UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION, Plaintiff, UNITED STATES OF AMERICA, on its own behalf, and for the benefit of the Penobscot Nation, Proposed Plaintiff-Intervenor, v. THE STATE OF MAINE; JANET T. MILLS, Attorney General for the State of Maine; CHANDLER WOODCOCK, Commissioner for the Maine Department of Inland Fisheries and Wildlife; and JOEL T. WILKINSON, Colonel for the Maine Warden Service; each in his/her official capacity, Defendants, CITY OF BREWER, et al. Intervenor-Defendants.	Civ. No. 1:12-cv-00254-GZS

UNITED STATES' MOTION FOR SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW

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The United States hereby moves for summary judgment pursuant to Rule 56 based on the memorandum of law below and the United States' and Penobscot Nation's Joint Statement of Material Facts on the claim raised in its Complaint-in-Intervention that the Penobscot Reservation includes some or all of the Main Stem of the Penobscot River. *See* ECF No. 58.

I. INTRODUCTION

In 1980, Congress enacted the Maine Indian Claims Settlement Act ("MICSA"), 25 U.S.C. §§ 1721-35, and in doing so settled claims that Maine and Massachusetts had acquired tribal land in violation of the Indian Trade and Intercourse Act ("ITIA"), 25 U.S.C. § 177. The MICSA removed a cloud on the validity of title to two thirds of Maine by ratifying what otherwise were unlawful acquisitions of Indian lands by the States of Massachusetts and Maine from the Penobscot Nation ("Penobscot" or "Nation") and the Passamaquoddy Tribe ("Passamaquoddy" or "Tribe") and other Maine Indian tribes. Besides relieving the State of Maine from potentially enormous liability, the MICSA also ratified the Maine Implementing Act, ("MIA"), Me. Rev. Stat. Ann. tit. 30, §§ 6201-14, a state statute that enacted the terms of a settlement agreement negotiated by the parties to the land claims. Maine again benefitted enormously, because not only was the cloud on title to much of the State lifted, but the MIA enabled the State to obtain broader State jurisdiction over Indian lands than Maine could otherwise exercise under Federal Indian law. Moreover, the United States shouldered the fiscal burden of compensating the Maine Indians for their lands lost to Massachusetts and Maine's unlawful acquisitions, establishing funds worth $ 81.5 million to benefit the tribes, including a $ 54.5 million Maine Indian Land Acquisition Fund with which new lands could be purchased for the Penobscot, Passamaquoddy, and the Houlton Band of Maliseet Indians ("Houlton Band"). 25 U.S.C. § 1724.

For its part, the Nation accepted the terms of State jurisdiction over its lands to the extent established in the MIA, but also retained important aspects of its own inherent sovereignty, including confirmation both of its existing Reservation lands, other real property, and a right on the part of its members to engage in sustenance fishing on their Reservation largely free of State interference or regulation. As a riverine tribe whose Reservation largely consists of over a hundred islands in the Penobscot River, it was or should have been clear to everyone in the negotiations that led to the MIA and to Congress ratifying it, that the Nation's sustenance fishing right would be exercised in the Penobscot River ("River") because there was simply no other practical place to exercise it. The MIA limits the scope of the Nation's sustenance right to its Reservation, Me. Rev. Stat. Ann. tit. 30, § 6207(4), but because all the parties understood the Nation's Reservation as encompassing some or all of the Penobscot River in the area of its islands (the "Main Stem")[1], that limitation was acceptable to the Nation.

That Maine understood the Nation's Reservation included the Main Stem is shown by the fact that in 1988, eight years after enactment of the MIA and MICSA, the State's Attorney General opined that Nation sustenance fishers in the Penobscot River were not subject to State regulation. Maine adhered to that position through the 1990s, when the State asserted in pleadings before the Federal Energy Regulatory Commission ("FERC") that portions of the River fell within the Nation's Reservation and affirmed that the Nation could exercise its sustenance fishing right in the River.

In 2012, however, Maine changed course, abruptly altering its interpretation of the MIA and the MICSA. On August 8, 2012, the State Attorney General issued an Opinion explaining

[1] The parties have stipulated that the Main Stem "means that portion of the Penobscot River from Indian Island north to the confluence of the East and West Branches of the Penobscot River, and includes the area from bank-to-bank unless otherwise noted" and that it is approximately 60 miles long. ECF No. 110 at 6814 (Stipulations Nos. 3-4).

that the State would treat the Nation's Reservation as ending at the uplands of its islands, and in correspondence with the Nation that same day, the Attorney General advised the Nation to bring suit if it disagreed with the State's newfound view. The State is now seeking to avoid honoring a crucial part of the bargain it struck with the Nation in exchange for the Nation relinquishing claims to significant lands in Maine. Worse, the State now seeks to read the MIA in a fashion which actually diminishes the Nation's existing Reservation, as well as the sustenance right and other rights that flow from the Reservation boundary, to the State's benefit.

In order to protect its reservation boundary and its right to sustenance fish under the MICSA and the MIA (collectively, "the Settlement Acts"), the Nation brought the present suit. The United States intervened to vindicate its interests both in protecting tribal rights and the integrity of tribal lands, as well as in the proper interpretation and enforcement of federal law (in the form of the Settlement Acts). Accordingly, the United States now moves for summary judgment, seeking a declaration that the Nation's Reservation encompasses some or all of the Main Stem of the Penobscot River and that the Nation may exercise its sustenance fishing right within the River.

II. BACKGROUND

A. The Penobscot Nation.

The Penobscot Indians take their name from the river basin they occupied. SMF ¶¶ 1-2. [2] As noted by Congress at the time of the Settlement Acts, the Penobscot are "riverine in . . . land-

[2] For purposes of this brief, "SMF" stands for the Statement of Material Facts in Support of the United States' and Penobscot Nation's Motions for Summary Judgment (ECF No. 119). References to documents on the Joint Stipulated Exhibit List (ECF No. 102) are by exhibit number from the list (Exh.) and then ECF number and then ECF page I.D., in the form: "Exh. XX, ECF No. XX at XX." References to documents submitted to the Court on the Public Document disk identify first the document number on the disk (as found on the Public Document

ownership orientation," with the Penobscot River forming the "center" of their aboriginal territory. S. Rep. 96-957 at 11; P.D. 282 at 5939. The Nation's historic way of life was organized around the ecosystem of the River, with their principal villages historically located on islands in the River or along its banks. SMF ¶¶ 8-10. The River provided important sustenance in the form of fish and its other wildlife, as well as a means of travel by which the Nation could access the Atlantic Ocean and move throughout its aboriginal territory. SMF ¶¶ 9-10. The River was central to the Nation culturally as well as materially: Professor Harald E. L. Prins explains that the Penobscot had historically "intimate connections to their river and its wildlife . . . . their mode of subsistence and material culture, their social organization and family totems, as well as mythological worldview, all continued through the treaty period in question."[3]

During the Revolutionary War, the Penobscot aided the colonists, and Massachusetts in turn guaranteed the Penobscots would be secure in their possession of the lands along the River, extending six miles out on either side. SMF ¶¶ 16-17. After the war, however, Massachusetts was burdened by debt and hoped acquiring and then selling Penobscot lands would prove lucrative. SMF ¶ 19. The Penobscots resisted, and three successive efforts to arrive at a land cession treaty, in 1784, 1786, and 1788, failed. SMF ¶ 20. In 1790 Congress passed the ITIA, 1 Stat. 137, which provided that "no sale of lands made by any Indians, or nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138. The

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Index, ECF No. 112-1) and then the page number superimposed on all the documents on the disk in the form: "P.D. X at XX."

[3] "The Penobscot Nation's Reservation of the Penobscot River Accompanying Its Reservation Islands in the Penobscot River in the 1796 and 1818 Treaties with Massachusetts and in the 1820 Treaty with Maine" ("Prins"), Exh. 288, ECF No. 105-88 (3707-3812) at 3745. Professor Prins is University Distinguished Professor of Anthropology at Kansas State University.

Act, as amended, remains in effect today. *See* 25 U.S.C. § 177; *Oneida Indian Nation of N.Y. v. Oneida County, New York*, 414 U.S. 661, 668 (1974) (ITIA "has remained the policy of the United States to this day").

"Despite Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government," *Oneida County, N.Y. v. Oneida Indian Nation of New York*, 470 U.S. 226, 232 (1985), Massachusetts continued pressing the Penobscots to cede land and in 1796, without federal approval, acquired a portion of Penobscot lands "on both sides of the River Penobscot." Treaty Between the Penobscot and Massachusetts, August 8, 1796, P.D. 6 at 34. The Nation, however, reserved to itself the islands in the River in the ceded area. A second treaty was concluded in 1818, again without federal approval and thus in violation of federal law, for the balance of the Nation's lands "on both sides of the Penobscot river," with the Nation again reserving islands in the River to itself and further retaining four townships of land on the side of the River. Treaty Between the Penobscot and Massachusetts, June 29, 1818, P.D. 8 at 44. In language that would have been superfluous if Massachusetts had not understood that the Nation retained control of the Penobscot River, the State provided in that Treaty that the "citizens of said commonwealth shall have a right to pass and repass any of the rivers, streams, and ponds" retained by the Penobscot. *Id.* at 46. In 1820, Maine separated from Massachusetts to become an independent State and that same year entered into a treaty with the Penobscot whereby it assumed Massachusetts' responsibilities under the Treaty of 1818. SMF ¶¶ 40-41. Subsequently, in 1833, Maine acquired the four townships reserved by the Penobscots along the River in 1818, again in violation of federal law. S. Rep. 96-957 at 12; P.D. at 5940.

B. The Maine Landclaims.

The validity of Massachusetts and Maine's treaties under federal law was not formally challenged until the 1970s. Until that time, the State asserted full jurisdiction over Indian affairs in Maine and the federal government did not formally recognize the Maine tribes. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). In the early 1970s, the Passamaquoddy Tribe initiated litigation that led to a judicial holding that the ITIA protected the lands of Maine Tribes and, based on that Act, the United States retained a trust responsibility to protect lands acquired in violation of federal law. *Id.* As a result, the United States brought actions on behalf of the Penobscot and the Passamaquoddy. SMF ¶ 68 (protective action brought on behalf of the Nation on July 14, 1972); *Joint Tribal Council*, 528 F.2d at 373 (protective action brought on behalf of Tribe in 1972 in wake of district court order requiring same).

Given the implications of land claims involving "nearly two-thirds of Maine's land," *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996), President Carter appointed retired Georgia Supreme Court Justice William Gunter to examine the merits of the case. S. Rep. 96-957 at 13; P.D. 282 at 5941. Gunter recommended settlement, and after two years of negotiations, in 1980, the parties arrived at a mutually agreeable settlement. *Id.* After the Penobscot, the Passamaquoddy, and the Houlton Band approved the agreement, the Maine legislature adopted the agreement in a state law, the MIA, Me. Rev. Stat. Ann. tit. 30, §§ 6201-14. S. Rep. 96-957 at 13; P.D. 282 at 5941. Since only Congress (pursuant to its plenary powers under the Indian Commerce Clause) can modify jurisdictional relationships between states, Indian tribes, and the federal government, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978), or transfer title to tribal lands, 25 U.S.C. § 177, the MIA required Congressional

ratification. In 1980, Congress enacted the MICSA, 25 U.S.C. §§ 1721-35, which expressly "approved, ratified, and confirmed" the jurisdictional arrangement contained in the MIA. 25 U.S.C. § 1725(b)(1).

C. Statutory Background: the Settlement Acts.

The MICSA was designed to settle pending land claims against Maine. With regard to the Penobscot, this meant principally the lands lost in the 1796 and 1818 treaties with Massachusetts. S. Rep. 96-957 at 12; P.D. 282 at 5940 (noting that the Nation "lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818"). The MICSA extinguishes claims premised upon unlawful transfer of tribal aboriginal lands, 25 U.S.C. § 1723, but at the same time provides federal funds to enable the tribes relinquishing their claims to reconstitute their land base. 25 U.S.C. § 1724.

Through the MICSA, Congress further established a unique jurisdictional relationship between Maine tribes and the State. The MICSA provides generally for state civil and criminal jurisdiction over Indians and their lands, *id.* §1725(a), but for the Penobscot and the Passamaquoddy, adopts and ratifies the MIA as determining the jurisdictional relationship between the State and those tribes. *Id.* § 1725(b)(1). The MICSA also limits the application of federal laws benefitting Indians within Maine by making federal law provisions addressed to Indians which affect or preempt state jurisdiction inapplicable. *Id.* § 1725(h). At the same time, the MICSA affirms that the Penobscot, the Passamaquoddy, and the Houlton Band are federally recognized tribes entitled to all the benefits of such recognition. *Id.* § 1725(i). The MICSA further required transfer of all tribal funds held in trust by the State to the Secretary of the Interior, *id.* § 1730, and released the State from any existing obligations towards the Maine tribes resulting from prior treaties and agreements with the Indians, *id.* § 1731. Finally, while the

MICSA makes the ITIA inapplicable to the Nation, *id.* § 1724(g)(1), it re-establishes a federal restraint on alienation of Nation territory subject to exceptions specified in the Act. *Id.* § 1724(g)(2).

One of the MICSA's chief purposes was its ratification of the settlement terms agreed upon by the State, the Passamaquoddy, and the Penobscot which was enacted by the State legislature in the form of the MIA. The MIA defines the Penobscot Indian Reservation as comprising

> 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, also known as Old Town 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.

Me. Rev. Stat. Ann. tit. 30 § 6203(8). The "agreement" referenced in the statute is the June 29, 1818 treaty between the Penobscot Nation and Massachusetts in which the Nation ceded "all the lands they claim, occupy and possess by any means whatever on both sides of the Penobscot River," while reserving to themselves "four townships of land" and "all the islands in the Penobscot river above Oldtown and including said Oldtown island." P.D. 8 at 44-45.

The MIA also defines the Penobscot Nation's territory which consists of the Penobscot Indian Reservation, Me. Rev. Stat. Ann. tit. 30 § 6205(2)(A), as well as the first 150,000 acres of newly acquired land held in trust by the United States within a specifically delimited area, *id.* § 6205(2)(B). The MIA provides for the taking of reservation land for public uses under state law if certain narrow conditions are met, but also provides for the replacement of such lands with lands of equal value "contiguous to the affected Indian reservation," and construes the Penobscot River as part of the Nation's Reservation for purposes of determining which replacement lands are contiguous to the Nation's Reservation. *Id.* § 6205(3)(A).

The MIA provides that state law generally applies to Indian lands in Maine, *id.* § 6204, but establishes a number of important exceptions. The Nation and the Passamaquoddy Tribe have the powers of a municipal government within their lands, and internal tribal matters, including membership, are not subject to State regulation. *Id.* § 6206(1). The Nation and the Tribe exercise exclusive jurisdiction over violations of tribal ordinances by tribal members within the confines of their respective territories. *Id.* § 6206(3). They may also regulate, within their respective Territories, the "[h]unting, trapping, or other taking of wildlife," and the taking of fish for any purpose within ponds of ten acres or less falling wholly within the Nation's Territory. *Id.* § 6207(1), (2). Such regulations apply equally to Nation members and non-members. *Id.* § 6207.

The MIA also established the Maine Indian Tribal-State Commission ("Commission"). *Id.* § 6212(1).[4] The Commission may promulgate fishing regulations governing rivers or streams falling within Indian Territory as well as sections of rivers where one bank falls within Indian territory for a length of half a mile or more, as well as ponds where half their area or more falls within Indian territory. *Id.* § 6207(3)(A-C). The Commission is to consider non-Indian interests in fishing as well as Indian interests, including "the needs or desires of the tribes to establish fishery practices for the sustenance of the tribes." *Id.* § 6207(3).

The MIA delineates the scope of tribal court jurisdiction over Indians. In the case of the Penobscot Nation, it provides for exclusive tribal jurisdiction over criminal offenses involving only Indians committed on the Reservation where the maximum term of imprisonment is not more than a year and the maximum fine does not exceed $5,000. *Id.* § 6209-B(1)(A). The Tribal

[4] The Commission consists of 13 members, with six appointed by the State's Governor, and six appointed by the Maine tribes (two by the Nation, two by the Passamaquoddy Tribe, and two by the Houlton Band). *Id.* The chair is appointed by a majority vote of the Commission members. *Id.* § 6212(2).

Court also has jurisdiction over certain juvenile crimes committed on the Reservation as well as small claims civil actions involving only Indians. *Id.* §§ 6209-B(1)(B, C). The MIA provides exclusive authority to tribal law enforcement officers to enforce on reservation the laws committed to tribal court jurisdiction. *Id.* § 6210(1). Within their Indian territories, tribal law enforcement officers have exclusive jurisdiction to enforce tribal ordinances passed pursuant to Section 6206 and tribal fish and wildlife regulations. *Id.* § 6210(1). Within their Indian territories, tribal law enforcement shares joint authority with State law enforcement to enforce regulations promulgated by the Commission. *Id.* § 6210(2). [5]

Finally, and most importantly for present purposes, the MIA provides the Nation (and the Passamaquoddy Tribe) a right to engage in sustenance fishing largely free of state interference on Reservation:

> Notwithstanding 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.

Id. § 6207(4). Subsection 6 provides a mechanism for the Maine Commissioner of Inland Fisheries and Wildlife to adopt remedial measures where there is a reasonable likelihood that fish or wildlife stocks may be depleted. *Id.* § 6207(6). For purposes of Section 6207, the term "fish" is defined as "a cold blooded completely aquatic vertebrate animal having permanent fins, gills, and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water." *Id.* § 6207(9). Thus the definition

[5] To the extent that the Tribes are authorized to regulate the activities of non-Indians, such as on-reservation hunting, MIA provides that "[t]he State shall have exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation." Me. Rev. Stat. Ann. tit. 30 § 6206(3).

expressly includes Atlantic salmon, an anadromous species of fish in the River, as well as eels, a catadromous species in the River.

D. Procedural Background.

On August 8, 2012, the State Attorney General transmitted an Attorney General Opinion regarding the division of regulatory jurisdiction between the Nation and the State to Penobscot Nation Chief Kirk Francis. Exh. 278, ECF No. 105-78 at 3568. That Opinion stated (for the first time and contrary to the transmittal letter's assertion that the position was "long-standing," *id.*) that the Penobscot "River itself is not part of the Penobscot Nation's Reservation, and therefore is not subject to its regulatory authority or proprietary control." *Id.* at 3570. The transmittal letter advised Governor Francis that "[t]o the extent there is disagreement, I believe it is important that the matter be resolved in an appropriate forum." *Id.* at 3568. In response, the Penobscot Nation brought suit against the Attorney General and other State officers in order to protect its sustenance fishing and other rights in the Main Stem of the River. ECF No. 8 (Second Amended Complaint).

On June 6, 2013, the Court granted intervention as defendants to a collection of towns and companies situated on the River and holding National Pollutant Discharge Elimination System permits ("NPDES Intervenors"). ECF No. 24 (Order granting intervention). On August 16, 2013, the United States moved for intervention, both in its own right and on behalf of the Nation as its federal trustee, in order to ensure that the Nation's reservation boundaries are honored and that it can fully exercise its sovereign powers within those boundaries in accord with the framework set forth in the Settlement Acts. ECF No. 33. The Court granted the United States intervention on February 4, 2014, and subsequently, the State was joined as a Defendant. After several extensions, expert discovery closed on October 15, 2014. ECF Nos. 79 (State

Motion to Extend Discovery); 80 (Order granting extension). On February 5, 2015, the Court established the briefing schedule for the present motions. ECF No. 98 (Feb. 5, 2015 Order).

III. ARGUMENT

A. Summary of Argument.

The Settlement Acts enacted and gave federal approval to the terms of a settlement compromise between the State, the Penobscot Nation, and the United States. The State, for its part, benefitted from the Nation's relinquishment of land claims against it while the Nation benefitted from provisions permanently protecting its existing reservation by providing that Reservation with a federal restraint against alienation. The State also benefitted from provisions allowing it forms of jurisdiction over the Nation and its lands that most other States lack over Indians tribes and lands within their boundaries. The Nation, in turn, did not relinquish critical attributes of its own sovereignty going forward, like control over internal tribal affairs and, importantly, the right to engage in and regulate – largely free of State interference – its traditional and culturally significant practice of sustenance fishing. The State now seeks to read the terms of the Settlement Acts to deprive the Nation in large part of the benefit of the bargain it struck in acceding to the land claim settlement by arguing that the MIA's definition of the Nation's Reservation excludes in its entirety the Penobscot River. Not only does this contention seek to strip the Nation of a portion of its Reservation, it also, for all practical purposes, deprives the Nation of any place to exercise its sustenance fishing right.

The definition of "Reservation" in the MIA is silent on ownership of the River: the definition states that the Nation is retaining the islands in the River that it reserved in its 1818 Treaty with Massachusetts. But the Supreme Court has made clear that a reference to islands as constituting a reservation can include the surrounding waters as well, and the legislative history

in this case demonstrates that this was the intent here. Congress confirmed in the Settlement Acts the lands that the Nation had never ceded to the State and that were thus not at issue in the land claims. Moreover, Congress considered the concessions made by the Maine Indians to the State in terms of jurisdiction but still considered the bargain fair because, among other things, it noted that the Settlement affirmed tribal sovereignty by acknowledging and guaranteeing the Tribes' sovereign right to sustenance fish free of State interference. A reading of the MIA, such as the State's recent interpretation, that deprives the Nation's sustenance fishing right of any practical value thus runs contrary to the intent of Congress in approving the MIA and enacting the MICSA.

To determine what lands the Nation retained as its Reservation, this Court must look to the 1818 Treaty with Massachusetts and its predecessor, the 1796 Treaty. In both treaties, the Nation was ceding lands to the State and the relevant interpretive canons require this Court to construe them liberally in the Indians' favor, on terms that the Indians negotiating the Treaties would have understood, and in accordance with the contemporaneous common law understandings to the extent consistent with the understanding of the Indians. Neither treaty ever mentions the River itself; the cession in each case concerns lands on both sides of the River. Furthermore, although in each case the Nation refused to give up its islands in the River, the negotiation history of each treaty is silent as to whether the River itself is being ceded. Professor Prins, an expert with a long history of studying Indians and the Penobscot in particular, concludes that the silence on the issue derives from the fact that Massachusetts negotiators, eager to secure the lucrative lands along each side of the River, knew raising the issue of the River itself would likely cause the Nation to cease negotiations. Moreover, under the relevant canons of interpretation, the cession of Indians rights and property in a treaty must be express, not

implied. Finally, Dr. MacDougall, an historian who has spent her career studying the Penobscot people and their language, examined the post-treaty events and found evidence of the Nation repeatedly asserting their rights to, and seeking protection for, their fishery in the River – as well as evidence of State recognition of the Nation's rights in the River.

In the wake of the Settlement Acts, all parties conducted themselves with a shared understanding that the Penobscot Nation's sustenance fishing right could be – indeed, would have to be – exercised in the Penobscot River because portions of the River fall within the bounds of the Reservation. The State's current position that the River is entirely outside the Reservation, thus denying that the Nation's sustenance fishing right extends to the River, is novel. In 1988, the State Attorney General issued an Opinion that Penobscot sustenance fishers in the River were not subject to State fishing regulations because of the MIA. And in the 1990s, even while contending that the Nation ceded the River in its treaties with Massachusetts, the State still took the position that the Nation, as a riparian landowner on the River, owned out to the thread of the River's channel on each side of each of its islands. As for the United States and the Nation, they have both been unwavering in their view that the Main Stem falls within the bounds of the Nation's Reservation.

Finally, even if there are factual issues that prevent the Court from granting summary judgment on the claim that the entire Main Stem falls within the bounds of the Reservation, the Court should nevertheless as a matter of law hold that the Nation, as an island owner in the River, is entitled to the same ownership rights as any other riparian landowner under Maine law and thus at a minimum owns to the thread or middle of the River on each side of its islands.

B. Standard for Summary Judgment.

Summary judgment is appropriate "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Atwater v. Chester*, 730 F.3d 58, 63 (1st Cir. 2013) (internal quotations omitted). Where parties cross-move for summary judgment, "the standard does not change; [the Court] view[s] each motion separately and draw[s] all reasonable inferences in favor of the respective non-moving party." *Bonneau v. Plumbers and Pipefitters Local Union 51 Pension Trust Fund ex. rel.*, 736 F.3d 33, 36 (1st Cir. 2013).

C. The Settlement Acts include the Main Stem in the Definition of the Penobscot Reservation.

The question before this Court is whether the Penobscot Reservation, which consists in large part of islands located in the Main Stem of the River, encompasses some or all of the Main Stem itself or, as the State asserts, ends at the upland of each and every one of the over one hundred islands in the Main Stem. The MIA defines the Penobscot Indian Reservation as comprising

> 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, also known as Old Town 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.

Me. Rev. Stat. Ann. tit. 30 §6203(8).

The State's position, as articulated in an Opinion of the Attorney General dated August 8, 2012, is premised upon a purported plain language reading of the statute that construes the absence of any express mention of the Penobscot River against the Nation. However, interpreting statutes involves more than "culling selected words or sentences from a statute's text and inspecting them in an antiseptic laboratory setting," because "a court engaged in the task of

statutory interpretation must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language." *Cablevision of Boston, Inc. v. Public Improvement Com'n of City of Boston*, 184 F.3d 88, 101 (1st Cir. 1999) (internal quotations and brackets omitted); *see also Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 46 (1st Cir. 2009) (interpreting a statute requires a court to "consider its plain text and design, structure, and purpose") (internal quotations omitted); *Simmons v. Galvin*, 575 F.3d 24, 35 (1st Cir. 2009) ("As the meaning of statutory language, plain or not, depends on context, we must look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy") (internal quotations and citations omitted).

Starting with the text itself, reference to islands alone without more does not plainly exclude the waters surrounding those islands. The Supreme Court has explained that defining a reservation in terms of islands leaves open – rather than forecloses – the question of whether the reservation is confined to the bare uplands of the islands. In *Alaska Pacific Fisheries v. United States*, the Supreme Court examined comparable language defining the reservation of the Metlakahtla Indians as the Annette Islands without mentioning the surrounding waters.[6] 248 U.S. 78 (1918). The Court was unable to tell on the face of the statutory provision whether the Metlakahtla Reservation encompassed or excluded surrounding waters and thus resorted to the standard methods of statutory interpretation, looking to the purpose of Congress in establishing the Reservation. In so doing, the Court considered whether it made sense to establish an island reservation that had no rights in the surrounding waters, as well as considered the conduct of the

[6] The language Congress used was: "That until otherwise provided by law, the body of lands known as the Annette Islands situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians . . . ." Act of March 3, 1891, c. 561, 26 Stat. 1101 (quoted at 248 U.S. 78, 86 (1918).

parties after the enactment of the statute. *Id.* at 88-90. The Court concluded that "the geographical name [of the islands] was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland – in other words, as descriptive of the area comprising the islands." 248 U.S. 78, 89 (1918) (construing "the body of lands known as the Annette Islands"). *See also United States v. Aam*, 887 F.2d 190, 195 (9th Cir. 1989) (looking past a narrow construction of treaty language in which "the tidelands were not expressly included within the description of the reservation boundaries," in order to "conclude . . . that the tidelands may arguably have been intended to be a part of the reservation"). This Court should adopt the same approach here.

Since the statute at issue concerns Indians, the Court in *Alaska Pacific* applied the Indian canons of construction to its interpretation of the statute, just as this Court must. *Id.* at 89. Those canons require that both statutes and treaties benefitting Indians be liberally construed in favor of the Indians. *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit") (internal citations omitted); *Alaska Pacific*, 248 U.S. at 89 ("statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"). Conversely, "congressional intent to extinguish Indian title must be plain and unambiguous." *Oneida*, 470 U.S. at 247-48 (internal quotations omitted). The First Circuit has likewise made clear that the Indian canons apply to the Settlement Acts, noting in the context of analyzing the MIA that "special rules of statutory construction obligate us to construe acts diminishing the sovereign rights of Indian tribes strictly, with ambiguous provisions interpreted to the Indians' benefit." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999)

(internal ellipses, quotations, brackets and citations omitted). Moreover, in examining the MIA's definition of the Penobscot Reservation, the First Circuit has departed from the State's narrow gloss by reading it as "defining reservation lands as those reserved to the tribes by agreement with Massachusetts and Maine and not subsequently transferred." *Maine v. Johnson*, 498 F.3d 37, 47 n. 11 (1st Cir. 2007).

In interpreting the Settlement Acts, the intent of Congress controls over the intent of any of the other settling parties. It is elementary that, when dealing with federal law, a court seeks to effectuate the legislature's intent. *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960) ("the primary function of statutory construction is to effectuate the intent of Congress"); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 788 (1st Cir. 1996) ("The chief objective of statutory interpretation is to give effect to the legislative will."). The MIA is a state statute, but Congressional intent controls with regard to its terms because absent Congressional ratification, the provisions of the MIA would be outside the legislative capacity of the State. *See Fellencer*, 164 F.3d at 709 (noting that "Congress' authority to legislate over Indian affairs is plenary and only Congress can abrogate or limit an Indian tribe's sovereignty"). The MIA, in other words, is to be construed (where statutory ambiguity warrants a departure from the plain text) not as the State might have intended its provisions but as Congress understood (and thus intended) it when it enacted the MICSA and through the MICSA gave effect to the MIA by ratification. *See id.* ("Because [the MIA] was adopted by the federal Settlement Act, the meaning of that [statute] raises a question of federal law."); *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997) (interpreting MIA provision presents a question of federal law). Congress also provided that where provisions of the MICSA and the MIA conflict, the MICSA controls. 25 U.S.C. § 1735(a). Moreover, in interpreting provisions of the MIA, the First Circuit has looked to the

federal legislative history to shed light on "the intent of Congress in the adoption of the Settlement Act" as well federal Indian law because "[w]e have long presumed that Congress acts against the background of prior law." *Fellencer*, 164 F.3d at 712 (internal quotations omitted). *See also Akins*, 130 F.3d at 488-89 (resorting to federal legislative history to resolve statutory ambiguity of the MIA); *Maine v. Johnson*, 498 F.3d 37, 43-45 (1st Cir. 2007) (construing the MIA by examining the statute's language and federal legislative history).

In enacting the MICSA, Congress carefully examined the MIA and provided a section by section analysis of the statute comparable to that performed on federal bills. S. Rep. 96-957 at 35-44; PD. 282 at 5963-72. Congress recognized that the MIA was different from typical state legislation insofar as it codified an "agreement between the Tribe and Nation with the State of Maine with respect to the jurisdiction of the Tribe, the Nation, and the State and the legal status of these Tribes under State law." *Id.* at 18; 5946. Through the MICSA, the United States joined the settlement and before doing so, Congress considered and addressed a variety of concerns that had been raised about the settlement and discussed specific provisions of the MIA in assuaging those concerns. *Id.* at 14-17; 5942-45. The entire legislative record shows Congress held several hearings and took lengthy testimony and evidence from representatives of the State, the Nation and Tribe, officers of the United States' Executive Branch and others with the goal of determining whether enacting the MICSA and ratifying the MIA was appropriate.

Accordingly, as the First Circuit has noted, the MIA is to be construed as a federal statute subject to the canons applicable to such statutes. *Fellencer*, 164 F.3d at 709. Specifically, because it is Congress and not the State of Maine that has authority to permit state jurisdiction over the Nation and the Tribe and to ratify violations of the ITIA, the extent of State jurisdiction permitted over the Nation and Tribe and their lands are federal law questions that are construed

"strictly" in favor of the Nation and Tribe. *Id*; *see also State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (explaining that, when interpreting settlement acts, "acts diminishing the sovereign rights of Indian tribes should be strictly construed," "given Congress's fortunate penchant for great clarity when expressing its intent in this area"). In other words, if it is not clear that Congress intended to confine the Nation's Reservation to the uplands of its islands, the Court cannot draw that inference.[7]

1. The purpose of the Acts confirm that the Nation retained the Main Stem. Congress intended, through the Settlement Acts, to protect the Nation's surviving Reservation lands. Through the MICSA, Congress in effect ratified the otherwise unlawful State treaties of 1796 and 1818. 25 U.S.C. §1723 (transfers of land by Penobscot Nation "shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including but without limitation the Trade and Intercourse Act of 1790"). At the same time, in adopting and ratifying the definition of the Penobscot Nation's Reservation as set forth in the MIA, *id.* §1722(i), Congress also confirmed to the Nation those lands that it had not ceded in its treaties with Massachusetts and placed them under federal restraints on alienation, *id.* §1724(g)(2).

Both the House and Senate Committee Reports supporting the MICSA are clear on this point: "The settlement also provides that the Passamaquoddy tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them." H.R. Rep. 96-1353 at 18; P.D. 283 at 6008; S. Rep. 96-957 at 18; P.D. 282 at 5946. Elsewhere, the House Report

[7] Moreover, given that the State is arguing that the MIA in effect diminished the Nation's Reservation by omitting that portion of the Nation's Reservation encompassing the Main Stem, "the statutory language must establis[h] an express congressional purpose to diminish" the Reservation. *Hagen v. Utah*, 510 U.S. 399, 411 (1994) (internal quotations omitted; brackets in original).

explained that the settlement envisioned four kinds of Indian lands, two of which were "existing reservation land" either held by individuals or in common, and two of which were "newly-acquired tribal land" which would either be inside or outside of the statutorily defined Indian Territory. H.R. Rep. 96-1353 at15-16; P.D. 283 at 6005-06; S.Rep. 96-957 at 15; P.D. 282 at 5943.[8] Thus, in adopting and ratifying the MIA's definition of the Penobscot Reservation, Congress intended to confirm as reservation lands all those lands that had not been ceded in the agreements of 1796 and 1818: "The Maine Act recognizes and defines the existing Passamaquoddy and Penobscot 'Reservations.'" S. Rep. 96-957 at 35; P.D. 282 at 5963. Thus, to the extent the Main Stem was never ceded to Massachusetts, it was part of the Nation's "existing reservation land" and understood by Congress as included, along with the Nation's islands, in the reservation definition of the MIA's Section 6203(8).

2. The structure and design of the Acts confirms that the Nation retained the Main Stem. The structure of the Settlement Acts further demonstrates that the Nation's Reservation is not limited to the bare uplands of the islands because part of the consideration the Nation received for settling its land claims was an on-reservation sustenance fishing right. As the First Circuit has explained, "[i]n ratifying the Implementing Act, Congress sought to balance Maine's interest in continuing to exercise jurisdiction over the Nation's land and members (which it had done without interference for almost two centuries) with the Nation's 'independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.'" *Fellencer*, 164 F.3d at

[8] The MIA's legislative history similarly provides: "[t]he boundaries of the [Penobscot and Passamaquoddy] Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law." Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory"; P.D. 264 at 3971.

708 (quoting S. Rep. 96-957 at 29) (internal citations omitted). The MICSA affirms that the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band are federally recognized tribes entitled to all the benefits of such recognition. 25 U.S.C. §1725(i). At the same time, the MICSA provides generally for state civil and criminal jurisdiction over Indians and their lands, *id.* §1725(a). For the Penobscot Nation and the Passamaquoddy Tribe, the MICSA adopts and ratifies the MIA as determining the jurisdictional relationship between the State and those tribes, *id.* § 1725(b)(1), and the MIA similarly extends State civil and criminal jurisdiction over Indians and their lands, including federal trust lands. Me. Rev. Stat. Ann. tit. 30 §6204. Nevertheless, the MIA also guarantees some degree of tribal sovereignty, providing that the Penobscot Nation and the Passamaquoddy Tribe may govern themselves with the same powers as state municipalities and that, with regard to internal matters like tribal membership and with regard to the taking of wildlife within their Indian territories, they may act largely free of state regulation. Me. Rev. Stat. Ann. tit. 30 §§ 6203, 6206(1), 6207(1), (2).

Most importantly, the MIA provides for a sustenance fishing right within the bounds of both the Penobscot and the Passamaquoddy Reservations. *Id.* at § 6207(4). The MIA provides:

> Notwithstanding 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.

Id. Congress expressly noted this sustenance fishing right when addressing concerns about ratifying the settlement by enacting the MICSA. One such concern was that the settlement effectually destroyed the sovereignty of both the Penobscot Nation and the Passamaquoddy Tribe. S. Rep. 96-957 at 14; P.D. 282 at 5942 *Fellencer*, 164 F.3d at 708 ("Both the House and Senate sought to assuage the Nation's fears that the settlement undermined its sovereignty.").

Congress considered the various aspects of sovereignty protected by the MIA, noting that the sustenance fishing right was one of the "expressly retained sovereign activities" of the Tribes. *Id.* at 15; 5943. Another concern Congress addressed was that the settlement would effectually strip the tribes of their subsistence hunting and fishing rights. *Id.* at 16; 5944. The Senate Report explained that "[u]nder Title 30, Sec. 6207 as established by the [MIA], the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the newly acquired Indian territory as well." *Id.* at 16-17; 5944-45. Thus Congress enacted the MICSA and ratified the MIA on the understanding that the settlement protected both Tribes' right to engage in sustenance fishing.

Because the MIA's definition of "fish" "includes inland fish and anadromous and catadromous fish when in inland water," Me. Rev. Stat. Ann. tit. 30 § 6207(9), it is clear that the State and Nation contemplated the taking of Atlantic Salmon for sustenance purposes – and the Nation's only access to such migratory fish is through the River. SMF ¶¶ 5-6. Thus, as a practical matter, the cramped reading of the statutory description of the Nation's Reservation now supported by the State would effectively nullify Section 6207(4) of the MIA as it applies to the Nation because it leaves no practical place where the Nation's sustenance fishing right could be exercised. That in turn frustrates Congressional intent because not only did Congress intend for the Nation to be secure in its right to engage in sustenance fishing without State interference, but Congress intended that the overall settlement be fair to all the parties. The MICSA and the MIA as a whole constitute a delicate compromise whereby both the State and the Maine tribes made concessions and secured benefits. Congress ratified the MIA based on its understanding that its provisions allowing extension of certain state civil and criminal laws over the Nation and

its lands would be counterbalanced by the MIA's protection of certain sovereign activities, like the right to engage in and regulate sustenance fishing on the Nation's Reservation. S. Rep. 96-957 at 14-16. *See Catala Fonfrias v. United States*, 951 F.2d 423, 427 (1st Cir. 1991) ("We will not apply a tool of statutory construction to frustrate Congress' plain intention."); *United States v. Brown*, 500 F.3d 48, 60 (1st Cir. 2007) (rejecting statutory reading that "threatens to frustrate Congress's express intent").

The State's proposed interpretation of the Nation's Reservation boundary also violates the interpretive rule that one statutory provision is not to be read in a fashion that results in it nullifying or rendering superfluous other statutory provisions. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985) ("no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous"); *Massachusetts Assoc. of Health Maintenance Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999) (same). *Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) (same).[9] The State's view would strip the right of sustenance fishing of all meaning, by articulating a "right" that cannot be exercised.

Section 6205(3) of the MIA also indicates that Section 6203(8) should be read as including the Main Stem within the bounds of the Nation's Reservation. Section 6205(3) governs public takings of reservation lands and requires, where such a taking is permissible under the terms of the MIA, that the public entity taking the lands find replacement lands "contiguous to the affected Indian reservation," if the tribe subject to the taking so desires. *Id.*

[9] Likewise, interpretations that would "render nugatory" statutory provisions should be avoided. *United States v. Walker*, 665 F.3d 212, 225 (1st Cir. 2011).

With regard to the Nation's Reservation, it provides that "[f]or purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Reservation." *Id.* So even though Section 6203(8) does not expressly include the Main Stem within the Nation's Reservation, other provisions reflect its inclusion. Section 6205(3) deems the entire Penobscot River, not just the Main Stem, as part of the Nation's Reservation for purposes of finding suitable replacement lands for its Reservation, a fact which shows the parties' understanding of the centrality of the River to the Nation's Reservation.

Reading the MIA's Section 6203(8) to include the Penobscot River as well as the Penobscot Nation's islands makes sense based on the language of the provision, the Congressional purpose of confirming to the Nation its existing reservation lands, and the structure of the Settlement Acts as a whole, which guarantees the Nation a meaningful sustenance fishing right in the River in exchange for significant and considerable concessions to the State. This reading is not only a common-sense, sensible result, *see Cahoon v. Shelton*, 647 F.3d 18, 22 (1st Cir.2011), but it is entirely consistent with and supported by an examination of the treaties of 1796 and 1818, which formed the heart of the Penobscot land claims. The treaties are important in this Court's construction of the Settlement Acts' language, as it must presume that Congress legislates with knowledge of then-existing law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85 (1988) ("[Courts] presume that Congress is knowledgeable about the existing law pertinent to the legislation it enacts.").

D. The Treaties of 1796 and 1818 reserved the Main Stem of the Penobscot River to the Nation.

1. Rules for interpreting treaties. Treaties, like federal statutes benefitting Indians, are to be construed liberally in favor of the Indians. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). As with statutes, not only is ambiguous language resolved in favor of the Indians, *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 174 (1973), but treaty terms are to be construed as the Indians would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("this Court has often held that treaties with the Indians must be interpreted as they would have understood them"); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 527 (1986) ("In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it."). Accordingly, a "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (internal quotations and brackets omitted).[10]

In addition, the intent to extinguish Indian title or limit sovereign rights must be plainly expressed. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276 (1985) ("Congressional intent to authorize the extinguishment of Indian title must be plain and unambiguous") (internal quotations omitted); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 260 (2d Cir. 2004) ("It is well-settled that an intention to authorize the extinguishment of

[10] This rule only operates to protect Indians and does not deny them resort to beneficial common law interpretations of treaty terms on the ground that they might not have understood them; in other words, it is meant to ensure that "[o]nly the clearest language depriving Indians of the rights which they had prior to the treaties will limit their rights today." *United States v. Michigan*, 471 F. Supp. 192, 252 (W.D. Mich. 1979).

Indian title must be plain and unambiguous . . . .") (internal quotations omitted).[11] When interpreting a treaty, a court must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) *quoting Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). See also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-08 (1978) (construing Medicine Creek Treaty in light of language, historical milieu, and post-treaty practice); *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976) (language, historical milieu, and "practical construction" of treaty).

Finally, *Alaska Pacific* instructs that in determining whether submerged lands are to be understood as included within a reservation, the Court should consider the importance of the waterbody to the tribe. 248 U.S. at 88 (noting that "[t]he Indians could not sustain themselves from the use of the upland alone"); *see also Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983) ("we conclude that where a grant of real property to an Indian tribe includes within its boundaries a navigable river and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant").[12]

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[11] These interpretive canons apply to Indian treaties generally, not just federal treaties with Indians. *See Oneida Cty., NY v. Oneida Indian Nation of New York State*, 470 U.S. 226, 248 (1985) (applying canons to construe state treaty language); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 260-61 (2d Cir. 2004) (applying Indian canons to construe British treaty with Indians); *Oneida Indian Nation of New York v. New York*, 194 F. Supp.2d 104, 139-40 (N.D.N.Y. 2002) (applying canons to State treaty).

[12] Here, of course, the question is not whether the State or the United States granted the Nation anything but rather did the Nation intend to give up what it already owned and relied upon. Thus whether Massachusetts understood the Nation's dependence on the River and its fishery – which

2. The Nation retained the River pursuant to the 1796 Treaty. The August 8, 1796 Treaty provides in pertinent part that the Penobscot Nation cedes

> all the lands on both sides of the River Penobscot, beginning near Col. Jonathan Eddy's dwelling house at Nichol's Rock, so called, and extending up the said River thirty miles on a direct line, according to the General Course of said River, on each side thereof, excepting however, and reserving to the said tribe, all the Islands in said River, above Old Town, including said Old Town Island, within the limits of the said thirty miles.

P.D. 6 at 34. The lands ceded in this treaty, known as "the Old Indian Purchase," would form the townships of Orono, Bradley, Milford, Greenbush, Argyle, Passadumkeag, Edinburg, Howland, and Lagrange. Prins (Exh. 288, ECF No. 105-88) at 3780.[13] In exchange for 189,426 acres of land, *id.*, the Penobscot Indians received one hundred forty nine and a half yards of blue cloth, four hundred pounds of shot, one hundred pounds of gun powder, thirty six hats, thirteen bushels of salt, a barrel of rum, one hundred bushels of corn and a promise of annual allotments of Indian corn, powder, shot, and blue cloth. P.D. 6 at 34-35.

The Treaty expressly cedes "all the lands on both sides of the River Penobscot" but does not mention the River itself and expressly reserves to the Nation the islands within the River. This Court must read the cession strictly and cannot find that the Nation has ceded the River in the absence of plain and unambiguous intent. Accordingly, the plain language of the Treaty does not support the notion that the Nation intended to cede the River. Resort to the history and circumstances of the Treaty only reinforces this point.

3. Massachusetts sought to purchase the valuable lands on both sides of the River, not the River itself. In the wake of the Revolutionary War, Massachusetts needed money to pay war

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Prins concludes its negotiators certainly did – is beside the point. The only issue is how the Penobscot Indians themselves would have understood the Treaty in light of their dependence on the River.

[13] See Expert Report of Ken Roy, Exh. 757, ECF No. 110-57 (6583-6604) at 6587, for a map outlining the lands comprising the Old Indian Purchase.

debts, and acquiring Indian land cheap and reselling it at market value provided one means of securing revenue. Prins at 3761. The Penobscot lands adjoining a floatable river looked lucrative because of their value both to loggers and settlers. *Id.* at 3770-75. The Penobscot Nation, however, was protective of its land and suspicious of non-Indian designs upon it. Twice, once in 1764 and again in 1793, survey parties entering Penobscot territory had met with a hostile reception. In 1764, Joseph Chadwick, engaged on surveying business at the behest of Massachusetts Governor Sir Francis Bernard, noted that the Penobscot "Indians are so jealous of their country being exposed by this survey," that things almost devolved to violence with the result that Chadwick was instructed "That I should take no Draughts of any Lands but only wrightings." *Id.* at 3750. In 1793, Captain Park Holland was commissioned by Massachusetts to chart Penobscot lands, and again he encountered hostility: "We proceeded as far as Oldtown . . . where there were a great number of Indians, very few of whom could speak a word of English, and who were strongly opposed to our going any farther." *Id.* at 3752. Holland was confronted by armed Indians who told him "that the river was their river, and that they did not wish any white man to go up." *Id.* at 3753. Further up the river, Holland met another group of Indians that again impeded his progress and "gave us to understand they wished to make a strong talk, the amount of which was, that the river was their own river, and they did not want any whites to go up" because that would be the first step in losing their lands. *Id.*

Penobscot opposition to land cessions was long and determined. Massachusetts tried three times to secure a treaty, in 1784, 1786, and 1788, and each time it failed. *Id.* at 3762-75. After the Nation refused to sell in 1784, in 1786 State negotiators claimed they had arrived at an agreement, but the Nation chiefs refused to endorse it. *Id.* at 3766-67. The terms of the proposed agreement foreshadowed the 1796 agreement insofar as it reflected a willingness to

yield land on each side of the River but not the islands within the River. *Id.* at 3766. An effort by the State to revive the proposed agreement in 1788 similarly failed. *Id.* at 3769.

Eight years later, the State tried again, finally succeeding. The February 26, 1796 Resolution of the Massachusetts General Court states that "the Interests of the commonwealth requires that the claims of the Penobscot Tribes of Indians to certain lands lying on each side of the Penobscot River . . . should be ascertained and extinguished." *Id.* at 3777. The Resolution does not mention the River itself or the islands within it. P.D. 14 at 76-77. In fact, the history of the negotiations leading to the 1796 Treaty appear to be silent on the question of the State's intentions regarding the River. As the Supreme Court has noted, a record's silence on a matter of great significance to the Indians is "likely not accidental." *Mille Lacs*, 526 U.S. at 197; 198 ("It is difficult to believe that . . . the Chippewa would have agreed to relinquish usufructuary rights . . . without at least a passing word about the relinquishment."). There is no discussion of the Penobscot River itself or an allocation of rights in the River because, as Professor Prins concluded, the State was focused on securing the lands adjoining the River, not the River itself. Prins at 3776-77.

Moreover, given the Penobscots' obstinate resistance to entreaties for their land over the twelve years preceding the 1796 treaty, including the hostile reception to Park Holland's survey party just three years earlier, it is not surprising the State chose not to raise the issue of ownership of the River itself. The State negotiators were certainly sophisticated enough to negotiate and draft provisions addressing the River itself had that been their intent, but, as Professor Prins concludes, raising that issue would likely have triggered Penobscot hostility and thereby jeopardized a land purchase the State had been trying to accomplish for over a decade. *Id.* at 3778 ("Nonetheless, the Penobscots would never have signed a Treaty that relinquished

their use and occupation of the Penobscot River and, as noted, Massachusetts authorities knew that and made no attempt to establish otherwise by the terms of the Treaty.").

4. The Penobscot Nation understood the Treaty as preserving their riverine existence by reserving both the River and their islands within it. As shown by Professor Prins, the Penobscot River was the "central artery of an ecosystem supporting Penobscot culture." Prins at 3727. The Nation relied upon the River both as an easy means of transport to avail itself of seasonal resources throughout their territory and as a source of subsistence since the fish it provided was crucial to the Nation's sustenance. *Id.* at 3727-37. *See also* MacDougall (Exh. 737, ECF No. 110-37: 6389-6432) at 6392-98 (discussing the cultural, linguistic and economic centrality of the River to the Nation historically); S. Rep. 96-957 at 11; P.D. 282 at 5939 (Penobscot Nation is historically "riverine in their land-ownership orientation" with the Penobscot River at the center of their aboriginal territory). This was not lost on the State negotiators since, as Prins notes, accounts contemporary to the Treaty period emphasized the importance of the River and its fisheries. Prins at 3776. Thus it is unlikely that the Nation knowingly ceded the River and their rights to its fisheries and resources *sub silentio* in 1796, all the more so given that the Nation negotiated to retain their islands in the River. *See* Prins at 3711-13 (offering expert opinion that the Nation did not understand itself as giving up the River when it ceded land along both sides of the River).

What the Nation reasonably understood, not what the State might reasonably have intended, controls how this Court should interpret the Treaty. *Mille Lacs*, 526 U.S. at 196 ("we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them"). Any niceties the State may want to read into the Treaty language now would

have been lost on the Nation because it negotiated through interpreters and only a few tribal members understood spoken English. *Id.* at 3778.

A dispute over the meaning of the 1796 Treaty in the interim between that treaty and the later 1818 treaty makes clear that the Nation understood that by reserving their islands, they were also reserving the River. The dispute concerned ownership of a number of small islands lying south of Oldtown Island which were prized by Nation members as fishing spots. *Id.* at 3782. The Treaty states that that Nation reserves "all the islands in said River, above Old Town, including Old Town Island," but the islands in question lay below Old Town. When settlers began occupying the islands and obstructed Penobscot access to them, the Nation complained to the Massachusetts Governor, framing the matter as a violation of their rights under the 1796 treaty. *Id*. As Professor Prins explains, for the Penobscot to view the Treaty as reserving small fishing locations below Oldtown Island shows that they understood that reserving the islands also reserved to them the surrounding river waters and the fisheries within them: "separating the two, was, in fact, inconsistent with their cultural ecology." *Id.* at 3783. Although the dispute spanned years, the Massachusetts' legislature eventually agreed with the Nation's understanding of the Treaty, and acknowledged in a legislative Resolve of February 27, 1812 the Nation's "right and claim to the fisheries upon certain rocks and small islands near to and below Old Town falls" and authorized State authorities "to recover possession of any or all of the rocks, ledges, fishing privileges and islands." P.D. 32 at 237-38; *see also* Prins at 3787-88.

5. The Nation reserved the Main Stem in the 1818 Treaty. The June 29, 1818 Treaty cedes

> all the lands [the Penobscot Nation possesses] on both sides of the Penobscot river, and the branches thereof, above the tract of thirty miles in length on both sides of said river, which said tribe [ceded in the 1796 Treaty]. . . .

P.D. 8 at 44-45. The Nation reserved to itself four townships of land along the River as well as "all the islands in the Penobscot river above Oldtown and including said Oldtown island." *Id.* at 45. In exchange for all the Nation's remaining land on either side of the River (excluding the four townships) Massachusetts paid the Nation four hundred dollars, provided the Nation, among other things, sundry articles (knives, kettles, calico, ribbon, drums, fifes, etc) and promised annual delivery of others (corn, wheat flour, pork, molasses, cloth, gunpowder, etc). *Id.* at 45-46. Once again the treaty makes no mention of the River, limiting the cession to land "on both sides of the Penobscot River," although it does provide a public right to use the river to transport goods and timber: "And that the citizens of said commonwealth shall have a right to pass and repass any of the rivers, streams, and ponds, which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same." *Id.* at 46.

6. The State's purpose in treating with the Penobscot Nation was to acquire their valuable lands, including their islands. As Professor Prins notes, acquiring valuable riparian land continued to be the State's purpose. Prins at 3800. The February 13, 1818 Resolve authorizing the treaty negotiations noted with concern that the Nation was "selling and disposing of timber, to the great diminution of the value of the lands, and the exclusion of settlements thereon," and further observed that "the connexion which this tribe have with the aforesaid lands operates to prevent settlements on the adjoining lands of the Commonwealth, and presents a material obstacle to the sale and settlement of the public lands." *Id.* at 3793 (quoting the February 13, 1818 Resolve of the General Court, P.D. 40 at 262). The State negotiators were authorized to acquire all remaining Penobscot lands, including their islands, but the status of the River itself was not addressed. Prins at 3790-3801; P.D. 40 at 263.

7. The Penobscot Nation continued to reserve islands in the River for the purpose of sustaining a tribal existence anchored on the River. In 1818, the State negotiators pressed the Nation to surrender its remaining lands along the River as well as its islands. Prins at 3796. With the exception of four townships, the State succeeded in acquiring the remaining Penobscot land along the River. It is not clear from the historical record whether there was a translator present, and the Penobscot negotiators communicated in poor English. *Id.* at 3796-97. Nevertheless, the terms of the 1818 Treaty show that the Nation was unwilling to cede the islands in the River, leaving the 1818 Treaty to repeat what had been set forth in 1796: that the islands in the River north of, and including, Oldtown, were reserved to the Penobscot Nation. Prins concludes that in doing so, the Penobscot hoped to continue their traditional way of life – and doing so would require reserving the River as well. *Id.* at 3800. That is likely why, in 1818, the State negotiators desired express treaty language guaranteeing non-Indians the right to pass on the watercourses falling within the Penobscot Reservation. Moreover, the State negotiators would have understood that in refusing the surrender of their islands, the Nation was attempting to reserve what was necessary to continue an existence centered on the resources of the River.

8. Massachusetts knew how to draft treaty language making clear the Nation ceded the River but did not do so in either 1796 or 1818. Two years prior to the 1796 Treaty, Massachusetts treated with the Passamaquoddy Tribe for lands. Treaty Between the Passamaquoddy Tribe and the Commonwealth of Massachusetts, September 29, 1794. P.D. 4 at 28-31. This treaty included language ceding the Tribe's interests in lands in the Commonwealth other than those reserved in the Treaty. *Id.* at 29. The 1794 Passamaquoddy Treaty reserved to the Passamaquoddy lands including certain "islands lying and being in Schoodic River," along with rights to the River itself by "assign[ing] to said Indians the privilege of fishing on both

branches of the river Schoodic without hinderance or molestation and the privilege of passing the said river over the different carrying places thereon." *Id.* at 29-30.[14] Two points bear mentioning. First, the 1794 Passamaquoddy Treaty states that the members of the Passamaquoddy Tribe will have the "privilege of passing the said river," whereas in the 1818 Penobscot Treaty, it is the non-Indian citizens of the Commonwealth who are granted use rights. The Penobscot Treaty states that "the citizens of said commonwealth shall have a right to pass and repass any of the rivers, streams, and ponds, which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same." P.D. 8 at 46. Whereas the 1794 Passamaquoddy Treaty provides tribal members with use rights over the river for fishing and transport, the Penobscot Treaty provides for use rights over the river to the non-Indians who might wish to pass. This difference between the two treaties is consistent with an understanding on the part of the drafters that the Penobscot Nation maintained ownership and related control of the Penobscot River. Second, the express mention of a fishery in the River in the 1794 Treaty shows that State negotiators were aware of tribal interests in waterbodies as well as land, and if the State wanted to confine the Penobscot Nation to the uplands of its islands, and avoid uncertainty with regard to Nation rights in the River, it certainly was capable of drafting treaty language to accomplish this goal – had it thought the Nation might not walk away from negotiations altogether.

A 1694 deed between "Madokowando, Sagamore of Penobscot" and "his Excellency S[i]r W[il]l[ia]m Phipps," then Royal Governor of New England but purchasing land for himself,

[14] As summarized by the First Circuit, "in 1794, Massachusetts entered into an agreement, also referred to as a treaty, with the Passamaquoddy Tribe by which the Tribe relinquished all its rights, title, interest, claims or demands of any lands within Massachusetts in exchange for a 23,000 acre tract comprising Township No. 2 in the first range, other smaller tracts, including ten acres at Pleasant-point, and the privilege of fishing on both branches of the Schoodic River." *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 374 (1st Cir. 1975).

contains strikingly similar language to the 1796 treaty, but instead of neglecting the River, addresses it in detail to make clear its inclusion in the cession: "all that parcel [and] parcels of land lying and being on both sides of the [St. Georges] River . . . Together with all the River, Islets, Mines, Minerals, Waters, Water-courses, Rivulets, Creeks, Ponds, Fountains, Wells, Springs, Falls; Standing-waters; Brooks." Prins Decl. Exh. A, ECF No. 119-19 (May 9, 1694 Deed from Chief Madockowando to Sir William Phipps, York County Registry of Deeds, Book 10, Page 237). The detailed enumeration here resolves the question of whether the 1694 deed includes the river flowing between the land "on both sides," a question that is more pointed in the case of the 1796 and 1818 treaties given that the Nation expressly reserved the islands in the River to comprise its homeland while the Nation in 1694 was deeding both the St. Georges River and the islands within it.

9. Post-Treaty events confirm the Nation's reservation of the River from the cession of lands along both sides of the River. Beyond examining the language of a treaty and the history of negotiations surrounding it, a court may also consider "the practical construction adopted by the parties." *Mille Lacs*, 526 U.S. at 196 (internal quotations omitted); *see also Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) ("To determine the parties' intent, the court must examine the treaty language as a whole, the circumstances surrounding the treaty, and the conduct of the parties since the treaty was signed.").

Dr. Pauleena MacDougall supplemented the work of Professor Prins by examining events post-dating the treaties of 1796 and 1818 in order to see if they shed light on the understandings of the parties to the treaties. MacDougall (Exh. 737, ECF No. 110-37) at 6392.[15] In general, the

[15] Dr. MacDougall is Director of the Maine Folklife Center and a Faculty Associate in Anthropology at the University of Maine. She has spent her entire career studying the history and language of the Penobscot Nation, beginning with her dissertation, *Indian Island, Maine*

Nation had difficulty both in protecting their rights and their lands, with settlers trespassing on their lands, destroying property, and threatening the Indians. *Id*. at 6413-15. For example, in 1830, the Nation petitioned the Governor of Maine for help because settlers were interfering with their fishing, occupying Nation islands and preventing Nation members from using them. *Id.* at 6414. Nevertheless, Dr. MacDougall found three things indicative of both the Nation and the State's understanding of the Nation's continuing rights to the River: (1) the Nation regularly complained to the State about problems with its fishery and the State at times promised action; (2) the Nation, through their Indian agent, signed leases to islands in the River that also addressed rights in the River itself; and (3) State statutes regularly acknowledged "water privileges" held by the Nation in the River.

10. The Nation repeatedly petitioned the State for help in protecting its fishery. In 1819, the State of Maine separated from Massachusetts, and in 1820, Maine negotiated a treaty with the Penobscot Nation under which it would assume Massachusetts' obligations under the 1818 treaty. P.D. 10 at 56-59 (Treaty with the Penobscot Indians, August 17, 1820); MacDougall at 6408-11. In July of 1820, when Nation representatives met with the Governor of Maine, they raised concerns about the viability of their fishery because white fishers downstream of Indian Island were catching much of the fish in weirs as they headed upstream, and the Governor acknowledged their concern by promising to remove downstream obstructions. *Id.* at 6409-10. In 1821, Penobscot leaders again petitioned for a law protecting the River's fish and, accordingly, their fishery. *Id.* at 6411. In 1831, the Nation sought the State's assistance in dealing with trespassers on its fishing stations around "Shad Island," a euphemism for the several small islands below Oldtown Island that had been at issue in the wake of the 1796 Treaty. *Id.* at

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1780-1930, and her more recent book, *Dance of Resistance: Tradition in the History of a People* (U. N.H. Press 2004).

6415. The Nation sought a law fining non-Indians five dollars for fishing in trespass there. *Id.* That same year, the *Daily Courier* of Portland Maine ran a comment noting that a failing of a recent article on the Penobscot Indians in that it "made no mention of the fisheries reserved to them." Exh. 740, ECF No. 110-40 at 6487.[16] Thus, in the decades following the 1818 Treaty, the Nation repeatedly sought to protect its fishery in the River and the existence of that fishery had some measure of public recognition.

11. Leases executed by the Nation's Indian Agent establish that the Nation's property rights extend past their islands into the River itself. Dr. MacDougall identified leases in 1831 that provided rights in the surrounding river water. MacDougall at 6422-23. A lease of Orson Island to Richard Bartlett and James Purinton permitted them to affix logging booms to the islands and specified that the lease encompassed "all the coves and eddies, and all other places on the shores." *Id.* at 6422. Another lease that same year leased "ledge Island or rock on Old Town Falls in shad channel," along with the "water privileges appurtenant with the liberty to establish dams mills or other establishments together with the privilege of building a dam." *Id.* The same lease "reserved a passage [in the River] for the fish in the spring of the year during the running up River of the Shad and Alewives." *Id.* In 1834, a deed from the Nation to Bartlett and Purinton purported to sell "Islands and ledges on the westerly side of the Old Town falls in the Penobscot River," but reserved "the right of taking fish on the Eastern shore of said Shad Island and the small Island east of Shad Island" to "said Penobscot Tribe of Indians as their exclusive right and privilege." Exh. 687, ECF No. 109-87 (6004-06) at 6005 (transcription of lease); MacDougall at 6422-23.

[16] The comment goes on, "I was informed that the best fishing places, were some islands, or rather rocks, (covered in high floods) in the river, which were reserved and tenaciously retained by the Indians . . . ." *Id.*

12. Maine recognized Penobscot rights in the River in a series of statutes which acknowledged the Nation's water privileges in the Penobscot River. The first of these statutes appears to have been enacted by the Maine legislature and approved by the Governor on March 10, 1835, known as "An Act additional to the several Acts for the better regulation and management of the Penobscot Tribe of Indians." 1835 Me. Acts 257, Ch. 158; P.D. 56 at 311-14.[17] The Act, among other things, required the survey, numbering and valuation of the Nation's islands for the purpose of dividing the land up into individual lots to be allotted to individual Indians. *Id.* at §§ 1-3. It further required that the survey set aside "a suitable quantity of land adjoining all water privileges belonging to said islands, as may be deemed valuable for mills, booms and fisheries." *Id.* at § 2. Such water privileges – the privilege of establishing mills, booms, and of exploiting the River's fisheries – were to be made available for leasing, with the proceeds of such leases to be held by the State and used to benefit the Nation. *Id.* at § 7. This 1835 statute makes clear that the State understood that the Nation had not ceded the River to the State in 1818.

Water privileges are property rights that provide the holder with rights to make use of water appurtenant to their property. For example, a mill privilege provides the right to establish a dam in the watercourse and as such enhances the taxable value of that land. *Penobscot Chemical Fibre Co. v. Inhabitants of Town of Bradley*, 99 Me. 263, 59 A. 83, 87 (1904) (noting that "[r]unning water is not property and is not taxable," but "land upon which a mill privilege exists is taxable, and the value of the land may be greatly enhanced by the fact that its topography is such that a dam may be maintained across a stream upon it"). However, the value of the land is only increased to the extent that the landowner is also holder of the rights in the

[17] This Act and the subsequent surveys resulting from it are discussed in the Roy Report, Exh. 757, ECF No. 110-57 at 6592-94.

watercourse. *Id.* (explaining that the mill privilege is "worthless" where one does not have the right to extend the dam across the entire river). Because a water privilege is a property right, it is subject to leasing and conveyance. *Carleton Mills Co. v. Silver et al.*, 82 Me. 215, 19 A. 154, 155 (Me. 1889) ("It is undoubtedly competent for the owner of the whole of a mill privilege to convey any part of the power he pleases . . . ."). Accordingly, if the Nation had ceded the River and retained only for itself the bare uplands of the islands, there would be no water privileges, including fisheries, remaining in Penobscot hands to be leased to third parties for the benefit of the Nation.[18]

Similar Acts followed the Act of 1835. In 1840, the State again required that the Nation's islands be surveyed, if they had not been surveyed already, and that they be allotted to individual Indians. Me. Rev. Stat. Ann. Tit. I, Ch. 15 §§ 13-15 (1840); P.D. 60. Again, "a suitable quantity of land, adjoining all water privileges belonging to said island, which may be deemed valuable for mills, booms, and fisheries," was set aside for the benefit of the Nation. *Id.* at § 14. In 1857, the State again provided for the survey of the islands, along with the setting aside of land adjoining water privileges in the River. Me. Rev. Stat. Ann. Tit. I, Ch. 9 §§ 11-13 (1857); P.D. 64. In 1904, the State deemed the prior surveys as "authentic" and again "the water privileges belonging to said islands" were to "remain for the benefit of the whole tribe." Me. Rev. Stat. Ann. Tit. I, Ch. 13 § 27 (1904); P.D. 93. *See also* Me. Rev. Stat. Ann. Tit. I, Ch. 14 §

[18] The existence of water privileges appurtenant to Nation islands establishes that the Nation retained ownership of the waters surrounding the islands and is consistent with a theory that the Nation retained the Main Stem in its entirety. The evidence also establishes without doubt, however, that Maine at a minimum understood the Nation as possessing riparian rights appurtenant to its islands, even if other holders of land along the Main Stem had riparian rights as well, and thus refutes the State's position that the Nation has no rights in the Main Stem. The Nation's riparian rights in the Main Stem are discussed below.

31 (1916) (same). Dr. MacDougall discusses this last statute as evidence that State recognition of the Nation's water rights extended into the twentieth century. MacDougall at 6424-25.

13. The general public's understanding of the Nation's retention of the Main Stem is demonstrated by an 1897 lawsuit over logs in the Main Stem. The case, *Stevens v. Thatcher*, concerned two rafts of logs on the shore of White Squaw Island, a Nation island whose shore was leased to the Penobscot Lumbering Association. 91 Me. 70, 72; 39 A. 282, 282; 1897 Me. LEXIS 132 at ***4-5 (1897). The west bank of the Main Stem, where White Squaw Island lies, falls in the township of Argyle while the east bank of the Main Stem falls in the older township of Greenbush. *Id.* at ***2.[19] The island itself lies on the west side of the River and would fall within the territorial limits of Argyle "unless it has been reserved or excluded . . . by virtue of some prior Indian treaty." *Id.* at ***5.

A Penobscot County deputy sheriff attached the logs to enforce a labor lien and filed the return with the town clerk of Greenbush. *Id.* at ***1. Subsequently, the logs were sold to the defendants and plaintiffs brought suit for damages. *Id.* at ***1-2. Defendants apparently contended that the attachment should have been recorded in Argyle as the logs were on rafts on the west side of the River. Plaintiff contended that none of the River fell within the jurisdiction of either Argyle or Greenbush because "[b]y this original grant to the Indians [the 1818 Treaty], of this island, they took limits to the Greenbush bank of the river on one side and to the Argyle bank on the other." *Id.* at ***3. The plaintiff relied on the language in the 1818 treaty reserving the islands in the River and on the fact that the same Treaty provided for a public right of

[19] The LexisNexis report of the case includes the Statement of Facts and the Plaintiff's argument, but only provides the LexisNexis pagination of these materials. The print version of Maine Reports also has these materials, but the version on Westlaw does not. Because the front matter is more important than the court's disposition for present purposes, the LexisNexis pagination is used.

passage by the public on the rivers falling within the lands reserved by the Nation. *Id.* at ***3-4. Based on this language, "[t]he Indians therefore took the dry land, the shore, and the water as it flows, to the bank across stream upon either side of the island, including, of course, the rafting place where these logs were attached." *Id.* at ***4. Plaintiff argued that because the River, having been reserved by the Nation, did not fall in any township, the proper place to file and record the attachment was the oldest adjoining town in the county – and that is what the deputy sheriff of Penobscot county did. *Id.* at ***3.

The actions of the Penobscot deputy sheriff and the legal arguments offered to the court supporting them show an understanding, even as the nineteenth century drew to a close, that the Main Stem was reserved to the Nation. The arguments made by the Penobscot deputy sheriff further show that a fair reading of the 1818 Treaty supports this belief about the ownership of the Main Stem. The court dismissed the suit, but not because it disagreed with the plaintiff that the Main Stem belonged to the Nation under the applicable treaties. Rather, the court held that no land, even land reserved to Indians, was exempt from incorporation in the political subdivisions of the State. *Id.* at ***5-6 ("The incorporation of any territory within those boundaries into a town, county, or other political division is a purely political act, and such power of incorporation is unaffected by any stipulations in the treaties cited."). The court made clear that it was not abrogating the Nation's treaties but holding that the treaties establish property rights in the Nation and that the Nation's lands could still fall within town boundaries: "Those treaties establish property rights in White Squaw Island to the Penobscot Indians [and] the incorporation of the territory of the island . . . into a town does not deprive the Indians . . . of any property rights." *Id.* at ***6.

The court's holding, which treats the Penobscot Nation as a private property owner, rather than a sovereign nation, is consistent with Maine law of the time which treated the Nation as subject to State law. *See Moor v. Veazie*, 32 Me. 343, 368 (1850) (regarding the Penobscot Nation as outside the reach of the Constitution's Indian Commerce Clause because "the Penobscot tribe of Indians always have been, and now are under the jurisdiction and guardianship of this State") (internal quotations omitted). That state of affairs was brought into question and overturned by the Maine Indians themselves through land claim litigation. *See Joint Tribal Council of the Passamaquoddy Tribe*, 528 F.2d 370, 380 (1st Cir. 1975) (holding Passamaquoddy Tribe subject to federal law, noting that "[n]either the Passamaquoddy Tribe nor the State of Maine, separately or together, would have the right to . . . terminate the federal government's responsibilities" to Indians). By 1979, the First Circuit recognized the inherent sovereignty of Maine tribes and their sovereign immunity from suit. *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979) ("But the [Passamaquoddy] Tribe's mere acceptance of benefits conferred upon it by the state cannot be considered a voluntary abandonment of its sovereignty and its attendant immunity from suit."). That same year, the Maine Supreme Court rejected *Veazie*'s view that Maine tribes were beyond the reach of the Indian Commerce Clause and held that "Indian country," as defined by and subject to federal law, "will include the land in Maine now occupied by the Passamaquoddy Indians." *Maine v. Dana*, 404 A.2d 551, 562 (1979).

Accordingly, it is not surprising that nineteenth century state law cases treat the Nation as akin to a private property owner or that throughout the nineteenth century the State repeatedly passed laws governing the Nation, requiring that their lands be surveyed and their water privileges reserved, or that the Nation's leasing of those same privileges was carried out by an

Indian agent assigned by the State, or that the Nation sought aid from the State when its fishery in the River was threatened. All this evidence serves only to show the Nation's interest in the River continued to be recognized in the years after its treaties with Massachusetts and Maine but tells us nothing about the legal propriety of the jurisdictional relationship between the State and the Nation that Maine forced upon the Penobscots. Indeed, the treaties of 1796 and 1818 were themselves legally void because the State had no right to acquire Nation land without federal approval. 25 U.S.C. § 177. The Settlement Acts were necessary both to ratify the State's acquisition of Nation land and to re-establish the jurisdictional relationship of the State with the Nation within federal law such that the relation is legally valid.

E. In the Wake of the Settlement Acts, the State of Maine, the United States, and the Penobscot Nation all Acknowledged that the Nation's Reservation extends into the Main Stem

After the enactment of the MICSA, the United States, Maine, and the Penobscot Nation consistently conducted themselves in accord with the view that under the Settlement Acts the Nation was entitled to exercise its sustenance fishing right in the Main Stem because its Reservation extends into the River. In the context of administrative law, courts give weight to the contemporaneous construction of a statute by the agency charged with administering it. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) ("Of particular relevance is the agency's contemporaneous construction which we have allowed to carry the day against doubts that might exist from a reading of the bare words of the statute.") (internal quotations and ellipses omitted); *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984) (agency construction of statute entitled to extra deference where "[f]ollowing enactment of the statute, the agency immediately interpreted the statute in the manner now under challenge").

The same principle applies to statutory construction generally. See 2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 49:3 (7th ed. 2008) ("Long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid" to determine the meaning of a doubtful statute.). The First Circuit has noted that the Secretary of the Interior was delegated authority by Congress to administer the MICSA. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1996). The Department of the Interior ("Interior" or "DOI") has always interpreted the Settlement Acts as including the Main Stem within the Nation's Reservation, as has the Nation. But equally important here, the State of Maine also regarded at least portions of the Main Stem as subject to the Nation's sustenance fishing right – up until two years ago. This Court should look to the parties' earlier interpretations of the Settlement Acts to better understand what the parties intended. *See U.S. ex rel. State of Louisiana v. Boarman*, 244 U.S. 397 (1917) ("contemporary construction of [an] act by the . . . law officers of the state charged with acting under it is persuasive authority as to its true meaning").

1. The Department of the Interior supported Nation efforts to assert jurisdiction over the Penobscot River contemporaneous with the enactment of MICSA. Although prior to the 1970s, the United States regarded the Penobscot Nation as subject to state jurisdiction, that ended with *Joint Tribal Council of the Passamaquoddy Tribe*'s holding that the United States has a trust relationship with the Passamaquoddy Tribe by virtue of the ITIA. 528 F.2d 370, 380 (1st Cir. 1975). On January 31, 1979, Interior included the "Penobscot Tribe of Maine" on a list of "Indian Tribal Entities that have a Government-to-Government Relationship with the United States." 44 Fed. Reg. 7235 (Jan. 31, 1979). As a federally recognized tribe, the Penobscot were

now eligible for "programs administered by the Bureau of Indian Affairs." *Id.* Nine months later, the Bureau of Indian Affairs ("BIA") entered a funding contract with the Nation, providing $585,587.00 to support "the Operation of Reservation Programs." Exh. 20, ECF No. 102-20 (1312-1320) at 1312. Among those programs was the Nation's "Wildlife and Parks program," which included enforcement of fishing and boating laws as well as monitoring the spring salmon run in the Penobscot River to prevent poaching. *Id.* at 1316. Thus, even before the land claims were resolved, Interior, through the BIA, was actively supporting the Nation's efforts to police its Reservation waters in the Penobscot River. SMF ¶ 67.

BIA funding of Nation programs in the River continued with a 1983 grant of over a million dollars to support, among other things, Nation efforts to improve the Atlantic Salmon fishery in the Penobscot River. SMF ¶ 129; Exh. 65, ECF No. 103-15 at 1561. Similarly, from 1986 through 1988, the BIA again provided annual fiscal support for Nation programs which, among other things, sought to protect the Nation's fishery in the River and improve the River's water quality. SMF ¶¶ 130-33; Exhs. 69-73, 83, ECF Nos. 103-19 at 1589; 103-20 at 1595, 103-21 at 1596, 103-22 at 1603, 103-23 at 1619; 103-33 at 1662-63. In 1992, the BIA again awarded money to the Nation to support tribal monitoring of both the River and its fish. SMF ¶ 134; Exh. 97, ECF No. 103-47 at 1720.

2. Interior has always taken the position that the Nation Reservation includes the Main Stem. The first time Interior (or any federal agency) needed to construe the boundaries of the Nation's Reservation as set forth in the Settlement Acts was in the context of proceedings before the FERC in relation to the license application of Bangor Hydro-Electric Company for the Milford Hydroelectric Project. SMF ¶ 122. Interior's dispute with Maine principally focused on the scope of Interior's authority under the Federal Power Act ("FPA") to require special

conditions on any FERC license designed to protect the Nation's Reservation.[20] However, both Maine and Interior took positions on the Nation's reservation boundaries as well: Interior asserted the same position it asserts today, while the State asserted a position inconsistent with its present view that the Reservation does not include any part of the River.

The State for its part made clear that its position was not to be confused with that of other litigants before the FERC who were arguing that the Nation's Reservation excluded the River entirely:

> First, the State believes that members of the Penobscot Indian Nation have a right to take fish for individual sustenance pursuant to the provisions of the Maine Implementing Act from that portion of the Penobscot River which falls within the boundaries of the Penobscot Indian Reservation. To the extent it has been argued that the Penobscots have no sustenance fishing rights in the Penobscot River, we disagree.

Exh. 179, ECF No. 104-79 (2267-87) at 2286 (Aug. 16, 1996 State Response to DOI's Filing of Section 4 (e) conditions). After this preface, the State then contended that the Nation had not reserved the River in its treaties with Massachusetts. *Id.*[21]

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[20] Under Section 4(e) of the FPA, licenses may only be issued for projects within federal reservations where the project is not inconsistent with the purpose of that reservation and such license is subject to any terms or conditions required by the federal agency supervising the reservation. 16 U.S.C. § 797. The term "reservation," as defined by the FPA, encompasses "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States." 16 U.S.C. § 796(2). The dispute over whether the Penobscot Reservation meets this definition is irrelevant to present controversy.

[21] The fact that the State preceded its assertion that the Nation had given up the River to Massachusetts during the treaty period with an express disclaimer that the State should not be understood as asserting the Nation could not sustenance fish in the River shows the State understood the drastic implications of seeking to deny the Penobscot's right to sustenance fish in the River outright. The State's present position, that the Nation reservation stops with its island uplands, no longer affords it room to retreat from the charge that it is seeking to deprive the Nation of one of the key rights it bargained with the State for in 1980 in exchange for giving up claim to aboriginal territory lost in violation of federal law. Not surprisingly, the State's Answer and Counterclaim does the best it can with this, alleging that the State has not interfered with Penobscot sustenance fishing in the River – although, if the State has its way, such sustenance

Interior responded by arguing that the treaties had reserved the River around the Nation's islands. Exh. 198, ECF No. 104-98 (2457-2521) at 2490-91 (April 1, 1997 Interior Response to Comments Received to the Conditions for the Protection and Utilization of the Penobscot Indian Reservation Pursuant to Section 4(e) of the Federal Power Act). Interior attacked the State's position, noting that if, as the State argued, the River had been ceded to Massachusetts, that "would eliminate the Penobscot Nation's fishing right, as there would be no portion of the Penobscot River within the bounds of the Reservation to which the fishing right would apply." *Id.* at 2490.

The State responded that even if the Nation had ceded the River, as an island owner in the River, it would possess parts of the River under Maine common law: "Thus, the boundaries of the Penobscot Reservation may generally be described as including the islands in the Penobscot River above Old Town (except those conveyed away between 1818 and 1980) and a portion of the riverbed between any reservation island and the opposite shore." Exh. 200, ECF No. 105 (2548-2563) at 2560 (May 30, 1997 Maine Response to the Department of the Interior's April 9, 1997 Filings Pursuant to Sections 4(e) and 10(e) of the Federal Power Act). In the end the FERC did not reach the question of whether the Nation's reservation extends into the River, but its license approval did require the licensee to consult and cooperate with the Penobscot Nation, among others, in ensuring adequate fish passageways on the River. SMF ¶ 127.

3. Lincoln Pulp and Paper Bankruptcy Proceedings. In 1997, when the Nation approached Interior about bringing an action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for damages to the Nation's rights in the Penobscot River due to pollution of its waters by the Lincoln Pulp & Paper Mill, Interior

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fishing in the River will be at the State's pleasure rather than pursuant to a federal right. ECF No. 67, Counterclaim ¶ 10.

reacted favorably, undertaking a Quality Assurance Project Plan to study the levels of contamination in the River and to assess the role of Lincoln Pulp's discharges in the River's degradation. SMF ¶¶ 156-59. Correspondence with Maine Senator Olympia Snowe in 1999 explained that the study (conducted jointly with EPA) was needed because the level of dioxin in the River's fish

> has prevented the Penobscot Indians . . . who have historically subsisted on fish, fiddlehead ferns, and wildlife along the River, from exercising their statutorily recognized right to safely fish in the Penobscot River for individual sustenance and critically important nutritional, cultural, and spiritual needs.

Exh. 223, ECF No. 105-23 (2864-2867) at 2864 (Dec. 29, 1999 letter from Interior to Senator Snowe).

In 2001, when Lincoln Pulp filed for Chapter 11 bankruptcy, the Department of Justice ("DOJ") filed a Proof of Claim seeking recompense for Lincoln's environmental liabilities. SMF ¶¶ 160-61; Exh. 233, ECF No. 105-33 (3117-3129). Among other things, DOJ sought "recovery of damages suffered by the Penobscot Indian Nation . . . for the loss of its sustenance fishing right and cultural use due to the contamination of the waters and sediments of the Penobscot River, which includes areas of the Nation's reservation." *Id.* at 3118-19. The pleading further alleged Lincoln Pulp was liable for "continuing nuisance and continuing trespass because the dioxin contamination caused by the Debtor's manufacturing facility discharges continues to remain unabated on the Nation's reservation and continues to harm the fish, sediments, and other natural resources of the Penobscot River." *Id.* at 3124; SMF ¶ 161.[22]

[22] The claim was one of three brought in the proceeding and was subsequently withdrawn in favor of pursuing CERCLA response action claims which, as Interior explained to the Nation, would still achieve the goal of cleaning the River. SMF ¶ 162; Exh. 235, ECF No. 105-35 (3143-44) at 3143 (Sept. 7, 2001 letter from Interior to Nation Chief Dana). Interior reaffirmed that the "United States government recognizes the Penobscot Indian Nation as a sovereign Indian

4. The EPA has similarly, and consistently, viewed Main Stem waters as part of the Nation's Reservation and funded activities in them. In 1994 EPA granted the Nation $40,000 for water quality monitoring of the Penobscot Reservation based on a tribal proposal that made clear the water quality to be monitored was that of the Penobscot River. SMF ¶ 135; Exh. 103, ECF No. 104-8 at 1971. In 1999, EPA provided a further grant of $19,700 to the Nation to support education about the dangers of eating contaminated fish in the River. SMF ¶ 136; Exh. 211, ECF No. 105-11 (2715-23). The Nation's funding proposal noted that "Despite the [fish] advisories, many tribal members continue to practice their cultural and legal claims to catch and consume fish in these waters." *Id.* at 2718. The EPA also provided the Nation a 1.1 million dollar grant to support water quality programs in the Penobscot River for fiscal years 1999-2006 which had, among its goals, protecting water quality, "treaty reserved aquatic resources, and related aquatic and marine ecosystems." Exh. 222, ECF No. 105-22 (2809-2863) at 2844; SMF ¶ 137.

In issuing a 1997 permit for waste discharges by Lincoln Pulp and Paper in the Penobscot River, EPA imposed "the most stringent terms for dioxin ever imposed in New England," and noted that in doing so it had "taken particular account of the fishing rights and consumption patterns of the Penobscot Nation." Exh. 194, ECF No. 104-94 (2325-49) at 2326, 2344; SMF ¶ 151. In the permit appeal proceedings, the State (through the Attorney General) contended that the Nation had not reserved the River in its 1796 and 1818 treaties, but noted that "there may be a certain portion of the river bed that goes along with the ownership of an island in the river." Exh. 201, ECF No. 105-1 (2564-2578) at 2573 (June 3, 1997 Letter from Assistant Attorney General to EPA). Interior responded in defense of both the Nation's fishing rights and the

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tribe" with a "right to sustenance fishing in the Penobscot River within the reservation." *Id.* at 3143.

boundaries of its Reservation, asserting that the Main Stem falls within the Reservation. Exh. 203, ECF No. 105-3 (2588-95) at 2591-94 (September 2, 1997 letter of Edward Cohen, Deputy Solicitor, Interior to EPA); SMF ¶¶ 152-53.

Similarly, in approving the State's National Pollutant Discharge Elimination Program in 2003, EPA acknowledged the Nation's fishing right and its federal responsibility to protect it, noting approvingly that Maine's Board of Environmental Protection ("BEP") had recently proposed more stringent water quality standards for the Penobscot River in order to protect subsistence fishing, and indicating that EPA "is in a position, consistent with MICSA, CWA [Clean Water Act], and our trust responsibility, to require the state to address the tribes' [water] uses consistent with the requirements of the CWA." *State Program Requirements; Approval of Application by Maine To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Maine*, 68 Fed. Reg. 65052-0168 at 65068 (November 18, 2003). Finally, in 1997, the EPA entered into a "Tribal Environmental Agreement" with the Nation which committed the Nation and the EPA to work together on "restor[ing] the natural resources of the Penobscot River, including its water, sediments, fish and other biota so that its members may use the river and exercise their sustenance fishing rights without fear or harm or illness from hazardous substances." Exh. 218, ECF No. 105-18 (2781-2797) at 2784; SMF ¶ 155.

5. United States Army Corp Permit for timber salvage in the Penobscot River. A 1996 timber salvage permit issued by the United States Army Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, demonstrates that other federal regulatory agencies understood and accounted for Penobscot ownership interests in the River in the course of carrying out their own responsibilities. In response to a 1994 application for a timber salvage permit in the Penobscot River Main Stem, the Army Corps

consulted with the Nation on special permit conditions to protect the Nation's rights, Exh. 169, ECF No. 104-69 (2222-23) at 2222 (Jan. 29, 1996 fax from Army Corps to Penobscot Nation representatives seeking review of draft permit condition), and then included that condition in the permit itself, Exh. 171, ECF No. 104-71 (2226-27) at 2226 (March 1, 1996 Army Corps timber salvage permit).[23] SMF ¶¶ 165-67.

6. The Department of Justice has litigated to protect Nation fishing rights in the River when threatened by State authorities. When the Maine BEP approved a hydroelectric project on the River that involved dams which threatened the Nation's fishery in the River in 1993, the United States sought and received permission to file an amicus brief supporting the Nation's right to sustenance fish in the Main Stem. SMF ¶¶ 140-43. The DOJ explained that the federal interest in the proceeding derived from the fact that "[t]his matter directly implicates the right of the Penobscot Indian Nation to take fish from the Penobscot River, as specifically confirmed by state and federal law." P.D. 236 at 3261; SMF ¶ 143. When the BEP's decision was affirmed by the Maine Superior Court, the United States continued to oppose the decision's potentially harmful impacts on the Nation's fishery. In an amicus brief presented to Maine's Supreme Judicial Court, the United States explained that the Nation's sustenance fishing rights "were singled out for retention in settlement of the Nation's very serious claim to the right of possession and use of a considerable portion of the State of Maine," and therefore, "the State of Maine, as the other contracting party, has an obligation to refrain from conduct that would render the promise of that consideration illusory." Exh. 132, ECF No. 104-32 (2106-30) at 2124. The underlying premise of the argument was that the Nation's sustenance fishing right is to be

[23] The permit allowed salvaging of timber submerged in the bed of the River but required "approval from the Penobscot Indian Nation before performing any in stream work," but said condition did not apply "where the Penobscot Nation claims no jurisdiction." *Id.*

exercised in the Penobscot River and actions on the part of the State threatening the salmon run in the River were in effect denying the Nation the benefit of the bargain it had struck with Maine in settling the land claims. [24] The argument applies with equal force to the present case where Maine is asserting a forced reading of the Settlement Acts that would, for all practical purposes, nullify the Nation's sustenance fishing right expressly reserved in those same acts.[25]

Outside the litigation context, the DOJ, like the DOI and the EPA, has assisted the Nation with grants supporting the Nation's Warden Service in its law enforcement activities along the River. Exhs. 256, 266, ECF Nos. 105-56 (3318-26), 105-66 (3338-78) SMF ¶¶ 138-39 (2007 and 2010 grants).

7. Until 2012, Maine viewed the Nation's Reservation as extending into the Main Stem. In the wake of the enactment of the MICSA, Maine Attorney General James Tierney issued a memorandum guiding state law enforcement as to its import. Exh. 52, ECF No. 103-2 at 1518 (Jan. 29, 1981 Attorney General Memo "Law Enforcement on Tribal Lands"). In that memo, the Attorney General echoed Congress' own understanding that tribal "[r]eservations consist of those land originally reserved to the respective Tribes by Treaties with the State dating back to the late 1700's, except any lands conveyed away by the Tribe since that date but before April, 1980." *Id.*

[24] Because the BEP's Order attempted to account for Nation fishing rights in the River, DOJ's dispute with the BEP was not over whether or not the Nation could sustenance fish in the River at all but whether the BEP's mitigation measures sufficiently protected salmon in the River such that the Nation could meaningfully exercise its fishing rights. *Id.* at 2122-25 (arguing Nation entitled to more than a mere "angling" opportunity); 2124 (State approval of project only permissible where Nation fishing right can be "satisfied in reasonable quantity with reasonable certainty, and without long-term damage to the resource").

[25] Maine's Supreme Judicial Court did not reach the arguments presented by DOJ, holding that as an Amicus, the DOJ could only present arguments pursued by parties to the case and noting that the Nation had not elected to appeal the BEP's decision. *Atlantic Salmon Federation v. BEP*, 662 A.2d 206, 211 (Me. 1995).

In 1987, the Nation decided a small harvest of salmon from the River would both affirm the Nation's sustenance right and help raise tribal support and awareness of the Nation's efforts to restore the Atlantic Salmon fishery in the River. Exh. 75, ECF No. 103-25 at 1630 (Dec. 7, 1987 Nation Department of Natural Resources Memorandum). In response, William J. Vail, Chairman of the Atlantic Sea Run Salmon Commission, wrote the State Attorney General seeking "clarification" of the Commission's authority as well as "an interpretation of the Maine Indian Claims Settlement as it relates to the regulation of fish and wildlife resources." Exh. 78, ECF No. 103-28 at 1638 (Feb. 5, 1988 letter from Chairman Vail to Attorney General Tierney). The Attorney General provided such an interpretation on February 16, 1988. Exh. 80, ECF No. 103-30 (1652-53) (Feb. 16, 1988 Attorney General Opinion). The Attorney General noted that

> we have verified with representatives of the Penobscot Indian Nation [that] members of the Nation intend, during the Atlantic Salmon run this coming summer, to place gill nets in the Penobscot River within the boundaries of the Penobscot Reservation . . . . you ask whether this activity would be legal.
>
> In the opinion of this Department, it would be.

Id. at 1652. Because the gill nets were to be placed in the River for the purpose of sustenance fishing, the Attorney General explained, "the activity in question would clearly fall within the purview of Section 6207(4) [of the MIA] and would therefore not violate 'any other law of the State,' including the prohibition against taking fish with gill nets." *Id.* at 1653.

F. At a minimum, the Nation Reservation includes the portions of the Main Stem the Nation is entitled to as a riparian land owner on the River.

Should issues of fact preclude the Court at this juncture from granting summary judgment on the claim that the Nation did not cede the Main Stem in its treaties with Massachusetts and thus held it as part of the Reservation confirmed to it in the Settlement Acts, this Court nevertheless should hold, as a matter of law, that the Nation Reservation extends to the thread of the channel on each side of each and every one of its islands in the Main Stem. Under the

common law of Maine, riparian landholders along watercourses above the influence of the tides own those watercourses. The Nation, as a riparian owner of land on the Main Stem, would be entitled to those portions of the Main Stem appurtenant to its islands, which are above the influence of the tides.

The legislative history of the MICSA indicates that the reservation boundaries established by the MIA were meant to include not just lands but all appurtenant water rights, including fishing rights. The House Report explains that "[t]he settlement also provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those *lands and natural resources* which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them." H.R. Rep No. 96-1353 at 18 (emphasis added); P.D. 283 at 6008; S. Rep. 96-957 at 18 (same); P.D. 282 at 5946. The MICSA defines "land and natural resources" to include "any interest in or right involving . . . water and water rights, and hunting and fishing rights." 25 U.S.C. §1722(b). The Senate Report further analyzed the MIA and noted that "[t]he Maine Act recognizes and defines the existing Passamaquoddy and Penobscot Reservations." S. Rep. 96-957 at 35; P.D. 282 at 5963.[26]

The Main Stem is navigable. Under federal law, the beds of navigable waterways are presumed to belong to the states. *Montana v. United States*, 450 U.S. 544, 551 (1981). Each state, however, is free to decide whether it will retain the bed for itself in trust for the public or allow it to be acquired by private owners. *Oregon ex rel. State Land Bd. v. Corvallis Sand &*

[26] The MIA's legislative history also provides: "[t]he boundaries of the [Penobscot and Passamaquoddy] Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law."Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory"; P.D. 264 at 3971.

Gravel Co., 429 U.S. 363, 378 (1977). Maine, following English common law tradition, divides navigable rivers between those subject to the tides (containing tidal waters) and those that, while still navigable, are upstream of tidal influences. *Veazie v. Dwinel*, 50 Me. 479, 483-485 (1862); *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787, 789 (1910). The former (tidal) are called "navigable," while the latter are distinguished by the term "floatable." *Id.* Under Maine law, the State retains ownership of the beds of "navigable" rivers, but riparian owners have property rights in the bed of "floatable" rivers. Specifically, the riparian owner on a floatable river is presumed to own the bed adjacent to his or her land out to the midpoint of the river (with the owner on the opposite bank of the river having rights in the remainder). *Id.* ("With respect to the rights of the riparian proprietor in floatable and nontidal streams, it is the settled law of this state that he owns the bed of the river to the middle of the stream and all but the public right of passage."). The Penobscot River is floatable along the Main Stem. *Pearson v. Rolfe*, 76 Me. 380, 385 (1884) (Penobscot River floatable starting at Old Town).[27]

In the typical case, the riparian owners on either side of a stream divide it along the thread or center of the channel. But where an island divides the stream,

> the riparian owners on the two main shores opposite the island, are not opposite riparian owners with common and equal right to use of all the water flowing between them. On the contrary, each such owner has for an opposite, the owner of that part of the island facing his land. Their equal and common right is confined to the flow of the water in the channel between them. They have no

[27] Riparian ownership of portions of the Main Stem would not affect the availability of the River as an avenue for public transport and commerce. Under Massachusetts common law, like Maine common law, rivers, whether navigable or not, are subject to a public "right of passage up and down the stream in boats or other craft for purposes of business, convenience, or pleasure." *Ingraham v. Wilkinson*, 4 Pick. 268, 21 Mass. 268, 284 (1826); *Moor v. Veazie*, 32 Me. 343, 356 (1850) ("The right in common of all the citizens to the use of its navigable waters has been established by judicial decisions; and that right is not limited in this State to waters, in which the tide ebbs and flows, but is admitted in lakes and fresh water rivers, which are navigable"). In any event, in the 1818 Treaty, Massachusetts included language providing that rivers in the Penobscot Nation's lands are subject to a public right of passage, as noted above.

> legal right in common or severalty in the water naturally flowing between other owners on another channel on the other side of the island where they have no land.

Warren v. Westbrook Manufacturing Co., 86 Me. 32, 40; 29 A. 927, 929 (1893). In other words, where an island divides a river into two channels, the island owner owns the bed out to the thread of the river on either side of the island. Accordingly, the Nation is entitled, at a minimum, to half of the River channel on both sides of its islands (with landowners on the either side of the channel entitled to the remainder) because by reserving islands in the Main Stem, the Nation is presumed to have reserved to the thread of the River on both sides of each of its islands, regardless of whether the Main Stem itself was ceded. These portions of the River would therefore form part of the Nation's Reservation and be subject to the Nation's sustenance fishing right.

The State's current position that the Nation is not entitled to exercise its sustenance fishing right anywhere in the Main Stem discriminates against the Nation by seeking to deprive the Nation of common law riparian rights available to other Maine citizens. If the Court finds the Nation did not reserve the Main Stem in the Treaty of 1818, at a minimum the statutory description of the Nation's Reservation as consisting of islands includes the rights attendant upon riparian ownership. Moreover, to read these rights out of the MIA and the MICSA requires the State to ignore the fundamental rule that statutory terms are presumed to possess the import that they would have under the common law: and under Maine common law, island ownership in a river above the influence of the tides carries with it ownership of the surrounding portions of the River. *See Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) ("[t]hough dictionaries sometimes help, we believe it more important here to look to the common law" in construing statutory terms); *Neder v. United States*, 527 U.S. 1, 21 (1999) ("where Congress uses terms that have

accumulated settled meaning under common law, a court must infer . . .that Congress means to incorporate the established meaning of these terms") (brackets and internal quotation marks omitted).

Moreover, the State's position is of recent provenance. As noted above, in 1988, the State's Attorney General formally opined that under the terms of the MIA, Nation members could sustenance fish within the River. Exh. 80, ECF No. 103-30 at 1652. Also, as noted above, nearly a decade later, in a May 29, 1997 pleading before FERC, the State emphatically rejected the notion that it viewed the Penobscot River as wholly outside the Reservation:

> To begin with, DOI has mischaracterized the State's position on this issue. While DOI contends that the State is arguing that the Penobscot Reservation does not include any portion of the river . . . and thus that the Penobscots' fishing rights would consist solely of the right to fish on ponds within the reservation, that is not the State's position.

Exh. 200, ECF No. 105 (2548-2563) at 2558-59 (State of Maine's Response to the Department of the Interior's April 9, 1997 Filing Pursuant to Section 4(e) and 10(e) of the Federal Power Act). Instead, the State pointed to Maine common law as a basis to assert that "the boundaries of the Penobscot Reservation may generally be described as including the islands in the Penobscot River above Old Town (except those conveyed between 1818 and 1980) and a portion of the riverbed between any reservation island and the opposite shore." *Id.* at 2560.

The State acknowledged the Nation's ownership of portions of the bed of the Main Stem outside the context of formal pleadings as well. For example, eel permits issued by the Maine Department of Inland Fisheries and Wildlife in the 1990s contained language proscribing the placement of eel traps on the portions of the Penobscot Riverbed owned by the Nation:

> This permit does not give the permittee permission to place fishing gear on private property against the wishes of the property owner. *The portions of the Penobscot River and submerged lands surrounding the islands in the river are*

> *part of the Penobscot Indian Reservation* and [fishing gear] should not be placed on these lands without permission from the Penobscot Nation.

Exh. 102, ECF No. 104-2 at 1887 (Eel Permit issued to Maine Live Fish Inc./Gerald Crommett dated April 22, 1994).[28] The Maine Warden Service, the law enforcement branch of the Maine Department of Inland Fisheries and Wildlife charged with enforcing game and fishing regulations on the Main Stem, acknowledges Penobscot jurisdiction over portions of the River, at least in practice. For example, a May 13, 2005 email memo from a Warden Ronald Dunham to Major Sanborn explained that the division of jurisdiction on the Main Stem between State and tribal enforcement is viewed as the thread of the River between Nation islands and the opposite bank:

> The rule of thumb has always been the halfway point between the island and the mainland was the division line. Common sense and law would put the mainland landowners with half the distance to any island as theirs.

Exh. 250, ECF No. 105-50 at 3310. The memo goes on to seek legal guidance because, Dunham reported, Penobscot game wardens viewed the entire Main Stem as falling with tribal jurisdiction. *Id.* That conflict continued, as documented by a 2010 memo by Penobscot Warden Ed Paul to Warden Tim Gould documenting a conversation with a state warden who indicated that for purposes of enforcing duck hunting laws, "he was going to use the thread of the river, what he was taught in advanced warden school." Exh. 267, ECF No. 105-67 at 3379.

That means that two years before the State Attorney General decided to adopt the State's present view, Maine law enforcement still treated the Nation as having ownership out to the thread on either side of the Nation's islands in the Main Stem. And, as late as 2012, DIFW rules defined the Penobscot Reservation as including "certain islands and surrounding waters above

[28] All similar eel permits that could be collected during discovery and placed in the record are identified at SMF ¶ 190.

Milford Dam." Exh. 281, ECF No. 105-81 (3573-3623) at 3623; SMF ¶ 197. Until the State Attorney General's Opinion of August 8, 2012, the debate between the State and the United States was not whether the Nation Reservation extends into the River but whether the Nation held more of the Main Stem than it was entitled to under Maine common law alone. Accordingly, and at a minimum, this Court should hold as a matter of law that the Nation's Reservation extends to the thread of the River on both sides of each of its islands in the Main Stem, even if trial proceedings are needed to determine whether the Nation retained the Main Stem in its entirety in its treaties with Massachusetts and thus under the Settlement Acts.

CONCLUSION

For the above-stated reasons, the United States should be granted summary judgment.

Dated: April 13, 2015

Respectfully submitted,

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Certificate of Service

I, Steven Miskinis, hereby certify that on April 13, 2015, I served the United States' Answer to State Defendants' Counterclaims upon all counsel in this action via the Court's electronic case filing system.

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