Nos. 16-1424; 16-1435; 16-1474; 16-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES, on its own behalf, and for the benefit of the Penobscot Nation,

Plaintiffs-Appellants/Cross-Appellees,

v.

JANET T. MILLS, Attorney General for the State of Maine; CHANDLER WOODCOCK, Commissioner for the Maine Department of Inland Fisheries and Wildlife; JOEL T. WILKINSON, Colonel for the Maine Warden Service; STATE OF MAINE; TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILFORD-SANGERVILLE SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET; KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF MATTAWAMKEAG; COVANTA MAINE LLC; LINCOLN SANITARY DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSO PAPER CORPORATION,

Defendants-Appellees/Cross-Appellants,

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,

Defendants-Appellees,

TOWN OF ORONO,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

PRELIMINARY PRINCIPAL BRIEF FOR PENOBSCOT NATION

[*continued on next page*]

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JURISDICTIONAL STATEMENT

This action arises under the Constitution and laws of the United States that protect the Penobscot Nation (the "Tribe" or "Nation"), a federally recognized Indian tribe, in the exercise of its sustenance hunting, trapping, and fishing rights and related governmental authorities within a reservation confirmed by Congress in the Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (1980). The district court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1362 over the Second Amended Complaint of the Nation seeking to prevent the threatened violation of federal law by state officials. On December 16, 2015, the district court entered final judgment disposing of all claims. On February 18, 2016, the district court entered an order denying timely motions for reconsideration or amendment filed pursuant to Fed. R. Civ. P. 59. The Penobscot Nation filed this timely appeal on April 18, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

Whether the right of Penobscot Indians to engage in hunting, trapping, and other taking of wildlife for sustenance within the Penobscot Indian Reservation—practices essential to the cultural identity of the Tribe—and the Tribe's exclusive authority to regulate those practices and the competing taking of wildlife by others in that reservation are in and on the submerged lands and waters of the Main Stem

of the Penobscot River, bank-to-bank, which provide the habitat for the fish, eel, muskrat, freshwater clam, turtles, and other species upon which the Penobscots have relied for their sustenance since aboriginal times, or confined to the uplands of islands, which provide no such habitat.

STATEMENT OF THE CASE

I. INTRODUCTION

This case presents the question whether Maine officials may consign the reservation sustenance hunting, trapping, and fishing rights of the Penobscot Nation, and its related authority to regulate the competing taking of wildlife by non-members from within that reservation, to the uplands of islands in the Penobscot River (the "River"). The district court correctly concluded that the Tribe's right to engage in, and exclusively regulate, sustenance fishing "within the boundaries of [its] reservation[]" necessarily meant that the reservation included the waters and bed of the Penobscot River because there are no waters to support fishing of any kind on the islands. But the court inconsistently and incorrectly concluded that for purposes of hunting, trapping and other taking of wildlife the Tribe's reservation was restricted to the uplands of the islands in the River. In so doing, it misread the law and ignored the fact that, as in the case of fish, these uplands have no waters to support the muskrat, turtles, waterfowl, freshwater clams, and other animals upon which the Penobscots rely for their sustenance.

The district court failed to properly apply the Supreme Court's controlling decision of *Alaska Pacific Fisheries*, which held that an Indian reservation consisting of islands necessarily includes the surrounding waters and bed. The court below also failed to consider the clear intent of Congress. Upon enacting the Maine Indian Claims Settlement Act in 1980, Congress confirmed all reservation sustenance rights (fishing, hunting, trapping, and other taking of wildlife)– together with the Tribe's related authority to regulate non-tribal member exploitation of its subsistence resources – within the same "reservation" in accord with the Tribe's historic, cultural practices and promised that as "expressly retained" and "sovereign" authorities, Maine could not control or terminate them, S.REP. 96-957, 14-15, 16-17 (1980) ("S.REP."); H.R.REP. 96-1353, 15, 17 (1980) ("H.R.REP.").[1] Finally, the decision below ignores important principles of both federal Indian law and statutory construction including interpreting ambiguities in favor of tribes and giving a single meaning to a statutory term where possible. Accordingly, that portion of the District court's decision should be reversed and judgment entered in favor of the Tribe declaring that for the purpose of the Tribe's right to engage in sustenance hunting, trapping, and other taking of wildlife and its related regulatory

[1] The Tribe provides relevant sections of the Senate Report in the Addendum ("Add.") at Add.82-90; the House Report is reprinted in 1980 U.S.C.C.A.N. 3786.

and enforcement authorities, the Penobscot Nation's reservation encompasses the bed and waters of the Penobscot River attending its islands, bank-to-bank.

II. HISTORICAL BACKGROUND

The Penobscot Nation (the "Nation" or the "Tribe") is a federally recognized Indian tribe. 80 Fed. Reg. 1945 (Jan. 14, 2015). Congress describes its "aboriginal territory" as "centered on the Penobscot River" and its "land-ownership orientation" as "riverine." S.REP., 11; H.R.REP., 11.

The Penobscots have long-depended upon the resources of the Penobscot River for subsistence. *See, e.g.,* Add.98-99,104-105,109-13; [Joint Appendix ("JA")]ECF124 at 7501¶¶5-6; ECF140-2 at 7861¶3.[2] The fish, eel, turtle, waterfowl, muskrat, beaver and other animals upon which Penobscot tribal members have relied for food are obtained in and on the Penobscot River. Add.98-99,109¶¶6-7; ECF140-1 at 7856¶7; ECF140-21 at 7946¶8; ECF141 at 8056¶60, 8060¶64; ECF148 at 8763¶22. There are no waters on the surfaces of the islands to support fish and these water-inhabiting animals. ECF124-2 at 7511¶12; ECF 141 at 7986¶6. The Tribe's river-based subsistence practices are imbedded in the Tribe's language, culture, traditions, and belief-systems, including its creation

[2] The Tribe provides the summary portions of the report of its expert, Professor Harald Prins, in the Addendum. The district court erred in failing to consider this and other expert reports as hearsay, Order at 4,n.3, because the parties expressly waived hearsay objections to these reports and other Joint Exhibits. ECF111 at 6813¶1.

legends. Add.98-99. Penobscot family names, *ntútem* (or "totems" in English), reflect the creatures of the River: *Neptune* (eel); *Sockalexis* (sturgeon), *Penewit* (yellow perch), *Orono/Tama'hkwe* (beaver), *Nicola/Nicolar* (otter), and *Francis* (fisher). ECF105-88 at 3741. And the Penobscots refer to themselves as *Pa'nawampske'wiak*, or "People of where the river broadens out." ECF105-88 at 3716.

The Penobscots do not distinguish between the islands where they maintain their villages and the waters and beds of the Penobscot River surrounding and between those islands, upon which they rely for subsistence and cultural practices. ECF124 at 7501¶5; ECF124-2 at 7511¶¶6,10; ECF140-2 at 7861¶4. Indeed, the principal Penobscot island village variously called *Panawamskeag* or *Pem ta guaiusk took*, has been translated as "great or long River." ECF105-88 at 3722-23.[3] Penobscot hunting districts are called *nzibum*, translated in English as "my river." Add.99. From treaty times until 1950 (when a bridge was built between Old Town and Indian Island), the Penobscots were a river-bound People, travelling between their island communities by the River. Add.99; ECF141 at 8060-61. *See also* Penobscots and birch bark canoes at ECF106-34 at 3976; ECF106-37 at 3979;

[3] This village, initially known by non-Indians as "Indian Old Town" and today referred to as "Indian Island," ECF105-88 at 3722, is located just above a series of ledges and falls, historically the Tribe's most prized fishing site, *id.* at 3782-88. *See* Add.106-08 (maps of Indian Island and other islands upriver).

ECF106-38 at 3980; ECF106-52 at 3994; ECF106-55 at 3997; ECF106-56 at 3998; ECF119-20 at 7319-22 (describing photographs).

The Penobscots' riverine-based culture and subsistence economy are not romantic notions of the distant past, but remain fundamental to the Tribe in the modern era. *See* Add.112-13; ECF124-2 at 7511¶11; ECF106-32 at 3974 (described at ECF119-20 at 7320¶23 (tribal youth cultural program)). *See also* S.REP., 17 (addressing fear of "acculturation"). For generations, and well into the 1990s, until water pollution suppressed their sustenance practices, Penobscot families relied upon fish, muskrat, eel, freshwater clams, and other food sources from the River, some for up to four meals per week to the tune of two to three pounds per meal. Add.109-13.

On the eve of the Revolutionary War in 1775, the Provincial Congress in Boston resolved to protect the Tribe's territory "beginning at the head of the tide of the Penobscot river and extending six miles on each side of said river" in exchange for the Tribe's pledge to support the Americans' war effort. ECF107-17 at 4521. "Despite requests from the Maine Indians, the federal government did not protect the tribes following the Revolutionary War [and] [t]he Penobscot Nation lost the bulk of its aboriginal territory in treaties [with Massachusetts] consummated in 1796 and 1818." S.REP. 11-12.

In the 1796 treaty, the Penobscot Nation ceded its aboriginal territory "on both sides of the River Penobscot" from the head of the tides "at Nichol's rock, so called, and extending up the said River thirty miles." Add.91; P.D.5 at 32-33 (copy of original).[4] *See also* ECF105-88 at 3719 (explaining Nichol's rock). The treaty stated that "all the islands in said River, above Old Town, including said Old Town Island, within the limits of said thirty miles," were reserved to the Tribe, but it was silent on the Tribe's continued use and occupation of the River within those limits and above the thirty mile limit. Add.91. This area included substantial Penobscot villages on the islands and shores of the River, including *Madawam'kik* Point (Mattawamkeag) and *Matna'guk* (Lincoln Island). *See* ECF105-88 at 3725 (describing these and other Penobscot communities); ECF106-6 at 3943 (Map of Lincoln and other islands).

In the 1818 treaty, the Nation ceded the rest of its territory "on both sides of the River" from above the thirty mile stretch ceded in the 1796 treaty, with the exception of four townships abutting the River. Add.93-94; P.D.7 at 38-43 (copy of original). The 1818 treaty likewise was silent on the Tribe's use and occupation of the River, but stated that the Tribe "shall have, enjoy and improve all of the four

[4] The parties jointly submitted public documents ("P.D.") to the district court, ECF112 at 6816-28, and waived all objections to their admissibility, other than relevancy, for the purpose of summary judgment. ECF111 at 6813-14¶2. Pertinent ones are included in the parties' Joint Appendix.

excepted townships . . . and all the islands in the Penobscot River above Old Town and including said Old Town island," and "that the citizens of said Commonwealth shall have a right to pass and repass any of the rivers, streams, and ponds, which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same." Add.94-95; ECF105-95 at 3861-66 (copy of original). In 1820, at the advent of Maine's statehood upon separation from Massachusetts, Maine entered into a treaty with the Penobscot Nation to accede to the Tribe's 1818 treaty cessions to Massachusetts. P.D.10 at 56-59 (1820 treaty, transcribed); P.D.9 at 48-53 (copy of original). *See also* Add.103-05 (discussing treaty). The Tribe later lost the four townships referred to in the 1818 treaty by deed to Maine. ECF140 at 7832¶202.

Before, during, and after these treaties, the Penobscot people looked to, and relied upon, the waters and bed of the Penobscot River surrounding and between their island communities for their survival and their way of life; that way of life depended on hunting, trapping, and fishing in and from the waters and beds of the River. Add.98-105, 109-13. As the Nation's expert, anthropologist Dr. Harald Prins, explains: "Because of this symbiosis in their riverine habitat, a severance between [the Penobscots'] use and occupation of the islands and their use and occupation of the River was inconceivable and would have reduced [the Penobscot Nation] to starvation, dooming their chances for survival." Add.103. *See also*

ECF105-88 at 3782-86 (on third Penobscot mission to Boston after 1796 treaty, Chief Attian, laboring under a misunderstanding of the treaty agreement, became so despondent about the possibility that the Tribe may have relinquished its principal fishing site at Old Town Falls that he committed suicide); ECF105-88 at 3735 (observations of Maine surveyor, Joseph Treat, in 1820 of Penobscots' subsistence reliance upon the River).

In considering their "reservation" after the above-referenced suspect treaties, the Penobscots did not distinguish between the islands where they maintained their dwellings and the waters and beds of the River surrounding and between those islands upon which they relied for fish, muskrat, waterfowl, eel, turtles, freshwater clams, and other water-dwelling species to feed themselves. Add.109¶8; ECF124 at 7501; ECF124-2 at 7510-11. As Loraine Dana, a single mother who relied upon food sources from the River to feed her children, testified before Congress during its consideration of the land claims settlement, her son "fishes my islands," employing the Penobscot locution, meaning that he fished in the waters surrounding and between the islands, bank-to-bank. Add.110-11.

III. THE TRIBE'S LAND CLAIMS, FEDERAL INDIAN LAW DECISIONS IN ITS FAVOR, ITS FEDERAL RECOGNITION BY THE BUREAU OF INDIAN AFFAIRS, AND THE LAND CLAIMS SETTLEMENT

Pursuant to an order issued by Judge Edward T. Gignoux in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975), the United States, as trustee for the Penobscot Nation, commenced *United States v. Maine,* Civil No. 1969-ND (D. Me.) to challenge the validity of the Tribe's land cessions in its treaties with Massachusetts and Maine for want of federal approval under the Indian Nonintercourse Act. See S.REP., 12-13. One of the first laws enacted by the newly formed Congress of the United States in 1790, the "Indian Nonintercourse Act" provided that Indian land cessions without the approval of the federal government were void. *See id.* at 12. The Penobscot Nation's 1796 and 1818 treaties with Massachusetts and its 1820 treaty with Maine were not approved by the federal government in accord with the Indian Nonintercourse Act. *Id.*

Two decisions in 1979 confirmed the application of federal Indian common law to the existing reservations of the Penobscot Nation and Passamaquoddy Tribe (their remaining territories after the suspect treaties) and drove Maine to "reevaluate the desirability of settlement." P.D.258 at 3740-45. As Congress explained, *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (Coffin, C. J.) and *State v. Dana,* 404 A.2d 551 (Me. 1979), established that the

Tribe's existing reservation "constitute[d] Indian country as that term is used in federal law," that the Tribe was "entitled to protection under federal Indian common law doctrines," and that it "possess[ed] inherent sovereignty to the same extent as other tribes in the United States." S.REP., 13-14 (describing holdings in *Bottomly* and *Dana*); H.R.Rep., 12 (same). Also in 1979, the United States Department of the Interior ("DOI"), Bureau of Indian Affairs ("BIA") recognized the Penobscot Nation on its list of Indian tribes with a government-to-government relationship with the United States. 44 Fed. Reg. 7235-01 (Jan. 31, 1979).[5]

The settlement took shape in three parts (with three parties, the Penobscot Nation, the State of Maine, and the United States) as follows: (1) the Tribe and the State, acting through its Attorney General, reached an "agreement" on (a) the terms for resolving the Indian Non-intercourse Act "claims for possession of large areas of land" and (b) "jurisdiction on [i] the present . . . Penobscot Indian reservation[] and [ii] in the claimed areas," 30 M.R.S.A. §6201; (2) the Maine legislature passed

[5] This Court describes BIA recognition as follows:

> Federal recognition is just that: recognition of a previously existing status. The purpose of the procedure is to "acknowledg[e] that certain American Indian tribes exist." 25 C.F.R. §83.2 (1993). The Tribe's retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic . . . and it may be altered only by an act of Congress.

State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994) (case citations omitted).

legislation, effective only upon ratification by Congress, intending "to implement" that agreement, *id.* §6202; and (3) Congress ratified the Maine Implementing Act, extinguished the land claims, and established, *inter alia*, a fund for the Tribe to purchase lands from willing landowners to restore its land base, *see* MICSA §§1721-32.[6]

On April 2, 1980, in his opening remarks to introduce MIA to Maine's legislature, State Senator Samuel W. Collins, Jr., who served as co-chair of the legislature's Joint Select Committee on the Indian Land Claims ("**Maine's Joint Committee**"), explained that "the premise of this bill and the entire settlement agreement is that the Indians are Federal Indians." He continued:

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

[6] The Maine legislation, "An Act to Implement the Maine Indian Land Claims Settlement," 30 M.R.S.A. §§6201-6214 is referred to herein as the "Maine Implementing Act" or "MIA." The federal act, the Maine Indian Claims Settlement Act of 1980, formerly codified as MICSA §§1721-1735 is referred to herein as "MICSA." Both are collectively referred to as the "Settlement Acts." This brief cites to the former codifications of MICSA. Pertinent excerpts from each are set forth in the Addendum.

P.D.271 at 4015-16.[7] This echoed the views of Maine's Deputy Attorney General, John Paterson, who, a few days earlier testified in public hearings on MIA that in the absence of a jurisdictional agreement with the Tribe confirmed by Congress "[s]tate laws would generally have no applicability [to the Tribe] as exists in most states," P.D.258 at 3779-80, and those of Thomas N. Tureen, counsel for the Penobscot Nation, who, at the same public hearings, testified:

> the lands of the Maine Indian Tribes constitute "Indian Country" as the term is used in Federal Law. As such, Indians residing on tribal lands in Maine are not subject to the civil or criminal jurisdiction of the courts of Maine, . . . state environmental laws, business regulations, and other governmental controls do not apply on tribal lands, and the tribes have an unfettered right to regulate hunting and fishing.

Id. at 3715.

[7] Rep. Bonnie Post and Senator Collins, as Co-Chairs of Maine's Joint Committee, jointly testified to the U.S. House Committee on MICSA, that

> The [State] Act, when read with the Federal Act, implicitly accepts the concept that the Penobscot Nation and the Passamaquoddy Tribe are "Federal Indians" . . . . [F]or almost two hundred years, Maine's Indians have been distinguished from "Western Indians" in their treatment by the Federal and State governments. Now, apparently, the legal concepts have altered. . . . Although in most respects, [the State Act] continues full State jurisdiction over the Indians and their land, it also provides specific exceptions in recognition of traditional Indian practices and the Federal relationship to Indians. In particular . . . the Nation[']s specific authority to regulate hunting and fishing within their territories.

P.D.281 at 5869-70 (paragraph breaks omitted).

The State of Maine provided no monetary consideration for the settlement. *Id.* at 3752. However, the State characterized as worthy consideration its settlement concession that the Tribe's powers with respect to hunting, trapping, and fishing would not be "recover[ed]" by the State. *See, e.g.*, P.D.258 at 3744-45 (testimony of Maine Attorney General on MIA to Maine's Joint Committee); P.D.278 at 4437. This is exemplified by a letter from Maine Attorney General Richard Cohen on behalf of himself, Maine Governor Joseph Brennan, and the co-chairs of Maine's Joint Committee, Senator Sam Collins and Representative Bonnie Post, to Senator John Melcher, Chair of the Senate Select Committee on Indian Affairs in response to a request from the Senate Committee on the jurisdictional provisions of the settlement. Attorney General Cohen wrote that those provisions confirmed the Tribe's "rights and authority . . . in recognition of traditional Indian activities" and that "the most significant aspect of this . . . authority is in the area of hunting and trapping and, to a limited extent, fishing." ECF109-8 at 5708.[8] He further wrote that the settlement otherwise "recovers back

[8] In stating that the settlement confirmed the Tribe's authority over fishing "to a limited extent," Attorney General Cohen referred to the settlement's establishment of the Maine Indian Tribal State Commission ("**MITSC**"), a joint commission consisting of representatives of Maine tribes and the State, which was granted exclusive regulatory authority over all fishing other than tribal member sustenance fishing in rivers within Penobscot Indian territory; that is, within the Penobscot reservation and within its newly acquired trust lands. *See* 30 M.R.S.A. §6207(3).

for the State almost all of the jurisdiction over the existing reservation[] that had been lost as a result of recent Court decisions." *Id.* at 5709.

These Penobscot hunting, trapping and fishing rights and related authorities were thoroughly discussed at the public hearings on the Maine Implementing Act. In his opening remarks, Maine Attorney General Cohen stated "[a]s a general rule, States have little authority to enforce state laws on Indian Lands," but the settlement "recovers for the State much of the jurisdiction over the existing reservations that it has lost in . . . recent litigation," with specific "exceptions which recognize historical Indian concerns." P.D.258 at 3744. Attorney Tureen testified that "as the negotiations progressed," the State expressed a willingness to compromise in recognition of "the Tribes' legitimate interest in . . . exercising tribal powers in certain areas of particular cultural importance such as hunting and fishing." *Id.* at 3763. The State's representatives appreciated the critical importance to the Tribe of exercising these powers, at the very least. For example, in order to explain the settlement to Maine's Joint Committee, Deputy Attorney General, John Paterson, provided Committee members with the *Bottomly* and *Dana* decisions and a report entitled "Indian Rights and Claims," emphasizing that:

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

> development of [land and water] resources is central to the cultural preservation and economic vitality of the tribe.

ECF102-42 at 1437. This view ran parallel with that of Penobscot representatives. As Reuben Phillips, a member of the Penobscot Nation, who served on the Tribe's negotiating committee for the land claims settlement, has explained:

> The Tribes' Negotiating Committee never would have agreed to, or recommended to the Penobscot members and Tribal Council, a settlement of [the] Tribe's land claims . . . that would extinguish the Tribe's reservation of the Penobscot River; for such a result would have been an unacceptable termination of [the Tribe's] existing reservation and [its] longstanding reliance upon the Penobscot River for sustenance fishing, trapping and hunting and for [its] cultural identity.

ECF124 at 7503¶15.

IV. THE MAINE INDIAN CLAIMS SETTLEMENT ACT AND PROVISIONS GOVERNING HUNTING, TRAPPING, AND FISHING WITHIN THE TRIBE'S RESERVATION

In October, 1980, Congress acted to finally settle *United States v. Maine* pursuant to MICSA. As noted above, Congress ratified, and rendered effective, MIA, which memorialized a jurisdictional agreement between the Tribe and Maine governing both the Tribe's then existing reservation and lands to be purchased with federal funds to restore the Tribe's land base lost through the suspect treaties. *See* 30 M.R.S.A. §6202.[9]

[9] Pursuant to MICSA, Congress established an acquisition fund for the purchase of designated lands to be held in trust by the United States for the Tribe. *See* MICSA §1724(c). Referred to herein as "**newly acquired trust lands**," they are distinct

On the eve of enactment of MICSA, Congress heard testimony from Penobscot tribal members who voiced concerns that settlement provisions might be construed to destroy the Tribe's "sovereign rights," in particular, those related to hunting and fishing, and the Tribe's culture. S.REP., 14-16. Congress, through identical language in the House and Senate committee reports, assuaged these concerns, calling them "unfounded." S.REP., 14; H.R.REP., 14. It said that the hunting and fishing provisions recognized the Tribe's exercise of "inherent sovereignty" and were "examples of expressly retained sovereign activities." S.REP., 14-15; H.R.REP., 14-15. Pursuant to those provisions, Congress explained, "the Penobscot Nation [has] the permanent right to control hunting and fishing . . . within [its] reservation. The power of the State of Maine to alter such rights without the consent of the . . . [N]ation is ended." S.REP., 17; H.R.REP., 17. In identical language, Congress further said that "[n]othing in the settlement provides for acculturation." *Id.* To the contrary, it said that the settlement "offer[ed]

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from the Tribe's reservation. *See Maine v. Johnson*, 498 F.3d 37, 47 & n.11 (1st Cir. 2007) (explaining the distinction and related MIA provisions). Some settlement provisions reference "Penobscot Indian Territory," which, by definition includes both newly acquired trust lands and the Penobscot Reservation. *See* 30 M.R.S.A. §6205(2). This case concerns only the Tribe's hunting, trapping, and fishing rights and related regulatory and enforcement authorities *within its reservation*, not within its newly acquired trust lands.

protection against" any disturbance of the Tribe's "cultural integrity . . . by outside entities" because "tribal governments" would be in control of such matters. *Id.*

Congress then ratified the hunting and fishing provisions set out in MIA, providing, in pertinent part, that: (a) within its reservation, "the Penobscot Nation . . . shall have exclusive authority . . . to promulgate and enact ordinances regulating . . . [h]unting, trapping or other taking of wildlife" and that "such ordinances may include special provisions for the sustenance of the individual members of . . . the Penobscot Nation," 30 M.R.S.A. §6207(1); (b) notwithstanding "any law of the State, the members of the Penobscot Nation may take fish, within the boundaries of [the] reservation[] for their individual sustenance," *id.* §6207(4); and (c) Penobscot game wardens would have exclusive authority to enforce the Nation's hunting and trapping regulations within the reservation, *id.* §6210(1). *See* MICSA §1725 (b)(1) (ratifying jurisdictional provisions of MIA). *See generally* S.REP. 37, 39 (detailed description of the settlement's distribution of jurisdiction over hunting, trapping and fishing).

At the same time, Congress ratified the definition of the Penobscot Indian Reservation set forth in MIA as follows:

> unless the context indicates otherwise, . . . '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.[10]

30 M.R.S.A. §6203(8), *ratified by* MICSA §1721(b)(3).

At the time of land claims settlement and for many years thereafter, none of the parties to the settlement (the Tribe, Maine, and the United States) announced or suggested that the Penobscot Nation's reservation hunting, trapping, and fishing rights and authorities were confined to the island surfaces of Indian Island and those northward. To the contrary, throughout the negotiations and up to the eve of the Maine Implementing Act, Penobscot representatives voiced their understanding that, by the terms of the settlement, the Tribe retained is aboriginal rights of sustenance fishing, hunting and trapping in the Penobscot River as reserved in its treaties with Massachusetts. ECF124 at 7504-7505¶¶11,14-15,28 (testimony of Reuben Phillips, Penobscot representative to the tribal negotiating committee); ECF119-5 at 7283-85 (resolution of tribal negotiating committee); ECF119-6 at 7286-87 (same). *See also* ECF119-32 at 7335¶11 (testimony of Jonathan Hull, Staff Attorney to the Maine Legislature); ECF119-35 at 7359-60. At the same time, State representatives voiced the view that the boundaries of the Penobscot Reservation included riparian rights reserved in those treaties or as a matter of law.

[10] The referenced date, June 29, 1818, is the date of the Penobscot Nation's last treaty agreement with Massachusetts. *See* Add.93.

P.D.264 at 3971. In its final committee reports, Congress said that "the Penobscot Nation will retain as [its] reservation those lands and natural resources which were reserved to [it] in the treaties with Massachusetts and not subsequently transferred by [it]." S.REP., 18.

In the decades following the settlement, Maine officials, including those who served in the state legislature at the time of the Maine Implementing Act, took the position that the Tribe's sustenance hunting, trapping, and fishing rights and related authorities were in and on the waters and submerged lands of the Penobscot River. For example: in 1988, Maine's Attorney General, James Tierney, who served in the Maine Senate when the Maine Implementing Act was passed, issued a formal opinion that the sustenance taking of Atlantic salmon from the Penobscot River by Penobscot members was not prohibited by state law because, pursuant to §6207(4), "members of the . . . Penobscot Nation are authorized to take fish, within the boundaries of [the Penobscot Reservation]" without any state law restrictions other than the residual authority provided to Maine's Commissioner of Inland Fisheries and Wildlife pursuant to §6207(6). ECF103-30 at 1652. In 1990, Maine game wardens turned over to the Penobscot Nation Tribal Court—a court with exclusive jurisdiction over violations of reservation sustenance hunting ordinances by Penobscot tribal members, *see* 30 M.R.S.A. §6206(3)—a criminal case involving a Penobscot tribal member hunting a deer swimming in the Penobscot

River. ECF141 at 8160-61. In the mid-1990's, Maine's permits for eel pots in waters of the Penobscot River provided: "The portions of the Penobscot River and submerged lands surrounding the islands in the river are part of the Penobscot Indian Reservation and [gear] should not be placed on these lands without permission from the Penobscot Nation." *E.g.*, ECF141 at 8162-63. And in 1997, in a brief to the Federal Energy Regulatory Commission ("FERC"), the State expressed the view that "Penobscot fishing rights under the Maine Settlement Act exist in that portion of the Penobscot River which falls within the boundaries of the Penobscot Indian Reservation," which "may generally be described as including the islands in the Penobscot River above Old Town . . . and a portion of the riverbed between any reservation island and the opposite shore." ECF105 at 2559-60.

Meanwhile, Penobscot tribal members continued to rely upon the waters and bed of the Penobscot River from the Tribe's principal reservation community at Indian Island, northward, to hunt, trap, and fish for sustenance, *see, e.g.*, Add.112-13; ECF124-2 at 7300-01, and the Tribe promulgated regulations governing those activities, *see, e.g.*, ECF103-13 at 1558-59; ECF104-45 at 2167; ECF140-1 at 7855-57. Likewise, the United States funded multiple programs for the Tribe to monitor, manage, and protect sustenance resources in and on the River, *see, e.g.*, ECF103-15 at 1561-66; ECF103-33 at 1662-63; ECF103-21 at 1599-1600;

ECF104-8 at 1971; ECF105-11 at 2715-17, and the Interior Department expressly advocated the view that the Penobscot reservation encompassed the bed and related fisheries of the Main Stem in multiple federal agency proceedings. *See* ECF104-96 at 2389; ECF105-3 at 2591-94. *See also* ECF105-34 at 3130-3142 (US claim against Lincoln Pulp & Paper for Tribe's "loss of its sustenance fishing right and cultural use" due to dioxin contamination of the River).

V. PROCEDURAL HISTORY

The controversy leading to this case arose on August 8, 2012, when Maine Attorney General William Schneider issued a formal opinion requested by Maine Commissioner of Inland Fisheries, Chandler Woodcock, and the Colonel of Maine's Game Warden Service, Joel T. Wilkinson, to address "the respective regulatory jurisdictions" of the Tribe and the State "relating to hunting and fishing on the [M]ain [S]tem of the Penobscot River." Add.115.[11] In that opinion, Schneider announced an unprecedented position of any Maine official: that the State of Maine has "exclusive regulatory jurisdiction" over hunting, trapping and fishing activities on the Main Stem and that the Tribe's authority to regulate hunting, trapping, and fishing is confined to the surfaces of islands in the Main

[11] The parties have stipulated that the "'Main Stem' means that portion of the Penobscot River from Indian Island north to the confluence of the East and West Branches [near Medway, Maine], and includes the area from bank-to-bank unless otherwise noted." ECF111 at 6814.

Stem because "the River itself is not part of the Penobscot Nation's Reservation." Add.115-16. He sent the opinion to Penobscot Chief Kirk Francis with a cover letter stating that if the Penobscot Nation disagreed with the opinion, the dispute should be resolved in "the appropriate forum." Add.114.

The Tribe commenced this action on August 20, 2012. ECF1 at 1. Pursuant to its Second Amended Complaint, the Tribe sought declaratory and related injunctive relief against Maine's Attorney General, now Janet Mills, who succeeded Schneider, Commissioner Woodcock, and Colonel Wilkinson (the "**State Defendants**" or "**SDs**") to establish that the Tribe's reservation sustenance hunting, trapping and fishing rights and related authorities are in the waters of the Main Stem of the River, not confined to island surfaces. ECF8 at 75-77.

The State Defendants responded with counterclaims, including generalized declaratory judgments that "[t]he waters and bed of the [M]ain [S]tem of the Penobscot River are not within the Penobscot Nation reservation" for any purposes. ECF10 at 99. Seventeen private and municipal corporations moved to intervene as defendants, calling themselves "NPDES Permittees" because they hold permits to discharge wastewater into the Penobscot River pursuant to the National Pollutant Elimination Discharge System of the Clean Water Act, filing a single, generalized counterclaim for a declaratory judgment "that the waters of the [M]ain [S]tem of the Penobscot River are not within the Penobscot Nation

reservation." ECF11 at 111. The United States intervened as plaintiff to seek a declaratory judgment and related injunctive relief against the State Defendants and the State of Maine. ECF58 at 649-650.[12]

The parties filed cross-motions for summary judgment. On December 16, 2015, the district court entered orders and a judgment disposing of all claims by partially granting and partially denying all of the parties' motions. Order on Cross-Motions for Summary Judgment ("Order") (Add.3-66). It decided that the only justiciable controversies were "(1) the boundaries of the Penobscot Indian Reservation within the Main Stem and (2) the limits of the sustenance fishing rights of the Penobscot Nation in this same area," Order at 51, and that these issues presented solely "questions of statutory construction." Order at 48.

With respect to the first, the district court began and ended its analysis with a purported "plain language" construction of the definition of "Penobscot Indian Reservation" in section 6203(8). Order at 54-55. The court concluded that this definition was "not ambiguous," and even if it was, "at the time of passage of the 1980 Settlement Acts, no one expressed the view that" the settlement "recognize[d] aboriginal title in the Main Stem waters." Order at 56. The district

[12] After the United States intervened, the State Defendants and Maine collectively referred to themselves as the "State Defendants." As used herein, unless context suggests otherwise, the Tribe refers only to Mills, Woodcock, and Wilkinson as the "State Defendants" or "SDs."

court acknowledged that the United States and the Tribe presented evidence that at the time of the Settlement Acts, Penobscot Negotiating Committee representatives maintained that the Nation retained sustenance fishing, hunting, and trapping rights in the waters and beds of the Main Stem, bank-to-bank, but characterized that evidence as "immaterial." *See* Order at 4,n.4 & 15,n.17, disclaiming the materiality of ECF124 at 7504-05 and ECF119-32 at 7335-36. The district court further acknowledged undisputed "post-passage" evidence that Maine's legislative representatives understood that the boundaries of the Penobscot Reservation encompassed the waters of the River, but did not consider that evidence. *See* Order at 56,n.43. With respect to the Tribe's exclusive authority to regulate sustenance and non-sustenance hunting, trapping, and other taking of wildlife within its reservation, pursuant to 30 M.R.S.A. §6207(1), and its related exclusive authority to enforce (but not adjudicate) those regulations under 30 M.R.S.A. §6210(1) (hereinafter referred to as the Tribe's "**reservation sustenance hunting and trapping rights and related authorities**"), the district court simply said, "it need not separately address issues related to hunting and trapping [because] MIA provides clear guidance on hunting and trapping once the boundaries of the Penobscot Indian Reservation are resolved." Order at 51. Thus, the district court implicitly held that these rights and authorities are confined to island surfaces, as it

confirmed in denying the motions for reconsideration. *See* App.70-71 (*denying* ECF164 at 9098-9100).

With respect to the second issue, the Court examined the language of section 6207(4), which provides that members of the Penobscot Nation "may take fish, within the boundaries of [their] reservation[] for their individual sustenance," notwithstanding any law of the State. Order at 57. The court recognized the Tribe's historical sustenance fishing practices in the Main Stem, pointing out that "the undisputed record is replete with evidence that members of the Penobscot Nation have continuously sustenance fished in the waters of the Main Stem both prior to the Settlement Acts and after the enactment of the Settlement Acts." *Id.* It then reasoned that applying the definition of the Penobscot Indian Reservation it had previously announced would confine the Tribe's reservation sustenance fishing right to island surfaces or to a situation (advocated by the SDs) in which a tribal member cast a line into the River while keeping one foot on an island shore—outcomes that the court held were "untenable and absurd" and "nonsensical." Order at 59,61,63. The court observed that "special statutory canons of construction . . . require[d] [it] to read ambiguous provisions in a manner that narrowly diminishes the retained sovereignty over tribal sustenance fishing." Order at 60. Finding section 6207(4) ambiguous, the district court held that it could not "adopt an interpretation of section 6207(4) that diminishes or

extinguishes the Nation's retained right to sustenance fish in the Main Stem" and therefore concluded "that the Settlement Acts intended to secure the Penobscot's retained right to sustenance fish in the Main Stem, as it had done historically and continuously." Order at 63-64.

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *Alaska Pacific Fisheries Co. v. U.S.*, 248 U.S. 78 (1918), in which the Court unanimously held that the Metlakahtla Indians' reservation defined as "the body of lands known as Annette Islands" included the intervening and surrounding submerged lands and waters of those islands, governs this case. Congress confirmed the Penobscot Nation's reservation as "the islands in the Penobscot River reserved to [it] by [treaty] agreement" with Massachusetts and Maine. MIA §6203(8). In *Alaska Pacific Fisheries*, the Court reached its holding by employing its time-tested rule that statutes affecting Indian tribes must be liberally construed to their benefit. The Court easily concluded that the reservation boundaries included the submerged lands and related waters of the area known as the Annette Islands because the Metlakahtlans could not have sustained themselves on the uplands alone and naturally looked upon the fishing grounds as part of the islands. Congress confirmed the Penobscot Indian reservation in a very similar manner. At the time of the Nation's treaty agreements, the Penobscots relied upon the submerged lands and related waters of the Main Stem, bank-to-

bank, for their survival through hunting, trapping, and fishing, and they naturally looked upon them as part of the islands. The same was true at the time of the land claims settlement. Furthermore, by the terms of the treaties in question, construed in accordance with the law governing Indian treaty interpretations as well as state common law, the Tribe retained aboriginal rights in the submerged lands and related waters in the Main Stem. Thus, the Tribe's sustenance hunting and trapping rights and related authorities within the Penobscot Indian Reservation remain in and on the submerged lands and related waters of the Main Stem, bank-to-bank.

The conclusion that these Penobscot rights and authorities are in and on the submerged lands and waters of the Main Stem is all the more compelling because, at the time of the land claims settlement, the Penobscot Nation, unlike the Metlakahtla Indians, had an existing reservation—its aboriginal territory imbedded in the Penobscot River—the very source of its creation story. And Congress confirmed these *specific* hunting and trapping rights and authorities as "retained," "inherent," "sovereign" powers within that aboriginal territory, which the Tribe never surrendered in its suspect treaties with Massachusetts and Maine. This conclusion is further bolstered by ordinary principles of statutory construction that require courts to give meaning to all the provisions of a statute, to construe

statutory terms in light of the statute as a whole, and to consistently construe statutory terms.

To the extent that there is a justiciable controversy warranting a declaratory judgment with respect to the boundaries of the Penobscot Indian Reservation in general, the Court should conclude, consistent with the outcome mandated by *Alaska Pacific Fisheries*, that those boundaries encompass the Main Stem, bank to bank, ending at the uplands of the mainland on both sides of the River because under the treaty agreements, the Tribe ceded only the uplands on both sides of the River and retained aboriginal title to the submerged lands attending the islands, bank-to-bank, and for the related reasons set out in the opening brief of the United States, which the Tribe adopts.

* * *

Thus, the district court's decision should be reversed, and the Court should hold that the Penobscot Nation's exclusive authority over sustenance hunting, trapping, and other taking of wildlife by its tribal members within the Penobscot Indian Reservation and its exclusive authority to regulate the competing taking of wildlife by others in that reservation remain in and on the bed and waters of the Main Stem of the Penobscot River, bank-to-bank.

ARGUMENT

I. LEGAL STANDARDS

A. Cross Motions for Summary Judgment

This Court reviews *de novo* a grant or denial of summary judgment and is not married to the trial court's reasoning. *OneBeacon Am. Ins. Co. v. Commercial Union Assur. Co. of Canada*, 684 F.3d 237, 241 (1st Cir. 2012). The Court must determine, based on undisputed facts, whether either party deserves judgment as a matter of law. *Id.*

B. Interpretation of Treaties, Treaty Substitutes, and Federal Statutes Affecting Indian Tribes

Although Congress ended formal treaty-making with Indian tribes in 1871 and thenceforth dealt with tribes through statutory enactments, *see generally, United States v. Lara*, 541 U.S. 193, 201-02 (2004) (discussing history), "treaty substitutes," like the Settlement Acts – that is, "statutes ratifying agreements with the Indians" – are subject to the same interpretive principles as those governing bilateral treaties. *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975). *Accord United States v. Dion*, 476 U.S. 734, 745 n.8 (1986).

"The underlying question of treaty interpretation is a question of law, reviewed de novo." *Richard v. United States*, 677 F.3d 1141, 1144–45 (Fed. Cir.

2012) (citation and quotation omitted). The Ninth Circuit recently described the enduring rule of interpretation established by the Supreme Court:

> Chief Justice Marshall wrote in the third case of the Marshall Trilogy, "The language used in treaties with the Indians should never be construed to their prejudice." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832). "If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Id.*

United States v. Washington, 827 F.3d 836, 850 (9th Cir. 2016). Courts must "look beyond the written words to the larger context that frames the Treaty," including the history and negotiations. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). *Accord Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675–76 (1979); *United States v. Winans*, 198 U.S. 371, 380 (1905); *Jones v. Meehan*, 175 U.S. 1, 11 (1899). In short, "[t]he canon of construction applied over a century and a half by [the Supreme] Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine*, 420 U.S. at 199. *Accord, Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (explaining the roots of the canon grounded in the federal trust responsibility to Indian tribes); *Narragansett Indian Tribe*, 19 F.3d at 702; *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993) (Posner, J.) (the

canon that treaties "are to be construed so far as is reasonable to do in favor of Indians" applies to federal statutes "as well.").

II. CONTRARY TO THE DISTRICT COURT'S DECISION, THE PENOBSCOT NATION'S RESERVATION SUSTENANCE HUNTING AND TRAPPING RIGHTS AND RELATED AUTHORITIES ARE IN THE WATERS AND BED OF THE MAIN STEM, BANK-TO-BANK.

In holding that the Tribe's reservation sustenance hunting and trapping rights and related authorities are limited to the upland surfaces of the islands in the Penobscot River, the district court failed to follow the controlling precedent of *Alaska Pacific Fisheries*, ignored the clearly expressed intent of Congress to preserve and protect the Tribe's aboriginal hunting and trapping rights from any interference by the State under venerable principles of federal Indian law, and ignored or failed to harmonize the sections of the statute intended to accomplish that objective.

A. The Supreme Court's Decision In *Alaska Pacific Fisheries* Is Controlling.

In *Alaska Pacific Fisheries*, 248 U.S. 78, the Supreme Court flatly rejected an assertion virtually identical to that made by the State Defendants and NPDES Permittees and adopted by the district court: that a reservation confirmed by Congress for the Metlakahtla Indians of Alaska described as "the body of lands known as Annette Islands" "embraces only the upland of the islands" and does not include, as well, "the adjacent waters and submerged land." *Id.* at 87. That action

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

The Court examined the purpose and circumstances surrounding the establishment of the reservation, in particular, the tribe's understanding:

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

Id. at 88-89 (emphasis added). The Court explained, "[t]his conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 89. The Court found further support from the post-treaty conduct of the Metlakahtlans, the Secretary of Interior, and the State of

Alaska, showing that they viewed the reservation as including "the adjacent fishing grounds as well as the upland." *Id*. at 89-90.

Alaska Pacific Fisheries is directly on point and warrants reversal of the district court's decision that the boundaries of the Penobscot Indian Reservation are confined to island surfaces, but especially, and more particularly, its decision that the Tribe's reservation sustenance hunting and trapping rights and related authorities are confined there.[13]

Congress is deemed to know the Supreme Court's jurisprudence governing its enactments affecting Indian tribes. *See Fellencer*, 164 F.3d at 712; *Akins v.*

[13] The Nation's Second Amended Complaint is narrowly drawn to address the only live controversy: that arising out of the Maine Attorney General's August 8, 2012 opinion to Defendant's Woodcock and Wilkinson, and his related letter to Penobscot Chief Kirk Francis, announcing the position on "the jurisdictional issue [over hunting, trapping, and fishing on the Main Stem] for state and tribal game wardens." Add.115. The State Defendants and NPDES Permittees have asserted generalized counterclaims for declaratory judgments that the Tribe's reservation is confined to island surfaces in every context. Absent any other live controversy, such generalized claims are non-justiciable. *See Pub. Serv. Comm'n v. Wycoff Co. Inc.*, 344 U.S. 237, 244 (1952) (discussing necessity for specific controversy to ground claims for declaratory judgments); *Cty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir. 2004) (rejecting bank's claim for declaratory judgment on reservation boundaries without specific controversy). If reached, the SDs' and NPDES Permittees' claims fail on the merits: those boundaries are in the Main Stem, bank-to-bank, just as the Tribe's sustenance fishing, hunting and trapping rights and related authorities. The Tribe separately adopts the principal brief of the United States regarding its reservation boundaries with the caveat that the Tribe's "ownership" is that of aboriginal title. *See infra* note 17 (explaining the Tribe's position that it retains aboriginal title to the submerged lands of the Main Stem).

Penobscot Nation, 130 F.3d 482, 489 (1st Cir. 1997). Thus, *Alaska Pacific Fisheries* informs Congress's understanding in confirming the Tribe's sustenance hunting and trapping rights and related authorities (not just its fishing rights) while describing the reservation as

> the islands in the Penobscot River *reserved to the Penobscot Nation by agreement* with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818.

30 M.R.S.A. §6203(8), *ratified by* MICSA §1722(i). By referring to the islands reserved to the Nation "*by agreement*" in the Tribe's 1818 treaty with Massachusetts, Congress had to have intended to confirm the treaty understanding of those islands, in particular, how the Penobscots "naturally looked" upon their sustenance fishing, hunting and trapping grounds in the River "as part of the islands" in the context of those treaties and thereafter. Indeed, the MIA definition directly references the treaty agreement date of June 29, 1818 and uses both "Old Town Island," the treaty's description, and "Indian Island," the more contemporary description to set the reservation's southern boundary.[14]

[14] The district court erroneously construed the definition of the reservation as "islands in the Penobscot River . . . consisting solely of Indian Island and all islands in that river northward thereof," reading the phrase "reserved to the Penobscot Nation by [treaty] agreement with the States of Massachusetts and Maine" right out of the definition. That phrase must be given meaning or it would be rendered redundant in violation basic principles of statutory construction. *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985).

1. The Tribe's Reasonable Understanding of The Islands Reserved To It By the Treaty Agreement, Coupled With Congress's Understanding Of Its Riverine Existence, Controls.

The governing interpretive principle in this setting is straight forward: it is necessary to "look beyond the written words to the larger context that frames the Treaty. . . . [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." *Mille Lacs Band*, 526 U.S. at 196 (citations and quotations omitted); *Alaska Pacific Fisheries*, 248 U.S. at 88-89. The record evidence establishes that the Tribe reasonably understood the concept of islands in its 1818 treaty agreement with Massachusetts (to which Maine acceded in the 1820 treaty) as including the intervening and surrounding waters and bed of the River, bank-to-bank, in order to carry out its sustenance hunting, trapping, and fishing practices and related cultural ways. App.98-101; ECF105-88 at 3775-3812. Thus, the Penobscots "naturally looked on" those waters and beds "as part of the islands." *Alaska Pacific Fisheries*, 248 U.S. at 89. As of 1980, Penobscots, including the Nation's representatives to the land claims settlement, held exactly the same view of their existing reservation. *See, e.g.*, App. at 107¶8; *supra* at 5, 8-9,19 (summarizing

facts).[15] Thus, whether the "islands in the Penobscot River reserved to the Penobscot Nation by [the treaty] agreement[s] with . . . Massachusetts and Maine" are looked at from the perspective of the Penobscot treaty negotiators in 1818 and 1820 or from that of the Penobscot land claims settlement negotiators in 1980, the understanding was the same. And, in light of the Supreme Court's decision in *Alaska Pacific Fisheries*, the Tribe's understanding during both timeframes is not only reasonable, but controlling, *see Alaska Pacific Fisheries*, 248 U.S. at 89-90. For the words "islands in the Penobscot River reserved to the Penobscot Nation by [the treaty] agreement" being "susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, . . . should be considered as used only in the latter sense." *Worcester*, 31 U.S. at 582.

Furthermore, Congress had a very clear understanding of this setting. Indeed, it knew at the time of the land claims settlement that the Penobscots were a "riverine" Tribe with aboriginal territory centered in the Penobscot River. *See* S.REP., 11; H.R.REP., 11. For more than a century following its suspect treaties, the Tribe had maintained this riverine existence in an "existing reservation," a

[15] The district court rejected the views of Penobscot negotiator, Reuben Phillips characterizing it as offered "to supplement . . . MIA legislative history." Order at 15 n.17. But MIA embodied a *settlement agreement*, *see supra* at 11-16 (describing the settlement), and the Tribe's understanding of the terms of that settlement is as important, if not more so, than "legislative history" unilaterally compiled by representatives of the State.

"known geographical area," from Indian Island northward, relying upon the waters and submerged lands to hunt, trap, and fish for subsistence without any bridge connecting it to the mainland. Finally, as in *Alaska Pacific Fisheries*, "further support" is found in the facts that "from the time of its enactment [MICSA] has been treated," not only by the Penobscots, but by the Secretary of the Interior and (until relatively recently) the Maine Attorney General "as reserving the adjacent fishing grounds as well as the upland." *Alaska Pacific Fisheries*, 248 U.S. at 90. The record is replete with that evidence, *see supra* at 19-22, and for the Penobscots their fishing grounds and their hunting and trapping grounds are the same. *See, e.g.*, App. at 107-08,110.

Thus, in accord with *Alaska Pacific Fisheries* not only is the Penobscot Nation's reservation sustenance fishing right and related authority within the waters and submerged lands of the Main Stem, bank-to-bank, but, contrary to the district court's decision, so too are the Nation's reservation sustenance hunting and trapping rights and related authorities.

2. Even Giving Prominence To The Commonwealth's View Of The Treaty Agreement, The Outcome Under *Alaska Pacific Fisheries* Is The Same.

Even if the Court looked to the views of Massachusetts treaty representatives rather than "giv[ing] effect to" the treaty agreements "as the Indians themselves would have understood them," the governing law informing the Commonwealth's

understanding (and that of Maine as its treaty successor) leads to the same conclusion.

First, treaties are agreements between sovereigns, *see Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 358 (7th Cir. 1983) (citing *Jones*, 175 U.S. 1 and *Worcester*, 31 U.S. at 582, and Massachusetts common law adopts the established rule that a granting sovereign (the Penobscot Nation) "retains the river within its own domain" and the receiving sovereign (Massachusetts) receives land extending only to the low water edge of the river adjacent to the land granted, not to the thread of the river. *Handly's Lessee v. Anthony*, 18 U.S. 374, 379 (1820) (cited with approval in *City of Boston v. Richardson*, 95 Mass. 146, 156-57 (1866) and *Lincoln v. Wilder*, 29 Me. 169, 179 (1848)). Thus, by the terms of the 1818 treaty, the Tribe retained the submerged lands of the Main Stem, bank-to-bank, at least for its continued use and occupation for sustenance hunting and trapping, as well as fishing.

Second, even if Massachusetts understood the treaty transaction to involve the Tribe as a private landowner, the Tribe, as the holder of land on both sides of the River above the head of the tides, would have owned the attending bed, bank-to-bank, *see Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207, 211; 77 A. 787, 790 (1910); *Storer v. Freeman*, 6 Mass. 435, 438 (1810). And the treaty (even if viewed by Massachusetts as a private deed) would have left the bed of the River to

the Tribe because the grant is from the "sides" of the River. *See Bradford v. Cressey*, 45 Me. 9, 13 (1858) (monument identified as "side" of river in grant of lands excludes submerged lands). At the very least, this would have secured the Tribe's continued use and occupation of the submerged lands and related waters for sustenance hunting and trapping in addition to fishing.

Third, the record evidence shows that the Commonwealth negotiated the 1796 and 1818 treaties with the understanding that it was extinguishing the Tribe's aboriginal title to the uplands on either side of the River by means of treaty cessions. *See* App. at 97-101.[16] Under long-established law, such cessions are grants *from* the Indians to Massachusetts, not vice versa, thereby leaving to the Penobscot Nation (along with its islands) that which it did not expressly cede in the treaties: its continued use and occupation of the River. *See, e.g.*, *Fishing Vessel Ass'n*, 443 U.S. at 678, 680–81; *Winans*, 198 U.S. at 381; *United States v. Adair*, 723 F.2d 1394, 1412–13 (9th Cir. 1983) (citing cases). Massachusetts representatives approaching the treaties in this light would be deemed to have understood the law and it would inform their understanding of what the Tribe

[16] The district court excluded the opinions of experts to the extent they amounted to legal conclusions, Order at 20,n.20, but did not explain what portions of those opinions it thought fit that description. Dr. Prins addresses the intent of Massachusetts to extinguish the Tribe's aboriginal title. Add.99-100; ECF105-88 at 3746-3812. This is relevant to discern the state of mind of Massachusetts representatives, their understanding of the treaty agreement at issue; it is not offered as a legal opinion.

retained with their islands in the treaty agreements: its continuing use and occupation of (aboriginal title to) the submerged lands and related waters of the Main Stem, bank-to-bank, at least for all of its sustenance hunting, fishing, and trapping needs.[17]

In short, even adopting the view of Massachusetts treaty representatives and completely ignoring how the Tribe understood the treaty terms, the "islands reserved to the Penobscot Nation by" the treaty included the submerged lands and related waters of the Main Stem, bank-to-bank.[18]

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[17] Were the boundaries of the Penobscot Reservation at issue for all purposes, the record firmly supports a holding that the Tribe retains, at a minimum, aboriginal title to the islands and submerged lands of the Main Stem, bank-to-bank, based on (a) its longstanding use and occupation of the River above the head of the tides, *see id.*; (b) apart from granting an easement for passage, its cession of only the uplands on both sides of the River in the 1796, 1818, and 1820 treaties, *see* Add.91-96; and (c) the lack of any express extinguishment by Congress of the Tribe's continuing use and occupation ("aboriginal title") of the Main Stem. *See County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 233-35 (1985) (discussing aboriginal title); *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 502-505 (W.D.N.Y. 2002) (same), *aff'd*, 382 F.3d 245 (2d Cir. 2004). While retained aboriginal title to the Main Stem is a right to continued use and occupation, and thus is not identical to ownership, until properly extinguished, it is "as sacred as the fee simple of the whites." *Oneida*, 470 U.S. at 235.

[18] Maine's representatives to the land claims settlement, moreover, opined that the Tribe's reservation boundaries "include any riparian . . . rights expressly reserved in the original treaties with Massachusetts or by operation of State law." P.D.264 at 3971. Thus, they essentially adopted the views of the Massachusetts treaty makers recounted above, and as the United States explains in its principal brief, they conceded, in accordance with State law, that the Tribe at least holds riparian ownership of the bed of the River from the shores of its islands to the thread.

B. Congress's Promise That the Tribe's Reservation Hunting And Trapping Rights And Related Authorities Are "Retained," "Inherent," And "Sovereign" Powers Confirms Them Within The Tribe's "Aboriginal Territory," Which It Never Ceded In Its Suspect Treaties With Massachusetts And Maine.

The Penobscot Nation's claim to its reserved hunting and trapping rights and related authorities in the waters and bed surrounding its Main Stem islands is even stronger than that for the Metlakahtla Indians in *Alaska Pacific Fisheries*. This is because (a) unlike the Metlakahtlans, whose reservation Congress set aside anew in 1891, at the time of MICSA in 1980, the Penobscots had a pre-existing reservation, described by Congress as its "aboriginal territory," which the Tribe had retained (i.e. never ceded) in its suspect treaties with Massachusetts and Maine and within which it had always engaged in sustenance hunting, trapping, and fishing – indeed, from which it derived its cultural identity, (b) Congress specifically addressed the Tribe's reservation sustenance hunting and trapping rights and related authorities as "Special Issues," and confirmed them as "retained," "inherent," and "sovereign" powers and, therefore, protected "under federal Indian common law doctrines"; and (c) under blackletter principles of federal Indian law, within their retained aboriginal territories, Indian tribes have inherent sovereign authority to enact and enforce laws to exclusively regulate all hunting and trapping.

Over the course of our nation's history, many Indian tribes were removed from their aboriginal homelands onto reservations set aside for them by the federal government, but some remained within their original territories. For example, Congress established the Annette Islands as a reservation for the Metlakahtla Indians in 1891, but those islands were not the tribe's aboriginal territory. *See Alaska Pacific Fishery*, 248 U.S. at 86-88. By contrast, at the time of the land claims settlement, the Penobscot Nation had an existing reservation, the one that it had occupied well before it ceded what Congress referred to as its "aboriginal territory," S.REP., 12; H.R.REP., 12, on both sides of the River in the questionable 1796, 1818, and 1820 treaties. Indeed, Congress said that the Penobscots' pre-existing "aboriginal territory" was "centered on the Penobscot River," S.REP., 11; H.R.REP., 11, and by the plain terms of those suspect treaties, the Tribe ceded *only* the uplands on both sides of the River, not its continued use and occupation ("aboriginal title") to the submerged lands and related waters of Main Stem, which it needed in order to survive through hunting, trapping, and other taking of wildlife. *See* Add.91,93-94,100-103. As the Supreme Court has explained, a treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *See Winans*, 198 U.S. at 381. *Accord Fishing Vessel Ass'n*, 443 U.S. at 678, 680–81; *United States v. Wheeler*, 435 U.S. 313, 327,n. 24 (1978). And the land claims litigation focused on recovering aboriginal

territory that the Tribe *had given up* in the suspect treaties, not what the Tribe had retained. *See Johnson*, 498 F.3d at 47 & n. 11.

At the time of the settlement, all parties agreed, and, indeed, Congress confirmed, that by virtue of *Bottomly* and *Dana* the Nation exercised inherent sovereign authority under established principles of federal Indian law within its "existing reservation." Thus, this reservation had the status of "Indian country," *see Dana*, 404 A.2d at 557-62, within which the Tribe had authority to exercise its inherent sovereignty, *Bottomly*, 599 F.2d at 1065-66. Under black letter principles of federal Indian law, this inherent sovereignty includes exclusive regulatory authority, and related enforcement authority, over all hunting, trapping, and fishing, whether carried out by tribal members or non-tribal members. *See, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331, 337 (1983) (citing *Montana v. United States*, 450 U.S. 544, 557 (1981) (a Tribe may "prohibit nonmembers from [reservation] hunting or fishing ... [or] condition their entry by charging a fee or establish bag and creel limits")); *Reich*, 4 F.3d at 494 (the inherent sovereignty of Indian tribes includes regulatory authority over hunting and wildlife resources "with respect to both Indians and non-Indians") (citing cases). Under that same law, a state generally has no power to interfere with an Indian tribe's exercise of those (and other) inherent sovereign authorities. *See Mescalero Apache Tribe*, 462 U.S. at 338 (rejecting state's assertion of concurrent authority

over nonmember hunting on tribe's reservation because "[t]he State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources," leaving the tribe's "authority over the reservation . . . at the sufferance of the State").[19] And under that same law, unless expressly surrendered by a valid treaty or abrogated by Congress in the clearest terms, Indian tribes retain their aboriginal territories, together with their inherent sovereign power to govern them. *See Dion*, 476 U.S. at 738; *Fishing Vessel Ass'n*, 443 U.S. at 678, 680–81; *Winans*, 198 U.S. at 381; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995); *United States v. Mich.*, 471 F. Supp. 192, 254-57 (W.D. Mich. 1979), *aff'd*, 653 F.2d 277, 279-80 (6th Cir. 1981).

By the terms of the jurisdiction agreement set out in MIA, the Tribe agreed to give up a large measure of its inherent sovereign authority within its existing reservation to Maine, but with notable exceptions, one of which was its authority to regulate hunting, trapping, and "to a certain extent fishing" (to use Attorney General Cohen's words) within its existing reservation. ECF109-8 at 5708. Nevertheless, in the course of its deliberations on whether to ratify MIA, Congress addressed concerns that these tribal powers might be "lost." Congress responded

[19] The Supreme Court has found that states may have some authority to regulate tribes' reservation hunting and fishing rights if tribes' exploitation of fish and wildlife resources could have a detrimental effect upon off-reservation resources. *Fishing Vessel Ass'n*, 443 U.S. at 683–84.

that these concerns were unfounded because it was confirming these powers as "expressly *retained* sovereign activities." S.REP. 14-15; H.R.REP. 14-15. Employing the language of federal Indian law articulated in *Bottomly* and *Dana*, Congress provided this assurance in "**Paragraph 7**" of the section addressing "Special Issues" in its identical final committee reports. S.REP. at 15 ("the hunting and fishing provisions discussed in [P]aragraph 7 below" are "examples of expressly retained sovereign activities); H.R.REP. at 15 (same). In that Paragraph Congress explained the provisions at issue in this case:

> *Prior to the settlement, . . . the State of Maine claimed the right to alter or terminate* [the Tribe's reservation sustenance hunting and fishing] rights at any time. Under Title 30, Sec. 6207 as established by the Maine Implementing Act, . . . *the Penobscot Nation [has] the permanent right to control hunting and fishing . . . within [its] reservation. The power of the State of Maine to alter such rights without the consent of the . . . [N]ation is ended* . . . [and] the State has only a residual right to prevent the . . . [T]ribe from exercising [its] hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters[,] not unlike that which other states have been found to have in connection with *federal Indian treaty hunting and fishing rights*.

S.REP. at 16-17 (emphasis added); H.R.REP. at 16-17 (same).

This Court has said that Paragraph 7 describes "important sovereignty rights *retained* by the Nation." *Fellencer*, 164 F.3d at 712 (emphasis added). By describing these specific sovereign powers as "retained" at the time of the land claims settlement, it is self-evident that Congress confirmed them as *pre-existing* inherent sovereign powers in accordance with the federal Indian law doctrines just

described. *See, e.g.*, *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 57 (1st Cir. 2007) (in enacting MICSA, Congress restored the Tribe's "sovereign powers" in accordance with "*Bottomly*'s holding regarding inherent sovereignty"); *Fellencer*, 164 F.3d at 708 ("until Congress acts, the tribes retain their sovereign powers") (quoting and citing *Bottomly*, 599 F.2d at 1066)).

At the time of the settlement, the Tribe could only have "retained" such pre-existing inherent sovereign powers in one place: within the "aboriginal territory" that Congress said was "centered on the Penobscot River," territory which the Nation never ceded, and, therefore, retained after those suspect treaties. *See Dion*, 476 U.S. at 738 ("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.") (citations omitted). Indeed, Congress explained that "the Penobscot Nation will *retain* as [its] reservation[] those lands and natural resources which were reserved to [it] in the treaties with Massachusetts." S.REP., 18. And this Court has said that the question of whether the boundaries of the Penobscot Indian Reservation include the waters of the River turns on whether those waters were "*retained* by the tribe[] . . . based on earlier [treaty] agreements between the tribe[] and Massachusetts and Maine." *Johnson*, 498 F.3d at 47 (emphasis in original). With respect to the Tribe's retained, inherent sovereign power over fishing,

hunting, trapping and other taking of wildlife set out in Paragraph 7, these descriptions of the Penobscot Indian reservation make perfect sense. The Tribe did not surrender these inherent sovereign powers within its retained aboriginal territory on the Penobscot River in its suspect treaties with Massachusetts and Maine. And Congress did not expressly abrogate them in MICSA. On the contrary, Congress assured the Tribe that these retained sovereign powers allowed the Tribe to control its sustenance resource base without interference by Maine, and were this not the case, the Tribe's ability to continue its sustenance practices and related culture would be in jeopardy.

In sum, in accord with governing principles of federal Indian law, because the Penobscot Nation never ceded its continued occupation and use of the waters and bed of the Penobscot River attending its Main Stem islands for hunting, trapping, and other taking of wildlife, it retained its inherent sovereign powers over all such activities within that reservation. Not only did Congress fail to expressly abrogate that aspect of the Tribe's existing reservation, it expressly confirmed it in a promise meant to quell tribal concerns.

Importantly, Congress has the power to restore the Nation's sovereign powers within its aboriginal territory even if they were previously lost. *See Lara*, 541 U.S. 193 (confirming Congress's authority to recognize, by statute, tribes' inherent sovereign authority to prosecute non-member Indians within their

territories after Supreme Court held that such authority had been divested). The record evidence submitted to the district court establishes that the Tribe retains aboriginal title to the submerged lands of the Main Stem, bank-to-bank. *See supra* note 17. But the Tribe need not *prove* that it holds aboriginal title to those submerged lands in order to establish that its sustenance hunting and trapping rights and related authorities are retained there and in the related waters. Congress has done so in the very manner the Supreme Court concluded it could in *Lara*. By confirming these rights and authorities as the "expressly retained" sovereign powers of the Tribe attending its "aboriginal territory" on the Penobscot River, Congress confirmed them in and on the submerged lands and related waters of the Main Stem, bank-to-bank.

C. Even If *Alaska Pacific Fisheries* Did Not Control And The Indian Law Canons Did Not Operate In This Case, The Tribe's Reservation Sustenance Hunting And Trapping Rights And Related Authorities Must Be In The Waters And Bed Of The Main Stem.

1. The District Court's "Plain Meaning" Rationale Is Erroneous

Ignoring the incorporation of the treaty agreements in the definition of the Penobscot Indian Reservation, the district court disposed of the question of the location of the Nation's reservation sustenance hunting and trapping rights and related authorities by resting on a "plain language" interpretation of the rest of the definition. In so doing, it pointed to Congress's definition in MICSA, which

provides that the "Penobscot Indian Reservation" means the "lands" defined in MIA. Order at 54-55. In employing such simplistic reasoning, the district court committed multiple errors.

First, such a reading renders meaningless the central provisions at issue, which clearly confirm the Tribe's jurisdiction, as well as that of MITSC, in "waters" even though those provisions address jurisdiction within the "Penobscot Indian Reservation" or "Penobscot Indian Territory," the definitions of which refer only to "lands." Subsection 6207(1) of MIA provides that subject to certain residual authority granted to the Commissioner of IFW in section 6207(6),

> the Penobscot Nation . . . shall have exclusive authority within [its] Indian territor[y] [which, by definition, includes the Penobscot Indian Reservation] to promulgate and enact ordinances regulating [h]unting, trapping or other taking of wildlife [and that] such ordinances may include special provisions for the sustenance of the individual members of . . . the Penobscot Nation.

Add.74. Subsection 6207(3) provides that subject to the same residual authority, "the [MITSC] shall have exclusive authority to promulgate fishing rules or regulations on . . . *[a]ny section of a river or stream* both sides of which are within Indian territory." *Id*. (emphasis added). Subsection 6207(6), in turn, provides that the Commissioner of IFW can take certain administrative actions if a Penobscot or MITSC regulation threatens to adversely affect fish or wildlife stock "on lands or waters outside the boundaries of land or *waters subject to regulation by* the [MITSC] . . . or *the Penobscot Nation*." Add.76-77 (emphasis added). By

confirming the Nation's (and MITSC's) jurisdiction over "waters" within the Penobscot Indian Reservation and, more broadly, within its Indian territory, both of which are defined as "lands," *see* Add.80, Congress clearly *did not* intend the definitional provisions referring to "lands" to exclude related waters. The most rudimentary canon of statutory construction (quite apart from the Indian law context) requires that "[a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." *E.g.*, *Ven-Fuel, Inc.*, 758 F.2d at 751-52. The district court's plain meaning ruling violated this canon.[20]

Second, just like its sustenance fishing practices, the Tribe's sustenance hunting, trapping, and other taking of wildlife practices take place in and on the waters and bed of the River attending the Tribe's islands, bank-to-bank. *See* Add.98-99,109; *supra* at 4 (identifying other record facts). To constrain the

[20] The district court supported its "island surfaces" only view of the reservation to avoid reading "solely" out of the definition of the reservation. Order at 55. As the United States explains, "solely" was used to draw a distinction between those islands existing in 1818 and those subsequently formed as a result of dam inundations after the 1818 treaty. The word also would delineate the Tribe's known island communities (from Indian Island northward) from Marsh Island to the west of Indian Island. *See* ECF105-88 at 3787-88 (quoting Massachusetts's resolve to restore the Tribe's fishing privileges in the Main Stem attending Indian Island "except Marsh's Island"). *See also* Add.106 (map showing Indian Island and Marsh Island).

Tribe's sustenance hunting and trapping practices to the uplands of the islands would render them essentially meaningless, leaving tribal members waiting for the stray turtle, waterfowl, eel, muskrat, freshwater clam or other subsistence species to find its way up onto an island surface. Such an interpretation would therefore cut off the Tribe from any reliable subsistence food source from the River. That was not the intent of any party to the settlement, all of whom agreed that the hunting and trapping provisions of the settlement (just like the fishing provisions) would "protect" the Tribe's "traditional Indian practices" of sustenance hunting, trapping, and other taking of wildlife, practices which indisputably take place in and on the River.

Third, all parties to the land claims settlement (tribal, state, and federal) understood and agreed that these very reservation sustenance hunting and trapping rights and related authorities secured the Tribe's cultural practices (or "traditional Indian practices"). *See supra* note 7. Indeed, Congress, acting as the Tribe's trustee, promised that the Tribe's exercise of governmental authority would allow it to protect against threats to its cultural practices by "outside entities." S.REP., 17; H.R.REP., 17. This would be an empty promise if the Tribe's sustenance hunting and trapping rights and related authorities did not encompass the water and beds of the River attending the islands in the Main Stem. For the Tribe's sustenance practices in and on the River are inseparable from its cultural practices;

they are one and the same. *See* Add.98-99; ECF105-88 at 3737-46. Severing them from the River and confining them to island services would be the death knell to Penobscot culture and would leave the Tribe's ability to engage in those practices at the mercy of "outside entities": the State and non-tribal members, acting pursuant to state law to hunt, trap, and take the river-based resources upon which these practices depend.

In *King v. Burwell*, 135 S. Ct. 2480 (2015), the Supreme Court held that the provision of the Patient Protection and Affordable Care Act, allowing tax credits for taxpayers enrolled in "an Exchange established by the State" was ambiguous because, if given its "plain meaning," there would be no similar credits available for taxpayers enrolled in Federal Exchanges, which the Act anticipated to operate as alternatives to, but in the same manner as, the exchanges established by states. *See id.* at 2489. The Court explained that while the phrase "established by the State" "may seem plain when viewed in isolation, such a reading turns out to be untenable in light of the statute as a whole." *Id.* at 2495 (quotations and citation omitted). So too here, the district court's relegation of the Tribe's reservation sustenance hunting and trapping rights and related authorities to the uplands of islands under a "plain meaning" reading of the definition of that reservation is untenable in light of the statute as a whole. It is also untenable in light of the realities on the ground: the Tribe's sustenance practices and culture mean nothing

if not exercised in the intervening and surrounding waters and submerged lands of the River. *See Reich*, 4 F.3d at 493-94 (resolving extrinsic ambiguity in favor or tribal interests in regulating wildlife resources).

In sum, the district court's simplistic conclusion that the Tribe's reservation sustenance hunting and trapping rights and related authorities must be confined to the uplands of its islands in the Main Stem under a plain language interpretation of the definition of the Penobscot Indian Reservation is wrong. Those rights and related authorities must be in the waters and beds of the River attending the islands because they cannot be meaningfully practiced anywhere else.[21]

2. Context Indicates That The Tribe's Reservation Sustenance Hunting And Trapping Rights And Related Authorities Are In The Waters And Bed Of The Main Stem.

Even if the "plain language" of the definition of the Penobscot Indian Reservation were as difficult a hurdle as the district court perceived it to be, the "context" that the court found "indicated otherwise" to allow it to clear that hurdle

[21] The district court found support for its view that the Nation's reservation is "land only" in a 1988 amendment to the definition, which provided that lands acquired as compensation for flowage of islands by a dam could would become part of the reservation. Order at 55 n.42. The court reasoned that if the definition "was intended to include the waters of the Main Stem, flowage would not result in the loss of designated reservation space." *Id.* Such reasoning fails appreciate the "designated reservation space" includes islands *qua* islands, where the Tribe maintains its dwellings. Just because the Tribe's loss of an island requires substitute *land* does not mean that the agreed upon "designated reservation space" could not be the islands and the attending waters and submerged lands within which the Tribe would exercise a subsistence way of life.

and find that the Tribe's sustenance fishing rights (and exclusive authority to govern those rights) must be in the entirety of the Main Stem is identical for its sustenance hunting and trapping rights and related authorities.

As in the case of fish, the muskrat, turtle, waterfowl, freshwater clams and other species upon which the Tribe relies for its sustenance are found in the waters and submerged lands of the River. *See supra* at 4. While the SDs point out that some of these animals may "venture onto the islands," ECF141 at 7986¶6, that is hardly a basis for meaningfully distinguishing between the Tribe's sustenance fishing right and its sustenance hunting and trapping rights. Leaving tribal members to rely on the happenstance of such ventures and turning full authority over to the State to govern the exploitation of the river-dwelling animals before they happen to stray onto an island deprives the Tribe of any meaningful ability to govern its sustenance resource base and its related cultural practices, contrary to the parties' understanding that the provisions at issue would protect the Tribe's "traditional Indian practice," whether they be fishing or hunting and trapping. Indeed, the most relevant "context" underlying Congress's confirmation of the Tribe's sustenance hunting and trapping rights and related authorities is identical to that underlying the Tribe's sustenance fishing rights and related authorities: (a) the Tribe's understanding of the islands reserved to it by the suspect treaties, (b) Congress's assurances in Paragraph 7, and (c) the parties' common recognition

that the Tribe would retain federal Indian law powers within its existing reservation for hunting and trapping and "to a limited extent," fishing.

Further, the Tribe's sustenance hunting and trapping rights and related authorities and its sustenance fishing rights and related authority are secured in the same "reservation," and both are addressed in the same section §6207 of MIA.[22] A well-established canon of statutory construction, even outside of the special Indian law context, requires that "similar language contained within the same section of a statute must be accorded a consistent meaning." *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998).

In short, even adopting the district court's rationale, "the context" in which the parties agreed to, and Congress confirmed, the Tribe's reservation sustenance hunting and trapping rights and related authorities—a context that is identical in every respect to the Tribe's reservation sustenance fishing rights and related authority—indicates that the Tribe's reservation sustenance hunting and trapping rights are in the waters and submerged lands of the Main stem, bank-to-bank.

[22] The only difference is immaterial: §6207(1)(B) addresses Indian territory, both the reservation and the newly acquired territory, and §6207(4) addresses the reservation, alone. Only the reservation location is at issue, and both provisions refer to the same "reservation."

CONCLUSION

For all of the above reasons, the district court's decision that the Nation's reservation is confined to the surfaces of the Main Stem islands should be reversed. The Tribe respectfully asks this Court to hold that the Penobscot Indian Reservation within which the Tribe exercises exclusive authority to promulgate regulations governing its tribal members' sustenance hunting, trapping, and other taking of wildlife and the competing taking of wildlife by others pursuant to 30 M.R.S.A. §6207(1) and exclusive authority to enforce those regulations pursuant to 30 M.R.S.A. §6210(1) encompasses the entirety of Main Stem of the Penobscot River, bank-to-bank.

Respectfully submitted this 17th day of October, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using serifs in Times New Roman 14 point font.

Dated: October 17, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2016 I electronically filed the foregoing Preliminary Principal Brief for the Penobscot Nation with a corrected caption together with the Addendum with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system and that all participants in this case were served through that system.

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION et al., Plaintiffs,	)	
v.	)	**Civil No. 1:12-cv-254-GZS**
JANET T. MILLS, Attorney General for the State of Maine, et al., Defendants,	)	

JUDGMENT

In accordance with the Order on Cross-Motions for Summary Judgment and the Order on the Pending Motions of State Intervenors entered on December 16, 2015 by U.S. District Judge George Z. Singal, Declaratory Judgment is entered as follows:

(1) In favor of the State Defendants to the extent that the Court hereby declares that the Penobscot Indian Reservation as defined in MIA, 30 M.R.S.A. § 6203(8), and MICSA, 25 U.S.C. § 1722(i), includes the islands of the Main Stem, but not the waters of the Main Stem; and

(2) In favor of the Penobscot Nation and the United States to the extent that the Court hereby declares that the sustenance fishing rights provided in section 30 M.R.S.A. § 6207(4) allows the Penobscot Nation to take fish for individual sustenance in the entirety of the Main Stem section of the Penobscot River.

CHRISTA K. BERRY
CLERK

By: /s/Lindsey Caron
Deputy Clerk

Dated: December 16, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket no. 1:12-cv-254-GZS
	)	
JANET T. MILLS, Attorney General for the State of Maine, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the Court are three motions for summary judgment: (1) the State Defendants' Motion for Summary Judgment, or in the Alternative, for Dismissal for Failure to Join Indispensable Parties (ECF No. 117), (2) the United States' Motion for Summary Judgment (ECF No. 120) and (3) the Motion for Summary Judgment by Plaintiff Penobscot Nation (ECF No. 121/128-1). As explained herein,[1] the Court GRANTS IN PART AND DENIES IN PART each Motion.

I. LEGAL STANDARD

Generally, a party is entitled to summary judgment if, on the record before the Court, it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for

[1] The Court notes that it is has additionally received and reviewed the Brief in Support of Plaintiffs' Motions for Summary Judgment (ECF No. 131-1) submitted by five members of the Congressional Native American Caucus acting as Amici Curiae.

summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. A "material fact" is one that has "the potential to affect the outcome of the suit under the applicable law." Nereida–Gonzalez v. Tirado–Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson, 477 U.S. at 248) (additional citation omitted).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the Court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. Santoni v. Potter, 369 F.3d 594, 598 (1st Cir. 2004).

Once the moving party has made this preliminary showing, the nonmoving party must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); see also Fed. R. Civ. P. 56(e). "Mere allegations, or conjecture unsupported in the record, are insufficient." Barros-Villahermosa v. United States, 642 F.3d 56, 58 (1st Cir. 2011) (quoting Rivera–Marcano v. Normeat Royal Dane Quality A/S, 998 F.2d 34, 37 (1st Cir. 1993)); see also Wilson v. Moulison N. Corp., 639 F.3d 1, 6 (1st Cir. 2011) ("A properly supported summary judgment motion cannot be defeated by conclusory allegations, improbable inferences, periphrastic circumlocutions, or rank speculation." (citations omitted)). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants

summary judgment to the moving party." In re Spigel, 260 F.3d 27, 31 (1st Cir. 2001) (quoting In re Ralar Distribs., Inc., 4 F.3d 62, 67 (1st Cir. 1993)).

Even when filed simultaneously, "[c]ross-motions for summary judgment require the district court to consider each motion separately, drawing all inferences in favor of each non-moving party in turn. AJC Int'l, Inc. v. Triple-S Propiedad, 790 F.3d 1, 3 (1st Cir. 2015) (internal quotations and citations omitted). In short, the above-described "standard is not affected by the presence of cross-motions for summary judgment." Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 34 (1st Cir. 2005) (citation omitted). "[T]he court must mull each motion separately, drawing inferences against each movant in turn." Cochran v. Quest Software, Inc., 328 F.3d 1, 6 (1st Cir. 2003) (citation omitted).

The Court notes that Local Rule 56 provides a detailed process by which the parties are to place before the Court the "material facts . . . as to which the moving party contends there is no genuine issue of material fact." D. Me. Loc. R. 56(b). Local Rule 56 calls for "separate, short, and concise" statements that may be readily admitted, denied or qualified by the opposing side. D. Me. Loc. R. 56(b)&(c). Additionally, the rule requires each statement to be followed by a "record citation . . . to a specific page or paragraph of identified record material supporting the assertion." D. Me. Loc. R. 56(f). "The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts." Id.; see also Fed. R. Civ. P. 56(e)(2) ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]").

In this Order, the Court has endeavored to construct the facts in accordance with the letter and spirit of Local Rule 56. Doing so has required the Court to review 479 separately numbered paragraphs, many of which were compound, complex, and supported with citation to voluminous records.[2] Additionally, many of the numbered paragraphs were immaterial and/or obviously disputed in the context of this litigation.[3] In short, in multiple instances, each of the movants has failed to comply with the letter and spirit of Local Rule 56, making construction of the undisputed material facts unnecessarily difficult. However, the parties have maintained—even after the briefing was complete—that this matter is amenable to resolution on the record submitted. (See 10/14/15 Transcript (ECF No. 156) at 5.) The Court concurs in that assessment.[4]

II. BACKGROUND[5]

On August 20, 2012, Plaintiff Penobscot Nation, which is a federally recognized American Indian tribe in Maine, filed this action seeking to resolve ongoing disputes between the tribe and the State of Maine regarding a section of the Penobscot River. This Court allowed the United

[2] In one measure of the complications created by the parties' dueling statements of material facts: There were a total of 713 responses (261 qualifications, 162 denials, and 290 instances of facts being admitted) to the 479 submitted statements of material facts. See generally Pls. Opposing Statement of Material Facts (ECF No. 140) ("Pls. Response SMF"), State Defs. Opposing Statement of Material Facts (ECF No. 141) ("Defs. Response SMF") & State Defs. Reply Statement of Material Facts (ECF No. 148).

[3] In other instances, the parties have attempted to support assertions of fact with citations to inadmissible materials. By way of example, the Court notes that factual assertions supported only by a citation to an unsworn expert report are hearsay and do not qualify as admissible evidence. See, e.g., Pls. SMF (ECF No. 119) ¶ 48 (citing only to the Expert Report of Pauleena MacDougall (ECF No. 110-37)); State Defs. SMF (ECF No. 118) ¶ 187 (citing only to the Expert Report of Harold Prins).

[4] The Court's decision to move forward with resolving the cross motions for summary judgment is based in part on the Court's conclusion that it may disregard as immaterial many factual disputes appearing in the record. Compare, e.g., Phillips Decl. (ECF No. 124) at PageID # 7504-05 & Hull Decl. (ECF No. 119-32) at PageID # 7335-36 with Paterson Decl. (ECF No. 141-1) at PageID # 8182.

[5] The citations used throughout this Order primarily reference the Joint Exhibits ("Jt. Ex."), which may be found on the docket at ECF Nos. 102-110, or the Public Document Exhibits ("P.D. Ex."), which were provided as a courtesy to the Court and may be found as indicated in the Declaration of Counsel (ECF No. 112) and the Public Documents Record Index (ECF No. 112-1).

States to intervene as a plaintiff on its own behalf and as a trustee for the Penobscot Nation. (See generally United States' Complaint (ECF No. 58).) The named State Defendants in this matter are: Janet T. Mills, the current Attorney General for the State of Maine; Chandler Woodcock, the Commissioner of the Maine Department of Inland Fisheries and Wildlife ("DIFW"); and Joel T. Wilkinson, Colonel of the Maine Warden Service. Additionally, the United States' Complaint directly names the State of Maine as a State Defendant.[6]

The Penobscot Nation asserts that it was prompted to file this case in response to the August 8, 2012 Opinion issued by then-Maine Attorney General William J. Schneider regarding "the respective regulatory jurisdiction of the . . . Penobscot Nation and the State of Maine relating to hunting and fishing on the main stem of the Penobscot River." (8/8/12 Ltr. from Atty. Gen. Schneider to Comm. Woodcock & Col. Wilkinson (ECF No. 8-2).) In relevant part, this Opinion concluded:

> [T]he Penobscot Nation has authority to regulate hunting and fishing on those islands [in the main stem] included in its Reservation from Indian Island in Old Town, northward to the confluence of the East and West branches in Medway. Like private landowners, the Penobscot Nation may also restrict access to their lands, here islands, as it sees fit. However, the River itself is not part of the Penobscot Nation's Reservation, and therefore is not subject to its regulatory authority or proprietary control. The Penobscot River is held in trust by the State for all Maine citizens, and State law, including statutes and regulations governing hunting, are fully applicable there. 30 M.R.S. § 6204. Accordingly, members of the public engaged in hunting, fishing or other recreational activities on the waters of the Penobscot River are subject to Maine law as they would be elsewhere in the State, and are not subject to any additional restrictions from the Penobscot Nation.
>
> To avoid friction on the Penobscot River, it is important that state and tribal officials, as well as members of the Penobscot Nation and the general public, have a clear understanding of the regulatory jurisdictions of the Penobscot Nation and the State of Maine. Both the State and the Penobscot Nation must encourage citizens to respond civilly to uniformed tribal and state game wardens performing their official duties. All citizens must heed and comply with ordinances promulgated by the

[6] References to "State Defendants" in this Order refer jointly to Mills, Woodcock and Chandler, in their respective official capacities, and the State of Maine to the extent it is appropriately named as a defendant.

> Penobscot Nation governing the islands it owns, as well as State laws and regulations covering the River.

Id. The Penobscot Nation and the United States (together, "Plaintiffs") maintain that this 2012 Attorney General Opinion reflects a misinterpretation of the law governing the boundaries of their reservation and their rights to engage in sustenance fishing.[7] Thus, Plaintiffs seek a declaratory judgment clarifying both those boundaries and tribal fishing rights within the Penobscot River. In responding to Plaintiffs' multi-part requests for declaratory relief, State Defendants have asserted their own claim for declaratory relief regarding these same issues. (See State Defs. Amended Answer (ECF No. 59) at 11-14 & State Defs. Mot. for Summ. J. (ECF No. 117) at 1, 30-31 n. 36.)

For purposes of this litigation, the parties agree that the "Main Stem" is a portion of the Penobscot River and stretches from Indian Island north to the confluence of the East and West Branches of the Penobscot River. (Stipulations (ECF No. 111) ¶¶ 3 & 4.) At present, the Main Stem is a non-tidal, navigable stretch of river that is approximately sixty miles long. (Id. & Penobscot Chem. Fibre Co., 30 F.P.C. 1465, 1466 (Dec. 9, 1963).) There are at least 146 islands located in the Main Stem. (Jt. Ex. 568 (ECF No. 108-68) at PageID # 5522; J. Banks. Decl. (ECF No. 140-1) ¶ 4.) These islands total between 4446 and 5000 acres. (Jt. Ex. 593 (ECF No. 108-93) at PageID # 5631; Jt. Ex. 568 (ECF No. 108-68) at PageID # 5522.) None of those islands contains a body of water in which fish live. (Barry Dana Decl. (ECF No 124-2) ¶ 12.) Within the Main Stem, there are stretches of river that contain no islands. (See, e.g., Jt. Exs. 301, 304, 309 & 310.) All told, the Main Stem islands, together with the bank-to-bank water surface of the Main Stem, cover approximately 13,760 acres. (State Defs. Ex. 8 (ECF No. 118-8) at PageID # 7090.)

[7] To the extent the pleadings and docket may reflect additional areas of dispute, the parties' briefings on the pending dispositive motions and representations at oral argument have winnowed the issues to be decided, as explained in the Discussion section of this Order. See *infra* III.

Before wading into the depths of the factual record the parties have placed before the Court, the Court first reviews the history of the key treaties and legislation that led to the present relationship between the State of Maine and the Penobscot Nation concerning the Main Stem.

A. Legislative Background of Penobscot Nation Land in Maine

In 1790, when Maine was still part of the Commonwealth of Massachusetts, Congress passed the Indian Nonintercourse Act ("ITIA"), 1 Stat. 137, which provided that "no sale of lands made by any Indians, or nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138.[8]

1. The 1796 and 1818 Treaties

Notwithstanding the language of ITIA, Massachusetts proceeded to negotiate two treaties with the Penobscot Nation that are relevant to the present case. The first treaty was negotiated in 1796 (the "1796 Treaty"). The subject of the 1796 Treaty was a six mile wide strip of land on each side of the Penobscot River stretching for thirty miles of the Main Stem. (Jt. Ex. 294 at PageID # 3858-59 (Transcription of 1796 Treaty).) After the execution of the 1796 Treaty, Massachusetts directed that the subject land be surveyed and laid out into townships and quarter townships, as follows:

> Whereas this Commonwealth in August one thousand, seven hundred and ninety six, obtained of the Penobscot tribe of Indians their relinquishment of their claims to the lands six miles wide on each side of Penobscot River, extending from Nicholas Rock,

[8] The Nonintercourse Act, as amended, remains in effect today. See 25 U.S.C. § 177; Oneida Indian Nation of N.Y. v. Oneida County, New York, 414 U.S. 661, 668 (1974) (ITIA "has remained the policy of the United States to this day"). However, it is not applicable to the Penobscot Nation as a result of express provisions of 25 U.S.C. § 1724(g), which establishes its own restraint on alienation of Penobscot Nation territory and provides specific exceptions. See id. § 1724(g)(2)-(3).

> so called, near the head of the tide in the said river, up the same river thirty miles, on a direct line, according to the general course thereof: and whereas … it is necessary to have a survey of said land, and information of the quality and situation there Resolved that Salem Town Esqr. be vested with full power to have all the said Lands surveyed and laid out into Townships as near the contents of six miles square as the land will admit, and also into quarters of Townships as soon as may be, according to his discretion, & a plan thereof returned to him with a true description of the quantity and situation of each Township, and quarter parts thereof, as also of the streams and waters therein and of the number of Settlers thereon, who may have settled prior to the first day of August one thousand, seven hundred and ninety six, with the number of acres each Settler has under improvement, and the particular time of his settlement.

(P.D. Ex.1 at 202-203.) Park Holland, John Maynard, and John Chamberlain were engaged by Salem Town to survey the Penobscot tract and created a map reflecting their survey. (Jt. Ex. (ECF No. 110-32) at Page ID # 6384.) The tract surveyed by Holland, Maynard, and Chamberlain, comprised of 189,426 acres, became known as the Old Indian Purchase.[9] (P.D. Ex. 21 at 209; Jt. Ex. 732 (Map 1).) After accounting for land sold, in 1817, Massachusetts asserted it was "still the proprietor of 161,815 ½ acres of land in the Old Indian Purchase."[10] (State Defs. Ex. 15 (ECF No. 118-15) at PageID # 7168.)

On June 29, 1818, Massachusetts entered into another treaty with the Penobscot Nation. In this "1818 Treaty," the Penobscot Nation ceded "all the lands [the Penobscot Nation possesses] on both sides of the Penobscot river, and the branches thereof, above the tract of thirty miles in length on both sides of said river, which said tribe [ceded in the 1796 Treaty]" but reserved four

[9] The nine surveyed townships became the Towns of Orono, Old Town, Argyle, Edinburg, Lagrange, Bradley, Milford, Greenbush, and Passadumkeag. P.D. Ex. 21 at 208-10; Jt. Ex. 757 (ECF No. 110-57) at PageID # 6587 Following Park Holland's 1797 survey, Massachusetts empowered Salem Town to advertise and sell the newly surveyed townships and quarter townships because it "was important to promote an early settlement of that part of the Country as well as to obtain a reasonable price for the said lands." P.D. Ex. 21 at 209. Between 1798 and 1810, Salem Town sold 27,610 ½ acres of land in the nine townships of the Old Indian Purchase. State Defs. Ex. 14 (ECF No. 118-14) at PageID # 7163-64 (discharging Salem Town from further service); State Defs. Ex. 15 (ECF No. 118-15) at PageID # 7168.

[10] Notably, in 1815, Massachusetts conveyed one of the townships on the west side of the Main Stem, now located in Argyle, to the trustees of the Maine Literary and Theological Institution (later named Waterville College), using the following description: "A Township of land numbered three on the West side of Penobscot River / being one of the Townships purchased of the Penobscot tribe of Indians . . . bounded as follows (viz) easterly by Penobscot River . . . ." Jt. Ex. 672 (ECF No. 109-72) at PageID # 5973-5794.

townships as well as "all the islands in the Penobscot river above Oldtown and including said Oldtown island." (P.D. Exs. 7 & 8 (1818 Treaty & Transcription of 1818 Treaty) at 45-46.) The 1818 Treaty also explicitly granted to the citizens of the Commonwealth of Massachusetts a right to "pass and repass" in any river, stream or pond that "runs through any of the lands hereby reserved [for the Penobscot Nation] for the purpose of transporting timber and other articles." (P.D. Ex. 8 at 46.)

When Maine became a state in 1820,[11] the unsold public lands in Maine that were obtained under the treaties of 1796 and 1818 were divided between Maine and Massachusetts by Commissioners appointed for that purpose; this division included townships or unsold acreage located along the Penobscot River. (Jt. Ex. 667 (ECF No. 109-67) at PageID #s 5944-48, 5956; see also Jt. Ex. 732 (Map 2).) The December 28, 1822 report by the Commissioners assigns lands to each state. (Id. at PageID # 5943, 5945-46, 5947.)) From the Old Indian Purchase, the following unsold lands were assigned to Maine: Townships No. 1, 2, and 4, east of the Penobscot River, which townships later became Passadumkeag, Greenbush, and Bradley, respectively.[12] (Id. at PageID # 5947-5948; Jt. Ex. 757 (ECF No. 110-57) at PageID # 6587 (map dated 1829).)

Thereafter, a deed dated June 10, 1833 documents a sale of the Penobscot Nation's four reserved townships from the 1818 Treaty to the State of Maine (the "1833 Deed"):

> Know all men by these present that, we the Governor, Councillors and principal head men of the Penobscot Tribe of Indians in council assembled after mature deliberation and upon full consideration of a proposition made to us in behalf of said Tribe, by the State of Maine . . . do cede grant, bargain, sell and convey to said State, all the right, title and interest of said Tribe in and to their four townships of land lying north of the

[11] See 3 Stat. 544, ch. 19 (1820) (admitting Main to the United States of America as of March 1820).

[12] The following unsold lands along the Main Stem were assigned to Massachusetts: Townships No. 1, 2, 4, and 5 west of the Penobscot River and Township No. 3 east of the Penobscot River, which townships later became Edinburg, Old Town, Orono, and Milford, respectively; and unsold land in Township No. 3, which land became part of Argyle. Jt. Ex. 667 (ECF No. 109-67) at PageID # 5945-5949; Jt. Ex. 757 (ECF No. 110-58) PageID # 6857 (map dated 1829).

> mouth of Piscataquis River . . . . To have and to hold to said State the above granted premises, with all the privileges and appurtenances thereto belonging forever.
>
> And we do covenant with said State that we are authorized by the Laws and usage of said Tribe to convey as aforesaid and that we for ourselves and in behalf of said Tribe will forever warrant and defend the premises against the claims of all the members of said Tribe.

(PD Ex. 131 at 592.) The sale price was $50,000.[13] (Id.)

2. United States v. Maine: The Land Claims Litigation

In the 1970s, the Penobscot Nation claimed that Maine and Massachusetts had failed to have the 1796 and 1818 Treaties and the 1833 Deed confirmed by Congress in accordance with ITIA. The Penobscot Nation claimed that it consequently retained title to all of these lands. See, e.g., Maine v. Johnson, 498 F.3d 37, 41 (1st Cir. 2007) (citing Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1065 (1st Cir. 1979)); see also Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787 (1st Cir. 1996) (explaining that the tribes then pursued claims to "nearly two-thirds of Maine's land mass"). The land claims of the Penobscot Nation were ultimately pressed by the United States in a 1972 case titled United States v. Maine, D. Me. Civil No. 1969-ND (P.D. Ex. 223 (Complaint)).[14] Other Maine Indian tribes asserted similar claims involving similar land transactions that had occurred since 1790.[15]

---

[13] The parties do not dispute that some of this land was in the Main Stem area and incorporated as Mattawamkeag and Woodville. Pls. Response to State SMF ¶ 203 (ECF No. 140 at PageID # 7832). The land ceded by the Penobscot Nation in the 1818 Treaty and the 1833 Deed along the Main Stem became the towns of Howland, Mattamiscontis, Chester, Woodville, Enfield, Lincoln, Winn, and Mattawamkeag. Pls. Response to State SMF ¶ 204 (ECF No. 140 at PageID # 7832-33).

[14] In a litigation report dated January 1, 1977, the Department of the Interior summarized the history of the land holdings of the Penobscot Nation. While noting that the Department of the Interior had experts who were prepared to testify that "at the time of the American Revolution and until 1796, the Penobscots continued to hold dominion over [6 to 8 million acres of land] which lay above the head of the tide of the Penobscot River," this report explained that as of the date of 1977 "the Penobscot Nation . . . holds only the islands in the Penobscot River between Oldtown [sic] and Mattawamkeag." Jt. Ex. 8 (ECF No. 102-8) at PageID # 1237-1238.

[15] The United States also filed a similarly titled case on behalf of the Passamaquoddy Tribe. See United States v. Maine, D. Me. Civil No. 1966-ND.

Settlement discussions in these cases began in March 1977 and were concluded with a stipulation of dismissal in August 1981. (See, e.g., P.D. Ex. 282 at 5941 (describing history of settlement discussions) & P.D. Ex. 233 at 3241-47 (stipulation of dismissal.) The tribes were represented at these negotiations in part by a committee of tribal representatives, including Rueben Phillips, Andrew Akins, James Sappier, and Timothy Love on behalf of the Penobscot Nation. (Phillips Decl. (ECF No. 124) ¶¶ 7-9.) The proposed settlement was presented to the members of the Penobscot Nation in early March 1980. (Phillips Decl. ¶¶ 12-17.) A tribal referendum vote on March 15, 1980 resulted in 320 votes in favor of the settlement and 128 opposed. (See P.D. Ex. 260 at 3940-42.)

As part of the Stipulation of Dismissal in United States v. Maine, on April 17, 1981, the Penobscot Nation Tribal Council authorized then-Governor Timothy Love to execute a Release and Relinquishment. (Jt. Ex. 612 (ECF No 109-12) at PageID # 5742.) In accordance with this authorization, on April 21, 1981, Governor Timothy Love authorized the United States to stipulate to the final dismissal with prejudice of the claims the United States had brought on behalf of the Penobscot Nation and also explicitly released and relinquished the Penobscot Nation's claims to the extent provided in the related acts passed by Congress and the Maine Legislature. (Jt. Ex. 612 (ECF No 109-12) at PageID # 5743.) This Release and Relinquishment was reviewed by the Department of Justice. (Jt. Ex. 612 (ECF No. 109-12) at PageID # 5736.)

3. The Passage of the Settlement Acts[16]

Ultimately, the stipulation of dismissal in United States v. Maine (P.D. Ex. 233) was the culmination of the passage of two pieces of legislation: the Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214 ("MIA"), and the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 ("MICSA"). Throughout this Order, the Court will refer to MICSA and MIA collectively as "the Settlement Acts." While the Settlement Acts operate in tandem, each act has its own legislative history, and the parties have drawn extensively from those legislative histories in constructing the factual record now before the Court.

a. MIA: 30 M.R.S.A. §§ 6201-6214

Working on the premise that this particular legislative action needed to occur "as soon as possible," L.D. 2037, the negotiated proposal that was thereafter enacted as MIA, was presented to the Maine Legislature in mid-March 1980. (Hull Decl. (ECF No. 119-32) ¶ 7.) On March 28, 1980, the Maine Legislature's Joint Select Committee on Indian Land Claims held a public hearing on L.D. 2037. (See P.D. Ex. 258 at 3738.) In his opening remarks at the hearing, Attorney General Cohen described "the Settlement Proposal" and his reasons for recommending "this Settlement to the people of the State of Maine." (P.D. Ex. 258 at 3740.) While acknowledging that "[i]t would be an overstatement to say that there would be no difference between Indians' Lands and non-Indians' Lands" under terms of L.D. 2037, he described the proposed legislation as "generally consistent with [his] belief that all people in the State should be subject to the same laws. While

[16] The legislative history of the Settlement Acts has been provided to the Court as Public Document Exhibits 240 through 287. Much of this factual section summarizes portions of that legislative history brought to the Court's attention via the submitted statements of material facts and responses thereto. However, the Court notes that in considering the legislative history provided, it has looked beyond the portions cited in the parties' statements of material fact in an effort to properly apply the canons of statutory construction.

there are some exceptions which recognize historical Indian concerns, in all instances the State's essential interest is protected." (Id. at 3744-45.)

Thomas Tureen, appearing at the hearing as counsel on behalf of the Penobscot Nation and the Passamaquoddy Tribe, explained that the negotiations that led to the current proposal occurred only because "feelings of mistrust began to break down and a spirit of reconciliation made itself felt." (Id. at 3763.) Tureen flagged the exercise of "tribal powers in certain areas of particular cultural importance such as hunting and fishing" as an issue that had been important for the State to understand. (Id.) Mr. Aikens, Chair of the Passamaquoddy-Penobscot Land Claims Committee, also spoke and indicated that part of the negotiation with the State had been "that neither side would make any changes or amendment to the package. We have not and we expect the same in return from the Maine Senate or House." (Id. at 3765-66.)

The Committee heard concerns about the hunting and fishing provisions of the proposed settlement. By way of example, Joe Floyd, a Public Member of the Atlantic Seamen's Salmon Commission, expressed concern that "critical parts of the Penobscot River" would "fall within the confines of the Settlement," which he said "could spell danger to the salmon." (Id. at 3855-56.) In response to expressed concerns about the sustenance fishing rights contemplated under L.D. 2037, Deputy Attorney General Patterson explained:

> Currently under Maine Law, the Indians can hunt and fish on their existing reservation for their own sustenance without regulation of the State. That's a right which the State gave to the Maine Indians on their reservations a number of years ago and the contemplation of this draft was to keep in place that same kind of right and provide that the Indians could continue to sustenance hunt and fish and that that would provide a legitimate basis for distinction between Indian and non-Indian hunting and fishing.

(Id. at 3793-94.) In response to later questions, Deputy Attorney General Patterson similarly explained:

> [T]he State currently lets Indians and the Legislature currently lets Indians engage and regulate their own hunting and fishing on their on reservations. That's a current state

> law. That's in Title 12, §7076. That was a right which the State gave to the Indians on their reservations some years ago. So in large measure, the policy embodied here was long ago recognized by the Legislature of the State. That's why the right to sustenance hunt and fish on reservations which is found in Sub-§4 on Page 9, is not such a major departure from current policy.

(Id. at 3894.)

Following this hearing, additional memoranda were drafted and distributed suggesting clarifications that might be made to L.D. 2037. The March 31, 1980 Preliminary Bill Analysis by John Hull, who was then working as a staff attorney for the Maine Legislature, noted, in relevant part, that the definition of the Penobscot Indian Reservation in L.D. 2037 "is unclear" with respect to whether "the boundaries extend to high or low water mark on tidal waters, or beyond that on marine waters." (P.D. Ex. 262 at 3945.)

A memo from then-Attorney General Richard S. Cohen, dated April 1, 1980, was provided to the Joint Select Committee on Indian Land Claims. It included a section, titled "Boundaries of the Reservation and Territory," that read in relevant part:

> The external boundaries of the Reservations are limited to those areas described in the bill including any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by the operation of law. . . .
>
> …. In any event the Tribes will not own the bed of any Great Pond or any waters of a Great Pond or river or stream, all of which are owned by the State in trust for all citizens. Jurisdiction of the Tribes (i.e. ordinance powers, law enforcement) will be coextensive and coterminous with land ownership.

(P.D. Ex. 263 at 3965-66.) The first portion of this section of the memo became part of the April 2, 1980 Report of the Joint Select Committee on Indian Land Claims Relating to L.D. 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory," with minimal changes:

> The boundaries of the Reservations are limited to those areas described in the bill, *but* include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of *State* law.

(P.D. Ex. 264 at 3971 (changes noted by added emphasis).) This was one of fourteen specific interpretations that the Joint Select Committee on Indian Land Claims announced as part of its understanding of MIA at the time of its passage.[17] (See P.D. Ex. 272 at 4023 (Representative Post explaining that "as we vote on this particular piece of legislation, we accept the understanding that is reflected" in the 4/2/1980 Joint Committee Report).)

Upon introducing L.D. 2037 to the Maine Senate on April 2, 1980, Senator Samuel Collins acknowledged some technical amendments had been made at the committee level but stated that "[t]he amending process is not open to the Legislature in the manner of our usual legislation, because this is the settlement of a law suit [sic]. Just as with a negotiated labor contract we cannot make the changes." (P.D. Ex. 271 at 4016.) He explained that, if enacted, the bill would be "a unique document" that would not "take effect unless Congress adopts it and finances it" and could not be readily amended once ratified by Congress. (Id.) He further stated, however, "It is the expectation of the committee . . . that at the time of enactment, we will have before you a further report of the committee in which we express some of our understandings of various words and provisions of this very complicated document, so that you may have them as a part of the legislative history of the act. No act of this complexity will be free from question marks. There will be

[17] The Penobscot Nation has attempted to supplement this MIA legislative history with documents that members of the Tribes' Negotiating Committee created between March 31, 1980 and April 2, 1980, all of which are focused on memorializing the Tribe's apparent objections to the April 2, 1980 Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 (P.D. Ex. 264). See Phillips Decl. (ECF No. 124) at PageID # 7504-05 & attachments cited therein. The Penobscot Nation's factual assertions on this point are clearly disputed. See Pls. SMF (ECF No. 119) ¶¶ 71-73, 77, 87, 93-97 & State Defs. Responses (ECF No. 141) at PageID # 8071-72, 8076, 8083, 8088-92. Thus, resolution of these factual issues would require a trial. The Court notes, however, that even if the Court accepted these particular factual assertions under the guise of viewing the factual record in the light most favorable to the Penobscot Nation, it would not change the Court's construction of MIA. Rather, such facts would only serve as additional evidence that some of MIA's provisions were ambiguous and susceptible to differing interpretations by the State and the tribes even at the time of MIA's passage.

interpretations necessary through the years just as there are interpretations necessary of all the statutes that we pass." (P.D. Ex. 271 at 4016.) Senator Collins also noted that L.D. 2037 "[w]ill be extending some hunting, fishing and trapping rights to about 800 Indian people in 300,000 acres." (Id.)

Ultimately, on April 2, 1980, the Maine Senate voted to approve L.D. 2037. (P.D. Ex. 271 at 4020.) On April 3, 1980, the Maine House voted to approve it. (P.D. Ex. 272 at 4025.) Thereafter, it was signed by Governor Brennan. On April 3, 1980, the Maine House of Representatives passed an order (H.P. 2055) to place documents in the Legislative Files, as did the Maine Senate (the "Legislative Files Order"). (P.D. Ex. 274 at 4031.) The Legislative Files Order directed that the following documents "be placed in the Legislative files": (1) "The report of the Joint Select Committee on Indian Land Claims," which included a memorandum to the Committee from Attorney General Richard S. Cohen, dated April 2, 1980 ("Report of Maine's Joint Committee"); and (2) "The transcript of the hearing of the Joint Select Committee on Indian Land Claims, including the statement of the Honorable James B. Longley and the memorandum to the committee from Maine Attorney General Richard S. Cohen, dated March 28, 1980." (Id.)[18]

In a declaration dated June 16, 2014, Michael Pearson, a member of the Maine Legislature and the Joint Select Committee in 1980, stated that he believes the sustenance fishing provisions of MIA were "intended to allow members of the Penobscot Nation to take fish for their sustenance from the Penobscot River in waters from Indian Island, near Old Town, at least as far up the River to Medway, where members of the Tribe had always taken fish for their subsistence" and were

[18] There is no indication in the Maine Legislative Record of consent or agreement on the part of the Tribes' Negotiating Committee to the Legislative Files Order or to the Report of Maine's Joint Committee. See P.D. Ex. 274 at 4031. There is also no record of consent or agreement on the part of the State's Negotiating Committee or the representatives of the United States. See id. However, the United States Senate Committee took "note of the hearings before, and report of, the Maine Joint Select Committee on Land Claims and acknowledge[d] the report and hearing record as forming part of the understanding of the Tribe[s] and State regarding the meaning of the Maine Implementing Act." P.D. Ex. 282 at 5973.

"not intended to confine members of the Penobscot Nation to seek out fish for their sustenance on the surfaces of the islands or within restricted zones of the River next to the islands." (Pearson Decl. (ECF No. 119-37) at PageID # 7363.) Likewise, Bennett Katz, then-Chair of the Maine Indian Tribal-State Commission, which was created by MIA, and previously a member of the Maine Senate at the time of MIA's passage, stated in a 1995 letter to the Federal Energy Regulatory Commission that he could not imagine that his colleagues intended MIA to be interpreted to mean that "[t]he sustenance fishing right granted to the Penobscot Nation is not on the Penobscot River" and that "[o]nly the islands and none of the waters in the Penobscot River constitute the Penobscot Reservation." (Jt. Ex. 161 (ECF No. 104-61) at PageID # 2200.) Katz went on to state that he was "certain the Penobscots never would have agreed to the Settlement had it been understood that their fishing right extended only to the tops of their islands" and that it would have "been assumed that the right [to sustenance fish] would be exercised in the waters of the Penobscot River" because any other interpretation would not "make sense." (Id.)

b. MICSA: 25 U.S.C. §§ 1721-1735

With the State's enactment of MIA, attention shifted to Congress. The Senate Select Committee on Indian Affairs held hearings on July 1 and 2, 1980 (P.D. Ex. 278), hearing testimony from tribal members and non-tribal Maine residents as well as state officials.[19] A map that was presented to Congress during the sessions on ratifying MIA showed the Passamaquoddy and Penobscot Reservations as shaded in red. (Sproul Decl. (ECF No. 141-2) at PageID # 8185

[19] This testimony included the testimony of Penobscot Nation member Lorraine Nelson (aka Lorraine Dana) who expressed concern that under the language of the proposed Settlement Acts, her "family will endure hardship because of the control of taking deer and fish." P.D. Ex. 278 at 4706-07. She described how her son "fish[ed] her islands to help provide for [her] family" and was referring to the fact that he fished in the Main Stem. L. Dana Decl. (ECF No. 1241-1) at PageID # 7508.

(referencing Jt. Ex. 732 (ECF No. 110-32) Map 30).) On this map, "river and lakes adjacent to settlement lands" are shaded white. (Jt. Ex. 732 (ECF No. 110-32) Map 30.)

At the Senate Committee hearing, the Committee requested that Maine's Governor and other state officials provide written responses to certain questions, including whether MIA and the proposed federal statute contain "jurisdictional language [that] bestow[s] preferential treatment upon the tribes." In his August 12, 1980 "joint response" letter, Attorney General Cohen responded to that question as follows:

> Under [MIA], the Penobscot Nation and Passamaquoddy Tribe are given certain rights and authority within the 300,000 acres of "Indian Territory." To the extent that these rights and authority exceed that given any Maine municipality, they do so only to a limited extent and in recognition of traditional Indian activities. . . . The most significant aspect of this limited expansion of authority is in the area of hunting and trapping and, to a limited extent, fishing in Indian Territory. Even in this area, the Indian Tribes must treat Indians and non-Indians alike, except for subsistence provisions, and Tribal authority can be overridden by the State if it begins to affect hunting, trapping or fishing outside the Indian Territory. Generally the Act does not provide Indians with preferential treatment. To the contrary, we believe the Implementing Act establishes a measure of equality between Indian and non-Indian citizens normally not existing in other States. Indeed, the Act recovers back for the State almost all of the jurisdiction that had been lost as a result of recent Court decisions.
>
> Obviously no one can guarantee that there will be no litigation in the future over the meaning of certain provisions in the Maine Implementing Act or S.2829. However, the provisions of S. 2829 and the Implementing Act have been carefully drafted and reviewed to eliminate insofar as possible any future legal disputes. Particular care was taken to insure that S. 2829 is adequate to finally extinguish the land claims, and as to those provisions we are satisfied that they have been drafted as carefully as possible. Nevertheless, litigation over this and other provisions is always possible and we cannot prevent the filing of future suits. Any contract, agreement or legislation always contains unanticipated ambiguities that sometimes can only be resolved through the courts. In our judgment, however, should questions arise in the future over the legal status of Indians and Indian lands in Maine, those questions can be answered in the context of the Maine Implementing Act and S. 2829 rather than using general principles of Indian law.

(P.D. Ex. 278 at 4436-4437.)

In the final House and Senate committee reports ("Committee Reports") on the federal act ratifying the terms of MIA, Congress confirmed in its "Summary of Major Provisions" that "the settlement . . . provides that the . . . Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred." (P.D. Ex. 282 at 5946; P.D. Ex. 283 at 6008.) Congress also addressed as "Special Issues" concerns raised in testimony and written materials to the House and Senate Committees, all of which the committees said were "unfounded." (P.D. Ex. 282 at 5942; P.D. Ex. 283 at 6004.) In response to the concern "[t]hat the settlement amounts to a 'destruction of the sovereign rights and jurisdiction of the . . . Penobscot Nation," the Committee Reports stated, in identical language, that the settlement "protects the sovereignty of . . . the Penobscot Nation" and that "hunting and fishing provisions discussed in paragraph 7" of the "Special Issues" were "examples of expressly retained sovereign activities." (P.D. Ex. 282 at 5942-43; P.D. Ex. 283 at 6004-05.) The Committee Reports then indicate in paragraph 7: "Prior to the settlement, Maine law recognized . . . the Penobscot Nation's right to control Indian subsistence hunting and fishing within [its] reservation[], but the State of Maine claimed the right to alter or terminate these rights at any time." (P.D. Ex. 282 at 5944-45; P.D. Ex. 283 at 6006-07.) In identical language, each report continued, "Under Title 30, Sec. 6207 as established by the Maine Implementing Act . . . the Penobscot Nation [has] the permanent right to control hunting and fishing . . . within [its] reservation. The power of the State of Maine to alter such rights without the consent of the [Tribe] is ended. . . . The State has only a residual right to prevent the [Tribe] from exercising [its] hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters . . . not unlike that which other states have been found to have in connection with

federal Indian treaty hunting and fishing rights." (P.D. Ex. 282 at 5944-45; P.D. Ex. 283 at 6006-07.)

With the passage of MICSA, Congress approved and ratified all earlier transfers of land and natural resources by or on behalf of the Penobscot Nation. See 25 U.S.C. § 1723. This ratification by its express terms included not only "any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance," but also "any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources." 17 U.S.C. § 1722(n). Before the end of 1980, the Settlement Acts were in effect.

B. Post-Settlement Acts: The State and the Penobscot Nation Chart a New Course[20]

"The slate is effectively wiped clean," stated Penobscot Nation counsel Thomas Tureen after Maine's passage of MIA. (Jt. Ex. 580 (ECF No. 108-80) at PageID # 5563.) Likewise, the Native American Rights Fund, whose lawyers represented the Penobscot Nation in the land claims case, celebrated the 1980 Acts by declaring: "The Maine settlement is far and away the greatest Indian victory of its kind in the history of the United States." (Jt. Ex. 582 (ECF No. 108-82) at PageID # 5566.)

On January 9, 1981, the Department of the Interior (the "DOI") published a notice in the Federal Register announcing the "extinguishment of all land and related claims of the Maine Indians" and, in relevant part, stating that MICSA "extinguishes any claims of aboriginal title of

[20] The parties have provided the Court numerous factual assertions that related to pre-1980 events that the Court has determined offer no insight into resolving the present dispute. Many of these statements are also disputed and supported by contested testimony of expert witnesses or actually reflect statements of law rather than fact. See, e.g., State Defs. Opposing SMF (ECF No. 141) ¶¶ 4, 5, 11, 12, 15, 23, 24 (first sentence), 26, 27, 28, 29, 31, 32, 34, 35, 42, 54, 55. The Court has disregarded such statements and does not include them in its recitation of undisputed material facts. The Court notes that, to the extent that it would have determined that the outcome of the present dispute required resolution of these disputed factual matters, this case could not have been resolved based on the present cross-motions.

the Maine Indians anywhere in the United States and bars all claims based on such title. This section also extinguishes any land claims in the State of Maine arising under federal law by any Indian tribe . . . ." (P.D. Ex. 288 at 6063 (46 Fed. Reg. 2390 (Dep't of Interior Jan. 9, 1981)).)

Since 1980, the Penobscot Nation has posted signs on certain islands in the Main Stem. (State Defs. Ex. 8 (ECF No. 118-8) at PageID # 7083.) Specifically, since at least 1983, the Penobscot Nation has posted signs on some (but not all) of the islands in the Main Stem that state: "PENOBSCOT INDIAN RESERVATION. NO TRESPASSING WITHOUT PERMISSION. VIOLATORS WILL BE PROSECUTED." (State Defs. Ex. 8 at PageID # 7083-84.) Similar postings do not appear at the public boat launches or on the banks of the Main Stem, nor have such postings appeared in the past at these locations. (Id. at PageID # 7084.) Notably, non-tribal hunters and trappers generally access the Main Stem from these river banks, especially the public boat launches. (Id. at PageID # 7084-85 & Ring Aff. (ECF No 52-3).)

The Penobscot Nation has posted a three-panel informational kiosk at the Costigan Boat Launch in Milford, which was funded by the DOI. (Id. at PageID # 7083; Jt. Ex. 705 (ECF No. 110-5) at PageID # 6156.) With respect to permits, the panel states: "To obtain fiddleheads or duck hunting permits for the islands, for information regarding other allowable uses of the reservation or to report water quality problems, contact the Penobscot Nation Department of Natural Resources at 12 Wabanaki Way, Indian Island, Old Town, Me. 04468 or call (207) 827-7776." (Jt. Ex. 705 (ECF No. 110-5) at PageID # 6156.)

Likewise, the Penobscot Nation's woodland territory beyond the Main Stem contains postings. (State Defs. Ex. 8 at PageID # 7084.) Generally, these posting signs read: **"NOTICE Penobscot Nation Indian Territory** Hunting, trapping, and other taking of wildlife under exclusive authority of the Penobscot Nation. Special restrictions may apply. Violators will be

prosecuted. PERMIT MAY BE REQUIRED Contact: Wildlife & Parks Community Bldg. Indian Is., Me. 04465 1-207-827-777." (State Defs. Ex. 8. at PageID # 7084; Georgia Decl. Ex. E (ECF No. 118-4) at PageID # 7037.) These postings are not visible from the Main Stem, nor do the signs notify the public that the Penobscot Nation regulates activities on the Main Stem. (State Defs. Ex. 8 at PageID # 7084.)

Since the passage of the Settlement Acts, the Penobscot Nation does not and has not required non-tribal members to purchase "access permits" in order to be on the waters of the Main Stem for navigating, fishing, or sampling. (Banks Decl. (ECF No. 140-1) ¶ 5; Kirk Loring Decl. (ECF No. 140-21) ¶ 12 (regarding 1976-2001 when Loring was Chief Game Warden for tribe).) However, the Penobscot Nation Warden Service has patrolled the Main Stem when it is not ice-bound, as it has done since it began operating its own warden service in 1976. (Kirk Loring Aff. (ECF No. 119-12) ¶¶ 8 & 9; Gould Decl. (ECF No. 140-2) ¶ 5.) The Penobscot Nation Warden Service historically has employed approximately four wardens who have patrolled in the Main Stem. (Kirk Loring Aff. (ECF No. 119-12) ¶ 4.) Under various Maine state laws, Penobscot Nation wardens are cross-deputized to enforce state laws within Penobscot Indian territory and have been granted the powers of a game warden outside said territory.[21] See, e.g., 12 M.R.S.A. § 10401.

During the early years following the passage of the Settlement Acts, the game wardens for Penobscot Nation and Maine occasionally collaborated on patrols and enforcement actions in the Main Stem. (See, e.g., Dunham Decl. (ECF No. 118-2) ¶2; Georgia Decl. (ECF NO. 118-4) ¶¶ 5,

[21] This practice of cross deputizing tribal game wardens began in 1982 and was expanded in 1986. P.L. 1981, ch. 644, § 4 (effective July 13, 1982), codified at 12 M.R.S.A. § 7055 (Supp. 1982-1983); P.L. 1985, ch. 633 (effective July 16, 1986), codified at 12 M.R.S.A. § 7055 (Supp. 1986). The statute was recodified in 2004 as 12 M.R.S.A. § 10401 (Supp. 2003). P.L. 2003, ch. 414, § A2 (effective April 30, 2004).

6-8; Georgia Decl. (ECF NO. 148-2) ¶¶ 4, 12; Wilkinson Aff. (ECF No. 118-6) at PageID # 7052; see also Jt. Exs. 85-87 (ECF Nos. 103-35-103-37) at PageID # 1697-1700 (documenting game warden collaboration on the summonsing of Kirk Francis).) More recently, the Main Stem patrol and enforcement actions by the wardens employed by the Penobscot Nation and the State have become contentious. (See, e.g., Wilkinson Aff. (ECF No. 118-6) at PageID # 7052-53.) In a May 2005 memo from DIFW, Dunham expressed his concerns that non-tribal trappers were being advised by tribal game wardens that their trapping activities violated tribal law and that the Penobscot Nation "claimed" the River "bank-to-bank." (See, e.g., Dunham Decl. (ECF No. 118-2) at PageID # 3310.) Dunham complained about the lack of clarity regarding the boundaries of the reservation lands but asserted that "[t]he rule of thumb has always been the halfway point between the island and the mainland" but "[t]he water belongs to the State."[22] (Id.)

The record contains dueling declarations regarding a November 12, 2011 interaction between Penobscot Nation Game Warden Richard Adams and a four-person duck hunting party. Jennifer Davis Dykstra was a member of the duck hunting party that was hunting from a boat on the Main Stem. As the party approached the Costigan boat landing, Penobscot Nation game warden Richard Adams approached the party and asked to see their hunting permits. The group did not have any permits from the Penobscot Nation and Adams indicated that they would need a Penobscot hunting permit to hunt in the Main Stem, even if that hunting was only done from a boat located in the waters of the Main Stem. (See Dykstra Aff. (ECF No. 52-2) ¶¶ 4-8; Gould Decl. ¶¶ 11-14; Adams Decl. ¶¶ 4-14.)[23]

[22] The Court has been provided a memo by a tribal game warden memorializing a September 2010 conversation with another DIFW warden who similarly expressed the view that the "thread of the river" was the boundary line for enforcing duck hunting law on the Penobscot River. Jt. Ex. 267 (ECF No. 105-67) at PageID # 3379.

[23] There is an apparent factual dispute regarding the exact words exchanged between the Penobscot Nation game warden and the Dykstra hunting party. See Pls. Response to State SMF ¶ 78 (ECF No. 140) at Page ID # 7764. The

C. The History of Fish and Fishing in the Main Stem

In an affidavit dated January 8, 1822, Joseph Butterfield attested that he had lived in "Oldtown" since 1803, and:

> that the fish either Salmon[,] Shad or Alewives were abundantly plenty in the Penobscot River until about 1813. Since which time they have been rapidly decreasing every season so that by this time there is scarce any to be taken in the season of the year when they are most plenty which has led me to believe that they have been unreasonably destroyed and in endeavoring to find out the cause I am led to believe that it is owing to the vast number of destructive Machines used in the tide waters and other places that has produced this evil, particularly the Wears…. [It] is now a fact that at Oldtown falls where I reside used to be considered one of the greatest places for taking fish on the river where the Penobscot Indians procured at least half of their living annually. That now they cannot take a sufficient quantity for their families to eat even in the best part of the season and many of the white people used to take plent[y] for their own use cannot git any by any means whatever.

(Jt. Ex. 560 (ECF No. 108-60) at Page ID #s 5493-94.)[24] As this affidavit establishes, there is a long history of fishing in the Main Stem, including commercial, recreational, and sustenance fishing. The factual record in this case explicitly discusses fishing of two particular species, Atlantic salmon and eels. The Court addresses each of these fisheries and then turns to a discussion of sustenance fishing by members of the Penobscot Nation.

Court cannot and need not resolve that factual dispute in connection with the pending motions. Rather, the Court concludes that its resolution of this factual dispute would have no material impact on the issues addressed herein.

[24] The Court notes that the copy of the affidavit in the record is illegible but takes the contents to be true as admitted in the statements of material fact. See Pls. Response to State SMF ¶ 120 (ECF No. 140) at Page ID # 7781. The record does not provide any clear context for what prompted Butterfield to make this written record of his observations in Old Town.

1. Atlantic Salmon

The commercial salmon catch in the Penobscot River decreased from the 1850s through 1947, the last year commercial fishing was permitted in the river, as follows:

a. In the 1850s, the annual commercial salmon catch was approximately 25,000;
b. In 1875, the annual commercial salmon catch was approximately 15,000;
c. From 1873 to 1900, the annual commercial salmon catch was approximately 12,000;
d. In 1910, the annual commercial salmon catch was approximately 2,500; and
e. In 1947, the annual commercial salmon catch was 40, all by rod.

(Jt. Ex. 694 (ECF No. 109-94) at PageID # 6034.) Even with commercial salmon fishing prohibited since 1947, for the decade between 1957 and 1967, no Atlantic salmon were reportedly caught in the Penobscot River. (Id.) By 1967, the quantity of shad, alewives, striped bass, and smelt in the Penobscot River was also severely reduced. (Id.)

A 1980 DIFW interdepartmental memo noted that Maine then allowed very limited non-commercial fishing of Atlantic salmon and expressed concern about the impact of "the proposed settlement" of the Indian claims, in that the settlement would involve acreage of watershed that could be subject to "[i]ncreased exploitation and capricious regulation" that would "negate" the gains made in increasing the "[u]seable Atlantic salmon habitat in Maine" and restoring anadromous fish stocks. (Jt. Ex. 601 (ECF No. 109-1) at PageID # 5681.) Following the passage of the Settlement Acts, the Penobscot Nation acknowledged the need to limit harvest of Atlantic salmon as well as work towards long-term restoration of Atlantic salmon in the Penobscot River. Since 1980, the Penobscot Nation has issued sustenance permits for the taking of Atlantic salmon by gill net on two occasions. (See Jt. Exs. 209 (ECF No. 105-9), 237 (ECF No. 105-37) & 239 (ECF Nos. 105-39).)

In 1983, the Penobscot Nation informed various state authorities that it had promulgated its own regulations for sustenance fishing of Atlantic salmon in the Penobscot River. (See Jt. Ex.

63 (ECF No. 103-33) at PageID #s 1558-59; Jt. Ex. 64 (ECF No. 103-14) at PageID # 1560.) In 1988, the Penobscot Nation proposed to harvest 10 to 12 Atlantic salmon for ceremonial use. (Jt. Exs. 75 (ECF No. 103-25), 76 (ECF No. 103-26), 77(ECF No. 103-27) & 81 (ECF No. 103-31).) In response to this proposal, the Atlantic Sea Run Salmon Commission sought clarification from the Maine Attorney General on the Penobscot Nation's "plan [to take] approximately 20 Atlantic salmon from the Penobscot River by the use of gill nets." (Jt. Ex. 78 (ECF No. 103-28) at PageID # 1638.) In a letter dated February 16, 1988, then-Maine Attorney General James Tierney responded that the Penobscot Nation's proposed fishing "would not be prohibited" under the express terms of 30 M.R.S.A. § 6207(4), which allows "sustenance fishing" that occurs "within the boundaries of" the Penobscot Indian Reservation. (Jt. Ex. 80 (ECF No. 103-30) at PageID # 1652.) Currently, the Penobscot Nation addresses the sustenance taking of Atlantic salmon in its fish and wildlife laws. (Banks Decl. ¶ 8; P.D. Ex. 222 at 3117-18 (section 303).)

2. Eel Potting

Eels are "fish," as defined by MIA: a "cold blooded completely aquatic vertebrate animal having permanent fins, gills and an elongated streamlined body usually covered in scales and includes inland fish." 30 M.R.S.A. § 6207(9).[25] Eel potting generally involves placing a device or "pot" at the bottom of a body of water, usually baited, to capture eels; the device is then marked with a line and a buoy. (Jt. Ex. 130 (ECF No 104-30) at PageID # 2093.) Both the State and the Penobscot Nation have issued commercial eel potting permits. (See, e.g., Jt. Exs. 214 (ECF No. 105-14), 215 (ECF No. 105-15), 220 (ECF No. 105-20), 227 (ECF No. 105-27), 228 (ECF No.

[25] The Penobscot Nation has regulated the use of eel pots by non-members as a trapping activity. See P.D. Ex. 222 (section 402); Banks Decl. (ECF No. 140-1) ¶ 7. The State disputes this categorization and asserts eel potting is a fishing activity for purposes of MIA. See State Defs. Reply SMF (ECF No. 148) at PageID # 8764. The significance of eel potting being categorized as trapping matters only if it is determined that an eel pot is being used on reservation land, in which case it would be regulated by the Penobscot Nation, if considered trapping, and by MITSC, if considered fishing.

105-28), 229 (ECF No. 102-29) & 312 (ECF No. 106-12).) In 1994 and 1995, Maine acknowledged that the Penobscot Nation had authority to control access to its lands for purposes of placing eel pots by conditioning state permits with language to the effect:

> This permit does not give the permittee the right to place fishing gear on private property against the wishes of the property owner. The portions of the Penobscot River and submerged lands surrounding the islands in the river are part of the Penobscot Indian Reservation and eel pots should not be placed on these lands without permission from the Penobscot Nation.

(Jt. Ex. 102 (ECF No. 104-2) at PageID # 1887; see also Jt. Ex. 109 (ECF No. 104-9) at PageID # 1977; Jt. Ex. 110 (ECF No. 104-10) at PageID # 1979; Jt. Ex. 111 (ECF 104-11) at 1981.) Likewise, the Penobscot Nation's commercial permits for eel potting have provided that State of Maine eel potting regulations "not superseded" also apply. (Jt. Ex. 214 (ECF No. 104-14) at PageID # 2742; Jt. Ex. 220 (ECF No. 105-20) at PageID # 2807; Jt. Ex. 228 (ECF No. 105-28) at PageID # 3090; Jt. Ex. 229 (ECF No. 105-29) at PageID # 3091.) The Penobscot Nation Department of Natural Resources finalized eel trapping permits and catch reports with conditions for non-tribal members and tribal members in 1995. (Jt. Ex. 145 (ECF No. 104-45) at PageID # 2167; Jt. Exs. 146 (ECF No. 104-46) at PageID # 2168; Jt. Ex. 221 (ECF No. 105-21) at PageID # 2808.) In this same time frame, the Penobscot Nation also raised concerns regarding the State's issuance of eel permits and explained that a tribal member was seeking to begin a commercial eeling venture; the Penobscot Nation sought from the State "a solution that lessens the possibility of confrontation . . . on the river." (Jt. Ex. 138 (ECF No. 104-38) at PageID # 2149.) On June 5, 1995, a State permit for eel pots was issued to the same tribal member for the Penobscot River from Oldtown to Howland and from West Enfield/Howland to the Mattaceunk Dam. (Jt. Ex. 486 (ECF No.107-93) at PageID # 5217.) In response to the request of a tribal member in 1995, the

State allocated an exclusive fishing zone, Milford to West Enfield, for eeling by tribal members. (Jt. Ex. 142 (ECF No. 104-42) at PageID # 2157.)

In March 1996, DIFW sent previously permitted eel potters a memo outlining changes in eel potting regulations for the upcoming season. (Jt. Ex. 172 (ECF No. 104-72) at PageID # 2228.) The letter informed eel potters of the prohibition on taking eels less than six inches long, announced that the fee for a state-wide permit would be $100 and enclosed a copy of the new application. (Id. at PageID # 2242-43.) The new application continued to include the language that the permit does not give the holder permit permission to place gear within the Penobscot Nation reservation, defined to include "portions of the Penobscot River and submerged lands surrounding the islands in the river." (Id. at 2244.) Similar correspondence was sent to eel weir operators with applicable changes noted, as well as to all divisions within DIFW. (Jt. Ex. 173 (ECF No. 104-73) at PageID # 2229-48.) DIFW provided the Penobscot Nation with a list of all eel potters and weir owners in October 1996. (Jt. Ex. 184 (ECF No. 104-84) at PageID # 2303-05.)

3. Sustenance Fishing

In addition to commercial and recreational fishing, members of the Penobscot Nation have also caught many types of fish (including eel and Atlantic salmon) for sustenance. (B. Dana Decl. (ECF No. 124-2) ¶ 6; Phillips Decl. (ECF No. 124) ¶ 6; C. Francis Decl. (ECF No. 124-3) ¶ 5.) Despite the decrease in catch and concerns about pollution in the River, members of the Penobscot Nation have routinely engaged in sustenance fishing in the Main Stem, bank-to-bank. (See, e.g., L. Dana Decl. (ECF No. 124-1) ¶¶ 6-12 (recounting her memories of tribal members fishing the area of the Main Stem back to the 1940s); B. Dana Decl. (ECF No. 124-2) ¶¶ 5-6 & 8-9 (recounting his memories of fishing and other tribe members fishing the area of the Main Stem back to the 1960s); Phillips Decl. (ECF No. 124) ¶ 6 (explaining that the Penobscot River "was an important

source of food for my family" and that his family fished and trapped "bank to bank" while he was growing up in the 1940s-1960s); C. Francis Decl. (ECF No. 124-3) ¶ 5-11.) Families living on Indian Island relied on the Penobscot River for food. (K. Loring Decl. (ECF No. 119-12) ¶ 4.) Some tribal members engaged in such fishing without obtaining a permit from the State of Maine. (B. Dana Decl. ¶ 8; K. Loring Decl. (ECF No. 119-12) ¶ 6.) State game wardens never interfered with any sustenance fishing activities pursuant to a "longstanding, informal policy" that "remains in effect." (Wilkinson Aff. (ECF No. 118-6) at PageID # 7054.) In fact, State game wardens were rarely seen patrolling the Main Stem by tribal members fishing and trapping in the area.[26] (See, e.g., Wilkinson Aff. (ECF No. 118-6) at PageID # 7054; L. Dana Decl. (ECF No. 124-1) ¶ 9; K. Loring Decl. (ECF No. 119-12) ¶5.)

D. The History of Regulation of the Main Stem

1. Regulation by the State

a. Pre-Settlement Acts

The record reflects a long history of Penobscot Nation members and other residents looking to the State government to regulate the many activities occurring in the Penobscot River, including the Main Stem. In 1790, 117 inhabitants on the Penobscot River petitioned the Massachusetts Governor and General Court, seeking legislation to protect the fish in the Penobscot River and its branches by placing limits on fishing nets and the number of days per week that fishing was permitted. (Jt. Ex. 558 (ECF No. 108-58) at PageID # 5486-89.) Later, in response to the January

[26] The Court notes that the State has submitted evidence that State game wardens patrol the Main Stem but "do not recall ever encountering a tribal member who claimed to be engaged in sustenance fishing." Georgia Decl. (ECF No. 118-4) ¶ 15. Nonetheless, these same game wardens certainly acknowledge seeing tribal members using the river. See id. ¶¶ 8, 13, 33-40; see also Georgia Decl. (ECF No. 148-2) ¶ 9; Priest Decl. (ECF No. 148-1) at PageID # 8782-83. Viewing the facts in the light most favorable to the Penobscot Nation, the Court can only conclude that the Maine game wardens involved have never had occasion to expressly inquire whether a tribal member was engaged in sustenance fishing, rather than commercial or recreational fishing.

1821 petition of the Chiefs of the Penobscot Indians, which had requested that the Maine Legislature restrict the weir and driftnet fisheries in the lower Penobscot River and Penobscot Bay, 176 inhabitants on the Penobscot Bay and River petitioned the Maine Legislature to complain about a variety of restrictions on their fishing, stating in part:

> Our "red brethren" have been instigated by some of their white brethren, far up the river, to make a talk about the destruction of salmon, by our expert fishermen on the big waters -- It will be found on investigation, that they have contributed their full share, to the destruction of the fish, not for their own use or consumption, but for fish merchants. When a salmon has run the gauntlet and arrived unharmed at the still waters, where the spawn is deposited, it becomes an object of solicitude; for by spearing them in these retired places, as has been the constant practice of the Indians, the destruction of a single fish is that of thousands. . . . The Indians are now reduced to a mere handful of strollers, having no regular residence and have really little or no interest in the result.

(Jt. Ex. 559 (ECF No. 108-59) at PageID # 5491-92.)

Starting in approximately 1825, the State of Maine passed legislation that authorized the construction and operation of log booms, piers, canals and dams in the Penobscot River, thereby regulating navigation on the Main Stem by non-tribal members.[27] (See generally, e.g., P.D. Exs. 48, 50, 55, 59, 61, 71, 90-91 & 97.)

In a petition dated January 25, 1831, two Penobscot tribal leaders petitioned the Maine Governor and Council seeking fishing rights and redress for various grievances. The petition stated in pertinent part:

> 1. There is an Island, called Shad Island, & some small ones near it, which belong to the Indians, lying just below Old town Island, where there are great conveniences for our Indians to take fish in the fishing season. We wish to have the whole right, of taking fishing within six rods on the east side & four rids on the southerly & westerly sides of Shad Island, up as far as to the foot of Old town Island; & if anybody except Indians takes fish within the limits mentioned, he may be forced to pay five dollars.
>
> . . . .

[27] When in use, booms held logs so that they covered the waters surrounding many of the islands in the Main Stem. Jt. Ex. 738 (ECF No. 110-38) at PageID #s 6450-51 & 6453.

> 5. All the Island in the Penobscot River, from Old Town upwards belong to our Tribe; . . . . Now we pray that all our Islands may be preserved and kept for the use of us, especially as far up the West Branch as opposite Moosehead Lake. Up the Piscataquis to Borad Eddy; & up the East Branchy to the head of first ponds; . . . .
>
> 6. Upon the border or margin of Oldtown Island & Orson Island, & among other small islands of ours among them; the white people land and fasten a great many rafts, which plagues us very much indeed. Now we pray our agent to be empowered to take for every thousand feet of boards or other lumber landed & fastened to said Islands two cents, for any log one cent, & if the rafts lay there two months there be paid half as much more; & if they lay their four months, then be paid double; all be paid at the beginning of the said periods; & if not so paid, the Indians shall be blameless, if they set the rafts adrift.
>
> 7. The Great Boom above Sunkhays deprives us of several Islands, spoils others by soaking them & throwing the flood wood upon them; & as the owners make a great deal of money; so we pray they give up the Islands to the Indians, as our rights, or pay us twenty dollars every year.

(Jt. Ex. 548 (ECF No. 108-48) at PageID #s 5439, 5441-5442.) In response, the Committee on Indian Affairs reported, in relevant part:

> [I]t is the duty of the Indian Agent to attend to the rights of said Indians,- to see that there are no encroachments made by the whites upon the Indians Islands, their fishing and other privileges, and generally to attend to all the reasonable complaints of [said] Indians, and see that justice be done them.

(Jt. Ex. 549 (ECF No 108-49) at PageID # 5444.) The report was approved by the Governor and the Executive Council. (Id.)

Between 1846 and 1883, the State of Maine passed multiple laws intended to generally improve and regulate navigation on the Penobscot River. (See generally P.D. Exs. 62, 68, 69, 75, 76, 78, 85 & 89.) In 1862, the State of Maine passed a law allowing the "agent of the Penobscot Tribe" to "lease the public farm on Orson Island" and also "lease the shores of the islands in the Penobscot river belonging to said tribe . . . for the purpose of booming and hitching logs." (P.D. Ex. 66.) In 1913, the State of Maine passed legislation that "authorized" the Penobscot Nation "to establish and maintain a ferry across the Penobscot river" between Old Town and Indian Island.

(P.D. Exs. 95 & 99.) In 1949, the State of Maine enacted a law to build a single lane bridge between Old Town and Indian Island. This bridge project was paid for by the State. (P.D. Ex. 101.) From 1970 through 1980, state regulators and game wardens published Maine's Open Water Fishing Laws and sought to apply those laws on all areas of the Penobscot River, including the Main Stem.[28] (P.D. Exs. 133-143.)

b. Post-Settlement Acts

The Settlement Acts contemplated that fishing regulations for bodies of water that ran through or bordered Indian territory would be promulgated by the Maine Indian Tribal State Commission ("MITSC"). See 30 M.R.S.A. §§ 6207(3) & 6212. Until MITSC adopted regulations, MIA states that "all fishing laws and rules and regulations of the State shall remain applicable" in the waters within MITSC's contemplated jurisdiction. 30 M.R.S.A. §§ 6207(3). In 1983, the Penobscot Nation asked MITSC to study the current management policies concerning Atlantic salmon, contending that the activities of the Maine Atlantic Sea-Run Salmon Commission were adversely affecting both the stocks "on the reservation" and the opportunity of the tribe to exercise its sustenance fishing rights in River. (Jt. Ex. 62 (ECF No. 103-12) at PageID # 1557.)

Since the enactment of the Settlement Acts, Maine, through DIFW, has continued to regulate boating on Maine's inland waters, including the Main Stem. The State's boating regulations contained no special exceptions or language regarding the compliance of the Penobscot Nation or its members within the Main Stem. (See generally State Defs. Ex. 21 (ECF No. 118-20) & P.D. Exs. 145-162.) However, from the perspective of the Penobscot Nation, Maine's actual

[28] From 1820 through 1980, the Penobscot Nation did not regulate navigation by non-tribal citizens on the Main Stem. State Defs. Ex. 8 (ECF No. 118-8) at PageID # 7082. Likewise, prior to the enactment of the 1980 Acts, the Penobscot Nation did not regulate kayaking, boating, canoeing or other forms of navigation by non-tribal members on the waters of the Main Stem. Id. Prior to the enactment of the 1980 Acts, the Penobscot Nation did not regulate sampling of the water, fish or wildlife by non-tribal members or the State of Maine on the waters, bed or banks of the Main Stem. Id.

enforcement actions in the Main Stem were relatively minimal. (L. Dana Decl. (ECF No. 124-1) at PageID # 7507; T. Francis Decl. (ECF No. 124-4) at PageID # 7516.) From 1981 to the present, DIFW regulations have provided tribal members with a free license to fish, hunt and trap. (P.D. Exs. 144-66 at 859, 882, 928, 954, 980, 1012, 1049, 1102, 1140-41, 1190-91, 1262, 1331, 1377, 1422, 1461, 1506, 1549, 1594, 1641, 1686, 1700, 1759, 1820.) The Maine Warden Service's policy is to "not interfere with any Penobscot Nation member who is taking fish from the Main Stem for his or her individual sustenance." (Wilkerson Aff. (ECF No. 118-6) ¶ 14.)

The DIFW Warden Service has enforced Maine fishing and boating laws against non-tribal members on the Main Stem by issuing summonses to non-tribal members for fishing, boating, and safety violations. (State Defs. Exs. 2 & 4 (ECF Nos. 118-2 & 118-5) at PageID #s 7003 & 7014.) The DIFW Hunting Regulations Summaries from 1992 to 2013 stated the following: "The Penobscot Nation also has exclusive authority to regulate hunting and trapping in the Penobscot Reservation, consisting of all islands in the Penobscot River north of, and including, Indian Island, located near Old Town, Maine." (P.D. Exs. 188-207 at 2301, 2323, 2346, 2370, 2395, 2425, 2450, 2484, 2518, 2555, 2592, 2629, 2670, 2703, 2736, 2769, 2802, 2838, 2885-86.) The Maine open water and ice fishing regulations for April 1, 2012 to March 31, 2013 included the following language: "The Penobscot Indian Reservation includes certain islands and surrounding waters in the Penobscot River above Milford Dam." (P.D. Ex. 165 at 1803.) This language was subsequently withdrawn in the succeeding year's regulatory summary.[29] (P.D. Ex. 166 at 1861.)

Since 1985, Penobscot Nation has repeatedly applied for and received Maine-issued water quality certifications for the Penobscot Nation-owned wastewater treatment facility at Indian

[29] DIFW considers the language to have been a mistake and removed it the following year in the open water and ice fishing regulations effective from April 1, 2013, to December 31, 2013. See A. Erskine Aff. (ECF No. 118-3) at PageID # 7011; P.D. Exs. 166 at 1861.

Island that discharges into the Main Stem. (Jt. Exs. 523-25 & 527-28 (ECF Nos. 108-23-108-25 & 108-27-108-28).)

In 1991, the Maine Legislature enacted a law to allow the Penobscot Nation's Department of Natural Resources to engage in fish sampling using gill nets on "any waters within, flowing through or adjacent to the Penobscot Indian Nation territory . . . ." (P.D. Ex. 118 at 538 (P.L. 1991, ch. 357) (codified at 12 M.R.S.A. § 12763(2) (2005).). The State thereby gave tribal biologists the same access to gill nets that DIFW already had. This legislation had the support of the Penobscot Nation and unanimous support of MITSC. (P.D. Ex. 117 at 527-30.) In MITSC's statement in support of the legislation, the Commission explained in relevant part:

> Under the Maine Indian Claims Settlement Act (30 M.R.S.A. § 6207), the Commission has exclusive authority to promulgate fishing regulations on certain bodies of water:
>
> - Any pond (other than those wholly within Indian territory and less than 10 acres in surface area), 50% or more of which the linear shore of which is within Indian territory;
> - Any section of a river or stream, both sides of which are within Indian territory; and
> - Any section of a river or stream, one side of which is within Indian territory for a continuous length of ½ a mile or more.
>
> To date, the Commission has not exercised this authority, because the Tribes and the State Department of Inland Fisheries and Wildlife both felt that state law and regulation have been sufficient. The Settlement Act provides that all state laws and regulations remain applicable until the Commission adopts its own regulations.
> There is now a growing interest on the part of the Tribes to have the Commission promulgate regulations. Thus, in the coming months the Commission expects to work closely with both the Tribes and the Department of Inland Fisheries and Wildlife, as it exercises its authority for the first time.

(P.D. Ex. 117 at 527-28.)

In a letter dated November 15, 1996, from DIFW Commissioner Ray Owen to Representative Ray Biscula, Commissioner Owen listed out various actions that he suggested could lead to a better coordination and exchange of information between his Department and tribal officials. (Jt. Ex. 627 (ECF No. 109-27) at PageID # 5815-16.) Included in this list was the "annual

issuances of a scientific collection permit to the Penobscot Nation." (Id.) The record includes a copy of one such permit issued to Penobscot Nation in 2003. (Jt. Ex. 628 (ECF No. 109-28).) This permit designated the location where authorized activity may be conducted as "Penobscot Indian Territories" and "Streams/Rivers of the Penobscot drainage," authorized the collection of fish from the inland waters for scientific purposes, and expired on December 31, 2003. (Id. at PageID # 5817.) The record also includes a similar application for a permit from Penobscot Nation, dated June 3, 2007. (Jt. Ex. 629 (ECF No. 109-29) at PageID # 5818.) DIFW then issued a permit listing the same locations that were listed in the earlier 2003 permit.[30] (Jt. Ex. 630 (ECF No. 109-30) at PageID # 5819.)

2. Regulation by FERC

Between 1796 and 1980, several dams were constructed on submerged lands within and adjacent to the Main Stem. Neither Penobscot Nation nor the United States acting on the Penobscot Nation's behalf granted a lease or any other interest in the submerged lands upon which any of the aforementioned dams were constructed. See generally *Bangor Hydro-Electric Co. (West Enfield Dam)*, 43 F.P.C. 132, 132 (1970) (noting that the West Enfield Dam was constructed in 1894); *Bangor Hydro-Electric Co. (Milford Dam)*, 42 F.P.C. 1302, 1302 (1969) (noting that the Milford Dam was built in 1905 to 1906); *Great Northern Paper Co.(Mattaceunk Dam)*, 37 F.P.C. 75, 75 (1967) (noting the construction of the Matteceunk Dam in the Main Stem was begun in 1937); *Penobscot Chemical Fibre Co. (Great Works Dam)*, 30 F.P.C. 1465, 1465 (1963) (noting that portions of the Great Works Dam, formerly in the Penobscot River at Old Town, were in

[30] The record also indicated that DIFW issued a Scientific Collectors Permit to the U.S. Fish & Wildlife Service on June 8, 2009, to collect bass from the Penobscot River in an area within the Main Stem. See Jt. Ex. 702 (ECF No 110-2).

existence prior to 1861). Because of the presence of hydroelectric dams on the Penobscot River, the Federal Energy Regulatory Commission ("FERC"), an independent federal agency, has had multiple occasions to conduct proceedings regarding licensed dams on the Penobscot River since the passage of the Settlement Acts. The Joint Stipulated Record contains FERC submissions by various state, tribal, and federal entities and at least one FERC decision. (See, e.g., Jt. Exs. 161, 179, 196-198, 200, 204, 207, 208, 210, 240, 471, 617, 618, 642-43, 655, 720 &728.)

As documented in FERC proceedings, the Penobscot Nation became more involved in hydroelectric relicensing based on its own interpretation of the rights it had secured under the Settlement Acts. (See, e.g., Jt. Ex. 74 (ECF No. 103-24) at PageID # 1629; Jt. Ex. 68 (ECF No. 103-18) at PageID # 1572-88.) In fact, by 1988, the definition of the Penobscot Indian Reservation in MIA was amended to account for some substitute lands the Penobscot Nation obtained as compensation for lands inundated by the West Enfield dam. See P.L. 1987, ch. 712, § 1 (effective Aug. 4, 1988); see also Bangor Hydro-Electric Co. (West Enfield Dam), 27 F.E.R.C. 61467 (1984) (copy provided as Jt. Ex. 655 (ECF No. 109-55)). The Penobscot Nation also received acknowledgment of its "critical interests in protecting the conservation of fishery resources on the Penobscot River" as part of a 1986 agreement with Bangor Hydro regarding the "West Enfield Associates" joint venture. (Jt. Ex. 68 (ECF No. 103-18) at PageID # 1578.)

Penobscot Nation also played a key role in negotiating and managing Bangor Hydro's salmon fry stocking mitigation, which began as a result of FERC's 1984 relicensing of the West Enfield Hydropower Project and multiple amendments thereto. (See generally Jt. Ex. 68 (ECF No. 103-18), Jt. Ex. 175 (ECF No. 104-76), Jt. Ex. 178 (ECF No. 104-78) & Jt. Ex. 248 (ECF No. 105-48).) In 1989, the Penobscot Nation demanded in-basin stocking of Atlantic salmon fry in the Penobscot River, which was approved by FERC. (See Jt. Ex. 248 (ECF No. 105-48) at PageID #

3296-3306.) The Bangor Hydro Company again consulted with the Penobscot Nation, as well as State agencies and the U.S. Fish and Wildlife Service, when it sought to revise its plans for stocking Atlantic salmon fry in the Penobscot River in 1994-95. (See P.D. Ex. 237 at 2370.) Working alongside state and federal agencies, the record demonstrates that Penobscot Nation played an important role in managing the West Enfield Fisheries Fund through 2005 in an effort to restore anadromous fish to the Penobscot River.

With respect to the state and federal government, the FERC documents provided to the Court reflect evolving positions on the boundaries and fishing rights of the Penobscot Nation in the River. For example, the DOI first publicly expressed its opinion that the Penobscot Indian Reservation included the bed or waters of the Main Stem in a 1995 letter to FERC. (See Jt. Ex. 642 (ECF No. 109-42) at PageID # 5863-5864.) By comparison, in 1993, when the DOI had occasion to analyze the status of islands located in the West Branch of the Penobscot River in connection with the relicensing of hydropower dams, the DOI explained that the Settlement Act had "extinguished all aboriginal claims to any lands or natural resources transferred from, by or on behalf of the Penobscot Nation. 25 U.S.C. § 1723. Included within this definition of transfer are any lands or natural resources over which the tribe lost dominion or control. 25 U.S.C. § 1722(n)." (Jt. Ex. 721 (ECF No. 110-21) at PageID # 6309.) Similarly, in 1994, the Penobscot Nation received a letter from the DOI regarding whether the Secretary of the Interior had authority to condition licenses FERC was issuing to two dams located in the west branch of the Penobscot River. In that letter, dated March 3, 1994, the DOI indicated that the dams in the west branch of the Penobscot River were not located within the Penobscot Indian Reservation. In reaching that conclusion, the letter explains,

> Congress in 1980 intended to confirm to the Nation the reservation that it understood then existed. In fashioning the 1980 legislation, the State of Maine and Congress recognized

> Penobscot ownership and control of islands in the main stem of the river, beginning at Indian Island and continuing north to the fork of the branches . . . . The recognition provided the basis for Congress' confirmation of islands to the Nation as its reservation. 25 U.S.C. § 1722(i); 30 M.R.S.A. § 6203(8). The background and history of this legislation, as well as its broad definition of transfer . . . , in my view, demonstrate that Congress considered islands located beyond the main stem to have been transferred, and the settlement legislation extinguished tribal claims to those transferred islands.

(Jt. Ex. 621 (ECF No. 109-21) at PageID # 5759.)

In 1995, the DOI again had an opportunity to address the boundaries of the Penobscot Indian Reservation in the context of its response to a pending FERC application by Great Northern Paper, Inc., which sought to license dams in the Lower Penobscot River. In its December 13, 1995 letter, the DOI asserted that the Penobscot Nation retained fishing rights and other riparian rights in the Main Stem. (Jt. Ex. 642 (ECF No. 109-42) at PageID # 5862-64.) In this same proceeding, the State of Maine expressed the following position:

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

(Jt. Ex. 179 (ECF No. 104-79) at PageID # 2286.)

In a November 10, 1997 DOI letter to FERC responding to a State submission, the DOI acknowledged agreement between the State of Maine and the United States that the Penobscot Nation's sustenance fishing right was properly exercised in portions of the Penobscot River, although the DOI and Maine then disputed the scope of riparian rights afforded by Maine common law to riparian owners. (Jt. Ex. 204 (ECF No. 105-4) at PageID # 2596-2608.)[31]

[31] In this same FERC proceeding, the Penobscot Nation also made a written submission asserting that the Great Northern project in fact "occup[ied] lands of the Penobscot Indian Nation." See Jt. Ex. 110-20 (ECF No 110-20) at PageID # 6243.

Ultimately, in 1998, FERC concluded that the Penobscot Indian Reservation was not a "reservation of the United States," a status that would have triggered special consideration under the Federal Power Act. Bangor Hydro-Electric Co. (Milford Dam), 83 F.E.R.C. 61037, 61078, 61082-090 (1998) (copy provided as Jt. Ex. 208 (ECF No. 105-8)). Given this conclusion, FERC did not endeavor to resolve the issues regarding whether the Penobscot Indian Reservation encompassed some or all of the Main Stem waters.

3. Regulation by the EPA

Beginning in the mid-1990s, the Penobscot Nation began lobbying the Environmental Protection Agency (the "EPA") for the establishment of water quality standards, particularly with respect to dioxin, that would protect the tribe's asserted right to sustenance fish in the Main Stem. (See Jt. Ex. 170 (ECF No. 104-70) at PageID # 2224.) This lobbying effort was in connection with the reissuance of a NPDES permit to Lincoln Pulp and Paper. (See, e.g., Jt. Ex. 175 (ECF No. 104-75) at PageID # 2254-55.) In the EPA's response to public comments, the EPA acknowledged that the Penobscot Nation was seeking "stringent dioxin limits" so that tribal members could "consume fish from the River without fear, consistent with the Nation's fishing rights." (Jt. Ex. 194 (ECF No. 104-94) at PageID # 2326.) In the context of a subsequent appeal of the EPA's NPDES permit to Lincoln Pulp and Paper, by letter dated June 3, 1997, the State of Maine, through its Attorney General, wrote to the EPA, asserting that the EPA had no federal trust obligation to account for the interest of the Penobscot Nation in the Penobscot River, that the Tribe's sustenance fishing right under the Settlement Acts did "not guarantee a particular quality or quantity of fish," and that, pursuant to the 1796 and 1818 Treaties, the Penobscot Nation retained "no reservation of the River or any of its resources." (Jt. Ex. 201 (ECF No. 105-1) at 2564-78.) In the same proceeding, the DOI twice wrote the EPA to clarify its view that the Penobscot Nation

retained sustenance fishing rights that were properly exercised in portions of the Main Stem. (See Jt. Ex. 203 (ECF No. 105-3) at PageID # 2591-94; Jt. Ex. 205 (ECF No. 105-5) at PageID # 2609-10.)

E. The Jurisdiction and Operation of the Penobscot Tribal Courts

Prior to 1979, the Penobscot Tribal Court did not exist. (Jt. Ex. 18 (ECF No. 102-18) at PageID # 1305.) However, the Settlement Acts contemplated that certain violations of state law or tribal regulations would be handled by tribal courts.

In a memo to State and local law enforcement, dated January 29, 1981, then-Maine Attorney General James Tierney offered guidance on law enforcement on tribal lands under the Settlement Acts. In that memo, the Penobscot Indian Reservation was generally described as "Indian Island and all the islands in the Penobscot River north of Indian Island." (Jt. Ex. 696 (ECF No 109-96) at PageID # 6045-46.) The memo went on to explain that additional lands acquired, as contemplated by MICSA, would become part of Indian Territory. The memo also explained that tribal courts would have certain exclusive jurisdiction but that such jurisdiction would depend on "(1) the nature of the subject matter, (2) the tribal membership of the parties, and (3) the place where the violation, crime or dispute occurred." (Id. at PageID # 6047.) In summary, the memo explained that the following would be "enforced only by Tribal police" and "prosecuted only in Tribal Courts":

(1) Commission of Class E crimes on the Reservations by Tribal members against Tribal members or the property of Tribal members;
(2) Commission of juvenile crimes which, if committed by an adult would constitute a Class E crime, on the Reservation by juvenile Tribal members against Tribal members or the property of Tribal members;
(3) Commission of juvenile crimes in 15 M.R.S.A. § 2103(1)(B) thru (D) by juvenile Tribal members occurring on the Reservation of the Tribe; and
(4) Violation of Tribal Ordinances by Tribal Members within Indian Territories

(Id. at PageID # 6050.) By comparison, the memo explained that '[v]iolations of Tribal Ordinances by non-Tribal members within Indian Territories may be enforced only by Tribal police and prosecuted only by State Courts." (Id.) Likewise, "[a]ll other violations of any State laws or regulations occurring on the Reservations may be enforced by either State, county or Tribal law enforcement officers" but prosecution of these violations would be "only in State Courts." (Id.) Similarly, correspondence from Andrew Mead, Chief Justice of the Penobscot Tribal Court, dated December 4, 1981, acknowledged that under the Settlement Acts, "the Tribal Court has complete jurisdiction over . . . all Class E offenses. . . . [E]verything above Class E automatically goes to the State Court having jurisdiction."[32] (Jt. Ex. 613 (ECF No. 109-13) at PageID # 5744.)

The summary judgment record includes materials related to a number of individual cases that have had some connection to the Penobscot Nation Tribal Court or law enforcement by Penobscot Nation Game Wardens. The Court briefly summarizes below each of the cases contained in the record as each serves as an example of the activities and enforcement actions involving the Penobscot Nation and the Main Stem.[33]

[32] In 1982, Tureen, acting as an attorney for the Penobscot Nation, did request that the Attorney General consider supporting legislation that would expand the jurisdiction of triable courts to Class D offenses. Jt. Ex. 614 (ECF No. 109-14) at PageID # 5745.

[33] The record also includes a single child support case that was handled by the Penobscot Tribal Court. In *Montgomery v. Montgomery (*Penobscot Nation Tribal Court Docket No. 2-27-08-Civ-014), the Penobscot Nation Tribal Court ruled on a child support claim by a Penobscot Nation tribal member against a non-tribal citizen who was not living on the Penobscot Indian Reservation and had never lived on the Penobscot Indian Reservation. Willis Aff. Exs. A (ECF No. 126-1) & B (ECF No. 126-2). In issuing its ruling, dated July 14, 2010, the Penobscot Nation Tribal Court acknowledged that it did "not have exclusive jurisdiction over [the child support] matter under the Land Claims Settlement Act" but found it had concurrent jurisdiction to enforce Maine's state laws regarding child support. Willis Aff. Ex. B (ECF No 126-2) at Page ID # 7544-47. The Court considers this case to have no relevance to the issues that this Court must resolve.

1. *Penobscot Nation v. Kirk Fields* (Penobscot Nation Tribal Court Criminal Action Docket Nos. 90-36 and 90-37)

In this 1990 case, the Penobscot Nation Tribal Court adjudicated a criminal case involving a tribal member, who was recorded employing a motor boat to chase down the deer and then shooting said deer in the Penobscot River with bow and arrow. (Jt. Ex. 86 (ECF No. 103-36) at PageID # 1698; Jt. Ex. 88 (ECF No. 103-38) at PageID # 1701; Jt. Ex. 93 (ECF No. 103-43) at PageID #s 1708-09.) The incident took place in the River between the mainland town of Greenbush and Jackson Island and was reported to state game wardens. (Jt. Ex. 85 (ECF No. 103-35) at PageID # 1697; Loring Decl. (ECF No. 119-12) ¶ 12; see also Jt. Ex. 302, ECF No. 106-2 at PageID # 3939 (map of Penobscot River showing Jackson Island).) The state game warden who initially took the report of Kirk's illegal deer hunting, contacted tribal game wardens. (Jt. Ex. 85 (ECF No. 103-35) at PageID # 1697; Jt. Ex. 87 (ECF No. 103-37) at PageID # 1699.) After an initial joint investigation, the state turned jurisdiction over to Penobscot Nation wardens for prosecution in the Tribal Court. (Jt. Ex. 85 (ECF No. 103-35) at PageID # 1697; Jt. Ex. 87 (ECF No. 103-37/119-16) at Page ID # 1699; Loring Decl. (ECF No. 119-12) ¶ 12 & Exs. B-D.)

2. *Penobscot Nation v. David Daigle* (Penobscot Nation Tribal Court Criminal Action Docket No. 95-143 & 144)

On June 11, 1994, David Daigle was charged with two violations of Maine state law, namely, Operating a Watercraft While Under the Influence (12 M.R.S.A. § 7801-9) and Failure to Comply with Duty to Submit (12 M.R.S.A. § 7801-9A). Charges were brought in Penobscot Tribal Court. The parties stipulated that the offenses charged occurred "within the area from the shore to the thread of the Penobscot River in an area between two islands in the Penobscot River, both of

which are within the area defined as the 'Penobscot Indian Reservation'." (Jt. Ex. 159 at PageID # 2192.)

Daigle sought dismissal of the charges arguing that the Tribal Court lacked jurisdiction over an offense committed on the River. (Jt. Ex. 125 (ECF No. 104-25) at PageID #s 2038-41.) Penobscot Nation opposed the motion arguing that its jurisdiction was established by retained aboriginal title and its riparian rights as island owners. (Jt. Ex. 129 (ECF No. 104-29) at PageID # 2073-76.) In a decision dated October 16, 1994, Chief Judge Growe of the Penobscot Tribal Court concluded that the Tribal Court did have jurisdiction, citing both the tribal court's reading of the Settlement Acts and the riparian ownership rights generally accorded to the owner of land adjoining a fresh water river under Maine law. (Jt. Ex. 159 (ECF No. 104-59) at PageID # 2193-95.)

3. *Penobscot Nation v. Coffman et al.* (Penobscot Nation Tribal Court Civil Action Docket Nos. 7-31-03-CIV-04)

The Daigle decision was later cited in the case of Penobscot Nation v. Coffman. The Coffman case arose out of a July 2003 incident in which the Penobscot Nation learned that Ralph Coffman (a non-tribal member) and his daughter (a tribal member) had salvaged 60 sunken logs from the bed of the Main Stem. (Jt. Ex. 709 (ECF No. 110-9) at PageID # 6175-78.) As a result of the dispute over logs salvaged from the Main Stem, the Penobscot Nation Tribal Council ordered that Ralph Coffman be removed and barred from the Penobscot Indian Reservation effective August 1, 2003. (Jt. Ex. 242 (ECF No. 105-42) at PageID # 3222.) Upon Ralph Coffman's appeal of the removal order, the Penobscot Nation successfully argued to the Tribal Court that the Tribal Court had no jurisdiction or authority to review actions of the Penobscot Nation Chief and Tribal Council with respect to the removal and banishment of nonmembers from the reservation. (Jt. Ex.

242 (ECF No. 105-42) at PageID #3224-37; Jt. Ex. 710 (ECF No. 110-10) at PageID # 6192.) In addition to removing Coffman, the Penobscot Nation filed a declaratory judgment action against Coffman, a non-tribal member, in Penobscot Tribal Court in order to gain possession of the logs. (Jt. Ex. 242 (ECF No. 105-42) at PageID # 3243-46.) The Penobscot Nation asserted that it retained aboriginal ownership of the Main Stem, limited only by the right of the public to use the river for navigation, but denied that aboriginal ownership has the same meaning as fee title. (Jt. Ex. 709 (ECF No. 110-9) at PageID # 6185-87.) The Penobscot Nation also argued that the Penobscot Nation's Tribal Court has concurrent (if not exclusive) jurisdiction with the State courts over a variety of reservation disputes, such as contract, tort or property rights disputes between Indians and non-Indians. (Id. at PageID # 6180-84.) In a judgment dated March 2, 2005, the Penobscot Nation's Tribal Court concluded: "the Penobscot Tribal Court retains jurisdiction to decide property disputes arising on lands of the Penobscot reservation, even if the dispute involves a non-Indian party."[34] (Jt. Ex. 246 (ECF No 105-46) at PageID # 3290.) The Tribal Court then found that logs harvested from the Main Stem were the rightful possession of the Penobscot Nation and thereby determined that Coffman, a non-tribal member, had no right to own and possess the salvaged logs.[35] (Jt. Ex. 246 (ECF No 105-46) at PageID # 3290-91.)

[34] The State of Maine was not a party to the Coffman litigation but was aware of the action given the parallel related litigation in the state court. See Jt. Ex. 241 (ECF No. 105-41) at PageID # 3206 (Coffman's Maine District Court complaint against Penobscot Nation for forcible entry and detainer).

[35] In the only other example of salvage logging in the record currently before the Court, Wendell Scott apparently sought and received permits from both the federal and state government to salvage logs from the Penobscot River; the federal permission from the Army Corps of Engineers noted that Scott would need to seek permission from the Penobscot Nation for "operations on Penobscot Indian Nation lands." (Jt. Ex. 171 (ECF No. 104-71) at PageID # 2226; Jt. Ex. 704 (ECF No. 110-4) at PageID # 6155.)

4. *Penobscot Nation v. Nathan Emerson & Tyler Honey* (Penobscot Nation Tribal Court Criminal Summons)

On September 5, 2009, a Penobscot Tribal Warden issued summonses to non-tribal members Nathan L. Emerson and Tyler J. Honey to appear in Penobscot Tribal Court for "[h]unting waterfowl [without] a [tribal] permit" on the Main Stem, specifically on the Penobscot River near Milford. (Jt. Ex. 701 (ECF No. 110-1) at Page ID # 6151.) The Director of the Penobscot Nation Department of Natural Resources, John Banks, was advised of these summonses via a memo from Penobscot Nation Game Warden Timothy Gould, in which Gould recounted that he had seen Emerson and Honey exit their boat and assume positions along the shore of an unnamed island in the Main Stem. (Jt. Ex. 699 (ECF No. 109-99) at PageID # 6145-46.) The record contains no additional information regarding the disposition of these summonses.

5. *State of Maine v. Miles Francis* (Maine District Court Criminal Summons)

In August 3, 1996, DIFW Wardens Georgia and Livezey were patrolling the Penobscot River in a boat in the area of Orson Island and Marsh Island. (Jt. Exs. 645 (ECF No. 109-45) at Page ID # 5877; Jt. Ex. 646 (ECF No. 109-46) at Page ID # 5878.) On this patrol, they issued a summons to Miles Francis, a tribal member, for the violation of Maine's headway speed laws. (Jt. Ex. 647 (ECF No. 109-47) at Page ID # 5879.) Penobscot Nation Counsel Mark Chavaree asserted that the appropriate forum to hear charges against Miles Francis was the Penobscot Nation Tribal Court and took the opportunity to note that "[t]he Penobscot Nation claims ownership of the entire bed of the [Main Stem]" and alternatively that the reservation "at the very least" extends "to the thread of the river surrounding our reservation islands." (Jt. Ex. 644 (ECF No. 109-44) at PageID # 5874.) In a further response to the summons issued to Miles Francis, Penobscot Nation Representative Paul Bisulca sent a letter to DIFW Commissioner Owen expressing the Nation's

concerns about DIFW enforcement actions against members of the tribe and informing him that tribal wardens were instructed to begin enforcing headway speed violations on the Penobscot River in order "to protect the integrity of [the Penobscot Nation] Reservation." (Jt. Ex. 181 (ECF No. 104-81) at PageID # 2297-98.)

F. Post-Settlement Act Funding from the Federal Government

With the passage of the Settlement Acts, the Penobscot Nation became eligible to apply for funding through multiple programs run through the DOI's Bureau of Indian Affairs ("BIA"). By letter dated October 31, 1980, federal funds were requested for the development of a water resource conservation and utilization plan that would involve "a complete and in-depth inventory and analysis of the chemical, biological, and physical make-up for the [Penobscot] [R]iver." (Jt. Ex. 51 (ECF No. 103-1) at PageID # 1516.) In this letter, then-Governor Timothy Love described the Penobscot Indian Reservation as "all the islands in the Penobscot River and its branches north of and including, Indian Island at Old Town" and sought funds to inventory of water resources on the river within "Estimated Water Miles 2600." (Id.) For Fiscal Year 1984, BIA awarded the Penobscot Nation a contract in excess of $1.2 million to run "reservation programs," included among those programs were monies that would "continue efforts to provide and improve the Atlantic salmon fishery in the Penobscot River around Indian Island." (Jt. Ex. 65 (ECF No. 103-15) at PageID # 1566.) The contract also specified that the Penobscot Nation would be "coordinating and cooperating" with DIFW and the Maine Atlantic Sea-Run Salmon Commission. (Id.) Similar fisheries work was contemplated under the contracts for fiscal years 1986 and 1987. (See Jt. Ex. 69 (ECF No. 103-19) at PageID # 1591-94; Jt. Ex. 71 (ECF No. 103-21) at PageID # 1598-1602.) The Penobscot Nation's contract for fiscal year 1989 allotted over $200,000 for

wildlife management and noted the continued development of a fisheries management program "for the Tribal reservation (Penobscot River) and newly acquired trust lands." (Jt. Ex. 83 (ECF No. 103-33) at PageID # 1662-63.)

In Fiscal Year 1993, the Penobscot Nation received funding for its water resources management program, which include monitoring of the Penobscot River.[36] (Jt. Ex. 97 (ECF No. 103-47) at PageID # 1720-35.) In relevant part, the scope of work for this project explained that "the Penobscot Nation has retained fishing rights through treaties" that applied to the Penobscot River. (Id. at PageID # 1725.) Similarly, the proposal submitted by the Penobscot Nation for EPA funding for water quality monitoring described the reservation as consisting of "all the islands of the Penobscot River (north of and including Indian Island) and appurtenant water rights, including fishing. Tribal members use the Penobscot River and its islands for fishing, hunting, trapping, recreation, gathering, and spiritual and cultural activities. As a riverine tribe with close spiritual and cultural ties to the river, [the Penobscot Nation] believes that clean water is of central importance." (Jt. Ex. 108 (ECF No. 104-8) at PageID # 1975.)

In 1999, the Penobscot Nation applied for and received $19,700 to study and educate tribal members on the risk of consuming contaminated fish. (See Jt. Ex. 211 (ECF NO 105-11) at PageID # 2715-23). The summary for this funding explains in relevant part: "[T]he members of the Penobscot Nation have continuously exercised their legally protected fishing rights. Fish harvested from the Penobscot River and other waters provide necessary sustenance to tribal members." (See id. at PageID # 2720.) Between Fiscal Years 1999 and 2006, the Penobscot Nation ultimately received over $1 million in EPA funding for programs focused on water quality;

[36] This contract came after the Maine Legislature enacted a law to allow the Penobscot Nation to engage in certain types of fish sampling regarding "any waters within, flowing through or adjacent to the Penobscot Indian Nation territory…." P.L. 1991, ch. 357 (effective June 18, 1991) (codified at 12 M.R.S.A. § 12763(2) (2005)), P.D. Ex. 118, 538.

much of the funded work centered on the Penobscot River. (Jt. Ex. 222 (ECF No. 105-22) at PageID # 2845-57.) In 2007 and 2010, the Penobscot Nation also sought and received funding for game warden patrols acknowledging that the tribe patrolled in the Penobscot River. (See Jt. Exs. 256 (ECF No. 105-56) & 266 (ECF No. 105-66).)

In connection with the pending litigation, the Penobscot Nation has applied to the DOI for $179,400 to pay for attorneys' fees and support in order to litigate the scope of the Penobscot Nation's reservation and jurisdiction. The BIA has also provided litigation support costs to the Penobscot Nation in these amounts: $96,000 in a November 14, 2011 contract; and $50,000 in a June 25, 2013, contract modification. (Jt. Ex. 636 (ECF No. 109-36) at PageID # 5825-52; Jt. Ex. 637 (ECF No. 109-37) at Page ID # 5832-55; State Defs. Ex. 7 (ECF No. 118-7) at Page ID # 7061.) When initially seeking this funding in 2010, the Penobscot Nation's Chief Kirk Francis informed the DOI that the Penobscot Nation had no intention of relinquishing its authority to regulate hunting, trapping, and taking of wildlife in the Penobscot River. (Jt. Ex. 636 (ECF No. 109-36) at PageID # 5826.) Chief Francis attached to his letter requesting funding a copy of the summonses to Penobscot Tribal Court that had been issued to non-tribal members Emerson and Honey and informed the DOI that the Penobscot Nation expected that similar enforcement would be required when the hunting season begins in the fall. (Id.)

III. DISCUSSION

The questions presented by the cross-motions for summary judgment are questions of statutory construction. Statutory construction necessarily begins "with the language of the statute itself." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985)); see also State of R.I. v. Narragansett Indian

Tribe, 19 F.3d 685, 699 (1st Cir. 1994) ("In the game of statutory interpretation, statutory language is the ultimate trump card."). "If the statute's language is plain, 'the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" In re Rudler, 576 F.3d 37, 44 (1st Cir. 2009) (quoting Lamie v. United States, 540 U.S. 526, 534 (2004)) (additional citations omitted); see also Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608, 610 (1st Cir. 1995) ("'Literal' interpretations which lead to absurd results are to be avoided."). When the plain language of the text is ambiguous, the Court may attempt to interpret the statute using various intrinsic and extrinsic aids. In doing so, the Court first looks to intrinsic aids, such as titles and other language and punctuation within the statute itself. See 2A Sutherland Statutory Construction § 47:1 (7th ed.) ("[I]ntrinsic aids generally are the first resource to which courts turn to construe an ambiguous statute."). When the examination of the whole statute does not clarify the apparent ambiguity in question, the Court may then look to legislative history as an extrinsic aid. See generally 2A Sutherland Statutory Construction § 48:1 (7th ed.). Ultimately,

> [t]he chief objective of statutory interpretation is to give effect to the legislative will. To achieve this objective a court must take into account the tacit assumptions that underlie a legislative enactment, including not only general policies but also preexisting statutory provisions. Put simply, courts must recognize that Congress does not legislate in a vacuum.

Passamaquoddy Tribe v. Maine, 75 F.3d 784, 788-89 (1st Cir. 1996) (internal citations omitted); see also 2A Sutherland Statutory Construction § 45:5 (7th ed.) ("[T]he essential idea that legislative will governs decisions on statutory construction has always been the test most often declared by courts.").

Beyond the general canons of statutory construction, the Court also necessarily acknowledges that special canons of construction are applicable to interpretation of statutes related to tribal matters:

> First, Congress' authority to legislate over Indian affairs is plenary and only Congress can abrogate or limit an Indian tribe's sovereignty. See U.S. CONST., art. I, § 8, cl. 3; Morton v. Mancari, 417 U.S. 535, 551–53 (1974) (discussing the plenary power of Congress to deal with special problems of Indians); see also F. Cohen, *Handbook of Federal Indian Law* 231 (1982 ed.) ("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."). Second, special rules of statutory construction obligate us to construe "acts diminishing the sovereign rights of Indian tribes . . . strictly," Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 702 (1st Cir. 1994), "with ambiguous provisions interpreted to the [Indians'] benefit," County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 247, (1985). These special canons of construction are employed "in order to comport with the[ ] traditional notions of sovereignty and with the federal policy of encouraging tribal independence," White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44, (1980), and are "rooted in the unique trust relationship between the United States and the Indians," County of Oneida, 470 U.S. at 247.

Penobscot Nation v. Fellencer, 164 F.3d 706, 709 (1st Cir. 1999). However, these special rules of construction may be inapplicable when Congressional intent is clear. Passamaquoddy Tribe v. Maine, 75 F.3d 784, 793 (1st Cir. 1996) ("If ambiguity does not loom, the occasion for preferential interpretation never arises.").

With these canons in mind, the Court must undertake a construction of MICSA and MIA; two statutes that that Law Court has indicated "quite precisely laid out the relationship thenceforth to obtain between the Penobscot Nation and the State of Maine" while "set[ting] up a relationship between the tribes, the state, and the federal government different from the relationship of Indians in other states to the state and federal governments." Penobscot Nation v. Stilphen, 461 A.2d 478, 487 & 489 (Me. 1983), appeal dismissed 464 U.S. 923 (1983).

Recognizing that a number of issues have been raised by the filings and briefing in this case, the Court held oral argument in part to clarify what issues the Court must resolve. Before identifying the legal issues that require resolution, it is worthwhile to note some of the issues that are not before this Court. First, the Court is not resolving the right to regulate water sampling or the right to regulate discharges by towns or non-tribal entities that currently discharge into the

Penobscot River. At oral argument, counsel for the Penobscot Nation acknowledged that the tribe is not claiming any such rights in this case. (10/14/15 Transcript (ECF No. 156) at PageID #s 8956-57 & 8960-61.) Likewise, the Penobscot Nation is not claiming a right to regulate fishing by nontribal members in the Main Stem. (See id. at PageID #s 8958-59.) The Court also concludes that it need not and should not resolve whether the Penobscot Nation has a right to summons nontribal members to appear before tribal courts for violations of state or tribal laws.[37] (See id. at PageID # 8972 ("[The United States'] reading of the Maine Implementing Act is that we don't see how [the Penobscot Nation] could be able to hail a nonmember into tribal court.") Additionally, the Court finds it need not separately address issues related to hunting and trapping. In the Court's view, MIA provides clear guidance on hunting and trapping once the boundaries of the Penobscot Indian Reservation are resolved.

Thus, the discussion that follows will not address any of the just-listed issues. Putting those issues aside, the Court concludes that two issues must be resolved: (1) the boundaries of the Penobscot Indian Reservation within the Main Stem and (2) the limits of the sustenance fishing rights of the Penobscot Nation in this same area.

A. The Differing Positions of the Parties Seeking Summary Judgment

It is a helpful starting point to briefly lay out the differing views of the parties on these issues:

[37] The Court recognizes that State Defendants are seeking a resolution of this issue and have placed facts involving at least four prior cases in which non-tribal members were summonsed to appear before the Penobscot Nation Tribal Court. However, in the Court's view, issues regarding the proper exercise of tribal jurisdiction in an individual case are inevitably fact-specific and should be raised in the context of the case in which jurisdiction is allegedly being improperly exercised. Asking this Court to review the exercise of jurisdiction by another court long after final judgment has entered raises a myriad of issues, including res judicata and various abstention doctrines. Therefore, the Court has determined that issues of tribal jurisdiction cannot and need not be adjudicated on the record presented.

1. Penobscot Nation's Position

The Penobscot Nation asserts that it has retained aboriginal title to the waters and river bed of the Main Stem. (Pl. Mot. (ECF No. 128-1) at 48.) As a result, it posits that the boundaries of the Penobscot Indian Reservation are actually the river banks found on either side of the Main Stem. According to the tribe, these boundaries result in the Penobscot Nation having exclusive authority within its Main Stem reservation to regulate "hunting, trapping, and other taking of wildlife for the sustenance of the individual members of . . . the Penobscot Nation." (Pl. Reply (ECF No. 152) at 27 (internal quotation marks omitted).)

The Penobscot Nation also takes the position that any non-tribal use of the river portions of the Main Stem is allowed pursuant to the "right to pass and repass any of the rivers, streams and ponds, which run through the lands [of the Penobscot Nation] for the purpose of transporting . . . timber and other articles." (P.D. Ex. 8 at 46.). Thus, they do not claim that their rights in the waters of the Main Stem include the right to exclude non-tribal members from these waters.[38]

2. United States' Position

The United States joins the Penobscot Nation is asserting that "the Main Stem falls within the bounds of the Nation's Reservation." (U.S. Mot. (ECF No. 120) at 14.) Alternatively, the United States asserts that the boundaries of the Penobscot Indian Reservation extend to the threads of the channels surrounding its islands.[39] (U.S. Mot. (ECF No. 120) at 54-55; 10/14/15 Tr. (ECF

[38] Despite this concession, the Court notes that finding the Penobscot Indian Reservation stretches from the bank-to-bank of the Main Stem would require the Court to adjudicate the riparian rights of every landowner along the Main Stem. Such an adjudication would require joinder of multiple riverfront landowners who are not currently involved in this litigation. See *infra* n. 47.

[39] With respect to nontidal navigable rivers, since at least 1849, Maine has recognized a common law rule that "riparian proprietors own to the thread of fresh water rivers." Brown v. Chadbourne, 31 Me. 9, 9 (1849); see also Pearson v. Rolfe, 76 Me. 380, 385-86 (1884) (explaining that in non-tidal, floatable streams, riparian rights include ownership of "the bed of the river to the middle of the stream" but do not include the right to block public passage); Warren v. Thomaston, 75 Me. 329 (1883).

No. 156) at PageID# 8971.) According to the United States, these riparian rights around the islands of the Main Stem create virtual halos of water in which the tribe may exercise of sustenance fishing in accordance with 30 M.R.S.A. § 6207(4). Because of the common law public servitudes on the riparian rights, the United States acknowledges that the Penobscot Nation does not have the ability to exclude non-tribal members from entering these areas to "fish, fowl, or navigate" or engage in any other public right that the Law Court might later determine falls within the public easement.[40] Under this riparian-rights approach, the United States posits that the area in which the Penobscot Nation may engage in sustenance fishing does not include the entire "bank-to-bank" of the Main Stem, but rather is limited to the halos around the islands.

3. State Defendants' Position

Contrary to the arguments pressed by the United States, the State Defendants take the positon that island owners in a navigable river generally have no riparian rights:

> Under principles of Maine property law, the *riverside* owners of a nontidal, navigable river own the submerged lands to the centerline or "thread" of the river, unless the deed clearly states otherwise.

(State Defs. Mot. (ECF No. 117) at 38 & n. 43; see also State Defs. Response (ECF No. 142) at 45.)[41] Given this position on the Maine common law, the State Defendants assert that the Penobscot Indian Reservation includes none of the waters surrounding the islands. However, at

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[40] Public servitude on riparian property along tidal water, great ponds, or navigable streams may be summarized as the public right to fish, fowl, and navigate . . . . The Maine Supreme Judicial Court, sitting as the Law Court, has interpreted "fish, fowl, and navigate" to encompass skating, digging worms, clamming, floating logs, landing boats, mooring, and sleigh travel, among other activities. These public servitudes, which evolved from commercial use, do not involve any depletion or damage to soil or chattels and do not include the right of the public to wash, swim, picnic, or sunbathe.

Donald R. Richards & Knud E. Hermansen, Maine Principles of Ownership Along Water Bodies, 47 Me. L. Rev. 35, 46-47 (1995) (footnotes omitted).

[41] In maintaining this position, the States' motion papers simply ignore Skowhegan Water-Power Co., 47 A. 515 (Me. 1900) (finding that island landowner in the Kennebec River acquired the rights of a riparian owner) and Warren v. Westbrook Manufacturing Co., 86 Me. 32 (1893) (holding that island owners had rights to the thread of the channel).

oral argument, the State did concede that Penobscot Nation did have a right to "access the navigable portion of the stream" from its islands. (10/14/15 Tr. (ECF No. 156 at PageID # 8989.)

In its briefs and at oral argument, the State Defendants proffered two arguments to avoid an absurd reading of section 6207(4), under which the Penobscot Nation would have a right to "take" fish only in an area widely acknowledged to not have any fish. First, , the State Defendants suggests that there is no case or controversy with respect to the sustenance fishing rights of the Penobscot Nation given the State's longstanding, informal policy of allowing sustenance fishing in the Main Stem. (See State Defs. Response (ECF No. 142) at 6; 10 /14/15 Tr. (ECF No. 156) at PageID #s 8983-85 & 8994.) Second, they assert that the sustenance fishing provision makes sense as applied to the reservations of other tribes with claims settled by MIA and MICSA.

With the three differing positions summarized, the Court turns to the statutory construction questions at hand.

B. The Boundaries of the Penobscot Indian Reservation

MICSA expressly defines "Penobscot Indian Reservation" as "those lands as defined in the Maine Implementing Act." 25 U.S.C. § 1722(i). MIA, in its definitional section, expressly defines the "Penobscot Indian Reservation" as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818." 30 M.R.S.A. § 6203(8).

There is, in the Court's view, no ambiguity in these definitions. Rather, the language plainly defines the Penobscot Indian Reservation as the islands in the Main Stem, which the Penobscot Nation had retained since the 1818 Treaty. MICSA is explicitly silent on the issue of any waters being included within the boundaries of the Penobscot Indian Reservation because

§ 1722(i) speaks only of "lands." By contrast, § 1722(b) specifically defines the phrase "land and natural resources" as "any real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b). Thus, § 1722(i)'s use of the word "lands," instead of the more broadly defined phrase "land and natural resources," appears to reflect a Congressional focus on defining only what land would make up the "Penobscot Indian Reservation."

With respect to MIA, looking only at the plain language of section 6203(8), the position taken by the Penobscot Nation would require this Court to read "the islands in the Penobscot River" as "the islands ***and*** the Penobscot River." Such a reading is implausible on its face, as it changes the plain meaning of a simple word, "in," and thereby significantly alters the meaning of section 6203(8).[42] Additionally, reading section 6203(8) to include the waters of the Main Stem requires the Court to disregard the statute's use of the term "solely." See Vance v. Speakman, 409 A.2d 1307, 1310 (Me. 1979) ("As this Court has repeatedly declared, 'An elementary rule of statutory construction is that words must be given their common meaning unless the act discloses a legislative intent otherwise.'") (citing and quoting Hurricane Island Outward Bound v. Town of Vinalhaven, 372 A.2d 1043, 1046 (1977)).

Even if there were any arguable ambiguity in the plain definitional language of section 6203(8), the record provided to this Court includes ample evidence that the waters of the Main

[42] The 1988 amendment of 30 M.R.S.A. § 6203(8) further supports the reading that MIA's definitional section intended to deal with land only. Pursuant to that amendment, land "that have been or may be acquired by the Penobscot Nation from Bangor Pacific Hydro Associates as compensation for flowage of reservation lands by the West Enfield dam" was added to the definition of "Penobscot Indian Reservation." Law 1987, c. 747, § 1. Implicit in this amendment is the suggestion that when islands in the Main Stem became submerged as a result of this dam, the Penobscot Nation had lost part of its reservation and should be allowed to replace it with additional land obtained "as compensation." If section 6203(8) was intended to include the waters of the Main Stem, flowage would not result in the loss of designated reservation space.

Stem have been treated and regulated like all other portions of the Penobscot River since Maine became a state in 1820. Likewise, the undisputed record supports the view that at the time of the passage of the 1980 Settlement Acts, no one expressed the view that passage of the Settlement Acts would change the ownership of the waters of the Main Stem or that the Settlement Acts intended to recognize an aboriginal title in the Main Stem waters.[43] (See, e.g., Jt. Ex. 732 (ECF No. 110-32) Map 30 (showing the islands of the Main Stem designates as "Indian Reservation" and the Main Stem waters as "river . . . adjacent to Settlement Lands").)

In short, the Court concludes that the plain language of the Settlement Acts is not ambiguous. The Settlement Acts clearly define the Penobscot Indian Reservation to include the delineated islands of the Main Stem, but do not suggest that any of the waters of the Main Stem fall within the Penobscot Indian Reservation. That clear statutory language provides no opportunity to suggest that any of the waters of the Main Stem are also included within the boundaries of the Penobscot Indian Reservation. Further, even if the Court were to deem the language of MIA and MICSA ambiguous on this point, the Court finds that the available intrinsic evidence as well as the extrinsic evidence in the legislative history similarly supports a finding that the legislative intent of MIA and MICSA was to set the borders of the islands in the Main Stem as the boundaries of the Penobscot Indian Reservation in this portion of the Penobscot River.

[43] By contrast, Plaintiffs' arguably strongest undisputed extrinsic evidence that MIA should be read to include the waters of the Main Stem are statements made post-passage. See, e.g., Jt. Ex. 80 (ECF No. 103-30) at PageID # 1652 (2/16/1998 Ltr. from Tierney indicating that the Penobscot Nation's proposed fishing in Main Stem "would not be prohibited" under the express terms of 30 M.R.S.A. § 6207(4), which allows "sustenance fishing" that occurs "within the boundaries of" the Penobscot Reservation); Jt. Ex. 161 (ECF No. 104-61) at PageID # 2200 (10/1/1995 Ltr. from Katz dismissing the argument that MIA can be read to mean that "[o]nly the islands and none of the waters in the Penobscot River constitute the Penobscot Reservation."); Pearson Decl. (ECF No. 119-37) at PageID # 7363.

C. Sustenance Fishing by the Penobscot Nation

Having determined that the Court must endorse the plain meaning of section 6203(8), the Court next considers another section of MIA, "Regulation of fish and wildlife resources." 30 M.R.S.A. § 6207. This section contains explicit sustenance fishing rights for the Penobscot Nation and the Passamaquoddy Tribe:

> **Sustenance fishing within the Indian reservations.** Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.

30 M.R.S.A. § 6207(4).[44] The same section also defines "fish":

> As used in this section, the term "fish" means a cold blooded completely aquatic vertebrate animal having permanent fins, gills and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water.

30 M.R.S.A. § 6207(9).

Given section 6207's focus on the regulation of fishing and hunting, subsection nine's carve out for sustenance fishing appears designed to position sustenance fishing outside the bounds of regulation by the State or MITSC and thereby provide broad protection for tribal sustenance fishing. In fact, the undisputed record is replete with evidence that members of the Penobscot Nation have continuously sustenance fished in the waters of the Main Stem both prior to the Settlement Acts and after the enactment of the Settlement Acts. See *supra* II.C. However, unless

[44] The Court notes that the United States previously attempted to have section 6207(4) interpreted by the Law Court in connection with a review of the Maine Board of Environmental Protection's decision to conditionally approve an Bangor Hydro-Electric Company's plan for the Basin Mills Dam. See Atl. Salmon Fed'n v. Bd. of Envtl. Prot., 662 A.2d 206, 211 (Me. 1995). The Law Court then determined that arguments that the conditional license "violates the Penobscot Indian Nation's reserved fishing rights established by 30 M.R.S.A. § 6207(4)" had not been properly reserved for review on appeal. Id.; see also Jt. Exs. 98 (ECF No. 103-48) (BEP public hearing transcript), Defs. Ex. 30 (ECF No. 141-11) (11/10/93 BEP decision on Basin Mills Hydro Project).

the waters of the Main Stem are inside the boundaries of the Penobscot Indian Reservation, the policy expressed in section 6207(4) actually contradicts this longstanding practice of a sustenance fishing in the Main Stem. To be clear, this difference between the written policy and the historical practice pre-dates the passage of MIA's section 6207(4). In fact, when passing MIA, the State simultaneously repealed 12 M.R.S.A. § 7076(9)(B), which had then afforded "special privileges" to Indians, including in relevant part: "the right of Indians to take fish and wildlife for their own sustenance on their own reservation lands." See Laws 1979, ch. 732, Sec. 6. By its terms, this prior statute allowed for sustenance fishing "on . . . reservation lands," but it was apparently understood and accepted that the Penobscot Nation sustenance fished in the waters of the Main Stem under this prior statute.

When 12 M.R.S.A. § 7076(9)(B) was replaced, in relevant part, with MIA's section 6507(4), nothing in the legislative history suggested that anyone thought they were substantively changing the sustenance fishing rights of the Penobscot Nation. (See, e.g., P.D. Ex. 276 at 4132 (Statement of Mr. Patterson: "Currently under Maine Law, the Indians can hunt and fish on their existing reservation for their own sustenance without regulation of the State. That's a right which the State gave to the Maine Indians on their reservations a number of years ago and the contemplation of this draft was to keep in place that same kind of right and provide that the Indians could continue to sustenance hunt and fish . . . ."). Rather, both the State and the Penobscot Nation understood that the Penobscot Nation's sustenance fishing rights would remain the same. But, it was understood that, by including those rights in the Settlement Acts, those rights could not be readily changed by some later State legislative action. Likewise, all sides were aware that but for the tribal sustenance fishing exception, MIA would mandate uniform fishing regulations for all,

with the regulations for all fishing grounds of significant size, including the entirety of the Penobscot River, promulgated by either the State or MITSC.[45] See 30 M.R.S.A. § 6207.

Given the longstanding differences in the language of the sustenance fishing provisions and the accepted practices in the Main Stem, the Court readily finds the language of section 6207(4) to be ambiguous. This ambiguity is reinforced by the three different positions asserted by the Penobscot Nation, the United States and the State Defendants, each of whom claim their position is supported by the language and history of the Settlement Acts.

The State Defendants suggest that this ambiguity can be resolved, and absurd results avoided, if the Court interprets section 6207(4) to mean that members of the Penobscot Nation may engage in sustenance fishing in the Main Stem so long as they cast their reel or net from one of the Nation's islands in the Main Stem. To state the obvious, a fish swimming in the Main Stem would not actually be "within the boundaries of [the reservation]" when taken. Thus, the State Defendants are not simply promoting a plain reading of section 6207(4). Notably, under the State Defendants' proposed interpretation of section 6207(4) sustenance fishing in the Main Stem could not be done from a boat. (See 10/14/15 Tr. (ECF No. 156) at PageID # 8991 ("MR. REID: As a matter of law, as a matter of statute it appears that they can't [fish from a boat].")) At oral argument, the Court described this interpretation as only allowing only sustenance fishing in the Main Stem when a tribal member has "one foot on the island."[46] (See id. at 56-57, 60.)

[45] Tribal regulation of fishing was expressly limited to ponds that were less than ten acres in surface area and contained "wholly within Indian territory." See 30 M.R.S.A. § 6207(1)(B). Thus, even a great pond or portion of a river located within a reservation would be subject to MITSC regulation, not tribal regulation. See id. at § 6207(3). Additionally, Maine's Commissioner of DIFW retained the ability to step in if remedial measures were needed to secure any state fishery. See 30 M.R.S.A. §§ 6207(1), (3) & (6).

[46] The Court is concerned that the logical extension of the State Defendants' proposed interpretation would result in a situation in which a hunter or trapper who keeps "one foot in the water" of the Main Stem somehow would not be hunting or trapping on the Penobscot Indian Reservation even though the bird or other animal being hunted is clearly located on land designated as a portion of the Reservation.

On the record presented to this Court, the State Defendants' proposed resolution of any absurd or ambiguous readings of section 6207(4) finds no support in the legislative record. There is no evidence that the Maine Legislature, Congress, or the Penobscot Nation intended for the Settlement Acts to change and further restrict the already long-accepted practice of Penobscot Nation members sustenance fishing in the Main Stem, such that tribal members would need to have at minimum one foot on an island and could no longer sustenance fish from boats in the Main Stem. Thus, this Court cannot endorse the State Defendant's proffered construction of section 6207(4) as a reflection of the legislative will. Additionally, the Court cannot accept the State Defendants' proffered interpretation as feasible under the special statutory canons that require the Court to read ambiguous provisions in a manner that narrowly diminishes the retained sovereignty over tribal sustenance fishing.

The Court also cannot allow the State to sidestep interpretation of section 6207(4). The State's assertion that it has no plans to discontinue its informal, longstanding policy of allowing sustenance fishing on the Main Stem does not obviate the need for this Court to clarify the scope of the sustenance fishing right guaranteed under MIA. The Settlement Acts were intended to secure certain rights for each tribe involved, and the Penobscot Nation has genuinely disputed the State's contention that sustenance fishing bank-to-bank is a mere favor that the State is free to continue or discontinue granting at its discretion.

Plaintiffs take an entirely different tack; they essentially assert that the rules of statutory construction require the Court to apply an identical meaning to "the boundaries of the [Penobscot Nation] Indian reservation[ ]" in section 6207(4) and the definitional provision of section 6203(8). Thus, to avoid an interpretation that would deprive the Penobscot Nation of any viable space for sustenance fishing, Plaintiffs urge the Court to place all or some of the waters of the Main Stem

within the boundaries of the reservation. The Court certainly recognizes that the general rules of statutory construction dictate that defined terms should have the same definitions throughout an entire statute. See, e.g., Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2004-05 (2012) ("[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotations and citations omitted). But, in the Court's assessment here, application of this canon would require the Court to disregard multiple other canons of statutory construction and the entirety of the available legislative history on the Settlement Acts.[47]

In deciding how to avoid the untenable and absurd results that flow from applying a singular definition of reservation in sections 6203(8) and 6207(4), the Court is reminded that MIA's "Definitions" section notes that the definitions laid out in section 6203 apply to the whole act "unless the context indicates otherwise." 30 M.R.S.A. § 6203. On the issue of sustenance fishing, the context does indicate otherwise. The current undisputed record shows a long history of Penobscot Nation members sustenance fishing the entirety of the Main Stem and an intention on the part of the Maine Legislature, Congress and the Penobscot Nation to maintain this status quo with the passage of the Settlement Acts. In fact, this status quo was maintained in practice and it was only in the context of this litigation that the State took the position that sustenance fishing rights in the Main Stem were not guaranteed under MIA.

[47] To the extent that the Penobscot Nation seeks a declaration that the Penobscot Indian Reservation includes the Main Stem waters bank-to-bank, the Court notes that it agrees with State Defendants that such a declaration could only be made if any and all land owners along the Main Stem who might claim riparian rights were joined as parties. See State Defs. Mot. (ECF No. 117) at PageID #s 6899-6902 & Fed. R. Civ. P. 19(a)(1). This necessary joinder would involve hundreds of additional land owners and presumably title insurance companies. See State Defs. Mot. (ECF No. 117) at PageID # 6900. In addition to whatever case management challenges such a case would present, a case involving hundreds of parties—each with a unique title and the potential to impair each of those titles—is precisely what the Settlement Acts were designed to preclude.

In Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), the Supreme Court confronted a situation somewhat similar to the one presented here. In that case, Congress had designated the "the body of lands known as the Annette Islands" as a reservation of the Metlakahtla Indians. See id. at 86 (quoting section 15 of the Act of March 3, 1891, c. 561, 26 Stat. 1101 (Comp. St. 1916, § 5096a)). Presented with a dispute as to whether the reservation included navigable waters around the islands, the Supreme Court took a pragmatic view: "The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation." Id. at 89. The Court also invoked the special canons of construction related to tribal matters and looked at the conduct of the tribe and the public since the creations of the Annette Islands reservation. In light of these considerations, the Supreme Court concluded that the reservation necessarily included the waters around the islands.

The Penobscot Nation cites the Alaska Pacific Fisheries case in support of its claim that section 6203(8) can be read to place the waters of the Main Stem within the Penobscot Indian Reservation. (See Penobscot Nation Mot. for S.J. (ECF No. 128-1) at 44-46.) In the Court's assessment, this argument is an overreach because the Court has found that 6203(8) is susceptible to a plain language interpretation. However, having found section 6207(4) to be ambiguous, Alaska Pacific Fisheries provides on-point precedent for interpretation of an ambiguous statutory provision related to a reservation. Considering all of the factors considered by the Supreme Court in Alaska Pacific Fisheries, this Court concludes that section 6207(4) must be read to allow the Penobscot Nation's longstanding, continuous practice of sustenance fishing in the waters adjacent to its island reservation. In the absence of any evidence suggesting that sustenance fishing has in

the past only occurred or been allowed in designated sections of the Main Stem, the Court finds that section 6207(4) allows the Penobscot Nation to sustenance fish in the entirety of the Main Stem subject only to the limitation of section 6207(6).[48]

Ultimately, the present dispute is not a disagreement about if or how members of the Penobscot Nation have sustenance fished in the Main Stem or whether they should be allowed to continue sustenance fishing in the Main Stem. It amounts to a disagreement as to the import of the Penobscot Nation's sustenance fishing in the Main Stem both before and after the passage of the Settlement Acts. The Penobscot Nation believes that sustenance fishing in the Main Stem reflects their retained aboriginal title as confirmed in the enactment of the Settlement Acts. The United States believes that sustenance fishing in the Main Stem is somehow a unique riparian right of the Penobscot Nation under the terms of the Settlement Acts. The State has evolved into a belief that this sustenance fishing is permissible by the good graces of the State under an informal policy that has given a broad reading to an otherwise very narrow statutory right. The Court disagrees with all of these theories.

In the Court's final assessment, the plain language of section 6207(4) is ambiguous, if not nonsensical. Because the Court must interpret this ambiguous provision to reflect the expressed legislative will and in accordance with the special tribal canons of statutory construction, the Court cannot adopt an interpretation of section 6207(4) that diminishes or extinguishes the Penobscot

[48] The Court certainly recognizes that the United States has argued that any ambiguity in section 6207(4) is best resolved by reading section 6203(8) to take the boundaries of the Penobscot Indian Reservation to the threads of the River around each island in its Reservation. While this is a Solomonesque approach to resolving this dispute, it lacks support in the legislative history or the actual sustenance fishing practices as described in the record. The Court also notes that the State maintains that this approach finds no support in Maine's common law. But see *supra* n. 39. Additionally, the Court recognizes that such a "halo" approach would create a myriad of enforcement issues that are not contemplated or addressed by the Settlement Acts. The Court notes that nothing in this decision should be read as deciding whether the Penobscot Nation has common law riparian rights as an island owner in the Penobscot River. Rather, the Court has determined that regardless of the resolution of that common law riparian rights question, the legislative intent contained in section 6207(4) was to provide the Penobscot Nation sustenance fishing rights in the entirety of Main Stem, not simply to the threads around their individual islands.

Nation's retained right to sustenance fish in the Main Stem. Rather, the Court concludes that the Settlement Acts intended to secure the Penobscot Nation's retained right to sustenance fish in the Main Stem, as it had done historically and continuously.

IV. CONCLUSION

For the reasons just stated, each motion for summary judgment (ECF Nos. 117, 120, 121/128-1) is GRANTED IN PART AND DENIED IN PART. The Court ORDERS that declaratory judgment enter as follows:

(1) in favor of the State Defendants to the extent that the Court hereby declares that the Penobscot Indian Reservation as defined in MIA, 30 M.R.S.A. § 6203(8), and MICSA, 25 U.S.C. § 1722(i), includes the islands of the Main Stem, but not the waters of the Main Stem; and

(2) in favor of the Penobscot Nation and the United States to the extent that the Court hereby declares that the sustenance fishing rights provided in section 30 M.R.S.A. § 6207(4) allows the Penobscot Nation to take fish for individual sustenance in the entirety of the Main Stem section of the Penobscot River.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 16th day of December, 2015.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket no. 1:12-cv-254-GZS
	)	
JANET T. MILLS, Attorney General for the State of Maine, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

ORDER ON THE PENDING MOTIONS OF STATE INTERVENORS

Before the Court are two motions by a jointly represented group of intervenors and counterclaimants, commonly referred to in this case as the "State Intervenors"[1]: (1) the Motion for Judgment on the Pleadings (ECF No. 116) and (2) the Motion to Exclude the Testimony of Plaintiffs' Experts (ECF No. 138). As briefly explained herein, both Motions are GRANTED IN PART AND DENIED IN PART.

While the Court is issuing a brief standalone order on these motions, the Court hereby incorporates in this Order the analysis found in its Order on Cross-Motions for Summary Judgment being filed this same day. For reasons more fully stated in that Order, the Court GRANTS IN PART AND DENIES IN PART the Motion for Judgment on the Pleadings. The Motion is GRANTED to the extent that the Court is declaring that the Penobscot Indian Reservation as defined in MIA, 30 M.R.S.A. § 6203(8), and MICSA, 25 U.S.C. § 1722(i), includes the islands of

[1] The State Intervenors include: the City of Brewer, the Town of Bucksport, Covanta Maine, LLC, the Town of East Millinocket, Great Northern Paper Company, LLC, Guilford-Sangerville Sanitary District, the Town of Howland, Kruger Energy (USA) Inc., the Town of Lincoln, Lincoln Paper and Tissue, LLC, Lincoln Sanitary District, the Town of Mattawamkeag, the Town of Millinocket, Expera Old Town, LLC, True Textiles, Inc., Veazie Sewer District, and Verso Paper Corp.

the Main Stem, but not the waters of the Main Stem. The Court notes that it concludes that this declaration is warranted on the pleadings and on the full summary judgment record. To the extent that, the State Intervenors' Motion for Judgment on the Pleadings can be read to request any other relief, it is DENIED.

In addition to seeking a judgment on the pleadings, the State Intervenors separately opposed Plaintiffs' requests for summary judgment and sought to exclude from this Court's consideration all of the expert testimony submitted by Plaintiffs in connection with the cross-motions for summary judgment. The Motion to Exclude the Testimony of Plaintiffs' Experts (ECF No. 138) argues that all three of Plaintiffs' experts proffer testimony that is irrelevant, unreliable and also includes improper legal conclusions. The experts are two historians, Pauleena MacDougall and Harold L. Prins, as well as one surveyor, Kenneth Roy.

While the Court does not believe it is necessary or proper to categorically exclude the expert testimony proffered by Plaintiffs under Rule 402 or Rule 702, the Court has disregarded any expert testimony that consists of improper legal opinions in constructing the factual narrative on the cross-motions for summary judgment. Likewise, as already noted in the Court's Order on Cross-Motions for Summary Judgment, to the extent any material fact was supported solely with a citation to any expert report, the Court has not considered that expert testimony. (See Order on Cross-Motions for Summary Judgment at 4 n.3.) Finally, to the extent that the Court has concluded that any expert testimony is immaterial or genuinely disputed, the Court has not considered that expert testimony in order to resolve the pending motions for summary judgment. In short, the Court has considered the Plaintiffs' proferred expert testimony after excluding any legal conclusions and applying the standards required under both Federal Rule of Civil Procedure 56 and District of Maine Local Rule 56.

With those caveats, the expert testimony submitted to the Court has not played a decisive role in the Court's statutory construction. Therefore, the Court GRANTS IN PART the Motion to Exclude the Testimony of Plaintiffs' Experts to the extent it sought exclusion of expert testimony that amounts to legal conclusions but otherwise DENIES the Motion.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 16th day of December, 2015.

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U.S. District Court

District of Maine

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Docket Text:
ORDER denying [164] Motion to Amend. & [165] Motion to Amend. DENIED. SO ORDERED. By JUDGE GEORGE Z. SINGAL. (JPL)

1:12-cv-00254-GZS Notice has been electronically mailed to:

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1:12-cv-00254-GZS Notice has been delivered by other means to:

Maine's Act to Implement the Maine Indian Claims Settlement
30 M.R.S.A. §§ 6201-6214
(Relevant Sections)

§ 6202. Legislative findings and declaration of policy

The Legislature finds and declares the following.

The Passamaquoddy Tribe, the Penobscot Nation...are 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, 1 Stat. 137, or subsequent reenactments or versions thereof.

Substantial economic and social hardship could be created for large numbers of landowners, citizens and communities in the State, and therefore to the State as a whole, if these claims are not resolved promptly.

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 on the part of all parties to achieve a fair and just resolution of those claims which, in the absence of agreement, would be pursued through the courts for many years to the ultimate detriment of the State and all its citizens, including the Indians.

The foregoing agreement between the Indian claimants and the State also represents 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 Passamaquoddy and Penobscot Indian reservations and in the claimed areas. To that end, the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State.

It is the purpose of this Act to implement in part the foregoing agreement.

§ 6203. Definitions

As used in this Act, unless the context indicates otherwise, the following terms have the following meanings.

1. Commission. "Commission" means the Maine Indian Tribal-State Commission created by section 6212.

* * *

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

The "Penobscot Indian Reservation" includes the following parcels of land that have been or may be acquired by the Penobscot Nation from Bangor Pacific Hydro Associates as compensation for flowage of reservation lands by the West Enfield dam: A parcel located on the Mattagamon Gate Road and on the East Branch of the Penobscot River in T.6 R.8 WELS, which is a portion of the "Mattagamon Lake Dam Lot" and has an area of approximately 24.3 acres, and Smith Island in the Penobscot River, which has an area of approximately one acre….

9. Penobscot Indian territory. "Penobscot Indian territory" means that territory defined by section 6205, subsection 2.

* * *

§ 6205. Indian territory

* * *

2. Penobscot Indian territory. Subject to subsections 3, 4 and 5, the following lands within the State shall be known as the "Penobscot Indian territory:"

A. The Penobscot Indian Reservation; and

B. The first 150,000 acres of land acquired by the secretary for the benefit of the Penobscot Nation from the [certain designated] areas....

* * *

§ 6207. Regulation of fish and wildlife resources

1. Adoption of ordinances by tribe. Subject to the limitations of subsection 6, the Passamaquoddy Tribe and the Penobscot Nation each shall have exclusive authority within their respective Indian territories to promulgate and enact ordinances regulating:

A. Hunting, trapping or other taking of wildlife….

* * *

Such ordinances shall be equally applicable, on a nondiscriminatory basis, to all persons regardless of whether such person is a member of the respective tribe or nation provided, however, that subject to the limitations of subsection 6, such ordinances may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation. In addition to the authority provided by this subsection, the Passamaquoddy Tribe and the Penobscot Nation, subject to the limitations of subsection 6, may exercise within their respective Indian territories all the rights incident to ownership of land under the laws of the State.

* * *

3. Adoption of regulations by the commission. Subject to the limitations of subsection 6, the commission shall have exclusive authority to promulgate fishing rules or regulations on:

* * *

B. Any section of a river or stream both sides of which are within Indian territory; and

C. Any section of a river or stream one side of which is within Indian territory for a continuous length of 1/2 mile or more.

In promulgating such rules or regulations the commission shall consider and balance the need to preserve and protect existing and future sport and commercial fisheries, the historical non-Indian fishing interests, the needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes, the traditional fishing techniques employed by and ceremonial practices of Indians in Maine and the ecological interrelationship between the fishery regulated by the commission and other fisheries throughout the State. Such regulation may include without limitation provisions on the method, manner, bag and size limits and season for fishing.

Said rules or regulations shall be equally applicable on a nondiscriminatory basis to all persons....

In order to provide an orderly transition of regulatory authority, all fishing laws and rules and regulations of the State shall remain applicable to all waters specified in this subsection until such time as the commission certifies to the commissioner that it has met and voted to adopt its own rules and regulations in substitution for such laws and rules and regulations of the State.

* * *

4. Sustenance fishing within the Indian reservations. Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.

5. Posting. Lands or waters subject to regulation by the commission, the Passamaquoddy Tribe or the Penobscot Nation shall be conspicuously posted in such a manner as to provide reasonable notice to the public of the limitations on hunting, trapping, fishing or other use of such lands or waters.

6. Supervision by Commissioner of Inland Fisheries and Wildlife. The Commissioner of Inland Fisheries and Wildlife, or his successor, shall be entitled to conduct fish and wildlife surveys within the Indian territories and on waters subject to the jurisdiction of the commission to the same extent as he is authorized to do so in other areas of the State. Before conducting any such survey the

commissioner shall provide reasonable advance notice to the respective tribe or nation and afford it a reasonable opportunity to participate in such survey. If the commissioner, at any time, has reasonable grounds to believe that a tribal ordinance or commission regulation adopted under this section, or the absence of such a tribal ordinance or commission regulation, is adversely affecting or is likely to adversely affect the stock of any fish or wildlife on lands or waters outside the boundaries of land or waters subject to regulation by the commission, the Passamaquoddy Tribe or the Penobscot Nation, he shall inform the governing body of the tribe or nation or the commission, as is appropriate, of his opinion and attempt to develop appropriate remedial standards in consultation with the tribe or nation or the commission. If such efforts fail, he may call a public hearing to investigate the matter further. Any such hearing shall be conducted in a manner consistent with the laws of the State applicable to adjudicative hearings. If, after hearing, the commissioner determines that any such ordinance, rule or regulation, or the absence of an ordinance, rule or regulation, is causing, or there is a reasonable likelihood that it will cause, a significant depletion of fish or wildlife stocks on lands or waters outside the boundaries of lands or waters subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or the commission, he may adopt appropriate remedial measures including rescission of any such ordinance, rule or regulation and, in lieu thereof, order the enforcement of the generally applicable laws or regulations of the State. In adopting any remedial measures the commission shall utilize the least restrictive means possible to prevent a substantial diminution of the stocks in question and shall take into consideration the effect that non-Indian practices on non-Indian lands or waters are having on such stocks. In no event shall such remedial measure be more restrictive than those which the commissioner could impose if the area in question was not within Indian territory or waters subject to commission regulation.

In any administrative proceeding under this section the burden of proof shall be on the commissioner. The decision of the commissioner may be appealed in the manner provided by the laws of the State for judicial review of administrative action and shall be sustained only if supported by substantial evidence.

* * *

8. Fish and wildlife on non-Indian lands. The commission shall undertake appropriate studies, consult with the Passamaquoddy Tribe and the Penobscot Nation and landowners and state officials, and make recommendations to the commissioner and the Legislature with respect to implementation of fish and wildlife management policies on non-Indian lands in order to protect fish and

wildlife stocks on lands and water subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or the commission.

9. Fish. As used in this section, the term "fish" means a cold blooded completely aquatic vertebrate animal having permanent fins, gills and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water.

* * *

§ 6210. Law enforcement on Indian reservations and within Indian territory

1. Exclusive authority of tribal law enforcement officers. Law enforcement officers appointed by the Passamaquoddy Tribe and the Penobscot Nation have exclusive authority to enforce, within their respective Indian territories, ordinances adopted under section 6206 and section 6207, subsection 1….

* * *

4. Powers and training requirements. Law enforcement officers appointed by the Passamaquoddy Tribe and the Penobscot Nation possess the same powers and are subject to the same duties, limitations and training requirements as other corresponding law enforcement officers under the laws of the State.

* * *

§ 6212. Maine Indian Tribal-State Commission

1. Commission created. The Maine Indian Tribal-State Commission is established. The commission consists of 13 members, 6 to be appointed by the Governor, subject to review by the Joint Standing Committee on Judiciary and to confirmation by the Legislature, 2 to be appointed by the Houlton Band of Maliseet Indians, 2 to be appointed by the Passamaquoddy Tribe, 2 to be appointed by the Penobscot Nation and a chair, to be selected in accordance with subsection 2....

2. Chair. The commission, by a majority vote of its 12 members, shall select an individual who is a resident of the State to act as chair....

3. Responsibilities. In addition to the responsibilities set forth in this Act, the commission shall continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State and shall make such reports and recommendations to the Legislature, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation as it determines appropriate....

Maine Indian Claims Settlement Act of 1980
P.L. 95-395[1]
(Selected Sections)

§ 1721. Congressional findings and declaration of policy

(a) Findings and declarations

Congress hereby finds and declares that:

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1790 (1 Stat. 137), or subsequent reenactments or versions thereof.

* * *

(3) The Penobscot Nation, as represented as of the time of passage of this [Act] by the Penobscot Nation's Governor and Council, is the sole successor in interest to the aboriginal entity generally known as the Penobscot Nation which years ago claimed aboriginal title to certain lands in the State of Maine.

* * *

(6) Substantial economic and social hardship to a large number of landowners, citizens, and communities in the State of Maine, and therefore to the economy of the State of Maine as a whole, will result if the aforementioned claims are not resolved promptly.

(7) This [Act] represents a good faith effort on the part of Congress to provide the Passamaquoddy Tribe [and] the Penobscot Nation...with a fair and just settlement of their land claims....

[1] The Maine Indian Claims Settlement Act was previously codified at 25 U.S.C. §§ 1721-1735. The [Act] remains in effect but was removed from the United States Code as of 25 U.S.C. Supp. IV (August 2016). The section headings herein are to the previously codified version.

(8) The State of Maine, with the agreement of the Passamaquoddy Tribe and the Penobscot Nation, has enacted legislation defining the relationship between the Passamaquoddy Tribe, the Penobscot Nation, and their members, and the State of Maine.

* * *

(b) Purposes

It is the purpose of this [Act] –

(1) to remove the cloud on the titles to land in the State of Maine resulting from Indian claims;

(2) to clarify the status of other land and natural resources in the State of Maine;

(3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation, and

(4) to confirm that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.

§ 1722. Definitions

For purposes of this [Act], the term –

* * *

(i) "Penobscot Indian Reservation" means those lands as defined in the Maine Implementing Act;

(j) "Penobscot Indian Territory" means those lands as defined in the Maine Implementing Act;

(k) "Penobscot Nation" means the Penobscot Indian Nation as constituted in aboriginal times, and all its predecessors and successors in interest. The

Penobscot Nation is represented, as of October 10, 1980, by the Penobscot Nation Governor and Council;

* * *

Calendar No. 1050

96TH CONGRESS, 2d Session } SENATE { REPORT No. 96-957

AUTHORIZING FUNDS FOR THE SETTLEMENT OF INDIAN CLAIMS IN THE STATE OF MAINE

SEPTEMBER 17 (legislative day, JUNE 12), 1980.—Ordered to be printed

Mr. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2829]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2829) to authorize funds for the settlement of Indian claims in the State of Maine, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

* * *

* * *

HISTORICAL BACKGROUND

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians were first contacted in the area which is the State of Maine and the Province of New Brunswick by the earliest explorers of the North American continent.

All three tribes are riverine in their land-ownership orientation. The aboriginal territory of the Penobscot Nation is centered on the Penobscot River. The aboriginal territory of the Passamaquoddy Tribe is centered on the Saint Croix River and the smaller river systems to the west. The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River.

When the Revolutionary War broke out, General George Washington requested the assistance of these tribes and, on June 23, 1777, Colonel John Allan, of the Massachusetts militia who was the director of the federal government's Eastern Indian Department, negotiated a treaty with these Indians, pursuant to which the Indians were to assist in the Revolutionary War in return for protection of their lands by the United States and provision of supplies in times of need. This treaty was never ratified by the United States, although Allan's journals indicate that the Indians played a crucial role in the Revolutionary War.

Despite requests from the Maine Indians, the federal government did not protect the tribes following the Revolutionary War. In 1794, the Passamaquoddy Tribe entered into an agreement with the Commonwealth of Massachusetts (which then had jurisdiction over all of what is now Maine), in which the tribe relinquished all but 23,000

acres of its aboriginal territory. Subsequent sales and leases by the State of Maine further reduced this territory to approximately 17,000 acres. The Penobscot Nation lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818. A sale to the State of Maine in 1833 resulted in the loss of four townships by the Penobscot Nation.

History of Litigation

The validity of these agreements with the Tribes was not seriously questioned until, in 1972, the Governors of the Passamaquoddy Tribe asked the United States to bring suit on behalf of their Tribe on the ground that its agreement with Massachusetts was invalid because it had never been approved by the federal government as required by the Nonintercourse Act.

The Nonintercourse Act—which is also known as the Trade and Intercourse Act—was first enacted by the newly-formed Congress of the United States in 1790 and was subsequently re-enacted five times. It consisted of many provisions regulating a wide spectrum of activities between American Indians and Indian Tribes and the non-Indian citizens of the United States. Salient among those provisions was a section which prohibited the transfer of any lands from Indians or Indian tribes without the approval of the United States. As reenacted in 1793, this section read, in pertinent part:

> * * * no purchase or grant of lands, or any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution * * *.

A fine of up to one thousand dollars and imprisonment for up to one year were provided for violation of this section. All the subsequent reenactments of the Nonintercourse Act included this section in one form or another. In 1834, it was enacted in its present form and is currently codified at Title 25, section 177 of the United States Code. The importance of this provision to federal Indian policy is critical and it has been described as "the linchpin of federal Indian law."

The tribe's request was denied by the United States on grounds that the Nonintercourse Act does not apply to nonrecognized tribes and on the grounds that there was, thus, no trust relationship between the United States and the Maine Tribes. The Passamaquoddy Tribe then brought a declaratory judgment action against the Secretary of the Interior and the United States Attorney General. In 1972, the tribes won an order forcing the United States to file a protective action on its behalf. In 1975, the United States District Court for the District of Maine held that the Indian Nonintercourse Act applies to all tribes, including those which are not federally-recognized, and that the Act creates a trust relationship between the United States and all such tribes. Later that year, the United States Court of Appeals for the First Circuit unanimously reaffirmed the *Passamaquoddy* decision, holding that the trust relationship created by the Act includes, at minimum, an obligation to investigate and take such action as may be warranted under the circumstances when an alleged violation of the Nonintercourse Act is brought to the government's attention.

The issues raised in the *Passamaquoddy* case were reaffirmed in two subsequent decisions involving Maine Indians: *Bottomly* v. *Passamaquoddy Tribe*, 599 F. 2d 1061 (1st Cir. 1979) (holding that Maine Tribes are entitled to protection under the federal Indian common law doctrines) and *State of Maine* v. *Dana*, 404 A. 2d 551 (Me. 1979), cert. denied 100 F. Ct. 1064 (Feb. 1980) (holding that reservation land of dependent Maine Indian Tribes constitutes Indian country as that term is used in federal law).

History of Settlement Discussions

The settlement process began in March of 1977 when President Carter appointed retired Georgia Supreme Court Justice William Gunter to study the case. After substantial study of the merits of the claims and the defenses to them, Justice Gunter recommended that the case be settled. The White House acted on this suggestion by appointing a three-person work group to develop a settlement plan which consisted of Eliot Cutler, Associate Director of the Office of Management and Budget for Energy, Natural Resources and Science; Leo Krulitz, Solicitor of the Department of the Interior; and A. Stephens Clay, Judge Gunter's law partner. Negotiations between this work group and the tribes produced an agreement between the tribes and the administration, which was announced in February, 1978. An agreement between the administration and officials of the State of Maine was announced in November, 1978. But it was not until March, 1980, that an agreement supported by all parties was announced.

Following its March announcement, the current agreement was approved by the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. The agreement was then adopted by the Maine legislature and signed into law by the Maine Governor Joseph Brennan, on April 2, 1980. The proposal was introduced in Congress on June 13, 1980, by Senator William Cohen and Senator George Mitchell of Maine.

Need

After the Court of Appeals affirmed the District Court decision the Justice Department undertook an analysis of the Tribes' claim. In a memorandum written in 1977, the Department described the case as "potentially the most complex litigation ever brought in the Federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties." This conclusion was based on the size of claim, the number of persons living within the disputed area, and the native of the legal issues involved. For, the Tribes claim up to 12.5 million acres, or 60 percent of the State of Maine and, in the nearly two hundred years that had intervened between the time the first agreement was reached and the present day, more than 350,000 people had moved onto the now disputed land.

If the case were to be litigated, it would involve a host of novel issues and, given the magnitude of the claim each side would be certain to appeal each ruling of the court. Moreover, the court would be required to decide questions of fact concerning events which began before this country was founded. Estimates of the time it would take to litigate such a case range from five to more than fifteen years. In the meantime, according to testimony offered to this Committee, titles to

land in the entire claim area would be clouded, the sale of municipal bonds would become difficult if not impossible, and property would be difficult to alienate. Although the State of Maine estimates its chances of succeeding, if the case were to be litigated, at 60 per cent, all the parties agree that such a victory would be pyrrhic. In July of this year, Secretary of the Interior Cecil Andrus, in testimony before this Committee, described this legislation as "critical" and urged its passage.

Special Issues

Testimony before the Committee and written materials submitted for the record reveal the following concerns about the settlement embodied in S. 2829 and the Maine Implementing Act, all of which the Committee believes to be unfounded:

1. *That the settlement will terminate the three Maine Tribes.*—In July 1, 1980, testimony, Interior Secretary Cecil Andrus stated that the setlement does not terminate the three Tribes in Maine. The Committee agrees with the Secretary. Numerous provisions of S. 2829 and the Maine Implementing Act make reference to the Maine Tribe as tribes, and Sec. 6(h) specifically provides

> That as Federally recognized Indian tribes the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations or tribes or bands of Indians, to same extent and subject to the same eligibility criteria as are generally applicable to other Indians, Indian nations or tribes or bands of Indians.

2. *That the settlement amounts to a "destruction" of the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation.*—Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States. The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State* v. *Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with these decisions the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.

The settlement also protects the sovereignty of the Passamaquoddy Tribe and the Penobscot Nation in other ways. For example, Secs.

6206(1) and 6214, and 4733 of the Maine Implementing Act provide that these Tribes, as Indian tribes under the United States Constitution, may exclude non-Indians from tribal decision-making processes, even though non-Indians live within the jurisdiction of the tribes. Other examples of expressly retained sovereign activities include the hunting and fishing provisions discussed in paragraph 7 below, and the provisions contained in Title 30, Sec. 6209 as established by the Maine Implementing Act and Sec. 6 in S. 2829 which provide for the continuation and/or establishment of tribal courts by the the Passamaquoddy Tribe and the Penobscot Nation with powers similar to those exercised by Indian courts in other parts of the country. Finally, Sec. 7(a) of S. 2829 provides that all three Tribes may organize for their common welfare and adopt an appropriate instrument to govern its affairs when acting in a governmental capacity. In addition, the Maine Implementing Act grants to the Passamaquoddy Tribe and Penobscot Nation the state constitutional status of municipalities under Maine law. In view of the "homerule" powers of municipalities in Maine, this also constitutes a significant grant of power to the Tribes.

3. *The settlement provides none of the protections that is afforded other tribes.*—One of the most important federal protections is the restriction against alienation of Indian lands without federal consent. Sections 5(d)(4) and 5(g)(2) and (3) of S. 2829 specifically provides for such a restriction and, as was made clear during the hearings, this provision is comparable to the Indian Non-Intercourse Act, 25 U.S.C. § 177. Sections 6 and 8 of S. 2829 also specifically continue the applicability of the Indian Bill of Rights of the 1968 Civil Rights Act, the Indian Child Welfare Act, and all other federal Indian statutes to the extent they do not affect or preempt authority granted to the State of Maine under the terms of the settlement.

4. *Individual Indian property and claims by Indians who hold individual use assignments will be taken in the settlement.*—The settlement envisions four categories of Indian land in Maine: individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian territory." Only newly-acquired land within Indian territory and newly-acquired tribal land to be held in trust for the Houlton Band of Maliseet Indians will be taken in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in comomn bv the Tribe as a whole, will not be taken by the United States in trust. These lands will simply be subject to a federal restriction against alienation which will prevent their loss or transfer to a non-tribal member. Sec. 5(f)(2)(C) of S. 2829 provides that the Department of the Interior will have no role in transfers of individual tribal property from one tribal member to another, and Sec. 18 of the Maine Implementing Act, ends the power of the Maine Commissioner of Indian Affairs to interfere with such internal transfers.

The settlement will also have no effect on claims by inividual Indian land owners or individual Indian assignment owners. Section 4 of S. 2829 and Title 30. Sec. 6213 as established by the Maine Implementing Act specifically protect claims which individual Indians

have for causes of action arising after December 1, 1873. For these reasons, trespass actions brought by individual Indians will not be affected.

5. *The Settlement will subject tribal lands to property taxation.*—Sec. 6208 of the Maine Implementing Act specifically prohibits the imposition of such a tax. The confusion over this issue apparently comes from two provisions of the settlement: Title 30, Sec. 6208(2) as established by the Maine Implementing Act, which provides for payments in lieu of taxes on lands within Indian Territory, and Sec. 6(h) of S. 2829 which provides that lands held in trust for the Passamaquoddy Tribe or the Penobscot Nation or subject to a restriction against alienation, shall be considered "Federal Indian reservations for purposes of federal taxation."

Title 30, Sec. 6208 as established by the Maine Implementing Act does not impose any taxes on any land within Indian territory. A tax is a charge against property which can result in a taking of that property for non-payment of the tax. Section 6208 does not provide for such a tax, and S. 2829 forbids such a tax. The actual workings of this provision are explained in detail in the Committee section-by-section analysis of the Maine Implementing Act which appears in this report. That analysis explains, among other things, that these payments in lieu of taxes will most likely be paid with funds provided to the tribes by the federal government.

Sec. 6(h) of S. 2829, which treats the Passamaquoddy and Penobscot Indian Territories as federal reservations for purposes of federal taxes is designed to insure that activities within these Territories are entitled to the same Federal tax exemptions which apply on reservations of other Federally recognized tribes. The provision is intended only to benefit the Tribes.

6. *That the provision for eminent domain takings will lead to a rapid loss of Indian land.*—While Sec. 6205(3), (4), and (5) of the Maine Implementing Act and Sec. 5 (h) and (i) of S. 2829 provide a mechanism for takings for public uses, these provisions impose preconditions on such takings which are more stringent than any other known to the Committee. Before a taking could ever be effectuated within the reservations, an entity proposing such a taking must demonstrate that there is no reasonably feasible alternative to the taking. No taking, whether within or without the reservation, can lead to a diminution of Indian lands, and any taken land must be replaced. The settlement provides machinery for adding such substitute lands to the reservation or Indian territory from which they are taken.

7. *Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement.*—Prior to the settlement, Maine law recognized the Passamaquoddy Tribe's and the Penobscot Nation's right to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time. Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the

newly-acquired Indian territory as well. The power of the State of Maine to alter such rights without the consent of the affected tribe or nation is ended by Sec. 6(e)(1) of S. 2829. The State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters. This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in Title 30, Sec. 6207(6) as established by the Maine Implementing Act, the State will only be able to make use of this residual power where it can be demonstrated by substantial that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal land.

8. *The lands and trust funds provided in the Settlement will not benefit the Indians because of the lack of adequate controls.*—In testimony before the Committee, one of the Indian opponents to the bill stated his belief that the Indians would receive no benefits from the trust fund established under the settlement, and that all income would be used by the Secretary of the Interior. This fear is unfounded. Section 6(b) of S. 2829 requires the Secretary to make all trust fund income available to the respective Tribe and Nation quarterly, and provides that he may make no deduction for the United States' expense in the administration of the fund.

Fears that the Tribes will not have adequate control over the management of the trust funds are equally unfounded. The legislation specifically provides that the funds shall be managed in accordance with terms put forth by the Tribes. As is explained elsewhere in this report, the Secretary must agree to reasonable terms put forth by the tribes, and through the Administrative Procedure Act, the Tribes may obtain judicial review of any refusal by the Secretary to agree to reasonable terms. While the United States will not be liable for losses which result from investments that the Tribes request which are outside the scope of the Department of the Interior's existing authority, such investments cannot be made except at the request of the Tribe or Nation which seeks such an investment.

9. *The Settlement will lead to acculturation of the Maine Indians.*—Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.

Summary of Major Provisions

S. 2829 provides congressional implementation and ratification of the terms of the settlement negotiated among the parties; that is, the Passamaquoddy Tribe, the Penobscot Nation. the Houlton Band of Maliseet Indians, the State of Maine, the private owners of large tracts of land, and the United States.

* * *

The settlement also provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them.

* * *

* * *

TREATY BETWEEN THE PENOBSCOT AND MASSACHUSETTS

August 8, 1796

This Indenture, made this eighth day of August in the year of our Lord one thousand seven hundred and ninety six between William Shepard, Nathan Dane and Daniel Davis, Esquires, Commissioners duly appointed and fully authorized and empowered by the Commonwealth of Massachusetts, to treat and stipulate with the Penobscot tribe of Indians, respecting lands they claim on Penobscot River on the one part, and Orono, Ossang, Nichawit, Joseph Peace, Myarramuggasett, and Sabattis Neptune, Chiefs of the said Tribe, for themselves, & for the said Tribe, Witnesseth.

That the said Chiefs for themselves, and for their said Tribe, in consideration of the immediate and annual payments, hereinafter mentioned made and secured to them by the said Commissioners, do grant, release, relinquish and quit claim to the said Commonwealth, their the said Tribes right, Interest, and claim to all the lands on both sides of the River Penobscot, beginning near Col. Jonathan Eddy's dwelling house, at Nichol's rock, so called, and extending up the said River thirty miles on a direct line, according to the General Course of said River, on each side thereof, excepting however, and reserving to the said tribe, all the Islands in said River, above Old Town, including said Old Town Island, within the limits of the said thirty miles. And the said Commissioners, for and in behalf of the said Commonwealth, in consideration of the relinquishment aforesaid, do covenant, promise, agree and engage, that the said Commonwealth shall deliver here at the mouth of Kendusdeag River, to the said Tribe, immediately on and after this indenture shall be signed and executed, the following articles, viz. One hundred and forty nine and a half yards of blue cloth for blankets, four hundred pounds of shot, one hundred pounds of Powder, thirty six hats, thirteen bushels of Salt being one large hogshead, one barrel of New England Rum, and one hundred bushels of corn at Major Robert Treats, and the said Commissioners do further promise, agree and engage, for and in behalf of said Commonwealth, that the said Commonwealth shall deliver hereafter in each and every year, to the said Tribe of Indians, at or near the said mouth of said Kenduskeag so long as they shall continue to be a nation and shall live within this Commonwealth, the following articles, viz. Three hundred bushels of good Indian corn, fifty pounds of powder, four hundred pounds of shot, and

seventy five yards of good blue cloth for blankets, and that the same articles be delivered at the times following, viz. One hundred Bushels of the corn on or before the first day of May annually, beginning on the first day of May next, and the other two hundred bushels of corn, with the said other articles, on or before the tenth day of October annually, beginning on the tenth day of October in the year of Our Lord one thousand seven hundred and ninety seven.

In testimony whereof, the said Commissioners and the chiefs aforesaid have hereto set their hands & seals the day & year first above written.

Signed and sealed & delivered
in the presence of us
and of the Tribe.
Jonathan Dowder
W. Synmes
Seth Catlin
Robt. Treat
Nicolas

Wm. Shepani
Nathan Dane
Daniel Davis
Joseph Orono
Squire Ossang his mark
Nectum Bewit his mark
Joseph Peace his mark
Niaro Muggaseth his mark
Sabatis Neptune his mark
Seber Monset his mark

Hancock ss. August 8th 1796. Their the above names Shepard, Dane, Davis, Orono, Ossang, Nectumbawit, Peace, Myarrowmuggeset, Neptune & Seber Museth personally acknowledged the aforesaid Instrument to be their free act & Deed in their several capacities aforesaid. Before me, Jonathan Eddy, Justice of the Peace.

SOURCE: Transcribed from a certified copy of the original, Hancock County Registry of Deeds, May 3, 1809, Hancock, Mass.

Treaty made by the Commonwealth of Massachusetts with the Penobscot tribe of Indians, June 29, 1818.

This writing indented and made this twenty ninth day of June, one thousand eight hundred and eighteen, between Edward H. Robbins, Daniel Davis and Mark Langdon Hill, Esqs., commissioners appointed by his excellency John Brooks, governor of the commonwealth of Massachusetts, by and with the advice of council, in conformity to a resolve of the legislature of said commonwealth, passed the thirteenth day of February, A. D. one thousand eight hundred and eighteen, to treat with the Penobscot tribe of Indians upon the subject expressed in said resolve, on the one part; and the said Penobscot tribe of Indians, by the undersigned chiefs, captains and men of said tribe, representing the whole thereof, on the other part, Witnesseth, That the said Penobscot tribe of Indians, in consideration of the payments by them now received of said commissioners, amounting to four hundred dollars, and of the payments hereby secured and engaged to be made to them by said commonwealth, do hereby grant, sell, convey, release and quitclaim, to the commonwealth of Massachusetts, all their, the said tribes, right, title, interest and estate, in and to all the lands they claim, occupy and possess by any means whatever on both sides of the Penobscot river, and the branches thereof,

above the tract of thirty miles in length on both sides of said river, which said tribe conveyed and released to said commonwealth by their deed of the eighth of August, one thousand seven hundred and ninety six, excepting and reserving from this sale and conveyance, for the perpetual use of said tribe of Indians, four townships of land of six miles square each, in the following places, viz:

The first beginning on the east bank of the Penobscot river, opposite the five islands, so called, and running up said river according to its course, and crossing the mouth of the Mattawamkeag river, an extent of six miles from the place of beginning, and extending back from said river six miles, and to be laid out in conformity to a general plan or arrangement which shall be made in the survey of the adjoining townships on the river—one other of said townships lies on the opposite or western shore of said river, and is to begin as nearly opposite to the place of beginning of the first described township as can be, having regard to the general plan of the townships that may be laid out on the western side of said Penobscot river, and running up said river according to its course, six miles, and extending back from said river six miles. Two other of said townships are to begin at the foot of an island, in west branch of Penobscot river in Nolacemeac lake, and extending on both sides of said lake, bounding on the ninth range of townships, surveyed by Samuel Weston, Esq., which two townships shall contain six miles square each, to be laid out so as to correspond in courses with the townships which now are, or hereafter may be surveyed on the public lands of the state. And the said tribe do also release and discharge said commonwealth from all demands and claims of any kind and description, in consequence of said tribe's indenture and agreement made with said commonwealth, on the eighth day of August, one thousand seven hundred and ninety six, by their commissioners, William Sheppard, Nathan Dane, and Daniel Davis, Esquires; and we the undersigned commissioners on our part in behalf of said commonwealth, in consideration of the above covenants, and release of the said Penobscot tribe, do covenant with said Penobscot tribe of Indians, that they shall have, enjoy and improve all the four excepted townships described as aforesaid, and all the islands in the Penobscot river above Oldtown and including said Oldtown island. And the commissioners will purchase for their use as aforesaid, two acres of land in the town of Brewer, adjoining Penobscot river, convenient for their occupation, and provide them with a discreet man of good moral character and industrious habits, to instruct them in the arts of husbandry, and assist them in fencing and tilling their grounds,

and raising such articles of production as their lands are suited for, and as will be most beneficial for them, and will erect a store on the island of Oldtown, or contiguous thereto, in which to deposit their yearly supplies, and will now make some necessary repairs on their church, and pay and deliver to said Indians for their absolute use, within ninety days from this date, at said island of Oldtown, the following articles viz: one six pound cannon, one swivel, fifty knives, six brass kettles, two hundred yards of calico, two drums, four fifes, one box pipes, three hundred yards of ribbon, and that annually, and every year, so long as they shall remain a nation, and reside within the commonwealth of Massachusetts, said commonwealth will deliver for the use of said Penobscot tribe of Indians at Oldtown aforesaid, in the month of October, the following articles viz: five hundred bushels of corn, fifteen barrels of wheat flour, seven barrels of clear pork, one hogshead of molasses, and one hundred yards of double breadth broad cloth, to be of red color one year, and blue the next year, and so on alternately, fifty good blankets, one hundred pounds of gunpowder, four hundred pounds of shot, six boxes of chocolate, one hundred and fifty pounds of tobacco, and fifty dollars in silver. The delivery of the articles last aforesaid to commence in October next, and to be divided and distributed at four different times in each year among said tribe, in such manner as that their wants shall be most essentially supplied, and their business most effectually supported. And it is further agreed by and on the part of said tribe, that the said commonwealth shall have a right at all times hereafter to make and keep open all necessary roads, through any lands hereby reserved for the future use of said tribe. And that the citizens of said commonwealth shall have a right to pass and repass any of the rivers, streams, and ponds, which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same.

In witness whereof, the parties aforesaid have hereunto set our hands and seal.

Edw'd H. Robbins.	(Seal.)
Dan'l Davis.	(Seal.)
Mark Langdon Hill.	(Seal.)
John his ⋈ mark. Etien, Governor.	(Seal.)
John his ⋈ mark. Neptune, Lt. Governor.	(Seal.)
Francis his ⋈ mark. Lolon.	(Seal.)
Nicholas Neptune,	(Seal.)

Sock his ⋈ mark. Joseph, Captain. (Seal.)

John his ⋈ mark. Nicholas, Captain. (Seal.)

Etien his ⋈ mark. Mitchell, Captain. (Seal.)

Piel his ⋈ mark. Marie. (Seal.)

Piel his ⋈ mark. Peruit, Colo. (Seal.)

Piel his ⋈ mark. Tomah. (Seal.)

Signed, sealed and delivered in presence of us :

Lothrop Lewis,
Jno. Blake,
Joseph Lee,
Eben'r Webster,
Joseph Whipple.

PENOBSCOT, ss.—June 30th, 1818. Personally appeared the aforenamed Edward H. Robbins, Daniel Davis, and Mark Langdon Hill, Esquires, and John Etien, John Neptune, Francis Lolon, Nicholas Neptune, Sock Joseph, John Nicholas, Etien Mitchell, Piel Marie, Piel Penuil, and Piel Tomah, subscribers to the foregoing instrument, and severally acknowledged the same to be their free act and deed.

BEFORE ME,

WILLIAM D. WILLIAMSON, Justice of the Peace.

PENOBSCOT, ss. Received July 1st, 1818, and recorded in book No. 4, page 195, and examined by

JOHN WILKINS, Register.

Copy examined.

A. BRADFORD, Secretary
of commonwealth of Massachusetts.

THE PENOBSCOT NATION'S RESERVATION OF THE PENOBSCOT RIVER ACCOMPANYING ITS RESERVATION ISLANDS IN THE PENOBSCOT RIVER IN THE 1796 AND 1818 TREATIES WITH MASSACHUSETTS AND IN THE 1820 TREATY WITH MAINE

Prepared for the Penobscot nation in Penobscot Nation v. Mills, *et als*., Civil Action No.1:12-cv-00254-GZS

Harald E.L. Prins, PhD
University Distinguished Professor of Anthropology
Kansas State University
11 December 2013

SCOPE OF OPINION

I have been asked to provide an expert opinion and report on the understandings of (a) the Penobscot Indian Nation and (b) the Commonwealth of Massachusetts of what was reserved to the Penobscot Indian Nation when the parties agreed that the Nation reserved "the islands in the Penobscot River" in the Treaties of 1796 and 1818. In particular, I have been asked to provide an opinion about what the parties understood with respect to the Penobscot Indian Nation's continued occupancy and use of the Penobscot River attending the reservation of the islands in the main stem of the River. I have also been separately asked to provide an opinion about whether the Penobscot Nation or Maine varied from those understandings when, pursuant to the 1820 Treaty, Maine acceded to the rights of Massachusetts in its prior Treaty of 1818.

My qualifications to provide the opinions herein, including a list of all publications I have authored in the previous 10 years, are set forth in my Curriculum Vitae, attached as Addendum 1. The terms of my compensation are set forth in the Consultation Agreement attached as Addendum 2.

SUMMARY OF OPINIONS

Below is a summary of the opinions I am prepared to give in the matter of *Penobscot Nation v. Mills*. The facts and data supporting them are set forth in the body of the Report and in the footnotes. This is meant only as a synopsis with some non-exhaustive examples of the supporting material and reasoning more fully delineated in the Report.

1. **As of the 1796, 1818, and 1820 Treaties, the Penobscot Indians did not distinguish between their occupation and use of their islands in the Penobscot River and their occupation and use of the River surrounding those islands.**

In the 1700s and 1800s, the Penobscot tribe consisted of about two dozen related indigenous families, linked together by ties of kinship. They shifted periodically between several main villages and numerous small temporary encampments widely scattered on islands and on both banks of their river, as well as beyond. Collectively, the Penobscot formed a large social network consisting of three core settlements and dozens of small camp sites situated on the east and west river banks and on a number of islands strung like wampum beads in a necklace along the main stem of the Penobscot River that provided them with almost everything they needed to survive. Penobscot Indian villages and smaller camps were almost always situated at a site with easy access to the river and its resources, in particular fish. Because the Penobscot River provided an abundance of fish, which was not only easily caught, but also easy to smoke and preserve, fish was a staple food. Having developed a predominantly river-based culture, as detailed in Part I of this Report, Penobscot Indian communities occupied seasonal encampments or established more permanent settlements with nearby canoe-landings on river islands or river banks. For instance, their major village, established on Indian Island (Panawamskeag), is located immediately above the Old Town Falls where they used to spear or net fish (salmon, shad, and alewives) during spring and early summer. Another village, Passadumkeag (also known as New Town), used to exist upriver on Thorofare Island near a major fish weir where they trapped fish (especially eel) primarily in the late summer and fall. Their northernmost village, Matawamkeag, sat on the Penobscot River's east bank at the confluence with the Matawamkeag, a major tributary. Nearby, Penobscots maintained a very large fish weir, primarily to catch eel. These strategically selected sites provided them easy access to fishing grounds at river falls, rapids, gravel bars, rocks, ledges, and other favored places where they speared, netted, or trapped eel, sturgeon, salmon, trout, shad, alewives, and other fish. Dependent on their canoes as a means of transport, they also hunted moose, deer, and other game animals swimming or wading in the water or walking or grazing or browsing near the river shore. In addition, they used bark canoes to shoot or trap muskrat, beaver, and otter, primarily valued for their thick fur. Moreover, they paddled or poled their canoes when hunting water birds, primarily duck and geese. Last but not least, they used canoes in search of edible plants, nuts, berries, as well as herbal medicines. In short, their traditional way of life before, during, and after the treaty period in question, depended on the

waters of the Penobscot River surrounding their string of islands, from bank to bank. In addition to traveling to their fishing sites, trap lines, and other locations in search of food and other vitally-important natural resources, they fished and hunted from their canoes, both by day and by night (using burning torches to attract fish). They also built fish weirs, some of which were very large, some nearly spanning the river from bank to bank. Primarily dependent on fishing, hunting, and food gathering (as well as some food gardening, fertilizing the soil with fish), they pursued a highly mobile way of life, with communities periodically splitting into family groups, each to its own district known as *nzibum*, meaning "my river." During the winter, when their rivers and lakes were frozen, Penobscots traveled on ice, up or down river, to and between islands, pulling their belongings (as well as fish, meat, furs and hides) on toboggans (sleds). While on the ice, Penobscots engaged in ice fishing as well as hunting game. Last but not least, as extensively described in this report, the Penobscot river has great spiritual significance as it features in their creation myths and is linked to many water-based family totem animals, including fish. Canoeing up or down the Penobscot River, whether for purposes of fishing, hunting, and trapping, or visiting relatives between Old Town Falls and the Forks (and beyond), Penobscots passed a sanctuary, a spiritually-powerful site in the form of a large granite rock situated in the river just south of Mattawamkeag. This peculiar rock with a deep cavity near the top was used as a deposit for ritual gifts to appease a powerful storm spirit dwelling in Mount Katahdin and in hope for an abundance of fish and game, but also plenty of hides and pelts. Confronted with white surveyors entering their domain above the head of the tide before the 1796 treaty, Penobcots explicitly claimed the river had always belonged to them and that they had it from the Creator. In short, culturally-adapted to the seasonal rhythm of their riverine ecological system, the Penobscot tribe has historically survived on the basis of an inextricable linkage between land and water in their island domain. Without the water surrounding their islands, Penobscot survival was in peril, as also articulated in their creation myth about Anglebému ("Guards the water"), the giant frog who had gulped up all the water in the Penobscot River. This monster was killed by Gluskábe, their 'culture hero' who thus released the water and rescued his "grandchildren" settled "up the river." In conclusion, the idea that Penobscots could survive by isolating the islands from the water surrounding each of them makes no sense from a cultural ecological, historical and ethnographic perspective.

2. The Commonwealth of Massachusetts entered into the 1796 or 1818 treaties understanding that it was extinguishing the Penobscot Nation's "Indian title" (also known as "aboriginal title").

As explained in Parts II-IV of this Report, at the time of the 1796 and 1818 treaties, the Penobscot Tribe had exclusive occupation and use the Penobscot River above the head of the tides (about 5 miles north of Bangor), including the River itself, bank to bank, all islands in it, and the uplands on both sides of the River extending at least six miles back from the River on each side, and Massachusetts recognized this as the exclusive domain of the Tribe, held as "Indian title" (or "aboriginal title") which could only be extinguished through treaty-making. This is well documented by the

early surveyors, Captain Joseph Chadwick (in 1764) and Captain Park Holland (in 1793), who separately recorded the tribe's firm stance (and their respect for it) that they were in the tribe's domain. While two Commonwealth attorneys, James Sullivan and Thomas Dawes, entertained the notion that the tribe's aboriginal title had been extinguished as a consequence of military confrontations between the British and the Tribe (and they with instructed a treaty agent, Daniel Little, to try to assert such a position to tribal leaders), this "conquest" theory was not based in historic fact and, ultimately, was dropped as an argument, in favor of extinguishing Indian title by means of a purchase by mutual agreement in a treaty. Asserting that they held their lands from the Creator since time out of mind, Penobscot tribal chiefs walked away from treaty discussions when the notion of having been conquered was suggested, and ultimately, General Knox, one of the largest proprietors in Maine (owner of the Waldo Patent), and a land speculator, as the US Secretary of War in charge of Indian Affairs, as well as other influential Commonwealth officials involved in the drive to consummate the 1796, rejected the conquest theory in favor of title extinguishment by treaty. Land speculators such as Knox, but also foreign bankers like Alexander Baring (the future Lord Ashburton) were interested in extinguishing Indian title from a legal and financial point of view, rather than from a human rights perspective. Familiar with the speculative value of lands increasing once Penobscot Indian title was extinguished in 1796 Treaty, Baring wrote: "the Penobscot Indians and it was finally agreed that this strip of valuable land should not be encroached upon but remain their hunting ground. The tribe resided at Indian Town, about 200 families, became Roman Catholics, lived quietly and crept insensibly into a state of civilization from the vicinity of European settlements. This is sure ruin to the Indians. They fell off, decreased in numbers…. The state has consequently appointed commissioners to treat with them, the result of which is not yet known, but they will certainly agree. The lands will afterwards be sold by the state in townships and we shall pick out some that will be of great service to our lands behind them. The attention of all New England speculators is fixed on these lands and they will sell very high. We can afford to give more than any body and the remainder selling high must give additional value to our lands. I reckon our back tract [northeastern Maine] worth twice as much when the Indians are removed than before…" Regarding the fundamentals, nothing changed in this regard when it came to the 1818 treaty.

3. The Penobscot Nation entered into the 1796 or 1818 treaties with the understanding that it was giving up its rights of occupancy and use to the lands, not with the understanding that it was being given lands or rights by Massachusetts.

As explained in Part IV, Penobscot leaders engaged in the treaties of 1796 and 1818 did not speak English, and translations were not always accurate, but they clearly did not make their marks upon those treaties with an understanding that they were being given lands or rights from Massachusetts. On the contrary, they zealously claimed dominion over the subject matter of the treaties and understood that they were relinquishing their rights only with respect to the lands above the shores. There was nothing in the area under consideration to be granted from Massachusetts to the

Penobscots. Tribal leaders would never have thought otherwise, and as described in the Report, the most influential Massachusetts representatives never thought otherwise.

4. **Upon entering into the treaties of 1796 and 1818, Massachusetts did not intend to extinguish the Penobscot Nation's occupation and use of the waters of the Penobscot River surrounding islands in the River from Indian Island northward**.

As explained in Parts IV and V, the Commonwealth's treaty efforts focused upon securing the land on either side of the Penobscot River for settlement (and eventually timber extraction), not the River itself. The River was left to the Penobscot tribe to occupy and use to sustain itself in its way of life attending it settlements on the islands from Old Town falls, northward. James Sullivan, at the time of the 1796 Treaty was Massachusetts Attorney General. He was quite familiar with the Penobscot Indian "way of life" at the time, and explicitly referred to their dependence on the fisheries on their river, observing: "what those people acquire by the labour of their women in the summer [growing crops], and by the hunting done by the men, lays up but very scanty provision for their long and cold winters. The sturgeon, the salmon, and the great fish, the men will condescend to take, but they feel themselves above the taking of small fish: the catching of shad and alewives they make the business of their women and children. The alewives taken, and some of the salmon, they preserve by hanging them in the smoke." This understanding on the Commonwealth's part is well-confirmed by the February 27, 1812 Resolve of the Commonwealth to re-secure the Tribe's fishing grounds attending its village at Indian island and Old Town falls. This shows that the Commonwealth understood that, as a result of the 1796 Treaty, the Tribe retained these fishing grounds, made up of bars, rocks, ledges and "small islands" even though they were not the identified "islands" in that Treaty. Nothing changed from Commonwealth's perspective with it consummated the 1818 Treaty. In fact, the Commonwealth saw fit in that Treaty to establish the right of its citizens to pass and repass the River to ensure that the Tribe would allow them to use it as a public highway for floating logs and boats that could navigate the shallows. The Commonwealth knew that the Penobscot Tribe depended upon its continuing occupation and use of the River to sustain its village establishments on the islands and, in fact, protected the Tribe's continued right to occupy and use the River fishery.

5. **Upon entering into the treaties of 1796 and 1818, the Penobscot Nation did not intend to give up its rights of occupancy and use of waters surrounding islands in the Penobscot River from Indian Island northward.**

Given the Penobscots' way of life described in Part I of the Report, it is inconceivable that the Tribe would ever intend to give up its occupancy and use of the waters surrounding its island villages and family camps from Old Town falls northward in the treaties 1796 and 1818. Indeed, after having failed to convince the old Penobscot Chief Joseph Orono to sign a treaty in 1784, General Knox reported

that Orono's response had been: "The Almighty placed us on the land and it is ours. . . . Orono continued his speech asking Massachusetts [government] to fix the bounds of the Penobscots' land to prevent the new inhabitants from interfering 'with us.' He declared that his people did not sell any land 'to our knowledge, and never will while we live." In 1788, in another failed effort to convince the Penobscots to agree to a treaty based on unacceptable terms, the Penobscot chief spokesman, a war chief identified as Colonel Orsong Neptune (the father of Lt. Governor John Neptune), informed the Massachusetts Commissioner, through an interpreter: 'Brother, God put us here. It was not King of France or King George. We mean to stay on this Island. The great God put us here; and we have been on this Island 500 years. …From this land we make our living." A year later, one of the most powerful and influential political figures in the USA in the post-revolutionary period, Knox reconsidered the concepts of "Indian title" and claims of possession based on the "right of conquest." In his capacity as U.S. Secretary of War (and in charge of Indian Affairs) in 1789, Knox wrote: "The Indians, being the prior occupants, possess the right to the soil. It cannot be taken from them except by their consent, or by rights of conquest in case of a just war. To dispossess them on any other principle would be a great violation of the fundamental laws of nature." In 1793, three years before the 1796 treaty, Captain Park Holland ventured upriver into Penobscot Indian territory above Old Town Falls for a survey. He was met with hostility as an intruder. Obviously, in defense of their homeland, Penobscots were willing to expel or even kill uninvited American whites. He reported in his field journal: "They gave us to understand… that the river was their river, and that they did not wish any white man to go up." Proceeding upriver, he arrived in Mattawamkeag, where "found another large Indian town, full of inhabitants, who forbade our proceeding any further. They came out to us, and gave us to understand they wished to make a strong talk, the amount of which was, that the river was their own river, and they did not want any whites to go up, for bye and bye the white man would come and buy a little of their land, then a little more, and the further the white men go up, the further the beaver and moose would go, and bye and bye the poor Indian would have no land and no moose meat. Many of these old men, I found to be afterwards, men of sound sense, strict integrity, and good judgement. We satisfied them that we did not come to buy their land, or to injure them, and proceeded on our way…." Captain Holland's 1793 account depicts not only the Penobscot's vigorous defense of their ancestral domain, but the ready acceptance of that tribe's claim of exclusive use and possession by these prominent agents of a foreign government. The five arduous trips made to Boston by Penobscot delegates between 1797 and 1812, described in Part V of the Report, aptly show, for example, that the Tribe considered its ancient connection to the River attending its island village of "Old Town" to be left entirely intact by the 1796 Treaty. In the early 19th century, soon after James Sullivan took office as governor of Massachusetts, Penobscot Chief Attian Elmut headed to Boston with a tribal delegation to request protection of their fishing privileges near their head village at Indian Island. The language used by the Chief, even as roughly translated, reveals the Penobscots' understanding of their retained fishery in the Penobscot River. (Indeed, years later, Neptune recounted that he "went to Boston and saw Governor Sullivan and told him about *our fishing ground*.") The Penobscot Chief referred to his own people as the

"proprietors of all the Islands both great and small on [the] Penobscot River," and explained that "our Islands and especially Shad Island … has been the greatest support to our Ancestors." Echoing those of past Penobscot leaders describing the Tribe's understanding of its relationship to the River, a note taker at the time wrote that Chief Attian proclaimed in 1807 that "the God of Nature gave them their fishery, and no man without their consent has a right to take it from them." The old chief became utterly desperate by his own inability to obtain recourse: "Oppressed with anxiety and care for his people, and perplexed with the business on hand, he fell into a state of derangement, and stabbed himself, in Boston, so badly that he soon died…. .an event much lamented."
Nothing changed with the 1818 Treaty. The Tribe continued to occupy and use the River to support its way of life unquestioned.

6. **Massachusetts and the Penobscot Nation understood that by reserving the islands in the Penobscot River from Indian Island northward in the 1796 and 1818 Treaties, the Penobscot Nation reserved its occupancy and use of the waters of the Penobscot River surrounding those islands.**

This is established by the synopses above and in Parts I-VI of the Report. It was understood by the Tribe and by Massachusetts that with the islands, the Tribe retained its continued occupancy and use of the Penobscot River between the islands and from shore to shore to sustain the Penobscot way of life described in Part I of the Report. Because of this symbiosis in their riverine habitat, a severance between their use and occupation of the islands and their use and occupation of the River was inconceivable and would have reduced them to starvation, dooming their chances for survival. Their mode of subsistence and material culture, their social organization and family totems, as well as mythological worldview, all continued through the treaty period in question. When those treaties were finally executed in 1796 and 1818, all parties were well aware of how and why the Penobscot people were culturally and historically embedded in their river habitat. As the nineteenth century progressed past 1818, non-Indians would encroach upon the River from their developments on the shores, including their sawmills and timber drives, but tribal members would continue to occupy and use the River in all of the ways described in Part I; and there was no assumption that the Treaties would deprive them of doing so in accordance with their ancient traditions.

7. **In entering into the 1820 Treaty with the Penobscot Nation Maine and the Penobscot Nation understood that Maine was acceding to the 1818 Treaty, with the exception of the Tribe's retention of land and services of an agent in Brewer.**

As fully described in Part VII, when Maine separated from Massachusetts in 1820, it took over the 1818 Treaty between the Commonwealth and the Tribe. Nothing changed other than the elimination of a small parcel of tribal land and related agent services in Brewer. The intent and understanding on the part of Maine and the Tribe

was that everything agreed to in the 1818 treaty carried over and was confirmed in the 1820 treaty with Maine.

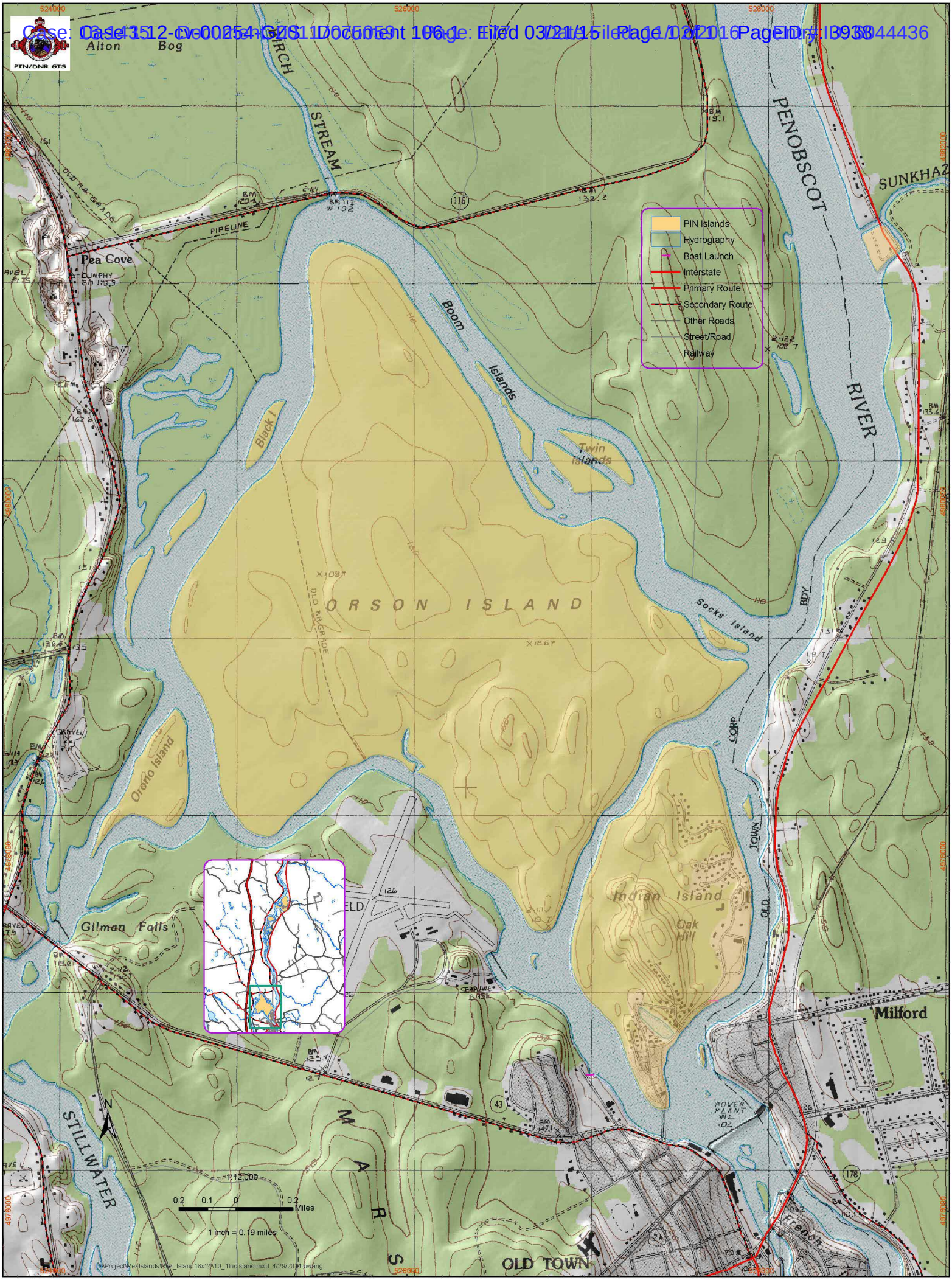
8. Maine and the Penobscot Nation understood that following the 1820 treaty, the Penobscot Nation reserved its occupancy and use of the waters of the Penobscot River surrounding those islands.

As described in Parts VII and VIII of the Report, Maine officials understood and accepted that the Penobscot tribe retained its occupation and use of the Penobscot River. There are numerous reports describing the importance of the fisheries at Old Town Falls, a few hundred yards below their head village at Panawamskeag ("Indian Island"), but also upriver. In addition to dependence of the fisheries, they also continued to hunt and trap, and canoed up and down the river where they established seasonal encampments on the river banks and islands. In the summer of 1820, when Penobscot tribal chief, Lt. Governor John Neptune visited the Governor of the newly-established State of Maine in Portland, he complains that "the white people take the fish in the river so they do not get up to us. They take them with weirs; they take them with dip-net. They are all gone before they get to us. The Indians get none. If you can stop them so that we can get fish, too, we shall be very glad. There is another thing — our hunting privilege. The white men come and spoil all the game. They catch all the young ones and the old ones. We take the old ones and leave the young ones till they grow bigger and are worth more. We wish the white men to be stopped from hunting. . . . We wish your Government to stop the white men from hunting — put their traps in their chests. Let white men have the timber and the Indians have the game weirs had been set up in their river which had obstructed the fish and injured their means of support."

The linkage between the river and the nearly 150 islands reserved by the Penobscots is so self-evident that the 1820 treaty, confirming that the State of Maine simply stepped into the shoes of Massachusetts with respect to the 1818 treaty terms, does not even mention the islands. During the treaty ceremony in Bangor, prior to the actual signing of the document, Captain Francis Lolar spoke on behalf of the Penobscot tribal council. Addressing Colonel Lewis, the treaty commissioner representing the State of Maine, he said: *Brother*.—The Good Spirit who made and placed the red men here, before white men came, gave us all the land from whence the waters run into the Penobscot. He caused the forests to abound with game, and the rivers with fish, for our use and subsistence- we then were contented and happy. When the white men came over the great waters to our country, we received them as friends and brothers: we then were many and strong: they few and weak: we gave them land, and permitted them to live peaceably among us, and have remained their friends. The white men are now very strong; we are weak, and now want them to be our friends. *Brother*.—We place the greatest confidence in the Governor, Chiefs, and people of the State of Maine, and are willing to put ourselves under their care and protection, helping, and expecting they will perform all their promises to us as faithfully as our good friends the governor, Chiefs, and People of Massachusetts have done." In his response, Colonel Lewis confirmed the state's intent to stand in shoes of Massachusetts concerning the specific understandings provided by the Treaty of

1818: "It being meant and intended, to assume and perform, all the duties and obligations of the commonwealth of Massachusetts, toward the said Indians, whether the same arises from treaties or otherwise…. So that said tribe may have continued to them, all the payments and enjoy all the immunities and privileges…." After the 1820 treaty, a Penobscot chief guided two surveyors, one of whom was Major Treat. Having witnessed the treaty ceremony in Bangor, Treat was personally familiar with the importance of the Penobscot Indian fisheries on the Shad Islands at Old Town Falls. Traveling by canoe upriver, with Neptune (one of the signers of the 1818 and 1820 treaties), Treat kept a journal and sketched maps of the river, marking numerous wigwam sites, place names, as well as several large fish weirs in the river. There are numerous Indian agent reports, newspaper accounts, and early ethnographic descriptions underscoring the continued importance of the river in the Penobscot way of life, well into the 20th century. In his 1822 *Report to the Secretary of War on Indian Affairs*, published two years later, Dr. Morse observed: "The Penobscots, in government and internal regulations, are independent- The legislative and executive authorities are vested in the sachems; though the heads of all the families are invited to be present at their public meetings, which are held in their house of worship, and conducted with order and decorum…. The tribe has the right to hunt and fish along the banks of the river, to the mouth of Penobscot Bay." Among his major sources of information regarding the Penobscots was the Bangor-based attorney and politician Williamson, the second Governor of the State of Maine and its major 19th-century historian.

Three years after the 1820 treaty, Maine government officials traveled to the Penobscot reservation, reporting Penobscot families encamped on ten islands in the main stem of the river above the falls. A generation later, in1842, two decades after the final treaty, the Indian agent reported 31 Penobscot families encamped on nine islands. Notwithstanding complaints about diminishing fish supplies due to fisheries below the falls, and dams, or ongoing disputes with local whites, Penobscots continued to spear and net fish at the Old Town Falls just downriver from their head village. Although more remote and less reported on, the same is true for Penobscots residing at Mattanawcook Island and other upriver island communities. They also continued to hunt and muskrat, beaver, and other fur-bearing animals along their river. In various degrees, families continued to depend for their food on fish and game harvest on their islands upriver. Penobscot families retained much of their indigenous way of life as described in the first section of this report until well into the 19th century. Whether the water on their river was low, high, or frozen, they camped on--or traveled between-- the many dozens of islands on their tribal reservation above Old Town Falls. Even in recent decades, several Penobscot families still frequent islands upriver for purposes of fishing, hunting, and trapping.


PIN/DNR GIS
Alton Bog
BIRCH STREAM
PENOBSCOT RIVER
SUNKHAZ
PIPELINE
Pea Cove
Boom Islands
Black I
Twin Islands
ORSON ISLAND
Socks Island
Orono Island
Indian Island
Oak Hill
Gilman Falls
Milford
OLD TOWN
STILLWATER
MARSH
PIN Islands
Hydrography
Boat Launch
Interstate
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Secondary Route
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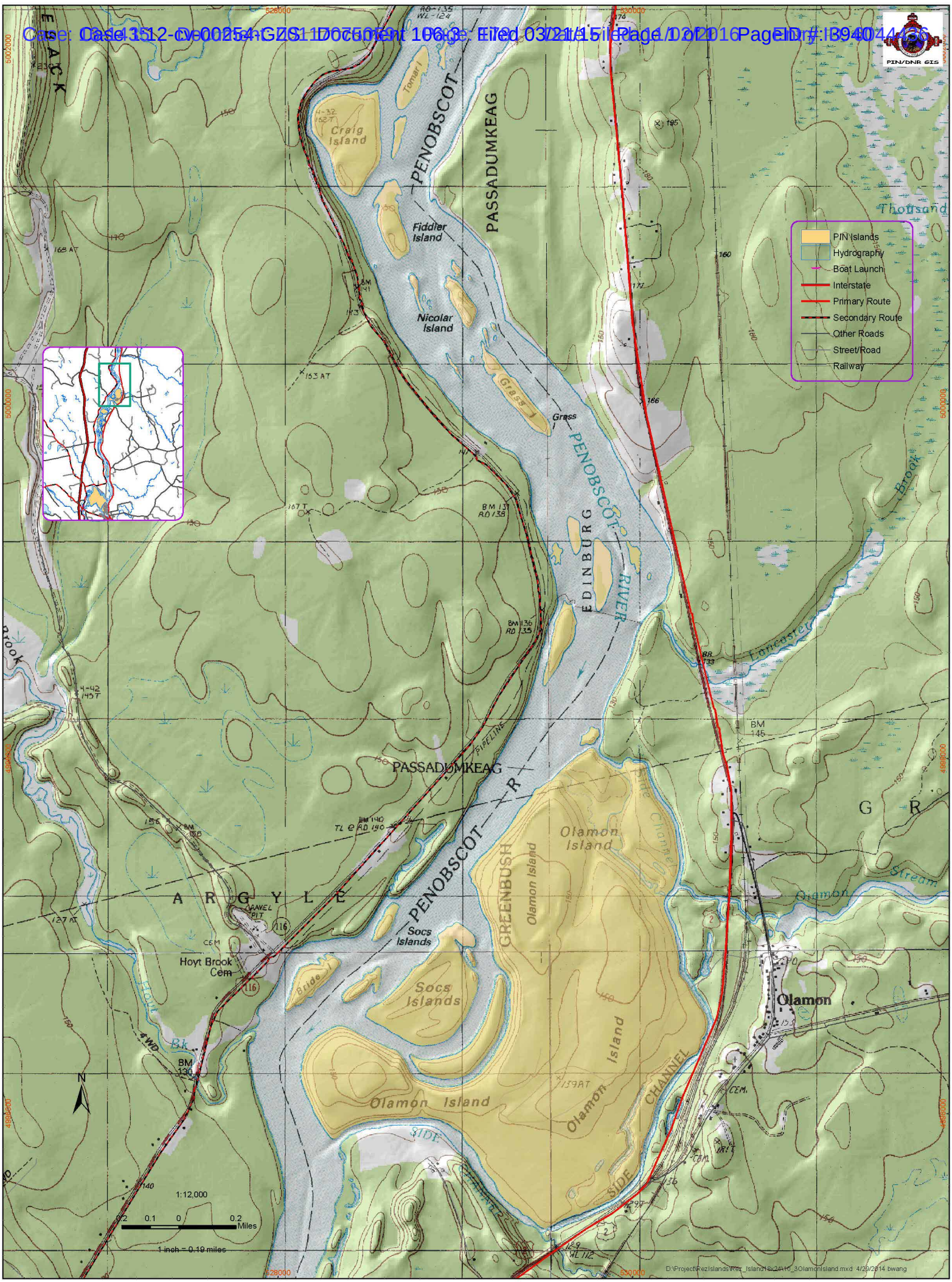
PENOBSCOT
PASSADUMKEAG
Craig Island
Fiddler Island
Nicolar Island
Grass
PENOBSCOT RIVER
EDINBURG
PASSADUMKEAG
PENOBSCOT R
ARGYLE
Olamon Island
GREENBUSH
Olamon Island
Socs Islands
Socs Islands
Olamon Island
Olamon Island
CHANNEL
Olamon
Hoyt Brook Cem
PIN Islands
Hydrography
Boat Launch
Interstate
Primary Route
Secondary Route
Other Roads
Street/Road
Railway
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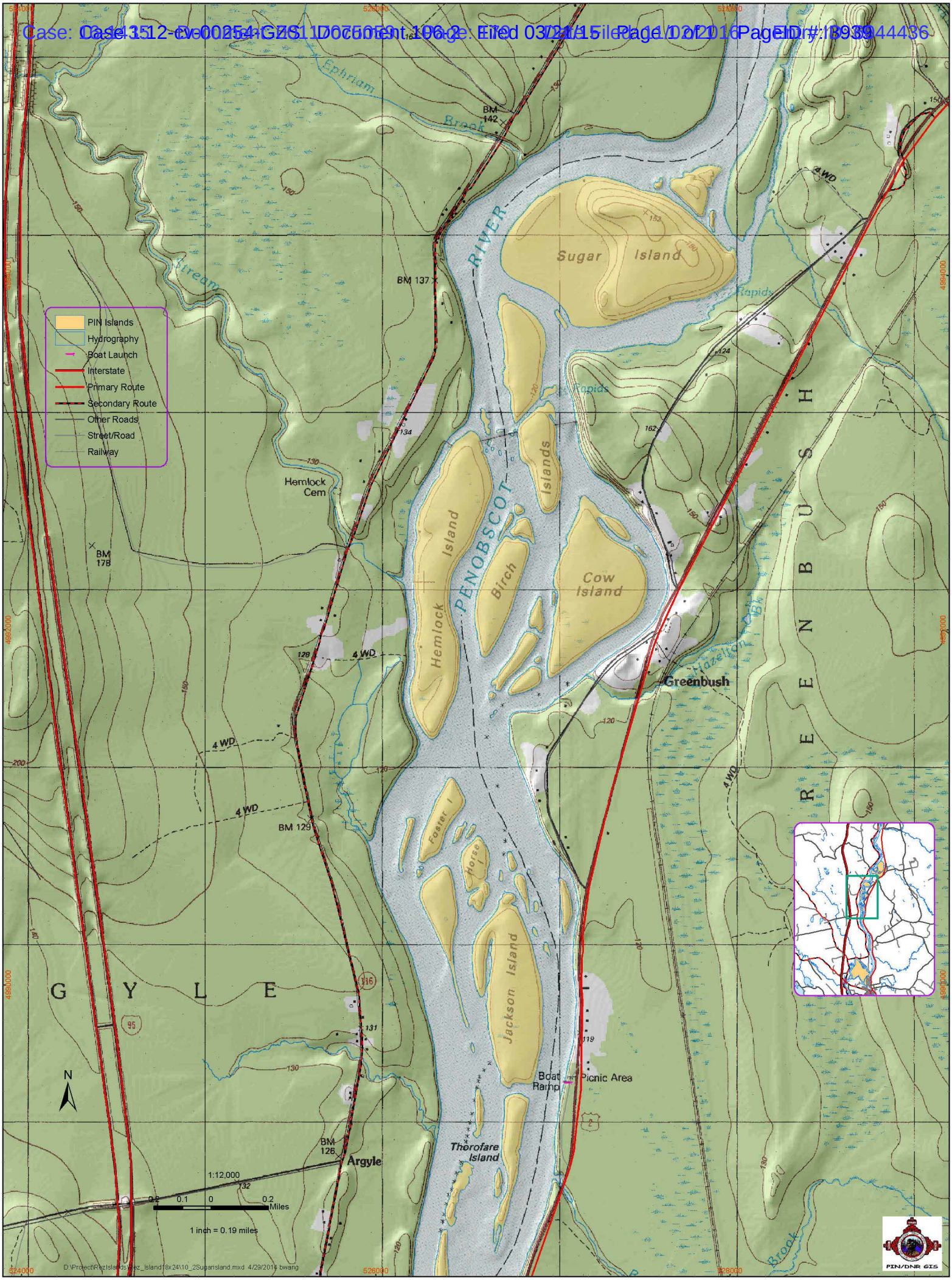
1 inch = 0.19 miles

PN-007343



PN-007345

DECLARATION OF LORRAINE DANA

I, Lorraine Dana, state as follows:

1. My name is Lorraine Dana. My full name is Dorothy Lorraine Dana, but I have never used my first name. My married name is Lorraine Nelson.

2. I am a member of the Penobscot Nation and have resided on Indian Island in the Penobscot River since I was 12 years old. My date of birth is xxxxxxxxxx, 1937.

3. The mainland town closest to Indian Island is Old Town, Maine.

4. Prior to residing on Indian Island, I resided on Mattanawcook Island in the Penobscot River with my father, Chester Dana, his wife, Liza Winchester Heigh, and my brother, Chester Dana, Jr. My father held Mattanawcook Island by assignment from the Penobscot Nation. After he passed away in 1975, I inherited my father's assignment to Mattanawcook Island and other islands near it, including Chokecherry Island. Until his death, my father resided on Mattanawcook Island for most of the year.

5. The mainland town closest to Mattanawcook Island is Lincoln, Maine.

6. My father was born and raised on Mattanawcook Island until he came of age and joined the United States Marine Corps. When he was a child, there was a village of Penobscot families on the island, but most of the residents eventually moved to either Indian Island or to Old Lemon Island further down the Penobscot River. My father was the last Penobscot tribal member to live year round on Mattanawcook Island. His main diet, and the diet of the other Penobscot families who lived there, consisted of fish and muskrat from the Penobscot River and other animals that they hunted or trapped.

7. My brother and I were adopted by Liza Heigh in 1942. We lived a short time in Enfield, Maine, but then moved to Mattanawcook Island. My father never wavered from his tradition of hunting, fishing, and trapping in the Penobscot River because he depended on this tradition to put food on the table. My brother and I fished in the River and across to the main land where there was a special cove where pickerel were plentiful. We ate what we caught. My father fished just about every day to feed our family and also provided muskrat and wildlife for us. We went to school in Lincoln, crossing the river every day.

8. When my father took fish and other water-dwelling animals from the Penobscot River, he never sought or carried a permit or license from the State of Maine. My brother and I likewise never sought or carried a permit or license from the State of Maine when taking fish from the River. It never occurred to us that one would be necessary because we considered the River to be our home.

9. My brother and I never encountered state wardens or other state officials while fishing on the River and I never heard of my father ever encountering a state warden or other official while fishing, hunting, or trapping on the River.

10. When I was 12 years of age, I moved back to Indian Island where I resided with my mother, Beatrice Phillips; my half-brothers, Neil, Reuben ("Butch"), Clifford, and Guy Phillips; and my half-sisters, Donna and Cheryl Phillips. Because of hardship raising a family on her own, my mother relied heavily upon the Penobscot River for food. My brothers fished and hunted for food. Clifford was an avid fisherman. He caught perch, pickerel, and bass to feed our family. My mother also bought muskrat to feed our family from tribal members who trapped muskrat in the Penobscot River.

11. I raised my own children on Indian Island as a single parent and continued to rely upon the River for food because I had little means. I had two sons, Barry and Robert, two daughters, Lori and Kelly. In the 1970s, Barry, being the older son of the two, spent much of his spare time hunting and fishing to help provide food for our family. Barry also provided fiddleheads that he picked on the banks alongside of the Penobscot River and flagroot, which we used for medicine. Flagroot grows on the River bottom up and down the Penobscot River.

12. While my father was alive, I regularly took my sons and my daughters to visit him at Mattanawcook Island during the spring and summer. While there, we relied upon the fish and muskrat that he caught from the River as our primary food source.

13. I recall the events surrounding the settlement of the Penobscot Nation's land claims against the State of Maine, including the proposal for the settlement presented to Penobscot tribal members in March of 1980. I voted against the settlement. I thought it was rushed and complicated. I also feared that the State of Maine would end up controlling our ability to fish, hunt, and trap for our food from the Penobscot River.

14. I recall testifying before the United States Senate Committee on the land claims in July, 1980. At that time, I was identified as "Lorraine Nelson." I have reviewed the following passage of that testimony at page 419 of Volume 1 of *Proposed Settlement of Maine Indian Land Claims, Hearings Before the Select Committee on Indian Affairs United States Senate*:

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

15. In giving this testimony and stating that "my son hunts and fishes my islands," I was referring to the fact that my son, Barry, hunted deer at Mattanawcook, Chokecherry, other islands assigned to me, and that he fished the River from his canoe all around those islands and between them, including near the mainland shores, in order to provide food for my family. Although I referred to "my islands," I was referring to the fact that he also fished all around Indian Island and other islands near Indian Island, including Orson and Marsh islands, and the waters between those islands, as well as the waters between those islands and the mainland shores, in order to provide food for my family.

16. I have never distinguished between the islands in the Penobscot River, where I and other members of the Penobscot Nation reside, and the River. The River is as much a part of our daily lives as the islands where we maintain our homes. So when I testified to the Senate Committee on the settlement of the land claims that "my son . . . fishes my islands," I was referring to his fishing in the River as described above.

17. My father, my brother, and I would commonly say we would "fish" an island when referring to fishing in the River in waters in the vicinity of an island. This simply meant that we were fishing in the waters of the Penobscot River in areas where we knew there were fish, and this was anywhere in the River, including in coves of the mainland shores.

18. I am familiar with the islands in the so-called "main stem" of the Penobscot River, from Indian Island, north up to Medway. There are no waters (such as ponds or streams) to support fish on those islands. Fish exist only in the Penobscot River, not on the islands.

19. I have personal knowledge of the foregoing facts.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 03/25/15 */s/ Lorraine Dana*
Lorraine Dana

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.	)	

DECLARATION OF CHRISTOPHER B. FRANCIS

Christopher B. Francis hereby declares and states as follows:

1. My name is Christopher B. Francis.

2. I am an enrolled member of the Penobscot Nation.

3. My date of birth is xxxxxxxxxxx, 1971, and have resided at Indian Island in the Penobscot River all of my life.

4. I have personal knowledge of the facts stated herein.

5. During my childhood, throughout the 1970s and into the early 1980s, my family relied upon fish, fresh water claims, and muskrat caught, gathered, and trapped from the waters and bed of the Penobscot River (the "River") surrounding Indian Island and northward for a substantial portion of our diet.

6. We relied upon all portions of the River, bank to bank, for these food sources.

7. From the spring (April) until the late fall (November), we relied upon these food sources from the River for three or four meals per week.

8. At each such meal, we caught, gathered, or trapped enough of these food sources from the River to feed my mother, my father, and me, which was between two and three pounds per meal.

9. The River species we ate during these meals included, but were not limited to, small mouth bass, perch, pickerel, catfish, fresh water clams, eel, and muskrat.

10. During this same period of time (throughout the 1970s and into the early 1980s), other families of Penobscot members at Indian Island similarly relied upon these same food sources for their diet as regularly as my family did.

11. Until the mid-1990s, I was often asked by elder members of the Tribe for fish from the River for their meals, and I often provided them with fish that I caught from the River near Indian Island, which they ate.

12. As my family became more aware of the contamination of fish and other River resources in the 1980s and 1990s, we refrained from relying as heavily upon the River for food. Other Penobscot families did the same.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 03/25/15

/s/ Christopher B. Francis
Christopher B. Francis

William J. Schneider
ATTORNEY GENERAL

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August 8, 2012

Kirk Francis, Governor
Penobscot Indian Nation
12 Wabanaki Way
Indian Island, ME 04468

Dear Governor Francis:

I am writing regarding regulatory jurisdiction on the main stem of the Penobscot River. My Office regularly receives inquiries from State Legislators, executive branch officials, and members of the general public concerning this issue. I also understand that there have been several incidents in recent years in which Penobscot Indian Nation representatives have confronted state employees, including game wardens, as well as members of public, on the River for the purpose of asserting jurisdiction over activities occurring on the River.

The State's long-standing position on this issue is set forth in the attached Opinion, which I have issued in order to provide guidance to the Department of Inland Fisheries and Wildlife and the Warden Service as these agencies perform their duties on the River. I would appreciate it if you would review the Opinion and inform me whether the Penobscot Indian Nation disagrees with its conclusions. To the extent there is disagreement, I believe it is important that the matter be resolved in an appropriate forum, and not be a source of unnecessary conflict between state and tribal wardens and others who are on the River. Our responsibilities to ensure safe use of the River demand no less.

Thank you for your consideration.

Sincerely,

WILLIAM J. SCHNEIDER
Attorney General

William J. Schneider
ATTORNEY GENERAL

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August 8, 2012

Chandler Woodcock, Commissioner
Department of Inland Fisheries and Wildlife
41 State House Station
Augusta, ME 04333-0041

Colonel Joel T. Wilkinson
Maine Warden Service
41 State House Station
Augusta, ME 04333-0041

Dear Commissioner Woodcock and Colonel Wilkinson:

You have requested an Opinion from this Office regarding the respective regulatory jurisdictions of the Penobscot Indian Nation ("Penobscot Nation") and the State of Maine ("State") relating to hunting and fishing on the main stem of the Penobscot River ("River"). This Opinion is intended to clarify the jurisdictional issue for state and tribal game wardens, as well as for those engaged in recreational activities on the River. As will be explained in more detail below, the Penobscot Nation may lawfully regulate hunting on, and restrict access to, the islands within the River from Medway to Old Town that comprise its Reservation, but may not regulate activities occurring on, nor restrict public access to, the River itself. With the exception of the islands that form the Penobscot Indian Reservation, the River is open for public use and enjoyment, and the State of Maine has exclusive regulatory jurisdiction over activities taking place on the River.

The division of regulatory jurisdiction as between the Penobscot Nation and the State is set forth in *An Act to Implement the Maine Indian Land Claims Settlement Act*, 30 M.R.S. §§ 6201, *et seq.*, which was ratified and confirmed by Congress in the *Maine Indian Claims Settlement Act*, 25 U.S.C. §§ 1721, *et seq.* Among other things, these statutes carefully explain how the Penobscot Nation and the State, respectively, may regulate activities such as hunting and fishing. 30 M.R.S. § 6207.

The Penobscot Nation has exclusive authority to regulate hunting, trapping and other taking of wildlife within its Indian Territory. 30 M.R.S. § 6207(1)(A). Its Territory is defined in the law to include both the Penobscot Indian Reservation, as well as additional land purchased by the United States Secretary of the Interior on the Penobscot Nation's behalf. 30 M.R.S.

§ 6205(2). The Penobscot Indian Reservation is defined to include "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island . . . and all islands northward thereof that existed on June 29, 1818, excepting any islands transferred to a person or entity after that date." 30 M.R.S. § 6203(8).[1]

For the purposes of your inquiry, which involves activities occurring on the main stem of the River, this means the Penobscot Nation has authority to regulate hunting and fishing on those islands included in its Reservation from Indian Island in Old Town, northward to the confluence of the East and West branches in Medway.[2] Like private landowners, the Penobscot Nation may also restrict access to their lands, here islands, as it sees fit. However, the River itself is not part of the Penobscot Nation's Reservation, and therefore is not subject to its regulatory authority or proprietary control. The Penobscot River is held in trust by the State for all Maine citizens, and State law, including statutes and regulations governing hunting, are fully applicable there. 30 M.R.S. § 6204. Accordingly, members of the public engaged in hunting, fishing or other recreational activities on the waters of the Penobscot River are subject to Maine law as they would be elsewhere in the State, and are not subject to any additional restrictions from the Penobscot Nation.

To avoid friction on the Penobscot River, it is important that state and tribal officials, as ~~well as members of the Penobscot Nation and the general public, have a clear understanding of~~ the regulatory jurisdictions of the Penobscot Nation and the State of Maine. Both the State and the Penobscot Nation must encourage citizens to respond civilly to uniformed tribal and state game wardens performing their official duties. All citizens must heed and comply with ordinances promulgated by the Penobscot Nation governing the islands it owns, as well as State laws and regulations governing the River.

Sincerely,

WILLIAM J. SCHNEIDER
Attorney General

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[1] This definition was amended twice with the agreement of the Penobscot Nation to add lands to the Reservation. In 1988, the statute was amended to add Smith Island, and 24 acres of land located at Matagamon Dam Lot on the East Branch of the River. 30 M.R.S. § 6203(8). In 2009, it was amended again to add 714 acres of land in Argyle, known as the Argyle East Parcel. As part of its Reservation, and therefore Territory, hunting on these additional lands is subject to regulation by the Penobscot Nation. Man-made boom piers in the River are not within the scope of this definition and therefore not part of Penobscot Indian Territory.

[2] By law, the Penobscot Nation must conspicuously post any land or water it regulates in order to provide reasonable notice to the public of any such restrictions. 30 M.R.S. § 6207(5).