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 RESPONSE/REPLY BRIEF FOR PENOBSCOT NATION

[*continued on next page*]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

REPLY IN SUPPORT OF APPEAL

INTRODUCTION

The State Defendants ("SDs") and NPDES Permittees ("Permittees") seek to sever a unique Indian people, the Penobscot Nation, from a river they have inhabited for centuries and that defines their way of life. Glibly describing the Tribe's subsistence relationship to the Penobscot River as "ridiculous" (in the case of hunting and trapping) or "ancillary" (in the case of fishing), they belittle the Penobscot way of life and attempt to gut one of the central provisions of the settlement of the Tribe's historic land claims against Maine.

In their Statement of the Case, the State Defendants misstate the historical context, the statutory framework, and the controversy leading to this case, and assert facts that are wholly unsupported by the record. In their legal arguments, the SDs and Permittees ignore Congress's promise that in settling the Tribe's historic land claims, it confirmed the Tribe's inherent sovereign authority to protect its sustenance hunting, trapping and fishing practices, which from time immemorial indisputably took place in the Penobscot River, and the Tribe's culture, which is inextricably tied to those practices in the River. They further fail to acknowledge Maine's fundamental settlement concession that the jurisdiction it had "lost" over the Tribe and its "existing" reservation by virtue of then recent judicial decisions would not be "restored," thereby leaving intact the Tribe's power to protect its

"traditional Indian practices" of hunting, trapping, and fishing. Instead, they argue that the Tribe "lost" its sustenance rights and related governmental authorities in the waters and bed of the River through "acquiescence" to Maine's asserted authority and domination. In so doing, they seek to revive a theory long ago rejected by this Court under established principles of federal Indian law, the very principles Congress expressly endorsed upon confirming the rights and authorities in question.

For the reasons described herein and in the Tribe's opening brief, the Court should reverse the district court and hold that the Tribe's exclusive regulatory and enforcement authority over sustenance hunting, trapping, and other taking of wildlife by its tribal members "within" the Penobscot Indian Reservation and over the competing taking of wildlife by non-tribal members from within that reservation is in the waters and bed of the Main Stem, bank-to-bank pursuant to 30 M.R.S.A. § 6207(1), § 6210(1) of the Maine Implementing Act ("MIA"), as ratified and rendered effective by Congress in the Maine Indian Claims Settlement Act ("MICSA").[1] To the extent that the Court finds that a controversy exists with respect to the SDs' and Permittees' counterclaims, it should hold, in accord with *Alaska Pacific Fisheries*, that Congress confirmed a reservation of islands together

[1] The Tribe's "reservation sustenance hunting and trapping rights and related authorities," are only those described in 30 M.R.S.A. § 6207(1), § 6210(1), the subject of the Tribe's appeal. *See* Preliminary Brief of Penobscot Nation ("P.N.Br.") at 25.

with the submerged lands and related waters within a known geographic area upon which the Tribe had long-relied for its subsistence practices and cultural identity and to which it retained aboriginal title, the Main Stem, bank-to-bank.

I. THE STATE DEFENDANTS MISSTATE THE HISTORICAL AND STATUTORY FRAMEWORK

The State Defendants fail to acknowledge that, at the time of the land claims settlement, the Tribe occupied what Congress and the parties variously described as a "present," "existing," and "historic" reservation over which the Tribe exercised inherent sovereign authority as "Indian country," and over which State authority had been ousted. Instead, they incorrectly claim that the Tribe's sovereign authority over its reservation derives solely from MIA and MICSA. This distorts the history and legal reality undergirding this case.

A. The Tribe's Existing Reservation

1. Understandings From Treaty Times To 1980

The State Defendants assert that pursuant to the 1796 and 1818 treaties, "the Tribe relinquished its claims generally to . . . the land in the Penobscot River watershed, with the exception of . . . the islands within the Main Stem." Principal Brief for the State Defendants ("S.D.Br.")5. They continue, "from that point forward, PN's reservation was understood to be limited to the islands in the Main Stem." *Id.* For the latter proposition, they cite to a single paragraph of their "Statement of Material Facts" ("SMFs"), filed in the district court, which, in turn,

cites to a single reference in an unsigned 1977 "draft" letter from the Department of the Interior ("DOI"), describing the Tribe's reservation by reference to islands. *See id.* at 5 (citing SMF¶11, citing incorrect page of ECF102-8).[2] Both factual assertions are groundless.

By means of the 1796 and 1818 treaties, Massachusetts purported to extinguish the Tribe's aboriginal title *to uplands* on either side of the Penobscot River. *See* Addendum to P.N.Br. ("Add.")91-93,99-100,101. Apart from the easement granted to non-tribal citizens to use the River "to pass and repass … for the purpose of transporting their timber and other articles,"Add.95, nothing on the face of the treaties ceded the Tribe's use and occupation of the submerged lands and waters of the River itself. *See id*.

In 1977, DOI was focusing on litigation to recover Penobscot lands wrongfully ceded in the treaties; the Tribe's "existing" reservation that it had not ceded in the treaties was a given. Congress knew full-well that treaties with Indian nations are grants *from* the Indians, not grants *to* them, and that the Indians retain all that is not expressly ceded. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 680, (1979). As this Court has

[2] The SDs improperly support their factual assertions by referencing paragraphs of their SMFs without citations to the underlying record evidence upon which a given SMF is based, forcing the reader to search for the record basis for a given paragraph. Moreover, virtually every SMF cited by the SDs is refuted by the joint Opposing Statement of Material Facts of the United States and the Penobscot Nation ("OSMFs"), ECF140.

explained, the scope of the Tribe's reservation within the bed and related waters of the River turns upon whether the Tribe "*retained*" them "based on earlier agreements between the tribe[] and Massachusetts and Maine. *Maine v. Johnson,* 498 F.3d 37, 47 (1st Cir. 2007) (emphasis in original).

It is clear, moreover, that by 1979, after formally recognizing the Penobscot Nation as a federal Indian tribe, DOI understood the Tribe's reservation to include the River, as evidenced by its provision of $84,560 in funds for the Tribe's exercise of governmental authority on the "Reservation lands and waterways" through the Penobscot game warden service, which patrolled the waters of the Main Stem on a daily basis. *See* [Joint Appendix ("JA")__]ECF102-20 at 1312-20; ECF194 at 9177¶¶8-11; ECF140-12 at 7945¶¶3-5. Contrary to the SDs' assertion, federal recognition of the Nation and its existing reservation came before the Settlement Acts, not as part of them.

Finally, in asserting that from the treaty times onward, the Nation's reservation "*was understood* to be limited to the islands in the Main Stem," the State Defendants choose to ignore what the *Penobscots* understood. The factual record overflows with undisputed evidence that Penobscot tribal members have long understood their reservation, retained after the suspect treaties, to include the River north of Indian Island, bank to bank. ECF140-2 at 7861¶4; ECF194 at 9177¶7; ECF124 at 7501¶5; *see also* Add.111¶16 ("The River is as much a part of

our daily lives as the islands where we maintain our homes"); ECF124-2 at 7511¶10 (the river has been as "integral to our way of life" as the islands); ECF105-88 at 3734-37,3775-3812 (Professor Harald Prins's report on treaties and post-treaty evidence of parties' understandings). Massachusetts treaty-makers understood likewise. *See id*. at 3770-3802.

2. Understandings At The Time Of The Land Claims Settlement

Turning to the parties' understanding at the time of the land claims settlement, the State Defendants assert, without any record citation, that "[t]he 2,000 page legislative history is devoid of any suggestion that PN would have any measure of sovereign authority or proprietary control over the Main Stem following passage of the Settlement Acts." S.D.Br.at 18. This is not true.

First, the Maine Legislature considered the issue at the time MIA was debated. In responding to questions at the Maine Legislature's public hearings on the MIA, Deputy Attorney General John Paterson explained that the Tribe's sustenance fishing rights and related authorities to govern those rights, within its reservation, were in the waters of the River, bank-to-bank. [JA__]P.D.258 at 3855-56,3878,3886,3893,3896. Paterson directly addressed the Tribe's authority to regulate sustenance fishing under a scenario where the Tribe allowed its members to gill-net Atlantic salmon "right across" the Penobscot River and whether the limited residual authority granted by MIA to Maine's Commissioner

of Inland Fisheries and Wildlife ("IFW") to check the Tribe's reservation sustenance fishing regulations would be sufficient to avoid "danger to the salmon." *Id.* 3855-56,3896-97. Paterson responded:

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

Id. at 3896-97. By the express terms of MIA, the Tribe can only enact the referenced sustenance fishing ordinances "within the boundaries of" the Penobscot Indian Reservation, 30 M.R.S.A. § 6207(4), and the Commissioner of IFW's limited residual authority is triggered only if the Tribe's sustenance fishing ordinance, within its reservation, threatens a depletion of fish stocks "outside the boundaries of lands or waters subject to regulation . . . by the Penobscot Nation." *Id.* Thus, this colloquy shows, beyond doubt, that Maine's Office of the Attorney General, which represented the State in the settlement negotiations, understood that the Penobscot Indian Reservation was not limited to island surfaces, but included the River, where the gill nets in the scenario presented would be used. Maine's Legislature, fully informed of this view, then approved MIA.

Second, Attorney General Richard Cohen and other Maine representatives to the settlement consistently represented to the State Legislature and to Congress that the jurisdictional agreement reached by the Tribe and Maine "restored" to Maine the jurisdiction it had "lost" within the Tribe's "existing" reservation with specific "exceptions" variously described as matters of "historic," "traditional," and "cultural" importance to the Tribe, namely the Tribe's "powers" over hunting, trapping, and fishing.[3] At the time of the Settlement Acts, these unique Penobscot practices took place where the Tribe had practiced its way of life for centuries: on the Main Stem, bank-to-bank. Add.109-113; ECF124-2 at 7510-11; ECF140-2 at 7861; ECF194 at 9176-77.

Clearly, then, the negotiation of the settlement agreement that became "legislative history," even considering only the State's side, reveals an understanding that the Tribe's reservation was not confined to the island surfaces, where the Tribe's members resided, but included the River, which they relied upon for food and their cultural identity.

[3] The very purpose of the reservation sustenance hunting and trapping rights and related authorities at issue was to ensure (in the words of Maine's representatives) that the Penobscot Nation would retain, and not surrender to Maine, sovereign authority to protect what they variously described as "traditional Indian activities" or "traditional matters of heritage to the Indians" that had been reaffirmed in then recent Court holdings. *E.g.*, P.D.258 at 3744-45; P.D.278 at 4625-26,4436,4442; P.D.281 at 5710,5871; P.D.264 at 264; ECF107-63 at 5048-52. The Nation's attorney called them "tribal powers in recognition of certain areas of particular cultural importance." P.D.253 at 3717.

It is not surprising that there was little focus on the Tribe's existing reservation in the legislative discussions of the land claims settlement because, as noted above, the focus of the pending litigation had nothing to do with the existing reservation. Rather, *United States v. Maine* put in jeopardy the validity of the Tribe's land cessions on either side of the Penobscot River in its suspect treaties with Massachusetts. On the brink of Maine's approval of MIA, however, the boundaries of the reservation did come into focus when Maine and Penobscot negotiators were unable to reach agreement about how to interpret certain language in the proposed legislation, including those boundaries. *See* ECF102-49 at 1509-13; ECF119-32 at 7335¶12; ECF124 at 7504¶19.

By memorandum dated April 1, 1980, Attorney General Cohen suggested that Maine's Joint Committee adopt interpretive statements in a separate written report "in the event [that] a court should look . . . for interpretive assistance." P.D.263 at 3963-67. He then wrote, "the external boundaries of the Reservation[] include riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of law." *Id.* at 3965. On April 2, 1980, after reading that memorandum, Penobscot representatives Reuben Phillips and James Sappier drafted a response in the form of a resolution by the Tribes' negotiating team to address "the understanding and interpretation that was

conveyed to the members of the tribe prior to the Tribal vote on acceptance of the Proposal," stating:

> The following are specific interpretations of this committee as they pertain to the legislature [sic]. . . .
>
> The Penobscot Nation [sic] is comprised of the Penobscot River and the Inlands [sic] within the River. . . . It is also the belief of this Committee and the Penobscot Nation that the river was never cited [sic] by the Tribe and therefore title is not extinguished and the State cannot regulate it except where specifically stated in the agreement.

ECF124 at 7504-05¶¶21-29, 7283-87. On April 3, 1980, Maine legislators, heeding Cohen's advice, but without obtaining consent from the Tribes, *see* ECF124 at 7505¶¶30-31, resolved to make a Joint Committee report part of the legislative files, which provided that "the external boundaries of the Reservation[] are limited to those areas described in the bill including riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of State law." P.D.264 at 3971¶14.[4]

[4] The SDs and the Permittees repeatedly assert that the definition of the Penobscot Indian Reservation was "meticulously" drafted with "precision" and with a clear understanding on everyone's part. Even ignoring the Penobscots' explicit reaction to Attorney General Cohen's April 1, 1980 memorandum, the fact that Cohen felt it necessary to pen language for a report of Maine's Joint Committee to clarify the State's interpretation of reservation boundaries shows that this was not the case. *See also* P.D.271 at 4016 (Joint Committee co-chair, Samuel Collins explaining on the floor of the legislature that the report was necessary because MIA is "very complicated" and "[n]o act of this complexity will be free from question marks."); P.D.270 at 4012 (state legislator complaining that "the haste … we are using on this bill … is frightening"); ECF119 at 7335¶8 (testimony of staff attorney for the legislature that "for such a significant bill," MIA "was unusually rushed").

Both the views of Penobscot representatives that MIA did not extinguish the Nation's aboriginal title to the Penobscot River and the views of Maine's Joint Committee that the boundaries of the reservation included riparian rights reserved by the Tribe's treaties with Massachusetts or by operation of State law, show that the parties clearly intended that the Penobscot reservation would include submerged lands and related waters attending the islands. The SDs cannot avoid its contemporaneous interpretations of the reservation boundaries by now arguing they unambiguously mean something else. As explained herein and in the Tribe's opening brief, the Tribe retained (and Congress confirmed) the Nation's aboriginal title to the submerged lands of the Main Stem, and as the United States explained in its opening brief and further explains in its reply, the Tribe's riparian rights reserved in the treaties, and operating pursuant to Maine law, include those same submerged lands.

Later in their brief, under the heading "Legislative History," the State Defendants make a more affirmative assertion: that "[t]he Tribe, DOI, the Maine Legislature, and Congress all *understood* that the Reservation was limited to the islands in the river." S.D.Br.at 31 (emphasis added). Ignoring the voluminous contrary evidence cited by the Tribe, they reference "two examples" of what they claim to be a "universal understanding" that "all parties shared a long held

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ECF119-33 at 7337-54 (same staff attorney identifying multiple areas of the bill vague and in need of clarification two days before the legislature's approval).

understanding that the Reservation was limited to Main Stem islands": (1) a single sentence in a "background" paper submitted by DOI to the House Committee on MICSA, stating that "[t]he Penobscot have a 4,000 acre reservation on a hundred islands in the Penobscot River," and (2) a map that "was given" to the Senate Committee "depicting the reservation as just islands in the Main Stem" because the key on the map indicated that the reservation was colored red "and only the islands [were] colored in red." S.D.Br.at 48 (citing P.D.278 at 4570-71 and P.D.281 at 5800).

The State Defendants' claim that this evidence supports such a "universal understanding" is sorely misplaced. As just described, the land claims settlement and the jurisdictional compromise under MIA were supposed to reflect an *agreement* between state and tribal representatives confirmed by Congress, and the Tribe's existing reservation was a given. That existing reservation was hardly on anyone's radar, particularly that of DOI, which was overseeing litigation to recover lands ceded by the Tribe, not those retained. Thus, to suggest that DOI's reference to the acreage of the islands, buried in the middle of a report to the House Committee, without affirmative evidence of the Tribe's concurrence (let alone any open discussion about it before the House and Senate Committees) reveals a "universal understanding" that the reservation was limited to the upland surfaces of

the islands is extremely farfetched.[5] The same is true of the map. Indeed, the SDs fail to point out that the map was prepared by Maine's Office of Attorney General for the purpose of identifying the newly acquired trust lands, *see* P.D.278 at 4570, and like the sentence from the DOI report about acreage, the Tribe was neither involved in its creation nor endorsed its key. Nor was the map actually discussed before the House or Senate committees. *See id.* at 4570-71.

In short, the two pieces of "legislative history" that the State Defendants rely upon to support a claim that there was a "universal understanding" that the Penobscot reservation was limited to island surfaces in the River are very thin reeds. The far more robust legislative history and the longstanding view a principal party to the underlying agreement, the Penobscot Nation, show quite the opposite: that the Tribe retained an existing reservation in the waters and bed of the River attending its island communities.

3. Understandings After the Settlement Acts

To support an assertion made in their Summary, but not elsewhere, that the Nation has not always believed that "the river was part of the Reservation," S.D.Br.43, the SDs state that "PN has not posted the dozens of public boat launches on the Main Stem to put the public on notice that it claims the river to be

[5] The SD's also suggest that the failure to describe the acreage of the River itself somehow reflects an intent to exclude it, but neglect to explain why anyone would ever try to describe a river in terms of acreage.

within the Reservation." S.D.Br.12. This is not so. The State Defendants, in fact, reference an informational panel at the only public boat launch that the Nation has been given an opportunity to post information, and that panel states that "[a]ll of the Islands north of, and including Indian Island *and the surrounding waters*, form the Penobscot Reservation." ECF118-8 at 7084¶¶8,11 (emphasis added); ECF110-5 at 6156 (same). The SDs further misrepresent what the panel actually says. Without inserting ellipses, they quote the panel, but omit the underscored phrase: "[t]o obtain fiddleheads or duck hunting permits for the islands, <u>for information regarding other allowable uses of the reservation or to report water quality problems,</u> contact the Penobscot Nation Department of Natural Resources." *See* ECF110-5 at 6156. As the U.S. points out in its reply, the SDs also misconstrue Maine Attorney General Tierney's 1988 opinion in an attempt to escape the State's own post-settlement actions showing that Maine, like the Tribe and the United States, understood the Penobscot Reservation to encompass the River. Indeed, the SDs utterly fail to address the litany of other examples delineated in the Tribe's opening brief, in which Maine has formally taken a position that the reservation encompasses the bed and related waters of the River. *See* P.N.Br.20-21.

B. The Nation's Jurisdiction

The State Defendants and the Permittees state that the Tribe's sovereign authority, like its historic reservation, came into existence for the first time upon Congress's enactment of MICSA. *See, e.g.,* S.D.Br.18 ("PN possesses only that authority MIA expressly provides to it."). In like vein, they assert that "the Tribe's rights are not inherent but entirely statutory," S.D.Br.44,n.23; *see* Principal Brief of Permittees ("Per.Br.")22. These descriptions of the Tribe's jurisdiction within its pre-existing reservation are incorrect.

In 1979, this Court's decision in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) and the Maine Supreme Court's decision in *State v. Dana*, 404 A.2d 551 (Me. 1979), in combination, confirmed that the Tribe's existing reservation constituted "Indian country," thereby establishing that the Tribe exercised inherent sovereign authority over that reservation and generally ousting Maine of any claimed civil and criminal jurisdiction there. Everyone agreed that this was the case. *See, e.g.,* P.D.258 at 3779-80; P.D.278 at 4442; P.D.253 at 3715; P.D.281 at 5721,5877.

Indeed, in identical language in its final committee reports, Congress said that *Dana* confirmed that the Tribe's reservation "constitute[d] Indian country as that term is used in federal law" and that *Bottomly* confirmed that, within that reservation, the Tribe "possess[ed] inherent sovereign authority to the same extent

as other tribes in the United States." P.D.282 at 5941-42; P.D.283 at 6003-04. As this Court has explained, upon enacting MICSA, "Congress understood [the Penobscot Nation] to be able to invoke sovereign powers": "our court had decided as much in *Bottomly* . . . and Congress was plainly aware of our holding." *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 57 (1st Cir. 2007) (citing S.REP. 96-957 at 14 and H.R.REP. 96-1353 at 14).

So the State Defendants' assertion that the Tribe's sovereign authority came into existence with MICSA is simply wrong. In fact, by virtue of *Bottomly* and *Dana*, it was understood that Maine had no jurisdiction over the Tribe and its reservation, and, with important exceptions, MICSA granted civil and criminal jurisdiction *to* Maine; Congress did not have to grant the Tribe something it already had. *See Aroostook Band*, 484 F.3d at 57 (given the tribes' pre-existing sovereign power at the time of the land claims settlement, "it is hard to see how the Congress that enacted MICSA intended recognition to be a 'grant' of sovereignty at all").[6]

The State Defendants' assertion that Tribal authority over reservation hunting, trapping, and fishing was "granted" by MIA with no grounding in federal

[6] Attorney General Cohen, under questioning from Senator George Mitchell made perfectly clear that the federal government and the Nation made jurisdictional "concession[s] to the State," to give Maine what it did not possess. P.D.278 4458. *See also* P.D.278 at 4442 (the Tribe's rights and authorities "under current general law," which Maine is "powerless to change," are "far more extensive" than those under the Settlement Acts).

Indian law is particularly misplaced. Selectively quoting from Attorney General Cohen's August 12, 1980 letter to the Senate Committee on the jurisdictional agreement between the Tribe and the State, the SDs assert that the "the original understanding of the Settlement Acts" was that "'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 [Settlement Acts] rather than using general principles of Indian law.'" S.D.Br.15 (alteration in original). This is an inaccurate portrayal of what Cohen wrote and of the parties' "understanding."

With respect to the Tribe's authority over reservation hunting, trapping, and fishing, Cohen meant quite the opposite. In the paragraph immediately preceding that quoted by the SDs, Cohen wrote that "[i]n recognition of traditional Indian activities . . . [,] "most significant[ly] . . . in the area of hunting and trapping and, to a limited extent, fishing," MIA would not "recover[] back for the State . . . the jurisdiction over the existing reservation[] that had been lost as a result of recent Court decisions." P.D.278 at 4436-37. Cohen understood that the Tribe's governmental authority over reservation hunting, trapping, and fishing were confirmed under the "recent Court decisions," *Bottomly* and *Dana*, and those decisions recognized the Tribe's sovereign authority within its existing reservation "using general principles of Indian law."

C. Consideration and Compromise

Although Maine paid no monetary consideration to the Penobscot Nation for the land claims settlement or jurisdictional concessions, Maine and the Permittees suggest that the Tribe got a generous deal, "millions of dollars," in exchange for surrendering its inherent sovereign powers over its pre-existing reservation to Maine. *See, e.g.*, S.D.Br.16&n.7,18,n.10. The implication is that the Tribe should be fully satisfied—because money was its "bottom line"—and that it should not now challenge the SDs attempt to further shrink its pre-existing reservation boundaries because SDs now regret Maine's jurisdictional concession regarding hunting and trapping, and to a limited extent fishing, within that reservation. *See id.*

This is backwards thinking. The money flowed from the federal government, not Maine, in large measure for the United States' historic failure to protect the Tribe from the unlawful land cessions in the treaties and encroachments by Maine. *See* P.D.278 at 4328,4416. Congress did not further breach its trust responsibility in the settlement itself by diminishing the existing Penobscot reservation boundaries beyond what had been extracted from the Tribe in the unlawful treaties.

To be sure, the Tribe agreed to surrender an extraordinary amount of its sovereign authority within its existing reservation, including exclusive tribal and

federal criminal jurisdiction, a vast amount of civil jurisdiction, and sovereign immunity from suit. As the Tribe's trustee, Congress had to oversee that surrender of tribal sovereignty as well as the compromise of *United States v. Maine* to ratify the treaties' land cessions, an undertaking dealing with "the most primal aspect of the tribe's existence." *Dana*, 404 A.2d at 561; *see Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 662, (D. Me. 1975), *aff'd,* 528 F.2d 370 (1st Cir. 1975) (describing "the fiduciary relationship between the Federal Government and the Indian tribes" reflected in the Nonintercourse Act). Indeed, MIA could not become effective without an act of Congress. *See Penobscot Nation v. Fellencer,* 164 F.3d 706, 709 (1st Cir. 1999) (citing U.S. Const., art. I, § 8, cl. 3).

But, in the end, in fulfilment of its "good faith effort" to provide the Nation "with a fair and just settlement," 25 U.S.C. § 1721(a)(7), Congress made perfectly clear that the Tribe's inherent sovereign authority over reservation hunting, trapping, and, to a limited extent, fishing was retained under established principles of federal Indian law.[7]

[7] The Tribe additionally agreed to relinquish exclusive regulatory authority over some reservation fishing by sharing authority with Maine over fishing by nontribal members through the Maine Indian Tribal-State Commission ("MITSC"). *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331, 337-38 (1983) (Indian tribes have inherent sovereign authority over reservation fishing, protected from interference by states). Thus, as Attorney General Cohen explained to the Senate Committee, the Tribe retained its sovereign authority to regulate fishing "to a

II. THE STATE DEFENDANTS MISREPRESENT EVENTS LEADING TO THIS LITIGATION

The State Defendants inflammatorily suggest that the Penobscot officials engaged in aggressive actions against nontribal members on the Main Stem in defiance of this Court's 2007 decision in *Maine v. Johnson*, 498 F.3d 37. *See* S.D.Br.13. Penobscot officials did no such thing. Every substantive SMF cited in support by the SDs is denied by the United States and the Tribe. *Compare* S.D.Br.13-14 *and* ECF140¶¶¶¶8,38,63,77-78,90,93,101,115,176-80. Most troubling, the State Defendants falsely represent that Penobscot requests for sampling permits commenced in 2008 in reaction to *Johnson*, citing a request for admission that the Tribe *denied*. *Compare* ECF118 at 6940¶115 (citing ECF118-8 at 7089-90¶28) *with* ECF118-8 at 7089-90¶28. In that denial, the Nation pointed out that it started requesting sampling permits years before *Johnson*, in 2000, and from State entities in 2004, *id.*, and these permits were hardly aggressive—they were voluntary, *see* ECF140-6 at 7876-77. The SDs' other suggestion that the Nation sought to charge nontribal members to access the waters of the Main Stem, or "banished" them from those waters, are also entirely without merit. *See* ECF140-4 at 7871-73; ECF140-2 at 7862-64. Indeed, given Congress's ratification of the Tribe's grant of the public right of way in the 1818 treaty, any

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limited extent." P.D.278 at 4436. As amicus MITSC points out, MITSC views the waters of the Main Stem to be within the Penobscot Indian Reservation. *See* Brief of Amicus Curiae Maine Indian Tribal-State Commission.

such action would be unlawful. Further, Penobscot wardens have been commended for their cordiality and professionalism by non-tribal citizens enjoying the Main Stem. ECF140-2 at 7865¶33,7867.

The State Defendants' representation that the Tribe shunned an invitation of Maine Attorney General Schneider to discuss the subject matter of his August 8, 2012 opinion and precipitously commenced this action is also false. The Tribe describes the facts in its Response to the SDs' cross-appeal, below.

III. THE NATION'S RESERVATION SUSTENANCE HUNTING AND TRAPPING RIGHTS AND RELATED AUTHORITIES ENCOMPASS THE SUBMERGED LANDS AND RELATED WATERS OF THE MAIN STEM, BANK-TO-BANK.

A. *Alaska Pacific Fisheries* Controls And Renders Meritless The State Defendants' and Permittees' "Plain Language" Argument.

Employing a cramped definition of "islands" as "parcels of land surrounded by water," S.D.Br.30; Per.Br.8, the State Defendants and Permittees argue that, in every respect, including the Tribe's reservation sustenance hunting and trapping rights and related authorities, the reservation is confined to island *surfaces*. In so doing, they ignore the mandate of *Alaska Pacific Fisheries*, 248 U.S. 78 (1918) ("*APF*"), and other Supreme Court decisions requiring consideration of the historic circumstances, the reasonable understanding of the Penobscots, and the promise of Congress.

The State Defendants and Permittees fail to acknowledge that MIA is not a mere statute, but memorializes a tribal-state agreement. While courts cannot

ignore unambiguous plain language, whether in an ordinary statute or in a contract, the question of whether an ambiguity exists requires giving the language a "fair appraisal" when viewed in "historical context." *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 774 (1985) (quotations and citation omitted). If, in light of that fair appraisal, the language is ambiguous, that ambiguity must be "resolved to the benefit of the Indians." *Id.* (quotation and citation omitted). This has always been the rule: if the words used "are susceptible of a more extended meaning than their plain import, as connected with the tenor of the [agreement], they should be considered only in the latter sense." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832). *Accord Fellencer,* 164 F.3d at 709 (applying rule, noting that it is "rooted in the unique trust relationship between the United States and the Indians") (quotation and citation omitted).[8]

[8] The Tribe endorses the United States' reply to the SDs' and Permittees' argument that Indian law canons of construction do not apply to interpretations of the Settlement Acts, and adds that the Permittees badly misconstrue the statutory terms and this Court's decision in *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997).

MICSA § 1722(d) (defining the laws of the state) combined with MIA § 6204 (applying state law to the Nation, "except as otherwise provided") in no way suggest that "special rules favoring Indians do not apply" to the Nation, nor does *Akins* stand for that proposition, as Permittees suggest. *See* Per.Br.26 & n.14. On the contrary, in *Fellencer*, this Court applied the canon straight up in construing MIA's "internal tribal matters" provision, which marks one limit of state authority over the Tribe and its reservation. *See Fellencer,*164 F.3d at 708-09. And in *Akins*, upon finding the statutory exemplars of "internal tribal matters" of little assistance, *Akins,* 130 F.3d at 486, the Court developed a judicial test incorporating

Applying this established rule, *Alaska Pacific Fisheries* held that a reservation defined as "islands" included the intervening and surrounding submerged lands and related waters. *APF*, 248 U.S. at 89. The State Defendants argue that *APF* is distinguishable on several fronts, none of which has merit.

First, they argue that the description of the island reservation in *APF* of "the body of lands known as Annette Islands" is materially different than here because "MIA defines the Reservation as 'consisting solely of Indian Island . . . and all islands in that river northward ….'" S.D.Br.41. Ignoring the critical preceding phrase, "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine," the SDs argue that the *APF* reservation was a known region, but not the Penobscot Nation reservation. The SDs' selective quotation of the reservation definition reads the essential historical context necessary to understand the language right out of that definition. As the Tribe explained in its opening brief, the reasonable understanding of the islands reserved to the Nation by the treaty agreements was that they encompassed

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principles of federal Indian common law, noting that Congress "explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act." *Id.* at 489-90. By so doing, this Court rejected the central tenet of *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983): that MIA should be construed as an ordinary state statute, *see id.* at 489. *Akins* held to the contrary: that the construction of MIA presents a federal question, and that Congress intended federal Indian common law to inform its construction, *see Akins*, 130 F.3d at 485, 489-90. As the Supreme Court observes, state courts are "inhospitable" forums for Indian tribes. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566–67 (1983).

the submerged lands and related waters in a known geographic area. Everyone knew *exactly* where the Penobscots continued to survive and practice their way of life attending their island communities: in the River, from Indian Island northward, bank-to-bank. Indeed, until 1950 when a bridge was built, they were an entirely river-bound people, clinging to that way of life, beleaguered and oppressed as they were. *See* ECF194 at 9176¶¶2-5. The Penobscot reservation, understood in the context of islands reserved in the treaty agreement and the natural connection of a unique People to a river in order to survive and maintain a way of life, clearly was within a single distinct and well-known region, just like the island reservation of the Metlakahtlans—not, as the State and Permittees imply, more than one hundred separate island reservations.

Next, the State Defendants assert that, unlike the reservation in *APF*, nothing in the Settlement Acts or their legislative history suggests an intent "to preserve a fishery that could serve as the Tribe's economic base." S.D.Br.at 42. Pointing to the "near[] annihilat[ion]" of the Penobscot River fishery by industrial pollution and other non-Indian activity, the SDs claim that the Penobscots could not reasonably have relied upon the Main Stem as a sustenance resource base in the same way as the Metlakahtlans. *Id.* Further, they argue that MIA only gives tribal members the right to try to catch whatever fish might be available to eat and does

not guarantee that there will be fish (or other water-dwelling animals) of any quality for consumption. *Id.* These arguments are devoid of merit.

While non-Indians did severely abuse the public right-of-way in the Main Stem granted by the Tribe in the 1818 treaty by inundating it with logs and waste related to the wood products and paper industries, the destruction of the resource by some of the parties here (or their predecessors) is no justification for their claim that because the resource was diminished, the Tribe did not—at the time of the treaties or thereafter—"naturally look[] on the fishing grounds as part of the islands" like the Metlakahtlans did in *APF*. *See Washington*, 443 U.S. at 669 n.13 (decline of Indian fisheries caused by non-Indian activity "irrelevant to determination of the fishing rights the Indians assumed they were securing"). Furthermore, as of 1980 and well into the 1990s—when the Tribe received funds to educate its tribal members about the hazards of eating contaminated fish, *see* ECF105-11 at 2715-23—Penobscots continued (as they had during treaty-times) to rely upon the river to feed themselves and their families in any case. *See, e.g.*, Add.109-111; ECF124-2 at 7510¶¶6-8; ECF140-2 at 7861¶3; ECF194 at 9176¶4; ECF124 at 7501¶6; ECF105-88 at 3734-37, 3808-12. In ratifying MIA, Congress knew that Penobscot tribal members relied upon the river for economic survival. Indeed, Penobscot tribal member, Loraine Dana, a single mother, testified to the Senate Committee that she was worried that the settlement terms might affect her

ability to rely upon the river to feed her family because "inflation has taken its toll." P.D.278 at 4707.

The State Defendants' assertion that sustenance fishing is strictly confined to individual consumption finds no support in the text of MIA or its legislative history. In fact, the regulation by the MITSC of non-tribal fishing within the Penobscot reservation and newly acquired trust lands must account for "the needs or desires of the tribe[] to establish fishery practices . . . to contribute to the economic independence of the tribe[]." MIA § 6207(3). Moreover, just before the Maine Legislature passed MIA, State representatives pushed for language to limit "sustenance" to personal consumption, not commercial disposition, but tribal representatives did not agree. ECF102-49 at 1510; *see also* ECF119-33 (Maine Legislature's staff attorney reporting that lack of definition of "sustenance" could present "serious problems of interpretation"). As in the case of disputes about how to interpret reservation boundaries, State representatives then unilaterally papered the legislative files to support their position. *See* P.D.264 at 3970¶4. The SDs' claim is as novel as it is unfounded when it argues that the Tribe's reservation sustenance fishing rights (and, presumably, its sustenance hunting and trapping rights) amount to nothing more than the right to attempt to catch (or trap) a food source in the Main Stem from the islands. A right to sustenance fish (or hunt or trap) is worthless without the existence of fish (and other river dwelling animals) to

eat. *See Washington*, 443 U.S. at 675-78 (treaty right to "take" fish ensures right to take fish, not just an opportunity to try). A unanimous panel of the Ninth Circuit recently confirmed that an analogous right to "take" fish, confirmed in a treaty for tribes in Washington, includes environmental protection so that there are "harvestable fish." *United States v. Washington*, 827 F.3d 836,863-64 (9th Cir. 2016).

In short, *APF* is directly on point and completely refutes the State Defendants' purported "plain meaning" island surfaces only theory.

B. Penobscot Sustenance Hunting And Trapping In Submerged Lands And Related Waters Of The Main Stem Significantly Implicates The Tribe's Culture And Is Not "Ridiculous"

Suggesting that Penobscot tribal members can travel to "remote lands" for "hunting opportunities," the State Defendants deride as "ridiculous" the Tribe's assertion that to meaningfully exercise its sustenance hunting and trapping rights they must take place in the waters of the River and not be confined to island surfaces. S.D.Br.45. These "remote lands" are the newly acquired lands meant to make up for what the Tribe had *lost* as a result of the 1796 and 1818 treaties, not what the Nation clung to thereafter to support itself and continue practicing its way of life. In ridiculing the importance of Penobscot sustenance hunting and trapping in the waters of the Penobscot River, the SDs turn a blind eye to the Tribe's critical connection to that River.

The Penobscots' clan names, hunting districts, and cultural and spiritual practices are all intertwined with the river that bears their name. *See* P.N.Br. 4-6. Indeed, their family hunting districts is *nzibum* which means "*my river*." ECF105-88 at 3729 (emphasis added).

When Penobscot and Maine representatives sat at the settlement bargaining table and agreed that the State's "loss" of jurisdiction over the Tribe's existing reservation with respect to hunting and trapping would not be "restored," but that the Tribe would retain those powers in order to protect "traditional Indian practices," they knew that those practices took place (and could only take place) in and on the Penobscot River; Penobscots resided on the islands and ate from the waters and bed of the River by hunting, trapping, and gathering muskrat, turtles, ducks, fresh water claims, and other water-dwelling animals from the River. *See, e.g.*, Add.109-113; ECF124-2 at 7510¶¶6-8; ECF194 at 9176¶4; ECF124 at 7501¶6; *see also* ECF140-1 at 7856¶7 (describing Penobscot eel potting); ECF140-21 at 7945¶8 (describing Penobscot muskrat trapping). These traditional practices were, and always have been, uniquely exercised by the Penobscots in the Penobscot River, not in "remote lands" far removed from the Tribe's homeland.

Therefore, quite contrary to the State Defendants' view, a fundamental promise of the land claims settlement—that the Tribe would be able to engage in sustenance hunting and trapping practices tied directly to Penobscot tradition and

culture—would be essentially meaningless if the Tribe's sustenance hunting and trapping rights were relegated to "remote lands."

C. Congress Did Not Extinguish, But Expressly Confirmed, The Tribe's Sustenance Hunting And Trapping Rights And Related Authorities Within The Tribe's Unceded Aboriginal Territory, The Submerged Lands And Related Waters Of The Main Stem, Bank-To-Bank.

As an alternative to their "plain language" argument, the State Defendants claim that Congress extinguished the Tribe's sustenance hunting and trapping rights (as well as fishing rights) in the waters and bed of the Main Stem, together with any sovereign authority to regulate the competing taking of wildlife by non-tribal members there, pursuant to 25 U.S.C. § 1723(a)(1). *See* S.D.Br.54-57. That section provides, in pertinent part:

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

25 U.S.C. § 1723(a)(1) (emphasis added). Section 1723(b) further provides:

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

25 U.S.C. § 1723(b). These provisions ended the land claims litigation and ratified the Tribe's land cessions pursuant to the 1796, 1818, and 1820 treaties. They do

not, however, address the Tribe's sustenance hunting and trapping rights (or its fishing rights) within its existing reservation, which was not the subject of those land claims.

Ignoring the operative language of section 1723(a)(1) requiring tribal agency—that any ratified transfer be "from, by, or on behalf of" the Penobscot Nation—the SDs argue that through the definition of "transfer" alone, the Tribe lost its sustenance hunting and trapping rights (as well as its fishing rights) in the waters and bed of the Main Stem, together with its sovereign authority to regulate non-tribal hunting trapping (and fishing) there. The definition of "transfer" is, indeed, broad, and includes any kind of conveyance and anything resulting in "a change of title to, possession of, dominion over, or control of land our natural resources." 25 U.S.C. § 1722(n). But the definition, alone, is not self-executing. By terms of the statute, the agency of the Tribe is required, and the SDs fail to establish that any of the things that they claim worked a transfer of the Tribe's hunting, trapping, and fishing rights in and on the submerged lands and related waters of the Main Stem were "from, by, or on behalf of" the Nation. Indeed all the acts they allege as such actions were by and on behalf of the State or non-tribal members, not the Nation. Thus, the SDs fail properly to apply the statutory terms, and their "transfer" argument fails for this reason.

The State Defendants' transfer argument also runs headlong into the very nature of the hunting and trapping rights and related authorities at issue here, which were expressly confirmed by Congress. It bears repeating that Congress flagged the Nation's reservation sustenance hunting and trapping rights and related authorities as "Special Issues" in its identical committee reports on MICSA, and explained that they were examples of the Tribe's "inherent" and "retained sovereign[ty]" under "principles of federal Indian law" articulated in *Bottomly*. P.D.282 at 5942-45; P.D.283 at 6004-07. It is a cardinal principle of federal Indian law that "the sovereignty retained" by Indian tribes "includes [the] right to regulate the use of [their] resources by members as well as non-members," through "hunting and fishing." *Mescalero Apache Tribe,* 462 U.S. at 337-38. This attribute of tribal sovereignty, like all others, remains intact unless expressly abrogated by Congress. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Bottomly,* 599 F.2d at 1064-66. And the federal government has a trust responsibility to protect this and other attributes of tribal sovereignty from interference by states. *Worcester*, 31 U.S. at 560; *State of Washington, Dep't of Ecology v. U.S.E.P.A.,* 752 F.2d 1465 (9th Cir. 1985).

As the Tribe explained in its opening brief, at the time of the land claims settlement, the Tribe could only have exercised these "retained" attributes of sovereignty related to hunting, trapping and fishing in one place: within its existing

reservation—the lands (and related waters) *retained*, not ceded, by the treaties. P.N.Br.47. The land claims litigation was about ceded lands. Congress knew this, stating that the Tribe "will *retain* as [its] reservation those lands and natural resources" not given up in its treaties with Massachusetts "and not subsequently transferred by [it]." P.D.282 at 5946 (emphasis added); P.D.283 at 6008 (same). *Accord Johnson*, 498 F.3d at 47 & n.11. Congress described this as the "aboriginal territory" of a "riverine" Tribe, "centered on the Penobscot River," and further described the "aboriginal territory" that the Tribe had transferred only by reference to the "treaties consummated in 1796 and 1818" and the sale of four townships to Maine in 1833. P.D.282 at 5939-40; P.D283 at 6001-02. Thus, consistent with the understanding of Penobscot and Maine representatives that the Tribe's powers over hunting, trapping, and fishing would protect the Tribe's "traditional Indian practices" on the waters of the Main Stem, Congress's assurance that these rights were the Tribe's pre-existing, inherent sovereign attributes under principles of federal Indian law confirms them there.

Through their definition-based "transfer" theory, the SDs attempt to resurrect the very legal argument that this Court rejected in *Bottomly*. As in *Bottomly*, they claim that a history of state domination of an Indian tribe and its territory—here through log inundation, which "interfered with fishing," the construction of structures, purported non-tribal conveyances of submerged lands,

and state regulation of fishing—operated to extinguish the Nation's "inherent" and "retained" sovereign rights and authorities with regard to hunting, trapping (and fishing) in and on the Main Stem's submerged lands and related waters. S.D.Br.7,56. They likewise assert that the Tribe's "acquiescence" to that domination, by, for example, petitioning the State to protect the Tribe's fishery, worked a "transfer" of these powers, making the same mistake that Maine made in *Bottomly*. *See id*.

In *Bottomly*, Maine argued that, by means of a similar "historical exegesis," its domination over tribal affairs and territories resulted in the extinguishment of inherent tribal sovereignty. *See* 599 F.2d at 1064-65. Rejecting the argument, this Court said that the State "fundamentally misconceive[d] basic principles of Indian law" and that the proper analysis was "just the reverse[:] [t]he power of Indian tribes are, in general, inherent powers of a limited sovereignty which has never extinguished." *Id.* at 1065 (quotations and citation omitted). Neither a history of such state domination nor tribal acquiescence to it, this Court said, could "be considered a voluntary abandonment of [the tribe's] sovereignty." *Id.* at 1066. *Accord Fellencer,* 164 F.3d at 709 ("Neither the passage of time nor the apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity.") (citation and quotation marks omitted).

By the terms of the Settlement Acts, Congress intended to confirm, not extinguish, the Tribe's retained, inherent sovereign powers to exclusively regulate hunting, trapping, and (to a limited extent) fishing within its pre-existing reservation lands and related waters, its "aboriginal territory" in and on the Main Stem, which it never ceded its treaties with Massachusetts. Had Congress intended the definition of "transfer" to operate as the SDs claim, its promise—as the Tribe's trustee—that these powers were protected would have been false.[9]

The Nation does not separately address the SDs' argument raising "laches, acquiescence and impossibility," but endorses the United States' reply.

D. Maine Has Never Owned The Submerged Lands Of The Main Stem, And Congress Confirmed The Tribe's Aboriginal Title To Those Lands.

In his August 8, 2012 Opinion, the Attorney General instructed Maine game wardens that the State has exclusive jurisdiction over all hunting and fishing on the Penobscot River and that the Tribe's jurisdiction is confined to island surfaces. ECF8-3 at 86-87. The Tribe's Second Amended Complaint is tailored to the specific controversy generated by this opinion (and the Attorney General's related

[9] Although tribal acquiescence to state domination is legally immaterial, the record facts establish its absence: before, during, and after the land claims settlement, Penobscots routinely hunted, trapped, and fished on the bed and waters of the Main Stem without permission from the State; eating from the River is just what they did. *See* Add.109¶8; ECF194 at 9176¶¶6-7. And from 1972 on, Penobscot game wardens patrolled the entire Main Stem on a daily basis and enforced laws regulating hunting and trapping thereon. *Id*.¶¶8-12; ECF140-21 at 7945¶5-7.

letter to Chief Francis), which addressed "the respective regulatory jurisdictions of the Penobscot Indian Nation and the State of Maine relating to hunting and fishing on the [M]ain [S]tem of the Penobscot River." *See* ECF8 at 71-77; ECF8-3 at 86. The Tribe seeks narrow declaratory and injunctive relief to establish, as a matter of federal law, that the Maine Attorney General is wrong and that the Nation has exclusive regulatory and enforcement authority over (a) tribal sustenance fishing, hunting, and trapping and (b) non-tribal hunting and trapping in and on the waters of the Main Stem. ECF8 at 73-77.

The SDs and the Permittees responded with broad counterclaims for declaratory judgments that the boundaries of the Tribe's reservation are strictly confined to island surfaces, regardless of any specific controversy, ECF50 at 682; ECF25 at 336, and those counterclaims form the primary bases of their responses to the Nation's appeal: they argue that the boundaries of the Tribe's reservation simply stop at the islands shores.[10]

[10] In pursuing their approach, the SDs confront an intractable dilemma: Because their broad position renders the Tribe's reservation sustenance fishing right meaningless, they claim that the fishing right is ill-defined because it is set out in reference to a small "r," reservation and it is "ancillary." *See* S.D.Br.39,43. These are silly arguments. The SDs cannot avoid the contradiction imbedded in their reasoning. Indeed, in attempting to confine the Tribe's reservation to island surfaces they go so far as to suggest that the Tribe's sustenance fishery in the Main Stem was essentially eliminated by the transfer provision because it was "depleted" or "nearly annihilated." Thus, they back themselves into a position that the settlement actually provided the Tribe with no reservation sustenance fishery at all.

As the Tribe highlighted in its opening brief, federal courts usually avoid issuing declaratory judgments in the absence of a crystalized controversy. There is no present controversy about the scope of the Tribe's reservation other than that concerning the respective jurisdictions of Maine and the Tribe over hunting, trapping, and tribal sustenance fishing in the Main Stem. Thus, this Court, in its discretion, can limit its decision to address only that controversy. However, if the Court accepts the SDs' invitation to rule broadly, the boundaries of the reservation are set by the Tribe's retained aboriginal title to the Main Stem. P.N.Br.30, n.13,40-41,ns.16-17.[11]

The Permittees respond that ownership concepts have no place in discerning the scope of the Tribe's reservation because "the area defined as [the] Reservation is owned" "in fee" by Maine and "[t]he tribes' aboriginal title was extinguished under the Settlement Acts." Per.Br.24,32. The SDs similarly assert that Maine

[11] The SDs wrongly assert that the Tribe "waived any claim of riverbed ownership at oral argument before the district court" because the Tribe's counsel said that "the concept of ownership is not in the case." S.D.Br.53. Instead, Counsel made clear to the district court that the Tribe believed its "circumscribed sustenance rights and related authorities . . . specifically outlined in our second amended complaint" did not implicate riverbed ownership, but if they did, the Tribe's position was that it retained aboriginal title to the riverbed, "a different concept than ownership." ECF156 at 9008-09. The distinction is really a semantic one; the Supreme Court describes the status of aboriginal title as being "as sacred as the fee simple of the whites." *Oneida II*, 470 U.S. at 235. As the U.S. points out in its brief, by the terms of the Settlement Acts, Congress recognized the Tribe's aboriginal title to its existing reservation, which engenders the status of "ownership."

became the "fee owner" of the Main Stem and, "acting as proprietor," conveyed submerged lands within the Main Stem to private parties. S.D.Br.at 56. The SDs and Permittees also erroneously seek to invoke a presumption, applicable in western states, that a United States conveyance establishing a reservation for an Indian tribe including submerged lands of a river will not trump a state from "gain[ing] title" to those submerged lands upon statehood under the equal footing doctrine. S.D.Br.28; Per.Br.26-27. The SDs concede, however, that they did not take ownership of the submerged lands of the Main Stem upon statehood because those lands are considered "privately owned." S.D.Br.28,n.16. In any event, they argue (like the Permittees) that the MICSA transfer provisions "extinguished" the Tribe's aboriginal title because "PN long ago lost possession and control of the Main Stem." *Id.* at 52. These arguments do not comport with fundamental legal principles that have long guided relations between the "discovering" Europeans and this country's original inhabitants.

1. The Boundaries Of The Reservation Are Those Of The Tribe's Retained Aboriginal Title After The Treaty Cessions, Which Congress Ratified In MICSA

Original Indian title or "aboriginal title" refers to the right of an Indian tribe to continued use and occupation of land and natural resources that it has historically occupied. *See Mitchel v. United States*, 34 U.S. 711, 746 (1835). *See generally*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAWS, § 15.05[1], at 1015-16

(Nell Jessup Newton ed., 2012) ("COHEN"). The measure is "actual, exclusive [relative to other Indian tribes, not non-Indians], and continuous use and occupancy for a long time" guided by the "way of life, habits, customs and usages of the Indians." *Sac & Fox Tribe of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967) (quotations and citation omitted).

Contrary to the SDs' and Permittees' view, the Nation's aboriginal title does not derive from a treaty "obligation," and 25 U.S.C. § 1731, discharging Maine of any treaty obligations is, therefore, completely irrelevant. Aboriginal title pre-dates European contact, *see United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941), and a valid treaty simply extinguishes a tribe's aboriginal title and thereby sets "a boundary line" with respect to that tribe's remaining land holdings. *Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 667-71 (1974) (*Oneida I*) (quotation and citation omitted). Further, until aboriginal title is validly extinguished by the United States, the federal government has a trust duty to protect it from state encroachments. *Id.* at 669-72.

By means of a fiction, grounded in presumed Christian superiority over the indigenous Americans, the first "discovering" European sovereign gained "ultimate title" to the land, subject to the right of any given tribal nation's continuing exclusive use and occupation—"aboriginal title"—until extinguished by the discovering sovereign. *See Pueblo of Jemez v. U.S.*, 790 F.3d 1143, 1154

(10th Cir 2015); COHEN at 1029. This "ultimate title," also referred to as "naked fee," "is very different from . . . fee simple absolute"; for it is entirely subject to a tribe's continued occupancy and possession (aboriginal title) until the latter is extinguished. *Id.* at 998-99. The naked fee gave the discovering sovereign nothing other than a "preemptive right," exclusive of any other sovereign, to extinguish a tribe's aboriginal title through purchase. *Oneida I,* 414 U.S. at 670-71. That right was lodged with Massachusetts as one of the original 13 colonies, but passed to the federal government with the establishment of the Republic. *Id.* at 670.[12]

When a tribe's aboriginal title is extinguished by means of a treaty cession, the tribe retains everything not expressly ceded. *United States v. Winans,* 198 U.S. 371, 381 (1905). In 1796 and 1818, recognizing that the Penobscot Nation held aboriginal title to the Penobscot River and related uplands above the head of the tides, Massachusetts set out to extinguish that Indian title to the uplands through treaty purchases. *See* Add.98-103; ECF105-88 at 3746-3802. In the wake of those treaties, Massachusetts continued to hold "naked fee" to the Nation's retained (unceded) aboriginal territory—everything other than the uplands expressly relinquished by the treaties. Massachusetts presumed, albeit in violation of federal

[12] An Indian tribe's aboriginal title confirms its exclusive use and occupancy of its aboriginal territory, including the exclusive hunting, trapping and fishing rights therein. *See Washington,* 443 U.S. at 680 (referring to a tribe's "exclusive right to fishing" within aboriginal territory reserved); *id.* at 683-84 ("it is clear that the Tribe may exclude non-Indians from access to fishing within the reservation"). *See generally,* COHEN at 1154-55 (citing cases).

law, that it extinguished the Nation's aboriginal title to the uplands. But as a matter of law, it could not have presumed to extinguish the Nation's aboriginal title to anything else. All it had was naked fee under the fiction of the discovery doctrine. While that naked fee passed to Maine in 1820, it is a far cry from fee simple absolute, contrary to the SDs' and Permittees' belief. Indeed, it is essentially meaningless. Unless and until the federal government expressly extinguishes the Nation's aboriginal title, the naked fee that Maine inherited from Massachusetts is entirely burdened by the Nation's aboriginal title, including the retained, inherent sovereign authorities that go with it. *See Oneida I*, 414 U.S. at 669, 671-72.[13]

The Permittees assert that colonial authorities extinguished the Nation's aboriginal title to the Main Stem pursuant to the Treaty of Portsmouth in 1713 and in the Dummer's Treaty of 1727. Per.Br.14, n.6. They fail to reference any language in either treaty to support that proposition. The former treaty expressly "sav[es] unto the Indians their own Ground," P.D.1 at 4, and the latter likewise

[13] Key federal and state representatives to the land claims settlement understood this. Counsel for DOI testified to the House Committee on the status of the Tribe's existing reservation, stating that "fee title is held by the State, but that . . . the tribe[] ha[s] a right of exclusive occupancy . . . ." P.D.281 at 5683-84. In a colloquy before the Senate Committee, Senator William Cohen and Maine Attorney General Cohen confirmed that the Tribe's aboriginal title is in the nature of "a possessory life estate that . . . is equivalent, for practical purposes . . . to a fee title." P.D.278 at 4454-55

"sav[es] unto the Penobscot . . . all their Lands, Liberties and Properties not by them conveyed or Sold to or Possessed by any of the English Subjects as aforesaid," P.D.2 at 17. Most obviously, if the Permittees were correct about the effect of these treaties, there would have been no need for Massachusetts authorities to enter into the Treaties of 1796 and 1818, which they did precisely because they understood the purchase of the aboriginal lands was the only way to extinguish aboriginal title. *See* Add.98-103; ECF105-88 at 3746-3802. Citing to a report of the SDs' expert, Bruce Bourque, without any page reference, the Permittees assert that "the likelihood of the PN establishing [aboriginal title] anywhere would have been, at a minimum, highly debatable." Per.Br.19,n.9. Bourque's report establishes no such thing. On the contrary, he acknowledges that Massachusetts entered into the 1796 and 1818 treaties with the Tribe as a sovereign, and that the purpose of the Treaties was to "[quiet] title . . . through treaties . . . that opened up vast areas of Maine's interior for settlement and economic development." ECF109-97 at 6053-54; ECF106-69 at 4057-59. The Permittees final assertion that illegal non-Indian inundations of the Main Stem worked an extinguishment of aboriginal title reveals a complete misunderstanding of the law. *See Oneida I,* 414 U.S. at 668-72 (aboriginal title can "only be interfered with . . . by the United States"; illegal state and non-Indian encroachments do not affect it).

In sum, the boundaries of the Nation's "historic" or "existing" reservation, as the parties called it at the time of the land claims settlement, was its aboriginal title to the submerged lands and islands of the Main Stem, what it had retained, not transferred to Massachusetts in the treaties.[14]

The State Defendants' assertion that "the Court should presume State control [of the Main Stem] and require the Nation to prove its claim to these assets of unique public importance through clear and explicit terms in the Settlement Acts," S.D.Br.28-29, is misplaced. As the United States points out in its reply, the Supreme Court cases the SDs cite are inapposite. The United States did not first own the territory of Massachusetts and Maine prior to statehood; so Maine gets no presumption that, upon entering the union, it took sovereign ownership of the bed of the Main Stem at the behest of the federal government as its trustee. On the contrary, under Maine and Massachusetts common law, title to the bed of navigable-in-fact waters above the effect of the tides is strictly private, subject only to the public right of way for transporting goods and for the passage of fish. *See, e.g.*, *Commonwealth v. Alger*, 61 Mass. 53, 66 (1851); *Wadsworth v. Smith*, 11 Me. 278, 281 (1834). Therefore, the SDs could never claim, contrary to Maine's own common law, that the State holds fee title, as a sovereign, to the bed of the

[14] The Permittees assertion that if Congress recognized the Tribe's aboriginal title to the Main Stem, there is nothing to stop the Tribe from claiming every area of the State it ever occupied, see Per.Br.10-11,n.4, is absurd. The Tribe long ago abandoned its aboriginal title to the River below Indian Island.

Penobscot River above the head of the tides. Indeed, as just explained, at the time of statehood, all Maine inherited from Massachusetts was the naked fee to those submerged lands, subject to the Tribe's unextinguished aboriginal title.

2. Congress Did Not Extinguish The Nation's Aboriginal Title To The Main Stem In MICSA

The State Defendants and the Permittees claim that Congress extinguished the Tribe's aboriginal title to the submerged lands of the Main Stem pursuant to the transfer provision of MICSA, *see* S.D.Br.51; Per.Br.19-20, is also without merit. To extinguish aboriginal title, Congress must express its intent in "plain and unambiguous" terms. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985) (*Oneida II*) (quotations and citation omitted). Recognizing that Congress's committee reports state that the Tribe "will retain as [its] reservation[] those lands and natural resources which were reserved to [it] in [its] treaties with Massachusetts and not subsequently transferred by [it]," S.D.Br.51 (underscore in original), the SDs contend that the Tribe's aboriginal title to the submerged lands was extinguished by MICSA's transfer provision, § 1723(b), discussed supra at 29-34. They rest on the broad definition of "transfer" to suggest that the Tribe "lost" its aboriginal title to the Main Stem by acquiescing to state dominion there. S.D.Br.at 51-52. But the committee reports employ the phrase "transferred *by* [the Nation]," and this tracks the plain terms of § 1723, which, as discussed above, requires some agency of the Tribe. That agency was present in the 1796, 1818,

and 1820 treaties. Thus, Congress extinguished the Tribe's aboriginal title to the uplands that the Tribe ceded in those treaties. In order to extinguish the Nation's aboriginal title to the submerged lands and islands in the Main Stem, which were not ceded by those Treaties, Congress was required to be far more explicit. *Oneida II*, 470 U.S. at 247-48.

* * *

Pursuant to the treaties, Massachusetts clearly left intact the Tribe's aboriginal title to the submerged lands of the Main Stem, thereby retaining only "bare title." Nothing changed from the treaty times to the enactment of MICSA: the boundaries of the Tribe's existing reservation, held as aboriginal title, were set by the treaty cessions at the shores of the uplands. *See Oneida I,* 414 U.S. at 670-71 (referencing the "boundary line [of an Indian reservation] established by treaties") (quotations and citation omitted). Indeed, the Tribe continued its way of life on the Main Stem, with tribal members continuing their subsistence hunting, trapping, and fishing practices at all times. *See supra* at 6,25,28. Congress did not extinguish the Tribe's aboriginal title there. To the contrary, consistent with the teachings of *APF*, it confirmed it by defining the reservation in accordance with the Tribe's and Massachusetts's understanding of the islands in the Penobscot River reserved by the treaty agreements.

RESPONSE TO CROSS-APPEALS

RESPONSE TO STATE DEFENDANTS' APPEAL

The State Defendants assert that there is no justiciable controversy to warrant the district court's declaratory judgment that the Nation's sustenance fishing right and its exclusive regulatory authority its tribal members' exercise of that right is in the Main Stem, bank-to-bank. In describing the controversy at hand, they claim that the Attorney General's opinion of August 12, 2012 does not address the Nation's sustenance fishing rights, and they suggest that the Tribe precipitated litigation by failing to accept an invitation to meet. The SDs misstate the facts and misapply the law.

Facts

The Maine Attorney General's August 8, 2012 opinion attempts to define the regulatory jurisdictions of the Tribe and the State with respect to the regulation of "hunting *and fishing*" on the [M]ain [S]tem." ECF8-3 at 86-87. Upon learning about the opinion, the Nation warned its tribal members that those "engaged in sustenance fishing on the river are at risk of prosecution by Maine law enforcement officers if they fish without a state permit or otherwise not in accordance with state law." ECF140-1 at 7859¶16. After the Attorney General failed to show up at a meeting requested by Chief Francis on August 14, 2012 (arranged at the State Capitol for the convenience of state officials) to discuss the competing views about

Penobscot and State warden authorities on the River, the Nation commenced this action for declaratory and injunctive relief. *See* ECF140-5 at 7874-75; ECF140-22 at 7947-48.

In the course of proceedings before the district court, the Attorney General's office announced a new position: that if a tribal member kept one foot on an island shore and casted into the Main Stem, it would consider such fishing to be within the boundaries of the Penobscot Indian Reservation. *See* Opinion at 59[Add.61]. It also announced, for the first time, that it was following an informal policy of not interfering with Penobscot sustenance fishing in the Main Stem by refraining from "enforc[ing] strict compliance" with its "islands only" theory of the reservation boundaries. ECF117 at 6883-84. At the same time it argued that "[t]he Main Stem [is] fully subject to the State's regulatory jurisdiction even if it were in the PN's Reservation, which it is not," *id.* at 6877, and that "PN's . . . jurisdiction over fishing . . . is limited to ponds ten acres or less," *id.* at 6881,n.29. In their briefing to this Court to support their counterclaim that "[t]he waters and bed of the [M]ain [S]tem of the Penobscot River are not within the Penobscot Nation reservation," ECF59 at 682, the SDs now argue that because of Maine's historic control over the Main Stem, the Tribe's fishing rights have been extinguished by MICSA's transfer provisions. *See* S.D.Br.7,9,55-56.

Summary of Argument

The facts speak for themselves: clearly there is a justiciable controversy over the right of Penobscot tribal members to engage in sustenance fishing in and on the waters and submerged lands of the Main Stem and the Nation's exclusive regulatory and enforcement authority over those activities.[15] Indeed, by bringing their broad counterclaim, the SDs necessarily place in controversy the location of the Penobscot Nation's sustenance fishery because if they prevail, and confine the reservation to island surfaces, they eliminate the only possible fishing in the reservation, the waters of the River. Further, the SDs threatened violations of federal law constitute a ripe controversy under *Ex Parte Young*, which they cannot moot with a policy announcement.

I. THE NATION'S EXCLUSIVE AUTHORITY OVER ITS TRIBAL MEMBERS' SUSTENANCE FISHING IN THE MAIN STEM IS IN CONTROVERSY.

The SDs' threatened interference with the Tribe's sovereign rights and authorities confirmed by federal law clearly present a ripe controversy under *Ex Parte Young*, 209 U.S. 123 (1908). *See Town of Barnstable v. O'Connor*, 786 F.3d

[15] The district court concluded that tribal member eel trapping for sustenance, which involves placing an eel pot on the bed of the River, constitutes reservation sustenance fishing under § 6207(4), because eel are "catadromous," thereby falling within the definition of "fish" under § 6207(9). Opinion at 26[Add.28]. The SDs' purported informal policy does not address tribal member sustenance taking of eels from the riverbed, and eels are an important traditional sustenance resource for the Penobscots. *See* ECF124-2 at 7510¶6; ECF194 at 9176¶4; ECF105-88 at 3734-36, 3808-11; ECF105-92 at 3852-53.

130, 139 (1st Cir. 2015) (discussing requirements for an action under *Ex Parte Young*). Contrary to the SDs' contention, the Tribe need not point to evidence that they are actually interfering with tribal members' sustenance fishing on the waters of the Main Stem. *See Massachusetts v. Wampanoag Tribe of Gay Head*, 98 F. Supp. 3d 55, 75 (D. Mass. 2015) ("a state official need not be violating a federal statute to be subject to suit under *Ex parte Young*; all that is required is an allegation that the official is interfering, or is about to interfere, with a federally protected right").

And the instant controversy is not merely about tribal member sustenance fishing, but Congress's confirmation of the Tribe's exclusive sovereign authority to govern that fishing in the Main Stem without interference by state officials. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 468 n.7 (1976) (distinguishing tribe's standing "to protect tribal self-government" from standing of tribal members). The Tribe exercises just such governmental authority, *see, e.g.*, P.D.222 at 3117-18; ECF140-1 at 78576-57¶8; ECF105-37 at 3193; ECF105-39 at 3196, and the Maine Attorney General's directive to Maine's game wardens through the August 8, 2012 opinion threatens the promise of MICSA that the Tribe can exercise that authority without state interference. *See Moe*, 425 U.S. at 468 n.7.

Furthermore, the SDs' post-litigation announcement that they are following an informal policy not to enforce state fishing laws against Penobscots who take to their canoes to fish in the River cannot moot the controversy because their "trust us" position simply does not irrevocably eradicate the effects of the Attorney General's August 8, 2012 opinion. *Town of Barnstable*, 786 F.3d at 142 (citations omitted) (emphasis added). *See ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) (defendants must show that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."). No matter how they characterize it, the State Defendants' official position destroys the meaningful exercise of the Tribe's sustenance fishing right, which, according to the promise of the Settlement Acts, is secure from any threat of State interference.

RESPONSE TO PERMITTEES' APPEAL

Summary of Argument

The Permittees' cross-appeal from the district court's decision confirming the Nation's sustenance fishing rights in the Main Stem, bank-to-bank, is meritless. Seeking to confine those rights to the island surfaces, they unabashedly render those rights meaningless, only to offer up one solution: acculturation and assimilation. Their arguments do violence to the promise of the Settlement Acts.

I. THE NATION'S SUSTENANCE FISHING RIGHT AND ITS RELATED EXCLUSIVE AUTHORITY TO GOVERN IT IS IN THE MAIN STEM.

First, the Permittees are wrong in asserting that "[n]othing in the text of section 6207 hints" that the Penobscot Indian Reservation includes waters of the Main Stem. On the contrary, as the Tribe pointed out in its opening brief, other provisions of that very section reference "waters subject to regulation by" the Tribe, *see* P.N.Br.50-51, and the Permittees cite to one of them, § 6207(6), describing the Commissioners of IFW's limited authority to review the Tribe's sustenance fishing laws, *see* Per.Br.40-41,n.24, which, by the plain terms of § 6207(4), operate only within the Tribe's reservation.

Second, their position is self-contradictory. Apparently adopting the SDs' one-foot-on-the-island theory, they say that "PN members can . . . catch anadromous fish taken from the Penobscot River, as long as they fish from the islands themselves." Per.Br.43, n.26. As the district court pointed out, according to this notion, a fish swimming in the Main Stem would not be "within the boundaries of [the reservation] when taken." Opinion at 59[Add.61]. So by taking this position, the Permittees abandon their textual argument that the reservation is confined to island surfaces. They also do not mention that their theory would prevent Penobscots from catching catadromous eels. *See supra* n.15.[16]

[16] The Permittees must at least acknowledge that the boundaries of the Tribe's reservation extend from the island shores to the thread of the Main Stem for all of

Third, the Permittees make the extraordinary claim that the Tribe no longer has a right to fish in the River because its members can buy fish "at the corner grocery." Per.Br.44. As much as the Permittees may think it appropriate for the Penobscot People to abandon their sustenance practices and the elements of their culture and "assimilate," acculturation has no place in the interpretation of the Settlement Acts. Congress ensured, upon ratifying and rendering effective the very provisions at issue, that the Tribe's cultural ways would not be terminated, but, on the contrary, its traditional subsistence practices would be protected. P.D.282 at 5942,5945; P.D.283 at 6004,6007.[17] While some of the Permittees have done severe damage to the ecological integrity of the Main Stem—*see*, *e.g.*, ECF105-23 at 2864-67 (DOI letter to Senator Olympia Snowe, reporting on assessment of contamination of Penobscot sustenance resources in the Main Stem from dioxin and other contamination from Lincoln Paper and Tissue LLC ("LP&P") and

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the reasons articulated by the United States, which the Nation endorses as the absolute bare minimum scope of its reservation in the Main Stem.

[17] The Permittees contention that "the Tribe itself has argued" that its traditions and historical practices are unimportant, *see* Per.Br.43-44, is false. They cite the Tribe's position as summarized in *Akins*, 130 F.3d at 487, which was in response to a claim that timber harvesting was not a traditional tribal activity and so could not be an "internal tribal matter," free from any state regulation pursuant to MIA § 6206(1). The Tribe's position that it cannot be limited to stereotypical preconceptions of what non-Indians consider "traditional" cannot be twisted to suggest that the most critical elements of the Tribe's historical practices—the Tribe's reservation sustenance hunting, trapping, and fishing rights—are not important.

related investigation of Great Northern Paper Company LLC); ECF105-34 at 3130-42 (U.S. Proof of Claim in subsequent Chapter 11 proceeding of LP&P for up to $60 million for injury to the Penobscot Nation, including losses to the Nation's "sustenance fishing right and cultural use of fish and other resources")—the Penobscots have survived and continued their way of life on their namesake River. The Settlement Acts enshrine a tribal-state agreement and a Congressional promise that they can exercise the powers of self-government to continue to do so.

CONCLUSION

For all of the above reasons, together with those set forth in the Nation's opening brief, the Tribe respectfully asks this Court to hold that its sustenance hunting, trapping, and fishing rights and related authorities within the Penobscot Indian Reservation pursuant to 30 M.R.S.A. §§ 6207(1), 6207(4), and 6210(1) encompass the entirety of Main Stem of the Penobscot River, bank-to-bank and, if the Court reaches the boundaries of the Penobscot Indian Reservation in general, that it hold that those boundaries encompass the entirety of the Main Stem, bank-to-bank.

Respectfully submitted this 19th day of January, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that, on January 19, 2017, I electronically filed the foregoing Preliminary Response/Reply Brief for Penobscot Nation 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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