UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

OPPOSITION OF THE PENOBSCOT NATION TO STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

The Penobscot Nation (the "Tribe" or the "Nation") hereby opposes the *State Defendants' Motion for Summary Judgment, or In the Alternative, For Dismissal* (ECF No. 117) (the "*SDs' MFSJ*"). The State Defendants' motion for summary judgment asserts (1) that the Tribe's reservation does not include the waters and bed of the Main Stem; (2) that the Tribe has no authority to regulate fishing, hunting, trapping or other taking of wildlife on the Main Stem; and (3) that Penobscot Nation members are subject to the authority and jurisdiction of Maine when hunting, trapping or fishing "on all of the waters of the Main Stem." *See id.* at 6904-05. These assertions fly in the face of the provisions of the Settlement Acts, the intent of Congress, and the understanding of the parties.[1]

INTRODUCTION

The Tribe's *Second Amended Complaint* (ECF No. 8) seeks declaratory and injunctive relief against Maine Attorney General, Janet Mills; Maine Commissioner of Inland Fisheries and Wildlife, Chandler Woodcock; and the Colonel of Maine's Game Warden Service, Joel Wilkinson (the "State Defendants" or "SDs") to prevent them from interfering with the Tribe's sustenance fishing, trapping and hunting rights and related authorities in the waters and bed of the Main Stem of the Penobscot River as confirmed by Congress in the Settlement Acts.[2]

[1] The State Defendants seek to re-characterize the Tribe's *Second Amended Complaint* as a quiet title or ejectment action, *see, e.g., SDs' MFSJ*, at 6867 (asserting that riverbed "conveyance" is at issue); *id.* at 6871 (stating that the Tribe claims the Main Stem as its "exclusive domain"); *id.* at 6902 (asserting that the Tribe claims "ownership of the Main Stem"), which it most certainly is not. The only issue arising from the Tribe's claims for equitable relief against the SDs in the *Second Amended Complaint* is Congress's allocation of regulatory and enforcement authority over tribal member sustenance fishing, trapping, and hunting and non-tribal member hunting, trapping and other taking of wildlife in the waters and bed of the Main Stem.

[2] The Tribe uses the same terms and abbreviations herein (e.g., "Main Stem," "Settlement Acts," "Maine Implementing Act," and "Settlement Act") as it used in *The Penobscot Nation's Motion for Summary Judgment on Its Second Amended Complaint With Incorporated Memorandum of Law* (ECF No. 128-1) (the "*Tribe's MFSJ*"). *See id.* at 7560-61 & n.2. In citations, the ECF Document number is used for the first reference to the document; thereafter only the ECF Page ID is provided. The Tribe's Additional Facts at the end of the *Opposing Statement of Material Facts of the United States and the Penobscot Nation in Support of Their Oppositions to the State Defendants' Motion for Summary Judgment and Additional Facts of the*

Congress identified these rights and authorities as "expressly retained sovereign activities," protected from interference by Maine. S. REP. NO. 96-957, at 14-17 (1980) ("S. REP."); H.R. REP. NO. 96-1353, at 14-17 (1980) ("H.R. REP.").[3]

In an apparent attempt to deflect the fact that their position completely undermines Congress's promise that the Tribe's aboriginal sustenance rights and related authorities would be protected from State termination, the State Defendants accuse the Tribe of generating a "contrived" controversy in order to attain fee title to the Main Stem, with attendant rights to banish anyone from using it.

Nothing could be more inaccurate. As the Tribe explains below, the Tribe has, for centuries, honored its 1818 treaty concession to Massachusetts, establishing the "public highway" status of the Main Stem. It has adopted State law as its own. Its wardens are trained by the State and enforce State law. The Tribe has never claimed a general right to exclude non-

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Penobscot Nation filed this day will be referred to herein as "PNAF." The joint Opposing Statement will be referred to as "OSMF."

[3] In this brief, the Nation uses "reserved aboriginal sustenance rights and related sovereign authorities," "reservation sustenance rights and related authorities," "aboriginal sustenance rights and related authorities" and like phrases as shorthand references to the specific provisions of the Settlement Acts at issue in the *Second Amended Complaint*, which are as follows:

> (1) the Tribe's reservation sustenance fishing, trapping, and hunting rights, *see* 30 M.R.S.A. §§ 6207(4) (reservation sustenance fishing rights), 6207(1) (reservation sustenance hunting and trapping rights; also addressing same in other Penobscot territory), *ratified and rendered effective by* 25 U.S.C. §§ 1721 *et seq.*;
>
> (2) the Tribe's exclusive regulatory authority and enforcement authority over tribal member reservation sustenance fishing, trapping, and other taking of wildlife, subject to the limited residual authority of Maine's Commissioner of Inland Fisheries and Wildlife ("IFW"), *see id*. §§ 6207(1), 6207(4), 6207(6) (IFW's residual authority to address Tribe's laws governing tribal members' reservation sustenance fishing, trapping, and hunting, and other taking of wildlife), *ratified and rendered effective by* 25 U.S.C. §§ 1721 *et seq.*; and
>
> (3) the Tribe's exclusive regulatory and enforcement authority (but not adjudicatory authority) over non-tribal member reservation hunting, trapping, and other taking of wildlife, *see id*. §§ 6207(1) (regulatory authority), 6210(1) (enforcement authority), 6206(3) (state court's exclusive adjudicatory authority over non-member violations of the Penobscot laws regulating reservation hunting, trapping, and other taking of wildlife), *ratified and rendered effective by* 25 U.S.C. §§ 1721 *et seq.*

tribal members from the Main Stem. Nor does it make any claim to oust private or municipal shore owners from their existing use of the river. No such controversies exist or have been presented here. And the Court need not accept the State Defendants' invitation to issue advisory opinions on issues like the jurisdiction of the Penobscot Nation Tribal Court in order to resolve the actual issue in the case—whether the Tribe's Congressionally-guaranteed sustenance fishing, hunting and trapping and related authorities are in the waters and bed of the Main Stem.

As more fully set forth below, the SDs fail to establish legal or factual grounds to prevail on their request for entry of summary judgment on the Tribe's *Second Amended Complaint* or on their requests for relief relating to the boundaries of the Tribe's Reservation and the allocation of authority and jurisdiction over the Tribe's fishing, hunting, and trapping rights. As further set forth below, the SDs' other requests for relief seeking to address the jurisdiction of the Penobscot Nation Tribal Court, the Tribe's permitting of individuals or entities engaged in sampling sustenance resources on the Main Stem, and the regulation of log salvaging should also be rejected because they present no live controversies or they involve factual disputes that prevent summary disposition and, in any case, require exhaustion of tribal remedies under well-established decisions of the Supreme Court and the First Circuit.

ARGUMENT

A. STATE DEFENDANTS' ARGUMENT THAT THERE IS NO PRESENT CONTROVERSY RELATED TO SUSTENANCE FISHING ON THE MAIN STEM IS FACTUALLY AND LEGALLY BASELESS

At the outset, the State Defendants appear to raise a jurisdictional question, suggesting that the Tribe's complaint is "contrived" and that no actual controversy over sustenance fishing exists because State Defendants have "never sought to enforce strict compliance with the limitations of Section 6207(1)," have not interfered with sustenance fishing anywhere on the Main Stem and have "no intention of doing so." *SDs' MFSJ* at 6884. Despite State Defendants'

paternalistic assurances that they will look the other way and allow tribal members to engage in sustenance fishing on the Main Stem, their crabbed view of what that means – casting from the island shores – together with the genesis of this dispute evidence a ripe controversy that satisfies the applicable standard under *Ex Parte Young*.

1. The genesis of this dispute, which State Defendants themselves teed up for litigation in August 2012, demonstrates that there is a present controversy.

On August 3, 2012, in response to mounting tensions related to tribal and state authorities in the Main Stem, Penobscot Chief Kirk Francis wrote to Daniel Billings, counsel to Governor LePage, requesting a meeting to attempt to iron out conflicting views. PNAF ¶45. This request arose in large part because of an incident on the River in July in which State wardens aggressively confronted Tribal members on the Main Stem just off Indian Island. PNAF ¶¶ 43-45. Mr. Billings, Chandler Woodcock, Commissioner of Maine's IFW, and Joel Wilkinson, Colonel of Maine's Warden Service, agreed that a meeting would make sense and scheduled it for August 14th at the IFW conference room in Augusta. PNAF ¶ 46. Chief Francis arranged for Penobscot representatives Timothy Gould, Chief of the Penobscot Nation's Warden Service, John Banks, Director of the Tribe's Natural Resources Department, and the Tribe's legal counsel to travel to Augusta for the meeting. PNAF ¶¶ 46-47. Chief Francis told Mr. Billings that he presumed someone from the Attorney General's office would attend. PNAF ¶¶ 46-47. On the morning of August 13, 2012, Chief Francis asked Mr. Billings to confirm who would attend for the State because he wanted "to make sure we have the right people there." PNAF ¶¶ 46-47. Mr. Billings responded that he, Commissioner Woodcock, Colonel Wilkinson and a representative from the Attorney General's Office would be in attendance. PNAF ¶¶ 46-47.

The next morning, August 14, 2012, Chief Francis received a letter from then Maine Attorney General William Schneider, dated August 8, 2012, enclosing an opinion directed to

Commissioner Woodcock and Colonel Wilkinson, "regarding the respective regulatory jurisdictions of the Penobscot Indian Nation and the State of Maine relating to hunting *and fishing* on the main stem of the Penobscot River." PNAF ¶ 48 (emphasis added); Jt. Exh. 278 (ECF No. 105-78). Quoting section 6203(8) of the Maine Implementing Act, Attorney General Schneider announced that "the River . . . is not part of the Penobscot Nation's Reservation" and that the Penobscot Nation's authority over hunting and *fishing* is "on" the islands only. PNAF ¶48 (emphasis added); Jt. Exh. 278 (ECF No. 105-78). By cover letter to Chief Francis (also dated August 8, 2012), the Attorney General acknowledged that litigation was a likely outcome of his proclamation, saying "[t]o the extent there is disagreement, I believe it is important that the matter be resolved in the appropriate forum." PNAF ¶48; Jt. Exh. 278 (ECF No. 105-78).

Notwithstanding receipt of this letter, Chief Francis directed Penobscot representatives to proceed to the scheduled meeting in Augusta. PNAF ¶ 49. In attendance for the State were Daniel Billings, Commissioner Woodcock, and Colonel Wilkinson. PNAF ¶ 50. No one from the Maine Attorney General's Office attended. PNAF ¶ 50. Shortly after the meeting began, Mr. Billings said that there was little, if anything, for the parties to agree about concerning the Penobscot and State authorities in the Penobscot River because the Attorney General's opinion that the Reservation does not include the waters of the Main Stem constituted a binding legal directive for State officials. PNAF ¶ 51.

Upon learning about the Maine Attorney General's letter, John Banks, Director of the Penobscot Nation's Department of Natural Resources, alerted Penobscot Tribal members who engage in sustenance fishing in the Main Stem that the Attorney General "has issued a legal opinion . . . stating that the Penobscot River is not part of the Penobscot Indian Reservation. As a result, tribal members engaged in sustenance fishing on the river are at risk of prosecution by

Maine law enforcement officers if they fish without a state permit or otherwise not in accordance with state law." PNAF ¶ 51. This warning was, and continues to be, posted on the Penobscot Nation's website. PNAF ¶ 51.

Given this history and their creation of this controversy, it is absurd for State Defendants to now argue that there is no controversy. It is particularly disingenuous for the SDs to make this argument when they simultaneously seek to introduce evidence about allegedly escalating confrontations on the River— first mischaracterizing action of Tribal Wardens, then arguing that they voluntarily "backed off" from fueling tensions by limiting MDIFW presence on the Main Stem and then asserting that, "[d]ue to the time the litigation has taken," IFW wardens will no longer "stand down" (*see SDs' MFSJ* at 6858), and will patrol the Main Stem to enforce state law in accordance with the Attorney General's directive. *See State Defendants' Statement of Material Facts* ("SDs' SMF"), ¶¶ 76-98, ECF No. 118, at 6933-37. The existence of a ripe controversy could not be much clearer.

2. The Attorney General's August 8, 2012 directive presents a threat to the Tribe's sustenance fishing rights and its exclusive authority to govern those rights giving rise to prospective relief under *Ex Parte Young*.

Under *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny, state actors are susceptible to suit for prospective relief for violations of federal law. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002); *accord Town of Barnstable v. O'Connor*, No. 14-1597, 2015 WL 2345449, at *7 (1st Cir. May 18, 2015) (citing and quoting *Verizon*). The Attorney General's directive of August 8, 2012 and the SDs' announcement that they are now proceeding to enforce state law on the Main Stem in accordance with that directive establish the requisite violation of federal law under *Ex Parte Young*. Indeed, they seek to interfere with two of the most central guarantees of the Settlement Acts: (1) the right of tribal members to be

physically on the waters of the Main Stem in their canoes and boats (not artificially confined to cast out from the islands) to engage in sustenance practices without molestation by the State and (2) the right of the Tribe to exclusively regulate those sustenance activities without State intrusion. By virtue of the Attorney General's directive and the SDs' announcement that it will patrol the Main Stem in accordance with it, the State Defendants threaten imminent harm to the Tribe's sovereign rights and authorities. There can be no doubt that this satisfies the controversy standard for relief under *Ex Parte Young*. *See, e.g.*, *Town of Barnstable*, 2015 WL 2345449, at *7 ("The *Ex parte Young* doctrine's very existence" means that a plaintiff may enjoin a state policy which threatens to violate a plaintiff's federal rights and the plaintiff "confines its request to the proper form of relief"); *Local Union No. 12004, United Steelworkers Of Am. v. Massachusetts*, 377 F.3d 64, 74 (1st Cir. 2004) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."). *See also Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999) (plaintiff need not risk prosecution or enforcement to attain *Ex parte Young* relief).

The Tribe need not wait for State Defendants to confront Penobscot sustenance fishers on the Main Stem or to confront Penobscot wardens' actual exercise of regulatory and enforcement authorities; the Attorney General's August 8, 2012 directive that the Reservation does not include the River and that the State has exclusive regulatory and enforcement authority over all hunting and fishing in the River is sufficient to ground the Tribe's right to prospective relief pursuant to *Ex Parte Young*. The SDs' non-binding assurance that they do not intend to interfere with Tribal members engaging in sustenance fishing simply does not avoid the *Ex Parte Young* standard. Indeed, to date the only thing that appears to have prevented escalating tensions from the Attorney General's August 8, 2012, directive is this litigation, but the SDs' have now

proclaimed that the hold is lifted. The Attorney General's standing directive and the SDs' policy to enforce that directive are imminent threats to the Tribe's federally-protected reservation sustenance rights and related authorities, and the Tribe is entitled to relief under *Ex Parte Young*.

B. THE STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE TRIBE'S *SECOND AMENDED COMPLAINT* AND ON THEIR COUNTERCLAIMS ADDRESSING THE SAME ISSUES FAILS BECAUSE THEIR "PLAIN MEANING" INTERPRETATIONS IGNORE CRITICAL PARTS OF THE DEFINITION OF THE PENOBSCOT INDIAN RESERVATION, SEVERAL OTHER SECTIONS OF THE STATUTE, AND THE OVERALL PURPOSE OF THE LAND CLAIMS SETTLEMENT.[4]

The State Defendants take the position that the waters and bed of the Main Stem are not part of the Penobscot Indian Reservation for any purpose, relying on what they claim is the "plain meaning" of section 6203(8) of the Maine Implementing Act that the Reservation is limited "solely" to the islands in the Main Stem. *See, e.g., SDs' Amended Answer and Counterclaim,* ECF No. 59, at 6883 (the Tribe's reservation is "specific islands" and "does not include the water or bed of the river"); *id.* at 6886 (the Penobscot reservation does not include "the waters or the bed of the Main Stem, and therefore PN has no authority to regulate hunting or trapping that occurs there").

These assertions are deeply flawed. Confining the Tribe's sustenance fishing, trapping, and hunting rights to the island surfaces would read them (and the Tribe's cultural practices tied directly to them) right out of the Settlement Acts because there are no fish or other water-

[4] This section addresses the SDs' motion for summary judgment on the Tribe's claims set forth in its *Second Amended Complaint* and on the SDs' counterclaims for declaratory judgment that directly confront those claims: that the Tribe's reservation does not include the waters and bed of the Main Stem; that the Tribe has no authority to regulate fishing, hunting, trapping or other taking of wildlife on the Main Stem; and that Penobscot Nation members are subject to the authority and jurisdiction of Maine when hunting, trapping or fishing "on all of the waters of the Main Stem." *See State Defendants' Amended Answer and Counterclaim* (ECF No. 59), at 682-683. (The SDs assert that, pursuant to the *Second Amended Complaint*, the Tribe seeks to regulate non-tribal members engaged in fishing on the Main Stem. This is wrong. The Tribe requests no such determination and, as explained *infra* pp 33-36, there is no live controversy presenting that issue.)

dwelling species on the island surfaces.[5] These fish, eel, turtle, muskrat and other animals inhabit the waters and bed of the Main Stem, bank-to-bank. Prins at 3729; SMF ¶¶ 5-6. The State Defendants would, therefore, render absolutely meaningless the Settlement Acts' provisions confirming in unequivocal language the Tribe's aboriginal sustenance rights and related authorities within the Tribe's reservation.

They would also render false Congress's express promises to the Penobscot Nation, as its trustee, that nothing in the Settlement Acts' terms would destroy the Tribe's sovereign authority over its tribal members' sustenance fishing, trapping, and hunting rights or the Tribe's culture. *See, e.g.,* S. REP., at 14-17 (addressing as "Special Issues" and assuaging as "unfounded" concerns that *"[s]ubsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement*" and "*[t]he settlement will lead to acculturation*") (emphasis in original); H.R. REP., at 14-17 (same).[6]

Further, as set forth in the *Tribe's MFSJ,* at 7614-19, it would make no sense for Congress to confirm the Tribe's exclusive authority (other than the residual authority given to the Commissioner of IFW) over sustenance fishing, trapping, and hunting rights in the waters and bed of the River attending the islands and not confirm the Tribe's authority to regulate non-tribal members competing for those sustenance resources, at least with respect to hunting, trapping and

[5] The Tribe incorporates by reference herein SMF ¶1-11, 56-67 showing the Tribe's inability to exercise sustenance fishing and trapping on island surfaces only and the cultural importance of the Tribe's exercise of sustenance practices in the Main Stem, bank-to-bank. *See also* Report of Harald E. L. Prins, Jt. Exh. 288, ECF No. 105-88 ("Prins") at 3716-46, 3750-54, 3782-90, 3803, 3808-3811; PNAF ¶¶ 22-24.

[6] In rendering the Tribe's reservation sustenance rights meaningless, particularly with respect to fishing and the hunting and trapping of water-dwelling wildlife, the SDs' position would also render meaningless the Commissioner of IFW's residual authority to challenge the Tribe's regulation of the same if such regulation fails to protect fishing and water-dwelling wildlife stocks in adjacent waters. *See* 30 M.R.S.A. § 6207(6). The Tribe could hardly impact fish and wildlife stocks in adjacent waters if it has no sustenance rights in any waters of the Main Stem

other taking of wildlife. (The Tribe addresses the lack of a live controversy about regulatory authority over non-Indian fishing on the Main Stem below.)

Apart from these broad considerations, the assertion that a "plain meaning" reading of part of section 6203(8) must confine the Tribe's reservation "solely" to the island surfaces ignores other language in that section, unequivocal legislative history showing the intent of the parties to confirm the Tribe's sustenance rights and related authorities within the Tribe's existing Treaty reservation, and other provisions of the statute.

1. Section 6203(8) of the Maine Implementing Act incorporates the Treaty understanding of the Reservation.

As described in the *Tribe's MFSJ* at 7603-06, *Alaska Pacific Fisheries Co. v. U.S.*, 248 U.S. 78 (1918), makes clear that when Congress confirms a reservation consisting of islands with the intent to secure a Tribe's related fishing rights, absent a clear indication to the contrary, it necessarily intends to include the waters and bed adjacent thereto as part of the reservation. If any "plain meaning" is to be given to the "islands" in the Main Stem, consequently, it necessarily must include the waters and bed adjacent thereto.

Contrary to the SDs' claim, moreover, Congress fully understood that the Tribe's existing Reservation as contemplated in the Settlement Acts was the reservation established as a result of the Treaties of 1796, 1818, and 1820 when it confirmed the definition of "Penobscot Indian Reservation" in section 6203(8) of the Maine Implementing Act:

> "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.

30 M.R.S.A. § 6203(8), *ratified by* 25 U.S.C. § 1721 *et seq*. (emphasis added). The SDs' "plain meaning" argument seeks to eliminate the italicized phrase. Congress could have, but did not, confirm a definition of the Penobscot Indian Reservation as: "the islands in the Penobscot River . . . *consisting solely of Indian Island*, also known as Old Town Island, and all islands in that river northward thereof . . . ." Because Congress chose to include the phrase "islands in the Penobscot River *reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine*," and the date of the June 29, 1818 Treaty, rudimentary principles of statutory construction require that these phrases be given meaning and not be rendered superfluous. *See United States v. Ven–Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985).

The only "agreement with the States of Massachusetts and Maine" is that provided by the Tribe's 1796 and June 29, 1818 Treaty agreements with Massachusetts and its 1820 Treaty agreement with Maine. SMF ¶¶23-42; *see* Prins at 3708-15. By referencing the date of the Tribe's Treaty with Massachusetts, June 29, 1818, Congress clearly intended to refer to that Treaty in defining the Penobscot Indian Reservation. Further, Congress used the phrase "by agreement," flagging its intent to incorporate the Treaty understanding of the "islands in the Penobscot River." And Congress is deemed to know that terms in treaty agreements with Indian tribes must be read in the manner that the Tribe would naturally have understood them. *See Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997) ("Congress was explicitly aware of such law, and explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act. . . . Congress acts against the background of prior law."). As the Tribe showed in its *MFSJ*, the Penobscot representatives to the 1818 Treaty, and the Massachusetts representatives, fully understood and agreed that the Tribe would retain, with the specified islands, its aboriginal right to engage in sustenance fishing, trapping, and hunting in the

waters and bed of the Main Stem, bank-to-bank, activities essential for the Tribe's survival and cultural integrity. *MFSJ*, at 7563-73, 7594-7614; SMF, ¶¶ 23-42.[7]

Thus, the very definition of "islands in the Penobscot River reserved by agreement" under section 6203(8) confirmed not only the Tribe's continued occupation of its islands, but also its aboriginal sustenance fishing, trapping and hunting rights that endured within the waters and bed of the Main Stem left to the Tribe after its Treaty cession of the uplands on either side of the River to Massachusetts.

2. The legislative history confirms Congress's intent to include the waters and bed of the River as part of the reservation.

Unequivocal legislative history further bolsters the conclusion that Congress, the Tribe, and the State all understood and intended the Penobscot Indian Reservation to include the waters and bed of the Penobscot River for the meaningful exercise of the Tribe's aboriginal sustenance rights and related sovereign authorities, retained (never ceded) in its Treaties.

Congress. First, contrary to the SDs contention, in its identical final committee reports, Congress made clear that the Tribe would "*retain* as its reservation those lands and natural resources which were reserved to [it] in [its] treaties with Massachusetts and not subsequently transferred [by the Tribe]." S. REP., at 18 (emphasis added); H.R. REP., at 18 (emphasis added). Second, Congress addressed the *specific* aboriginal sustenance rights and related authorities at issue (*see supra* note 3) as "Special Issues" and promised that (a) they were "expressly *retained*

[7] From aboriginal times to the moment Congress confirmed the Settlement Acts in 1980 (and beyond), the Penobscot people have (a) never distinguished between the islands in the Penobscot River, upon which they maintain their dwellings, and the waters and bed of the Main Stem, bank-to-bank, upon which they have relied for all aspects of the Penobscot way of life (with no physical connection to the Mainland shore until a bridge was constructed between Indian Island and Old Town in 1950), (b) never stopped engaging in sustenance fishing, trapping and hunting, in the waters and bed of the Main Stem, bank-to-bank, and (c) never ceased in their efforts to protect the sustenance resources in the waters and bed of Main Stem. *See Tribe's MFSJ* at 7563-89; SMFs ¶¶ 1-7, 9, 24, 28-35, 41, 43-48, 56-67, 71-73, 77, 95-97, 114-115, 128-139, 155-156, 163-164, 168-181, 188-189, 191, 196; Declaration of Timothy Gould (attached to PNAFs) (Gould Decl.) ¶¶ 2-5. *See also* PNAFs ¶¶ 22-24, ¶ 29 (Maine Indian Tribal State Commissions ("MITSC") initiatives).

sovereign activities" and, as such, (b) they were "protected" from termination by Maine under federal Indian common law principles. S. REP., at 14-15, 16-17 (emphasis added); H.R. REP., at 15, 17 (emphasis added). An Indian tribe's "sovereign" authority that is "retained" is just that: it is that which it retains (does not cede) unless unequivocally relinquished by valid Treaty agreement or act of Congress. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) ("unless and 'until Congress acts, the tribes retain' their historic sovereign authority" (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065-66 (1st Cir. 1979) ("The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which have never been extinguished [and] until Congress acts, the tribes retain their existing sovereign powers.") (citations and quotations omitted); *accord Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) ("Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self governing entity.") (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231 (1982 ed.); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) (attributes of tribal sovereignty "predate[] the birth of the republic" and can only be altered by Congress).

Going into the Settlement Acts, the only treaties at issue were those that the Tribe had signed with Massachusetts and Maine. Thus, in characterizing the Tribe's sustenance rights and related authorities at issue in this case as "expressly retained sovereign activities," Congress could only have meant those *within the Tribe's existing Treaty reservation* left intact and not ceded by treaty to another sovereign, Massachusetts (or to Maine as successor). Indeed, the very federal Indian common law principles that Congress said "protected" these particular rights and authorities confirm, in no uncertain terms, that within their unceded aboriginal domains tribes

retain aboriginal rights and related sovereign authorities over fishing, trapping, and hunting activities unless clearly relinquished by valid treaty or by Act of Congress. *See United States v. Dion*, 476 U.S. 734, 738 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. These rights need not be expressly mentioned in the treaty." (internal quotation marks and citations omitted)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171-73 (1982); *United States v. Michigan*, 653 F.2d 277, 279-80 (6th Cir. 1981). Thus, the SDs wrongly ignore the unequivocal intent of Congress, confirming that the Tribe's sustenance rights and related authorities are retained sovereign authorities left intact (never ceded) under the Tribe's Treaties with Massachusetts and Maine.

The United States succinctly summarized the legal underpinnings of the Tribe's retained sustenance rights and related authorities when the Tribe's fishing rights in the Main Stem were first in jeopardy after the enactment of the Settlement Acts due to a proposed dam:

> The Penobscot Nation's right is a reserved right, meaning it was reserved from the greater aboriginal rights of the Nation to the use and occupancy of its territory which had not been validly extinguished under 25 U.S.C.§ 177, prior to the enactment of the Maine Implementing Act and the federal Settlement Act ratifying its terms. The fishing right, therefore, is not a grant from the state of Maine in the exercise of its sovereign authority over fish and wildlife within its borders; it is a reservation from the aboriginal rights given up by the Penobscot Nation in the settlement which finally extinguished its aboriginal rights. . . . Those rights pre-dated and existed independently of State sovereignty.

Jt. Exh. 132, ECF No. 104-32 at 2123.

Maine. As set forth in the *Tribe's MFSJ* and related *SMFs*, the State of Maine provided no monetary consideration for the settlement of the land claims. Yet Maine representatives to the settlement negotiations championed the notion that the single worthy compromise on the

State's part was leaving intact the Tribe's sovereign authority over fishing, hunting, and trapping activities within its existing Treaty reservation. These State representatives consistently said that the Settlement Acts would "restore" Maine's asserted jurisdiction over the Penobscot Nation and its existing reservation, which had been "lost" as a result of the Law Court's decision in *State v. Dana*, 404 A.2d 551, 560-61 (Me. 1979), and the First Circuit's decision in *Bottomly*, with *one exception*: the Tribe's sovereign authority over fishing, hunting, and trapping activities (variously referred to as matters of "traditional," "historic," or "cultural" importance) within its Treaty reservation (variously referred to as its "present," "existing," or "historic" reservation) would be left to the Tribe in accordance with the federal Indian law principles laid down in *Bottomly* and *Dana*. *See Tribe's MFSJ* at 7573-78 (examples of the State representatives' statements) and SMF ¶¶ 74, 110-72, 98-113 (same).[8] These sovereign authorities remain fully intact because, under the very principles of federal Indian law conceded by State representatives

[8] As Maine's Attorney General Richard Cohen explained to Congress, after *Bottomly* and *Dana*:

> [T]he Maine Tribes now have certain rights *on their reservations* that other citizens do not. The State is now powerless to change that fact. Should the Tribes be successful in recovering land in a lawsuit they would enjoy these same additional rights on these other lands also. Under current general law [federal Indian common law], their rights are far more extensive than those accorded under [the Settlement Acts] . . . . [W]e think the Maine Implementing Act restores [much of] what was lost under recent Court decisions [with] . . . some minor distinctions . . . [that] represent a fair compromise and balancing of Tribal, State and Federal interests.

Senate Hearing on S. 2829 Before the S. Select Comm. on Indian Affairs, 96th Cong. 149 at 154 (1980) (P.D. 278 at 4442) (emphasis added). *See also id*. at 148-49 (P.D. 278 at 4436-37) (Attorney General Cohen's testimony that the Settlement Acts' provisions addressing tribal authority over reservation subsistence hunting, trapping, and fishing recognize "traditional Indian practices" and are the exception to settlement terms otherwise restoring "almost all of the jurisdiction over [the] existing reservation[] that had been lost as a result of recent Court decisions").

Maine's Deputy Attorney General John Patterson testified at the public hearings held by the Maine legislature on the Maine Implementing Act that the "right to sustenance hunt and fish" within the reservations reflects the State's recognition of "traditional Tribal interests" preserved by the treaties, which he referred to as "agreements that were negotiated back in the 1700's and 1800's." *Public Hearing on L.D. 2037 Before the J. Select Comm. on Maine Indian Claims Settlement*, 109th Legis. at 157 (1980) (P.D. 258 at 3895). Recognizing that these rights and authorities pre-existed the settlement, he continued, "[t]his represents a negotiated compromise and it has to be viewed from that perspective and not from the perspective of were the slate clear, would we do this." *Id.* at 158 (P.D. 258, at 3896).

to govern the Tribe's aboriginal sustenance rights and authorities, (a) the Tribe never relinquished them in its Treaties and, therefore, retained them within the waters and bed of the Main Stem, bank-to-bank and (b) Congress has never terminated them, but rather, expressly confirmed them. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2030; *Wheeler*, 435 U.S. at 322-23; *Bottomly*, 599 F.2d at 1065-66 (citing and quoting *Wheeler*).

The Tribe. If the Settlement Acts are conceived of as two pieces of legislation, one state and one federal, the conventional sources of "legislative history" used for statutory interpretation would exclude the intent of the Penobscot Nation from the equation. But the Settlement Acts reflect the settlement of *United States v. Maine* by the United States as trustee for the Penobscot Nation and attending compromises of its sovereign authority, requiring the Nation's understanding and acceptance. The Tribe incorporates by reference herein SMF, ¶¶ 68-97, 114-19, showing its intent to retain with its reservation islands sustenance fishing, trapping, and hunting rights in the Main Stem, bank-to-bank, rights which it had always practiced, and never ceded, in its Treaties.

3. Sections 6202, 6204, 6206, and 6207of the Maine Implementing Act confirm that Maine understood that jurisdictional compromises regarding authority over fishing, hunting and trapping concerned the Tribe's existing Treaty reservation and were intended to assure its fishing, hunting and trapping rights there.

The opening provision of the Maine Implementing Act reciting Maine's "[l]egislative findings" further makes clear that Congress, the Tribe, and the State all understood and intended the Penobscot Indian Reservation to include the waters and bed of the Penobscot River for the meaningful exercise of the Tribe's aboriginal sustenance rights and related sovereign authorities, retained (never ceded) in its Treaties:

> [T]he Penobscot Nation . . . [is] asserting claims for possession of large areas of land in the State and for damages alleging that the lands in question originally were transferred in violation of the Indian Trade and Intercourse Act of 1790 . . . .
>
> The claims also have produced disagreement between the Indian claimants and the State over the extent of the state's jurisdiction in the claimed areas. This disagreement has resulted in litigation and, if the claims are not resolved, further litigation on jurisdictional issues would be likely.
>
> The Indian claimants and the State, acting through the Attorney General, have reached certain agreements which represent . . . a good faith effort by the Indian claimants and the State to achieve a just and fair resolution of their disagreement *over jurisdiction on the present . . . Penobscot Indian reservation[] and in the claimed areas.* To that end, . . . the Penobscot Nation ha[s] agreed to adopt the laws of the State as [its] own to the extent provided in this Act.
>
> It is the purpose of this Act to implement in part the foregoing agreement.

30 M.R.S.A. § 6202 (emphasis added), *ratified by* 25 U.S.C. § 1721 *et seq*.

Clearly, the Penobscot Nation and the State distinguished between (a) the "claimed areas," those that the Tribe had ceded in violation of the Indian Non-Intercourse Act in its 1796 and 1818 Treaties with Massachusetts (and Maine as successor), the very subject of *United States v. Maine*, and (b) the Tribe's "present" reservation – that is, the Tribe's retained aboriginal title to its territory *not ceded* in those Treaties. Indeed, the Tribe's existing Treaty reservation was the *bare minimum* that the Tribe had going into the settlement of *United States v. Maine*, the least it could count on for exercising its retained aboriginal sustenance rights and related sovereign authorities. For the land claims litigation focused on recovery of lands the Tribe ceded to Massachusetts in its Treaties, not lands and resources that the Tribe never ceded and continued to rely upon for its way of life. Again, as the Tribe made clear in its *MFSJ* and related *SMFs*, the Massachusetts and Penobscot representatives to those Treaties never questioned the Tribes' retention of its aboriginal right to engage in sustenance activities in the Main Stem (bank-to-bank), and, as noted above, *supra*, n.7, the Tribe never ceased exercising those rights from

aboriginal times to the moment of Congress's enactment of the Settlement Acts in 1980 (and beyond).

Similarly, the other statutory provisions cited by the SDs, far from supporting their position, entirely refute it. Section 6204, most heavily relied on by the SDs, does make the laws of the State applicable to the Tribe "[e]xcept as otherwise provided in this Act." Section 6206, also cited by the SDs, contains the identical "[e]xcept as otherwise provided in this Act" language. The Tribes' reserved sustenance rights and related sovereign authorities set forth in sections 6207(1), 6207(4), and 6210(1), enumerated *supra* note 3, fall precisely in the category of "as otherwise provided in this Act" and, accordingly, the SDs attempt to rely on the "plain meaning" of section 6204 to undermine them is as flawed as its attempt to do so with their "plain meaning" reading of section 6203(8).

Indeed, there is substantial irony in the SDs' reliance on a plain meaning argument to challenge the Tribe's reservation sustenance rights and related sovereign authorities when they are explicitly set out in section 6207 the Maine Implementing Act. Since those sustenance rights can only be exercised in the waters and bed of the River, to give them "plain meaning" (indeed, any meaning at all) necessarily requires recognition that the reservation includes the waters and bed of the Main Stem.

4. The SDs "plain meaning" argument that land only means land and never water fails.

Beyond this, the SDs' repeated refrain, consistent with their commitment to "plain meaning," that references in the Settlement Act provisions or legislative history to "land" can only mean "land" and never mean "water," *see SDs' MFSJ* at 6885-88, ignores interpretations from its own representatives, the Tribe, and Congress establishing that the Tribe's reservation sustenance rights and authorities are in the waters of the Penobscot River.

First, in responding to questions at the Maine legislature's public hearings on the Maine Implementing Act, Deputy Attorney General John Patterson made perfectly clear that the Maine negotiators understood that the Tribe's sustenance fishing rights and related authorities to govern those rights, *within the reservation*, were in the waters of the Main Stem, bank-to-bank. *Public Hearing on L.D. 2037 Before the J. Select Comm. on Maine Indian Claims Settlement*, 109th Legis. at 117-18, 140, 148, 155, 158 (1980) (P.D. 258 at 3855-56, 3878, 3886, 3893, 3896). He was asked to address concerns about the Tribe's regulation of sustenance fishing under a scenario where the Tribe allowed gill-netting of Atlantic salmon "right across" the Penobscot River and whether the Commissioner of IFW's residual authority to step in might be "too late" and thereby "spell danger to the salmon." *Id.* at 117-18 (PageID# 3855-56). Representative Michael Pearson asked Deputy Attorney General Patterson to respond directly to the concern about a *sustenance fishing ordinance* that would allow gill netting of salmon, *id.* at 148, 158-59 (PageID# 3856, 3896-97). (By the express terms of 30 M.R.S.A. § 6207(4), such an ordinance would operate *solely* "within the boundaries of" the Penobscot reservation.) Mr. Patterson responded, by referring to the Commissioner of IFW's residual authority under 30 M.R.S.A. § 6207(6), *Id.* at 155, 157-59 (PageID# 3893, 3895-97). (By the express the terms of section 6207(6), that residual authority would be triggered *only* if the Tribe's sustenance fishing ordinance within its reservation threatened a depletion of fish stocks "outside the boundaries of lands *or waters* subject to regulation . . . by the Penobscot Nation.") Mr. Patterson responded:

> I would suspect that in most instances the Tribes share the concern about protecting the fishery. If, however, the Tribe objects and does not enact [an ordinance to protect the fishery] . . . the Commissioner doesn't have to wait until the harm occurs. He can go out and act in the absence of a Tribal ordinance and can hold if the evidence so demonstrates that the lack of that Tribal ordinance is reasonably likely to cause a harm, that if we permit gill netting to occur, if we don't prohibit it, that there's going to be some harm to the fishery and he can go out himself and take action under normal State law to prohibit gill netting.

Id. at 158-59 (PageID# 3896-97).

Because the Tribe can only enact sustenance fishing regulations within the boundaries of the Penobscot Indian Reservation and the Commissioner of IFW's limited residual authority is triggered only in reference to a Penobscot sustenance fishing ordinance within the Penobscot Indian Reservation, this colloquy shows, beyond any doubt, that Deputy Attorney General Patterson understood that the Penobscot Indian Reservation included the *waters* of the River in which gill nets, in the scenario presented, would be used.[9]

Second, the State Defendants point to a January 29, 1981 memorandum prepared by Maine Attorney General James Tierney to "State and Local Law Enforcement Officers" on the subject of "Law Enforcement on Tribal Lands" for the proposition that "the State of Maine . . . repeatedly expressed the understanding that the Penobscot Tribal Reservation consists of the islands in the Main Stem, without mention of the bed or waters of the Main Stem." *See SDs' Statement of Material Facts* (ECF No. 118), PageID# 6912-13. In that memorandum, Attorney General Tierney wrote:

> Tribal lands will be of two types: Indian Reservation and Indian Territory. Reservations consist of those lands originally reserved to the respective Tribes by Treaties with the State dating back to the late 1700's, except any land conveyed away by the Tribe since that date but before April, 1980.

[9] Right in the middle of this discussion, obviously addressing the sustenance fishery *in the waters* of the Penobscot River, Mr. Patterson observed, "As a general proposition, States elsewhere in the country that have Indian *Land* in those states are unable to exercise their regulatory authority over Indian hunting and fishing practices *on their lands*," *id.* at 157 (PageID# 3895) (emphasis added) thereby using "land" while meaning water, a usage occurrence that the SDs' fail to acknowledge happens all the time. The final reports of the Senate and House engage in exactly the same mixed usage. In one sentence, they refer to the Commissioner of IFW's residual authority to check the Tribe's exercise reservation sustenance "fishing rights" under tribal law if they "ha[ve] a substantially adverse effect on stocks in . . . adjacent *waters*, and in the next they say that this authority can only be invoked if the Commissioner can demonstrate such an adverse effect on stocks "outside tribal *land*." S. REP., at 17 (emphasis added); H.R. REP., at 17 (emphasis added).

Jt. Exh. 52, ECF No. 103-2 at 1518-19. Seven years later, in February, 1988, still serving as Maine's Attorney General, Mr. Tierney issued an opinion addressing whether the Tribe's proposal to engage in precisely the type of gill net fishing for salmon in the Penobscot River considered by Deputy Attorney General Patterson at the public hearings on the Maine Implementing Act would constitute a sustenance fishing practice within the Penobscot Indian Reservation free from interference under a state law prohibiting gill netting of salmon. Jt. Exh. 80, ECF No. 103-30 at 1652-53. He concluded that, by the terms of 30 M.R.S.A. § 6207(4) leaving the Tribe's sustenance fishing practices *within the Penobscot Reservation* free from State authority, the gill netting could go forward. *Id.* Just as Deputy Attorney General Patterson pointed out, however, he explained that the Commissioner of IFW could exercise limited residual authority under section 6207(6) if he determined that such a practice would harm fishing stocks on waters outside of the reservation. *Id.*; *see also* SMF ¶¶ 182-86 (other background documents showing consensus that the issue involved the exercise of the Tribe's reservation sustenance fishing right in the waters of the Main Stem). Clearly, James Tierney, who not only served as Maine's Attorney General in the years following the Settlement Acts, but also served as Majority Leader of Maine's House of Representatives when the Maine Implementing Act was under consideration, 6 Legis. Rec. 713, 715 (2d Reg. Sess. 1980) (P.D. 270 at 4011, 4013), understood that the waters of the Main Stem were part of the Penobscot Indian Reservation for the Tribe's exercise of its sustenance fishing right and related authority.[10]

[10] In their brief, the State Defendants attempt brush off Attorney General Tierney's opinion by suggesting that it did not address their "plain meaning" interpretation of section 6203(8) that the Tribe's reservation consists "solely" of islands. *SDs' MFSJ*, at 6883 n.33. They cannot so easily dismiss the import of the opinion: it is plain that Attorney General Tierney knew and understood that the Tribe's sustenance fishing right would be exercised out in the waters of the River, not confined to the island surfaces.

Third, and perhaps most important, the SDs ignore the fact that the Tribe has never distinguished between the Islands, where its members have maintained their residences since aboriginal times, and the waters and bed surrounding the islands, everywhere between them and bank-to-bank, where the Tribe has engaged in sustenance fishing, trapping, and hunting practices since aboriginal times. SMF ¶¶ 4-6, 56-64, 96-97, 114. Tribal member Lorraine Dana's testimony to the Senate at the time of its consideration of the Settlement Acts is exemplary. Laboring under a misconception that the Settlement Acts would allow Maine to control the Tribe's sustenance fishing and hunting practices, she testified, "My son hunts and *fishes my islands* to help provide food for our family, and if we are to abide by State laws . . ., my family will endure hardship." SMF ¶ 114. In testifying "my son . . . fishes my islands," Ms. Dana referred to the fact that her son, Barry Dana, fished in the waters surrounding and between islands in the Main Stem, and bank-to-bank, where the members of her family, for multiple generations, had always fished for sustenance since, indeed, there are no fish on the island surfaces. SMF ¶ 114. The phrase "fishes my islands" is a Penobscot locution, meaning fishing in the waters of the River, bank-to-bank. SMF ¶ 114. Penobscots simply do not distinguish (and have never distinguished) their islands from the waters and bed of the River that sustain their way of life. SMF ¶¶ 4-6, 56-64, 96-97, 114. Congress, in the final reports of the House and Senate responded to Ms. Dana's concerns as a "Special Issue" and put to rest any concern that this way of life could be undermined by Maine. In identical language, the House and the Senate confirmed that, henceforth, Maine could not interfere with the Tribe's reservation sustenance rights (which indisputably exist only in the waters and bed of the River) or its cultural practices, which are indisputably inseparable from the exercise of those rights. S. REP., at 16-17; H.R.

REP., at 16-17. *See also* SMF ¶¶ 4-6, 56-64, 96-97, 114. *See* Prins at 3737-46 (explaining the inextricable ties between Penobscot culture and sustenance practices in the Penobscot River).[11]

5. Recognition of the Tribe's exclusive authority over hunting and trapping would not constitute a "dramatic change."

Two assertions by the SDs warrant additional responses: (a) that the Tribe's exclusive regulatory and enforcement authority over hunting, trapping, and other taking of wildlife on the Main Stem would involve a "dramatic jurisdictional change," *see SDs' MFSJ* at 6886, and (b) that pre-1980 practices and post-1980 practices of the Penobscot Nation suggest that the Tribe has no such regulatory or enforcement authority, *see id*. at 6885, 6887.

The SDs claim that the Nation's exclusive regulatory and enforcement authority over hunting, trapping, and other taking of wildlife on the Main Stem would be a "dramatic jurisdictional change" is, first of all, irrelevant, because Congress's intent governs the jurisdictional allocations established by the Settlement Acts (not past practices). As discussed above, Congress confirmed that these are sovereign authorities under principles of federal Indian law. They cannot, therefore, be "lost" or "waived" if not exercised. As the Supreme Court has made perfectly clear, an Indian tribe's "sovereign power, even when unexercised, is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms," *Jicarilla Apache*

[11] The SDs suggest that the Tribe's sustenance fishing rights really are not very important to the Tribe "in the real world." *SDs' MFSJ* at 6884 n.34. This reflects an ahistorical, deep-seated misconception of the nature of these rights. The truth is that (a) Penobscot tribal members have continued to engage in these sustenance activities even though at suppressed levels as the result of the polluted state of the River, *see* SMFs ¶ 63; Jt. Exh. 195 (ECF No. 104-95) (1997 letter from Penobscot Chief Francis Mitchell to Department of the Interior discussing harm cause to Penobscot sustenance fishing practices due to water pollution); Jt. Exh. 216 (ECF No. 105-16 (1999 report prepared for Department of Interior on suppressed sustenance fishing by Penobscot tribal members); *see also* SMFs ¶ 4-6, 56-64 (ongoing dependence upon the River for food); Gould Decl. ¶¶ 2-5 (same) and (b) as a matter of law, these aboriginal rights are not "use it or lose" propositions; they exist as inherent sovereign rights which endure unless terminated by Congress in the most express terms. *See supra* at p. 13-14 and *infra* at pp. 23-24. Thus, in making such an argument, the SDs reveal not only their ignorance of the practices of the Penobscot people, but also the principles of federal Indian law that govern their reservation sustenance rights.

Tribe, 455 U.S. at 148, and as the First Circuit said in *Bottomly*,"the mere passage of time with its erosion of sovereign powers of a tribal government cannot constitute an implicit divestiture," 599 F.2d at 1066 (citation and quotation marks omitted); *accord Fellencer*, 164 F.3d at 709 ("Neither the passage of time nor the apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity.") (citation and quotation marks omitted).

The claim about a "dramatic change" is also nonsense. Tribal game wardens train side-by-side with State game wardens, undergoing the exact same training and certification requirements under Maine law as required by the terms of the Settlement Acts, *see* 30 M.R.S.A. § 6210(4), and the Tribe incorporates Maine's hunting laws as tribal law, by reference, *see* PNAFs ¶¶ 18-21. Thus, when a Penobscot game warden issues a summons to a non-Indian hunter for violating the Tribe's hunting laws on the Main Stem, the non-Indian hunter experiences exactly the same professional law enforcement treatment that he or she would receive from a Maine game warden under the exact same law. PNAFs ¶ 18. The only difference is that the Penobscot game warden's uniform bears a patch indicating "Penobscot Warden Service" and the law applied is that of the Penobscot Nation, incorporating state law by reference. *See id.*; Jt. Exhs. 313-316, 322, Page Id #3955-58, 3964 (photos of Penobscot Warden Troy Francis in uniform). Indeed, the law cited in such summonses directly references Title 12 of the Maine Revised Statutes. *See* PNAFs ¶¶ 19-21. Finally, adjudications of violations of Penobscot laws regulating hunting, trapping, or other taking of wildlife by non-tribal members, by the terms of the Settlement Acts, are within the exclusive jurisdiction of the State courts. A non-Indian who faces actual prosecution after receiving a summons from a State-trained

Penobscot warden for a State-law hunting violation (incorporated by reference as Penobscot law) therefore proceeds to State court.[12]

As for the pre- and post-1980 practices of the Tribe, Penobscot tribal members have engaged in sustenance hunting and trapping activities on the Main Stem since aboriginal times without any regulation by the State. SMF ¶¶ 5, 12, 13, 56-64; PNAF ¶¶ 1-3, 22-24. Before 1980, State game wardens rarely (if ever) appeared on the Main Stem. SMF ¶¶ 57, 64; PNAF ¶¶ 1-6. Indeed, as of 1976, when the Penobscot Nation formed its warden service, and thereafter, Penobscot wardens have patrolled the Main Stem every day. PNAF ¶5. During these patrols between 1976 and 1980, Penobscot game wardens cannot recall ever seeing State game wardens on the Main Stem, and they enforced the Tribe's trapping laws against non-tribal members on the Main Stem. PNAF ¶¶ 4-6. After 1980, Maine took the position that the Penobscot Indian Reservation included riparian rights out from the island shores to the "thread" of the river, the midpoint between the island shores and the mainland shores on either side of the islands. SMF ¶199-200; PNAF ¶¶8, 42. The Tribe, while never holding that view, took State game wardens out on the Main Stem in Penobscot patrol boats and shared their experience in navigating around sunken logs, rocks and rapids. PNAF ¶¶8-11. Until the latest controversy, State wardens simply have had no significant presence on the Main Stem other than when in the company of Penobscot wardens in Penobscot boats. SMF ¶¶ 57, 64; PNAF ¶¶1-3, 5-6, 11-13. That is why the sudden presence of State wardens patrolling in a motor craft (albeit one that was broken down) and confronting Penobscot tribal members in waters off of Indian Island in July, 2012

[12] The SDs make much of the fact that on *one* occasion, in 2009, a Penobscot warden mistakenly summonsed two duck hunters to the Penobscot Tribal Court rather than State Court. *See SDs' MFSJ* at 6857, 6872, 6873 & n.17. This is consistent with the SDs' effort to generate controversy where there is none: the Tribe agrees that the summonses mistakenly directed the hunters to Tribal Court when they should have indicated State Court and the Tribe has repeatedly told the SDs that these summonses issued in error. *See* PNAF ¶20 and PN's *Supplemental Response to Defendants' First Set of Interrogatories* (March 28, 2014) (attached thereto) ¶6.

created such a stir and led to Chief Francis's request for a meeting with Maine's governor. *See* PNAF ¶¶43-46.[13]

Finally, although the Tribe has not aggressively enforced its laws governing hunting, trapping or other taking of wildlife against non-tribal members in the waters and bed of the Main Stem, it has exercised that authority by, for example, issuing nuisance trapping permits to non-tribal members engaged trapping fur-bearing animals on the Main Stem, warning non-tribal members engaged in trapping and hunting in the waters and bed of the Main Stem that they require permits from the Tribe, and confiscating a non-tribal member's beaver trap for want of a tribal permit. SMF ¶¶ 66, 179, 199; PNAF ¶4. And as the Tribe pointed out in its *MFSJ*, post-1980, Maine has recognized the Tribe's authority to issue permits for non-tribal member eel-trapping on the bed of Main Stem, its authority to prosecute tribal members violating Penobscot laws for sustenance hunting in the waters of the Main Stem, and its authority to engage in sustenance fishing (including the use of gill nets attached to riverbed) in the Main Stem. *See Tribe's MFSJ* at 7589-91; SMF ¶¶168-200.[14]

[13] Indeed, the description of David Georgia and the other State wardens about the joint patrols with Penobscot wardens on the Main Stem constitutes an admission of the very tribal presence and jurisdiction that the SDs now contest. *See* ECF No. 118-4 (Declaration of David Georgia) ¶¶5-8 (describing acceptance of Penobscot patrols on River); ECF No. 118-2 (Declaration of Ronald Dunham) ¶¶ 3, 8 (describing same; complaining about less cooperation in recent years); ECF No. 118-6 (Declaration of Joel Wilkinson) ¶5 (describing same). These declarations clearly show these State wardens' understanding that that Penobscot wardens had jurisdiction over portions of the river and its bed.

[14] The SDs make much of the Tribe's failure to post the Main Stem with warnings that it regulates hunting, trapping, and other taking of wildlife by non-tribal members and of language in a single poster at the Sunkhaze boat ramp entitled "Penobscot River: Home to the Penobscot Nation," that does not purport to provide an exhaustive list of the Tribe's permitting requirements. Again, the Tribe's ability to exercise its Congressionally confirmed sovereign authority over hunting, trapping, and other taking of wildlife within its original Treaty reservation cannot be lost or waived by the existence or lack of posters. *See Merrion*, 455 U.S. at 148; *Wheeler*, 435 U.S. at 323; *Fellencer*, 164 F.3d at 709; *Bottomly*, 599 F.3d at 1066. As a practical matter, moreover, the Tribe is not in a position to mount posters up and down the mainland shores.

For all these reasons, the SDs "plain meaning" argument cannot withstand scrutiny. As the Tribe explained in its *MFSJ*, the Settlement Acts are the equivalent of a modern treaty and therefore subject to the rules governing the interpretation of treaties. *Tribe's MFSJ* at 7593-7609 (and cases cited). Thus, as the Supreme Court instructs, it is necessary to "look beyond the written words to the larger context that frames the Treaty." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (citations and quotations omitted). This is "especially helpful to the extent that it sheds light on how the [Tribe's representatives] understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Id*. (citations and quotations omitted). Seen in that light, there is no question that the "plain meaning" argument advanced by the SDs fails.

Further, their attempt to portray the Settlement Act as "painstakingly" crafted so as to resolve all the present disputes, *see, e.g.*, *SDs' MFSJ* at 6862, 6869, 6881, is a reach that far exceeds its grasp. As the foregoing discussion amply demonstrates, the statute on its face contains ambiguities. As Jonathan Hull has explained, it was drafted and enacted with unheard of haste, leaving numerous issues unresolved. ECF No 119-32, PageID# 7335 (Hull Decl. ¶ 8); *see also* SMF ¶¶ 87-97. Indeed, former Attorney General Richard Cohen, the lead negotiator for the State, in interviewing for the chairmanship of MITSC in the mid-90's, acknowledged the same, stating that "it was understood by all parties, most especially himself, that as settlement negotiations drew to a close there were details of the settlement that had not been resolved and the potential for unforeseen issues to arise that could destabilize the settlement." PNAF ¶ 33. Jt. Exh. 185, ECF 104-85, at 2310.[15] *See also* Me. Legis. Rec. 718 (1980) (P.D. 271 at 4016) ("No Act of this complexity will be free from question marks. There will be interpretations necessary

[15] Mr. Cohen further opined, presciently, that MITSC should acquire an independent counsel because any opinion of the Attorney General's office would be biased in favor of the State. PNAF ¶ 33.

through the years….") (Remarks of Senator Collins); PNAF ¶ 34 ("Any contract, or agreement or legislation always contains ambiguities that sometimes can only be resolved through the Courts.") (Richard Cohen letter to Senator Melcher, Aug. 12, 1980).

Under long-standing principles of Indian law requiring that any such ambiguities or uncertainties be interpreted in favor of the Tribe, the State's reliance on the "plain meaning" doctrine must be rejected. Because there are no fish and water-dwelling species on the island surfaces, their position renders essentially meaningless the Tribe's sustenance fishing, trapping and hunting rights confirmed pursuant to 30 M.R.S.A. §§ 6207(4) (reservation sustenance fishing) and 6207(1) (reservation sustenance hunting, trapping, and other taking of wildlife). As Seventh Circuit Judge William Posner has explained with respect to such ambiguities:

> [L]iteral readings of statutes—readings that refuse to take into account any ambiguities that are not visible on the face of the statute—are rather in vogue in the Supreme Court these days . . . [T]he "plain meaning" canon, however, is parried by . . . the canon that not only treaties but (other) federal statutes as well are to be construed so far as is reasonable to do in favor of Indians. . . . Even literalists, that is to say, acknowledge the applicability to statutes of the principle of contract interpretation that allows the court to seek meaning beneath the semantic level not only when there is an "intrinsic" ambiguity in the contract but also when there is an "extrinsic" one, that is, when doubt that the literal meaning is the correct one arises only when one knows something about the concrete activities that the contract was intended to regulate.

Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 493-94 (7th Cir. 1993) (citations omitted). The cases of this Circuit are in full accord. *See, e.g.*, *Fellencer*, 164 F.3d at 709; *Narragansett Indian Tribe*, 19 F.3d at 702. Application of these canons requires that judgment be entered in favor of the Tribe and against the SDs that for purposes of sustenance fishing, hunting, and trapping and the exclusive regulatory authority over hunting, trapping and other taking of wildlife (*see supra* note 3) the Penobscot Nation's Reservation includes the waters and bed of the Main Stem, bank-to-bank.

C. THE OTHER COUNTERCLAIMS ASSERTED BY THE STATE DEFENDANTS SHOULD BE DISMISSED BECAUSE NONE PRESENTS A RIPE CONTROVERSY, THEY SEEK TO COLLATERALLY ATTACK DECISIONS OF THE PENOBSCOT NATION'S TRIBAL COURT DECIDED MANY YEARS AGO, THEY INVOLVE DISPUTED FACTS, AND/OR THEY ARE SUBJECT TO THE TRIBAL EXHAUSTION DOCTRINE.

As the First Circuit has said, "one reason the legal issues must be crystallized in a declaratory action is to enable the trial judge to see 'some useful purpose to be achieved in deciding them.'" *Narragansett Indian Tribe*, 19 F.3d at 693 (quoting *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952)). *See also Colonial Penn Grp., Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 232 (1st Cir. 1987) ("the Declaratory Judgment Act is procedural only"). The SDs' other requests for declaratory relief consist largely of collateral attacks on Tribal Court decisions from decades ago and fail to crystallize any live factual or legal dispute. Several of those requests, moreover, arise from disputed facts that preclude summary judgment. Finally, even if these claims could somehow proceed, they must first be raised in Tribal Court under the tribal exhaustion doctrine.

1. This Court Should Not Issue an Advisory Opinion on Tribal Court Jurisdiction.

Citing no pending case or controversy, the SDs seek a broad advisory opinion that the Penobscot Nation Tribal Court has no jurisdiction over non-tribal members. But the SDs provide no facts to establish the existence of a pending case or controversy over an attempt by the Tribal Court to exercise its jurisdiction. As the First Circuit has made clear, a declaratory judgment action cannot proceed unless the claimant establishes "that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Narragansett Indian Tribe*, 19 F.3d at 692-93*; see also* 28 U.S.C. § 2201(a) (the Declaratory Judgment Act requires "actual controversy"). The SDs fail to meet this exacting standard to establish a controversy for their requested declaratory judgment.

In an attempt to create a controversy, the SDs' impermissibly attempt to collaterally attack three decisions of the Penobscot Nation Tribal Court and fall back on a pair of summonses that the Tribe has acknowledged issued in error.

(a) Penobscot Nation v. Coffman.[16]

While the State was not a party to that 2003 case, it was aware of it. *See* PNAF ¶40. Indeed, Deputy Attorney General, Paul Stern, counsel for the SDs in this case, communicated directly with Joseph Farris, Esq., counsel for the defendant, Ralph Coffman, and, at Mr. Farris's request, sent him a copy of the State's brief in a FERC case addressing the scope of the Penobscot Reservation in the Penobscot River. PNAF ¶¶40-42. (In that brief, the State took the position that the Penobscot Indian Reservation includes submerged lands attending the Main Stem islands out to the "thread" of the River. PNAF ¶¶40-42; Jt. Exh. 200, ECF No. 105, PageID# 2558-60). Mr. Coffman had separately commenced an action in the Maine District Court involving the same controversy about the ownership of logs salvaged from the bed of the Penobscot River near an island allotment held by his daughter, a Penobscot tribal member, *see* Jt. Exh. 246, ECF No. 105-46 (Tribal Court pleadings in *Coffman*), and the Maine District Court stayed that action to allow the case to proceed through the Penobscot Nation Tribal Court, Jt. Exh. 243, ECF No. 105-43 (District Court stay orders). There is no live controversy now pending that would give rise to the SDs' claim for a declaratory judgment with respect to the Tribal Court's jurisdiction in *Coffman*.

[16] No. 7-31-03-CIV-04 (Pen. Tribal Ct., Mar. 2, 2005), Jt. Exh. 246, ECF No. 105-46; *See SDs' MFSJ* at 6872, *SDs' SMF* ¶¶ 36-44

(b) Penobscot Nation v. Daigle.[17]

In that 1995 case, decided by then Tribal Court Judge Gary Growe, the Penobscot Nation Tribal Court prosecuted a Penobscot tribal member for an OUI while operating a motor boat in the Main Stem. The Court applied many of the principles at issue in this case, but also held, consistent with the view of the State of Maine at the time, that because the incident occurred on the island side of the "thread" of the River, it was indisputably within the Penobscot Reservation and, therefore, subject to the Tribal Court's jurisdiction. *See* Jt. Exh. 160, ECF No. 104-60. As in *Coffman*, there is no live controversy about navigation or OUI enforcement to invoke this Court's subject matter jurisdiction. Further, even if there were a live controversy, the SDs have no standing to intervene in such an internal tribal matter. *Cf.* 30 M.R.S.A. § 6206(1) (internal tribal matters are not subject to the jurisdiction of the State).

(c) Montgomery v. Montgomery.[18]

The Maine Attorney General's Office appeared for the State's Department of Health and Human Services ("DHHS") and is bound by the decision in this child custody matter involving a tribal member parent and a non-tribal member parent in which a judgment was entered in 2010. *See* SDs' SMFs ¶49 at 6925 and Affirmation of Debby Willis at 6991.

* * *

Fundamental principles of repose prohibit this attempt by the SDs now to collaterally attack these final judgments or decrees of the Penobscot Nation Tribal Court. *See U.S. v. Mendoza*, 464 U.S. 154, 158-59 (1984); *N.L.R.B. v. Donna-Lee Sportswear Co.*,836 F.2d 31, 34 (1st Cir. 1987); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 755 (1st Cir. 1994). For that reason

[17]No. CR-95-143 & 144 (Pen. Tribal Ct., Oct. 16, 1995), Jt. Exh. 160, ECF No. 104-60; *See SDs'MFSJ,* at 6872; *SDs' SMF* ¶ 32.

[18] No. 2-27-08-CIV-014 (Pen. Tribal Ct., Jul. 14, 2010). *See SDs' MFSJ* at 6872, *SDs' SMF* ¶ 49.

alone, the SDs' attempt to re-litigate these cases should be denied. By the terms of the Settlement Act, the judgments and decrees of the Tribal Court are to be given full faith and credit by this Court and by the Maine Courts. *See* 25 U.S.C. § 1725(g). Thus, to the extent this court considers the Tribal Court decisions in *Coffman*, *Daigle*, or *Montgomery*, it should not be to determine whether those thoroughly litigated decisions create a current justiciable controversy, but rather to determine whether those cases have already disposed of the claims now raised by the SDs (were any facts actually alleged to otherwise establish the controversy).

Beyond this, with respect to each exercise of Tribal Court authority represented by *Coffman*, *Daigle*, and *Montgomery* that the SDs' seek to attack by means of their counterclaims in this action, the SDs lack standing in their own right to mount such attacks. *See Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 16, 19 & n.19 (1983) (to establish cognizable claim for declaratory relief, claimant must identify anticipated coercive federal cause of action to be brought by the party against whom claimant seeks declaratory relief); *Playboy Enters., Inc. v. Pub. Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 29 (1st Cir. 1990). And when and if any non-tribal member faces a future matter in which he or she believes that the Penobscot Nation Tribal Court is acting beyond its jurisdiction, such person may proceed to bring an action for injunctive relief against the Tribal Court Judge in this Court on the federal question of the scope of the Tribal Court's jurisdiction subject to the requisite exhaustion of tribal court remedies pursuant to the tribal "exhaustion doctrine." *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985); *Ninigret Dev. Corp.*, 207 F.3d at 33. Were there a cognizable claim now before the Court regarding the Tribe's adjudicatory authority at issue in *Coffman* or *Daigle*, that doctrine would require the Court to stay, or dismiss without prejudice, to allow the Tribal

Court to reach disposition in the first instance. *See Iowa Mut. Ins. Co.*, 480 U.S. at 20 n.14; *Nat'l Farmers Union*, 471 U.S. at 857; *Ninigret Dev. Corp.*, 207 F.3d at 35.[19]

Summonses. The SDs point to two 2009 Penobscot Tribal Court summonses, arising out of a single incident on the Main Stem, that Penobscot wardens incorrectly served upon two non-tribal members for hunting violations. The summonses should have specified State Court, not the Penobscot Tribal Court. The Tribe has consistently conceded that these summonses were improper because the State courts have exclusive jurisdiction to prosecute violations of the Tribe's hunting ordinances by non-tribal members, *see* 30 M.R.S.A. § 6206(3). *See* PNAF ¶20. There is no controversy about this matter, nor any claim by the Tribe that it can summons non-members to Tribal Court for hunting violations, nor any actual attempt by the Tribe to do so.

2. This Court Should Not Issue an Advisory Opinion on Regulation of Fishing by Non-Tribal Members in the Main Stem.

The SDs assert, "[i]n the last few years, PN Wardens have informed non-tribal members that $40.00 PN 'access permits' are required to be on the Main Stem for any reason, including fishing." *SDs' MFSJ* at 6879. SDs do not, and cannot, argue that this argument responds to the Tribe's *Second Amended Complaint*, *id*. at 6879 n.26, because nothing in the Tribe's *Second*

[19] Congress said the Penobscot Nation's exercise of judicial authority through its Tribal Court exemplified the exercise of inherent sovereign authority in accordance with principles of federal Indian law. S. REP., at 14-15; H.R. REP., at 14-15. The Senate Report further explained that the Settlement Acts recognized the Nation's judicial authority as "the inherent authority of a tribe to be self-governing," *id*. at 29 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Thus, the tribal exhaustion doctrine readily applies to federal court actions challenging the Penobscot Nation Tribal Courts adjudicatory authority over non-tribal members so long as that court has "colorable" jurisdiction. *See Ninigret Dev. Corp.*, 207 F.3d at 33. Thus, for example if the Tribal Court's authority to adjudicate a child support controversy like that presented in *Montgomery* case were challenged, the Court likely would stay the action to allow the Tribal Court to assess its jurisdiction in the first instance. *See id.* at 32-33. The Tribal Court certainly has colorable jurisdiction to decide a case like *Montgomery*. Just because the Settlement Acts did not provide that the Tribe would have exclusive jurisdiction over such a child support case, this does not mean that the State courts have exclusive jurisdiction over such matters, or that the Tribal Court would not have concurrent jurisdiction with Maine over such matters, as the Tribal Court Judge, in *Montgomery*, reasoned. *See* SDs' SMF at 6994-96. *See also State ex rel. W. v. W.*, 459 S.E.2d 791, 792-93 (N.C. 1995) (addressing jurisdictional issue similar to that presented by *Montgomery*); *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988) (same).

Amended Complaint raises this issue and the Tribe's wardens have *never* told non-tribal members that they need a $40.00 access permit to be on the Main Stem, let alone "for fishing." *See* PNAF ¶ 14. No such controversy is presented by the *Second Amended Complaint.* In fact, from 1980 to the present, the Tribe has not sought to regulate non-Indian fishing in the Main Stem.[20] And the SDs fail to identify a single non-tribal member who has been subjected to Tribal action for such fishing. There is, accordingly, no justiciable controversy before the Court.

Were there a justiciable controversy, the Tribe would have strong arguments that it had such authority. It is black letter law that, within their reservations, Indian tribes have inherent sovereign authority not only over hunting, trapping and other taking of wildlife by non-tribal members, but over fishing by non-tribal members as well. *See Mescalero Apache Tribe*, 462 U.S. at 337-38; *Merrion*, 455 U.S. at 140. The Penobscot Nation's inherent sovereign authority over the health of its reservation (in particular, the exploitation of its sustenance resources there) is considered an "internal tribal matter," free from any state authority by the terms of the Settlement Acts. *See Fellencer*, 164 F.3d at 712 (health of reservation community affected by employment of non-tribal member, a health care nurse, is an "internal tribal matter" subject to the exclusive authority of the Tribe; applying principles of federal Indian law governing tribes' inherent sovereign authorities); *Akins*, 130 F.3d at 489-90 (exploitation of reservation resources by tribal member is an "internal tribal matter"; applying principles of federal Indian law governing tribes' inherent sovereign authorities). Indeed, the Maine representatives to the settlement recognized that, pursuant to the *Bottomly* and *Dana* decisions, confirming the Tribe's

[20] The SDs point to a fifteen-year-old affidavit executed by the Tribe's Natural Resources Director, John Banks, for the proposition that the Tribe seeks to regulate non-tribal member fishing on the Main Stem. *See SDs' Motion*, at 6879-80 (citing SDs' SMF 144A (citing Jt Exh. 225)). That affidavit references eel potting permits, *see* Jt. Exh. 225, which involve *trapping*, not fishing. *See* PNAF ¶¶ 22, 23. Indeed, in the 1990s, Maine readily acknowledged that the Tribe had authority over eel potting by non-tribal members who sought to place eel trapping equipment on the bed of the Main Stem. *See* SMF ¶190.

inherent powers under federal Indian common law, the State had "lost" just such authority within the Tribe's existing reservation. *See Tribe's MFSF* at 7573-78; SMF ¶¶ 79-80; *see also supra* note 8 and accompanying text.

In as much as the Tribe has good arguments that the regulation of fishing on the Main Stem, whether by tribal members or non-tribal members, rests with it, so does MITSC. Pursuant to section 6207(3), MITSC has jurisdiction over fishing within a river "both sides of which" are within the Penobscot Indian Reservation. Because there are strong arguments that both sides of the Penobscot River are part of the Penobscot Indian Reservation, MITSC has sound arguments that it governs non-Indian fishing there. To be sure, Maine Attorney General Richard Cohen flagged his view that, pursuant to the terms of the settlement, MITSC would govern non-Indian fishing in the Tribe's historic Treaty reservation, where the Tribe would exercise its aboriginal (or in his words "traditional") sustenance rights and related sovereign authorities. P.D. 258 at 3895. When he conceded that the Settlement Acts would not "restore" to Maine its presumed authority over these reservation rights and authorities after having "lost" them as a result of *Bottomly* and *Dana* (and, therefore, that they would be retained by the Tribe), he qualified the Tribe's retention of authority over fishing by saying it was "to a limited extent." P.D. 278 at 4436-37.

MITSC's authority over non-Indian reservation fishing would fit that concept. Indeed, MITSC's charge in promulgating its regulations is to account for the traditional and sustenance practices of the Penobscots within their reservation. *See* 30 M.R.S.A. § 6207(3).[21] Of the three authorities theoretically in competition for regulatory authority over non-Indian fishing in the Main Stem, the State of Maine is, far and away, the *least* well suited. If exclusive regulatory

[21] Pursuant to the Settlement Acts, unless and until MITSC promulgates regulations governing non-Indian fishing within reservation waters, the State's fishing rules apply by default. 30 M.R.S.A. § 6207(3).

authority rested with Maine, Congress's promise to the Penobscot Nation that Maine could no longer interfere with, or terminate, its fishing rights (and related cultural practices) would be a dead letter. Maine could promulgate regulations giving non-Indians full-fledged opportunity to overrun the Tribe's sustenance uses. Congress promised, in no uncertain terms, that by the terms of the settlement the Tribe would never have to worry about that risk. *See* S. REP. at 14-17; H.R. REP. at 14-17.

The SDs' request for a declaratory judgment that the Penobscot Nation "has no authority or jurisdiction to regulate . . . fishing by non-tribal members on the waters of the Main Stem." ECF No. 59, ECF at 682, and that "no portion of the Main Stem falls within MITSC's jurisdiction," ECF No. 117, at 6882, is plainly nothing more than a request for an advisory opinion. The Tribe has not asserted its own regulatory authority in any concrete case or controversy and neither has MITSC. Finally, for the Court to address such thorny issues in the abstract, MITSC should be joined. *See* FED. R. CIV. P. 19. The SDs failed to timely join MITSC as required by the Scheduling Order and it is too late to do so now.[22]

3. This Court Should Not Issue an Advisory Opinion on Regulation of Non-Member Boating on, and Access to, the Main Stem.

The SDs assert that the Tribe "has taken the position in a variety of contexts that it has both the authority to regulate boating on the Main Stem and the right to exclude non-tribal members from the Main Stem entirely." *SDs' MFSJ* at 6873-74. Nothing could be farther from the truth. *See* PNAFs ¶¶ 14-15.

For the first proposition, the SDs cite to the Penobscot Nation Tribal Court's decision in *Daigle*, addressed above, and to the fact that *nineteen years ago*, the Tribe challenged the authority of Maine to prosecute a Penobscot tribal member for a headway speed violation in the

[22] The MITSC's position on regulatory authority over fishing in the Main Stem is set out in the PNAFs ¶¶ 25-32, which the Tribe incorporates by reference herein.

waters of the Main Stem while transporting a priest who served the Tribe's community. *See id.*; SDs' SMF ¶¶32-35; Jt. Exh. 181, ECF No. 104-81 (Letter from Paul Bisulca to Ray Owen, describing the incident). The Tribe addressed above the SDs' improper collateral attack up *Daigle* and their failure to establish any live controversy or claim that warrants relief with respect to tribal jurisdiction over tribal members' boating activities on the Main Stem. Their attempt to drum up a nineteen year old controversy about whether the State has authority over a tribal member's boating activity on the Main Stem fares no better. There is simply no present case or controversy giving rise the Court's Article III subject matter jurisdiction, let alone declaratory relief. *See Narragansett Indian Tribe*, 19 F.3d at 693.

The SDs' assertion that the Tribe has sought to exclude non-tribal members from the Main Stem is equally groundless. No officer or representative of the Tribe has ever made such an attempt, *see* PNAF ¶14, and the Tribe denies the SDs' factual assertions for this proposition. *See* OSMFs ¶ 78.[23] As the Tribe has consistently explained, it has always abided by the term of its 1818 Treaty with Massachusetts, granting the citizens of Massachusetts (and Maine as successor) to use the Penobscot River as a public highway. While the Tribe regulates and enforces its laws governing hunting, trapping, and other taking of wildlife on the Main Stem, *see* SMFs ¶¶ 177-81, 187-192, PNAF ¶¶ 4-5, including its $40 fee for hunters, it has never claimed authority to *prevent* any non-Tribal member from simply boating on the River. As in the case of the SDs' other claims, there is simply no case or controversy about this. And, again, if there were, the affected non-tribal member could readily proceed to this Court under *National Farmers Union* to seek injunctive relief against the Penobscot officers involved, subject (again) to the requisite exhaustion of tribal remedies. In the meantime, the SDs themselves lack standing to

[23] The SDs go to great lengths to characterize Penobscot wardens as an over-reaching and aggressive lot. In fact, the opposite is true. PN wardens conduct their duties on the Main Stem with the utmost professionalism and courtesy to nontribal members. *See* PNAFs ¶¶ 14-18.

bring such a claim, can point to no cause of action that would entitle them to attain relief, and cannot leverage the declaratory judgment act to establish federal question jurisdiction for such a claim. *See Franchise Tax Bd.*, 463 U.S. at 16, 19 & n.19; *Playboy Enters.*, 906 F.2d at 29.[24]

4. This Court Should Not Issue an Advisory Opinion on Water and Sustenance Resources Sampling.

The SDs' final counterclaim against the Tribe, like the others, presents no present controversy.[25] According to the SDs, the Penobscot Nation commenced a bold rebellion "immediately following" and, therefore, in implied defiance of, the First Circuit's decision in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007)– a case addressing Maine's authority to permit pollution discharges into the Main Stem – by engaging in a number of attempts impermissibly to assert jurisdiction on the Main Stem, including requesting that individuals and entities engaged in activities on the Main Stem affecting sustenance resources (e.g., riverbed archeology projects, species sampling, and the like) alert the Tribe by filling out a land use permit. *See SDs' MFSJ* at 6857.

[24] By way of a footnote, the SDs' make the inflammatory assertion that the Tribe "claims authority to banish all non-tribal citizens (including shoreline owners who normally would hold title to the thread of the River) from the Main Stem." *SDs' MFSJ* at 6901 n.49 (citing SDs'SMFs ¶ 38). This is absurd. The Tribe makes no such claim and the SDs provide no facts to support such a proposition. They point to an order *issued ten years ago* to Mr. Coffman, stating that he is not permitted to enter the reservation in light of the controversy over his log salvaging operation. *See* SDs' SMF ¶ 38 (citing to related order). There is no present controversy about this issue, and the SDs have no standing to generate one. When and if any such shoreline owner (or someone in the place of Mr. Coffman) faces an assertion of tribal authority that they believe is beyond the jurisdiction of the Tribe to assert, they can seek injunctive relief in this Court. *See National Farmers Union.*

[25] In their Motion, the SDs' seek to argue a counterclaim against the Tribe that they asserted only against the United States: that the Penobscot Nation has no authority to regulate log salvaging in the Main Stem. Because the SDs' failed to assert this counterclaim for declaratory relief against the Tribe, it is waived. *See, e.g., Kunelius v. Town of Stow*, 588 F.3d 1, 19 (1st Cir. 2009); *Aulson v. Blanchard*, 83 F.3d 1, 7 (1st Cir. 1996). Even if the Court were to entertain it, it should be rejected for the same reasons as the SDs' other counterclaims attempting to assert issues involving non-tribal members when there is no live controversy. Indeed, SDs drum up a reference to a statement made by the Tribe' director of natural resources 19 years ago, in 1996, when he told a non-tribal member that he did not need a state permit to salvage logs in the Main Stem. *See* SDs' SMF ¶164. There is simply no live controversy to support the Court's Article III jurisdiction.

The SDs manipulate the actual chronology. The Tribe commenced requesting these permits from individuals and entities tampering with sustenance resources affecting the Main Stem ecosystem in 2000, fifteen years ago and *seven years before* the *Johnson* decision, in 2000. *See* ECF No. 118-8 at #7089.[26]

In any event, the SDs inflate what has actually been happening for the fifteen years that the Tribe has been requesting these permits. First, these permits have been requested on a voluntary basis, without fee, and have never restricted activities on the Main Stem. *See* PNAFS ¶¶35-36. The Tribe has never threatened to "remove" anyone from the Main Stem engaged in activities there without one of these sampling permits. PNAF ¶37. And it is not at all clear where or how they could be enforced if the Tribe actually wanted to enforce one. Second, over the course of the last fifteen years, no one has ever declined to execute the permit when asked to do so by the Tribe. PNAF ¶38.

In short, this is a lot of handwringing about nothing. No one has been harmed or threatened, no one has faced coercive action by the Tribe in any manner, no one has been required to pay a fee, and no one, to date, has refused to execute a permit when asked. PNAF ¶¶35-39. There is simply no injury to anyone that would establish an actual case of controversy. *See Narragansett Indian Tribe*, 19 F.3d at 693.

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[26] In an odd kind of "fact-invention," the SDs assert:

> PN first began demanding sampling permits from the State of Maine in 2008, although it claims it issued permits to the University of Maine Cooperative Fish and Wildlife Research Unit in 2004 and 2006, and to others in 2000 and 2005.

SDs' SMF at 115 (citing ¶ 28 of the Nation's responses to the SDs' RFAs). Paragraph 28 of the Nation's responses to the SDs' RFAs, however, *denied* the SDs' request for an admission that "[p]rior to 2008, PIN did not require a permit or permission from PIN for the State of Maine or its employees to sample water, fish or wildlife on the Main Stem," citing the fact that it issued these permits to the University of Maine. ECF No. 118-8, PageID# 7089.

Indeed, if this were such a burning controversy, one must ask why the SDs took fifteen years to raise it. The Tribe's practice of requesting individuals and entities engaged in taking sustenance resources or other activities on the Main Stem affecting them has, until now, been uncontroversial. To be sure, the principal water quality and fish sampling done on the Main Stem since 1980 has in fact been carried out by the Tribe, not any State agency. *See* OSMF ¶ 107. So it is not surprising that there has been no issue until the SDs decided to create one in the summer of 2012.

D. DISPOSITION OF THE TRIBE'S *SECOND AMENDED COMPLAINT* INVOLVES NO ISSUE REGARDING MAINE'S ASSERTED SOVEREIGN OWNERSHIP OF THE RIVERBED OF THE MAIN STEM.

The SDs assert that "to achieve the result the Plaintiffs urge upon the Court," the Tribe "must overcome the presumption against the sovereign's conveyance of the riverbed." *SDs' MFSJ* at 6867 & n.10 (citing *Coeur d'Alene Tribe* and *PPL Montana, LLC. v. Montana*, 132 S.Ct. 1215 (2012)). *See also id.* at 6902 (characterizing Tribe's *Second Amended Complaint* as the "functional equivalent of quiet title action" and citing *Coeur d'Alene Tribe*.)

The SDs rely upon principles under the so-called "equal footing doctrine," which govern the conveyance of "navigable" riverbeds by the United States before states, other than the original 13 colonies, entered the Union. *Idaho v. United States*, 533 U.S. 262, 272-73 (2001). Pursuant to the equal footing doctrine, pre-statehood conveyances by the United States in the United States' territories outside of the original 13 states are presumed not to convey title to submerged lands under "navigable" waters absent clear indications by Congress. *See id.* To ensure that "new" states enter the Union on an "equal footing" with no less sovereign rights than any of the original 13, the Supreme Court applies "the default rule"

> that title to land under navigable waters passes from the United States to a newly admitted State. . . . Specifically, although Congress has the power before statehood to

> convey land beneath navigable waters, and to reserve such land for the United States [or for an Indian tribe], a court deciding a question of title to the bed of navigable water must begin with the strong presumption against defeat of a State's title.

Id.

This rule has no bearing whatsoever to the situation presented here. First, Maine, which was originally a district of Massachusetts, was part of one of the original 13 states with its own law governing sovereign title to submerged lands under waterways. The United States did not first own the territory of Massachusetts and Maine prior to statehood. No pre-statehood United States conveyance of title is at issue. So the equal footing doctrine simply does not apply. Second, the rule of Massachusetts and Maine, quite contrary to that applied by the Supreme Court in equal footing doctrine cases, is that title to the bed of navigable-in-fact waters above the effect of the tides is strictly private, subject only to the public right of way for transporting goods and for the passage of fish. *See, e.g.*, *Commonwealth v. Alger*, 61 Mass. 53, 66 (1851); *Wadsworth v. Smith*, 11 Me. 278, 281 (1834). *See also Coeur d'Alene Tribe*, 521 U.S. at 285 (restating same rule adopted by several of the original states in accordance with English common law). Thus, unlike the situation in the equal footing doctrine cases, Maine could never claim, contrary to its own common law, that it holds title, *qua* sovereign, to the bed of the Penobscot River above the head of the tides, the Main Stem at issue in this case.

More important, the Tribe's claims present no issue of any "conveyance" of riverbed title. The *specific* aboriginal sustenance rights and authorities at issue were not conveyed to the Tribe by the United States, or by Massachusetts or Maine. Whatever else Congress may or may not have done in settling the Tribe's historic land claims against Maine, one thing is certain: it confirmed (indeed, pursuant to identical language in its final committee reports, it *assured* the Tribe as its trustee) that the sustenance rights and related authorities at issue were expressly

reserved aboriginal rights; in other words, rights never given up by the Tribe in its Treaty cessions to Massachusetts (and Maine as successor).

This discrete bundle of sovereign rights and authorities is *aboriginal*; that is, it pre-dated the existence not only of the Republic, but also of the original 13 colonies. *See United States v. Pend Oreille Cnty. Pub. Util. Dist. No. 1*, 585 F. Supp. 606, 609-10 (E.D. Wash. 1984) (aboriginal rights involve no conveyance; they are "pre-existing" interests involving "occupancy and use from time immemorial"). *See also United States v. Michigan*, 471 F. Supp. 192, 261-62 (W.D. Mich. 1979) (*remanded on other grounds*, 623 F.2d 448 (6th Cir. 1980) *modified*, 653 F.2d 277 (6th Cir. 1981) (explaining the nature of aboriginal fishing rights). These rights and authorities were not "granted" or "conveyed" to the Tribe from scratch by Congress pursuant to the Settlement Acts. Nor were they "granted" to the Tribe in its Treaties with Massachusetts or Maine.[27] Pursuant to the Settlement Acts, Congress simply affirmed their enduring existence under well-settled principles of federal Indian law.

Thus, the "conveyance paradigm" set up by SDs, one which seeks to interject competing State "ownership" of the riverbed against the Tribe, has absolutely no relevance to this action to confirm the Tribe's aboriginal sustenance rights and related authorities in the waters and bed of the Main Stem attending its islands.[28] The Supreme Court has made perfectly clear that a case

[27] Indeed, as Professor Harald Prins's report makes clear, neither the Tribe nor Massachusetts ever intended to sever these aboriginal rights of the Tribe attending its islands in the Main Stem. *See* Prins at 3708-15, 3780-81; 3811-12; SMFs ¶¶ 24, 27-27. *See also* Prins at 3782-96 (describing Massachusetts's concession that the Tribe retained its fishery below Indian island).

[28] Indeed, any sovereign interest of Maine that rests upon European "discovery" of the Tribe's territory before entering the first Treaties is nothing more than a so-called "preemptive right to purchase" the Tribe's aboriginal territory, which remains subject to a Tribe's aboriginal rights unless or until those aboriginal rights are extinguished by Congress. *See* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 19-20, 30-36 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW (West 2015) at 430. Because Congress expressly *confirmed*, rather than *extinguished*, the discrete aboriginal sustenance rights and related authorities of the Tribe at issue in the Tribe's

presenting claims of state authority in competition with an Indian tribe's *aboriginal* rights attending submerged lands is quite distinct from one in which a state presses sovereign authority in competition with a tribe's rights derived, in the first instance, from a grant or conveyance from the United States. *See Idaho*, 533 U.S. at 274 n.5 (explaining that aboriginal rights attending submerged lands, "which cannot be extinguished without explicit action by Congress" not at issue; observing that Indian treaty cessions are "not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted") (citations omitted). *See also Pend Oreille Cnty.*, 585 F. Supp. at 608-10 (explaining the distinct considerations involved when equal footing doctrine confronts retained aboriginal rights and stating that even if the new State "would have fee title to the bed and banks, [that fee would be] burdened by the tribe's beneficial interest" unless Congress extinguished it).[29] Because it is clear that Congress confirmed the discrete sustenance rights and related authorities at issue in the Tribe's *Second Amended Complaint* as retained *aboriginal* rights, they remain intact absent express extinguishment by Congress. *See also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 430 (West 2015) ("If aboriginal title is not extinguished, a conveyance of fee to a purchaser transfers no more than a reversion that matures only when aboriginal title ends.").

This puts to rest SDs' argument that the Court is barred by the Eleventh Amendment from proceeding on the Tribe's *Second Amended Complaint*. *See SDs' MFSJ* at 6899, 6902.

Second Amended Complaint, they operate in perpetuity regardless of any "ownership" Maine may have presumed to accrue, from any source, from Treaty times to the present.

[29] *Pend Oreille Cnty.* is instructive. Although it involved an Indian tribe's treaty cessions to the United States, not to a State, the Court carefully explained the principles that preserve aboriginal title through subsequent presumed ownership transfers. The instant case is far stronger for preservation of the Penobscot Nation's discrete aboriginal sustenance rights and authorities at issue because, given Massachusetts and Maine common law, Maine has never (and could never) assert sovereign "ownership" of bed of the Main Stem. Whereas, in *Pend Oreille Cnty.*, the State of Washington could at least posit a theory that it attained such ownership under the equal footing doctrine.

Unlike the situation in *Coeur d'Alene Tribe*, a quiet title action to submerged lands brought by the tribe in which Idaho was found to have a legitimate claim that it owned the bed of Lake Coeur d'Alene *qua* sovereign by virtue of the "equal footing doctrine," *see* 521 U.S. at 283, Maine can make no such claim. As just discussed, pursuant to its common law, Maine has no ownership interest in the Main Stem *qua* sovereign that could ever thwart the reserved aboriginal sustenance rights and related authorities it issue here, rights and authorities that Congress identified as "retained" and "protected" by the terms of the Settlement Acts. Any "ownership" interests Maine might claim within the Main Stem, unlike those claimed by Idaho under the "equal footing doctrine," would, pursuant to the common law of Massachusetts and Maine, stem from transactions that could only be deemed "private." *See, e.g.*, *In re Opinions of the Justices*, 118 Me. 503, 507, 106 A. 865 (1919) ("[s]ubject to th[e] qualified right of passage, nontidal rivers and streams are absolutely private"); *Alger*, 61 Mass. at 66; *Wadsworth*, 11 Me. at 281. *Cf. Pend Oreille Cnty.*, 585 F. Supp. at 610.

E. THE STATE DEFENDANTS' "TRANSFER" DEFENSE TO TRIBE'S *SECOND AMENDED COMPLAINT* LACKS MERIT.

The SDs also assert that the Tribe's reservation sustenance rights and related authorities, if not confined to island surfaces, should be considered extinguished in accordance with the "transfer" provisions of the Settlement Acts. *See SDs' MFSJ*, at 6888 n.38 ("all claims in the PN's Second Amended Complaint" should be defeated by virtue of the "transfer" provisions).

Pursuant to section 1723(a) of the Settlement Act, Congress ratified and rendered lawful the "transfer" of lands or natural resources "from, by, or on behalf of" the Tribe, including those in its Treaty cessions to Massachusetts (and Maine as successor). Pursuant to section 1723(b), Congress expressly extinguished any such transfers from, by, or on behalf of the Tribe which

involved aboriginal title.[30] By invoking these provisions to challenge the Tribe's claims in its *Second Amended Complaint*, the SDs argue, in essence, that Congress intended to extinguish the Tribe's aboriginal sustenance rights and related sovereign authorities in the waters and bed of the Main Stem if the requisite "transfer" can be shown. They then assert that such a transfer was accomplished in three ways: (1) because pre-1980 State-sanctioned log drives in the Main Stem interfered with the Tribe's fishing practices, *see SDs' MFSJ* at 6890; (2) because Maine enacted regulations to govern fishing, hunting, and trapping in the Main Stem, *id.* 6891-92; and (3) because post-Treaty deeds not involving the Tribe should be presumed to convey the Main Stem bed attending lands on either side of the River, *see id*. at 6893-94.

The SDs' arguments fail because section 1723(a)'s transfer provisions simply cannot be read to terminate the very aboriginal sustenance rights and related sovereign authorities in the Tribe's original Treaty reservation that Congress expressly confirmed the Tribe would *retain*

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[30] Section 1723(a) provides in pertinent part that:

> Any transfer of land or natural resources . . . from, by, or on behalf of . . . the Penobscot Nation . . . including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including but without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 . . . and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer.

25 U.S.C. § 1723(a)(1). Section 1723(b) provides in pertinent part:

> To the extent that any transfer of land or natural resources described in subsection (a)(1) of this section may involve land or natural resources to which . . . the Penobscot Nation . . . had aboriginal title, such subsection (a)(1) shall be regarded as an extinguishment of said aboriginal title as of the date of such transfer.

25 U.S.C. § 1723(b). Congress broadly defined "transfer" to include:

> any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources.

25 U.S.C. § 1722(n).

under the Settlement Acts. The SDs' "transfer" theory immediately confronts the same problem as its "plain meaning" theory: it renders meaningless the ability of the Tribe to engage in sustenance activities (and related cultural practices) because those activities take place in the waters and bed of the Main Stem, not on the island surfaces. SMF ¶¶ 4-6, 56-64, 96-97, 114; PNAFs ¶¶ 22-24; *see also supra* notes 5 and 7. Thus, as in the case of the SDs' "plain meaning" theory, their application of the "transfer" provisions would render completely superfluous the Settlement Acts' sustenance fishing provision and largely superfluous the sustenance trapping and hunting provisions.[31] As the Tribe has discussed elsewhere, rudimentary principles of statutory construction, let alone those protective of tribal interests, prohibit the SDs' application of the transfer provisions in this manner. *See MFSJ* at 7592-93; *supra* at p. 11; *infra* at p. 28.

Most troubling is that the SDs would, in effect, impute to Congress an intent to double-cross the Penobscot Nation upon compromising *United States v. Maine* as the Tribe's trustee. Congress singled out the discrete bundle of sustenance rights and related authorities that the Tribe seeks to protect pursuant to its *Second Amended Complaint* as reserved aboriginal and sovereign rights under federal Indian common law. So, while Congress extinguished the Tribe's aboriginal title to the uplands on either side of the Main Stem, transferred to Massachusetts by its Treaties (transfers that were challenged by *United States v. Maine*), it earmarked this *particular* bundle of aboriginal sustenance rights and related sovereign authorities as "expressly retained" that is, not transferred (or ceded) by the Treaties, but retained within the unceded Treaty reservation, meaning within the bed and waters of the Main Stem. Under the SDs' construction

[31] The Tribe concedes that its members could *try* to engage in sustenance practices by standing on the shores of the islands without ever getting into a canoe or other boat out on the Main Stem. But it defies common sense to suggest that this is workable. Penobscot muskrat traps are out in the river, SMF ¶ 56-57, 63-64; PNAF ¶ 22, so are their eel traps, SMFs ¶¶ 43-45; PNAF ¶23, so are their gill nets. SMF ¶186; PNAF ¶24. Obviously, ducks and other waterfowl are taken from the River. And the Penobscot cultural identity is inextricably tied to the River, bank-to-bank, where the Penobscots engage in their traditions, sustenance activities being at the core. SMF ¶¶ 1-9; 56-64, 80, 174.

of the "transfer" provisions, Congress *on the one hand* would have assured the Tribe that these "expressly retained" aboriginal sustenance rights and related authorities were secure, thereby enabling the Penobscots to meaningfully engage in sustenance fishing, hunting, and trapping and related cultural practices, free from any threat that the State might end them, while, *on the other*, taking them away because Maine purported to exercise just such control prior to Congress's Settlement Act assurances.

Such a construct is blatantly at odds with Congress's trust responsibility to the Penobscot Nation in settling its historic land claims and dealing with "the most primal aspect of [its] existence," *Dana*, 404 A.2d at 561-562: the last remnants of its aboriginal rights left to it by its legally-suspect Treaties with Massachusetts (and Maine by successor) after hundreds of years of paternalistic abuses, including much harm to Penobscot River resources at the hands of these States. *See generally* Francis J. O'Toole & Thomas N. Tureen, *State Power and the Passamaquoddy Tribe: A Gross National Hypocrisy*, 23 ME. L. REV. 1, 10-11 (1971) (recounting history). As the *Amicus Brief of the Members of Congress* (ECF No. 131-1) explains, Congress's enactments affecting Indian tribes simply cannot be construed in this manner.[32]

Two fundamental principles of federal Indian law also combine to defeat the SDs' transfer claim. First, the Court must resolve statutory ambiguities in favor of the Tribe. *See, e.g., Fellencer*, 164 F.3d at 709; *Narragansett Indian Tribe*, 19 F.3d at 702. Second, Congress cannot be deemed to extinguish aboriginal rights (and related sovereign authorities) unless it

[32] Such a reading, furthermore, would run at odds with the basic purpose of the land claims settlement: to resolve the claims of the Tribe to recover the land and natural resources it had lost because of the illegal acts first of Massachusetts and then of Maine, *not* to undermine the last vestiges of the Tribe's aboriginal rights indisputably not relinquished by the Tribe under those illegal treaties. The "transfer" provisions were most clearly intended to ratify the lands and natural resources lost by the Treaties. With respect to the "present" Penobscot reservation the express purpose of the Settlement Acts was to "achieve a just and fair resolution" of jurisdictional allocations, 30 M.R.S.A. § 6202, and, in that context, Congress *guaranteed* that the Tribe would retain its aboriginal sustenance fishing, trapping, and hunting rights and related sovereign authorities, *see supra* note 3, as a "just and fair" jurisdictional allocation.

does so in unequivocal terms. *See Oneida Indian Nation*, 470 U.S. at 247-48; *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 914 (1st Cir. 1996); *Bottomly*, 599 F.2d at 1066 (citing and quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). *See also Mescalero Apache Tribe*, 462 U.S. at 337-38 ("the sovereignty retained by the Tribe . . . includes its right to regulate the use of its resources by members as well as non-members. . . . Moreover, this aspect of tribal sovereignty . . . confirms the power of tribes to regulate on-reservation hunting and fishing"); *Merrion*, 455 U.S. at 140.

By the broad definition of "transfer" set forth in section 1722(n), quoted above in note 31, Congress may have intended to ensure that structures affixed to the bed of Main Stem by riparian shore owners would be secure from challenges on the basis of aboriginal title (and the Tribe has never sought to oust such uses), but Congress certainly could not have intended, by that definition alone, to extinguish the particularized aboriginal sustenance rights and related sovereign authorities at issue; for Congress expressly confirmed that the Tribe would retain them. And, indeed, Penobscot tribal members have always engaged in their sustenance activities without affecting, or being affected by, such structures. *See supra* note 7 (and the record facts cited therein).

Moreover, by the terms of section 1723(a), a "transfer" is effectuated only if it is "from, by, or on behalf of" the Tribe. The canons of construction favoring the Penobscot Nation require at a minimum, at least with respect to *these* discrete aboriginal sustenance rights and related sovereign authorities, that there be some participation by the Tribe in the "transfer," something far more than unilateral action by the State or some private actor. Each of the SDs' transfer arguments rests upon the view that Congress intended to extinguish the Nation's sustenance rights and related authorities by virtue of the State's mere assertion of any form of dominion over

the waters and bed of the Main Stem, regardless of any agency on the part of the Tribe. Not only does this fail to comport with the "from, by, or on behalf of" language of section 1723(a), but it completely contradicts Congress's clear intent *to confirm* the Tribe's reserved aboriginal sustenance rights and related sovereign authorities in the Main Stem. For these reasons, the SDs' application of the "transfer" provisions is legally untenable and should be rejected.

In any event, an examination of each of the SDs' "transfer" arguments shows the inherent flaws of their reasoning.

Log Inundation. The SDs assert that pre-1980 State-sanctioned log drives in the Main Stem, inundating the River with logs from non-Indian timber operations "interfered with fishing and other uses of the river," presumably thereby constituting a "transfer" of the Tribe's sustenance fishing rights and related authorities. *SDs' MFSJ* at 6891; s*ee also id.*, at 6888 n. 38 (noting that the SDs make this argument as a defense to the Tribe's *Second Amended Complaint*). The SDs, however, provide no facts to show that these log drives involved any concessions "from, by or on behalf of" the Tribe to relinquish the sustenance rights and authorities at issue. Nor do they provide any facts showing that these drives in any way affected or displaced, forever, the Tribe's historic sustenance use and related cultural practice on the River. Indeed, pursuant to the 1818 Treaty, the Tribe knowingly granted Massachusetts (and Maine as successor) the right to use the Main Stem for the passage of logs without ceding its continued use and occupation of the River for sustenance practices. Congress cannot possibly be deemed to have condoned the termination of the Tribe's critical connection to the River simply because the State exercised its treaty right to drive logs. In any event, the undisputed record facts show that the Penobscots never ceased to engage in, and fight for, their aboriginal

sustenance practices in the waters and bed of Main Stem even in the face of the state-sanctioned log drives and other intrusions. *See* SMF ¶¶ 4, 5, 44-49, 128-37, 149-55, 156, 163-64, 168-81.

Fishing, Hunting, and Trapping Laws. Even more incredibly, the SDs (and the NPDES Permittees) cite to the enactment of fishing, hunting, and trapping statutes and regulations relating to the Main Stem as another example of state "dominion and control" over the Main Stem prior to 1980, which they claim by virtue of the "transfer" language operated to terminate the Tribe's aboriginal sustenance rights and related sovereign authorities there. As in the case of log inundation, the SDs presume that Congress intended that past acts of unilateral claims of State domination could operate to terminate the very sustenance rights and related authorities Congress announced it was protecting. But through their identical final committee reports, the House and the Senate promised that the Tribe's concern that "subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine" was "unfounded," and the State's presumed authority (prior to 1980) to control or even "terminate" these rights "within" the reservation "without the consent of" the Tribe "*is ended*." S. REP., at 14, 16-17 (emphasis added); H. R. REP., at 14, 16-17 (emphasis added). The mere enactment of these statutes and regulations, moreover, if capable of effecting a "transfer," would necessarily also effect a transfer of the islands themselves, since their application was not limited to the Main Stem. That would result in the "transfer" of the very "islands" the State concedes are all that was left of the Reservation and render the definition of Reservation meaningless.

In any event, regardless of any asserted State authority to control Penobscot sustenance fishing, trapping, and hunting practices before 1980, the Penobscots were not in the least bit fazed: the facts show that they ate freely from the River by taking fish, eel, muskrat and the like without a thought that they needed permission from any Maine authority to do so. SMF ¶¶ 4, 5,

56-64. Indeed, before 1980, Penobscot tribal members who regularly engaged in these and other activities on the Main Stem never saw Maine wardens on the Main Stem. SMF ¶¶ 57, 64; PNAF ¶¶ 2, 6.[33]

Post-Treaty Deeds. The SDs' third "transfer" argument, that post-treaty deeds not involving the Tribe should be presumed to transfer ownership of the bed of the Main Stem out to the "thread" and operated to terminate the Tribe's sustenance rights and related authorities in the Main Stem fare no better than their first two arguments. The SDs reason that, pursuant to an interpretative presumption applied to riparian deeds under Massachusetts and Maine common law, certain post-treaty deeds given by Massachusetts and Maine for lots on either side of the Main Stem purported to include the bed of the Main Stem from the shores out to the "thread" (or "middle of the stream") of the River. *See SDs' MFSJ* at 6893. *See also Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787, 789 (1910); *Haight v. Hamor*, 83 Me. 453, 22 A. 369, 371-72 (1891) (discussing interpretive rebuttable presumption of riparian ownership to thread); *Trustees of Hopkins Acad. v. Dickinson*, 63 Mass. 544, 546-47 (1852) (same); *Storer v. Freeman*, 6 Mass. 435, 438 (1810) (same).

On their face, not one of the cited deeds involved a transaction "from, by, or on behalf of" the Tribe, let alone one that purported to relinquish the particularized set of aboriginal

[33] The SDs make passing reference to pre-1980 Penobscot ordinances which they claim "did not purport to regulate hunting, fishing or trapping on the Main Stem and applied only to 'reservation *lands*' or 'Penobscot Tribal *lands*'." *SDs' MFSJ* at 6892. As the Tribe has already explained above, *supra* p. 13-14, whatever the Tribe may or may not have enacted cannot constitute a waiver (or relinquishment) of its inherent sovereign authorities at issue. This is just another example of the SDs' attempt to leverage faulty distinctions between the use of "land" and "water." Indeed, the facts show that prior to 1980, the Tribe enforced its trapping laws on waters and bed of the Main Stem, *see* ASFMF ¶4(b); the United States funded the Tribe's game wardens in the exercise of authorities on the waters of the Main Stem pursuant to the Indian Self-Determination and Indian Education Assistance Act, 25 U.S.C. § 450 *et seq.*, a federal law designed to support the exercise of tribal self-government, SMF ¶ 67; and the Tribe's game wardens (as they have always done since 1976) patrolled them Main Stem every day and, in so doing, do not recall encountering state game wardens except when they were accompanied by tribal wardens. SMF ¶65; PNAF ¶2, 6.

sustenance rights and related sovereign authorities at issue in the *Second Amended Complaint*. But, according to the SDs, these deeds exhibit another form of pre-1980 state dominion or control that Congress deemed sufficient, without more, to terminate the Tribe's aboriginal sustenance rights and related sovereign authorities within in its existing Treaty reservation, the waters and bed of the Main Stem. The SDs fail entirely to explain how this could be so, and the law and facts are entirely against them.

To start with, any transfer analysis with regard to riparian deeds would require a detailed factual analysis of (i) the individual deed history of a particular landowner, and (ii) the ownership or control that the particular landowner purported to make of the bed of the Main Stem under those deeds. If any riparian owner would be in a position to make such a case it would be the SDs themselves because they say the State "is the fee owner of numerous public boat launches on the Main Stem." *See SDs' MFSJ* at 6902. The SDs, however, fail to articulate any legal or factual basis by which their boat ramp ownership could have worked a transfer of the Nation's reserved aboriginal sustenance rights and related sovereign authorities. *See SDs' MFSJ* at 6893-94 (making no argument that State's deeds attending the boat ramps operate to terminate the Tribe's sustenance rights and related authorities in the Main Stem under the "transfer" provisions). This is because such an argument is frivolous.

First, as discussed above, riverbed "ownership" issues are immaterial to the reserved aboriginal sustenance rights and related sovereign authorities at issue in the *Second Amended Complaint*. Indeed, the SDs make no case (nor could they) for the proposition that the Tribe's exercise of those reserved aboriginal sustenance rights and authorities cannot coexist with the State's ownership of boat ramps along the Main Stem. This is because, whatever else may have been accomplished by the "transfer" provisions, one thing is certain: Congress *confirmed* that

the Tribe's sustenance rights and related authorities at issue in the Main Stem were *retained* in their original aboriginal and sovereign status pursuant to federal Indian common law. In other words, even if riparian shore owners along the Main Stem could claim a "transfer" of some interest in the Main Stem by virtue of some application of the Settlement Act's transfer provisions, the Tribe's aboriginal sustenance rights and related sovereign authorities would still exist in those portions of the Main Stem.

Second, even if the SDs could leverage deeds to which neither the Nation nor its members are a party to somehow work a "transfer" of the Tribe's sustenance rights and related authorities at issue, the Court would, as part of its necessarily detailed factual inquiry, have to closely consider the deed from the Commonwealth of Massachusetts to Joseph Treat (one of the negotiators of the 1818 treaty) that purports to convey land on the east side of the river that is bound on a line "down on the Easterly side of said River." SDs' SMF ¶ 206. That language expressly rebuts any interpretative presumption that the deed purported to convey to the thread of the river rather than to the side expressly stated. *See MSJ* at 7610-11. This deed, and others like it would immediately neutralize any suggestion that the mere existence other deeds in the chain of title of shore owners suggesting a different presumption amount to a form of "dominion" or "control" to effectuate the extinguishment of the Tribe's aboriginal sustenance rights and related sovereign authorities at issue. Certainly, no landowner claiming under Joseph Treat could succeed with such an argument.

F. THERE IS NO MERIT TO THE STATE DEFENDANTS' JOINDER DEFENSE.[34]

The SDs assert a single affirmative defense to the Tribe's *Second Amended Complaint* as follows:

> Plaintiff's Second Amended Complaint should be dismissed for failure to join indispensable parties, in particular, the riparian owners who own the bed of the Main Stem (1) at least to the thread of the River under Maine's common law, and (2) as a result of transfers confirmed by 25 U.S.C. § 1723(a)(1) & (b).[35]

By their motion, and in reference to the reservation sustenance rights and related sovereign authorities at issue, the SDs argue that putative private and municipal riparian landowners along the shores of the Main Stem are required parties and dismissal is warranted for their non-joinder pursuant to FED. R. CIV. P. 19. ECF 6899-6904. Notably, the SDs do not raise this defense to challenge that portion of the Tribe's *Second Amended Complaint* requesting declaratory and injunctive relief to protect its sustenance fishing rights in the waters of the Main Stem. ECF 6899 n.46. They thereby concede—as they must—that the Court can issue the relief the Tribe requests in that regard without joinder of riparian landowners or municipalities.[36]

Indeed, riparian landowners and municipalities—none of whom were parties to the Settlement Acts, nor to the original treaties referenced in those acts—cannot be necessary parties

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[34] The SDs argue that the Tribe's claims in the *Second Amended Complaint* are barred by "laches, acquiescence and impossibility." *SD Motion*, at 6894. They failed to raise these defenses in their Amended Answer to the *Second Amended Complaint*. *See* ECF No. 59. Thus, they are waived. FED. R. CIV. P. 12(h)(1). Even if the Court were to entertain them as defenses to the Tribe's claims, they should be rejected as meritless for all of the reasons set forth in the *United States' Opposition to the SDs' MFSJ*, which the Tribe incorporates by reference herein.

[35] The Tribe adopts by reference the argument of the United States that the SDs, by failing to raise the joinder of riparian owners until after the joinder deadline, has waived that issue. *See US Opposition to SDs' MFSJ* (ECF No. 143), PageID# 8598-8600. To the extent the Court reaches the issue over that objection, the Tribe adopts the United States' other arguments in opposition to this defense as well. *See id*. at PageID# 8595-8608.

[36] As the Tribe has pointed out above, the SDs' attempt to avoid the impact of their position by asserting that the Tribe's sustenance fishing rights in the waters of the Main Stem are not at issue because (a) as a matter of law, those rights are limited to casting from the shores of island and (b) as a matter of fact, the SDs have chosen not to interfere with Penobscot sustenance fishing practices out in the waters of the Main Stem, does not pass the straight face test.

to resolve the location of the Nation's sustenance fishing rights, particularly when the SDs argue elsewhere in their brief that "exclusive fishing privileges to someone other than the owner of the bed of a nontidal river" can be accomplished by legislation. ECF 6880 n.27. For that is exactly what Congress accomplished by confirming the Tribe's sustenance rights and related authorities upon enacting the Settlement Acts. And just as this Court can resolve the issue of the location of the Nation's reservation sustenance *fishing* rights without joinder of riparian owners and municipalities, so too can it resolve under basic Rule 19 principles the issue of whether the Tribe's *other* reservation sustenance rights (hunting, trapping and other taking of wildlife) and related sovereign authorities, *see supra* note 2, were confirmed by Congress to be exercised in the Main Stem and now warrant the protection the Tribe requests without such joinder.

A party is "required" under Rule 19(a)(1) if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Massachusetts v. Wampanoag Tribe of Gay Head, No. CIV.A. 13-13286-FDS, 2015 WL 854850, at *9 (D. Mass. Feb. 27, 2015); FED. R. CIV. P. 19(a)(1).

1. The Court can accord complete relief among the parties with respect to the claims of the *Second Amended Complaint*.

The State Defendants misconstrue the analysis of Rule 19(a)(1)(A) when they assert that riverside owners and municipalities are "required" because, in their absence, the Court cannot accord complete relief among existing parties under Rule 19(a)(1)(A). ECF 6900-01. Rule

19(a)(1)(A) "is concerned only with those who are already parties" and the Court must analyze the completeness of relief between the existing parties and "not as between a party and the absent person whose joinder is sought." *Wampanoag Tribe of Gay Head*, 2015 WL 854850, at *9. That is why the Federal District Court of Massachusetts in *Wampanoag Tribe of Gay Head*, in rejecting an assertion that an additional party was required in a dispute under an Indian Land Claims Settlement Act (even assuming "further litigation" with that absent party "is inevitable"), noted as follows:

> The Court can accord complete relief among the parties currently involved in this case with respect to the claims at issue. The four parties (counting the Tribe as one) represent the four signatories to the Settlement Agreement. A judgment as to the rights of the parties under the agreement will bind all four parties and resolve the current dispute. Accordingly, no additional parties are required on the basis of Rule 19(a)(1)(A).

Id., at *10.

The State of Maine, the United States, and the Nation are the only parties to the Settlement Acts, and the sustenance rights and other authorities of the Tribe at issue in the *Second Amended Complaint* begin and end with the intent of those Acts. The issues to which SDs direct their joinder defense – the Nation's Settlement Act rights and authorities over hunting, trapping and taking of wildlife – involve only these Settlement Act parties, and all are present. Thus, just as in *Wampanoag Tribe of Gay Head*, no additional parties are required under Rule 19(a)(1)(A).

2. SDs identify no riparian owners or municipalities that claim an interest that may be impaired or impeded by a judgment in their absence.

The SDs do not actually identify any party that claims a right to prevent tribal members from exercising sustenance fishing, hunting, or trapping rights and related authorities in the Main Stem of the Penobscot River. Nor do they identify any party (other than the State) that could possibly claim competing regulatory authority over hunting, trapping, or other taking of wildlife

within the Main Stem, or any party who would be harmed by the Tribe's exercise of its rights. Instead, ignoring the fact that the Tribe's *Second Amended Complaint* is strictly confined to the confirmation of its reservation sustenance fishing, trapping, and hunting rights and related sovereign authorities, nothing more, the SDs argue that PN's claims "come at the expense of the riverside owners whose title extends to the thread of the river under Maine common law, and municipalities whose boundary lines also extend the thread of the Main Stem." ECF 117, at 6899. They say that, if the Court does not accept their position that the Main Stem of the Penobscot River has been "transferred" out of the reservation, these putative riparian owners must be joined because, without them, the Court "could not issue an order that recognizes PN's interest in submerged lands throughout the Main Stem and that commensurately diminishes" their "common law rights and other interests" in the same lands. ECF 117, at 6901. Any judgment, they claim "would create a cloud on their title." *Id.*

Like many of the SDs' arguments, this proves too much. Although, as demonstrated above, this case involves aboriginal title, rather than "ownership" as used by the SDs, if, as the SDs, assert Maine common law somehow gives absent riparian owners an interest in this litigation out to the thread of the Main Stem, then at a minimum the Tribe, as owner of the islands in the Main Stem, has the same ownership interest to the thread on the island-side of the Main Stem, waters and river bed that the State claims is outside the Reservation. The SDs simply cannot have it both ways by asserting that riparian owners have an interest to thread of the Main Stem, but that the Tribe does not.

In any case, as the moving party, the State Defendants have the burden to show that the absent party claims a non-frivolous interest that will be impaired if it is not joined as a party. *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999). Dismissal under Rule 19 "will not be

granted because of a vague possibility that persons who are not parties may have an interest in the action." *Raytheon Co. v. Cont'l Cas. Co.*, 123 F. Supp. 2d 22, 32 (D. Mass. 2000). The SDs' conclusory statements about the vague possibility of a "cloud" on the title of riverside owners do not meet their burden.[37]

No riparian owner or municipality has *any* interest in the location of the Nation's sustenance fishing, hunting, trapping and related authorities, regardless of whether such riverside landowners or municipalities might have a transfer defense regarding their occupation, if any, of the riverbed. And, despite being aware of this litigation, no riparian landowner has moved to intervene asserting that a "cloud on their title" would result. Significantly, Old Town, the municipality closest to and most connected with the Tribe, was not one of the NPDES Intervenors. And recently, the Town of Orono, the next closest major town, voluntarily withdrew from the case. *See* ECF No 115 (motion requesting voluntary dismissal), and No 127 (Order granting same). This indicates that those property owners and municipalities do not believe that disposition of this suit will impair or impede their ability to protect their interest. *Wampanoag Tribe of Gay Head*, 2015 WL 854850, at *11 (citing *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 483 (5th Cir. 1982) ("Furthermore, the property owners themselves, patently aware of this litigation, never intervened either at the district or appellate court level. Presumably the property owners do not believe that the disposition of this suit will 'impair or impede' their

[37] *See Pub. Serv. Co. of New Hampshire v. Portland Natural Gas & Transmission*, No. CIV.02-105-B, 2002 WL 1770801, at **1-2 (D.N.H. Aug. 1, 2002) (moving party did not meet its burden of persuasion that underlying fee holders are necessary parties in litigation between holders of easements on the property); *Sierra Club v. Watt*, 608 F. Supp. 305, 322 (E.D. Cal. 1985) (mineral rights owners are not required parties in litigation that implicates the real property in which they hold mineral rights when "the issues this suit tenders are not, by the terms of plaintiffs' pleading, an adjudication of property rights qua property rights" but are instead an interpretation of the designation of that real property under the definition of a federal statute); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300 & n.18 (5th Cir. 1976) (assertion that harbor restoration litigation would in the absence of riparian owners lead to future litigation for trespass and interference with riparian rights "is questionable" when specific riparian rights would not demonstrably prevent the requested relief).

ability to protect their interests."); *Burger King Corp. v. Am. Nat. Bank & Trust Co. of Chicago*, 119 F.R.D. 672, 678 (N.D. Ill. 1988) ("Courts frequently consider the refusal of an absent party to seek intervention as a factor mitigating against the necessity of joining him pursuant to Rule 19(a).")).

Finally, the SDs who assert that they are riparian owners of boat ramps have the same interest as any absent landowner that they assert should be joined. Courts have consistently recognized that, when an absent party's interests are the same as those of an existing party, and the existing party will adequately protect those interests, the absent party's interest is unlikely to be impaired by its absence from the litigation. *Wampanoag Tribe of Gay Head*, 2015 WL 854850, at *12 (citing *Tell v. Trustees of Dartmouth Coll.*, 145 F.3d 417, 419 (1st Cir. 1998)). *See also Modern, Inc. v. Florida*, 444 F. Supp. 2d 1234, 1243-44 (M.D. Fla. 2006) (absent an evidentiary showing that "additional property owners will necessarily be bound by the results of these proceedings" the court cannot conclude that the other property owners aside from those owned by the current parties have rights that may be impaired in their absence). Under this circumstance, joinder is plainly not required.

3. Disposing of this Action in the Absence of Riparian Landowners and Municipalities Will Not Subject a Party to a Substantial Risk of Inconsistent Obligations.

Pursuant to Rule 19(a)(1)(B)(ii), an absent party is a "required" party if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party's] absence may ... leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." FED. R. CIV. P. 19(a)(1)(B)(ii). This provision is intended to prevent prejudice to existing parties. The State Defendants, however, do not actually claim that they would be subject to multiple, or otherwise

inconsistent obligations. Instead, they suggest that a decision in the Nation's favor would "lead[] to additional litigation in which riverside owners' sought to vindicate" their unspecified property interests and that municipalities would also sue the Nation over unspecified jurisdictional concerns. ECF No. 117, at 6901. To the extent any party is potentially prejudiced by nonjoinder, it would be the Nation, and the Nation is not asserting any prejudice.

Moreover, to the extent that the State Defendants make reference to absent parties who may seek to "vindicate their interest," the State Defendants do not suggest that those concerns would have anything to do with the Nation's fishing, hunting, trapping or taking of wildlife and related authorities and multiple or inconsistent obligations thereunder. Absent this showing, the State Defendants have not met their burden of persuasion that other riparian landowners are required under 19(a)(1)(B)(ii).

CONCLUSION

For all the foregoing reasons and the reasons set forth in the Tribe's Motion for Summary Judgment, the State Defendants' Motion for Summary Judgment should be denied and judgment entered in favor of the Tribe.

Respectfully submitted,

Dated: June 22, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2015 I electronically filed the within Opposition of the Penobscot Nation to the State Defendants' Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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