UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION	)	
	)	
Plaintiff,	)	Civil Action No. 1:12-cv-00254-GZS
	)	
v.	)	
	)	
JANET T. MILLS, et als.	)	
	)	
Defendants.	)	

MOTION OF THE PENOBSCOT NATION FOR SUMMARY JUDGMENT ON ITS SECOND AMENDED COMPLAINT WITH INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

This case presents the question whether the State can effectively deprive the Penobscot Nation ("Nation" or "Tribe") of the sustenance fishing, trapping, and hunting rights, and related authorities, guaranteed by Congress pursuant to the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (the "Settlement Act"). The controversy arises from a letter dated August 8, 2012, in which Maine's Attorney General informed the Penobscot Nation that he had instructed State law enforcement officers that the Penobscot Indian Reservation is confined to islands in the River, does not include the River itself, and that Maine has exclusive jurisdiction over all activities in and on the River.

Because the Tribe's guaranteed sustenance fishing, hunting, and trapping rights can only be exercised in the waters and beds surrounding the islands in the Main Stem of the Penobscot River,[1] this attempt to confine the boundaries of the Penobscot Reservation exclusively to the

[1] "Main Stem" is defined, by stipulation of the parties, as "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." *See* ECF No. 111, ¶3.

islands in the River renders the protection of the Tribe's fishing, hunting and trapping rights promised by Congress in the Settlement Act meaningless. Such a result flies in the face of well-settled principles of federal Indian law, long-standing rules of statutory construction, and the Settlement Act's confirmation of the Reservation boundaries as they existed at the time of the treaties of 1796, 1818, and 1820, which indisputably included the River bank to bank.

For the reasons set forth below, the Tribe is entitled to judgment on its Second Amended Complaint against Janet T. Mills, Chandler Woodcock and Joel Wilkinson ("State Defendants"), affirming (1) its sustenance fishing, hunting, and trapping rights in the Reservation are in the waters and bed of the Main Stem of the Penobscot River bank to bank and (2) that the Tribe has exclusive regulatory and enforcement authority in this Reservation over sustenance fishing, hunting and trapping by its members and hunting, trapping, and other taking of wildlife by non-members.

* * *

Pursuant to the Settlement Act, Congress settled massive land claims brought in the 1970's by the United States, on behalf of the Penobscot Nation, against the State of Maine (the "State" or "Maine"), 25 U.S.C. § 1721(a), and ratified an agreement between the Penobscot Nation and the State regarding jurisdictional allocations on the Tribe's existing reservation memorialized in Maine's Act to Implement the Indian Land Claims Settlement, 30 M.R.S.A. §§ 6201 *et seq.* (the "Maine Implementing Act"). *See id.* § 6202 (describing jurisdictional agreement with respect to the Tribe's existing reservation).[2] The United States brought the land claims action in this Court, captioned *United States v. Maine,* Civil Docket No. 1969, to recover lands that the Penobscot Nation ceded in treaties with Massachusetts and Maine without federal approvals required by one the first acts of Congress, the Indian Non-Intercourse Act of 1790.

[2] The Settlement Act and the Maine Implementing Act are collectively referred to herein as the "Settlement Acts."

See S. REP. NO. 96-957 at 11-13 (1980) ("S. REP.") (describing "Historical Background" and "History of Litigation"); H.R. REP. NO. 96-1353 at 11-13 (1980) ("H.R. REP.") (same) (P.D. 283 at 6001-03). *See generally* Tim Vollman, *A Survey of Eastern Land Claims: 1970-1979*, 31 M. L. REV. 5 (1979)(hereinafter "A Survey of Eastern Land Claims").[3]

In settling these claims, Congress confirmed that the settlement protected the right of the Nation's tribal members to engage in sustenance fishing, hunting, and trapping in the Tribe's existing reservation, retained by the Tribe after ceding lands under the suspect treaties, and that the State's asserted power to apply its laws to such activities (or terminate them) "is ended." S. REP. at 16-17; H.R. REP. at 16-17; s*ee* S. REP. at 18 ("the Penobscot Nation will retain as [its] reservation[] those lands and natural resources which were reserved to [it] in [its] treaties with Massachusetts and not subsequently transferred by [it]"); H.R. REP. at 18 (same). As set forth below, these subsistence activities have always taken place on the Penobscot River in the waters and beds of the River surrounding the islands where tribal members have resided for centuries. Indeed, there are no waters on the Tribe's islands to support fish or other water-dwelling animals, including the eel, turtle, and muskrat upon which the Penobscot People have relied for their subsistence since aboriginal times.

[3] The Tribe cites to Congress's Senate and House Committee Reports in accordance with standard citation form. Other legislative materials are cited in accordance with the Public Documents and related index provided to the Court and designated "P.D. XX" in accordance with that index and the consecutive pagination provided. The Tribe uses the same abbreviation for citations to the Joint Exhibits ("Jt. Exh.") as those set forth in the United States' and the Penobscot Nation's Statement of Material Facts in Support of Their Motions for Summary Judgment ("SMF").

I. THE PENOBSCOT NATION, THE PENOBSCOT RIVER, AND THE PENOBSCOT WAY OF LIFE

As Congress explained upon settling *United States v. Maine*, "the aboriginal territory of the Penobscot Nation is centered on the Penobscot River" and it is "riverine in [its] land-ownership orientation." S. REP. at 11; H.R. REP. at 11. Indeed, the Penobscots traditionally referred to their family hunting districts as *nzibum*, (meaning "my river"), and their family names *ntútem* ("totems" in English), derive from the fish and other creatures that inhabit the River, including *Neptune* (eel); *Sockalexis* (sturgeon), *Penewit* (yellow perch), *Orono*/*Tama'hkwe* (beaver), *Nicola*/*Nicolar* (otter), and *Francis* (fisher). Report of Harald E. L. Prins, Phd., University Distinguished Professor of Anthropology, Kansas State University, *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* (December 11, 2013), Jt. Exh. 288, ECF No. 105-88 ("Prins") at 3716, 3754-3812; SMF ¶1.

As a "riverine" Indian tribe, the Penobscot People have never distinguished between the islands in the Penobscot River that they have inhabited since aboriginal times and the River between those islands and the mainland shores, bank to bank, upon which they have relied for all aspects of their physical, spiritual, and cultural sustenance. Prins at 3716-46, 3750, n. 117; SMF ¶4. Thus, when they think of their "reservation" left to them by their original treaties with Massachusetts or at present, Penobscots do not distinguish between the island communities where they maintain their physical residences, and the Penobscot River, upon which they have relied for their food, transportation, recreation, and ceremonial practices. Prins at 3716-46, 3750-54, 3782-90, 3803, 3808-3811; SMF¶¶ 4, 7; *see also* Prins at 3782-89 (describing Maine

surveyor, Joseph Treat's, post-treaty observation of "Indian eel ware camp" with related eel weir "across the Penobscot River, almost bank to bank" attending the Penobscot island village of Passadumkeag). There are no waters on the surfaces of the islands to support the fish, eel, turtle muskrat, beaver and other animals upon which they have relied for subsistence-- they are caught and trapped in the bed and waters of the Penobscot River. Prins at 3729; SMF ¶¶5-6. And from aboriginal times until 1950 (when a bridge was built between Old Town and Indian Island), the Penobscots travelled everywhere (between their island communities and the mainland) by the River. SMF ¶¶10, 61-64.

This reliance continues to the present day. Multiple Penobscot tribal members describe, in detail, their families' reliance upon sustenance fishing, trapping and hunting in and on the River surrounding their island communities from the 1930's up to and after the 1980 Settlement Acts. *See* SMF ¶¶56-64; Declarations of Lorraine Dana, Barry Dana, Kirk Loring, Christopher Francis, and Reuben Phillips, attached to SMF. The history of two of those families is representative and particularly revealing.

Dana Family

Born in 1937, Lorraine Dana has resided on Indian Island in the Penobscot River since she was 12 years old. Prior to that she resided with her father, Penobscot tribal member Chester Dana, on *Mattanawcook* Island in the Penobscot River, just to the west of Lincoln, Maine. Chester Dana was born on *Mattanawcook* Island and (apart from U.S. Marine Corps service) resided there until his death in 1975. The last Penobscot tribal member to live year round on that Island, his main diet consisted of fish and muskrat from the Penobscot River and other animals that he hunted or trapped. (The same was true of the other Penobscot families who lived there.) SMF ¶56.

Lorraine and her brother, Chester Dana Jr., resided on *Mattanawcook* Island with their father after 1942, and commuted to school in Lincoln by canoe. Their father fed the family fish, muskrat and other animals that he hunted, fished, and trapped in the Penobscot River. Lorraine and Chester Jr. likewise fished in the River, bank to bank, around and near *Mattanawcook* Island and ate what they caught. SMF ¶¶56-57.

Upon moving to Indian Island at age 12, Lorraine Dana resided with her mother, Beatrice Phillips, her four half-brothers, Neil, Reuben ("Butch"), Clifford, and Guy Phillips, and her two half-sisters, Donna and Cheryl Phillips. Her brothers fished and hunted for food. Her brother Clifford caught perch, pickerel, and bass to feed the family, and her mother, Beatrice, bought muskrat, trapped by other tribal members in the River, to feed the family. SMF ¶58.

Lorraine Dana raised her own children on Indian Island as a single parent of four children and continued to rely upon the River for food. In the 1970s, her son, Barry, spent most of his spare time hunting and fishing in the River to help provide food for the family. He fished all around Indian Island and other islands near Indian Island, including Orson and Marsh islands, and in the waters between those islands, as well as the waters between those islands and the mainland shores. He caught perch, pickerel, bass, chub, catfish, and eel, and the family ate what he caught two to three times per week, sometimes more. He used the entire river, bank to bank, to catch fish and eel.[4] SMF ¶59.

Ms. Dana has never distinguished between the islands in the Penobscot River, where she and other members of the Penobscot Nation reside, and the River. It was common usage for her and her family members to say that they would “fish” an island when referring to fishing in the

[4] He also collected flagroot plants, which grow on the bottom of the River near shores, from the same areas of the River, and the family used flag root for medicinal purposes. SMF ¶59. He collected flagroot from waters near the mainland shores as readily as from the waters near island shores. *Id.*

River in waters in the vicinity of an island. This simply meant that they were fishing in the waters of the Penobscot River in areas where they knew there were fish, and this was anywhere in the River, including in coves of the mainland shores. Thus, in testifying to the Senate during its deliberations on the Settlement Act that "my son hunts and fishes my islands," she was simply referring to the fact that her son, Barry Dana, hunted deer at *Mattanawcook*, Chokecherry, and other islands in the Penobscot River assigned to her, and that he fished the River from his canoe all around those islands and between them, including near the mainland shores, in order to provide food for her family. SMF ¶114.[5]

Francis Family

Christopher B. Francis is a Penobscot tribal member who has resided at Indian Island his entire life. He was born in 1971. During his childhood, throughout the 1970's and into the early 1980's, his family relied upon fish (small mouth bass, perch, pickerel, catfish), eel, fresh water clams, and muskrat caught, trapped, or gathered from the bed and waters of the Main Stem, bank to bank, for a substantial portion of its diet. From the spring (April) until the late fall (November), his family relied upon the River for these food sources for three or four meals per week, about two to three pounds per meal. Mr. Francis knew other Penobscot families that similarly relied upon these same food sources for their diet as regularly as his family throughout the 1970's and 1980's. When he became aware of the contamination of fish and other river resources in the 1990's, Mr. Francis and other tribal members refrained from relying as heavily

[5] In July, 1980, Lorraine Dana testified to the Senate Committee on Indian Affairs ("Senate Committee") during its deliberations on the Settlement Act as follows:

> My son hunts and *fishes my islands* to help provide for our family, and if we are to abide by State laws, as this bill intends us to, my family will endure hardship because of the control of the taking of deer and fish. You know as well as I, inflation has taken its toll, and at the present time I am unemployed and have a family of five to support. Two of these children are going to college. I have brought them up by myself.

SMF ¶114.

upon the River for their food. Nevertheless, the practice continued, and, until the mid-1990's, Mr. Francis regularly provided elder Penobscot tribal members with fish he caught from the river for them to eat. SMF ¶63.

The Penobscot Peoples' reliance upon the Penobscot River for sustenance fishing, hunting, and trapping recounted above is matched by their reliance upon the River for their cultural identity. *See* Prins at 3737-46. To just give two examples: The Tribe's "culture hero," *Gluskabe* ("the man from nothing"), "creat[ed] the whole Penobscot River system" and invented the Penobscot fish weir system, an important means for ensuring tribal subsistence. Prins at 3738-41, SMF ¶9. The Tribe's sacred granite rock, *Maja-Obseoose*, or "Pimolos Rock," rising up to the surface of the waters of the Main Stem, was known to contain "a deep circular hole in which Penobscot shamans, *medéolinu*, placed ritual offerings to *Pemúle*, a potentially dangerous mythic storm spirit . . . residing in Mount Katahdin . . . to secure success in fishing, hunting, or trapping." Prins at 3742-43, 3810; SMF ¶9. Indeed, the original Penobscot name for the Tribe's principal island village at what is now referred to as "Indian Island," is *Pem ta guaiusk took*, which means "great or long River." Prins at 3727, 3745.[6]

As Professor Prins summarizes:

> The Penobscot River has been the central artery of an ecosystem supporting Penobscot culture-- their traditional shared and socially transmitted ideas, values, emotions, and perceptions, which are used to make sense of experience and generate behavior and are reflected in that behavior, or, in short, their way of life. . . .
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> * * *
>
> The Penobscot tribe's creation myths, animal totem stories, ritual gifting at a sacred rock in their river, river-dwelling magic creatures, and divination involving fish blood or beaver and muskrat bones, not only affirmed the cultural identity of tribal members but also reminded them of their deeply historical, ecological, and spiritual roots in their

[6] Non-Indians first referred to this village as "Old Town" (and later just "Indian Island") in contrast to the Tribe's island community, *Passadumkeag*, which they called Indian "New Town," upriver at Thorofare Island. *See* Prins at 3708, 3712, 3718, 3766, 3769, n.164

> ancestral homeland and intimate connections to their river and its wildlife. Such was the case in the past, including the treaty period, and remains so today.

Prins at 3727, 3745.

II. THE PENOBSCOT NATION'S EXISTING RESERVATION AS A RESULT OF THE TREATIES WITH MASSACHUSETTS AND MAINE

At the time of the 1796 Treaty with Massachusetts (the "1796 Treaty"), the Penobscot Tribe had exclusive occupation and use the Penobscot River above the head of the tides (where the tides cease to affect the River flow)(about 5 miles north of Bangor), including the River itself, bank to bank, all islands in it, and the uplands on both sides of the River extending at least six miles back from the River on each side. Prins at 3709-10, 3746, 3750-65; SMF ¶11. The historical record establishes that the Penobscot Nation understood that it occupied this territory as the domain of a sovereign. For over 100 years the agents first of the Crown and then of the Commonwealth of Massachusetts recognized and accepted that claim to ownership and sovereignty. Prins at 3750-53, 3758, 2764; SMF ¶12.

Early acknowledgement of Penobscot ownership rights exists in the form of a 1694 deed between Sir William Phipps, English Governor of New England, and Madockawando, "Sagamore of the Penobscott," by which Sir William Phipps purchased lands for himself and his heirs along the St. George River in Maine. SMF ¶13. Seventy years later, when early surveyors, Joseph Chadwick and Park Holland, sought to survey lands along the Penobscot River above the head of the tides, first in 1764 and later in 1793, they recounted, respectively, that Penobscot representatives "are so jealous of their country being exposed by . . . survey, as made it impractical for us to perform the work with accuracy," (Chadwick) and they "gave us to understand . . . that the river was their river, and that they did not wish any white man to go up" and sought to "forbade our proceeding any further" (Holland)." Prins at 3750, 3753; SMF ¶14.

(citations and quotations omitted). In 1763, Massachusetts Governor Bernard promised the Penobscots "That the English should not Extend there Settlements above the Falls" at Sobscook (Nichols Rock). Prins at 3748-79; SMF ¶15.

In 1775, Penobscot Chief Joseph Orono pledged the Tribe's support for the Americans in the Revolutionary War in exchange for protection against continued encroachment by white settlers on either side of the Penobscot River. Prins at 3751, 3759; SMF ¶¶16-17. *See also* S. REP. at 11-12; H.R. REP. at 11-12. Pursuant to what became known as the Watertown Resolve, the Provincial Congress in Boston "strictly forbid any person or persons whatever from trespassing or making waste upon any of the lands and territories and possessions [of the Tribe] beginning at the head of the tide on the Penobscot river and extending six miles on each side of said river." Prins at 3759; SMF ¶17 (quoting Watertown Resolve). In 1777, the United States negotiated a treaty with the Penobscot, the Passamaquoddy and the Maliseet whereby the United States agreed to protect the lands of these Indians and they, in turn, promised assistance in the War. S. REP. at 11; H.R. REP. at 11.

At the conclusion of the Revolutionary War, Massachusetts was burdened with debts and looked to the Penobscot Nation lands, rich with timber and bordering river, as a means of raising public funds if the lands could be bought cheaply from the Indians and sold dear to private buyers. Prins at 3758, 3761-62, 377075; SMF ¶19. Massachusetts tried three times, in 1784, 1786, and 1788, to enter into a treaty with the Penobscots to buy their lands, and each time the Penobscots refused. Prins at 3762-65 (1784); 3765-69 (1786 and 1788); SMF ¶20. In 1784, when Massachusetts Treaty commissioners, including Revolutionary War General, Henry Knox, who would later become U.S. Secretary of War and one of the largest land speculators in Maine, first approached Penobscot Chief Orono about the prospect of purchasing from the Penobscot

Nation the six mile trips of land on either side of the River, Orono responded, "the Almighty placed us on the land and it is ours," and that his people did not sell any land "to our knowledge and never will while we live." Prins at 3764; SMF 21.[7]

Unable to resist the pressures of continued white encroachment any longer, however, in 1796 and 1818, the Penobscot Nation entered into treaties with the Commonwealth of Massachusetts in which it ceded its aboriginal title to the uplands on either side of the Penobscot River at a point above the head of the tides. Prins at 3776-80; Prins Add. 6 (1796 Treaty) at 3857-59; SMF ¶25; Prins at 3791, 3798-3800; Prins Add. 7 (copy of 1818 Treaty) at 3860-66; SMF ¶36. In 1820, at the event of its statehood, Maine entered into its own treaty with the Penobscot Nation to, in essence, adopt the terms of the Commonwealth's 1818 Treaty as its own. Prins at 3802, 3806-07; SMF ¶¶39-40.

The focus of the Commonwealth was not on the River but rather on securing lucrative timberlands in order to derive huge sums from land speculation. Everyone involved unequivocally recognized that the Penobscot People would be left to use and occupy the Penobscot River to continue their way of life attending their island villages (including their sustenance hunting, trapping and fishing rights in the River). Most important, the Penobscot Nation understood, grounded in its world view, that the islands reserved carried with them the River surrounding them (everywhere between the islands and bank to bank), upon which the Penobscot Indians depended for their physical and cultural survival. Prins at 3708-15 (Summary of Opinions); 3746-3812; SMF ¶41.

[7] Knox and his fellow treaty commissioner Benjamin Lincoln reported to the Massachusetts General Court on March 5, 1785 that "your Committee has satisfactory evidence that the Indians of the Penobscot Tribe have long inhabited the Penobscot River and parts thereto adjacent, & claimed the lands laying on the same River by right of Prior occupancy." Prins at 3757, 3764; SMF ¶22.

Thus, pursuant to the 1796 Treaty, Massachusetts acquired, by purchase, the lands "on both sides of the River" from the head of the tides, "beginning near Colonel Jonathan Eddy's dwelling house, at Nichol's rock, so called, and extending up the said River thirty miles." Prins at 3778; Prins Add. 6; SMF ¶¶25-26. By expressly reserving "all the Islands in said River, above Old Town, including Old Town Island," the parties understood that the Penobscot Nation retained "Indian title" (or "aboriginal title") to the River. Prins at 3780-81; SMF ¶¶26-27; *see also id*. at 3782-96 (describing Massachusetts's concession that the Tribe retained its fishery in the River south of the islands referenced in the 1796 Treaty).

Likewise, pursuant to the 1818 Treaty with Massachusetts (the "1818 Treaty"), Massachusetts presumed, again without the consent of the United States required by the Indian Non-Intercourse Act, to extinguish, by purchase, the lands "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 conveyed to said commonwealth" under the 1796 Treaty, with the exception of four townships abutting the River as more fully described in the Treaty, which Maine later presumed to purchase from the Nation. Prins at 3791, 3798-3800; Prins Add. 7; SMF ¶36. Again, the Nation's aboriginal title to the River was left intact. Indeed, as Professor Prins explains, the purpose of the 1818 Treaty for Massachusetts was to secure extremely valuable timberlands by securing a huge swath, extending from either side of the river northward for "indefinite extent," for articles and things of comparably little value, not to extinguish the tribe's continuing Indian title to the river attending the island communities. Prins at 3800; SMF ¶37. In order to secure the ability to extract timber from the vast uplands ceded by the Tribe, Massachusetts carved out from the Tribe's retained aboriginal title to the River a right in the "citizens of the Commonwealth" to "pass and repass . . . for the purpose of transporting their

timber and other articles." Prins at 3799, 3800-01; Prins Add. 6; SMF ¶38. Nothing changed when, upon Maine's separation from Massachusetts, the new state was required to accede to the 1818 Treaty. Prins at 3802-03, 3806-07, 3811-12; SMF ¶¶39-42.

From his exhaustive examination of original sources, including the journals and accounts of the treaty commissioners, surveyors, land speculators, and translators of the Penobscot representatives, Professor Prins concludes:

> By using the words, "[a]ll the islands in said River, above Old Town, including said Old Town Island," in the 1796, 1818, and, by reference, in the 1820 treaty, the treaty-makers understood and agreed that the Penobscot tribal community had retained its traditional way of life on their river, in particular their fisheries. They understood the meaning of the word "island" to be "land surrounded by water," and that without their River Penobscot Indian families encamped on the islands or along the river banks, primarily surviving on fishing, hunting, and trapping, would be isolated and condemned to starvation. As set forth in Part I, the tribe's very creation myth of the Penobscot's ancient hero Gluskábe slaying the monster "Guards-the-Water" articulated the understanding that its mode of subsistence continued to be based on occupying and using their river—bank to bank, island to island. This was also understood by the Massachusetts and Maine treaty delegations facing Penobscot tribal leaders at the treaty sites described in this Report, and no member could possibly have contended otherwise; indeed, they never did. Their words and actions, after each treaty – from the Massachusetts' February 27, 1812 Resolve confirming the Penobscot tribe's fishery at the Old Town Falls, to the Massachusetts' treaty commissioners securing, from the tribe, the right of passage on the River for the citizens of the Commonwealth, to Maine Governor King's recognition of the tribe's fishery in 1820, to major Treat's post-treaty map and journal—all confirm that the treaties did not have the objective of extinguishing the Penobscot tribe's Indian title to their ancestral river. To the contrary, the parties agreed that with the reserved islands, the Penobscot tribe retained its ancestral Indian title (its use and occupation) of the river surrounding those islands, which was essential to their survival and wellbeing.

Prins 3811-12; SMF ¶42.

* * *

This, then, was the nature and extent of the Penobscot Nation's existing reservation in the Penobscot River at the time of the treaties. As set out above, for tribal members still alive today, their lives on the Penobscot River in the Main Stem for nearly four decades before the settlement

of their land claims in 1980 and continuing thereafter involved the same continued use and occupation of the River as their ancestors.

III. *UNITED STATES V. MAINE*, JUDICIAL DECISIONS ESTABLISHING THE FEDERAL INDIAN LAW STATUS OF THE TRIBE AND ITS EXISTING RESERVATION, AND THE SETTLEMENT

Pursuant to the order issued by Judge Edward Gignoux in his landmark decision, *Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649 (D. Me. 1975), affirmed by the First Circuit, 528 F.2d 370 (1st Cir. 1975), the United States commenced the land claims litigation against Maine in this Court, on behalf of the Penobscot Nation, as trustee, to recover multiple remedies on the ground that the Tribe's treaties with Massachusetts and Maine, ceding the uplands on both sides of the Penobscot River, were illegal for want of federal approval. *See* S. REP. at 12-13; H.R. REP. at 12-13. *See generally* Tim Vollman, *A Survey of Eastern Land Claims: 1970-1979*, 31 M. L. REV. 5 (1979). A parallel action was filed on behalf of the Passamaquoddy Tribe, asserting similar claims in reference to land cessions under its treaties. See 25 U.S.C. §§1721, 1731 (referencing the respective actions for the Penobscot Nation and the Passamaquoddy Tribe, *United States v. Maine*, Civil Nos. 1996-ND and 1969-ND).

Although settlement discussions had commenced in 1977, it was a series of judicial decisions in 1979 confirming the application of federal Indian common law doctrines to the Passamaquoddy Tribe and its retained aboriginal territory not ceded in its Treaties and, by extension, to that of the Penobscot Nation that ultimately drove Maine to consummate a settlement. In his opening statement at the March 28, 1980 public hearing on the Maine Implementing Act ("public hearing") held by the Maine Legislature's Joint Select Committee on the Indian Land Claims ("Maine's Joint Committee") then Maine Attorney General Richard Cohen announced that recent Court decisions in which Maine was "on the losing side" caused

him "to reevaluate the desirability of settlement." P.D. 258 (Transcript of Public Hearing on Maine Implementing Act) at 3740. He continued, the "proposal before you . . . recovers for the State much of the jurisdiction over the *existing reservations* that it has lost in . . . recent litigation," with "some *exceptions which recognize historical Indian concerns*." *Id.* at 3744-45(emphasis added). Later, in a letter dated August 12, 1980, to Senator John Melcher, Chair of the Senate Select Committee on Indian Affairs ("Senate Committee"), Attorney General Cohen said that, with the exception of the Tribes' authority over "*hunting and trapping and, to a limited extent, fishing*," the Maine Implementing Act "recovers back for the State almost all of the jurisdiction over *existing reservations* that had been lost as a result of recent Court decisions." SMF 155.

The Court decisions in question were handed down by the First Circuit and the Law Court in 1979. On May 17 of that year, the First Circuit decided *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (Coffin, J.), and on July 3, the Maine Supreme Judicial Court decided *State v. Dana*, 406 A.2d 83 (Me. 1979) (Wernick, J.). In its final committee reports on the Settlement Acts, Congress described *Bottomly* as holding that the "Maine Tribes are entitled to protection under federal Indian common law doctrines," S. REP. at 13, and that they "still possess inherent sovereignty to the same extent as other tribes in the United States." S. REP. at 14; H. R. REP. at 14. In the same reports, Congress said that in *Dana*, "the Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view." S. REP. at 14; H. REP. at 14.

State and Penobscot representatives involved in the settlement negotiations were also of the same view:

- On April 2, 1980, in his opening remarks to introduce the Maine legislation part of the settlement to the Maine Legislature, Maine Senator Samuel W. Collins, Jr., Chairman of

Maine's Joint Committee, stated that "the premise of this bill and the entire settlement agreement is that the Indians are Federal Indians." He continued:

> This means that the Indians and their lands are within the exclusive jurisdiction of the Federal Government, and its Indian Laws. Under this premise, the State has no jurisdiction at all, but the Federal Government has that authority and can presumably delegate it to the State, or, in this instance, ratify and incorporate into Federal Law an agreement between the State and the Indians.

P.D. 271 (Maine Legislative Record, April 2, 1980) at 4015-16.

- By undated Memorandum to Maine's Joint Committee, Legislative Staff from the State's Office of Legislative Assistants wrote that recent federal court decisions and *Dana* "form the foundation of the present settlement agreement" and that "the basic change is the recognition of the Passamaquoddies and the Penobscots as 'federal' [I]ndians and wards, rather than 'state'[I]ndians." P.D. 240 at3328;

- On March 28, 1980 at the public hearings held on the Maine Implementing Act, Maine's Deputy Attorney General, John Paterson, testified that in the absence of a jurisdictional agreement with the Tribe confirmed by Congress "State laws would generally have no applicability [to the Tribes] as exists in most states." P.D. 258 at 3780.

- At the same hearings, Thomas N. Tureen, counsel for the Penobscot Nation and the Passamaquoddy Tribe testified that as a result of *Dana*, "the lands of the Maine Indian Tribes constitute Indian Country as the term is used in Federal Law. As such, Indians residing on Tribal Land in Maine are not subject to the civil or criminal jurisdiction of the Courts of Maine . . . and the Tribes have an unfettered right to regulate hunting and fishing." Pub. Hearings at 24. He said that the settlement represented a compromise and that "as the negotiations progressed," the *State expressed an understanding of "the Tribes' legitimate interest in . . . exercising tribal powers in certain areas of particular cultural importance such as hunting and fishing.*" P.D. 258 at 3763 (emphasis added).

- On July 1, 1980, Senator Collins confirmed, under questioning from Senator George Mitchell before the Senate Committee, that the Penobscot Nation and the Passamaquoddy Tribe "were not now subject to the jurisdiction of the State of Maine," but that the Tribes could agree "to return that jurisdiction to the State" if confirmed by Congress. S. Rep. at 343-44; *see also* P.D. 278 at 4625 (testimony of Maine Representative, Bonnie Post, co-chair of the Maine's Joint Committee, (the proposed settlement "accepts the concept that the Penobscot Nation and the Passamaquoddy Tribe are Federal Indians").

- At the same hearings, Andrew Akins, Chairman of the Penobscot Negotiating Committee, testified that the *Dana* and *Bottomly* decisions "confirm[ed] . . . the existence of our inherent tribal sovereignty, and 'Indian country' status of our lands" pursuant to principles of federal Indian law. P.D. 278 at 4463-64. *See also* P.D. 281 at 5721 (same, testimony of Phillips); *Id.* at 5875-76 (same, Testimony of Akins).

In sum, although *United States v. Maine* involved litigation to recover lands that the Tribe had ceded to Massachusetts and Maine in the 1796, 1818, and 1820, Congress, the State, and the Penobscot Nation recognized and agreed that separate litigation, *Bottomly* and *Dana*, established that the Tribe's *existing reservation* – the one left to the Tribe pursuant to the suspect treaties and fully described in Professor Prins' report – was governed by federal Indian common law. There was also a consensus that, within that reservation, the Penobscot Nation enjoyed the rights and protections of federal Indian common law.

Notably, as the emphasized quotations above reveal, there was also a general understanding that whatever Maine would "recover" from the federal Indian common law cloak otherwise protecting the Penobscot Nation and its existing reservation, there was an *exception* for the Tribe's traditional and culturally important fishing, trapping, and hunting activities. *See also* SMF ¶¶70, 79-80, 111.[8]

IV. CENTERPIECE CONSIDERATION FOR THE SETTLEMENT: THE PENOBSCOTS' RETENTION OF ABORIGINAL FISHING, TRAPPING, AND HUNTING RIGHTS AND RELATED AUTHORITIES IN THE PENOBSCOT RIVER

The State of Maine provided no monetary consideration for the settlement. SMF ¶104. However, the State's representatives, who vigorously held out for a vast amount of State

[8] At the time of the *Bottomly* and *Dana* decisions, the Penobscot Nation was well underway in building its tribal governmental authority over River resources. In January, 1976, the Penobscot Nation had formed its game warden service, appointing four tribal members to serve as the Tribe's wardens, with Kirk Loring as Chief. SMF ¶65. The Tribe's wardens patrolled the River from sun up to sun down, from Indian Island to Medway, every day from mid-April, after the break-up of the winter ice, until November, when the River again became ice bound. SMF ¶65. In his first year of service, Chief Warden Loring encountered a non-tribal member engaged in muskrat trapping in the River in the River between the mainland town of Winn and so-called Brown Islands. SMF ¶66. Because this individual had no permit, Chief Warden Loring confiscated his trap. *Id.* In January, 1979, the United States Department of the Interior ("DOI"), Bureau of Indian Affairs ("BIA") recognized the Penobscot Nation as an Indian tribe with a government-to-government relationship with the United States and listed the Tribe on the Bureau's list of federally-recognized Indian Tribes, 44 Fed. Reg. 7235 (Jan. 31, 1979). SMF ¶67. By October, 1979, the BIA supported Nation's efforts to regulate and monitor wildlife resources in the Penobscot River by approving a one year funding contract in the amount of $585,587.00 pursuant to 25 U.S.C. § 450 (P.L. 638), the Indian Self-Determination and Education Assistance Act ("ISDA"), and other federal laws. *Id.* The contract funded the Tribe's efforts to enforce federal, State, and tribal hunting, fishing and boating laws and ordinances as well as to monitor muskrat and salmon in the River. *Id*.

jurisdiction over the Nation, its existing reservation, and lands to be newly acquired with federal funds, characterized, as worthy consideration, the State's concession that, by the terms of the settlement, to use Attorney General Richard Cohen's words, the Tribe's fishing, hunting, and trapping rights would not be "recovered" by the State. And in addressing concerns about the Tribe's exercise of those rights in the Penobscot River at the Legislature's public hearing on the settlement, Maine's representatives confirmed that the State's willingness to recognize those rights was part of the deal and would not spell disaster for fishing stocks in waters outside of the Reservation.

In his opening remarks to introduce the Maine legislation part of the settlement to the Maine Legislature on April 1, 1980, Senator Collins stated:

> Our own State Court in the *Dana* case has . . . ousted us from criminal jurisdiction and we will be regaining most of that. We will be extending some hunting, fishing and trapping rights to about 800 Indian people in 300,000 acres. But we should remember that to the Indians such rights were property rights over the entire State of Maine, before the European Boat People ever arrived on this continent. Is that too much of a price to pay to settle a $25,000,000,000 lawsuit?

P.D. 271 (Maine Legislative Record) at 4016.

These hunting, fishing, and trapping rights were thoroughly discussed at the public hearing on March 28, 1980, before the Maine's Committee of the Maine Legislature on the Maine Indian Claims Settlement. P.D. 258. In his opening remarks at the public hearing, Attorney General Cohen described "the Settlement Proposal" and his reasons for recommending "this Settlement to the people of the State of Maine." P.D. 258 at 3740. He observed that "[a]s a general rule, States have little authority to enforce state laws on Indian Lands," but that the Settlement "proposal before you . . . recovers for the State much of the jurisdiction over the existing reservations that it has lost in . . . recent litigation," except for " some exceptions *which recognize historical Indian concerns*." SMF ¶79. At the same hearings, Thomas N. Tureen,

counsel for the Penobscot Nation and the Passamaquoddy Tribe, testified that, as a result of *State v. Dana*, "the lands of the Maine Indian Tribes constitute Indian Country as the term is used in Federal Law. As such… the Tribes have *an unfettered right to regulate hunting and fishing*." SMF ¶80. He said that the settlement represented a compromise and that "as the negotiations progressed," the State expressed an understanding of "the Tribes' legitimate interest in . . . exercising tribal powers in certain *areas of particular cultural importance such as hunting and fishing*." SMF ¶80.

At the public hearing, Joseph Floyd, member Maine Atlantic Sea Run Salmon Commission, expressed concern about the provisions of the settlement that would allow tribal sustenance fishing for Atlantic Salmon in the Penobscot River, in particular, the prospect of Indians stringing a gill net "right across" the River, and he said that "jurisdiction in its present proposal form could spell danger to the salmon." SMF ¶81. Alan Meister, Chief Biologist at the State's Atlantic Sea Run Salmon Commission, accompanied Commissioner Floyd. *Id.* Rep. Michael Pearson, a member of the Maine's Joint Committee , responded that, under the terms of the settlement, "[t]he Commissioner of Inland Fisheries and Wildlife could step in" to address the issue. SMF ¶82.

Rep. Michael Pearson asked Chairman Collins to allow Deputy Attorney General John Paterson to address the concerns about tribal salmon fishing for sustenance. SMF ¶85. Senator Collins complied, stating that "[s]ome members of the Committee have particularly asked that we try to address some of the questions about salmon and fishing and so on." P.D. 258 at 3886. Deputy Attorney General Paterson responded that the settlement terms allowed the Commissioner of Maine Department of Inland Fisheries and Wildlife ("DIFW") and the Atlantic Salmon Commission to take effective remedial measures, after consultation with the Tribe, if

tribal sustenance practices threatened the salmon fishery. SMF ¶84. *See also* P.D. 270 (Me. Legislative Record) at 4011 (1980)(testimony of Maine Rep. Charles G. Dow, who served on Maine's Committee, that he met with the State's Department of Inland Fisheries and Wildlife about L.D. 2037, that "questions were answered to their satisfaction, and that the Deputy Commissioner of Fisheries and Wildlife was in front of our committee saying that he was satisfied with the bill as it is."). Rep. Pearson asked Deputy Attorney General Paterson to address what would happen if tribal gill netting practices placed the fishery stock in jeopardy. SMF ¶85. Paterson responded:

> The Commission of Inland Fisheries and Wildlife can go to the Tribes before the fact and say, ['']this is a list of regulations . . . that I would like you to adopt because I think it's necessary to protect the fishery.['] I would suspect that in most instances, the Tribes share the concern about protecting the fishery. I think that's a genuine concern and I would suspect that in most instances there would be an amicable working out of any problem. . . . [H]owever, . . . [h]e can go out and act in the absence of a Tribal ordinance and . . . if the evidence so demonstrates that the lack of that Tribal ordinance is reasonably likely to cause a harm, that if we permit gill netting to occur, if we don't prohibit it, that there's going to be some harm to the fishery and he can go out himself and take action under normal State law to prohibit gill netting.

Id. Mr. Paterson also responded to the concern that the settlement terms were discriminatory because they allowed tribal sustenance fishing under tribal law, stating that "the State felt it appropriate in the negotiations to recognize *traditional Tribal interests*" and that sustenance hunting and fishing involved "*particularized cultural interests*" reflected in "the original agreements that were negotiated back in the 1700's and 1800's." SMF ¶86.

Throughout the negotiations, the Penobscot representatives always maintained "that the Penobscot Nation retained aboriginal title to the Penobscot River where the Penobscot People have always fished, hunted, and trapped for their sustenance." Phillips Decl. ¶9; SMF ¶71; *See also* SMF ¶¶ 76-77, 95-97. Indeed, in attaining approval of the settlement from the Tribe's membership and its Tribal Council, the Penobscot negotiators conveyed their understanding that

"the settlement would confirm our existing reservation in the River and that our right to engage in sustenance fishing, hunting, and trapping in the River would be protected from any interference by the State of Maine." Phillips Decl. ¶¶12-14; SMF ¶¶76-77.

This understanding that the settlement confirmed the Penobscots' sustenance fishing rights in the Penobscot River as traditionally practiced is confirmed by Michael D. Pearson and Bennett Katz, who served in the State Legislature at the time of the settlement and by Jonathan Hull, who served as counsel to the Maine Legislature.

Michael Pearson served in the State's House of Representatives at the time of the land claims settlement and sat on the Joint Select Committee to review, and work on, the Maine Implementing Act. SMF ¶101. He confirms that the intent of the sustenance fishing provision was "to allow members of the Penobscot Nation to take fish for their sustenance from the Penobscot River in waters from Indian Island, near Old Town, at least as far up the River to Medway, where members of the Tribe had always taken fish for their subsistence." *Id.*

Bennett Katz served as majority leader of the Maine Senate at the time of settlement. SMF ¶103. He later served as Chair of the Maine Indian Tribal State Commission, a nine-member committee of Penobscot, Passamaquoddy, and State representatives to review the effectiveness of the Maine Implementing Act and make recommendations to the Legislature for any changes. *Id.* In 1995, he took offense at the assertion in a proceeding before the Federal Energy Regulatory Commission that "only the islands . . . constitute the Penobscot Reservation" and that the Tribe's sustenance fishing right "is not on the Penobscot River, because the river is outside the boundaries of the Reservation." Jt. Exh. 161, ECF No. 104-16 at 2200. Confirming the position of the Penobscot negotiators referenced above, he said he was "certain that the Penobscots never would have agreed to the Settlement had it been understood that their fishing

right extended only to the tops of their islands." *Id.* He also said that "the State . . . never questioned the existence of the right of the Penobscot Indian Nation to sustenance fishing in the Penobscot River." *Id.*; SMF ¶103.

Jonathan C. Hull served as staff attorney for the Office of Legislative Assistants of the Maine Legislature at the time of the settlement and, in that capacity, reviewed the proposed bill for the Maine Implementing Act and advised the Legislature and Maine's Select Committee with regard to issues concerning language and interpretation issues. Hull Decl. ¶¶2-3; *see* SMF ¶71. In March and early April of 1980, he attended hearings and meetings with State and Penobscot negotiators in order to understand, and advise the Committee on, the terms of the Maine Implementing Act. *Id.* at ¶4. He recalls that the Penobscot negotiators "consistently expressed their view that by the terms of the settlement, the Penobscot Nation retained its aboriginal rights of sustenance fishing, hunting and trapping in the Penobscot River as reserved in its treaties with Massachusetts" and he recalls no discussion of, or objection to, this position by any party involved in the negotiations. *Id.* at ¶11; SMF ¶¶71-72; *see also* SMF ¶97.

V. PENOBSCOT EFFORTS TO CLARIFY AMBIGUITIES IN THE STATE'S CHARACTERIZATION OF THE TRIBE'S RESERVATION BOUNDARIES

On the eve of the Maine Legislature's expected approval of the proposed bill to become the Maine Implementing Act, the State and Penobscot negotiators were unable to reach agreement about how to interpret certain language in the Maine Implementing Act, including how to interpret the boundaries of the Penobscot Indian Reservation. SMF ¶87

By memorandum dated April 1, 1980, Attorney General Cohen suggested that Maine's Joint Committee adopt interpretive statements in a separate written Committee report "in the event [that] a court should look . . . for interpretive assistance." ("April 1 Memorandum") SMF ¶¶90-91. With respect to reservation boundaries, he wrote: "the external boundaries of the

Reservations are limited to those areas described in the bill including riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of law." SMF ¶92.

On April 2, 1980, after reviewing Attorney General Cohen's April 1 Memorandum, Penobscot representatives, Butch Phillips and James Sappier drafted a Resolution, providing, in pertinent part, as follows:

> The Passamaquoddy/Penobscot Negotiating Committee, during the course of it's [sic] numberous [sic] deliberations; through months of good faith negotiation with the Attorney General's office, and conducting information workshop for members of the tribes, have gained a good understanding of the intent of the Bill. This understanding and interpretation have been the basis for the agreement with the state on the various items.
>
> It was the understanding and interpretation that was conveyed to the members of the tribe prior to the Tribal vote on acceptance of the Proposal.
> The following are specific interpretations of this committee as they pertain to the legislature [sic]. . . .
>
> (3) Sustenance Hunting & Fishing for Tribal members shall be under the exclusive regulation of the Tribes, and ordinances shall be passed to control the taking of Fish and Wildlife for Sustenance. These Ordinances shall not prohibit members from providing Fish and Wildlife for the sustenance of the elderly members or others in the Tribes who cannot provide for themselves.
>
> (4) *The Penobscot Nation is comprised of the Penobscot River and the Inlands [sic] within the River*. . . . It is also the belief of this Committee and the Penobscot Nation that *the river was never cited [sic] by the Tribe and therefore title is not extinguished and the State cannot regulate it except where specifically stated in the agreement*.

Phillips Decl. Exhs. C-E. The Resolution was signed by the Tribes' representatives and delivered to Maine's Joint Committee. SMF ¶94.

The Penobscot representatives' purpose was to set forth the position they had conveyed to Penobscot members when they voted to approve the settlement, including, that, by the terms of the settlement, the Penobscot Nation retained the Penobscot River where members of the Nation had always fished, hunted, and trapped for their sustenance. SMF ¶96.

On April 3, 1980, the Maine House and Senate passed resolutions to place certain documents in the Legislative files: a report of Maine's Select Committee, which included an April 2, 1980 memorandum from Attorney General Cohen ("Joint Committee Report"); the transcript of the public hearing held on March 28, 1980, a statement of former Governor James Longley, and a March 28, 1980; memorandum from Attorney General Cohen ("Legislative Files Orders"). SMF ¶¶105-06. The Tribes' Negotiating Committee did not authorize or consent to the Joint Committee Report or to the Legislative Files Orders. SMF ¶107-08. The Joint Committee Report closely tracked Attorney General Cohen's statement that "the external boundaries of the Reservations are limited to those areas described in the bill including riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of law," but changed the last clause to read "by operation of *State law*." *Compare* Jt. Exh. 49, ECF No. 102-49 at 1511 *with* P.D. 264 (Report of Maine Joint Committee) at 3970.

VI. THE FISHING, TRAPPING, AND HUNTING PROVISIONS OF THE MAINE IMPLEMENTING ACT

As adopted, the Maine Implementing Act set forth the Penobscot Nation's sustenance hunting, trapping, and fishing rights in section 6207. The sustenance fishing provision states:

> *Notwithstanding . . . any law of the State, the members of the Penobscot Nation may take fish, within the boundaries of their . . . Indian reservation[] for their individual sustenance* subject to the limitations of subsection 6 [addressing Maine's residual right to address adverse effects of tribal subsistence practices discussed in the House and Senate Reports quoted above].

30 M.R.S.A. § 6207(4) (emphasis added); s*ee also id.* § 6207(6) (residual authority of Maine Commissioner of Inland Fisheries and Wildlife to take action to address adverse effects of Penobscot Nation regulation of fish and wildlife on fish and wildlife stocks "on lands or waters outside the boundaries of land or waters subject to regulation by . . . the Penobscot Nation").

The term "fish" is defined to include "inland fish and anadromous and catadromous fish when in inland water." *Id.* § 6207(9). The hunting and trapping provision provides, in pertinent part:

> Subject to the limitations of subsection 6, . . . the *Penobscot Nation shall have exclusive authority within [its] Indian territory* [both the existing reservation and lands to be newly acquired by the terms of the settlement] *to promulgate and enact ordinances regulating . . . [h]unting, trapping or other taking of wildlife. . . . [S]uch ordinances may include special provisions for the sustenance of the individual members of . . . the Penobscot Nation*.

30 M.R.S.A. § 6207(1) (emphasis added). *See also id.* § 6205(2) (Penobscot Indian Territory includes the Penobscot Reservation and newly acquired land to be held in trust for the Nation by the United States); *id.* § 6207(6) (Commissioner's residual authority).

Other sections of the Maine Implementing Act set forth jurisdictional allocations over hunting, trapping, and other taking of wildlife within the Tribe's reservation and within lands to be acquired by the United States in trust for the Nation (together referred to as "Penobscot Indian Territory," *see* 30 M.R.S.A. § 6205(2)):

- The Tribe's Game Wardens "have exclusive authority to enforce" the Tribe's laws adopted under section 6207(1), governing "hunting, trapping, and other taking of wildlife," by tribal members as well as non-tribal members. *See* 30 M.R.S.A. § 6210(1).

- The State Courts, however, have exclusive jurisdiction to adjudicate any such violations by individuals who are not members of either the Penobscot Nation or the Passamaquoddy Tribe. *See* 30 M.R.S.A. § 6206(3); s*ee* also S. Rep. at 39 ("Tribal police officers . . . are thus vested with authority to arrest non-members, but judicial proceedings must be through the State courts which are empowered to enforce Tribal ordinances against non-members.").

- The Tribe's Wardens are "subject to the same duties, limitations and training requirements as other corresponding law enforcement officers under the laws of the State. *See* 30 M.R.S.A. § 6210(4).

The Maine Implementing Act defines the "Penobscot Indian Reservation," in pertinent part, as:

> the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as

> Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818 [the date of the Nation's last treaty with Massachusetts], excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act.
>
> 30 M.R.S.A. § 6203(8).

VII. CONGRESS'S ENACTMENT OF THE SETTLEMENT ACTS

To persuade Congress that it should "adopt and finance" the settlement, various state legislative leaders provided written testimony to the House Committee on Interior and Insular Affairs ("House Committee"). In their testimony, Maine's co-chairs of Maine's Joint Committee, Senator Samuel Collins and Representative Bonnie Post, explained their view that "the [State] Act, when read with the Federal Act, implicitly accepts the concept that the Penobscot Nation and the Passamaquoddy Tribe are 'Federal Indians'" and that "legal concepts [had] altered" the State's past presumption of authority over the Maine tribes. They said that "the State and Indians have now voluntarily negotiated" to restore "full State jurisdiction over the Indians and their land," but with "specific exceptions in recognition of *traditional Indian practices* and the Federal relationship to Indians." As an example of one such exception, they referred, "in particular," to the Tribes' "specific authority to regulate hunting and fishing within their territories." House Hearings 230.[9]

It was clear to all concerned at the time that the Penobscot Nation had no intention of surrendering its aboriginal rights in the Penobscot River. Hull Decl. ¶13; SMF ¶113. The views of concerned Penobscots about the protection of sustenance fishing, hunting, and trapping rights within the Tribe's reservation were pronounced. SMF ¶¶114-15. Lorraine Dana was perhaps most vocal. As described above, p.p. 5-7 n.4, if anyone might have had concerns about ensuring

[9] At the House Hearings on August 25, 1980, Attorney General Cohen testified that he thought the "jurisdictional agreement" embodied by the Maine Implementing Act would generally treat Indians and non-Indians in the same manner under state law with the exception of "*some traditional matters of heritage to the Indians such as fish and game.*" P. D. 281 (House Hearing) at 2710.

that Penobscot tribal members would be able to rely upon the River for food unencumbered by the State, it was Ms. Dana. *See* SMF ¶¶59-61, 114.

Upon enacting the Settlement Act, Congress took pains to assuage the concerns raised by Ms. Dana and others in "[t]estimony before the Committee[s] . . .[t]hat subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement." S. REP. at 14-16 (emphasis omitted); H. R. REP. at 14-16 (same). Referencing the First Circuit's decision in *Bottomly* and the Law Court's decision in *Dana*, the House and the Senate promised that "settlement . . . protects the sovereignty of . . . the Penobscot Nation" through "the hunting and fishing provisions," which are "examples of expressly retained sovereign activities." S. REP. at 14-15; H. R. REP. at 14-15. Accordingly, under the Settlement Acts, the power of Maine "to alter or terminate these rights at any time . . . without the consent of the . . . [N]ation is ended." S. REP.at 16-17; H.R. REP.at 16-17. Congress continued, "[t]he State has only a residual right to prevent the . . . tribe[] from exercising [its] hunting and fishing rights in a manner that has a substantially adverse effect on stocks in or on adjacent lands or waters. . .[,] not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights." S. REP. at 16-17; H.R. REP. at 16-17.

VIII. POST-SETTLEMENT EVIDENCE OF THE PARTIES' UNDERSTANDING THAT THE PENOBSCOT INDIAN RESERVATION IS IN THE PENOBSCOT RIVER

The Penobscot Nation

Just as it did during the treaty times and thereafter, *see* SMF ¶¶28-35, 41, 44-49, 53, at all times since the enactment of the Settlement Acts in 1980, the Penobscot Nation has ceaselessly worked to protect its sustenance fishing, trapping, and hunting rights in the Penobscot River and the health of fish and other River resources upon with they rely. The lengthy history of the Tribe's actions in this regard over the course of the last 35 years is fully set forth in the SMFs,

and they are incorporated herein by reference. *See* SMF ¶¶128-139, 149, 155-159, 163-164, 168-181, 186, 188-189, 191-192, 196. The Tribe highlights just a few examples here.

By letter dated October 31, 1980, just three weeks after Congress enacted the Settlement Act, the Tribe, through its Governor, Timothy Love, sought bureau of Indian Affairs ("BIA") funding to develop a water resource conservation and utilization plan involving "a complete and in-depth inventory and analysis of the chemical, biological, and physical make-up for the [Penobscot [R]iver." SMF ¶128. Echoing the many statements of past Penobscot leaders during the treaty times, he wrote, "The importance of water conservation to the Penobscot Nation cannot be overlooked." *Id.* By 1983, the Tribe had a full-fledged natural resources conservation program in place, funded by over $1 million from the BIA, which included its ongoing "efforts to improve on Atlantic Salmon fishery in the Penobscot River." SMF ¶129. Ever since, the Tribe's Department of Natural Resources has worked, at every turn, to monitor and protect the environmental integrity of the River. *See e.g.* SMF ¶¶128-139, 168-174.

Similarly, the Penobscot Nation promulgated regulations governing sustenance fishing of Tribal members on the Penobscot River, SMF ¶176 and, on June 23, 1983 the Penobscot Nation sent to the Commissioner of the DIFW the then-current Penobscot Nation's sustenance fishing regulations which governed the taking of Atlantic Salmon in the Penobscot River. SMF ¶177. The Tribe has continuously regulated non-tribal eel trapping in the Penobscot River since 1994 by issuing permits and requiring reports of catch data from permittees. SMF ¶179. The Penobscot Nation's Department of Natural Resources also issued "nuisance permits" to non-tribal members for the taking of furbearers, such as beaver, from the Penobscot River. *Id.*

Finally, due to losses suffered from the polluted state of the River, the Tribe asked the United States, as its trustee, to initiate a natural resources damages assessments and recovery

proceedings under the Comprehensive Environmental Response, Compensation, and Liability Act. In that request, Penobscot Chief Francis Mitchell reported:

> After a decade of fish consumption advisories on the Penobscot River, we face the reality that the important cultural connection of our tribal members – especially our children – to the Penobscot River is fading. Experiencing the communal exercise of our treaty rights creates a sense of self-worth, and belonging to the Penobscot Nation, and it connects our people to their land, culture, ancestors, and history. The deprivation of these rights, and the severing of this connection between our people and their land and history, is generating significant cultural damage, and poses a serious issue for our members and leaders.

Jt. Exh. 195, ECF No. 104-95 at 2351; SMF ¶156 (citing same).

Thereafter, the United States commenced natural resources damages assessments in the Main Stem, including an assessment of the value of the Penobscot Nation's "foregone cultural use" due to the polluted state of the River. SMF ¶¶157-159. A United States' proof of claim later filed in the Chapter 11 bankruptcy proceedings of Lincoln Pulp & Paper sought "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." SMF ¶¶160-161.

The United States

Since the settlement, the United States Department of the Interior ("DOI"), likewise, has been steadfast in its position that the Nation's reservation encompasses the Penobscot River. This has taken the form of (a) advocating for protection of the Tribe's fishing rights in the River in multiple proceedings before the Federal Energy Regulatory Commission ("FERC") and the Environmental Protection Agency ("EPA"); (b) commencing a natural resources damages assessment, as trustee for the Penobscot Nation, to address the Tribe's lost cultural uses in the River due to dioxin and other harmful discharges undermining the Tribe's subsistence use of, and cultural connection to, the River; and (c) unceasing federal funding of the Nation's efforts to

protect the River. SMF ¶121. The Justice Department ("DOJ"), likewise, has filed briefs to protect the Nation's sustenance fishery in the River. SMF ¶¶140-146. As more fully set out in the memorandum of the United States, these and other federal government departments and agencies have never retreated from the view that the Nation's reservation encompasses the River, and they have consistently invoked the federal government's trust responsibility to protect it.

The State of Maine

For years following the enactment of the Settlement Acts in 1980, Maine never questioned the view that the Penobscot Indian Reservation includes the Penobscot River and consistently recognized the Tribe's sustenance fishing, trapping, and hunting rights and related jurisdictional authorities in the waters and bed of the River.

Fishing

Maine Attorney General James Tierney addressed the Tribe's sustenance fishing rights in the River by formal opinion dated February 16, 1988 to William J. Vail, the State's Commissioner of Inland Fisheries and Wildlife and Chair of its Atlantic Sea Run Salmon Commission. Jt. Exh. 80, ECF No. 103-30 at 1652; SMF ¶185. Because Maine law prohibited gill netting of Atlantic Salmon and the Penobscot Nation intended to catch salmon in the Penobscot River by that method, Commissioner Vail inquired "whether there is any legal impediment to the taking of approximately twenty Atlantic salmon *from the Penobscot River* by use of gill nets by members of the Penobscot Indian Nation." *Id.* (emphasis added). Observing that the salmon "will be consumed by members of the Penobscot Nation," Attorney General Tierney explained that this activity would involve the Nation's authority to take fish for sustenance purposes "*within the boundaries of the Penobscot Reservation*" without interference under the laws of the State. Jt. Exh. 80, ECF No. 103-30 at 1652-53 (emphasis added). He went

on to describe the residual authority that Commissioner Vail could exercise pursuant to 30 M.R.S.A. §6207(6). *Id.*

Hunting

In 1990, in the matter of *Penobscot Nation v. Kirk Fields* (Penobscot Nation Tribal Court Criminal Action Docket Nos. 90-36 and 90-37), the Penobscot Nation Tribal Court adjudicated a criminal case involving a tribal member, who hunted a deer in the Penobscot River with bow and arrow while also employing a motor boat to chase down the deer. The incident took place in the River between the mainland town of Greenbush and Jackson Island. Recognizing that the Penobscot Nation had jurisdiction over a tribal member engaged in hunting in the Penobscot River, the State turned jurisdiction over Penobscot wardens for prosecution in the Tribal Court. SMF ¶187.

Trapping

In the mid-1990's, in the face of new-found interest in eel trapping in the Penobscot and other Maine rivers, the Penobscot Nation worked on efforts to develop state-wide regulations to conserve the resource, eventually promulgating its own permitting laws for eel trapping in the Main Stem and issuing permits to both tribal members and non-tribal individuals. *See* Jt. Exh. 142, ECF No. 104-42 at 2156-57; SMF ¶¶189, 191. During that time, the State and the Tribe agreed to designate the zone in the Main Stem from the impoundment just above the dam at Milford northward to the West Enfield dam to exclusive eel potting by the Penobscot Nation's tribal members and to the Nation's exclusive regulation of eel potting in that zone, SMF ¶¶178, 192. The State's permits for the taking of eels for waters of the Penobscot River provided as follows:

> 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 [gear] should not be placed on these lands without permission from the Penobscot Nation.

SMF ¶190 (emphasis added).

Moreover, even as of 2012, at the time this litigation commenced, the rules of Maine's DIFW governing inland fishing from April 1, 2012 through March 31, 2013 stated that "The Penobscot Indian Reservation includes certain islands *and surrounding waters in the Penobscot River* above the Milford Dam." SMF ¶197. After the initiation of this litigation, and without any public notice, the Department entirely removed from the inland fishing rules the language defining the reservation as the islands and "surrounding waters" that had appeared in the rules in effect until March 13, 2013 quoted above. SMF ¶198.[10]

IX. THE MAINE ATTORNEY GENERAL'S OPINION AND THIS ACTION

By letter dated August 8, 2012 to Penobscot Nation Chief, Kirk Francis, Maine's Attorney General, William Schneider, announced a new opinion (directed to the Commissioner of DIFW, Chandler Woodcock and the Colonel of Maine's Game Warden Service, Joel Wilkinson). The opinion states that the Penobscot River "is not part of the Penobscot Nation's Reservation," that the Penobscot Nation's authority over hunting and fishing is "on" the islands only, and that Maine has exclusive authority over all activities on the River. Jt. Exh. 278, ECF No. 105-78, ECF at 3570.

[10] Penobscot Nation's commends to the Court the videos of the Penobscot River as well as the photographs and maps of the Penobscot River and Penobscot tribal members on the River, all of which are part of the record. While a view would be the best way for the Court to understand the islands and the waters of the Main Stem, these materials are a close substitute. *See* SMF ¶¶201-205 at ECF at 3966- 4006(photographs); ECF 4009 (maps)(aerial videos); Declaration of Troy Francis with Exhibit A (video of Warden Francis in Penobscot warden boat between Indian Island and Orson Island and between Indian Island and the mainland shore), ECF 3938-47 (maps).

SUMMARY JUDGMENT STANDARD

To prevail on its motion, the Penobscot Nation is required to show "that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see Baltodano v. Merck, Sharp, and Dohme (I.A.) Corp.*, 637 F.3d 38, 41 (1st Cir. 2011). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." *Santiago–Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir. 2000) (internal quotation marks omitted). The Tribe seeks a declaratory judgment and such injunctive relief as the Court deems necessary to prevent the State Defendants from violating its sustenance fishing, hunting, and trapping rights and related regulatory and enforcement authorities in the waters and bed of the Main Stem as confirmed by Congress in the Settlement Acts. The undisputed facts establish that the State Defendants are poised to violate these federally protected rights and authorities. Thus, the Tribe is entitled to the declaratory and injunctive relief it requests in its Second Amended Complaint.

ARGUMENT

The Tribe initially sets forth three background legal principles that govern this case:

First, interpretations of the Settlement Acts, memorializing the United States' compromise of *United States v. Maine*, as trustee for the Penobscot Nation, present questions of federal law. *See Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir. 1999); *Akins v. Penobscot Nation*, 130 F.3d 482, 484-85 (1st Cir. 1997). This is because, pursuant to Article 1, section 8 of the Constitution, Congress has plenary authority over Indian affairs, and but for Congress's oversight and confirmation, there would have been no settlement of the land claims. *See Fellencer*, 164 F.3d at 708-09 (construing "internal tribal matters" clause of Maine

Implementing Act) (citing *Akins*, 130 F.3d at 485; *Bottomly*, 599 F.2d at 1066 ("until Congress acts, the tribes retain their [ ] sovereign powers"); and U.S. Const. art. I, § 8, cl. 3)).

Second, because of the "the unique trust relationship between the United States and the Indians," especially prevalent in Congress's compromise of *United States v. Maine*, "special rules of statutory construction obligate" federal courts to resolve ambiguities in the Settlement Acts "to the [Indians'] benefit." *Fellencer*, 164 F.3d at 709 (quoting and citing *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985)). *See generally* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW (West 2015) (hereinafter "Canby") at 122-130 (discussing Supreme Court cases underpinning the canons of construction applied in cases involving Indian tribes).[11]

Third, and closely related to the second, although Congress ended treaty-making with Indian tribes in 1871, statutes like the Settlement Acts are considered "treaty substitutes" subject to the same venerable principles that govern the interpretation of treaties with tribes. *See United States v. Dion*, 476 U.S. 734, 745 n.8 (1986); *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975) (and cases cited therein); *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995). *See generally* COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 18.02, p. 1157-58 (2012) (hereinafter "Cohen"); Canby at 122-130. Thus, as the Supreme Court has said, "[t]he canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine*, 420 U.S. at 199.

[11] In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, Judge Gignoux held that the Indian Non-Intercourse Act imposed upon the United States "an obligation of trust" to Indian tribes in accordance with "an unbroken line of Supreme Court decisions, which, from the beginning have defined the fiduciary relationship between the Federal Government and the Indian tribes." *Id.* at 662. That trust responsibility was ever-present upon Congress's compromise of *United States v. Maine*, a case brought by the United States, on behalf of the Penobscot Nation pursuant to that Act. *See* 25 U.S.C. § 1721(a)(7) ("This subchapter represents a good faith effort on the part of Congress to provide . . . the Penobscot Nation … with a fair and just settlement of their land claims.").

I. THE PENOBSCOT NATION'S SUSTENANCE FISHING, HUNTING, AND TRAPPING RIGHTS ARE IN THE WATERS AND BED OF THE MAIN STEM OF THE PENOBSCOT RIVER

Pursuant to the Settlement Act, Congress confirmed that, with the exception of limited residual authority granted to the Commissioner of DIFW pursuant to 30 M.R.S.A. § 6207(6), the Penobscot Nation would henceforth have exclusive authority over sustenance fishing, trapping, hunting and other taking of wildlife within the Penobscot Indian Reservation. 30 M.R.S.A. §§6207(1), 6207(4) (quoted in full above at p. 25). It ratified the definition of the "Penobscot Indian Reservation" as "*the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island*, also known as Old Town Island, *and all islands in that river northward thereof*" in existence the time of the 1818 Treaty, other than islands transferred by the Tribe between the Treaty and the effective date of the Settlement Acts in 1980. 30 M.R.S.A. § 6203(8) (emphasis added) (quoted in full above at p.p. 25-26).

The Maine Attorney General's directive to Defendants Wilkinson and Woodcock that the Penobscot Reservation is strictly confined to the islands in the Main Stem and does not include the waters or bed of the River, that Maine has exclusive authority over all activities in the River, and that the Penobscot Nation has none wrongly severs the Tribe's sustenance fishing, hunting, and trapping rights from its namesake River. It patently conflicts with the promise and purpose of the Settlement Acts confirmed by Congress, and on the undisputed material facts set forth above, finds no support in the law.

A. Congress Confirmed The Tribe's Sustenance Fishing, Trapping, And Hunting Rights In The Existing Treaty Reservation, And The Islands "Reserved To" The Tribe In Those Treaties Included Sustenance Fishing, Trapping, and Hunting Rights In The Waters And Bed Of The Penobscot River

1. Congress Confirmed The Tribe's Fishing, Trapping, And Hunting Rights In Accordance With The Reservation Left To The Tribe In The Treaties

In ratifying and rendering effective the Maine Implementing Act, Congress made clear that "[t]he settlement . . . provides that the Penobscot Nation will retain as [its] reservation[] those lands and natural resources which were reserved to [it] in [its] treaties with Massachusetts and not subsequently transferred by [it]." S. REP.at 18; H.R. REP. at 18.[12] *See also Maine v. Johnson,* 498 F.3d 37, 47 (1st Cir. 2007) (the Tribe's reservation, including any related waters in the Penobscot River claimed by the Tribe, was "*retained* by the tribes under the Settlement Act, based on earlier agreements between the tribes and Massachusetts and Maine") (emphasis in original). *Cf. Mille Lacs. band of Chippewa Indians,* 526 U.S. 172, 197 (1999)(citing statement of Senate Chairman of Committee on Indian Affairs that Act authorizing treaty with Chippewa "would reserve to them . . . those rights which are secured by former treaties").

There is no dispute that Penobscot representatives to the settlement made it perfectly clear that they intended to hold onto their existing reservation under the suspect Treaties. *See* SMF ¶¶71-73, 75. For the Penobscots, a central consideration for the settlement was that it would confirm the Tribe's "existing reservation in the River" under the Treaties, and that the Tribe's "right to engage in sustenance fishing, hunting, and trapping in the River would be protected from any interference by the State of Maine." Phillips Decl. ¶11; SMF ¶73.

> The Tribes' Negotiating Committee never would have agreed to, or recommended to the Penobscot members and Tribal Council, a settlement of [the] Tribe's land claims . . . that

[12] The First Circuit refers to the Senate and the House Reports as the "authoritative source" on Congress's Settlement Act intentions. *Akins v. Penobscot Nation,* 130 F.3d 482, 489 (1st Cir. 1997).

> would extinguish the Tribe's reservation of the Penobscot River; for such a result would have been an unacceptable termination of [the Tribe's] existing reservation and [its] longstanding reliance upon the Penobscot River for sustenance fishing, trapping and hunting and for our cultural identity.

Phillips Decl. ¶15; SMF ¶73.

Nor is there any dispute that Maine's representatives understood that the settlement confirmed the Tribe's existing reservation established by the Treaties. SMF ¶¶71-72, 74. Indeed, to cite just one of the many examples provided above, Attorney General Cohen described the settlement as "an agreement between the State and the Tribes specifying the laws that will apply to the *historic* reservations and the newly acquired lands."); SMF ¶¶74, 110, and claimed that the settlement "recover[ed] back for the State almost all of the jurisdiction over *existing* reservations that had been lost as a result of recent Court decisions" with the exception of "hunting and trapping and, to a limited extent, fishing." SMF ¶110; *see also* 30 M.R.S.A. § 6202 (purpose of Maine Implementing Act to address "jurisdiction on the *present* . . . Penobscot Indian reservation[]" as well as in "the claimed areas") (emphasis added).

Thus, the parties to the settlement (and most important, Congress, which was acting as trustee for the Tribe in settling the land claims) understood that the settlement's allocation to the Tribe of jurisdiction over the Nation's sustenance fishing, hunting, and trapping rights (and related authorities) was in its "present," "historic," or "existing" reservation established by the Treaties. And Congress, in addressing a number of "Special Issues" raised by tribal members during its deliberations on the settlement, assured the Tribe that its concerns about State power over those rights were "unfounded"; that the State's ability to control the Penobscots' exercise of those rights was "ended." *See* S. REP. at 14-17; H.R. REP. at 14-17.

2. Congress, Maine, And The Penobscot Nation Agreed, Going Into The Settlement, That Federal Indian Common Law Governed The Penobscot Nation's Existing Reservation, And That Law Confirms The Penobscot Nation's Sustenance Fishing, Trapping, And Hunting Rights In The Waters And Bed Of The Penobscot River

The undisputed facts establish that, going into the settlement, Congress (as well as Maine and Penobscot representatives) understood that the Tribe's existing Reservation was governed by federal Indian common law, and, pursuant to that law, the State had "lost" jurisdiction over the reservation and the Tribe. The undisputed facts also establish that the State's representatives conceded, at every turn, that, by the terms of the Settlement Acts, Maine would *not* "recover" its presumed authorities with respect to the Tribe's "traditional" and "culturally important" fishing, trapping, and hunting practices within its "historic" (or "existing") Treaty reservation. SMF ¶¶79, 85-86, 110-11.[13]

Congress's (and the parties') recognition that federal Indian common law principles governed the Penobscot Nation and its existing Reservation under its Treaties at the time of the Settlement Acts triggered a set of fundamental Indian law principles, protective of the Tribe, which then guided Congress as it confirmed the settlement terms.

First, the meaning of the phrase "islands in the Penobscot River" in the Treaties "must . . . be construed, not according to the technical meaning of [the] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *accord Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (McLean, J., concurring) ("How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."); *Lac Courte Oreilles Band of Lake*

[13] Nothing could be more evident of the federal law status of the Tribe and its existing reservation going into the land claims settlement, particularly with respect to fishing, and trapping authorities, than the BIA's recognition of the Penobscot Nation as a federal Indian tribe in 1979 and its funding of the Tribe's oversight and patrol of the Main Stem pursuant to ISDA. *See supra* note 8. As the First Circuit has said, such funds issue under the ISDA to further tribal self-governance and over matters of critical importance to Indian Tribes. *See Penobscot Nation v. Fellencer*, 164 F.3d at 713.

Superior Chippewa Indians v. Voigt, 700 F.2d 341, 350 (7th Cir. 1983) (citing and quoting from *Meehan* and *Worcester*). As the report of Professor Prins makes perfectly clear, the "islands in the Penobscot River" in the Tribe's Treaties with Massachusetts were understood not only by the Penobscot treaty-makers, but by those representing the Commonwealth, to include the waters and bed of the Penobscot River upon which the Tribe relied for its survival. *See* Prins at 3811-12

Second, when Indian tribes enter into treaties to cede their exclusive use and occupation of their aboriginal domains, which the Penobscot Nation did in its Treaties with Massachusetts and Maine, they retain all of their rights and continued use and occupation of their lands and natural resources not expressly ceded. *Oneida Indian Nation v. Oneida Cnty., New York*, 414 U.S. 661, 667 (1974); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941); *United States v. Michigan*, 471 F. Supp. 192, 254 (W.D. Mich. 1979); s*ee also Johnson*, 498 F.3d at 47 (describing the Tribe's reservation as "*retained*" pursuant to the Treaties) (emphasis in original). *See generally* Cohen § 18.01, pp. 1154-55. The report of Professor Prins also makes clear that in its treaties with Massachusetts and Maine, the Penobscot Nation ceded *only* the uplands on either side of the River, and retained all of its aboriginal rights to use and occupy the Penobscot River, albeit with a public easement granted to the citizens of Massachusetts (and Maine, as successor) to use the River to transport timber and other goods. *See* Prins at 3778-81, 3800, 3782-90, 3853; SMF ¶¶26, 27, 38, 42.

Third, where, as here, the Penobscots' continued use and occupation of the waters and bed of the Penobscot River for sustenance fishing, trapping, and hunting "were not much less necessary to the existence of the Indians than the atmosphere they breathed," absent the most express relinquishment in the Treaties, the Tribe *retained* with its islands (a) the full continued use and occupation of the waters and bed of the River necessary for its survival, *see United*

States v. Winans, 198 U.S. 371, 381 (1905); *Parravano Babbitt*, 70 F.3d at 542 (9th Cir. 1995); *United States v. Michigan*, 471 F. Supp. at 253-55 and (b) exclusive authority over all fishing, hunting, and trapping activities therein, *see New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337-338 & n.19 (1983) ("tribes in general retain this authority"; citing *Montana v. United States*, 450 U.S. 544 (1981) and, *inter alia*, *Winans*, 198 U.S. at 381). Furthermore, state governments have no authority to interfere with this retained tribal authority unless it substantially affects resources outside of tribal territories. *See Mescalero Apache Tribe*, 462 U.S. at 342; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684 (1979); s*ee generally* Canby at 518-519 (discussing treaty rights to hunt and fish "free from state law"); *id.* at 530-33, 543 (discussing evolution of the law to allow states, in rare settings, to assert limited authority over treaty hunting and fishing rights to protect shared resources), 546-547 (discussing tribal authority over non-Indian hunting and fishing on Indian lands).

Fourth, only Congress can terminate or modify these retained aboriginal rights and authorities of an Indian tribe, and if it is to do so, it must act in the clearest terms. *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (citations omitted); *accord Dion*, 476 U.S. at 738 (they are retained "unless [they] were clearly relinquished by treaty or have been modified by Congress"); *Lac Courte Oreilles Band*, 700 F.2d at 354; *see generally* Cohen § 18.03[1] at 1158–59; Canby at 519. Silence regarding these rights in a Treaty or Congressional enactment cannot be construed as the relinquishment of such rights by a tribe. *See Mille Lacs*, 526 U.S. at 198; *Bottomly*, 599 F.2d at 1065-66 ("until Congress acts, the tribes retain their existing sovereign powers") (citing and quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)).

Applying these principles in a case involving tribal fishing rights in the Great Lakes, the U.S. District Court for the Western District of Michigan explained:

> [R]eservations in treaties are not limited to land. Although the term "reservation" is commonly thought to pertain to land, other valuable rights not relinquished when Indians convey their aboriginal title are also reservations, . . [and include] "reserved rights to fish, reserved rights to water and reserved or retained rights of sovereignty, i.e., the right to tribal self-government.
>
> *********
>
> Indians retain whatever rights they possess which are not relinquished by treaty or taken by Congress. Rights are reserved by implication if they are not expressly relinquished and a contrary conclusion is inconsistent with the use of the resource by the Indians at the time of the treaty.

United States v. State of Mich., 471 F. Supp. 192, 254, 257 (W.D. Mich. 1979) (citing *United States v. Wheeler*, 435 U.S. 313 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908); *Winans, supra*)). The court further explained that:

> The right to fish is one of the aboriginal usufructuary rights included within the totality of use and occupancy rights which Indian tribes might possess . . . . The factual predicate giving rise to th[at] reservation . . . is a showing of the Indians' dependence upon that resource.

Id. at 256. In language that is apt here, that court observed, "[t]he evidence relating to Indians' use of the fishery resource, as related above, is overwhelming." *Id.*

This framework informs what Maine conceded, what the Tribe counted on, and what Congress confirmed going into the settlement. All expected that Maine would secure a substantial measure of jurisdiction, atypical of the federal Indian law construct, but that would *not* be true with respect to jurisdiction over hunting, trapping and fishing within the Tribe's *existing* Reservation left by the Treaties. Because, to use Maine's terminology, such jurisdiction was "lost" and would not be "recovered" by the terms of the settlement, it would remain intact, fully protected under these federal Indian common law principles. And those principles confirm,

beyond any doubt, that the Tribe's authority over hunting, trapping, and fishing rights within its existing Treaty Reservation, *was in the waters and bed of the Penobscot River*.

Congress's announcement that, by the terms of the settlement, these rights and authorities are "expressly retained sovereign activities," S. REP. at 14-15; H.R. REP. at 15, and that "the power of the State of Maine to alter such rights is ended," S. REP.at 16-17; H.R. REP. at 17, captures, in a nutshell, the federal Indian common law protections for aboriginal fishing, hunting, and trapping rights and authorities retained by Indian tribes just recounted. *See, e.g.*, *Mescalero Apache Tribe,* 462 U.S. at 332-333, 337-338 & n. 19; *Montana,* 450 U.S. at 557 (Indian tribes have inherent authority over hunting and fishing rights on tribal lands); *United States v. Michigan,* 471 F. Supp. at 254. So does its statement that the residual right granted to Maine to protect off-reservation fish and wildlife in or on adjacent lands or waters is "not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights," S. REP. at 16-17; H.R. REP. at 16-17; s*ee, e.g., Mescalero Apache Tribe,* 462 U.S. at 342; *Washington State Commercial Passenger Fishing Vessel,* 443 U.S. at 684; s*ee generally* Canby at 530-33, 543.

The State Defendants' assertion that subsection 6204(8)'s definition of the Penobscot Indian Reservation as "islands in the Penobscot River" means island surfaces only, disconnected from the River, completely divorces the construction of that provision from the foregoing overarching federal Indian law framework which the State conceded—and Congress promised—would govern the Tribe's sustenance hunting trapping, and fishing rights. This violates the Supreme Court's unequivocal mandate that taking this framework into account is essential for the interpretation of the settlement terms and the Treaties referenced therein, particularly from the most critical perspective, that of the Penobscots. *Mille Lacs,* 526 U.S. at 196. This

framework confirms that "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine," 30 M.R.S.A. § 6203(8), must be construed "in the sense in which they would naturally be understood by the Indians." *E.g. Meehan*, 175 U.S. at 11; *Lac Courte Oreilles Band*, 700 F.2d at 350. And because the undisputed facts establish, both at the time of their Treaties with Massachusetts and Maine and the settlement of *United States v. Maine*, that the Penobscots use and occupation of the water and bed of the Main Stem for sustenance fishing, trapping, and hunting, *everywhere between the islands and bank to bank*, was "not much less necessary to the existence of the Indians than the atmosphere they breathed," the Tribe's reservation attending the islands includes precisely those waters and the bed of the River for those purposes. *See Winans*, 198 U.S. at 381; *United States v. Michigan*, 471 F. Supp. at 253-55. Any other construction would defeat the very purpose of those Treaties, as well as that of the Settlement Acts: to leave the Penobscot People able to continue to rely upon the Penobscot River to take fish, muskrat, eel, turtle and other river-dwelling animals for their sustenance in accordance with their traditions, as they had done since aboriginal times.

The State's assertion, moreover, flies in the face of a basic rule of statutory construction that would apply even in the non-Indian context -- "[a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." *E.g.*, *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985); *Massachusetts Assoc. of Health Maintenance Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999) (same). Interpretations that would "render nugatory" statutory provisions should be avoided. *United States v. Walker*, 665 F.3d 212, 225 (1st Cir. 2011). The State's assertion that the only place tribal members can

exercise their sustenance fishing, hunting, and trapping rights is on the surface of the islands would do exactly that, since those rights cannot be exercised on the island surfaces where there are no fish or river-dwelling animals. The boundaries of the Penobscot Indian Reservation, accordingly, must be construed to include the waters and bed of the Main Stem bank to bank, the only place where the exercise of those rights is meaningful. Given this result under the less stringent ordinary standards of statutory construction, application of the more favorable rules of construction governing the construction of treaties and agreements with Indians establishes, *a fortiori*, that the Penobscot reservation necessarily includes the waters and bed of the Main Stem.

* * *

Furthermore, (a) Maine's representatives understood or made clear in their deliberations that they understood, that clear in their deliberations on the settlement that the Tribe would exercise sustenance fishing rights in the River, in particular, for an anadromous species, Atlantic Salmon, SMF ¶¶ 81-85, 101, 103; *see also* SMF ¶¶ 71-21 and (b) the overwhelming evidence of post-settlement conduct of the parties, the United States, the Penobscot Nation, and the State of Maine shows in no uncertain terms that they understood that the Tribe's reservation included the waters and bed of the Main Stem for the Tribe to engage in its fishing, hunting, and trapping rights and authorities confirmed in the Settlement Acts. *See* SMF ¶¶ 120-200.

B. The Supreme Court's Decision In *Alaska Pacific Fisheries Co. v. U.S.* Requires Finding That The Boundaries Of The Penobscot Indian Reservation Include The Waters And Bed Of The River Attending The Islands In The Main Stem, Where The Tribe Has Always Relied For Its Sustenance Needs.

In *Alaska Pacific Fisheries Co. v. U.S.*, 248 U.S. 78 (1918), the Supreme Court addressed an assertion virtually identical to that made by the Defendants: that a reservation confirmed by Congress by act of 1891 for the Metlakahtla Indians of Alaska described as "the body of lands known as Annette Islands" "embraces only the upland of the islands" and does not include, as

well, "the adjacent waters and submerged land." *Id.* at 87. The action was brought by the United States on behalf of the Tribe to enjoin a corporation from maintaining a fish trap in the ocean, "600 feet from high tide line of the island on which the Indians settled." *Id.* The Court said the question was "one of construction – of determining what Congress intended by the words 'the body of lands known as Annette Islands." *Id.*

The Court examined the purpose and circumstances surrounding the establishment of the reservation, in particular, the Tribe understands:

> [T]he Metlakahtlans . . . looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development. . . .
>
> The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. . . . *The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.* . . . Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name 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.

Id. at 88-89 (emphasis added). The Court explained, "[t]his conclusion has support in the general rule that 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." *Id.* at 89. The Court found further support from the post-treaty conduct of the Indians, the Secretary of Interior, and the State of Alaska, showing that they viewed the reservation as including "the adjacent fishing grounds as well as the upland." *Id.* at 89-90.

Congress is deemed to know the Supreme Court's Indian law jurisprudence affecting its enactments affecting Indians tribes. *See Akins,* 130 F.3d at 489. Indeed, as discussed above, it announced that federal Indian common law doctrines governed the Penobscot Nation and its

existing Reservation at the time of the Settlement Acts. Thus, *Alaska Pacific Fisheries* informs Congress's understanding in confirming the Tribe's sustenance fishing, trapping and hunting rights while describing the reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818. . ."

Congress knew that the Penobscots were a "riverine" Tribe with aboriginal territory centered in the Penobscot River; that the islands *in the River* from Indian island northward (certainly within the Main Stem) were in a known geographical area, with waters and submerged lands that the Tribe relied upon for sustenance fishing, trapping, and hunting (and related cultural practices). By referring to "the islands *in the Penobscot River reserved to the Penobscot Nation by agreement*" in the Tribe's treaties with Maine and Massachusetts, Congress, therefore, had to have intended to confirm the purpose of that Reservation, in particular, how the Penobscots "naturally looked" upon their sustenance fishing, hunting and trapping grounds in the River "as part of the islands" from treaty times up to the settlement of *United States v. Maine*. The undisputed facts clearly show that the Tribe has never distinguished between the islands and the waters and bed of the River upon which its tribal members have conducted their way of life for hundreds of years. And since the settlement, the agencies and departments of the United States have never wavered from the view that the Tribe's Reservation encompasses the bed and waters of the River; nor did the State of Maine, until relatively recently.

Thus, in accord with *Alaska Pacific Fisheries* and the undisputed material facts, the Penobscot Nation's sustenance fishing, trapping, and hunting rights, within its Reservation, are

in the waters and bed of the Main Stem attending its islands where tribal members naturally have relied for their sustenance. That is, everywhere between the islands and bank to bank.

C. The Penobscot Nation Never Ceded, And Therefore Retained, Both Aboriginal Title And Equivalent Riparian Rights To The Bed Of The Main Stem, Bank to Bank, For Sustenance Fishing, Trapping, And Hunting

As described above, in the face of uncertainties about the interpretation of the settlement terms regarding the boundaries of the Penobscot Indian Reservation, the State and the Tribe offered their interpretations. Maine Attorney General Cohen provided a recommended interpretation to Maine's Joint Committee in his April Memorandum, stating that the boundaries "include[ed] riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of law." SMF ¶¶91-92. When, at his suggestion, the Maine's Joint Committee later issued its report on its interpretation of the terms, it changed the last clause to read "by operation of State law." SMF ¶92. In response, the Tribe, through its representatives to the settlement negotiations, clarified its view that "The Penobscot Nation is comprised of the Penobscot River and the Inlands [sic] within the River. . . . [And] that the river was never cited [sic] by the Tribe and therefore title is not extinguished and the State cannot regulate it except where specifically stated in the agreement." Phillips Decl. ¶¶22-28, Exhs. D & E; SMF ¶¶93-95. As set forth below, regardless of which view is employed, the result is that the Penobscot Nation retained both aboriginal title (the right of occupancy) and equivalent riparian proprietorship to the bed of the Penobscot River in the Main Stem for the exercise of sustenance fishing, trapping, and hunting in the Main Stem, bank to bank, as confirmed by Congress.

1. Under Principles Of Federal Indian Law, Restated By The Penobscot Representatives, The Penobscot Nation Never Ceded The Riverbed Of The Main Stem And Therefore Retained It For Sustenance Fishing, Hunting, And Trapping

At the time of its treaties with Massachusetts, the Tribe held aboriginal title to the islands in the Main Stem, as well as to the riverbed, bank to bank, and the uplands, which were the subject of those Treaties. Prins at 3746, 3750-65, 3778-80, 3782-89, 3791, 3798-3800; SMF ¶¶11, 25, 28, 36. Aboriginal title is the time immemorial right of exclusive occupancy and use by a tribe of its ancestral homelands, and it can only be extinguished with the express consent of the United States. *See, e.g., Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. at 233-35; *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941). Indeed, the lack of federal consent in the Treaties was the very basis for *United States v. Maine*, and rendered the Tribe's land cessions in the Treaties subject to a determination that they were void. *See generally* Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 35-37; Canby at 427-437 (discussing aboriginal title and the eastern land claims).

As described above, in its Treaties with Massachusetts, the Tribe ceded aboriginal title to the uplands on either side of the River to Massachusetts; Massachusetts did not grant anything to the Tribe. *See Maine v. Johnson*, 498 F.3d at 47 & n. 11 (the Tribe's reservation was "*retained*" based on earlier agreements between the Tribe and Massachusetts) (emphasis in original); *see also United States v. Michigan*, 471 F. Supp. at 254 (setting forth the federal Indian law framework for cessions of aboriginal title). Thus, the Penobscot Nation retained full aboriginal title (exclusive occupancy as well as use) of the entire bed of the Main Stem, bank to bank,

including the islands referenced in the Treaties, at least for the purpose of sustenance fishing, hunting, and trapping, which are the issues presented by the Second Amended Complaint.[14]

Attorney General Cohen's formulation in his April 1, 1980 memorandum to Maine's Joint Committee that the Tribe's reservation includes "riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of law" arrives at the same place. "[B]y operation of law," that is, federal Indian law, the Tribe retained its aboriginal title to the bed of Penobscot River. And aboriginal title to that bed (occupancy and use until extinguished by the United States) is the functional equivalent of "riparian rights." As the Supreme Court has said aboriginal title is "as sacred as the fee simple of the whites." *E.g.*, *Oneida Indian Nation*, 470 U.S. at 235; *Santa Fe Pac. R. Co.*, 314 U.S. at 345.

But, as we now show, even if the Treaties are construed in accordance with "riparian rights" principles under Massachusetts and Maine common law, incorporated as the federal rule of decision in this case, they reserved to the Penobscot Nation the equivalent of riparian ownership of the bed of the Main Stem, bank to bank. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d at 1261 & n.11 (question of ownership of land allegedly part of an Indian reservation and allegedly never conveyed away by the United States or by the Tribe "is an issue of federal law to be settled by reference to local law").[15]

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[14] Indeed, eighty-three years before the Settlement Acts, in *Stevens v. Thatcher*, 91 Me. 70, 39 A. 282 (1897), the Maine Supreme Judicial Court accepted the general premise that the treaties reserved the bed of the Main Stem to the Penobscot Nation. *See id.* 72 (setting forth Penobscot County Sheriff's assertion that Tribe retained for the Tribe not only the islands but "the dry land, the shore and the water as it flows, to the bank across the stream upon either side of the island") (reporter's summary of argument); *id* at 73, 39 A. 283 (accepting the Sheriff's premise, but holding that its decision concerning town boundaries did not affect the "stipulations in the treaties," including the Tribe's retention of "the island with other territory").

[15] Attorney General Cohen and the Maine's Joint Committee used the phrase "riparian . . . rights *expressly* reserved by the original treaties with Massachusetts." This is contrary to fundamental principles of federal Indian law governing treaty interpretation. *See Mille Lacs*, 526 U.S. at 196; *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 955 (9th Cir. 1982). It is inconceivable that Penobscot representatives to the 1796 and 1818 Treaties could in any way fathom how to "expressly reserve" "riparian rights, and the Nation did not adopt this interpretation. SMF¶¶107-08. Even accepting it as a guiding interpretive principle for the Tribe's reservation

2. Under Massachusetts And Maine Law Governing Riparian Rights, Restated By The Attorney General Cohen And By Maine's Joint Committee, The Penobscot Nation Retained Riparian Rights To The Riverbed Of the Main Stem, At The Very Least For Sustenance Fishing, Hunting, And Trapping Rights Therein

Maine Attorney General Cohen's and the Maine Joint Committee's formulation of the boundaries of the Penobscot Nation reservation as including "riparian . . . rights expressly reserved by the original treaties with Massachusetts" is consistent with the Tribe's retention of aboriginal title to the riverbed of the Main Stem under federal Indian common law. Under the law of Massachusetts and Maine, in order to obtain riparian ownership of a riverbed from a sovereign who is retaining the islands therein, the grantee's deed must expressly provide for the taking of the bed. The Penobscot Nation's treaties with Massachusetts do no such thing and, accordingly, leave riparian ownership in the Tribe.

The Tribe's treaty with Massachusetts was, in essence "a contract between two sovereign powers." *Lac Courte Oreilles Band*, 700 F.2d at 358 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 675 (1979)). When Massachusetts entered into the Treaties, it presumed to extinguish the Tribe's aboriginal title, retained by the Tribe, as a sovereign. *See* Prins at 3776-80, 3798-3800; SMF ¶¶25, 36. Congress clearly understood this to be the case; otherwise, it would never have described the Tribe's fishing, trapping, and hunting rights and authorities as "expressly retained sovereign activities." The law applicable to territorial cession in this government-to-government transaction provides that the granting sovereign (the Penobscot Nation), "retains the river within its own domain" and the receiving sovereign (Massachusetts) receives land extending only to the low water edge of the river adjacent to the land granted, not to the thread of the river. *Handly's Lessee v. Anthony*, 18 U.S. 374, 379 (1820) (cited with approval as part of Maine's common law

boundaries, however, as set forth below, it readily confirms the Tribe's riparian rights to the bed of the Main Stem, consistent with its retained aboriginal title to the bed.

in *Lincoln v. Wilder*, 29 Me. 169, 179 (1848) and *Wood v. Kelley*, 30 Me. 47, 55 (1849)). By operation of this law, the Tribe's riparian rights to the bed were thus expressly reserved to it under the Treaties.

And, even a non-sovereign grantor who retains the islands in a river granting land bounded by "the side" of the river retains the entirety of the riverbed.[16] Applying Massachusetts and Maine riparian ownership principles to the Treaty transaction, as if the Penobscot Nation were cognizant of that law, the Tribe was deemed "competent . . . to limit [its] grant as [it] may choose," and thereby "run [its] line on either side [of the river], or to the centre thereof, at [its] pleasure, by the use of apt words to indicate [its] intention so to do." *Bradford v. Cressey*, 45 Me. 9, 13 (1858). It "would involve an absurdity," the Law Court has said, to hold that a party, like the Penobscot Nation, "may not bound a grant by the bank, margin, side, or shore of a stream of water." *Id.; see also Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207, 212, 77 A. 787, 789 (1910). Thus, when a river shore owner, standing in a position equivalent to that of the Penobscot Nation granted land bounded on "the west bank" of a creek, the Law Court held that this grant excluded the entire creek. *Cressey*, 45 Me. at 12.

In reaching this holding, the Law Court cited with approval *Canal Com'rs & Appraisers v. People ex rel. Tibbits*, 5 Wend. 423 (N.Y. 1830),[17] which involved a grant using language

[16] The Main Stem of the Penobscot River is not affected by the tides. *See Veazie v. Dwinel*, 50 Me. 479, 480 (1862). Accordingly, Massachusetts and Maine by, common law, would have understood the Tribe to own the entire bed of the Penobscot River subject only to the right of the public to pass and repass on those portions of sufficient size to float boats or logs (exactly as the 1818 Treaty provided). *See, e.g., In re Opinions of the Justices*, 118 Me. 503, 106 A. 865 (1919); *Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207, 211, 77 A. 787, 789 (1910); *Storer v. Freeman*, 6 Mass. 435, 438 (1810). The Penobscot Nation could reserve any or all of the River and the bed thereof when it faced the Massachusetts treaty-makers, though the Tribe would have been unaware of the legal presumption applied to specific words, unlike its well-represented Massachusetts counterparts. But because Massachusetts, in drafting and presenting its Treaties to the Tribe, bounded the grant on each "side" of the Penobscot River, the Treaties reserved to the Penobscot Nation aboriginal title to the bed, the functional equivalent of "riparian rights" as framed by Maine's Joint Committee on the advice of Maine Attorney General Cohen.

[17] Both Maine and Massachusetts adopt the *Tibbets* reasoning as part of their common law. *Ingraham v. Wilkinson*, 21 Mass. 268, 286 n.2 (1826); *Cressey*, 45 Me. at 12; *Attorney Gen. v. Herrick*, 190 Mass. 307, 313 (1906).

almost identical to that in the Penobscot Nation's treaty cessions to Massachusetts, but with an additional phrase favoring the grantee. The issue presented in *Tibbits* was whether a grant of land using the following language, included the islands and bed of the Hudson River:

> All that and those tract and tracts of land called Rensselaerwyck lying and being in and upon the banks of Hudson's river . . . beginning at the south end of Berrein Island on Hudson's river aforesaid, and extending northward up along both sides of the said river unto a place theretofore and yet called the Cahoes or the great falls of the said river, and extending itself east and west all along from each side of the said river backwards into the woods twenty-four English miles.

Tibbits, 5 Wend. 423, 458-59 (1830) (concurring opinion of Senator Beardsley). "[T]he terms of description 'extending northward up along both sides of said river,' render it . . . *quite certain* that the bed of the river was not intended to be included." *Id.* (emphasis added). Even Chancellor Walworth, writing in dissent in *Tibbets*, acknowledged that the language "northward up along both sides of said river," would ordinarily exclude "the bed of the river and the islands within the same" but that the additional phrase "*lying and being in and upon the banks of Hudson river* … included the islands or lands lying and being *in* the river as well as the lands on the banks thereof on each side." *Id.* at 450-51 (opinion of the Chancellor) (emphasis original).

The Penobscot Nation's Treaties with Massachusetts employ virtually the same operative language as the grant at issue in *Tibbits*, but with an express reservation of the islands. The grant in the 1796 treaty is:

> to all the *lands on both* sides of the River Penobscot, beginning near Col. Jonathan Eddy's dwelling house, at Nichols rock . . . 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 said thirty miles.

P.D. 6 at 34 (emphasis added).

That in the 1818 treaty is:

> to all the lands they claim occupy and possess by and means whatever *on both sides of the Penobscot river*, and the branches thereof, on above the tract of thirty miles in length *on both sides of said river*, which said tribe conveyed and released to said Commonwealth by their deed of the eight of August, one thousand seven hundred and ninety six.

P.D. 8 at 44-45 (emphasis added).

Thus, under the common law of Massachusetts and Maine governing riparian rights, the "side of the Penobscot river" was the monument of the grant delineating the lands given away by the Tribe, thereby excluding the entire bed of the river from the grant. *See Cressey*, 45 Me. at 13; *Dunlap v. Stetson*, 8 F. Cas. 75, 81 (C.C.D. Me. 1827) (land bounded on the bank of the Penobscot River in Bangor did not include river); *Winthrop v. Curtis*, 3 Me. 110, 117 (1824) (with land measuring fifteen miles on each side of the river, the 15 miles is measured from each side and not from the thread). The Treaties therefore expressly reserved the Tribe's riparian rights to the River.

In sum, the Penobscot Nation retains the riverbed of the Main Stem, bank to bank, to engage in sustenance fishing, trapping, and hunting whether the Settlement Acts and their incorporation of the Treaty boundaries are interpreted under (a) federal Indian common law, (b) federal common law governing riverbed ownership in grants between sovereigns, or (c) Massachusetts and Maine common law governing retained riparian ownership when land is granted on the "side" of a river.

D. Terminating The Tribe's Sustenance Fishing, Trapping, and Hunting Rights In The River Would Be Tantamount To Terminating The Tribe's Reservation and Destroying Its Culture, Results That Congress Promised Would Never Occur

In enacting the Settlement Acts, Congress acted as trustee for the Penobscot Nation with the most exacting fiduciary responsibility to provide "a fair and just settlement of [its] land claims." 25 U.S.C. § 1721(a)(7); s*ee Morton*, 388 F. Supp. at 662. See also *State v. Dana*, 404

A.2d 551, 561-62 (Me. 1979) (discussing "the most primal aspect of the of the Tribe's existence" protected by the Indian Non-Intercourse Act). At the time of the settlement, the Tribe's existing land and natural resources base was within its "existing reservation" left to it by its Treaties with Maine and Massachusetts. And under those treaties of cession, the Tribe retained its occupation and use of the Penobscot River so it could maintain its sustenance way of life as best it could in the face of non-Indian intrusions. Prins at 3709, 3778-81, 3782-90, 3802-03, 3807; SMF ¶¶24, 26, 27, 41, 42.

United States v. Maine brought into question the validity of the Tribe's land cessions under the Non-Intercourse Act, opening up the possibility that the Tribe retained *not only* its aboriginal domain in the Penobscot River, which it indisputably did not cede, *but also* the full aboriginal domain it possessed before the questionable Treaty cessions. It would make no sense whatsoever in this setting for the Tribe to give up the bare minimum of what it had going into the settlement: its continued use and occupation of the Penobscot River for sustenance purposes, left fully intact by the suspect Treaties. And were Congress to do so, it would have terminated the most vital remnant left of the Penobscots' aboriginal base: their right to continue to sustain themselves and their culture by engaging in their sustenance fishing, hunting, and trapping practices in the waters and bed of the Penobscot River.

Termination of this essential, existing aboriginal base would have required the most exacting words on the part of Congress. There must be "clear evidence" that Congress intended such an outcome. *Mille Lacs Band of Chippewa Indians,* 526 U.S. at 202-03 (citing cases); *Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d 951, 955 (9th Cir. 1982). Nowhere on the face of the Settlement Acts are such words to be found. After all, *United States*

v. Maine was not about abrogating what the Tribe had retained after its treaty cessions to Massachusetts and Maine; it was about *recovering* those land cessions.

On the contrary, not only did Congress, through its identical final committee reports, promise that the Tribe's sustenance hunting, trapping, and fishing rights constituted secure aboriginal authorities, but it promised that the settlement would neither "terminate" the Tribe nor destroy its culture. Confronted with concerns that "*[t]he settlement will lead to the acculturation of the Maine Indians,*" Congress said:

> Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments . . . which control such internal matters.

S. REP. at 17 (emphasis in original); H.R. REP. at 17 (same). Confronted with concerns "*that the settlement will terminate*" the Tribe, Congress said "the settlement does not terminate the . . . Tribe[]." H.R. REP.at 14 (emphasis in original); H.R. REP.at 14 (same).

These would be false promises indeed if, as the State Defendants would have it, rather than protecting the Tribe's ability to exercise its aboriginal hunting, trapping, and fishing rights in the River without risk of termination by Maine, the settlement accomplished the opposite, only at the hands of the Tribe's trustee, the United States.

II. THE STATE DEFENDANTS THREATEN TO INTERFERE WITH THE RIGHT OF PENOBSCOT NATION TRIBAL MEMBERS TO ENGAGE IN SUSTENANCE FISHING, TRAPPING, AND HUNTING IN THE WATERS AND BED OF THE MAIN STEM FREE OF STATE AUTHORITY AND WITH THE PENOBSCOT NATION'S EXCLUSIVE AUTHORITY TO REGULATE THOSE ACTIVITIES, SUBJECT ONLY TO RESIDUAL AUTHORITY GRANTED TO MAINE'S COMMISSIONER OF INLAND FISHERIES AND WILDLIFE

Because the State Defendants wrongly claim that the Tribe's Reservation does not include the waters and bed of the Penobscot River and that it has no authority to regulate activities on the River, they impermissibly threaten to interfere with the right of Penobscot tribal

members to engage in their sustenance fishing, hunting, and trapping practices on the River, free from State authority (other than the residual authority granted in the settlement to the Commissioner of DIFW). This claim also violates the express authority of the Tribe to exclusively govern those sustenance activities on its own terms without State interference. *See* 30 M.R.S.A. § 6207(4) (no state authority over tribal member sustenance fishing in the Reservation; only limited residual authority for the Commissioner); § 6207(1) (the Tribe has "exclusive" regulatory authority over hunting trapping and other taking of wildlife in its Reservation and, subject to the limited residual authority of the Commissioner, "may include special provisions for the sustenance" activities by Penobscot tribal members).

By the promise of the Settlement Act, the Penobscot Nation's tribal members must be free to engage in their sustenance activities in the waters and bed of the Main Stem without fear of State intrusion. By that promise, the Penobscot Nation likewise must be free to regulate those activities on its own terms, without State intrusion, except for the very limited remedial authority given to the Commissioner, *see* 30 M.R.S.A. § 6207(6), which Congress said was similar to the limited authority available to states "in connection with federal Indian treaty hunting and fishing rights." S. REP. at 17; H.R. REP. at 17. Pursuant to the Maine Attorney General's standing directive of August 8, 2012, that the Penobscot Nation's reservation does not include the waters or bed of the Penobscot River, that Maine has exclusive jurisdiction over all activities in the Main Stem, and that the Penobscot Nation has no authority to regulate activities on the Main Stem, the State Defendants threaten to destroy these federal rights of the Penobscot Nation secured by the Settlement Acts.

III. THE STATE DEFENDANTS THREATEN TO INTERFERE WITH THE RIGHT OF THE PENOBSCOT NATION TO EXCLUSIVELY REGULATE HUNTING, TRAPPING, AND OTHER TAKING OF WILDLIFE IN THE WATERS AND BED OF THE MAIN STEM AND TO HAVE ITS GAME WARDENS EXCLUSIVELY ENFORCE THE TRIBE'S REGULATIONS THERE

In addition to confirming, through its ratification of 30 M.R.S.A. § 6207(1), the Penobscot Nation's right to exclusively regulate sustenance hunting, trapping, and other taking of wildlife within the waters and bed of the Penobscot River in accordance with its existing Treaty Reservation and principles of federal Indian law, Congress also confirmed the Tribe's exclusive regulatory authority over all hunting, trapping and other taking of wildlife there under the same provision, *see* 30 M.R.S.A. § 6207(1) (the Penobscot Nation "shall have exclusive authority within" its Reservation and newly acquired trust lands" to promulgate and enact ordinances regulating [h]unting, trapping or other taking of wildlife"), but with significant compromises made by the Tribe, *see* 30 M.R.S.A. § 6206(3) (state court has exclusive jurisdiction to adjudicate those tribal law violations by non-Indians).

It makes perfect sense that Congress would confirm, in large measure, the same federal Indian law protections for tribal authority over non-Indian hunting and trapping within the Tribe's Reservation—the waters and bed of the Main Stem upon which Penobscots rely for their sustenance and cultural identity—in tandem with those protecting the Tribe's exclusive authority over its tribal members' sustenance activities there. Were that not the case, non-Indians would be free to exploit the Tribe's sustenance (and cultural) resources beyond any control of the Tribe.

As made clear above, the importance of these concerns on the part of Penobscots prompted Congress to promise, through its final committee reports, that the settlement's "hunting and fishing provisions" were examples of "expressly retained sovereign activities." The importance of these concerns certainly was not lost on the State. In order to explain the

settlement to Maine's Joint Committee, Deputy Attorney General, John Paterson, provided the Committee members the *Bottomly* and *Dana* decisions as well as a report entitled "Indian Rights and Claims," which reads, in pertinent part:

> A primary interest of tribal governments in pressing jurisdictional claims over persons and property is the Indian's desire to preserve the cultural heritage of the tribe. In order to preserve this unique legacy, the political integrity and economic viability of the tribal community must be respected and developed. . . . The tribe's ability to regulate the use and extent of development of [land and water] resources is central to the cultural preservation and economic vitality of the tribe.

SMF ¶70. The undisputed facts, moreover, show that, at every turn, State representatives pointed to Maine's concession that the Tribe would to retain its federal Indian common law jurisdiction over hunting, trapping, and, according to Attorney General Cohen, "to a limited extent," fishing, within its Treaty Reservation as worthy consideration for avoiding (a) the risks presented by *United States v. Maine* and (b) the sea change thwarting the State's presumed authority over the Tribe and its reservation brought about by *Bottomly* and *Dana*. And as described above, it is black letter law that, within their Reservations, Indian tribes have inherent sovereign authority to exercise exclusive regulatory and adjudicatory jurisdiction over non-Indians who engage in any form of resource exploitation, let alone hunting and trapping wildlife for recreation or consumption. *See Williams v. Lee*, 358 U.S. 217, 223 (1959); *Mescalero Apache Tribe*, 462 U.S. at 335 (discussing tribes' "power to manage the use of their territory and resources by both members and nonmembers" and to "regulate economic activity within the reservation").

But even with the force of that federal Indian common law behind it, the Tribe compromised a significant aspect of its sovereign authority by agreeing that the state courts would have exclusive jurisdiction over prosecutions of non-Indians for violations of the Tribe's laws governing hunting, trapping and other taking of wildlife within its Reservation and trust

lands. 30 M.R.S.A. § 6206(3). The Tribe was surrendering a significant attribute of its inherent self-governing authority, the jurisdiction of the Penobscot Nation Tribal Court, then administered by a highly competent jurist, Andrew Mead,[18] who now sits on the Maine Supreme Judicial Court. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65-66 (1978) (tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" on Indian reservations).

Although the Tribe gave up adjudicatory authority over violations of its hunting and trapping laws to the State, it did retain exclusive enforcement authority over those laws by ensuring that only Penobscot game wardens would issue summonses for violations of those laws within its Reservation (and in the newly acquired trust lands). *See* 30 M.R.S.A. § 6210(1). By the terms of the settlement, Penobscot Game Wardens receive exactly the same training as their state warden counterparts. *See* 30 M.R.S.A. § 6210(4).

The State Defendants threaten to thwart this carefully-crafted, federally-approved regime, which Congress said, in the face of significant tribal concerns, would "protect" the Tribe's ability to control hunting and fishing within its existing reservation without further interference by the State. Pursuant to the Maine Attorney General's August 8, 2012 directive to Defendants Woodcock and Wilkinson, the State Defendants, and other state officers they oversee, are poised to oust the Penobscot game wardens and the Tribe from asserting any authority whatsoever, not only over Penobscot tribal members' sustenance activities on the River, but over non-Indians who compete with those tribal members to exploit the very resources upon which they rely – resources that the Penobscot People have, in fact, relied upon for virtually every aspect of their way of life for hundreds of years.

[18] *See* Jt. Exh. 33, ECF No. 102-33 at 1374-1400 (Judge Andrew Mead presiding in Penobscot Nation Tribal Court in March, 1980).

This attempt to undo the promise Congress made violates the core consideration of the Settlement Acts for the Tribe: security, under federal law, from any further presumed authority by state officials to, in the words used before Congress, "destroy" the Penobscots' right to control their own and others' use of the waters and bed of the Main Stem surrounding their islands for hunting, trapping and other taking of wildlife therein. This was essential to preserve the last remnant of their ancestral way of life not already taken from them by Massachusetts and Maine.[19]

CONCLUSION

For the foregoing reasons, Plaintiff Penobscot Nation respectfully requests that the Court enter summary judgment in its favor on its Second Amended Complaint.

Respectfully submitted,

Dated: April 13, 2015

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[19] *See* S. REP. at 14-17; (Settlement Acts will not "terminate" the Tribe, "lead to acculturation," or "amount to a 'destruction' of the sovereign rights and jurisdiction of the tribe"; the hunting and fishing provisions are "expressly retained sovereign activities" that "protect[] the sovereignty" of the Tribe); H.R. REP. at 14-17 (same).

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015 I electronically filed this Motion for Summary Judgment with incorporated Memorandum of Law with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Kaighn Smith, Jr.
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