UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION, Plaintiff, and UNITED STATES, Intervenor, v. JANET T. MILLS, Attorney General for the State of Maine, *et al.*, Defendants, and CITY OF BREWER, *et al.*, Intervenors.	)	Civil Action No. 1:12-cv-00254-GZS

STATE DEFENDANTS' OPPOSITION TO THE PENOBSCOT NATION'S AND UNITED STATES' MOTIONS FOR SUMMARY JUDGMENT

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NOW COME State Defendants and oppose the motions for summary judgment of the Penobscot Nation ("PN" or "the Tribe") and United States ("U.S.") (together "Plaintiffs"), and request that the Court deny the motions for the reasons expressed in the State Defendants' motion for summary judgment ("State MSJ" or "Doc't 117"), as well as those expressed below.

INTRODUCTION

Plaintiffs' motions for summary judgment are based almost entirely on the false premise that State Defendants are threatening the right of PN members to engage in sustenance activities in the waters of the Main Stem. Neither motion provides any factual support for this contention, and none exists.

No tribal member has claimed that the State is preventing them from sustenance fishing, hunting, or trapping. Nothing in Attorney General William Schneider's 2012 Opinion ("Schneider Opinion") prevents any tribal member from engaging in these activities. Doc't 8-B. The State has a longstanding policy of allowing PN members to take fish for individual sustenance from the Main Stem, and has no intention of changing that policy. State Defendants' Opposing Statement of Material Facts ("SDOSMF") ¶¶ 101, 103. Plaintiffs failed to identify a single instance in which any state official prevented, attempted to prevent, or in any way interfered with a PN member engaging in sustenance fishing, or any other sustenance activity, in the Main Stem. Therefore, Plaintiffs' lengthy arguments variously asserting a right to engage in sustenance fishing, hunting, and trapping on the Main Stem do not present a justiciable case or controversy, and their requests for a declaration vindicating those rights should be denied.

The only claim in either motion that makes out a case or controversy is PN's assertion that the Tribe has exclusive regulatory authority over hunting, trapping, and taking of wildlife on

the Main Stem. Doc't 128-1 at 57-59. This argument fails because the 1980 Acts grant PN no such authority. Doc't 117 at 14-15, 29-32.

On the merits, Plaintiffs' motions generally present arguments as to why the plain meaning of dispositive provisions within the 1980 Acts should be set aside in favor of counter-intuitive and results-oriented interpretations that have no support in the legislative record. The Court should deny both motions.

SUMMARY OF THE ARGUMENT

The essence of Plaintiffs' argument is that the State, through the 1980 Acts, signed over the property rights of the riverside owners and its own jurisdiction over one of the largest commercial and recreational waterways in Maine—granting a small community of tribal members the right not simply to use the river in customary ways, but also to own it and for the first time regulate activities that occur there—all without so much as hint at this result in the text or legislative history. This flies in the face of the rules of statutory construction, logic and historical fact.

Although Plaintiffs present their arguments in the context of sustenance fishing, hunting, and trapping, their position raises troubling questions about what it would mean if the river itself were declared to be part of the Tribe's reservation. PN is circumspect about how it would seek to apply such a ruling in other contexts. The right to regulate non-tribal activities, which PN claims, is tantamount to the right to prohibit those activities. PN's assertion that it possesses sovereign authority over the 60-mile Main Stem has potentially far-reaching implications, none of which Congress or the Maine Legislature remotely intended.

Plaintiffs have taken the word "islands" in the statute and rewritten it to mean "river." They have taken the term "riparian rights" in the legislative history and boldly asserted that it

means "right to regulate and to exclude." They have taken "sustenance fishing" and turned it into a right to dominate at least 60 miles of the Penobscot River, which is an economic and cultural mainstay of five counties, many dozens of communities and many thousands of people, tribal and non-tribal alike.

Limiting the reservation to "solely the islands" in the Main Stem did not deprive PN's members of meaningful sustenance fishing opportunities. The 1980 Acts allow such fishing in the river from the reservation's many islands, and the State has never interfered with PN members engaging in sustenance fishing anywhere in the Main Stem. Plaintiffs' lengthy statement of material facts does not contain a single allegation that any agent of the State has ever prevented any PN member from engaging in sustenance activities. The claim that tribal sustenance rights are under attack by the State is completely without support and should be discredited.

ARGUMENT

I. There is no case or controversy regarding the extent of PN members' sustenance fishing, hunting, and trapping rights on the Main Stem.

Plaintiffs' motions are almost entirely devoted to establishing that PN members have a right to engage in sustenance fishing, hunting, and trapping in the waters of the Main Stem. Doc't 128-1 at 1-55. For its part, the U.S. devotes its entire motion to establishing PN members' right to engage in sustenance fishing in the Main Stem, at least to the thread of the River, but does not join PN in asserting that any similar right exists as to sustenance hunting and trapping. Doc't 120. None of these claims presents a justiciable case or controversy.

A. The Schneider Opinion does not address sustenance activities.

Neither of Plaintiffs' motions expressly addresses the case or controversy requirement, though both presume that the Schneider Opinion is a sufficient basis for the Court to issue a

declaratory judgment addressing the scope of PN's rights to engage in sustenance activities on the Main Stem. *See, e.g.*, Doc't 128-1 at 56 ("Pursuant to the Maine Attorney General's standing directive of August 12, 2012, … the State Defendants threaten to destroy these federal rights of the Penobscot Nation secured by the Settlement Acts."). It is not.

On its face, the Schneider Opinion was a response to an inquiry from the Commissioner of the Maine Department of Inland Fisheries and Wildlife ("MDIFW") as to how the 1980 Acts allocate regulatory jurisdiction between the State and PN, with particular reference to the Main Stem. In the course of providing that guidance, the Schneider Opinion addresses the scope of PN's reservation, which is relevant to jurisdictional issues governing hunting and trapping. The Schneider Opinion does not, however, address or even mention the scope of PN's sustenance fishing, hunting, and trapping rights.

Regrettably, the U.S. portrays the Schneider Opinion as a provocative act in which the Attorney General dared PN to file suit. Doc't 120 at 3 ("… the Attorney General advised the Nation to bring suit if it disagreed with the State's newfound view."). The documents do not support that characterization. The same day the Attorney General issued his Opinion, he sent the document to PN's Governor under a respectful cover letter simply inviting dialogue:

> I am writing regarding regulatory jurisdiction on the main stem of the Penobscot River. My Office regularly receives inquiries from State Legislators, executive branch officials, and members of the general public concerning this issue. I also understand that there have been several incidents in recent years in which [PN] representatives have confronted state employees, including game wardens, as well as members of public on the River for the purposes of asserting jurisdiction over activities occurring on the River.
>
> The State's long-standing position on this issue is set forth in this attached Opinion…. I would appreciate it if you would review the Opinion and inform me whether [PN] disagrees with its conclusions. To the extent there is disagreement, I believe it is important that the matter be resolved in an appropriate forum, and not be a source of unnecessary conflict

> between state and tribal wardens and others on the River. Our responsibilities to ensure safe use of the River demand no less.

Doc't 8-C *(Letter from AG Schneider to Governor Francis* (Aug. 8, 2012)). The nature and timing of PN's response is telling.

If PN's concerns with the Schneider Opinion's analysis of regulatory jurisdiction were its unstated implications for PN's sustenance rights, one might have expected PN to accept the Attorney General's invitation for dialogue to explore the issue. This is particularly true because the record is completely devoid of any evidence of MDIFW wardens or any other State official interfering with PN members' sustenance activities on the River. Therefore, any perceived conflict over sustenance rights that could have been inferred from the Schneider Opinion would have been a hypothetical matter. PN did not, however, contact the Attorney General, or anyone else in State government, to discuss the matter.

If PN had contacted State officials to discuss concerns about sustenance rights, it would have been immediately apparent that there is no actual controversy over the issue. State Defendants acknowledge the right of PN members, as provided by 30 M.R.S.A. §§ 6207(4) & (6), to take fish for individual sustenance while fishing in Main Stem waters from the islands of the reservation. Doc't 117 at 28-29. Just as importantly, MDIFW wardens have a longstanding policy not to enforce strict compliance with the limitations of section 6207(4), and instead to allow PN members to engage in sustenance fishing anywhere in the Main Stem, from bank to bank. SDOSMF ¶¶ 101, 103. The State has no intention of changing that policy. *Id*. In their 68-page statement of material facts, Plaintiffs offered no evidence of an actual incident in which State officials ever interfered with a PN member who claimed to be engaging in sustenance activities on the Main Stem. Doc't 119. But instead of accepting the Attorney

General's invitation for dialogue, PN filed this lawsuit eight days after the Schneider Opinion issued. Doc't 1.[1]

B. There is no justiciable case or controversy over the scope of PN members' sustenance rights.

Plaintiffs' allegations that PN members' sustenance activities are in jeopardy are entirely speculative. Imaginary or speculative fear of governmental interference with one's claimed rights is insufficient to create a justiciable case or controversy. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). The First Circuit has addressed the case or controversy requirement in cases involving potential government enforcement under a statute as follows:

> In assessing the risk of prosecution as to particular facts, weight must be given to the lack of history of enforcement of the challenged statute to like facts, that no enforcement has been threatened as to plaintiffs' proposed activities. Particular weight must be given to the Government disavowal of any intention to prosecute such conduct on the basis of the Government's own interpretation of the statute….

Blum v. Holder, 744 F.3d 790, 798 (1st Cir. 2014). Here as in *Blum*, there has been no enforcement, there is no threat of enforcement, and the government has disavowed an intention to prosecute based on its interpretation of the statute. SDOSMF ¶¶ 101, 103. Plaintiffs' failure to establish a case or controversy leaves the Court without subject matter jurisdiction over their claims alleging interference with their sustenance activities. *American Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) (vacating summary judgment in plaintiff's favor because there was "literally no controversy left for the court to decide - the case is no longer 'live.'"). Since the Court lacks jurisdiction, Plaintiffs are not entitled to judgment over these claims as a matter of law, and their motions for summary

[1] The record shows PN's filing was not an urgent act of defense in the face of State aggression, as Plaintiffs portray, but the culmination of a plan to sue the State, with federal funding, that PN had been discussing with the U.S. Department of the Interior ("U.S. DOI") since at least August, 2010. SDOSMF ¶ 139.

judgment should be denied accordingly. *Id.; see also Ramirez v. Sanchez Ramos*, 438 F.3d 92, 97 (1st Cir. 2006).

II. Plaintiffs' claims regarding the scope of PN members' sustenance fishing, hunting, and trapping rights fail on their merits.

Generally, Plaintiffs argue PN has a right to pursue these sustenance activities throughout the Main Stem because: (1) the 1980 Acts incorporated by reference the treaties of 1796 and 1818 and those treaties must be interpreted as granting PN sovereign control over the entirety of the Main Stem; (2) Indian canons of construction and federal case law arising from other states dictate that the 1980 Acts must be interpreted as granting PN sovereign control over the entirety of the Main Stem; (3) legislative history, including particularly post-enactment statements of legislators, legislative staff, and a PN member, demonstrate a legislative intent to grant PN sovereign control over the entirety of the Main Stem; and (4) the actions and statements of the parties and the general public show that all have always regarded the entirety of the Main Stem to be subject to PN's sovereign control. Doc'ts 120, 128-1.[2] To the extent the Court reaches the merits of these arguments, they should all be rejected.

A. Under the plain language of the 1980 Acts, PN's reservation consists solely of the islands in the Main Stem.

The core of both Plaintiffs' arguments is that the 1980 Acts, and specifically 30 M.R.S.A. § 6203(8), should be construed as granting PN the same reservation that Plaintiffs argue was provided under the Treaties of 1796 and 1818, and that that reservation – whatever its precise boundaries may be – included the Main Stem. Doc't 128-1 at 36, 39; 120 at 20-21. "The chief objective of statutory interpretation is to give effect to the legislative will." *Passamaquoddy*

[2] The U.S. presents its argument in the context of alleged interference with sustenance fishing rights, Doc't 120, while PN goes further, alleging that the State is interfering with claimed sustenance hunting and trapping rights on the Main Stem as well. Doc't 128-1 at 55-60.

Tribe v. Maine, 75 F.3d 784, 788 (1st Cir. 1996). And to determine legislative will, courts turn first to the plain language of the statute: "When … Congress has unambiguously expressed its intent through its choice of statutory language, courts must read the relevant laws according to their unvarnished meaning." *Id.* at 793. Applying these principles to the 1980 Acts leads to the conclusion that PN's reservation consists of the islands in the Main Stem, and nothing more or less than the islands.

Section 6203(8) reads in pertinent part as follows:

> **Penobscot Indian Reservation.** "Penobscot Indian Reservation" means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act. If any land within Nicatow Island is hereafter acquired by the Penobscot Nation, or the secretary on its behalf, that land must be included within the Penobscot Indian Reservation.

30 M.R.S.A. § 6203(8). Plaintiffs argue that the clause "reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine" operates to import the ancient treaty terms, as Plaintiffs read them, governing the reservation boundaries into the 1980 Acts. This argument fails because the plain language of the statute does not effect such an incorporation by reference.

Section 6203(8) does not incorporate by reference the ancient treaties. The core of the definition of the PN reservation is the phrase "islands in the Penobscot River." 30 M.R.S.A. § 6203(8). The clause that follows, "reserved to the Penobscot Nation by agreement with the States of Maine and Massachusetts," serves only as a means of identifying which islands in the river are covered by the definition; it is not an implied incorporation by reference of the treaties

themselves. *Id*. And if there were any doubt as to whether the definition included more than the islands in this river segment, that doubt is eliminated by the remainder of the sentence, which confirms that the reservation consists "solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818 …." *Id*. In this way the definition contains several layers of clarifying language to confirm that the reservation consists *solely* of specific islands within the designated river segment.

Plaintiffs' incorporation by reference theory ignores 25 U.S.C. § 1731, which employs sweeping language to provide the State with a general discharge from all treaty obligations and renders the ancient treaties immaterial. Section 1731 makes explicit that all questions regarding the relationship between the State and the Tribes would thereafter be answered by exclusive reference to the 1980 Acts. Section 1731 provides:

> Except as expressly provided herein, this subchapter shall constitute a general discharge and release of all obligations of the State of Maine and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of any Indian nation, or tribe or band of Indians or the United States as trustee therefor, including those actions now pending in the United States District Court for the District of Maine captioned United States of America against State of Maine (Civil Action Nos. 1966-ND and 1969-ND).

There is no "express" retention of treaty provisions governing the territorial limits of the reservation, either in the Maine Indian Land Claims Settlement Act ("MICSA"), in section 6203(8) of the Maine Implementing Act ("MIA"), or elsewhere.[3] Plaintiffs' argument that section 6203(8) impliedly resurrects those treaties therefore fails.

[3] Had Congress wished, there can be no doubt that it could have incorporated by reference any ancient treaty terms that served the purposes of the 1980 Acts. That omission, by itself, is a clear indication that it intended no such thing. *See infra* at 10-11 (discussing Congressional statement of purpose in MICSA).

When PN argued that section 6204 is ambiguous as to whether the State's regulatory authority applies to Indian Territory, the First Circuit observed that the provision is "about as explicit as is possible" in confirming that it does. *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007). Section 6203(8) likewise is about as explicit as is possible in defining PN's reservation as solely the islands in the Main Stem.

B. The structure and purpose of the 1980 Acts confirms that Congress did not intend to grant PN sovereign control over the Main Stem.

Courts look to the structure and purpose of a statute to inform the intended meaning of statutory language. *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 46 (1st Cir. 2009).

1. The stated purpose of the 1980 Acts

There is no need for speculation as to the purpose of MICSA because Congress expressly stated the purposes at the outset of the law, in four parts:

> (b) Purposes
>
> It is the purpose of this subchapter —
>
> (1) to remove the cloud on the titles to land in the State of Maine resulting from Indian claims;
>
> (2) to clarify the status of other land and natural resources in the State of Maine;
>
> (3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation; and
>
> (4) to confirm that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.

25 U.S.C. §§ 1721(b)(1)-(4). The first two parts of this four-part statement of purpose show that the statute was primarily intended to put to rest, once and for all, any doubts as to ownership of land and control over the State's natural resources. Considering that Congress' highest priority was to bring clarity to these issues, the argument that the 1980 Acts impliedly incorporated by reference the terms of ancient treaties, and thereby carried forward all of the ambiguities associated with Plaintiffs interpretations of them, cannot prevail. *Department of Revenue of Oregon v. ACF Industries, Inc*., 510 U.S. 332, 340 (1994) (interpretation that would "subvert statutory plan" is disfavored). Instead, Congress achieved its objective of clarity through reliance on carefully crafted statutory provisions using language that all Maine citizens could easily understand in 1980. Section 6203(8)'s definition of the PN reservation is the perfect example of that clarity, and Plaintiffs' effort to parse the language and create ambiguity in this provision runs directly counter to the expressed purpose of the law.

2. The relevance of sections 6207(4) & (6): sustenance fishing

Plaintiffs argue strenuously that one of the fundamental purposes of the 1980 Acts was to grant PN members a right of sustenance fishing in the Main Stem, and that State Defendants' position that the scope of the reservation is limited to the islands denies them that right.[4] For

[4] PN describes its "retention of aboriginal fishing, trapping and hunting rights and related authorities in the Penobscot River" as the "centerpiece consideration" it received under the 1980 Acts. Doc't 128-1 at 17. There are at least two problems with this statement. First, under the 1980 Acts, PN and its members did not "retain" ill-defined "aboriginal" rights. SDOSMF ¶¶ 28, 71, 72, 113; 25 U.S.C. §§ 1722(n) & 1723. Whatever rights PN may have had under the ancient treaties were expressly extinguished and replaced with a set of specific rights codified in the statutes. 25 U.S.C. § 1731; *Penobscot Nation v. Stilphen*, 461 A.2d 478, 487 (1983) (the 1980 Acts "quite precisely la[y] out the relationship thenceforth to obtain between the Penobscot Nation and the State of Maine."). Second, PN did not regard fishing, hunting, and trapping rights to be the "centerpiece consideration" when the 1980 Acts were pending before Congress. PN's representatives were direct and candid with Congress that their "bottom line" was money and land that could create an economic base of the Tribe's future. *Senate Hearings* at 179, PD Exh. 278, 4467 (Andrew Akins, the chair of the Tribal Negotiating Committee and a PN member, addressing a question from Senator Cohen while testifying in support of MICSA before the Senate Select Committee on Indian Affairs, stated, "Senator, our bottom line is 300,000 acres and $27 million. That is the bottom line.")

example, the U.S. claims "[t]he State's view would strip the right of sustenance fishing of all meaning, by articulating a 'right' that cannot be exercised." Doc't 120 at 24, *see also* 47 ("The State's present position … no longer affords it room to retreat from the charge that it is seeking to deprive the Nation of one of the key rights it bargained with the State for in 1980…"). PN's motion takes the same approach: "The State's assertion [is] that the only place tribal members can exercise their sustenance fishing, hunting and trapping rights is on the surface of the islands … where there are no fish or river-dwelling animals."[5] Doc't 128-1 at 43-44. All of this mischaracterizes State Defendants' position.

The summary judgment record contains no document in which State Defendants, or any other state officials, express the opinion that the sustenance fishing right that section 6207(4) affords to PN members is, in PN's words, "completely divorce[d]" from the Penobscot River. To the contrary, State Defendants interpret sections 6203(8) and 6207(4) together as permitting PN members to engage in sustenance fishing in the Main Stem from the shores of the reservation islands. Doc't 117 at 28-29. Such fishing could be by rod and reel, by nets, or other methods. This interpretation does not "strip the right of sustenance fishing of all meaning, by articulating a 'right' that cannot be exercised," Doc't 120 at 24, or "deprive the Nation of one of the key rights it bargained with the State for in 1980." *Id*. at 47. Nor does it restrict the right to the surface of

[5] PN's assertion that its members' "sustenance hunting and trapping rights" would be meaningless unless they extend to the waters of the Main Stem makes no sense either as a legal or a factual matter. As a matter of law, any "sustenance hunting and trapping rights" that PN members have would arise under provisions in tribal ordinances. 30 M.R.S.A. § 6207(1); *see infra* at 50-53. The 1980 Acts authorize PN to adopt such ordinances not only for the reservation, but also for PN territory, which includes the vast after-acquired acreage. *See* 30 M.R.S.A. §§ 6207(1) (describing ordinance authority); 6205(2) (defining PN territory). It is therefore incorrect to suggest that sustenance hunting and trapping must take place on Main Stem waters or not at all. As a factual matter, it is not clear what "river dwelling animals" PN is referring to that can only be hunted or trapped in Main Stem waters, but not on the reservation islands or elsewhere within the territory that is subject to PN's ordinance authority. Doc't 128-1 at 44. This is another example of a hypothetical concern that is not grounded in reality.

the islands, where no fish exist. Doc't 128-1 at 44. By giving effect to all statutory language in a manner that reads these provisions harmoniously, the State's interpretation comports with First Circuit law on statutory construction. *United States v. Lahey Clinic Hosp.*, 399 F.3d 1, 10 (1st Cir. 2005) ("where two seemingly inconsistent acts can reasonably stand together, a court must interpret them in a manner which gives harmonious operation and effect to both, in the absence of clear and unambiguous expression of Congressional intent to the contrary.").

State Defendants' interpretation accounts for many of the Plaintiffs' arguments. For instance, the U.S. argues that MIA's definition of "fish" as including "inland fish and anadromous and catadromous fish when in inland water," 30 M.R.S.A. § 6207(9), makes clear that the 1980 Acts "contemplated the taking of Atlantic Salmon for sustenance purposes." Doc't 120 at 23. Accepting the premise of this argument as true for the sake of discussion, this is perfectly consistent with State Defendants' position – PN members have a statutory right to fish for and catch salmon for their individual sustenance from the shores of the many islands that comprise their reservation. Similarly, State Defendants' interpretation of sections 6203(8) & 6207(1) is consistent with the fact that the legislative record contains several statements that seem to assume sustenance fishing would occur within at least some Main Stem waters. Doc't 128-1 at 7 n.5 (testimony of Lorraine Dana to the Senate Committee that "My son hunts and fishes my islands…"); *id*. at 19-20 (testimony of Maine Atlantic Sea Run Salmon Commission member expressing concern about the potential impact of sustenance fishing on salmon). And for the same reasons, State Defendants' interpretation does not "nullify," "render superfluous" or "render nugatory" PN members' sustenance fishing right. Doc't 120 at 24, Doc't 128-1 at 44.

3. The relevance of section 6205(3)(A): eminent domain

The U.S. also argues that the language of 30 M.R.S.A. § 6205(3)(A), which addresses eminent domain proceedings involving reservation lands, supports the conclusion that PN's reservation was intended to include the Main Stem and its submerged lands. Doc't 120 at 8, 25. Exactly the opposite is true. Section 6205(3)(A) authorizes the taking of reservation lands for public use under certain limited circumstances, and includes requirements for the replacement of such lands with other lands of equal value "contiguous to the affected Indian reservation." 30 M.R.S.A. § 6205(3)(A). The statute also includes this sentence: "*For purposes of this section*, land along and adjacent to the Penobscot River shall be *deemed* to be contiguous to the Penobscot Indian Reservation." *Id*. (emphasis added).

This language shows that the drafters of the 1980 Acts did not, as a general proposition, consider the Penobscot River to be part of the PN reservation. If the definition of "Penobscot Indian Reservation" at section 6203(8) included the River itself, additional statutory language deeming the River to be part of the reservation for the limited purposes of section 6205(3)(A) would be superfluous. This language would only be necessary if, as State Defendants contend, section 6203(8) limited the reservation to the "islands in the Penobscot River." 30 M.R.S.A. § 6203(8). It is well-settled that interpretations of statutes that render certain provisions or language superfluous are strongly disfavored. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *see also Massachusetts Assoc. of Health Maintenance Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999) (explaining "we are loath to reduce statutory language to a merely illustrative function, and … '[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.'") (internal citations omitted).

The Court should reject Plaintiffs' interpretation of the 1980 Acts because it subverts the statute's express purposes, it fails to reconcile the language of 6203(8) & 6207(1), and it renders superfluous the language of section 6205(3)(A). *Lahey Clinic Hosp.*, 399 F.3d at 10; *Massachusetts Assoc. of Health Maintenance Orgs,* 194 F.3d at 181. State Defendants' construction of the statute, which reads provisions harmoniously and gives effect to all language in a manner that comports with Congressional intent, should prevail. *Id*.

C. Plaintiffs' arguments cannot overcome the presumption against a state's loss of sovereignty over navigable waters.

Plaintiffs' arguments do not account for the most relevant caselaw regarding disputes between tribes and states over the control of navigable waters. The analytical starting point in such a dispute is the principle that the state's sovereignty is presumed. The Supreme Court has explained, "[F]or the 13 original States, the people of each State, based on principles of sovereignty, 'hold the absolute right to all their navigable waters and the soils under them,' subject only to the rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1227 (2012), citing *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842). "Upon statehood, the State gains title within its borders to the beds of waters then navigable …. It may allocate and govern those lands according to state law…." *Id*. at 1228. Therefore, when Massachusetts and Maine became states, each became the presumptive sovereign of all navigable rivers within its borders.

When it comes to rivers, there is a presumption *against* a state's loss of sovereignty or jurisdiction a tribe. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283-84 (1997) (removal of navigable waters from state's jurisdiction in favor of a tribal claim is not to be lightly inferred,

and "should not be regarded as intended unless the intention is definitely declared or otherwise made very plain."); *Montana v. United States*, 450 U.S. 544, 551, 554 (1981) (effort to obtain tribal control of river must "overcome the presumption against the [state's] conveyance of the riverbed."); *see also Seneca Nation of Indians v. New York*, 382 F.3d 245, 259 (2d Cir. 2004) (the intention to divest a state of jurisdiction over navigable rivers must be "shown in the treaty with such certainty as to put it beyond reasonable question.") (citations omitted); Doc't 117 at 12-13, 21. The Supreme Court explained that for a state to forego its sovereignty over a river, it must do so in "clear and special words," or "definitely declare[] or otherwise ma[k]e very plain" such a conveyance. *Montana*, 450 U.S. at 551, 554 (citations omitted). When it comes to rivers any doubt inures to the benefit of the state, not the tribe. When Massachusetts negotiated the treaties of 1796 and 1818, it is presumed not to have conveyed the River to the Tribe, just as Maine is presumed not to have done so in the 1980 Acts.

Plaintiffs' arguments are based on a line of authority favoring tribal interpretation of a treaty where navigable waters are not involved. Doc't 128-1 at 38-43; Doc't 120 at 26-27. That law is inapplicable. In addition, Plaintiffs cannot point to the requisite "clear and special words" or "very plain" declaration in the 1980 Acts, in their legislative history, or, for that matter, in the ancient treaties. Indeed, Plaintiffs make no effort to meet the high standard of proof that the Supreme Court has established as necessary to prove their claim of sovereign tribal control over the Main Stem. Their proffered reading of the 1980 Acts should be rejected.

D. The Indian canons of construction do not apply to the 1980 Acts, and even if they did apply, they do not dictate an interpretation that PN's reservation includes the entirety of the Main Stem.

Although this case is a dispute over the scope of the reservation, Plaintiffs show an aversion to discussing the single provision in the 1980 Acts that expressly defines the term.

30 M.R.S.A. § 6203(8). For example, PN's 60-page motion contains only two references to the provision, and neither reference is accompanied by analysis of the text. Doc't 128-1 at 26, 35. Their strategy is instead to discuss everything but the definition in an attempt to create statutory ambiguity where it does not exist, and then argue that federal rules of construction that accord special status to Indian tribes obligate the Court to interpret the statute as they would like. Both the U.S. and PN, supported by their amicus, argue that the Court must interpret the 1980 Acts using so-called Indian canons of construction that require any ambiguities to be resolved to the Tribe's benefit. Doc't 117 at 17; Doc't 128-1 at 34, 38; Doc't 131. This strategy is misplaced.

The Indian canons are not an interpretive rule employed to discern legislative intent, but a common law doctrine that is designed to compensate for the disadvantaged position of tribes in treaty-making. *Tulee v. Washington*, 315 U.S. 651, 684-85 (1942). The text and legislative history of MICSA make clear that any such generally applicable federal Indian law that would affect or preempt Maine's jurisdiction does not apply to the 1980 Acts. Additionally, these interpretive rules do not apply when the language of the disputed provision is unambiguous, and even if they were applicable to this case, courts give them little effect when construing modern settlement acts involving well-represented tribes.

1. Sections 1725(b), 1725(h) and 1735(b) of MICSA, and their legislative history

MICSA is nationally unique in that it contains provisions making the Tribes eligible to receive the financial benefits of federally-recognized tribes, which was a high priority for the Tribes, while also generally subjecting the Tribes to the State's civil, criminal and regulatory jurisdiction, which was a high priority for the State. *Senate Report* at 30-31, PD Exh. 282, 5958-59. The Tribes' eligibility to receive services and benefits available to federally-recognized tribes in other states is confirmed at 25 U.S.C. §§ 1725(b) & (c). The State's

jurisdiction is made applicable to Indians and Indian Tribes, and their lands and natural resources, through several complementary provisions. First, as a general proposition, sections 1725(a) & (b)(1) establish that Maine Indians and Indian Tribes and their lands and natural resources are subject to state law except as otherwise provided in MIA. Second, to ensure that no then-existing federal Indian law would be interpreted in a manner that would call into question the applicability of state law to Maine's Tribes, and thereby upset the jurisdictional bargain that had been so carefully negotiated, section 1725(h) stipulates that:

> no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. § 1725(h). Third, section 1735(b) essentially tracks the same language as section 1725(h), except that it applies to future changes to federal law. The combined effect of sections 1725(h) and 1735(b) is to bar the application of any federal law that accords special status to Indians and affects or preempts Maine's jurisdiction, unless Congress expressly makes that law applicable in Maine. 25 U.S.C. §§ 1725(h) & 1735(b).

a. The Senate Committee's amendment of S. 2829

To appreciate the significance of sections 1725(h) and 1735(b), a review of their origins is illuminating. MICSA as introduced in S. 2829, included section 6(g), which read in pertinent part:

> Except as provided in this Act, the laws of the United States which relate or accord special status or rights to Indians, Indian nations, tribes, and bands of Indians, Indian lands, Indian reservations, Indian country, Indian territory or lands held in trust for Indians, shall not apply within the State of Maine ….

S. 2829 § 6(g), *Senate Hearing* at 18, PD Exh. 278, 4308. U.S. DOI was concerned that Section 6(g)'s sweeping introductory clause could prevent the Maine Tribes from receiving the financial benefits of generally applicable federal Indian legislation, and worked with the parties to develop alternative language. As described by the Secretary:

> We found this provision troublesome and confusing in that Federal financial benefits to Indian tribes would be divorced from general Federal statutes applicable to Indians. This was a subject of some discussion with representatives of the State and Tribes, and agreement was reached on the language of our proposed Section 6(h).

Letter, Secretary Cecil D. Andrus to Senator John Melcher, Chairman, Joint Select Committee on Indian Affairs, 8/8/1980, Senate Hearing at 95, 103, PD Exh. 278, 4383, 4391. This language essentially reversed the presumption regarding the applicability of federal Indian Law as it had appeared in the original section 6(g). Instead of generally barring the application of federal Indian law from Maine, it made it generally applicable, but with one salient and material exception: federal law that would affect state jurisdiction. The new language was set forth in Section 6(h) of the bill as reported from Committee, and is now codified at Section 1725(h).

In its section-by-section analysis of the bill as reported, the Committee explained in detail how this amended provision was intended to work. It noted that, as amended, "the general body of federal Indian law would be "applicable to the [tribes] and their land and natural resources and to any other Indians, Indian nations or tribes or bands of Indians within the State of Maine." *Id.* Although this was the general rule, it would not apply "*to the extent* the provisions of *such Federal law* would *affect or preempt* the civil, criminal or regulatory jurisdiction of the State of Maine…" *Id.* (emphasis added). The Committee report language, then, makes it clear that the Committee adopted the compromise language that the parties proposed reversing the prohibition against the general application of federal Indian law in Maine, but also made it clear this reversal

should not affect the jurisdictional construct that was an integral part of the legislation for the State.

The Committee also cited 25 U.S.C. § 175, which authorizes the U.S. Attorney to represent Indian tribes in certain litigation, as an example of a non-jurisdictional federal statute that would apply to Maine under Section 6(h). *Senate Report* at 31, PD Exh. 282, 5959. Completing its explication of Section 6(h), the Committee stated the general prohibition on federal law that would "affect or preempt" Maine law would extend to all federal laws that "accord[] special status or rights to…Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State." *Id.* at 30-31, PD Exh. 282, 5958-59. Thus, the tribal provisions of the Clean Air Act would not apply to the Maine Tribes. *Id.* at 31, PD Exh. 282, 5959

Section 6(h) of the bill as reported was enacted into law without change and codified at 25 U.S.C. § 1725(h).[6] The legislative history of this provision shows the provision was carefully crafted to allow for the application of the general body of federal Indian law in Maine governing such issues as Indian housing, Indian health, and Indian education, without affecting the

[6] To be clear, the House version of the bill, H.R. 7919, was enacted. *Congressional Record, September 22 and 23, 1980,* at H9275-H-9285, PD Exh. 286, 6045-6055; S13198-S13202, PD Exh. 287, 6056-6061. As explained in the House Report:

> The Committee adopted an amendment in the nature of a substitute to H.R. 7919. The Administration had serious objections to some of the provisions of the legislation as introduced in the Senate (S. 2829). H.R. 7919, though introduced much later than the Senate bill, *is identical to S. 2829*. Over a period of three months, officials of the Administration met and negotiated with representatives of the State and of the three tribes. Senate and House Committee staff attended and participated in many of these meetings. The amendment in the nature of a substitute is the result of these negotiations and resolves all of the problems in the original legislation.

*House Repor*t at 18, PD Exh. 283, 6008 (emphasis added). Importantly, the House Committee adopted the Senate Report: "A complete section-by-section analysis of this bill and the Maine State Implementing Act are contained in Senate Report 96-957 which the Committee accepts as its own." *House Report* at 20, PD Exh. 283, 6010.

jurisdictional compromise that was an essential part of the bill. To provide further protection for the legislation's jurisdictional component, the Committee added another new provision at Section 16(b), which complemented the new Section 6(h). This new provision read:

> The provisions of any Federal law enacted after the date of this Act for the benefit of Indians, Indian nations…which would materially affect or preempt the application of the laws of State to lands owned or held in trust for Indians, Indian nations … as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of each such subsequently enacted Federal law is specifically made applicable within the State of Maine.

Senate Report at 11, PD Exh. 282, 5939. The Committee explained that this new term would operate as a "rule of construction to govern the interpretation of statutes enacted after the date of the enactment of [MICSA]." *Id*. at 35, PD Exh. 282, 5963. Section 16(b) of S. 2829 as reported was enacted into law without change and is now codified at 25 U.S.C. § 1735(b).

From the foregoing it is clear that, although Congress fully exercised its power to revise the language of the proposed legislation, it carefully avoided disturbing the substance and form of its jurisdictional component. To the contrary, the Committee made it clear that it understood the rationale underlying this part of the bill and approved of it.

b. The Senate Committee's citation to *Bryan v. Itasca County*

In taking care to protect the bill's jurisdictional balance, the Committee was specifically concerned about the potential effect that the so-called Indian canons of construction would have on questions of statutory interpretation that might later arise. The Senate Report makes clear that sections 1725(h) and 1735(b) were intended to prevent courts from applying the canons to questions of interpretation involving the 1980 Acts.

> The phrase "civil, criminal, or regulatory jurisdiction" as used in [section 1725(h)] is intended to be broadly construed to encompass the statutes and regulations of the State of Maine as well as of the jurisdiction of the courts of the State. The word "jurisdiction" is not to be narrowly interpreted as it

> has in cases construing Public Law 83-280 such as *Bryan v. Itasca County*, 426 U.S. 373 (1976).

Senate Report at 30-31, PD Exh. 282, 5958-59. In *Bryan*, the Supreme Court addressed the question of whether section 4 of Pub. L. 83-280, 28 U.S.C. 1360, authorized the State of Minnesota to levy a personal property tax on the mobile home of an Indian who resided on the reservation. *Bryan v. Itasca County*, 426 U.S. 373, 375 (1976). The statute gave Minnesota jurisdiction over civil causes of action to which Indians are parties and provided that the state's civil laws "that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere in the State." *Id.* at 373. The Court found that because the statute did not expressly mention tax laws, it was ambiguous on the question presented, and applied the Indian canons of construction to resolve the ambiguity in favor of the tribe by construing the word "jurisdiction" narrowly.

The Supreme Court decision in *Bryan*, issued just four years before passage of the 1980 Acts, illustrated how federal courts would be relying on the Indian canons of construction to resolve ambiguities in jurisdictional statutes against states and in favor of Indians, except where Congress may otherwise provide. *Id.* at 392. The *Senate Report* specifically invokes *Bryan* for the purpose of clarifying that the decision's mode of analysis is not to apply to jurisdictional questions arising under the 1980 Acts. *Senate Report* at 30, PD Exh. 282, 5958. Sections 1725(h) and 1735(b), then, manifest Congress's specific intent to ensure that this would not occur in Maine. The reliance of Plaintiffs and their supporting amicus on the Indian canons of construction is therefore misplaced, and their associated arguments should be rejected.

2. Decisions of the First Circuit

Plaintiffs cite *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999), in support of their argument that the Indian canons of construction apply to the 1980 Acts. *See,*

e.g., Doc't 117 at 17, Doc't 128-1 at 34. *Fellencer*, however, cannot bear the weight that Plaintiffs would place on it. *Fellencer* was a dispute between PN and a non-tribal member who was a former employee alleging discrimination in violation of the Maine Human Rights Act. *Fellencer*, 164 F.3d at 707. At the outset of its analysis, the court observed, "special rules of statutory construction obligate us to construe acts diminishing the sovereign rights of Indian tribes … strictly." *Id.* at 709 (citations and internal quotation marks omitted).

First, the *Fellencer* Court's analysis expressly invoked and relied on a five-part test set forth in *Akins v. Penobscot Nation*, 130 F.3d 482, 486-487 (1st Cir. 1997), to determine whether the challenged employment decision was an internal tribal matter within the meaning of 30 M.R.S.A. § 6206(1), and not subject to the anti-discrimination protections of Maine employment law. *Fellencer*, 164 F.3d at 709-12. The *Akins* decision never mentions the Indian canons of construction, which played no role in the development of its five-part test. *Akins*, 130 F.3d 482. Since the *Fellencer* holding was the result of a five-part test that was itself not influenced by Indian canons of construction, the decision's prefatory language about the applicability of those interpretive rules was merely *dicta*.[7]

Second, the State of Maine was not a party to the *Fellencer* litigation, and its absence from the case is important both legally and for practical reasons. The record before the court showed that the Maine Attorney General had issued a formal Opinion concluding that PN's employment decisions, when acting in its capacity as a governmental employer, "are not subject to regulation by the State." *Id.* at 710. The court found significant that the State had "disavowe[d] the very 'state interest' that Fellencer seeks to invoke in support of her private

[7] The *Fellencer* Court added a 6th factor, which it deemed appropriate in light of the factual circumstances of the case, to the *Akins* five-part test. *Id.* at 710. Its decision to do so, however, was expressly made "in the spirit of *Akins*," and therefore not driven by the Indian canons of construction.

cause of action."[8] *Fellencer*, 164 F.3d at 710-11. Both *Akins* and *Fellencer* make clear, therefore, that the court would treat differently a jurisdictional dispute under the 1980 Acts between PN and the State. Additionally, the fact that the State was not a party to *Fellencer* meant the court did not receive briefing from the State. On the merits, that briefing would have expressed the same conclusion that PN was urging upon the court, but it also likely would have explained that the Indian canons of construction were inapplicable. The court's prefatory language concerning those canons was therefore included in its opinion without the benefit of the State's analysis of the issue.

In more recent First Circuit decisions interpreting MICSA's jurisdictional provisions, the Court has not applied the Indian canons of construction despite being urged to do so by tribal litigants. For example, in *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007), the tribe expressly argued that the Court must apply the Indian canons to MICSA's provisions, and "contend[ed] that, judged against a backdrop of federal common law protecting Indian sovereignty [citation omitted], MICSA was not clear enough to subjugate this aspect of the tribe's sovereignty to Maine law." *Id* at 50. The Court went on to find that "MICSA is clear." *Id*. As a result of that finding, it had no occasion to apply the Indian canons, which are an interpretive rule for resolving ambiguities, even if the canons were applicable to the 1980 Acts. Even so, the Court observed that MICSA and the Aroostook Band of Micmacs Settlement Act,[9]

[8] The State had also disclaimed any sovereign interest in the *Akins* decision. The Court's opinion in that case used even stronger language: "Of great significance is that this is an intra-tribal dispute. It involves only members of the tribe, and not actions by the Nation addressed to non-tribal members. The tribe's treatment of its members, particularly as to commercial interests, is not of central concern to either Maine or federal law." *Akins*, 130 F.3d at 488.

[9] Pub. L. No, 102-171, 105 Stat. 1143, set out as a note following 25 U.S.C.A. § 1721 (West).

"displaced any federal common law that might otherwise bear on this dispute." *Id*. at 49.[10] The Indian canons are a doctrine developed through the jurisprudence of the federal courts, and therefore are inescapably part of "federal common law that might otherwise" have had a bearing on the dispute. The language of the *Ryan* decision, therefore, appropriately calls into question the applicability of the Indian canons to the 1980 Acts. *See also, Johnson*, 498 F.3d at 41-47 (interpreting the 1980 Acts by examining their plain language and legislative history, without regard for Indian canons of construction). Plaintiffs' reliance on the Indian canons of construction is misplaced.

3. If the Indian Canons of Construction applied, *arguendo*

Even if the Indian canons of construction were applicable to the 1980 Acts, they would not govern the issues presented in this case. The plain language of 30 M.R.S.A. § 6203(8) defines PN's reservation as consisting of "islands in the Penobscot River." *See supra* at 7-10; Doc't 117 at 14-15. When the question presented can be resolved based on the plain language of the statute, the Indian canons of construction are immaterial. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986). As the Supreme Court has explained, the canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Id*.; *see also Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014) ("district court did not err by declining to make findings regarding the Treaty's meaning to the Yakama people at the time of its signing, because the meaning to the Yakama people cannot overcome the clear words of the Treaty"). Plaintiffs' arguments in this case represent a search for ambiguity where none can be found, *see supra* at 7-10, and therefore the

[10] The Court went on to apply traditional rules of statutory interpretation, instead of the Indian canons, to resolve the issue presented. *Id*., at 56.

Indian canons are unavailing according to their own terms. *Catawba Indian Tribe*, 476 U.S. at 506.

There are other compelling reasons why the Indian canons should be given little effect here as well, even if there were statutory ambiguity. The policy underlying a rule of construction that is sympathetic to Indian interests is to compensate for the disadvantage at which the treaty-making process placed the tribes. *Tulee*, 315 U.S. at 684-85. Picking up on this rationale, and citing 19th century case law, PN argues that:

> 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,' and '[h]ow the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

Doc't 128-1 at 38 (citations omitted). There are several reasons why this line of argument is inapposite as applied to the 1980 Acts.

First, the phrase at the center of the present dispute, "islands in the River," and "solely" the islands, is not a phrase whose meaning is different to "learned lawyers" than to anyone else. Ironically, it is the State Defendants whose interpretation gives that phrase its ordinary meaning, and it is Plaintiffs who urge an intensively-lawyered construction based on arcane legal doctrines. The notion that anyone would have trouble understanding what is meant by "islands in the Penobscot River" is meritless and demeaning.[11]

[11] PN attempts to sow doubt as to how this phrase would have been understood by PN members by creating another strawman – that State Defendants' interpretation would cut the Tribe off from the River that it depends on for transportation, food and cultural activity. Doc't 128-1 at 4, 39, 42-44. This simply is not true. Although the Main Stem is not part of PN's reservation, the River is open to PN members and the general public alike for all of the uses identified. The fact that these uses are subject to State regulation, 30 M.R.S.A. § 6204, does not make them unavailable, and there is no evidence that state regulation has interfered with PN's desired uses of the River.

During the negotiations that led to the 1980 Acts, PN's legal team included some of the most well-respected lawyers of the time, including experts from the Native American Rights Fund and Harvard Law School Professor Archibald Cox. SDOSMF ¶ 69. The Second Circuit has observed that these circumstances diminish the relevance of the Indian canons:

> Where, as here, the [tribe] [was] represented by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsay Clark, we think the [pro-Indian] rule of construction applies with less force.

United States v. Atlantic Richfield, 612 F.3d 1132, 1139 (2d Cir. 2000). The record of the 1980 Acts and their development makes abundantly clear that this was not a case of a powerful state taking advantage of a helpless tribe.

Finally, the Supreme Court has explained that the "pro Indian" canon may be offset by traditional rules of statutory interpretation, which include the rules that different provisions of the law must be read in a manner that avoids conflict, and that readings that render statutory language surplusage must be avoided. *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001); *see also supra* at 7-13 (discussing traditional rules of construction) and 15-16 (discussing why ambiguity inures to the benefits of the state, and not the tribe, in a dispute over jurisdiction over navigable waters). For all of these reasons, even if this case were about ambiguous provisions in the 1980 Acts, which it is not, only traditional rules of statutory interpretation should guide the Court's analysis.

E. Federal caselaw from other jurisdictions, including *Alaska Pacific Fisheries v. U.S.*, does not support Plaintiffs' interpretation of the 1980 Acts.

PN and the U.S. argue that the Supreme Court's 1918 decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), "requires" the Court to find that the 1980 Acts define PN's reservation as including the waters and bed of the Main Stem. Doc't 128-1 at 44-46;

Doc't 120 at 17-17. *Alaska Pacific Fisheries* is easily distinguishable from the present case, and the distinctions between the two point up weaknesses in Plaintiffs' claim.

In *Alaska Pacific Fisheries*, 800 Metlakahtla Indians emigrated from British Columbia and settled on one of the small Annette Islands in southeastern Alaska in 1887, with the encouragement of the United States. Congress subsequently sanctioned this settlement in 1891, as follows:

> That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, … under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior.

Id. at 86, *quoting* Act of March 3, 1891, c. 561, Section 15, 26 Stat. 1101. The Annette Islands, and the submerged lands and waters surrounding them "[a]ll were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority." *Id.* at 87.

In 1916, Alaska Pacific Fisheries, a California corporation, erected a "formidable" fish trap without the consent of the Indians or the Secretary of the Interior approximately 600 feet from the high tide line of the island on which the Indians settled, intending to catch 600,000 salmon in a single season. *Id*. at 87. The United States, on behalf of the Metlakahtla Indians, sought to deconstruct this device, and the issue before the Supreme Court was what Congress intended by the words "the body of lands known as Annette Islands," and in particular whether the phrase "embrace[d] only the upland of the islands or includes as well the adjacent waters and submerged land." *Id.* at 87. The Court found against the corporation for a number of reasons, none of which applies here.

Most obviously, *Alaska Pacific Fisheries* turned on the interpretation of the phrase "the body of lands known as the Annette Islands." *Id.* at 86. The Court reasonably interpreted these words as a reference to "a single body of lands," including both the submerged lands and the uplands of the islands. *Id*. at 89. In other words, the Court concluded that "the body of lands known as the Annette Islands" was, both linguistically and as a matter of Congressional intent, a reference to a recognized region encompassing both the islands and the surrounding submerged lands in a marine archipelago. In the present case, the operative phrase is "the islands in the Penobscot River," and "solely" the islands. 30 M.R.S.A. § 6203(8). The statute contains no reference to a "body of lands," nor does it invoke the public's understanding of what a particular area is "known as."

These are critical distinctions. The formulation in the 1980 Acts is both precise and readily understandable in its plain language, whereas the formulation used in the 1891 statute establishing the Metlakahtla reservation was inherently ambiguous and in need of interpretation. On this basis alone Plaintiffs' argument that *Alaska Pacific Fisheries* "requires" the 1980 Acts to be interpreted as including the entirety of the Main Stem within PN's reservation should be rejected.

Second, the Court observed that the Annette Islands and the adjacent submerged lands and waters were a "district" where "the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority." *Id.* at 88. Essentially, the United States before and after the 1891 legislation could do with the Annette Islands and the surrounding submerged lands as it wished, and it wished that the corporation not have a fish trap that would aggrieve the Metlakahtla Indians. In the present case, the United States has admitted is not the trustee of the Penobscot reservation, Doc't 46 at 7, and the Main Stem is not subject to

the exclusive "dominion and sovereignty" of the United States. *Montana*, 450 U.S. at 551. The federal government lacks the authority here to dictate its preferred outcome, as it did with the fish trap controversy on the Annette Islands.

Third, in *Alaska Pacific Fisheries*, the Court found that Congress intended that the Annette Islands salmon fishery would provide the Metlakahtla Indians with an economic base sufficient to sustain the entire tribe, and therefore that fishery had to be protected for the Indians' benefit. *Alaska Pacific Fisheries*, 218 U.S. at 88-89. There is no such intent reflected in the text or legislative history of the 1980 Acts. In 1980, the Main Stem did not have a fishery that would have been capable of sustaining PN in any way that remotely resembled the 19th century circumstances of the Metlakahtla Indians on the Annette Islands. *See* SDOSMF ¶¶ 46 (1821 report of PN agent stating Penobscot River fishery was "nearly annihilated"), 177-78 (PN and MDIFW statements acknowledging depleted nature of salmon fishery in 1983). The Acts provide PN members a qualified right to take what fish they can catch for their individual sustenance, but that is no guarantee of fish of a sufficient quantity or quality to meet the dietary needs of that tribal member, much less the entire Tribe.[12] 30 M.R.S.A. § 6207(4). The factual circumstances associated with the Supreme Court's ruling in *Alaska Pacific Fisheries* are dramatically different than those present here, and the case provides little guidance on how the 1980 Acts defined PN's reservation.

F. Plaintiffs' citations to legislative history and after-the-fact declarations purporting to address the development of the 1980 Acts are unpersuasive.

Plaintiffs' reliance on legislative history and other extrinsic materials that purport to show legislative intent is flawed in two basic respects. To the extent their citations are to the actual

[12] The right is limited in its territorial scope as described *supra* at 11-13, and is subject to the oversight of the MDIFW Commissioner. 30 M.R.S.A. §§ 6207(4) & (6).

legislative record, those references are selective and not in proper context. Much of PN's argument, moreover, is based on after-the-fact affidavits prepared for this litigation that purport to declare what Congress and the Maine Legislature intended in the 1980 Acts. These affidavits are legally immaterial, and the fact that PN felt the need to generate them speaks to the absence of support for Plaintiffs' position in the actual legislative record.

1. Legislative History

PN draws upon statements in the legislative record in an attempt to support its argument that the 1980 Acts "retained" the tribes' "sovereign" or "aboriginal" rights, and those rights must be construed in accordance with principles of federal Indian common law. Doc't 128-1 at 14-17, 38-44. PN cites to portions of the Senate and House Reports in support of these arguments. *Id*.; citing variously *Senate Report* at 12-17, PD Exh. 282, 5940-45; *House Report* at 12-17, PD Exh. 283, 6004-07.

In *Maine v. Johnson,* PN made a similar argument that the 1980 Acts carried forward the Tribe's inherent sovereignty, and that their rights could only be understood with reference to federal Indian common law. *Maine v. Johnson*, 498 F.3d at 43. The First Circuit expressly rejected this argument, observing that PN's citations to the Congressional reports did not reflect their full context:

> The [Penobscot and Passamaquoddy] tribes cite to House and Senate reports referring to the sovereignty of the Maine tribes as equal to that of other Indian tribes, H.R. Rep. 96–1353 at 14; S. Rep. 96–957 at 14 (1980), but the reports are referring to the view adopted by the *Bottomly* decision—which preceded and indeed precipitated the Settlement Acts. *See* 68 Fed.Reg. at 65,060. And the Settlement Acts were a compromise by which land claims were limited, federal funds paid over, and the authority of the tribes and the State redefined on a new basis, closer to Maine's historic treatment rather than the full sovereignty asserted by the tribes.

> This temporal distinction is borne out explicitly in a passage in the Senate Report, adopted as well in the House Report. This makes clear that the statutory compromise "extended" state power over "Indian territory"—thereby reviving the pre-litigation state of affairs—with the caveat that tribal sovereignty would be "strengthened" to the extent of withdrawing Maine's prior assertion of authority over "internal affairs." S. Rep. 96–956 at 14; H.R. Rep. 96–1353 at 15.

Id. This passage refutes all of PN's arguments that are premised on the notion that the 1980 Acts "retained" "inherent" or "aboriginal" rights. Instead the Acts "redefined on a new basis" the relationship between the State and the Maine tribes in clear and precise statutory terms, and that relationship is "closer to Maine's historic treatment than the full sovereignty asserted by the tribes." *Id*.

Other portions of the legislative record demonstrate that the 1980 Acts were intended to confer only limited rights of self-government on the tribes as specifically provided for therein, and the Indian-State framework in Maine was not to be subject to the overlay of federal Indian common law. The Senate Report summarizes the jurisdictional relationship this way: "Essentially, the Maine Implementing Act accords the Passamaquoddy Tribe and Penobscot Nation the status of municipalities under State law; it provides for the application of State law to persons and property within the Penobscot Indian Territory…." *Senate Report* at 18, PD Exh. 282, 5946. PN's own lawyer, Thomas Tureen, testified at the hearing before the Maine Legislature's Joint Select Committee that the tribes understood "the legitimate interests of the State in having basic laws such as those dealing with the environment apply uniformly in Maine …," and that the Tribes "came to see" "[t]he General Body of Indian Regulatory law" "as a source of unnecessary Federal interference … [and] the State came to see [it] as a source of uncertainty in future Tribal-State Relations." *State Hearing* at 25, PD Exh. 258, 3763. At the Senate Hearing, Tureen made substantially similar statements in response to a question from

Senator Cohen, but went even further, stating that the tribes wanted to be sure federal law would not apply for their own reasons, to forestall the "pervasive interference and involvement of the Federal Government in internal tribal matters," as was occurring in the West. *Senate Hearing* at 182, PD Exh. 278, 4470. Thus, the 1980 Acts are "unlike that which exist[] anywhere else in the United States." *Id.* These statements directly contradict PN's arguments that the 1980 Acts generally preserved "inherent" or "aboriginal" sovereign rights that were subject to future protection under principles of federal Indian common law. Doc't 120 at 22-24, Doc't 128-1 at 14-17, 38-44.

Plaintiffs' references to the legislative history in support of the argument that the 1980 Acts defined PN's reservation as coextensive with whatever the ancient treaties may have reserved are also ill-founded. *See* Doc't 120 at 21; Doc't 128-1 at 47. For example, the U.S. cites to the Senate Report's statement that "The Maine Act recognizes and defines the existing Passamaquoddy and Penobscot Reservations." *Senate Report* at 35, PD Exh. 282, 5963. But this statement simply reflects that the 1980 Acts recognized the reservations that were understood to exist in 1980, and for PN, that reservation consisted solely of islands in the Main Stem. *See* Doc't 117 at 35-44 (explaining long history of State dominion and control over the Main Stem waters, and private use of the Main Stem bed).

PN quotes from Maine Attorney General Cohen's April 1, 1980 Memorandum, PD Exh. 263, 3965, stating that the reservation "include[d] riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of law." Doc't 128-1 at 47. That quotation omits important language. The full statement reads "*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." PD Exh. 263, 3965 (emphasis added). The portion of the sentence that PN quotes merely confirms that the rights that came with PN's island reservation include the same riparian rights attendant to the ownership of islands in a nontidal, navigable river under principles of Maine common law. In its entirety this statement recognizes that the PN reservation is defined in MIA, which limits it to islands in the Main Stem, and those islands come with whatever riparian rights are provided for in Maine law.[13] All of this is consistent with State Defendants' position.

As Congress was considering MICSA, it was presented with a map of the Penobscot and Passamaquoddy reservations. SDOSMF ¶ 56. That map depicted the reservations as colored in red. *Id*. (citing Jt. Exh. 732, Map 30, Doc't 110-32, PageID#: 6384). As to the PN reservation, that map showed only the islands in the Main Stem as colored in red, and not the River itself. *Id*. Notwithstanding PN's selective quotations from the record, this map is a clear indication that Congress intended PN's reservation to include the islands and only the islands.

2. After-the-fact declarations

PN puts great weight on a series of declarations and other statements from former legislators, a legislative staffer and a member of PN's tribal negotiating team, all of whom express their views on the legislative intent of the 1980 Acts decades after the fact. *See* Doc't 128-1 at 2-24, 37, 47 (citing declarations or other statements of Michael D. Pearson, Bennett Katz, Jonathan C. Hull and Reuben "Butch" Phillips describing PN's positions during negotiations with State officials and the intent of the parties during the Legislature's

[13] As explained *infra* at 43-44, the riparian rights of an island owner in a navigable river are primarily the right to access the water and wharf out to the navigable portion of the river, subject to regulation. These rights depend only on ownership of lands that is in contact with water, not on ownership of the submerged land.

consideration of MIA). The U.S. does not join PN in this line of argument. As a matter of law, it is well-established that these statements cannot be relied upon to show legislative intent.[14]

As to Pearson, Katz and Hull, the Supreme Court regards the post-enactment statements of legislators and their staffers to have little or no value for the purpose of statutory interpretation. *See, e.g., Barber v. Thomas*, 560 U.S. 474, 486 (2010) ("whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of individual legislators, made after the bill in question has become law."); *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 297-98 (2010) (letter sent by one of a bill's primary sponsors 13 years after enactment is of "scant or no value"); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (cautioning against reliance on material prepared by staffers and lobbyists who might be interested in "secur[ing] results they were unable to achieve through the statutory text").

Even if the Court were to consider the materials, they are of no moment. Pearson, Katz and Hull each say that MIA was intended to allow PN to engage in sustenance fishing in the Main Stem. Doc't 128-1 at 21-22. These statements are not significantly different from State Defendants' interpretation: MIA was intended to allow PN members to take fish from the River for their individual sustenance while fishing from the shores of PN's many reservation islands. *See supra* at 11-13.

As to Phillips, his declaration should be disregarded for both legal and factual reasons. As a matter of law, his testimony as to what was said and done 35 years ago cannot be used to show legislative intent. *Western Air Lines v. Board of Equalization of State of South Dakota,*

[14] Although such declarations are irrelevant and therefore should play no role in the Court's decision, State Defendants obtained the declaration of John R. Paterson, the former Deputy Attorney General who led the State's negotiating team, in order to demonstrate the factual problems with PN's allegations. *See, e.g.,* SDOSMF ¶¶ 71,72.

480 U.S. 123, 131 (1987) ("Appellants' attempt at the creation of legislative history through the *post hoc* statements of interested onlookers is entitled to no weight, however."). But even if the Court were to accept this version of events, it does not advance, but rather undercuts, PN's position.

Phillips makes two basic points in his declaration. First he claims that PN always "maintained" during negotiations with the State that PN's reservation included the river. Doc't 128-1 at 20. Even if true, the positions that parties "maintained" during negotiations is immaterial; the only thing that matters is the statutory text that was ultimately enacted.[15]

Second, Phillips asserts that PN members of the Tribal Negotiating Committee prepared an eleventh-hour resolution for that Committee on the eve of the Legislature's vote on MIA declaring that PN interpreted the bill as including the Penobscot River within PN's reservation. *Id*. at 21-22. Phillips further asserts that the executed resolution was delivered to the Legislature's Joint Committee on April 2, 1980, the day the Maine Senate voted to approve the bill. *Id*. at 23. There are serious problems with these claims. First, there is no record of any such resolution in any of the Maine Legislature's voluminous files chronicling its consideration of the bill. There is also no document in the legislative history of the bill that refers or alludes to such a resolution. Former Deputy Attorney General John Paterson, who led the State's negotiating team, categorically denies that this resolution was ever provided to the Legislature. SDSOMF ¶¶ 73, 93-97, 113, 115. At no time after the drafting of MIA or MICSA did PN's attorneys or representatives inform the Maine Legislature or Congress that they believed that Tribe's reservation would include the Main Stem under the terms of the 1980 Acts, and if they

[15] The State "maintained" its own positions during negotiations, but the respective litigation positions of the parties bear no necessary correlation to what was enacted. SDOSMF ¶ 97.

had, the State's representatives never would have recommended enactment.[16] *Id.* at 73, 113, 115. Given these authenticity problems, the Court should disregard the alleged resolution and the arguments that PN bases on it.

Even if the resolution is assumed authentic, the narrative that PN sets forth in its motion actually undercuts its position on the merits. According to PN, its negotiators identified a difference of opinion regarding how MIA defined the PN reservation in the last days before the Legislature's enactment of the bill. Doc't 128-1 at 22. Maine Attorney General Cohen then issued his April 1, 1980, Memorandum to the Committee stating in pertinent part that "the external boundaries of the Reservations are limited to those areas described in the bill …." PN claims that its negotiators, troubled by the Attorney General's Memorandum, were moved to prepare their resolution declaring a contrary interpretation.[17] Doc't 128-1 at 23. Although Phillip's declaration states that the resolution was "delivered to Maine's Joint Committee," there is no record of this having occurred, nor did PN's representative to the Legislature raise the issue on the record as the Senate and House voted on the bill.[18] All of this took place, or is alleged to have taken place, between April 1 and 3, 1980.

[16] PN never shared the alleged resolution, or mentioned its existence, to any state official in the 35 years since passage of the 1980 Acts until it was produced in this case.

[17] It is not clear why PN would have been troubled by Attorney General Cohen's Memorandum stating that the "external boundaries of the reservation are limited to those areas described in the bill …." Presumably, PN's negotiators and their talented legal team already knew well that MIA contained a definition of PN's reservation, and that definition would resolve any questions regarding the scope of the reservation.

[18] Notably, another of PN's declarants, a legislative staffer who worked for the Maine Legislature's Joint Select Committee during its consideration of MIA, states that he "do[es] not recall" having seen the alleged resolution, Doc't 119-32 ¶ 11, and the document does not appear among his three-volume set of background materials related to the Legislature's consideration of MIA that he personally compiled for the State Law and Legislative Reference Library. *Id.* at ¶ 14; Doc't 119-36; SDOSMF ¶ 94.

Following enactment of MIA, the matter went to Congress for ratification. The U.S. Senate Select Committee on Indian Affairs held its hearing on the bill on July 1 and 2, 1980. Senate Hearing, PD Exh. 278, 4284. The U.S. House of Representatives Committee on Interior and Insular Affairs held hearings on the bill on August 25, 1980. *House Hearing*, PD. Exh. 281, 5638. PN's attorneys and representatives, and PN members including Reuben "Butch" Phillips, testified at length at the hearings. *See, e.g., id.,* 5726-27 (colloquy between Rep. Snowe and Reuben Phillips concerning the internal process by which the tribes presented the terms of the 1980 Acts to tribal members for their review and approval); *see also* SDOSMF ¶ 115 (citations to Akins and Philips testimony). None of these witnesses mentioned the issue raised in the alleged resolution. PN had nearly five months between the date on which it now claims it noticed a difference of opinion over the scope of its reservation, and date of the hearing before the House Committee, to raise the issue and seek clarification or amendment of the legislation. Instead, throughout that time, it continued to advocate for passage of these statutes with full knowledge that MIA defined its reservation as limited to solely "islands in the Penobscot River." 30 M.R.S.A. § 6203(8). There are only two plausible explanations for this: either the account that PN offers in its motion is not accurate, or PN accepted Congressional ratification of MIA's definition limiting its reservation to "islands in the Penobscot River" because it continued to want passage of the legislation for the many and substantial benefits it would bring the tribe. "Having reaped the benefits, the Tribe cannot expect the corollary burdens imposed under the Settlement Act to disappear merely because they have become inconvenient." *Passamaquoddy Tribe*, 75 F.3d at 794.

G. The actions and statements of the parties and the general public show that no one has regarded the Main Stem as being subject to PN's sovereign control since at least 1796.

Plaintiffs present a variety of historical theories as to why the 1980 Acts should be interpreted as conferring on PN sovereign control over the Main Stem on PN. First they argue that PN and Massachusetts, the parties to the Treaties of 1796 and 1818, both intended that those treaties would leave control over the Main Stem with PN. Doc't 120 at 28-30, Doc't 128-1 at 10-12. Second, they argue that the actions and statements of PN, the State and the general public between the Treaty of 1820 and the 1980 Acts demonstrate a common understanding that PN's reservation included the Main Stem from bank to bank. Doc't 120 at 37-44; Doc't 128-1 at 49 n.11. Third, they assert that the post-enactment construction of the 1980 Acts by the parties shows all assumed PN's reservation included the entirety of the Main Stem. None of these arguments has merit.

1. The Treaties of 1796 and 1818

Plaintiffs rely heavily on the expert report of Dr. Harold Prins to argue the subjective intent of both PN and the Commonwealth of Massachusetts in the Treaties of 1796 and 1818. Doc't 120 at 28-30, Doc't 128-1 at 10-12. This argument is irrelevant as a matter of law, since a core purpose of the 1980 Acts was to end the arguments and uncertainties associated with the ancient treaties and put into place a new statutory framework with precise and easily understood language. *See supra* at 10-11. Even if the treaties were relevant, Plaintiffs' assertions are unpersuasive and sharply contested, and therefore cannot provide the basis for summary judgment. SDOSMF ¶¶ 1-27.

PN and the U.S. both assert that Massachusetts did not intend to secure the Penobscot River in the Treaties of 1796 and 1818, and instead sought only the lucrative timberlands along

the sides of the River. Doc't 120 at 28-31; Doc't 128-1 at 11[19] This defies common sense and is contradicted by the Report of Dr. Bruce Bourque. SDOSMF ¶¶ 26-28, 42. The "lucrative timberlands" along the river would have been worth little if the treaties left the River itself under PN's sovereign control. *Id.* The River was the only means of access to the vast uplands that Massachusetts acquired through the treaties, and it is inconceivable that the Commonwealth's negotiators intended to leave the Tribe with superior rights or authority over this critical economic artery. SDOSMF ¶¶ 10, 26-28, 42.

Plaintiffs' arguments that PN never would have "relinquished" the River itself in the treaties because they were so reliant on it for transportation, food, and other uses are likewise misplaced. Doc't 120 at 31, Doc't 128-1 at 11. At the time of the treaties and in the years that followed, it was never the view of PN and its members that they had ownership or control over the River, which was used by all the region's inhabitants, and travelers, as a common highway and resource. SDOSMF ¶¶ 4, 24, 27. Instead, the Indians regarded the River as a public resource open and accessible to all for navigation, fishing, hunting, trapping and other uses. *Id.* Indeed, the notion of ownership of water was inconsistent with PN's hunter-gather traditions, under which the tribal members used natural resources to support their needs, but did not see

[19] The U.S. motion contains no citation to a statement of material fact in this section. Doc't 120 at 28-31. PN's motion contains citations directly to the Prins Report, and also to paragraph 41 of their statement of material fact. Doc't 128-1 at 11; Doc't 119, ¶ 41. Paragraph 41, however, does not support the factual allegations that precede the citation. *Id.* For example, those allegations begin with the statement, "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." Doc't 128-1 at 11. Paragraph 41 of the statement of material fact says nothing of the sort, and is instead focused on reasons why PN members must have believed the treaties left them with access to the River. Doc't 119, ¶ 41. Plaintiffs' practice of citing directly to record material rather than their statement of material fact effectively deprives State Defendants of the ability to address and rebut their factual allegations through their Opposing Statement of Material Facts, and fails to comply with summary judgement practice requirements set forth in D. Me. Local R. 56(f). State Defendants object to any factual statements that appear in Plaintiffs' motions that are not accompanied by a supporting citation to their Joint Statement of Material Facts, and request that the Court disregard all such allegations.

themselves as "possessing" those resources. *Id*. Massachusetts and Maine also treated the River and its fishery as common resources open to Indians and non-Indians alike, and the history of the River's use during this period is consistent with that. *Id*. Therefore, the argument that PN believed the treaties reserved the River to the Tribe with exclusive or superior rights to use it is belied by the historical record.

Plaintiffs also argue that the following language in the Treaty of 1818 demonstrates that PN retained sovereign control over the Main Stem: "And that the citizens of said commonwealth shall have a right to pass and repass any of the rivers, streams and ponds, which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same." Doc't 120 at 33; Doc't 128-1 at 12.[20] The implication of this language, they assert, is that the Treaty provided non-tribal members with no other rights to use the Penobscot River other than this limited right of passage. *Id*. This language was not, however, a limitation on the rights of non-tribal members to use the Penobscot River; it was an affirmative grant of rights to non-tribal members to use "any of the rivers, streams and ponds, which run through any of the lands" that were still reserved to PN. SDOSMF ¶ 38. In 1818, those lands were substantial, including four townships, two on each side of the River, across from one another. SDOSMF ¶¶ 36, 38.[21] The township on the east side is now the Town of Mattawamkeag, named after the important river that joins the Penobscot at that location. *Id*. The other two townships,

[20] Although the U.S. quotes this sentence from the Treaty fully, PN selectively edits the sentence in its Motion to omit the words "any of the rivers, stream and ponds, which run through any of the lands hereby reserved." Doc't 128-1 at 12. The effect of this omission is to give the reader the impression this sentence was intended to address only passage through the Penobscot River, and nothing else, which is incorrect.

[21] It is worth noting that the 1818 Treaty contains almost identical language in the preceding sentence reserving the right of the State "to make and keep open all necessary roads, through any lands hereby reserved for the future use of said tribe," clearly referring to the four townships.

through which the West Branch of the Penobscot flowed, were located near present day Millinocket. *Id.* Therefore, the "right to pass and repass" sentence in the Treaty was simply intended to ensure non-tribal members could use all the waterways within PN's four reserved townships to transport goods to market, and is not an implied acknowledgement that the Penobscot River was generally subject to PN's sovereign control.[22]

Finally, the effect of the ancient treaties must be understood within the context of the common law that served as their backdrop. In Massachusetts and Maine, a grant of land on both sides of a nontidal river includes any islands located in the river. "The plaintiff owning the lands on both sides of the river, he owns the island to the extent of the length of his lands upon it." *Granger v. Avery*, 64 Me. 292, 295 (Me. 1874). Had PN not specifically reserved the islands in the Treaties of 1796 and 1818, the Tribe's conveyance of land on both sides of the River would have included the islands as well, and Massachusetts would have owned the river bank-to-bank.[23] Plaintiffs' argument that reserving the islands was the legal equivalent of reserving the

[22] This interpretation is confirmed by contemporary events and circumstances. In the years leading up to and immediately following the Treaty of 1818, non-tribal members were making extensive use of the River in a manner that is completely inconsistent with the claim that PN controlled such activity. For example, between 1790 and 1822 tribal and non-tribal citizens filed several petitions with the States of Massachusetts and Maine, describing intense fishing in the River, and requesting the intervention of the state governments to stop depletion in fish stocks that was occurring. SDOSMF ¶¶ 28, 41, 46-49. These accounts show both the extensive non-tribal usage that was taking place during the treaty period, and also that tribal and non-tribal people alike regarded the only authority capable of controlling activity on the River to be the state governments, not PN. *Id.*

[23] The United States explained this common law principle – that grants bounded on fresh water rivers include any islands between the shore and the center – in its brief in opposition to the petition for certiorari in *Seneca Nation v. State of New York*, 547 U.S. 1178:

> For example, this Court stated in *Jones v. Soulard*, 65 U.S. (24 How.) 41 (1860), that "from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh-water rivers … confer the proprietorship on the grantee to the middle thread of the stream … [and this is] too well settled, as part of the American and English law of real property, to be open to discussion." *Id.* at 65. Under the English and early American common law presumption, "[p]rima facie every proprietor upon each bank of a [freshwater] river is entitled to the land,

entire river is inconsistent with this principle. Had the Tribe reserved the river bank-to-bank, there would have been no need to reserve the islands separately, and the Treaties' language reserving the islands would have been superfluous.

The Commonwealth's negotiators would have been well aware of these common law principles.[24] Dr. Prins' theory that those negotiators understood they were only securing the uplands along the river backs through the treaties, and perhaps a limited easement to pass goods through the river, fails to account for the common law, and is therefore not credible.

2. Usage and regulation of the River between 1820 and 1980

The U.S. relies on Dr. Pauleena MacDougall, the Director of the University of Maine's Folklife Center, and her interpretation of several 19th century leases, for the proposition that the State and the general public understood PN did not cede the River in the ancient treaties. Doc't 120 at 38-39. A close reading of these leases shows only that the public regarded PN as possessing the same riparian rights in their reservation islands that any private owner of such islands would have, nothing more. For example, the 1831 lease of Orson Island to Bartlett and Purinton permitted them to affix log booms to "all the coves and eddies, and all other places on

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> covered with water, in front of his bank, to the middle thread of the stream," *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (D.R.I. 1827) (No. 14,312) (Story, J.), including "all islands between the shore and the center," 1 Henry Philip Farnham, Law of Waters and Water Rights 277 (1904).

Brief for the United States in Opposition, *Seneca Nation v. State of New York*, 547 U.S. 1178 (No. 05-905), 2006 WL 1069125, at 10-11 (addressing proper interpretation of treaty boundaries along the Niagara River, a nontidal, navigable river).

[24] In 1796, two of the treaty commissioners were distinguished lawyers, Nathan Dane and Daniel Davis. Davis, who also was a treaty commissioner in 1818, was appointed U.S. Attorney for Maine shortly after the 1796 treaty and went on to serve as Massachusetts' Solicitor General from 1801 to 1832. Nathan Dane is best known for his nine volume, *Abridgement and Digest of American Law* and for his support of Harvard Law School. *Senate Hearing* at 739-740 , PD Exh. 279, 5032-5033.

the shores." Doc't 120 at 38 (citing *MacDougal Report* at 6422). Dr. MacDougall seizes on the words "coves and eddies" as apparent evidence that PN was leasing the river waters, which she takes to mean the Tribe owned the River itself. *Id.* This interpretation makes no sense. By its terms, the lease was for the purpose of "affixing log booms" to the islands. *Id.* One cannot affix log booms to water; they can only be affixed to the shores. SDOSMF ¶ 51. The only reasonable interpretation is that the lease authorized booms to be affixed to the shores of "all the coves and eddies, and all other places on the shores." This reading of the lease is also consistent with the fact that the words "and all other places on the shores" follows "all the coves and eddies," indicating that the lease was intended to cover only the shores of the islands and not the river waters. *Id.*

Similarly, the 1834 sale of "islands and ledges on the westerly side of Old Town falls" reserving fishing rights on the eastern shore of Shad Island to PN is an unremarkable transaction. Doc't 120 at 38 (citing *MacDougall Report* at 6422-23). There is no reason why any owner of such islands, Indian or non-Indian, could not sell them while reserving to the seller an exclusive easement to fish from the eastern shore. That is all that occurred here. There is nothing about this conveyance that leads to the conclusion PN did not cede its interests in the River in the ancient treaties.

The U.S. also argues that 19th century statutes recognizing that PN may lease water privileges associated with their islands "refutes the State's position that the Nation has no rights in the Main Stem." Doc't 120 at 40 n.18. Here the U.S. is refuting a position that the State has never taken. As the U.S. motion itself concedes, the cited statutes simply address common law riparian rights associated with ownership of waterfront property. *Id.* at 39-40. The State has always regarded PN's reservation islands to include such water privileges, to the same extent that

any private owner of the same islands would have such privileges.[25] The statutes that the U.S. cites show that the Legislature had that same understanding. It is conspicuous that none of the 19th century leases or statutes that the U.S. cites mention or presume the existence of any inherent, aboriginal or sovereign rights – only the same common law rights that attend to the private ownership of land.

Importantly, these riparian rights are wholly distinct from jurisdictional authority, which the 1980 Acts confer upon PN only as expressly provided in MIA. 30 M.R.S.A. § 6204; *see also Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91, 95 (Me. 1996) (describing riparian rights as the right to have the water remain in place in its natural character, the right of access to the water, the right to wharf out to navigable water subject to regulation by the state, and the right to use the water immediately adjoining the property for transaction of business associated with the wharves) (citing Henry Philip Farnham, *Law of Water and Water Rights* § 63 (1904). Riparian rights "depend upon lateral contact with the water, and not upon ownership of the soil under the water." Farnham, *Law of Water and Water Rights* § 63. The fact that the State has recognized PN's riparian rights does not imply that PN's reservation includes submerged lands. *Id*. Nothing in MIA confers upon PN any authority to regulate activities occurring on the River. So while PN enjoys the same water privileges as any other private owner of an island in a non-tidal navigable river, neither PN nor any other private owner of such islands may exercise governmental authority over the activities of other citizens on the river. That sovereign authority lies exclusively with the State of Maine. *Id*.

[25] As the U.S. has admitted, the State of Maine holds fee ownership of PN's reservation islands in trust for PN. *See, e.g.*, Doc't 46 at 7. Riparian rights associated with that fee ownership are likewise subject to that trust. PD Exh. 263, 3965 (April 1, 1980 Memorandum of Attorney General Cohen).

Plaintiffs argue that the Law Court Opinion in *Stevens v. Thatcher*, 91 Me. 70, 39 A. 282 (1897), is evidence of a public understanding that PN owned or controlled the Main Stem. Doc't 120 at 41-43, Doc't 128-1 at 49 n.14. Plaintiffs mischaracterize *Stevens*, in large part by citing to the prefatory materials provided by the Reporter of Decisions, rather than the text of the Court's opinion. That opinion does not endorse any party's claim to ownership of submerged lands in the Main Stem. *Stevens* involved a dispute over the ownership of a raft of logs affixed to one of PN's islands in the Main Stem, and whether the local sheriff had erroneously filed the return on a writ of attachment issued against the logs in Greenbush, rather than Argyle. 91 Me. at 70, 73, 39 A. at 283. The local sheriff (to avoid a suit over his failure to perfect the attachment) took a position in the case that implied the River in the vicinity of the island was PN territory, while the defendants argued it was controlled by the local municipality. *Id*. Financially motivated arguments put forth by two of the three litigants in this case, seeking to avoid an adverse judgment, can hardly be said to reflect the general public's understanding of PN's treaty rights.

Finally, the Plaintiffs and their experts fail to account for, or even mention, the overwhelming evidence of State dominion and control over the Main Stem since 1796. *See* Doc't 117 at 35-44. The historical record shows pervasive and exclusive State regulation of all activities taking place on the Main Stem, including navigation, fishing, hunting, trapping, and environmental protection, and an absence of any corresponding PN regulation, until immediately preceding this litigation. SDOSMF ¶¶ 41, 47-50, 54, 57, 65, 67, 134, 165, 167. The record also shows the construction of several major dams in the Main Stem, without any indication that the dam owners sought or received any form of lease or permission from PN to occupy the riverbed, or that PN objected to their construction on the grounds that the dams would be located within an

area the Tribe claimed as its reservation. SDOSMF ¶ 54. And the record shows that immediately following the ancient treaties, Massachusetts and Maine began conveying the riverfront lots on the Main Stem to private citizens using deed language that carried title to the centerline of the River. Doc't 117 at 38-39; SDOSMF ¶¶ 23, 25-27, 36-37. This evidence directly refutes Plaintiffs' contention that there was a common understanding among PN, the State and the general public that PN's reservation includes the Main Stem. At the very least, the factual underpinnings of Plaintiffs' theories are not undisputed, and its motion therefore fails.

3. Post-enactment construction by the parties

Plaintiffs argue that the post-1980 actions and statements of the parties to this litigation demonstrate an understanding that PN's reservation includes the Main Stem. Doc't 120 at 44-51; Doc't 128-1 at 17 n.8, 28-32. They assert that both the federal government and PN have "always" interpreted the reservation as including the Main Stem. Doc't 120 at 45; *see also* Doc't 128-1 at 28 (PN and U.S. DOI have "been steadfast in [their] position that the Nation's reservation encompasses the Penobscot River."). In presenting this argument, Plaintiffs draw from the record selectively, and ignore numerous examples of their own written statements that contradict their current position. For instance, in 1977 U.S. DOI formally instructed the Department of Justice that "the Penobscot Nation today holds only the islands in the Penobscot River between Old Town and Mattawamkeag." SDOSMF ¶ 74. This shows that immediately prior to the 1980 Acts, U.S. DOI understood that PN's reservation included only the islands, and nothing more. In 1994, U.S. DOI's Solicitor, while rejecting PN's contention that its reservation included the West Branch of the Penobscot River, wrote to PN:

> Specifically, I have concluded that Congress in 1980 intended to confirm to the Nation the reservation that it understood then existed. In fashioning the 1980 legislation, the State of Maine and Congress recognized Penobscot ownership and control of islands in the Main Stem of the

> river…. This recognition provided the basis for Congress' confirmation of islands to the Nation as its reservation.

SDOSMF ¶¶ 120, 121. This shows that in 1994 U.S. DOI believed that the 1980 Acts confirmed boundaries of the PN reservation as it existed in 1980, the same reservation that in 1977 it said consisted of "only the islands." Taken together, these two statements show that until 1994, U.S. DOI understood that the 1980 Acts limited PN's reservation to "only the islands" in the Penobscot River.

In 1995 U.S. DOI first publicly expressed the opinion that PN's reservation included the bed or waters of the Main Stem. SDOSMF ¶ 121. When it did so, the pronouncement was a shock. Great Northern Paper's attorney characterized U.S. DOI's new opinion as "tortured," "contradicted by the clear statutory language of the Maine[ ] Act," and "at variance with current and historical practice." SDOSMF ¶ 121. The current position of the federal government is a reversal of that which it held going into the 1980 Acts, and for the 14 years that followed.

PN likewise regarded its reservation as consisting only of the Main Stem islands until relatively recently. For example, in 1980 PN Governor Tim Love wrote to U.S. DOI, "As you well know, the Penobscot Indian Reservation presently consists of all the islands in the Penobscot River … north of, and including, Indian Island at Old Town." SDOSMF ¶ 174. In 1996, PN's counsel wrote to the Federal Energy Regulatory Commission and explained that the boundaries of the reservation "include[ ] only Indian Island and the islands in the Penobscot northward thereof." *Id*. And the same year, John Banks, the Director of PN's Department of Natural Resources, wrote to the MDIFW that "Penobscot Reservation lands encompass the islands in the Penobscot River from Indian Island northward." *Id*. These are but a few examples of the numerous places where PN formally described its reservation only in terms of the Main Stem islands with no suggestion that it also included the River. Against this background,

Plaintiffs' claim that they have "always" regarded the reservation as including the entire Main Stem, and been "steadfast" in that position, lacks credibility.[26]

The examples that Plaintiffs offer of regulatory actions or statements that appear to support their position are uncompelling. For example, Plaintiffs argue that patrols of the Penobscot River by PN's tribal warden service represent an exercise of the Tribe's sovereign control over the river. Doc't 120 at 46, Doc't 128-1 at 17 n.8, 28. The opposite is true. These patrols take place under the auspices of a state statute authorizing PN wardens to enforce *the State's* fish and game laws. 12 M.R.S.A. § 10401 (describing process for the Commissioner of MDIFW to grant the powers of Maine wardens to PN wardens "who have qualified under the written code prepared by the commissioner and approved by the Director of Human Resources within the Department of Administrative and Financial Services").[27] SDOSMF ¶¶ 138-39. The powers granted to PN wardens are all expressly subject to revocation by the Commissioner, *id*., once again showing that it is the State, rather than the Tribe, that controls all activities occurring on River, including the actions of PN's law enforcement officers.[28]

[26] The First Circuit has also noted that U.S. DOI's recent positions on the 1980 Acts are inconsistent with its statements to Congress in 1980. *See Maine v. Johnson*, 498 F.3d at 45 n.10 (observing that an opinion letter that U.S. DOI provided to U.S. EPA regarding regulatory jurisdiction under the 1980 Acts "appears to be in tension with Interior Department testimony given to Congress when the Settlement Acts were being considered.")

[27] The Maine Legislature first authorized PN's wardens to act with the powers of state game wardens within Penobscot Indian Territory in 1981. P.L. 1981, ch. 644, §4, codified at 12 M.R.S.A. § 7055 (1981). The statute was amended in 1985 to provide the same authorization outside Indian territory. P.L. 1985, ch. 633, codified at 12 M.R.S.A. § 7055 (1985). The statute was recodified in 2003 as 12 M.R.S.A. § 10401 (2003).

[28] It is also worth noting that a written reference to PN wardens patrolling the PN reservation by boat does not necessarily imply that the reservation includes the river. The only practical way to patrol a reservation of islands in a river is by boat, since there is no other means of accessing the islands.

PN also argues that its issuance of permits for "eel potting" in the Main Stem is evidence of its sovereignty over the River. Doc't 128-1 at 31-32. To the extent PN has been purporting to regulate this little known practice, its actions have been *ultra vires*, since PN has no authority to regulate the taking of fish from any river or stream. 30 M.R.S.A. § 6204; Doc't 117 at 24-29. And to the extent MDIFW's regulatory materials governing eel potting have wrongly suggested that some portions of the Main Stem are part of PN's reservation, that is simply a mistake made by a staff person who administers this obscure program, and such mistakes do not affect the State's rights as sovereign. *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 63 (1984) (government is not bound by the acts of its agents that exceed the agent's lawful authority).[29] In the end, PN's reliance on eel potting as some of its best evidence showing tribal sovereignty over the River only serves to point up how strained its argument is.

H. The 1980 Acts confirmed the "transfer" of any rights PN may have had to the bed, waters or natural resources of the Main Stem.

State Defendants specifically incorporate by reference this argument as set forth in their motion for summary judgment. Doc't 117 at 33-38.

I. Equitable considerations of laches, acquiescence and impossibility bar the claims of PN and the United States seeking expansion of tribal sovereignty over the Main Stem.

State Defendants specifically incorporate by reference this argument as set forth in their motion for summary judgment. Doc't 117 at 39-44.

[29] PN also points to language in MDIFW's 2013 fishing law summary that mistakenly suggested the waters surrounding PN's islands were part of the reservation. Doc't 128-1 at 32. This too was simply a one-time administrative error that was never approved by the Commissioner's Office. SDOSMF ¶¶ 197, 198.

III. There is no case or controversy regarding PN's authority to regulate its own members engaging in sustenance activities on the Main Stem.

PN's request for a declaratory judgment that the Tribe has authority to regulate its own members as they engage in sustenance activities on the Main Stem is another hypothetical conflict with no real-world underpinnings. Doc't 128-1 at 55-57, 59. PN states the issue in dramatic terms: "Pursuant to the Maine Attorney General's August 8, 2012 directive[30] 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 … over Penobscot Tribal members' sustenance activities on the River …." Doc't 128-1 at 59. Conspicuously absent from this argument, however, are any references to statements of material fact that demonstrate that PN's attempts to regulate in this manner have been, or will be, threatened or obstructed. Here again, PN is attempting to contrive a dispute that might serve as an occasion for the Court to issue a broad ruling on the scope of its reservation by presenting the issue in the most innocuous context possible – its need to regulate its own members as they engage in sustenance activities on the River. But it can muster no facts to show that this conflict actually exists. Its motion for summary judgment on this claim should therefore be denied. *American Civil Liberties Union of Massachusetts*, 705 F.3d at 53.

IV. PN's claim that it may exclusively regulate hunting and trapping throughout the Main Stem fails on its merits.

PN claims that throughout the Main Stem it has both the exclusive authority to regulate sustenance hunting, trapping, and taking of wildlife by its members (Doc't 128-1 at 55-56), and

[30] PN's description of the Schneider Opinion as a "directive" is characteristic of the overstatement that pervades its motion. The Schneider Opinion is a response to an inquiry from Commissioner Woodcock and Colonel Wilkinson seeking guidance on jurisdictional responsibilities. *Schneider Opinion* (August 8, 2012), *Jt. Ex. 278*, Doc't 105-78, PageID*#:* 3570. There is nothing about the Opinion that resembles a command, order or "directive." Exaggerations like this one show PN struggling to make out a controversy over sustenance rights that does not in fact exist.

exclusive authority to regulate hunting, trapping, and taking of wildlife generally, including the activities of non-tribal members (Doc't 128-1 at 57-59). These arguments, which the U.S. does not join, overreach for several reasons. First, PN is asserting this regulatory authority over an area where it does not apply. The 1980 Acts only confer such authority on PN within its territory, and PN's territory does not include the waters or riverbed of the Main Stem. *See* 30 M.R.S.A. §§ 6207(1) (describing PN's ordinance authority); & 6205(2) (defining PN territory); *see also* Doc't 117 at 14-15, 29-32.

Second, the regulatory framework governing fishing, hunting and trapping on both lands and waters is set forth precisely in section 6207. PN's ordinance authority is set out in section 6207(1):

> **1. Adoption of ordinances by tribe.** Subject to the limitations of subsection 6, the Passamaquoddy Tribe and the Penobscot Nation each shall have exclusive authority within their respective Indian territories to promulgate and enact ordinances regulating:
>
> A. Hunting, trapping or other taking of wildlife; and
>
> B. Taking of fish on any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area.
>
> Such ordinances shall be equally applicable, on a nondiscriminatory basis, to all persons regardless of whether such person is a member of the respective tribe or nation provided, however, that subject to the limitations of subsection 6, such ordinances may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation. In addition to the authority provided by this subsection, the Passamaquoddy Tribe and the Penobscot Nation, subject to the limitations of subsection 6, may exercise within their respective Indian territories all the rights incident to ownership of land under the laws of the State.

The manner in which the 1980 Acts provide for regulation of fishing on water bodies informs an understanding of PN's hunting and trapping authority. Sections 6207(1)(B) & (3)

identify in meticulous detail the water bodies and shoreline segments where PN or the Maine Indian Tribal State Commission ("MITSC") have authority to promulgate fishing regulations. The only water bodies subject to tribal fishing ordinances are ponds "wholly within Indian territory and … less than 10 acres in surface area." 30 M.R.S.A. §6207(1). MITSC may promulgate regulations for

> A. Any *pond* other than those specified in subsection 1, paragraph B, *50% or more* of the linear shoreline of which is within Indian territory;
>
> B. *Any section of a river or stream both sides* of which are within Indian territory; and
>
> C. *Any section of a river or stream one side* of which is within Indian territory for a continuous length of *1/2 mile or more*.

30 M.R.S.A. § 6207(3) (emphasis added).

Section 6207(4) then provides: "*Notwithstanding any rule or regulation promulgated by the commission or any other law of the State*, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6." 30 M.R.S.A. §6207(4) (emphasis added).[31] The section thus acknowledges that, but for this express exception, fishing by tribal members would be subject to regulation by either MITSC or the State, but not a tribe.

As to hunting and trapping, MITSC has no jurisdiction. It is wholly implausible that the drafters would have assigned authority over hunting and trapping on water bodies to the individual tribes rather than to the State or MITSC. That approach is inconsistent with the approach the 1980 Acts take to the regulation of fishing, and yet there is no rationale that might explain the different treatment.

[31] The Penobscot Reservation is part of Penobscot Indian Territory. 30 M.R.S.A. § 6205(2). When the term "reservation" is used, it means, for PN, the Penobscot Indian Reservation defined in section 6203(8).

PN has exclusive authority to regulate hunting and trapping on its reservation islands. Reflecting the land-based nature of PN's authority, section 6207(1) also provides:

> In addition to the authority provided by this subsection, the Passamaquoddy Tribe and the Penobscot Nation …may exercise within their respective Indian territories *all the rights incident to ownership of land* under the laws of the State.

30 M.R.S.A. § 6207(1) (emphasis added). That this includes the right to exclude or to close their territory completely was made clear:

> *Like private landowners, the Tribes can close their lands*. Unlike private landowners they can adopt separate hunting and fishing regulations ….

Joint Select Committee Report, App. 7, PD Exh. 264, 3978 (emphasis added). It is therefore clear that PN may not only regulate hunting and trapping on its reservation islands, but also foreclose it entirely.

PN's exclusive authority to promulgate hunting and trapping ordinances is, however, qualified by the following provision:

> Such ordinances shall be equally applicable, on a nondiscriminatory basis, to all persons regardless of whether such person is a member of the respective tribe or nation provided, however, that subject to the limitations of subsection 6, such ordinances may include special provisions for the sustenance of the individual members of the … the Penobscot Nation.

30 M.R.S.A. § 6207(1). Thus, contrary to PN's argument, its ordinance authority in its territory is not unfettered.[32] The ordinances must be nondiscriminatory and although PN may include special provisions for the sustenance of tribal members in its ordinances, those provisions, like sustenance fishing within its reservation under section 6207(4), are subject to the MDIFW

[32] PN's assertion that it possesses "adjudicatory authority over non-Indians who engage in any form or resource exploitation, let alone hunting and trapping wildlife for recreation or consumption," Doc't 128-1 at 58, is directly counter to the statute. PN had no adjudicatory authority over non-tribal members under any circumstances. 30 M.R.S.A. § 6206(3); *see also* Doc't 117 at 16-18.

Commissioner's authority to intervene to prevent the depletion of any fish or wildlife stocks. 30 M.R.S.A. § 6207(6).

State Defendants respect PN's statutory right to adopt ordinances governing PN's territory that contain special provisions for the sustenance of individual tribal members, but PN's assertions that this authority (1) extends to the waters of the Main Stem, (2) is free from any sort of State oversight, and (3) extends to the "adjudication" of disputes involving non-tribal members, are all without support in the law. PN's request for a declaratory judgment recognizing that claim of authority should be denied.

CONCLUSION

To the extent Plaintiffs seek judgment declaring (a) the scope of PN's members' rights to engage in sustenance fishing, hunting, or trapping, or (b) the authority of PN to regulate its own members as they engage in these sustenance activities, their motions should be denied because these claims present no justiciable case or controversy. To the extent Plaintiffs seek judgment declaring (a) that PN's reservation includes some or all of the Main Stem, or (b) that PN has authority to regulate hunting, trapping or the taking of wildlife on some or all of the Main Stem, their motions should be denied because the 1980 Acts unambiguously define the PN reservation as consisting solely of islands in the Main Stem, and confer no authority on PN to regulate activities on the River.

Dated: June 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald D. Reid, hereby certify that on June 22, 2015, I electronically filed this Motion with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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