleadings and Incorporated Memorandum of Law with the Clerk of Court using the CM/ECF system which will send the notification to all counsel of record.

DATED: April 13, 2015

/s/ Catherine R. Connors
Catherine R. Connors

PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100

Attorney for State Intervenors