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 THE STATE DEFENDANTS

[*continued on next page*]

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JURISDICTIONAL STATEMENT

The Penobscot Nation ("PN" or "the Tribe") and the United States ("U.S.") filed claims seeking, *inter alia*, a declaration that the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 ("MICSA"), and the Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214 ("MIA") (together "the Settlement Acts"), grant PN members the right to take fish for their individual sustenance from the waters of the Main Stem of the Penobscot River.[1] ECF 1, 3, 8, 58. The district court lacked jurisdiction over these claims because neither the Tribe nor any of its members has suffered the particularized injury necessary to show standing and any question as to the scope of tribal members' sustenance fishing rights is not ripe for adjudication.

Defendants Janet T. Mills, Attorney General of the State of Maine; Chandler Woodcock, Commissioner of the Maine Department of Inland Fisheries and Wildlife ("MDIFW"); Joel T. Wilkinson, Colonel of the Maine Warden Service; and the State of Maine (collectively "State Defendants"); and the Town of Howland *et al*. ("State Intervenors"), filed counterclaims seeking a declaration that the Penobscot Indian Reservation is limited to the islands in the Main Stem. ECF 10, 25, 59, 67, 70, 86-87. State Defendants' and State Intervenors' counterclaims are based on MICSA, which confirmed and ratified MIA. The

[1] The Main Stem is the 60-mile river segment from Indian Island northward to the confluence of the East and West Branches in Medway. ECF 111: 2.

district court had jurisdiction over these counterclaims pursuant to 28 U.S.C. § 1331, and authority to grant the relief requested pursuant to 28 U.S.C. § 2201.

The district court (Singal, J.) entered both its Judgment and related Order on Cross Motions for Summary Judgment on December 16, 2015. PN and the U.S. filed motions to alter or amend the Judgment and Order, which motions the court denied by order of February 18, 2016. ECF 164-165, 172. PN and the U.S. each filed timely notices of appeal on April 18, 2016. State Defendants and State Intervenors filed timely cross-appeals on April 28 and 29, 2016, respectively. The four appeals were consolidated by order of July 1, 2016. This Court has jurisdiction over the appeals pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES ON APPEAL

I. Whether MIA and MICSA define the Penobscot Indian Reservation as the islands within the Main Stem of the Penobscot River, or alternatively as the Main Stem of the Penobscot River and the islands within it.

II. Whether the history of state dominion and control over the Main Stem bars Plaintiffs' claims.

STATEMENT OF ISSUES ON CROSS-APPEAL

I. Whether a justiciable case or controversy exists as to where Penobscot tribal members may take fish for personal sustenance.

II. Whether the district court erred by granting the motion of the U.S. to intervene.

STATEMENT OF THE CASE

Introduction

This case arises out of a dispute between the Tribe and the State regarding the boundaries of the Penobscot Indian Reservation ("Reservation"). State Defendants, relying on MIA's definition of the term, maintain the Reservation is limited to islands in the Main Stem. PN and the U.S. rely instead on a subsection of the statute granting members of the Passamaquoddy and Penobscot Tribes sustenance fishing rights "within the boundaries of their respective Indian reservations." Plaintiffs argue this provision implies that the Reservation must include the Main Stem bank-to-bank, because otherwise tribal members would be left without a meaningful sustenance fishing right.

State Defendants have never interfered with tribal sustenance fishing in the Main Stem, and have no intention of interfering with such fishing. Accordingly, there is no occasion here for the Court to sort out the precise contours of that statutory right because there is no live controversy associated with it. But Plaintiffs are attempting to claim the Main Stem as part of the Reservation for all purposes through reliance on the sustenance fishing provision. This distorts the statutory framework of the negotiated settlement beyond recognition.

Plaintiffs' argument disregards plain language to the contrary in MIA's definition of "Penobscot Indian Reservation," a cornerstone term of the Settlement

Acts. It is also inconsistent with the legislative and historical record. PN never represented to Congress or the Maine Legislature that it believed the Main Stem was part of its reservation while the legislation that would become the Settlement Acts was pending. This case can and should be decided based on the plain language of MIA's definition of "Penobscot Indian Reservation." The district court correctly determined that provision unambiguously limits the Reservation to the islands in the Main Stem, and solely the islands.

State governments have controlled activities on the Main Stem since the 18th century, and PN acquiesced to that state control. The Tribe's acquiescence gave rise to settled expectations among municipalities, public utilities, businesses, and private citizens, all of whom ordered their lives with the understanding that the Main Stem is a public resource and its bed privately owned. The judicial declaration Plaintiffs seek would be a destabilizing pronouncement with results PN never could have achieved legislatively in 1980.

Factual Background

The following recitation of facts serves three purposes.[2] First, it provides helpful context to the legal issues. Second, it shows the absence of a case or controversy regarding sustenance fishing. Third, it supports State Defendants'

[2] The district court properly found that any factual disputes that appear in the record are immaterial to the legal issues this case presents, and properly resolved those issues based on the unambiguous language of the statute. Add. 4 n.4.

alternative arguments that State dominion and control over the Main Stem extinguished any interests PN might have claimed in the river under the Settlement Acts' transfer provisions, and that equitable principles bar Plaintiffs' claims that the Reservation includes the Main Stem.

The Early History

PN 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." 25 U.S.C. § 1721(a)(3). Between 1796 and 1833, PN negotiated three major land cessions with the Commonwealth of Massachusetts and the State of Maine, respectively. In 1796, the Tribe relinquished its claims to a six-mile wide strip on each side of the Main Stem beginning at the head of tide in Old Town and extending 30 miles northward. PD 5, 6.[3] In 1818, the Tribe relinquished its claims generally to the rest of the land in the Penobscot River watershed, with the exception of four reserved townships, as well as the islands within the Main Stem. PD 7, 8. In 1820, Maine became a State and succeeded to the rights and obligations of Massachusetts under the treaties. PD 10. In 1833, PN sold its four reserved townships to the State of Maine for $50,000. PD 131: 592. From that point forward, PN's reservation was understood to be limited to the islands in the Main Stem. ECF 118 ¶ 11.

[3] "PD" refers to numbered Public Documents jointly submitted by the parties to the district court, the most relevant of which are included in the Joint Appendix.

The Geography of the Main Stem

The Main Stem is a non-tidal, navigable river segment containing at least 146 islands. *Id.* ¶¶ 1, 3. Together these islands consist of between 4,446 and 5,000 acres. *Id.* ¶ 4. The entire surface area of the Main Stem from bank-to-bank, including the islands, is approximately 13,760 acres. *Id.* ¶ 2. These acreage figures are significant because the U.S. Department of the Interior ("DOI") provided an acreage estimate for the Reservation to Congress as it considered MICSA, and that estimate corresponds only to the surface area of the islands. *See infra* at 48.

The History of State Dominion and Control over the Main Stem

Maine has exercised pervasive and exclusive sovereign control over the Main Stem since it became a State in 1820. Its courts have jealously guarded public rights of access to navigable rivers, including specifically the Main Stem. In 1841, the Maine Supreme Judicial Court observed "[t]he waters of the Penobscot are, of common right, a public highway, for the use of all the citizens." *French v. Camp*, 18 Me. 433, 434 (1841); *see also Brooks v. Cedar Brook & Swift Cambridge River Improvement Co.*, 82 Me. 17, 21 (1889); *Moor v. Veazie*, 32 Me. 343, 356 (1850); *Brown v. Chadbourne*, 31 Me. 9, 20-22 (1849). It is well-settled that the State is the trustee of public rights in rivers such as the Main Stem. *Mullen v. Penobscot Log-Driving Co.*, 38 A. 557, 560 (Me. 1897) ("The state represents

all public rights and privileges in our fresh-water rivers and streams, and may dispose of the same as it sees fit.").

The Maine Legislature authorized and regulated the construction of log booms, piers, canals, and dams in the Main Stem. ECF 118 ¶ 64. It authorized log drives to supply downriver mills with timber, and, at times, these log drives interfered with fishing, navigation, and other uses of the river. *Id.* ¶ 66. The State also regulated navigation on the Main Stem by, for example, granting exclusive rights to operate steamboats to private parties and authorizing the Tribe to operate a ferry to Indian Island. *Id*. ¶¶ 64, 66, 69. Maine, and Massachusetts before it, have continually regulated fishing on the Main Stem since 1789. *Id.* ¶¶ 117-118, 121-22, 127-33. When PN experienced problems due to depleted fisheries in the early 1800s, it petitioned Massachusetts and later Maine to address the problem. *Id*. ¶¶ 117-118, 121.

The governments of Massachusetts and Maine also long ago conveyed much of the submerged land within the Main Stem to private parties through conventional real estate transactions. Following the Treaties of 1796 and 1818, the state governments set about conveying the land they had acquired, including the riverfront lots, to private citizens to promote settlement in the region. *Id*. ¶¶ 186-222. 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 indicates otherwise. *Avery v. Granger*, 64 Me. 292, 292 (1874). Many of the deeds from Massachusetts and Maine contain language that confirms the riverside lots include the submerged lands to the thread of the Main Stem. ECF 118 ¶¶ 206-21. Under Maine and Massachusetts law, those deeds convey the submerged lands to the river's centerline. *Avery*, 64 Me. at 292.

Historical Acquiescence to State Control

Before 1980, the Tribe, its members and their lands were regarded as fully subject to the State's jurisdiction. *See, e.g.*, *Stevens v. Thatcher*, 39 A. 282, 283 (Me. 1897) ("Notwithstanding any treaties within the territory of Maine, the political jurisdiction of the state includes every person and every acre of land within its boundaries."); *Maine v. Newell*, 24 A. 943, 944 (Me. 1892) ("Indians … have always been regarded by [Massachusetts and Maine] and by the United States as bound by the laws of the state in which they live . … They are as completely subject to the state as any other inhabitants can be." (citation omitted)); *see also* PD 283: 6004 [JA _] ("Maine Tribes were considered by the State of Maine, the United States and by the Maine courts to have no inherent sovereignty.").

Since the earliest days of Maine's statehood, when the Tribe encountered problems on the Main Stem, it did not take direct action, but instead sought help from the State. Shortly after Maine became a state in 1820, PN petitioned the State

for assistance in addressing the effects of non-tribal fishing. ECF 118 ¶ 118. In 1831, again frustrated by a depleted fishery, PN petitioned the State to intervene on its behalf. *Id.* ¶¶ 121-121A. Later in the 19th century, PN acquiesced to state laws governing log booms and other river activities. *Id.* ¶¶ 69-70. The Tribe has never regulated navigation on the Main Stem, and there is no record of any PN ordinance expressly regulating fishing, hunting, or trapping on the Main Stem. *Id.* ¶¶ 61, 153. PN did not regulate hunting by non-tribal members on its own lands until the Maine Legislature authorized it to do so in the 1970s. *Id.* ¶¶ 7-11, 69, 101, 123, 134-43, 160, 165, 169-73. And PN has repeatedly taken the public position that its Reservation consists of "islands in the [Main Stem]" without reference to the bed or waters of the surrounding river. *Id.* ¶¶ 2, 4-5. These are but a few of countless examples of PN's actions over the past 200 years demonstrating the Tribe's longstanding acquiescence to State control of the Main Stem.

The U.S.'s position that the Reservation includes the Main Stem was first announced in 1995, and came after consistently taking contrary positions for decades. From 1796 until the 1970s, the federal government largely ignored PN and regarded the welfare of the Maine tribes to be a state responsibility. 25 U.S.C. § 1721(a)(9) (Congressional acknowledgement that federal government "repeatedly denied that it had jurisdiction or responsibility for [the Maine

Tribes]"); *Joint Passamaquoddy Tribal Council v. Morton*, 528 F.2d 370, 374-75 (1st Cir. 1975) (describing the long history of the federal government denying assistance to the Maine tribes); *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 20, 770 A.2d 574, 581 (explaining that "[t]he State of Maine undertook … the almost exclusive role of assisting and regulating the Indians residing within its borders.").

Decisions of the Federal Power Commission ("FPC") likewise show that the federal government historically regarded the Reservation as consisting of islands only. In 1963, the FPC issued an order in the licensing of the Great Works Dam in Old Town describing the project area as potentially owned by the applicant or the United States, but never mentioning PN. *In re: Penobscot Chem. Fibre Co. – Project No. 2312*, 30 F.P.C. 1465, 1963 WL 4030 (Dec. 9, 1963) (also noting that portions of the dam were in existence prior to 1861); ECF 118 ¶ 9. The FPC issued similar orders regarding other dams in the Main Stem in 1967, 1969, and 1970, each time without mentioning that PN had any interest in the proceeding.[4] *Id.* ECF 118 ¶ 9. Each of these dams was constructed on submerged lands within the Main Stem between 1796 and 1980. *Id.* ¶¶ 9-10. There is no record of the

[4] *In re: Bangor Hydro-Electric Co. – Project No. 2600*, 43 F.P.C. 132, 1970 WL 6592 (Feb. 3, 1970) (noting West Enfield Dam was constructed in 1894); *In re: Bangor Hydro-Electric Co. – Project No. 2534*, 42 F.P.C. 1302 (1969) (noting Milford Dam was built in 1905-1906); *In re: Great N. Paper Co. – Project No. 2520*, 37 F.P.C. 75, 1967 WL 3144 (January 9, 1967) (noting Matteceunk Dam was constructed in 1937).

dam owners seeking any form of lease or permission from PN, and no record of any objection from the Tribe on the grounds that the dams were being built on or within its reservation. As PN and the federal government remained silent, and in reliance on the commonly held understanding that PN's reservation consisted only of the islands, the dams were built and have been generating electricity for many decades.

In 1977, DOI's Solicitor concluded, "the Penobscot Nation today holds only the islands in the Penobscot River between Old Town and Mattawamkeag." *Id.* ¶ 11 (emphasis added). In 1994, the Solicitor, while rejecting PN's argument that the Reservation included the West Branch of the Penobscot River, wrote:

> Specifically, I have concluded that Congress in 1980 intended to confirm to the Nation the reservation that it understood then existed. In fashioning the 1980 legislation, the State of Maine and Congress recognized Penobscot ownership and control of islands in the main stem of the river…. This recognition provided the basis for Congress' confirmation of islands to the Nation as its reservation.

Id. ¶ 11A. The 1994 opinion that Congress intended to confirm the reservation as it existed in 1980, together with the 1977 conclusion that the reservation then consisted only of the islands, demonstrates that as recently as 1994 the federal government's position was that the Reservation consisted of the islands and nothing more. A year later, in 1995, DOI for the first time publicly claimed the Reservation includes the Main Stem. *Id.* ¶ 11B. The dam owners were stunned by

the pronouncement and described the position as "tortured," "contradicted by the clear statutory language of the Maine[] Act," and "at variance with current and historical practice on the [Main Stem]." *Id.* ¶ 11C. The State also "emphatically disagreed" with DOI's new position. ECF 141 ¶¶ 123-124.

PN's Posting of Tribal Lands

MIA requires that PN "conspicuously post[ ]" waters over which it claims jurisdiction "in such a manner as to provide reasonable notice to the public" of any claimed limitations on uses occurring there. 30 M.R.S.A. § 6207(5). PN has conspicuously posted many of its reservation islands with signs that read: "PENOBSCOT INDIAN NATION RESERVATION. NO TRESPASSING WITHOUT PERMISSION. VIOLATORS WILL BE PROSECUTED." ECF 118 ¶ 51. PN has not, however, posted the Main Stem waters. *Id*. ¶¶ 50-60. For example, 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 within the Reservation. *Id*. ¶¶ 52-60. The only statement of any kind at a Main Stem boat launch is at an informational kiosk that states: "[t]o obtain fiddleheads or duck hunting permits <u>for the islands</u> contact PIN's department of natural resources." *Id.* ¶¶ 57-59 (emphasis added). The kiosk contains no reference to use of the river itself. *Id*.

Events Leading to this Litigation

In 2007, this Court held that MIA was "about as explicit … as is possible" in confirming the State's environmental regulatory jurisdiction over Indian territory. *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007). Immediately following that decision, PN officials took a series of provocative actions against non-tribal members and state employees that ultimately led to this litigation. In a variety of contexts, PN officials began to assert that the Main Stem was their exclusive domain. PN wardens confronted non-tribal members at public boat launches and demanded payment of $40 for "access permits" to be on the Main Stem for any reason. ECF 118 ¶¶ 63, 77-78, 176-80. A PN official wrote to state agency commissioners demanding that regulators obtain permits from PN before monitoring water quality on the river. *Id*. ¶¶ 8, 101, 115. And while the *Johnson* case was pending, PN and its tribal court claimed authority to banish non-tribal members from the Reservation, which it contends includes the Main Stem from bank-to-bank. *Id*. ¶ 38.[5]

Although the Maine Warden Service had enjoyed a strong working relationship with PN's wardens, tensions increased as PN began asserting jurisdiction over the river. *Id*. ¶¶ 76-79. In 2011, PN directed its wardens to cease

[5] PN suggests in a footnote that there may not be a case or controversy to support a declaration as to the Reservation's boundaries for purposes other than sustenance fishing. PN Brief 34 n.13. The facts set forth above show the need for the Court to resolve conclusively whether the Tribe possesses any jurisdiction over non-tribal activities on the Main Stem.

cooperative patrols with Maine wardens and announced that PN had exclusive jurisdiction over the Main Stem. *Id*. ¶¶ 76, 90, 93. To diffuse tensions, the Maine Warden Service temporarily stood down and requested a written opinion from Maine's Attorney General regarding jurisdiction over the river. *Id*. ¶¶ 96-97. In 2012, Attorney General William Schneider issued an Opinion explaining that the Reservation consists of the islands but not the waters of the Main Stem, and that jurisdiction over fishing, hunting, and other recreational activities occurring on the river lies with the State. ECF 8-2. The Schneider Opinion does not address or mention tribal sustenance fishing rights. Attorney General Schneider invited PN to meet with him to discuss areas of conflict. *Id*.

Twelve days after issuance of the Schneider Opinion, PN filed this lawsuit. ECF 1. PN's complaint accused State Defendants of threatening PN members' rights to take fish from the river for individual sustenance. ECF 3, 8. Discovery revealed that PN had been planning to file its lawsuit since at least August 2010, when it successfully applied for federal grant money to sue the State.[6] ECF 118 ¶ 12.

Statutory Background

The Settlement Acts were intended to resolve completely and finally the land claims brought by the Maine Tribes and to establish in statute a clear

[6] As of the close of discovery, DOI had disbursed $96,000 on November 14, 2011, and $50,000 on June 25, 2013. ECF 118 ¶ 12.

jurisdictional relationship between the State and the Tribes. 25 U.S.C. § 1721(b); 30 M.R.S.A. § 6202. In ascertaining the meaning of the Settlement Acts, courts have looked to their language, structure, and, where appropriate, legislative history. *Johnson*, 498 F.3d at 41-48; *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 793 (1st Cir. 1996); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983). This analysis comports with the original understanding of the Settlement Acts: "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." PD 278: 4433, 4437 [JA_].

Resolution of Indian Land Claims

Three features of the Settlement Acts operate to resolve and extinguish all actual or theoretical tribal claims to lands and natural resources. First, MIA carefully defined the lands that would comprise the Reservation and PN territory. 30 M.R.S.A. §§ 6203(8), (9) & 6205(2). Second, all prior tribal "transfers" of land or natural resources were ratified and approved. 25 U.S.C. § 1723(a)(1); 30 M.R.S.A. § 6213. And third, the Settlement Acts extinguished PN's aboriginal title to, and all claims regarding, land or natural resources transferred effective as of the date of the transfer. 25 U.S.C. §§ 1723(b), (c). In this way, MIA and

MICSA "effectively and completely extinguish[ed] the Maine Indian land claims and all related claims in Maine." PD 282: 5929, 5950 [JA _].

The import of the "transfer" provisions is discussed in greater detail *infra* at 53-56, but at the outset it is important to understand that they cover far more than just land transactions. "Transfer" is broadly defined to include

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

25 U.S.C. § 1722(n) (emphasis added); 30 M.R.S.A. § 6203(13). As a result, all claims to land or natural resources over which the Tribes lost dominion, possession, or control, including those based on aboriginal title, have been extinguished. 25 U.S.C. §§ 1723(a)(1), (b)-(c); 30 M.R.S.A. § 6213.

The Settlement Acts afforded the Maine tribes 300,000 acres, $27 million, and federal recognition that provided access to millions of dollars in annual federal funding. PN became the beneficiary of a $26,800,000 trust fund to finance land acquisition, and a $13,500,000 trust fund that pays income to PN quarterly. 25 U.S.C. §§ 1724(a)-(d).[7] The Native American Rights Fund, whose lawyers

[7] PN's priorities for settlement were revealed in a colloquy between Senator Cohen and PN's Andrew Akins. Senator Cohen noted that the State viewed its "bottom line" as including "the retention by the State of civil and criminal jurisdiction over the tribes." PD 278: 4466-67 [JA _]. Mr. Akins responded: "Senator, our bottom line is 300,000 acres and $27 million. That is the bottom line." *Id.* at 4467 [JA _].

represented PN, celebrated by declaring, "The Maine Settlement is far and away the greatest Indian victory of its kind in the history of the United States." ECF 118 ¶ 14.

The Jurisdictional Relationship

The Settlement Acts "quite precisely la[y] out the relationship thenceforth to obtain between the Penobscot Nation and the State of Maine." *Stilphen*, 461 A.2d at 487. That relationship is nationally unique.[8] *Penobscot Nation v. Georgia-Pac. Corp.*, 254 F.3d 317, 320 (1st Cir. 2001). With limited exceptions, PN members and land are subject to the laws and jurisdiction of the State. *Akins*, 130 F.3d at 485. MIA expressly provides:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

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[8] "We could never have a nation within a nation within Maine." PD 278, 4424, 4427 [JA _] (statement of Governor Brennan); *see also* PD 281: 5689 (same from Governor's counsel); PD 281: 5719 [JA _] ("one issue that meant a great deal to me, and I think was fairly persuasive with other legislators …. [is] [t]hat we would not have a nation within a nation idea, but that, in fact, we would be able to continue the relationship, generally speaking, we have had for many years.") (statement of Maine Joint Select Committee Co-Chair Bonnie Post); PD 278: 4426 [JA _] ("Both parties agree that … a 'nation within a nation' would be divisive and destructive if applied in Maine …. [B]oth the Indians and the State prefer the continuation of the historical relationship.") (statement of Maine Joint Select Committee Co-Chair Sam Collins).

30 M.R.S.A. § 6204.[9] MICSA confirms the same. 25 U.S.C. § 1725(b)(1).[10] The 2,000 page legislative record 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.

Section 6206(1) of MIA confers upon PN the status of a municipality, except for internal tribal matters. 30 M.R.S.A. § 6206(1). This municipal status both assured a level of autonomy and enabled the tribes to take advantage of state programs that provide benefits and services to towns and cities. The sum of these provisions confirms the State's primary jurisdiction as codified in the Settlement Acts.[11] PN possesses only that authority MIA expressly provides to it. 30 M.R.S.A. § 6204; *Johnson*, 498 F.3d at 42. Any claims of tribal authority must be grounded in the language of the statute.

[9] This provision is to be "broadly construed." PD 282: 5958-5959. Indeed, DOI declared that the language was intended "to effectuate the broad assumption of jurisdiction over Indian lands by the State of Maine." PD 278: 4383, 4389 [JA _]; PD 281: 5766, 5772 [JA _].

[10] PN's counsel "acknowledged the expansion of the State's jurisdiction over the Maine Indian tribes … to be part of the quid pro quo for the State's going along with the settlement, which was necessary for [PN] to get the monetary benefits…." *Stilphen*, 461 A.2d at 483.

[11] PN members were well aware that the Settlement Acts would subject PN, its members, lands and natural resources to the jurisdiction of the State at the time the legislation was being considered. Some PN members testified in opposition during the hearings for this reason. PD 258: 3802-27, 3878-82, 3884-86 [JA _, _, _].

Sustenance Fishing

MIA authorizes both Passamaquoddy and Penobscot tribal members to "take fish, within the boundaries of their respective Indian reservations, for their individual sustenance" subject to the authority of the MDIFW Commissioner to protect fish stocks. 30 M.R.S.A. §§ 6207(4), (6). Since the Reservation is defined to include specific islands within the Main Stem but does not include the surrounding river, 30 M.R.S.A. § 6203(8), it is not obvious on the face of the statute how the sustenance fishing provision applies to PN members. But there is no occasion for the Court to address this issue of statutory interpretation. As discussed *infra* at 60, State officials have a longstanding policy of not interfering with PN members taking fish for individual sustenance from the waters of the Main Stem, and they have no intention of changing that policy. ECF 118 ¶¶ 143A-143B. Evidence that state officials abide by this policy is uncontroverted. In their lengthy statement of material fact, PN and the U.S. adduced no evidence of any incident in which state officials interfered with a PN member engaging in sustenance activities on the Main Stem. ECF 119, 140.[12]

[12] PN attached to its Complaint a 1988 Opinion of Maine Attorney General James Tierney expressing the view that 30 M.R.S.A. § 6207(4) would permit the use of gill nets to take approximately 20 Atlantic Salmon from the Penobscot River for sustenance purposes. ECF 8-1. The focus of that Opinion was whether PN could employ a method for sustenance fishing that would be unlawful under Maine's general law. *Id*. The Opinion contains no discussion of the scope of the Reservation, and its conclusion that such fishing should be permitted is consistent with the State's policy of allowing sustenance fishing in the Main Stem.

Procedural History

PN filed suit on August 12, 2012, and later amended its complaint twice. ECF 1, 3, 8. State Defendants answered and counterclaimed. ECF 10, 59. The U.S. moved to intervene in support of the Tribe and add the State as a Defendant, ECF 33, and State Defendants objected on the grounds that the motion was barred by 25 U.S.C. § 1723(a)(2). ECF 39; *see infra* at 63-65.[13] The court concluded that State Defendants' objection should be considered a merits defense and granted the U.S. intervenor status. ECF 57. State Defendants answered the U.S.'s complaint in intervention and counterclaimed. ECF 87.

State Intervenors filed a motion to intervene, ECF 12, to which the Tribe objected, ECF 18, but which the court granted. ECF 24. The Tribe moved to dismiss the State Intervenors' claims. ECF 31. The Court denied that motion. ECF 57.

State Defendants and State Intervenors requested leave of court to file for summary judgment prior to discovery on the grounds that the claims presented issues of law requiring no factual development. ECF 62-63. The Tribe and the

[13] Section 1723(a)(2) states, in pertinent part:

> The United States is barred from asserting on behalf of any … Indian nation … any claim under the laws of the State of Maine arising before the date of this Act and arising from any transfer of land or natural resources by any … Indian nation… including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, on the grounds that such transfer was not made in accordance with the laws of the State of Maine.

U.S. objected and requested discovery. ECF 65-66. The Court held a conference of counsel to consider the parties' positions, and allowed discovery to proceed before summary judgment. ECF 68-69. The parties then engaged in extensive discovery, after which State Defendants, the Tribe, and the U.S. each moved for summary judgment, and State Intervenors moved for judgment on the pleadings. ECF 116-117, 120-121.

Decision Below

Following oral argument, the district court granted in part and denied in part the motions. Add. 1. The court granted summary judgment in favor of State Defendants and judgment on the pleadings in favor of State Intervenors, 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 the Main Stem, but not the waters of the Main Stem." Add. 64. In doing so the Court held as follows:

> 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 waters of the Main Stem fall within the Penobscot Indian Reservation. The 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 and 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.

Add. 56.

The court also granted summary judgment in favor of the Tribe and the U.S., declaring that "the sustenance fishing rights provided in section 30 M.R.S.A. § 6207(4) allow[] the Penobscot Nation to take fish for individual sustenance in the entirety of the Main Stem section of the Penobscot River." Add. 64. Taking into account the historical fishing practices of tribal members and legislative history that implies the parties assumed sustenance fishing in the Main Stem would continue under the Settlement Acts, the court found the language of section 6207(4) to be ambiguous. Add. 58-59. The court also noted that the definitional section of MIA provides that the meanings set forth therein apply "unless the context indicates otherwise." 30 M.R.S.A. § 6203; Add. 61. The court found that the context of the sustenance fishing provision requires that an alternate meaning be ascribed to the term "reservation" as it appears in section 6207(4) and held that in that context the term should be synonymous with "the waters of the Main Stem." Add. 61-63.

Although State Defendants argued that the sustenance fishing issue did not present a case or controversy, the court reached the merits with essentially no analysis of justiciability. The court addressed the issue this way: "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." Add. 60.

PN and the U.S. filed motions to amend the decision, requesting a ruling as to whether the Reservation includes the riverbed adjacent to the islands to the centerline of the river's channel under Maine common law "riparian rights." ECF 164-165. State Defendants opposed the motions, arguing that the court had already addressed the issue in its order and that riparian rights include rights of access to the water, but not ownership of adjacent submerged land, which is determined independently. ECF 169. The court denied the motions summarily. ECF 172. These appeals followed.

STANDARD OF REVIEW

A. Summary Judgment

This Court reviews entry of summary judgment de novo and affirms if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *McGrath v. Tavares*, 757 F.3d 20, 25 (1st Cir. 2014). Here, all parties agreed that the matter was ripe for summary judgment and the only questions presented were issues of law. Add. 4. The Court is not limited to the district court's rationale but "may affirm the entry of summary judgment on

any sufficient ground revealed by the record." *Rodriguez v. Smithkline Beecham*, 224 F.3d 1, 5 (1st Cir. 2000).

B. The Inapplicability of the Indian Canons of Construction

Both the U.S. and PN argue that the Court must interpret the Settlement Acts using so-called Indian canons of construction that require ambiguities to be resolved to the Tribe's benefit ("Indian canons"). PN Brief 30-32; U.S. Brief 34-37. These interpretative rules do not apply to this case for two reasons. First, the issue presented does not turn on ambiguous statutory provisions. The plain language of 30 M.R.S.A. § 6203(8) defines PN's Reservation as a set of "islands in the Penobscot River." When the question presented can be resolved based on the plain language of the statute, the Indian canons do not apply. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986). The Indian canons "do[ ] not permit reliance on ambiguities that do not exist; nor do[they] permit disregard of the clearly expressed intent of Congress." *Id.*; *see also Or. Dep't. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). The Indian canons are therefore unavailing according to their own terms. *Catawba Indian Tribe*, 476 U.S. at 506.

Second, MICSA bars courts from applying the Indian canons to any issue of statutory interpretation arising under the Settlement Acts that could diminish the State's jurisdiction. The Indian canons are not an interpretive rule employed to

discern legislative intent, but a federal common law doctrine designed to compensate for the disadvantaged position of tribes in treaty-making. *Tulee v. Washington*, 315 U.S. 651, 684-85 (1942).[14] The text and legislative history of MICSA make clear that any such generally applicable federal Indian law does not apply to the Settlement Acts if it would affect or preempt Maine's jurisdiction.

MICSA contains unique provisions that protect the State against the effects of federal law that might otherwise undermine Maine's jurisdiction over tribes and tribal lands. Sections 1725(h) and 1735(b) bar the application of any federal law that accords special status to Indians and affects or preempts Maine's jurisdiction, unless Congress expressly makes that law applicable in Maine. 25 U.S.C. §§ 1725(h), 1735(b). The Indian canons are part of federal common law, and applying them here to resolve ambiguities against the State and in favor of the

[14] That policy would not be served by applying the Indian canons to the Settlement Acts, because the Tribes did not negotiate the terms of those statutes from a positon of disadvantage. The Tribes had won a substantial legal victory in a case that effectively placed a cloud on titles throughout two-thirds of the State, *Joint Passamaquoddy Tribal Council*, 528 F.2d at 370, and were represented by some of the nation's most respected lawyers, including those in the Department of Justice and DOI who "carefully examined all aspects of the proposal to insure the broad interests of the tribes … are well served under it," PD 278: 4323, and who also signed off on the dismissal of the pending litigation against the State as part of the settlement. PD 233: 3243-44. *See United States v. Atl. Richfield*, 612 F.3d 1132, 1139 (9th Cir. 1980) (questioning rationale underlying the Indian canons in similar circumstances). The record of the Settlement Acts makes clear that this was not a case of a state taking advantage of an unsophisticated tribe, so there is no policy reason for courts examining ambiguous statutory provisions to tip the scales in favor of the tribes. *But cf. Connecticut v. U.S. Dep't of Interior,* 228 F.3d 82, 92-93 (2d Cir. 2000) (misconstruing *Klamath Indian Tribe* as having applied Indian canons to clear language resulting from negotiation with well-represented tribe).

Tribe would affect and potentially preempt the State's jurisdiction.[15] Congress has never expressly made the Indian canons applicable to Maine, and therefore they do not apply to questions of statutory interpretation with jurisdictional consequences arising under MIA or MICSA. 25 U.S.C. §§ 1725(h), 1735(b).

MICSA's legislative history speaks directly to this issue. The Senate Report shows that Congress was concerned that applying the Indian canons to the Settlement Acts would upset the jurisdictional balance that had been negotiated, and explains that sections 1725(h) and 1735(b) bar courts from applying them when construing MIA and MICSA. At the time, the Supreme Court had recently decided *Bryan v. Itasca County*, 426 U.S. 373 (1976), a case that illustrated how federal courts were relying on the Indian canons to resolve ambiguities in jurisdictional statutes, except where Congress may otherwise provide. The Senate Report cites *Bryan* for the purpose of clarifying that the interpretive methodology the Court used in that decision is not to apply to jurisdictional questions arising under the Settlement Acts. PD 282: 5958 [JA _]. Sections 1725(h) and 1735(b), then, manifest Congress's specific intent to ensure that no federal law, including the Indian canons, would undermine the jurisdictional framework that the State and

[15] This case has direct jurisdictional implications for the State. For example, if the Court were to declare the Main Stem to be part of the Reservation, the State would lose jurisdiction over hunting and trapping there. 30 M.R.S.A. § 6207(1). The Tribe could also try to tax the owners of submerged lands. 30 M.R.S.A. § 6206(1). The Tribe could also regulate the Main Stem in its role as a municipal equivalent, which would affect – but not preempt – State jurisdiction.

the Tribes had negotiated in the Settlement Acts unless Congress expressly so provided.

Plaintiffs cite *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), to argue the Indian canons apply to the Settlement Acts. This reliance is misplaced. *Fellencer* was a dispute between the Tribe and a non-tribal member claiming discrimination under the Maine Human Rights Act. *Fellencer*, 164 F.3d at 707. The State was not a party and, significantly, had "disavow[ed] the very 'state interest' that Fellencer [sought] to invoke in support of her private cause of action." *Fellencer*, 164 F.3d at 710. The *Fellencer* Court's analysis also did not give any effect to the Indian canons, but instead applied a five-part test first enunciated in *Akins*. 130 F.3d at 486-87. The *Akins* case was another dispute in which the State had disavowed any interest, and the decision does not mention the Indian canons in setting forth its five-part test. *Akins*, 130 F.3d at 488. Both *Akins* and *Fellencer* make clear that the Court would treat a jurisdictional dispute between the State and PN differently. And in subsequent cases in which the State asserted a sovereign interest, the Court analyzed the Settlement Acts using traditional rules of statutory construction and without applying the Indian canons. *Johnson*, 498 F.3d 41-47; *see also Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 50, 56 (1st Cir. 2007) (applying traditional rules of statutory construction rather

than the Indian canons and noting the Settlement Acts "displaced any federal common law that might otherwise bear on this dispute.").

C. The Applicability of Presumptions Governing Tribal Claims to Navigable Rivers and Submerged Lands

To succeed, PN's claim to the Main Stem must overcome the presumption against a state's loss of sovereignty over its navigable rivers. When Maine became a state, it became the presumptive sovereign of all navigable rivers within its borders. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) ("Upon statehood, the State gains title within its borders to the beds of waters then navigable …. It may allocate and govern those lands according to state law….") (citation omitted). The State's sovereign right to and authority over its navigable rivers is "absolute," and "subject only to the rights surrendered and powers granted by the Constitution to the Federal Government."[16] *Id*. at 1227. Therefore, in this jurisdictional dispute over the Main Stem's waters and submerged lands, the Court should presume State control and require the Tribe to prove its claim to these assets of unique public importance through clear and explicit terms in the Settlement Acts.

[16] Submerged lands underlying navigable rivers in Montana are state-owned, *PPL Montana*, 132 S. Ct. at 1227-28, and in Maine submerged lands of non-tidal, navigable rivers are typically privately owned, *see supra* at 7-8. Even so, *PPL Montana's* discussion of states' unique sovereign interests in navigable rivers and submerged lands is relevant to this case because all states have the sovereign interest and responsibility to protect rivers as public assets for the good of all citizens. *See Mullen*, 38 A. at 560 (discussing Maine's role as the trustee of public rights in the Penobscot River).

The Supreme Court has applied this principle when evaluating the claims of western tribes to navigable rivers and submerged lands. When the Coeur d'Alene Tribe asserted that a lake and its tributaries were part of its reservation, the Court explained that a heightened standard of proof applies to such claims. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283-84 (1997) (navigable waters and the submerged lands underneath them "uniquely implicate sovereign interests," thus justifying a "strong presumption" of state control). And when the Crow Tribe made a similar claim to a Montana river, the Court refused to find that a state was deprived of control over a navigable river absent "clear and special words" that "expressly refer[ ] to the riverbed" in the operative instrument – here the Settlement Acts – that "definitely declare[] or otherwise ma[k]e very plain" such an intent. *Montana v. United States,* 450 U.S. 544, 551, 554 (1981) (citations omitted). When it comes to sovereign control over navigable rivers, therefore, any doubt inures to the benefit of the state, not the tribe.

SUMMARY OF THE ARGUMENT

This case requires the Court to determine the boundaries of the "Penobscot Indian Reservation." The answer to that question lies where one would expect to find it – in the statute's meticulously drafted definition of that term. 30 M.R.S.A. § 6203(8). That definition limits the Reservation to "islands in the Penobscot River," and goes on to describe specifically which islands are included. *Id.* In

doing so, the statute emphatically limits the Reservation to "solely" the set of islands described. *Id.*

The phrase "islands in the Penobscot River" has a plain meaning. Islands are parcels of land surrounded by water; they are not also the surrounding water and submerged lands. Plaintiffs urge that the phrase "islands in the river" should be given a meaning that is synonymous with "river." That interpretation cannot stand because it reads the word "islands" entirely out of the statute, violating rules of statutory construction and dramatically altering the meaning of the definition to achieve Plaintiffs' desired outcome. The district court correctly granted State Defendants summary judgment on the grounds that this language is unambiguous and dispositive.

The structure of the statute is consistent with the plain meaning of section 6203(8). There is no reference to the "river" or "submerged lands" in section 6203(8), and yet other jurisdictional provisions expressly use those terms where there is an intent to include them. *Compare* 30 M.R.S.A. § 6203(8), *with* 30 M.R.S.A. § 6207(3) *and* 30 M.R.S.A. § 6207(1)(B). Additionally, section 6205(3) provides that if reservation land is taken by eminent domain, land adjacent to Penobscot River is "deemed" to be contiguous to the Reservation "for the purposes of this subsection." The unmistakable inference is that for all other purposes the river is not part of the Reservation.

The legislative history supports the same conclusion. DOI represented to Congress that the Tribe possessed a 4,000 acre reservation on islands in the Penobscot River. If the Reservation included the entire Main Stem, it would be 13,760 acres. Similarly the Senate Committee was presented with a map depicting the Reservation as just the islands in the Main Stem, not the Main Stem itself. This shows that the Tribes, DOI, the Maine Legislature, and Congress all understood that the Reservation was limited to the islands in the river, just as the plain language of section 6203(8) says, and there is no contrary legislative history to indicate otherwise.

The historical record, from the earliest days of Maine's statehood through passage of the Settlement Acts, likewise makes clear that no one, including the Tribe, regarded the river to be part of the Reservation. For example, during this period three major hydroelectric projects were constructed within the Main Stem. PN never objected to the construction of these dams on the grounds that they would be located within the Reservation. If anyone believed the Reservation included the Main Stem, there would be some record of controversy surrounding the construction of these enormous projects, and yet there is none. The reason why is that all parties understood the Reservation was limited to the islands, just as section 6203(8) would later codify.

Similarly, after the Settlement Acts became law, the Tribe never posted the banks or boat launches of the Main Stem to put the public on notice that it considered the river to be part of the Reservation. This is significant because it shows the Tribe's understanding immediately following 1980. Section 6207(5) requires the Tribes to post conspicuously any lands or waters that they regulate in order to provide the public with reasonable notice of those regulations. When the Settlement Acts became law, PN did conspicuously post its islands, but those postings only indicate that the islands, not the river or its bed, are subject to tribal regulation. This undermines Plaintiffs' litigation position that PN always believed the river was part of the Reservation.

The Settlement Acts' "transfer" provisions extinguished any interest the Tribe may have had in the river or riverbed. 25 U.S.C. §§1722(n), 1723; 30 M.R.S.A. § 6213. These provisions were intended to avoid disruption of societal expectations as they had developed over 160 years, essentially codifying the laches doctrine but in even more sweeping terms. The Settlement Acts confirmed all prior "transfers," which are defined broadly to include "any conceivable events or circumstances under which possession, dominion or control can pass." PD 282: 5489; PD 281: 5806-07 [JA _, _]. Maine has exercised pervasive and exclusive dominion and control over the Main Stem since 1820, and by the terms of the statutes this exercise of sovereign control extinguished any

interest the Tribe may have claimed in the river. This same evidence of longstanding state control coupled with tribal and federal acquiescence bars Plaintiffs' claims under principles of equity.

The district court erred by issuing a declaratory judgment addressing the scope of PN members' sustenance fishing rights in the Main Stem. The State has never interfered with these practices, and there is no threat of such interference. Plaintiffs have failed to show standing because there is no evidence of any actual or imminent injury, and any allegation of future injury is at best hypothetical. The issue is also not ripe for adjudication. Plaintiffs' claim depends on future events that may never come to pass, and it is unnecessary for the Court to issue a declaration to avoid a hardship to the parties because the parties would not "act differently tomorrow" if the Court issued the requested relief. The standing and ripeness problems leave the Court without subject matter jurisdiction over Plaintiffs' claims alleging interference with sustenance activities.

The district court also erred by granting the U.S. intervenor status. MICSA bars the U.S. from bringing Indian land claims against the State arising under Maine law. 25 U.S.C. § 1723(a)(2). The U.S.'s claim that PN owns all or part of the riverbed is premised upon Maine common law and is thus barred.

ARGUMENT

I. MIA and MICSA Define the Penobscot Indian Reservation as Solely the Islands within the Main Stem.

The statutory definition explicitly limits the "Penobscot Indian Reservation" to a delineated set of islands in the Main Stem, and nothing more. The plain meaning of the text is also consistent with the stated purposes of the Settlement Acts and supported by their legislative history.

A. The Plain Language of the Statute

MIA carefully defines PN's reservation as follows:

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

30 M.R.S.A. § 6203(8). This language is dispositive of whether the Reservation includes the river. The core statement of the definition is set forth in the opening clause: the Reservation "means the islands in the Penobscot River." *Id*. Plaintiffs' argument requires re-writing this clause to read "the islands and the Penobscot

River surrounding them…." That change is dramatic – linguistically, legally, and in its real world implications.

1. Section 6203(8)'s Use of the Word "Solely"

The definition eliminates any potential confusion regarding the identity of the included islands by describing the Reservation as "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…." *Id.* (emphasis added). The word "solely" is a powerful word of limitation that strongly conveys legislative intent to exclude everything but that which the statute expressly includes. *See, e.g.*, *Helvering v. Sw. Consol. Corp.*, 315 U.S. 194, 198 (1942) (Congress's use of "solely" "leaves no leeway"). This language forecloses any argument that the definition implicitly includes the surrounding riverbed and waters.

2. Section 6203(8)'s Reference to an "Agreement with the States of Massachusetts and Maine"

The definition also describes the Reservation as those islands "reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine…." This clause is a reference to the Treaties of 1796, 1818, and 1820 for the singular purpose of identifying the islands that are included in the Reservation; it does not incorporate by reference the treaties themselves. Such an interpretation would nullify section 1731 of MICSA, which provides the State with a general discharge from any obligation arising from the treaties. 25 U.S.C. § 1731. Nor

does this language incorporate the Tribe's subjective understanding of the ancient treaties, because doing so would undermine the core purpose of clarifying the status of land and natural resources in Maine. 25 U.S.C. § 1721(b)(2). The Settlement Acts were intended to end disputes about the meaning and effect of the ancient treaties and put into place a modern statutory framework. Section 6203(8) cannot objectively be read as perpetuating those disputes by impliedly incorporating by reference the very source of the original controversy. The Settlement Acts rendered the ancient treaties legally immaterial, and all of Plaintiffs' arguments that depend on those treaties must be rejected. PN Brief 36-41; U.S. Brief 32-43.

3. Section 6203(8)'s Use of the Word "Islands"

The word "islands" as used in the definition of the Reservation must be given its plain meaning, and Plaintiffs' arguments that it is an ambiguous term are without merit.

a. Textual Analysis

The U.S. argues that the word "islands" should not be given its dictionary meaning, but instead must be interpreted as including "the surrounding riverbed to the thread of the channels." U.S. Brief 28. PN goes further, declaring that "islands" must be understood as a "concept" that includes "the intervening waters

and bed of the River, bank-to-bank." PN Brief 36. In other words, PN's position is that when the statute says "islands," it means "river." These arguments violate all the familiar rules of construction.

The Settlement Acts do not define the word "island." When a term is not defined in the statute, courts interpret that term "in accordance with its ordinary meaning." *FDIC v. Meyer*, 510 U.S. 471, 477 (1994). The ordinary meaning of "island" is "[a] tract of land surrounded by water, and smaller than a continent."[17] There is simply no objective interpretation of "island" that sweeps in the surrounding water and submerged lands, and Plaintiffs' creative efforts to ascribe that meaning to the term or otherwise find ambiguity where there is none all fail. *Catawba Indian Tribe*, 476 U.S. at 506; *Klamath Indian Tribe*, 473 U.S. at 774.

Plaintiffs' argument that "islands" is an ambiguous term that must be given the meaning of "river" is similar to the argument that DOI made, and that the Supreme Court rejected, in *Carcieri v. Salazaar*, 555 U.S. 379 (2009). In *Carcieri*, DOI argued that the word "now" within the phrase "now under Federal jurisdiction" was ambiguous, and should be interpreted to mean "now and hereafter." *Id.* at 391. The Court observed that DOI's interpretation of "now under Federal jurisdiction" effectively read the word "now" out of the statute, violating

[17] Island, WEBSTER'S DICTIONARY, http://www.webster-dictionary.org/definition/island (last visited Nov. 30, 2016).

the principle that "we are obliged to give effect, if possible, to every word Congress used." *Id.* at 391 (quotation marks omitted). Exactly the same is true here. Plaintiffs urge the Court to interpret the phrase "islands in the Penobscot River" as meaning "the Penobscot River." As the Court held in *Carcieri*, "when Congress enacted a definition with detailed and unyielding provisions, … this Court must give effect to that definition even when it could be argued that the line should have been drawn at a different point." *Id.* at 393 n.8 (quotation marks omitted).

The Court noted that elsewhere in the same statute Congress used different language to convey the same meaning that DOI sought to ascribe to the term "now." *Id.* at 391. The Court reasoned that this demonstrated Congressional intent that "now" carried a different meaning than those phrases. *Id.* at 389-90. In the Settlement Acts, the term "submerged lands" is expressly used in 30 M.R.S.A. § 6207(1)(B) as part of the description of ponds potentially subject to tribal regulatory authority.[18] This shows that the Legislature's use of the word "islands" in section 6203(8), without any reference to "submerged lands," was a conscious choice; had it intended to include submerged lands within the Reservation it would

[18] *See also* 30 M.R.S.A. § 6207(3) (using the word "river" in discussion of waterbodies where fishing is potentially subject to regulation by Maine Indian Tribal State Commission).

have expressed that intent using those words, as it did in section 6207(1)(B). *Carcieri*, 555 U.S. at 391.[19]

The U.S. argues that a term that is given two different meanings in the same statute cannot be considered unambiguous. U.S. Brief 30-32. But the analysis they offer here is imprecise and flawed. Section 6203(8) is a specific definition of the term "Penobscot Indian Reservation." That defined term appears nowhere in section 6207(4), which instead uses only the generic term "reservations." Any ambiguity that exists does not arise in section 6203(8), which is meticulously drafted, but in section 6207(4), because the statute does not expressly address how sustenance fishing rights apply to PN members within their island "reservation."

b. *Alaska Pacific Fisheries*

Plaintiffs present the Supreme Court's decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), as the lynchpin of their case, arguing that it requires the Court to find that PN's Reservation includes the waters and bed of the Main Stem. PN Brief 3, 27, 32, 42; U.S. Brief 31. *Alaska Pacific Fisheries* is distinguishable from the present case and provides no support for their position.

Alaska Pacific Fisheries involved the Metlakahtla Reservation on the Annette Islands in southeastern Alaska. Congress established the reservation in

[19] Notably, DOI's interpretation of the disputed phrase in *Carcieri* was contrary to the agency's interpretation at the time of the statute's enactment. *Id*. at 390. Here too, DOI is on record formally stating that PN's reservation included "only the islands" in the Main Stem in 1977. ECF 118 ¶ 11.

1891, describing it in pertinent part as "the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska." *Alaska Pac. Fisheries*, 248 U.S. at 86 (citations omitted). The Annette Islands, and the submerged lands and waters surrounding them, "[a]ll were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority." *Id.* at 87.[20]

In 1916, a commercial fishing corporation erected a large fish trap, without the consent of the Indians or DOI, approximately 600 feet from the shore of the islands on which the Indians settled. *Id*. at 87. The issue before the Court was whether the reservation "embrace[d] only the upland of the islands or includes as well the adjacent waters and submerged land." *Id*. The Court found that the reservation included surrounding waters and submerged lands, and therefore upheld DOI's authority to remove the trap. *Id*. at 89.[21]

Plaintiffs argue that *Alaska Pacific Fisheries* stands for the proposition that island reservations must necessarily be understood to include surrounding waters

[20] The exclusive federal jurisdiction over the Metlakahtla Reservation contrasts with the circumstances of the Main Stem. The U.S. has admitted that it is not the trustee of the Reservation, ECF 46 at 7, and both the Main Stem and the Reservation (with limited exceptions) are subject to State jurisdiction. 30 M.R.S.A. § 6204; 25 U.S.C. § 1725.

[21] Notably, the Court applied the Indian canons – inapplicable in this case, *supra* at 24-28 – to reach this conclusion. *Id.*

and submerged lands. PN Brief 3, 32-35; U.S. Brief 31. It does not. The legal and factual circumstances that led the Court to find that the Metlakahtla reservation included adjacent submerged lands are not present here. [22]

First, the language used to define the two reservations is fundamentally different. Congress defined the Metlakahtla reservation as a "body of lands known as the [] Islands," whereas MIA defines the Reservation as "consisting solely of Indian Island … and all islands in that river northward…." 30 M.R.S.A. § 6203(8). About the "body of lands" phrase the Court said:

> 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.

Alaska Pac. Fisheries, 248 U.S. at 89. This shows that the Court considered the "body of lands" reference, in the context of Alaska's Alexander Archipelago, to be a reference to a region, and not merely the islands within the region. MIA contains no similar language. 30 M.R.S.A. § 6203(8).

[22] The underlying circuit court decision explained that a Presidential Proclamation defined that reservation as including not only the islands, but also 3,000 feet of surrounding waters. *Alaska Pac. Fisheries v. United States*, 240 F. 274 (9th Cir. 1917). Although the Supreme Court does not discuss the Proclamation, it undoubtedly informed the Court's analysis.

Second, the factual backdrop to *Alaska Pacific Fisheries* is also significantly different than the present case. The Court found that Congress intended the Annette Islands salmon fishery to provide the Metlakahtla Indians with an economic base sufficient to sustain the tribe, and therefore the fishery had to be protected for the Indians' benefit. *Alaska Pac. Fisheries*, 248 U.S. at 89. The text and legislative history of the Settlement Acts reflects no intent to preserve a fishery that could serve as the Tribe's economic base. In 1980, the Main Stem did not have a fishery that would have been capable of sustaining PN in any way that remotely resembled the 19th century circumstances of the Metlakahtla Indians. *See* ECF 141 ¶¶ 46 (1821 report stating Penobscot River fishery was "nearly annihilated"), 177-78 (PN and MDIFW statements acknowledging depleted nature of salmon fishery in 1983). MIA provides PN members a qualified right to take what fish they can catch for their individual sustenance, but that is no guarantee of a fishery sufficient to meet the dietary needs of that tribal member, and certainly not the economic needs of the entire Tribe. 30 M.R.S.A. § 6207(4). For all of these reasons, *Alaska Pacific Fisheries* is inapposite.

4. The Significance of Section 6207(4): Sustenance Fishing

Much of Plaintiffs' argument is that the Reservation must be deemed to include the river because the Settlement Acts were intended to allow PN members to engage in sustenance fishing in the river, and the sustenance fishing right is

limited to the Reservation. ECF 143: 39, 42-44; ECF 144: 8-10, 16-23. This attempt to define the Reservation through the subsection that addresses sustenance fishing violates rules of statutory interpretation. Courts will not construe vague or ancillary provisions as altering the fundamental terms of a statute. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("[Congress] does not – one might say – hide elephants in mouseholes."); *see also King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (rejecting interpretation of sub-sub-sub section of Tax Code that would threaten viability of Affordable Care Act). MIA provides that "Penobscot Indian Reservation means the islands in the Penobscot River…." 30 M.R.S.A. § 6203(8) (emphasis added). In MIA, section 6207(4) is an ancillary provision that is arguably vague as applied to PN members, while section 6203(8) is a fundamental term drafted with great clarity. Section 6207(4) cannot be relied upon to dramatically alter the meaning of section 6203(8).

Moreover, the use of the word "means" within the definition has special significance as matter of statutory construction. "As a rule, 'a definition which declares what a term 'means' excludes any meaning that is not stated.'" *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) (citations omitted). MIA's statement that the Reservation "means the islands in the Penobscot River" therefore excludes the unstated meaning that Plaintiffs urge upon the Court. *Id*. "Islands in the river" does not mean "river."

5. The Significance of Section 6207(1): Sustenance Hunting and Trapping

Building on their theory that the PN Reservation should include the Main Stem for the purpose of sustenance fishing, Plaintiffs argue that it must likewise include the Main Stem for the purposes of sustenance hunting, trapping and other "related authorities."[23] PN Brief 32-49; U.S. Brief 15. This argument has no merit.

There is a critical difference in how the Settlement Acts treat sustenance fishing and sustenance hunting and trapping. MIA provides individual tribal members the right to take fish for personal sustenance within a reservation. 30 M.R.S.A. § 6207(4). In contrast, the statute authorizes the tribes to adopt ordinances governing hunting and trapping, that contain special provisions for sustenance of tribal members, within their territories. 30 M.R.S.A. § 6207(1). Indian territory is defined to include not only the reservations, but also the vast after-acquired trust lands. 30 M.R.S.A. § 6205(2). Therefore, unlike sustenance

[23] PN's use of the term "related authorities" is apparently a reference to its claim to have implied authority to regulate the activity of nontribal citizens on the Main Stem in whatever way the Tribe deems necessary to protect natural resources. PN Brief 42-44. This assertion has no support in the Settlement Acts. As the U.S. informed the district court at oral argument, the Tribe's rights are not inherent but entirely statutory. Add. 76. The Settlement Acts provide PN no authority to regulate nontribal activity on the Main Stem.

fishing, sustenance hunting and trapping need not take place in the Main Stem (or even on the reservation islands) in order to have meaning for PN members.[24]

Against this background, Plaintiffs' arguments that hunting and trapping rights "must be in the waters and beds of the River attending the islands because they cannot be meaningfully practiced elsewhere," are nonsense. PN Brief 54; *see also* U.S. Brief 14 (characterizing effect of district court decision as limiting hunting and trapping rights to the island uplands.) PN "has over 130,000 acres of remote lands available for various kinds of hunting opportunities."[25] These lands are Indian territory, and therefore subject to tribal ordinances that can include special provisions for sustenance hunting by tribal members. Those tribal ordinances specifically contemplate deer driving by tribal members on the Reservation islands themselves. PD 222: 3115. Against this background, the Tribe's claim that the Court must declare the entire Main Stem to be part of the Reservation or else PN members' hunting and trapping practices would be reduced to waiting for "the stray turtle … to find its way up onto an island surface" is ridiculous.

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[24] PN attempts to bury this point in a short footnote at the end of its brief, in which it dismisses the different statutory treatment of sustenance fishing, and sustenance hunting and trapping, as "immaterial." PN Brief 56 n.22.

[25] *Hunting Permits and Information*, PENOBSCOT NATION, https://www.penobscotnation.org/departments/natural-resources/natural-resources-hunting-permits-information (last visited Nov. 15, 2016).

6. The Significance of Section 6205(3)(A): Eminent Domain

Section 6205(3)(A) of MIA, which addresses eminent domain proceedings involving reservation lands, strongly supports the conclusion that the Reservation was not intended to include the Main Stem and its submerged lands. 30 M.R.S.A. § 6205(3)(A). This provision authorizes the taking of reservation lands for public use under certain limited circumstances, and includes requirements for the replacement of such lands with other lands of equal value "contiguous to the affected Indian reservation." *Id*. The statute also states: "For purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation." *Id*. If the definition of "Penobscot Indian Reservation" at section 6203(8) included the river itself, additional statutory language deeming the River to be part of the Reservation for the limited purposes of section 6205(3)(A) would be superfluous. Interpretations of statutes that render certain provisions or language superfluous are strongly disfavored. *See Mass. Ass'n. of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999) ("'no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.'" (citations omitted)). Section 6205(3)(A) is compelling evidence that the Settlement Acts were intended to exclude the river from the Reservation.

B. The Purpose of the Settlement Acts

Plaintiffs' arguments run counter to the expressly stated purpose of the Settlement Acts, set forth at the outset of MICSA:

> (b) Purposes
>
> It is the purpose of this subchapter—
>
> (1) to remove the cloud on the titles to land in the State of Maine resulting from Indian claims; [and]
>
> (2) to clarify the status of other land and natural resources in the State of Maine[.]

25 U.S.C. §§ 1721(b)(1)-(2). MICSA thus was primarily intended to put to rest, once and for all, any doubts as to ownership of land and jurisdiction over the State's land and natural resources. Considering that Congress's highest priority was to bring clarity to these issues, the argument that the Settlement Acts impliedly incorporated by reference the terms of ancient treaties, and thereby carried forward all of the inherent ambiguities and disputed interpretations associated with them, cannot prevail. *Dep't. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (interpretation that would "subvert statutory plan" is disfavored). Instead, Congress achieved its objective of clarity through reliance on carefully crafted statutory provisions using language that all Maine citizens could easily understand in 1980. Section 6203(8)'s definition of the PN reservation is the perfect example

of that clarity, and Plaintiffs' effort to parse the language and create ambiguity in this provision runs directly counter to the expressed purpose of the law.

C. Legislative History

The Settlement Acts' extensive legislative history contains little in the way of direct discussion of the boundaries of the Reservation. This is likely because all parties shared the long held understanding that the Reservation was limited to Main Stem islands – a concept that is so straightforward it would engender no confusion. But there are two examples of how this universal understanding was shared with Congress. The Senate Committee was given a map depicting lands affected by the settlement as it considered the legislation. ECF 141 ¶¶ 2-7; PD 278: 4570-71 [JA _]. The key on that map indicates that the Reservation is colored in red, and only the islands in the river are colored in red. *Id*. The legislative record contains no map indicating the Main Stem would be part of the Reservation.

Similarly, during the House Hearings, DOI represented that PN possessed a 4,000 acre reservation on islands in the Penobscot River. PD 281: 5800 [JA _]. If the Reservation included the entire Main Stem, it would be 13,760 acres. ECF 118 ¶ 2. All of this shows that the Tribes, the federal government, the Maine Legislature, and Congress all understood the Reservation was limited to the islands in the river, just as the plain language of section 6203(8) says, and there is no contrary legislative history indicating otherwise. *See Idaho v. United States*,

533 U.S. 262, 267 (2001) (previously published acreage calculations for a reservation showed the mutual understanding of both the government and tribe as to whether submerged lands were intended to be included).

In the absence of any actual legislative history supporting their argument, Plaintiffs resort to a series of after-the-fact declarations and other statements from former legislators, a legislative staffer, and a Penobscot member of the tribal negotiating team, all of whom testified as to their views on the legislative intent of the Settlement Acts decades after enactment. U.S. Brief 47; PN Brief 16, 19, 36-37 n.15.[26] The U.S. concedes these assertions are contested facts, U.S. Brief 47 n.22, so it is not clear why Plaintiffs, after representing to the district court that the case was ripe for summary judgment, Add. 4, rely on them in support of their appeal. Regardless, as a matter of law, it is well-established that these statements cannot be relied upon to show legislative intent. *See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 297-98 (2010) (letter sent by one of a bill's primary sponsors 13 years after enactment is of "scant or no value"); *Exxon Mobil Corp. v. Allapattah Servs, Inc.*, 545 U.S. 546, 568 (2005) (cautioning against reliance on material prepared by staffers and

[26] Even taking the declarations at face value, the negotiating position that the Tribe "maintained," U.S. Brief 47, has no necessary correlation to the terms of settlement. Negotiations typically involve parties "maintaining" positions that are ultimately compromised in the resolution.

lobbyists who might be interested in "secur[ing] results they were unable to achieve through the statutory text").

D. PN's Claims of Aboriginal Rights

Throughout its brief the Tribe characterizes its rights in the Main Stem as "aboriginal." PN Brief *passim*. This view has no support in the law. The Settlement Acts extinguished any aboriginal claims PN may have had and put in their place a set of statutory rights. The U.S. explained this during oral argument before the district court:

> The Court: Do they have [aboriginal rights] today?
>
> Mr. Miskinis: They – all their aboriginal rights are now subject to the Maine Implementing Act. So, no, their rights are now what are described in the Maine Implementing Act. They do not have rights independent of that.

Add. 76; *see also infra* at 53-56 (explaining the extinguishment of PN's aboriginal claims to the Main Stem under 25 U.S.C. § 1723(b)). The Court should therefore reject all of PN's arguments based on any claimed aboriginal rights.

E. The Applicability of Maine Common Law

The U.S. argues that Congress intended to confirm PN's existing reservation in the Settlement Acts, and that, applying principles of Maine property law to the Treaties of 1796 and 1818, the reservation as it existed in 1980 included the entire

Main Stem. U.S. Brief 33-49.[27] This argument is flawed for several reasons. First, PN's Reservation cannot be determined by applying common law property principles to ancient treaties. Those treaties were not incorporated into the Settlements Acts, and all the State's obligations under the treaties were expressly extinguished. *See supra* at 35-36. Questions of statutory interpretation arising under the Settlement Acts must be resolved by examining the language and structure of the statutes and their legislative history. *Johnson*, 498 F.3d at 41-48.

The U.S. also misreads the legislative history. Congress intended to confirm what it understood to be PN's existing reservation in 1980, but it understood that reservation to consist solely of islands in the Main Stem. *See infra* at 47-48 (discussing legislative history showing understanding that the Reservation was limited to the islands). The House and Senate Reports, upon which the U.S. relies for support, are entirely consistent with the conclusion that the Reservation includes the islands but excludes the river. PD 282: 5946; PD 283: 6008 [JA _, _]. Both Reports explain the tribes "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." *Id.* (emphasis added). The U.S. fails to account for the phrase "and not subsequently transferred." "Transfer" is a defined

[27] As explained *infra* at 63-65, the U.S. is barred from making this argument by 25 U.S.C. § 1723(a)(2).

term in the Settlement Acts that includes the loss of possession or control. *See infra* at 53-56. PN long ago lost possession and control of the Main Stem, and therefore any rights it had to the river and to submerged land were transferred and extinguished. 25 U.S.C. § 1723(b).

The U.S. argues that Maine common law principles extend the boundary of the Reservation at least to the thread of the river. U.S. Brief 27-28, 53, 57. This argument demonstrates why one must rely on the statutes rather than the common law for the definition of the Reservation. *Johnson*, 498 F.3d at 41-48. Under the U.S.'s theory, the boundaries of the Reservation are two invisible lines winding laterally between each island and the mainland shores, in a 60-mile river segment with highly irregular contours. It would be impossible to demarcate such a boundary, so, for example, duck hunters drifting down the river could not be certain whether they were subject to state or tribal law unless they hewed closely to either the mainland or island shorelines. There is no indication in the legislative history that such an impractical result was intended, and there is no reason to read the statutes to create this enforcement nightmare.

Plaintiffs also conflate the common law concept of "riparian rights" with separate and distinct common law rules of deed construction, discussed *supra* at 7-8, that create a rebuttable presumption that title to land bounded by rivers

extends to the centerline.[28] *See* PN Brief 41 n.18 (arguing that a reference in the legislative history to "riparian rights" entitles the Tribe to "ownership" of the bed to the centerline).[29] "Riparian rights" is a term used to refer to a set of water privileges that assure owners of riverfront land access to, and beneficial use of, the water. *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1996). Ownership of submerged land is not a "riparian right," but instead is determined by the deed. *See supra* at 7-8. Therefore, references in the legislative history to "riparian rights" associated with the islands, PD 264: 3971 [JA _], do not imply ownership of adjacent riverbed.[30]

II. The History of State Dominion and Control over the Main Stem Bars Plaintiffs' Claims.

The long history of state governments exercising dominion and control over the Main Stem, and Plaintiffs' acquiescence to state control, have both legal and equitable significance. The Settlement Acts extinguish any claims PN may have

[28] The U.S.'s argument that an upland owner possesses an exclusive fishing privilege fails to account for legislation modifying the common law: "the rights of [citizens] in the fisheries [of navigable streams] are determined according to the effect of … legislation, rather than by the principles of the common law." *Cole v. Inhabitants of Eastham*, 133 Mass. 65 (1882).

[29] PN waived any claim of riverbed ownership at oral argument before the district court: "The Court: Is it your view that the Indian Tribe owns the bottom of the river? Mr. Smith: No." ECF 156 at 11; Add. 73. And responding to another question, PN's counsel stated: "Ownership – the concept of ownership is not in this case, your Honor." *Id.*

[30] The U.S. cites to 1997 comments the State filed in a Federal Energy Regulatory Commission proceeding containing a sentence suggesting the Reservation may include a portion of the adjacent riverbed. U.S. Brief 50. That sentence reflects an error caused by relying upon common law real estate principles to identify the boundaries of a reservation that is defined by statute. 30 M.R.S.A. § 6203(8).

had to land or natural resources that were subject to such dominion and control. And the same underlying facts operate to bar Plaintiffs' claims under principles of laches, acquiescence, and impossibility.

A. The Settlement Acts Extinguished Any Claims PN May Have Had to the Main Stem.

The core theory underlying the Tribes' 1970s land claims was that all prior conveyances of their lands were invalid under the Nonintercourse Act. *Joint Passamaquoddy Tribal Council*, 528 F.2d at 376. In order to resolve that issue conclusively, the Settlement Acts declared that all prior "transfer[s]" of "land or natural resources" made by or on behalf of the Tribes, including those transfers "pursuant to any treaty, compact, or statute of the State," were made in accordance with the laws of the United States and Maine. 25 U.S.C. § 1723(a)(1); 30 M.R.S.A. § 6213(1). Congress expressly approved and ratified these transfers, and made them effective as of the date of the transfer. 25 U.S.C. § 1723(a)(1); 30 M.R.S.A. § 6213. MICSA extinguished any aboriginal title PN might otherwise have asserted in the land or natural resources so transferred. 25 U.S.C. § 1723(b). DOI explained at the legislative hearings and again in 1993 that "all aboriginal claims to any lands or natural resources … over which the tribe lost dominion or control" are extinguished under this provision. PD 281: 5682, 5825 [JA _, _]; ECF 118 ¶ 19A.

The operative terms in the statute are defined broadly. The word "transfer" includes not only transfers "pursuant to any treaty, compact, or statute of the State," 25 U.S.C. § 1723(a)(1), but also includes conveyances and any "act… or circumstance that resulted in a change in … possession of, dominion over, or control of land or natural resources." 25 U.S.C. § 1722(n); *see also* 30 M.R.S.A. § 6213(13) (containing nearly identical definition). The legislative history confirms that the sweeping nature of this language was intentional. Transfer "cover[s] all conceivable events and circumstances under which title, possession, dominion or control of land or natural resources can pass." PD 282: 5949; PD 281: 5806-07 [JA _;_].

In addition, the term "land or natural resources" is comprehensively defined to include:

> 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) (emphasis added); 30 M.R.S.A. § 6203(3). Therefore, the "transfer" provision does far more than merely confirm the validity of prior property transactions. It extinguishes any rights or claims of any kind that PN may have had prior to the effective date of the statute that were "transferred" through "any act, event or circumstance that … resulted in a change in … control of or

dominion over" "land or natural resources" including "water and water rights, and hunting and fishing rights." 25 U.S.C. §§ 1722(b), (n) & 1723; 30 M.R.S.A. § 6213. The sum of these provisions accomplished two of the stated goals of the Settlement Acts: "to remove the cloud on titles to land in the State of Maine resulting from Indian claims" and "to clarify the status of lands and natural resources in the State of Maine." 25 U.S.C. §§ 1721(b)(1)-(2).

The history of Maine's dominion and control over the Main Stem, *see supra* at 6-8, shows the State acting in the capacity of both governmental regulator and fee owner. Since 1820, Maine has exercised sovereignty over the Main Stem by dictating whether and to what extent any given activity could take place there. *Supra* at 6-8. PN and the federal government never questioned and always acceded to state authority, at least until 1995. *Supra* at 8-12. And acting as proprietor, the State conveyed to private parties the riverfront parcels along the Main Stem together with adjacent submerged lands, all in publicly recorded deeds.[31] *Supra* at 7-8. This evidence proves a "transfer" under MIA and MICSA because it demonstrates that PN has not had possession of, dominion over, or control of the Main Stem and the bed beneath it for hundreds of years, if it ever

[31] The privatization of the Main Stem's submerged lands creates a dilemma for the Plaintiffs, who seek a declaration that the Main Stem's submerged lands belong to the Tribe, but who failed to name as defendants the hundreds of riverfront owners with claims to these same lands. The district court correctly observed that the relief Plaintiffs seek could not be granted in the absence of those riverside owners, Add. 61 n.47, although the issue was also properly made moot by the court's declaration that the Reservation is limited to the Main Stem's islands.

did. 25 U.S.C. § 1723(a)(1); 30 M.R.S.A. § 6213(1). The Settlement Acts extinguished PN's claims to any lands or natural resources that were so transferred. 25 U.S.C. § 1723(b).[32]

B. Laches, Acquiescence, and Impossibility Bar Plaintiffs' Claims Seeking Expansion of Tribal Sovereignty over the Main Stem.

In *City of Sherrill v. Oneida Nation*, 544 U.S. 197 (2005), a tribe asserted a claim of sovereignty over territory that had been part of its reservation most recently in 1805, and that the tribe had reacquired in the 1990s through private purchases. During the intervening time, the State of New York and its counties and municipalities continuously governed the area. *Id*. at 215-16. The federal government acquiesced to the state and local governance, *id*. at 205-07, 214, as did the tribe, *id.* at 216-17. The tribe did not seek to gain repossession of its lands until the 1970s, and did not attempt to assert sovereignty over the territory in question until the 1990s. *Id*. at 214. Noting the long delay in asserting the claim, the acquiescence of the federal government and the tribe in the interim, the settled

[32] The U.S. suggests in a footnote that the State's long history of control over the Main Stem should not be interpreted as effecting a "transfer" of PN's interests because the State also regulated the Reservation islands, and it could not be suggested that PN's interests in the islands have been extinguished by transfer. U.S. Brief 45 n.20. First, the transfer provisions obviously do not apply to the islands that MIA explicitly designates as PN's Reservation. Second, the State's dominion and control over the Main Stem was qualitatively different than any control it exerted over the islands. The State never recognized any uniquely tribal rights to the waters or bed of the Main Stem, nor did PN ever assert any until the 1990s. But the State always recognized PN's right of use and occupancy in its reservation islands and protected PN's interests in those islands accordingly. *See, e.g.*, ECF 118 ¶¶ 121-22 (19th century petitions showing Maine guarding against "encroachments made by whites upon the Indian Islands.").

expectations of third parties, and the disruptive nature of the remedy sought, the Court barred the claim. *Id*. at 220. This Court likewise should bar Plaintiffs' claims that seek to expand tribal sovereignty over the Main Stem.

The facts of this case are strikingly similar to those presented in *City of Sherrill*: the State continuously governed the disputed area since the early 19th century, *supra* at 6-8; both the Tribe and the federal government acquiesced to State governance, *supra* at 8-12; the Tribe did not make a claim to the area until the 1970s, *see, e.g.*, *Johnson*, 498 F.3d at 41; and the Tribe did not attempt to assert sovereignty over the area until at least the 1990s, ECF 118 ¶¶ 11A-11B. The actions and inactions of the parties created settled societal expectations that the Main Stem is a public resource subject to State, not tribal, regulation, and that its bed is privately owned. *See, e.g.*, ECF 118 ¶ 11C (describing reaction of dam owner in 1995 when DOI first took the position that the Main Stem was part of the Reservation). A judicial declaration in 2016 that the Main Stem is part of the Reservation would be a disruptive remedy certain to lead to new conflicts between the Tribe and others who use the Main Stem for everything from duck hunting to hydroelectric generation.[33]

[33] Before the district court, PN described its view of its own regulatory authority over its reservation in terms that have no identifiable limit. ECF 144: 34.

The history of dam construction within the area Plaintiffs now argue is part of the Reservation illustrates the equitable problems with their claim. *See supra* at 11-12. When these projects were proposed, there is no record that PN or the U.S. objected or raised the issue of whether they would be within the Reservation. As a result, the dams were built and bills enacted all based on the universal understanding that the Reservation consists solely of islands in the Main Stem, just as MIA defines. 30 M.R.S.A. § 6203(8).

Enforcing the long dormant claims that Plaintiffs assert today, but did not raise to Congress or the Maine Legislature in 1980, would be inequitable under the *City of Sherrill* analysis. 544 U.S. at 202. The Court should bar these claims accordingly. *See also Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 456 n.7 (W.D.N.Y. 2002) (criticizing federal government after it changed its position and attempted to shift blame to State of New York and private property owners in dispute over tribal claim to the Niagara Islands).

CROSS-APPEAL

I. There is No Case or Controversy Regarding the Extent of PN Members' Sustenance Fishing Rights in the Main Stem.

The district court erred by issuing a declaratory judgment addressing the extent of tribal members' sustenance fishing rights in the Main Stem because there is no evidence the State has ever interfered with these practices, and the undisputed facts show there is no threat of such interference.

A. The Nature of the Claims and the Decision Below

Plaintiffs sought declaratory relief addressing the rights of PN members to engage in sustenance fishing in the Main Stem. These claims called upon the district court to determine how sections 6207(4) and 6203(8) of MIA should be harmonized. 30 M.R.S.A. §§ 6203(8), 6207(4). The district court concluded the statute should be interpreted as conferring the sustenance fishing right throughout the waters of the Main Stem. Add. 62-63. The court lacked jurisdiction to issue this declaration because the underlying facts do not present a justiciable case or controversy.[34]

B. Undisputed Material Facts

The State has a policy of not interfering with PN members' sustenance fishing in the Main Stem and has no intention of changing that policy. ECF 118 ¶¶ 143A-143B. The Schneider Opinion addresses how the Settlement Acts allocate regulatory jurisdiction between the State and PN, with particular reference to the Main Stem, but does not address or even mention the scope of PN's sustenance fishing rights. ECF 8-2. There are simply no facts before the Court showing any threat to PN members who wish to take fish for individual sustenance

[34] Although tribal sustenance fishing in the Main Stem has never concerned the State, the district courts' declaration is creating confusion. The U.S. Environmental Protection Agency immediately interpreted the district court's ruling to mean the Maine tribes may have sustenance fishing rights outside of their reservations. 81 Fed. Reg. 23239, 23243 & n.9 (April 20, 2016).

from Main Stem waters, and therefore no occasion for a judicial declaration resolving this issue of statutory interpretation.

C. Standing

Standing requires plaintiffs to show they have suffered an invasion of a legally protected interest that is both concrete and particularized, and also actual or imminent. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Allegations of injury that are conjectural or hypothetical are insufficient to demonstrate standing. *Id.*; *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014). Plaintiffs have suffered no injury because there is no evidence that any tribal member ever experienced State interference while engaging in sustenance activities. Any claim of possible future injury is at best speculative, but also highly suspect, because there is uncontroverted testimony that the State has no intention of changing its longstanding policy against interfering with tribal sustenance activities in the Main Stem. Here, as in *Blum*, there has been no enforcement, there is no threat of enforcement, and the government has disavowed an intention to prosecute. *Blum*, 744 F.3d at 798; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (imaginary or speculative fear of governmental interference with one's claimed rights is insufficient to create a justiciable case or controversy). Plaintiffs therefore lack standing to press their sustenance fishing rights claims.

D. Ripeness

These claims are likewise not ripe for adjudication. "[I]f a plaintiff's claim, though predominantly legal in character, depends on future events that may never come to pass, or that may not in the form forecasted, then the claim is unripe." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 536 (1st Cir. 1995). The ripeness doctrine is particularly important in cases that seek a pre-enforcement declaration of statutory rights. *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 205 (1st Cir. 2002). To determine ripeness, courts apply a two prong test, examining both whether the claim is fit for review, in terms of its finality and definiteness, and whether deferring review would create a hardship to the parties. *Town of Barnstable v. O'Connor*, 786 F.3d 130, 143 (1st Cir. 2015).

When a claim of threatened injury is based on a contingent future event, it is not fit for review. *Ernst & Young*, 45 F.3d at 538. The sustenance rights claims are based on the possibility of future state enforcement under a strict interpretation of the statute – despite the fact that no enforcement has ever occurred – and the State has disavowed any plans for such enforcement. These claims therefore fail the fitness prong of the ripeness test. *Id.*

Nor was it necessary for the court to issue a declaration to avoid a hardship to the parties. Mere uncertainty about a legal rule does not constitute a hardship

for the purposes of a ripeness analysis. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 811 (2003). In a pre-enforcement challenge, a hardship only exists when the plaintiff shows a "direct and immediate" threat of prosecution. *Gun Owners*, 284 F.3d at 206. Here, there is no immediate threat of prosecution, and no evidence of threatened future prosecution. Tribal members wishing to take fish for individual sustenance from the Main Stem have always done so without State interference, and they may continue to do so with that same expectation. Because the parties would not "act differently tomorrow" if the court issued the relief requested, *Town of Barnstable*, 786 F.3d at 143, no hardship exists that would justify judicial intervention. *Ernst & Young*, 45 F.3d at 536-38.

Plaintiffs' failure to establish a case or controversy leaves the Court without subject matter jurisdiction over their claims alleging interference with sustenance activities. *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013). Their sustenance rights claims should be dismissed accordingly.

II. The District Court Erred by Granting the U.S. Intervenor Status.

Section 1723(a)(2) of MICSA bars the U.S. from asserting on the Tribe's behalf any claim under state law arising before October 10, 1980, and arising from any "transfer" of land or natural resources, on the grounds that such transfer was not made in accordance with state law. 25 U.S.C. § 1723(a)(2). Although the U.S. cloaks its arguments in terms of the Settlement Acts, the essence of its claim is

that, under principles of Maine common law, PN never transferred its rights to the Main Stem. U.S. Brief 17-21, 38-43, 46. Section 1723(a)(2) was included in MICSA to protect the State against exactly such a claim.[35]

The original bill that would become MICSA did not contain this provision. PD 281: 5643-65. This language was inserted specifically at the request of the State, and with the express agreement of DOI, to replace two paragraphs in the original bill deeming prior Indian transfers "to have been made in accordance with laws of the State…," and extinguishing state law claims related to such transfers. *Id.* at 5650-51, 5769. DOI expressed the concern that extinguishment of state law claims should occur only in MIA, and that while MICSA would ratify MIA, the federal legislation should not include this language. *Id.* at 5769. DOI's Solicitor explained:

> Section 4(a)(2) and (3) … as introduced, would have Congress deem transfers of Indian land to have been made in accordance with the laws of the State of Maine, and would ratify any such transfer as of the date of the transfer. We believe that it is inappropriate for the Federal government to extinguish state law claims. Those claims should instead be extinguished by the State Legislature and in fact are the subject of Section 6213 of

[35] The U.S.'s presence as a plaintiff in this action has real consequences for the State. The federal government's intervention deprived the State of an Eleventh Amendment sovereign immunity defense that would otherwise be available to bar the Tribe from seeking control of State-owned submerged lands, such as those adjacent to various boat launches in the Main Stem. *Coeur d'Alene Tribe,* 521 U.S. at 281. Even if the Court determines that the U.S. was properly granted intervenor status, PN's argument that it retained aboriginal title to the submerged lands of the Main Stem would be barred by the Eleventh Amendment to the extent PN's claims are not identical to those of the U.S. *Seneca Nation of Indians v. New York,* 178 F.3d 95, 97 (2nd Cir. 1999).

> the Maine Implementing Act. Nevertheless, we agreed, at the request of the State, to insert language in lieu of those two paragraphs which would bar the United States as trustee for the Indians from asserting past land claims arising under state law.

Id. (emphasis added). Thus, what became Section 1723(a)(2) was drafted specifically to bar the federal government from doing what it seeks to do here.

"Laws of the State" as used in Section 1723 is a defined phrase that explicitly includes "common laws of the State of Maine." 25 U.S.C. § 1722(d). The U.S.'s position in this litigation rests upon just that: (1) a claim that the Tribe did not transfer the bed of the Main Stem in ancient treaties and deeds, and/or (2) that PN holds the bed of the Main Stem by virtue of the Tribe's pre-1980 ownership of the islands. U.S. Brief 17-21, 38-43, 46. These are claims arising before the Settlement Acts based on Maine law and are therefore barred. 25 U.S.C. § 1723(a)(2).

CONCLUSION

For all the foregoing reasons the Court should (1) affirm the district court's order that the Reservation consists solely of islands in the Main Stem and does not include any portion of the river or its submerged lands, and (2) vacate the district court's orders that (a) declare the scope of PN members' sustenance fishing rights and (b) grant the U.S. intervenor status to assert an Indian land claim against State Defendants based on State law.

Dated: November 30, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 16,454 words in 14-point Times New Roman font (excluding the parts of the brief exempted by Rule 32(a)(7)).

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CERTIFICATE OF SERVICE

I, Gerald D. Reid, hereby certify that on November 30, 2016, I electronically filed the Brief of State Defendants with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

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]

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[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.)

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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.)

18

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

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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

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(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

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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, Plaintiff, v. JANET T. MILLS, et al. Defendants.	)	Case No. 1:12-cv-254-GZS

ORDER ON PENDING MOTIONS

Before the Court are the following motions: (1) Motion of the Penobscot Nation to Dismiss Claims, Defenses & Counterclaims of the Intervenor Defendants/Counterclaim Plaintiffs (ECF No. 31) (the "Motion to Dismiss"); (2) Motion to Intervene by the United States (ECF No. 33); (3) Motion to Amend Answer & Counterclaim by the State Defendants (ECF No. 36) (the "Motion to Amend"); and (4) Penobscot Nation's Motion for Oral Argument (ECF No. 41).

Having reviewed all of the parties' written submissions, the Court has determined that this matter may be decided without further hearing or argument and in an exercise of its discretion DENIES the Motion for Oral Argument (ECF No. 41) pursuant to Local Rule 7(f). For reasons briefly explained herein, the Court now DENIES the Motion to Dismiss (ECF No. 31), GRANTS the Motion to Intervene (ECF No. 33), and GRANTS the Motion to Amend (ECF No. 36).

The Court assumes familiarity with the background facts of this litigation to the extent they were laid out in the Court's prior Order allowing intervention by a group of Defendants known as the NPDES Permittees. See Penobscot Nation v. Mills, D. Me. 1:12-cv-254-GZS, 2013 WL 3098042 (D. Me. June 18, 2013).

I. Motion to Dismiss (ECF No. 31)

Plaintiff Penobscot Nation moves to dismiss the claims, defenses and counterclaims of the Intervenors NPDES Permittees under Rules 12(b)(1) and (h)(3) asserting lack of subject matter jurisdiction. NPDES Permittees are a group of municipalities and companies with permits that authorize the discharge of water or treated wastewater into the Penobscot River or its branches or tributaries. To the extent Plaintiff's Second Amended Complaint invokes federal question jurisdiction under 28 U.S.C. § 1331 and seeks a declaration regarding its ability to regulate portions of the Penobscot River pursuant in relevant part to the Maine Indian Claims Settlement Act of 1980 (MICSA), 25 U.S.C. §§ 1721 et seq., there is undoubtedly a federal question presented. The NPDES Permittees have intervened as defendants and counterclaimants who expressly seek a declaration that "the waters of the main stem of the Penobscot River are not within the Penobscot reservation." (NPDES Permittees Answer & Counterclaim (ECF No. 25) at 10.) Essentially, Intervenors present the same question but want the opposite answer. Under these circumstances, the Court readily finds subject matter jurisdiction over the claims, defenses and counterclaims of the Intervenors NPDES Permittees.

Additionally, under Rule 12(b)(6), Plaintiff claims that the NPDES Permittees' counterclaim fails to state an actual controversy. In response, NPDES Permittees repeat that Plaintiffs have refused to enter into a stipulation that they would not seek to regulate discharges from the Intervenors if they were to obtain the declaration they seek via this action. (See ECF Nos. 19-1 & 19-2.) In short, the Court is satisfied that there is a sufficient controversy to allow the Intervenors to proceed as defendants and counterclaimants in this action.

Therefore, Plaintiff's Motion to Dismiss is hereby DENIED.

II. Motion to Intervene (ECF No. 33)

"[I]ntervention comes in two flavors: intervention as of right, Fed. R. Civ. P. 24(a), and permissive intervention, Fed. R. Civ. P. 24(b)." Ungar v. Arafat, 634 F.3d 46, 50 (1st Cir. 2011). In order to intervene as a right, the movant "must demonstrate that: (i) its motion is timely; (ii) it has an interest relating to the property or transaction that forms the foundation of the ongoing action; (iii) the disposition of the action threatens to impair or impede its ability to protect this interest; and (iv) no existing party adequately represents its interest." Id. The starting point for permissive intervention is simply that the parties seeking intervention have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b).

In this case, State Defendants specifically oppose intervention by the United States arguing that such intervention is explicitly prohibited by 25 U.S.C. § 1723(a)(2) & (3). These portions of MICSA bar the Unites States from asserting certain land claims on behalf of Penobscot Nation. As the United States correctly points out in its reply, whether the claim asserted here involving a portion of the Penobscot River falls within that bar is a question of statutory interpretation and the core issue of the pending dispute. (See United States' Reply (ECF No. 46) at 4.) The Court cannot and will not resolve this issue in the context of a motion to intervene. Rather, State Defendants' argument is best categorized and considered as a "merits defense."[1] (Id. at 5.)

[1] The Court recognizes that State Defendants strenuously object to this view in their Sur-Reply (ECF No. 51). However, to the extent they assert that Section 1723 "was written to protect the State against such litigation" (Sur-Reply at 2), this litigation is proceeding as a claim brought by Penobscot Nation even if the United States is not allowed to intervene. Thus, whatever protection Section 1723 may provide the State Defendants, it cannot stop the pending litigation already brought by Plaintiffs.

Turning to the standard factors considered in connection with a request to intervene, the Court finds the United States' request for intervention to be timely in the procedural context of this action. As outlined in the papers, the United States has an interest relating to the transaction that forms the core of the ongoing action and the outcome of this case would undoubtedly impact that interest and the interpretation of a federal statute. The disposition of the claims already presented in this action could impair the United States' interest. Given the alignment of the interests of Penobscot Nation and the United States, one might argue that the existing Plaintiff will adequately represent the interests of the United States. However, the Court believes that the United States has a unique interest in this case given the role of MICSA and the inevitable interaction between federal administrative agencies and any government or sovereign that might regulate activities on the Penobscot River. For all of these reasons, the Court alternatively finds that it is appropriate to allow the permissive intervention of the United States is this action. See, e.g., Daggett v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 113 (1st Cir. 1999) (noting a district court can consider "almost any factor rationally relevant" in exercising its discretion to allow permissive intervention).

Therefore, the Motion to Intervene is hereby GRANTED. The Court concludes that the United States is entitled to intervene as a right and, alternatively, is entitled to permissively intervene in this case. The United States shall docket its Complaint in Intervention (ECF No. 33-2) and be added to the docket as a Plaintiff-Intervenor.

III. Motion to Amend (ECF No. 41)

The State Defendants in this action seek to amend their Answer & Counterclaim pursuant to Federal Rule of Civil Procedure 15(a). State Defendants have provided the Court with a

proposed amended answer and counterclaim (ECF No. 36-1), which adds one additional affirmative defense and clarifies the nature of their counterclaim. The First Circuit has explained:

> A motion to amend a complaint will be treated differently depending on its timing and the context in which it is filed. . . . As a case progresses, and the issues are joined, the burden on a plaintiff seeking to amend a complaint becomes more exacting. Scheduling orders, for example, typically establish a cut-off date for amendments (as was apparently the case here). Once a scheduling order is in place, the liberal default rule is replaced by the more demanding "good cause" standard of Fed.R.Civ.P. 16(b). This standard focuses on the diligence (or lack thereof) of the moving party more than it does on any prejudice to the party-opponent. Where the motion to amend is filed after the opposing party has timely moved for summary judgment, a plaintiff is required to show "substantial and convincing evidence" to justify a belated attempt to amend a complaint.

Steir v. Girl Scouts of the USA, 383 F.3d 7, 11–12 (1st Cir. 2004) (citations, internal quotation marks & footnotes omitted).

Having reviewed all of the written submissions in connection with this Motion, the Court finds good cause to allow the State Defendants' amendment. The Court notes that State Defendants filed the Motion to Amend on August 26, 2013. One of the documents attached to the Motion is a letter that Plaintiff sent to the Federal Energy Regulatory Commission dated July 11, 2013 (ECF No. 36-4). Thus, it is clear that the timing of State Defendant's request to amend does not reflect delay, rather it reflects the developing factual record related to this litigation. Additionally, the Court notes that the discovery deadline in this matter is currently set for April 21, 2014. As noted elsewhere in this Order, the United States is being added to this case as an intervenor. In short, the Court does not find that Plaintiff will be prejudiced by this amendment in light of the current procedural posture of the case.

To the extent that Plaintiff specifically objects to the proposed addition of an affirmative defense of failure to join indispensable parties, the Court cannot say on the current record that

such a defense would be futile. However, by allowing the amendment, the Court states no opinion on the merits of the asserted defense. In the Court's view, this potential defense reflects the apparent larger dispute between the parties, which is now being brought to the forefront via the State Defendants' amendment of their counterclaims.

Therefore, the Motion to Amend is hereby GRANTED. State Defendants' shall file their Amended Answer & Counterclaim as a standalone filing on the docket.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 4th day of February, 2014.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

_____

PENOBSCOT NATION,
Plaintiff,

and

UNITED STATES OF AMERICA, on its own behalf, and for the benefit Of the Penobscot Nation,
Plaintiff-Intervenor,

CIVIL ACTION

v.

Docket No. 1:12-254-GZS

STATE OF MAINE, JANET T. MILLS, Attorney General of the State of Maine, CHANDLER WOODCOCK, Commissioner for the Maine Department of Inland Fisheries and Wildlife, and JOEL T. WILKINSON, Colonel for the Maine Warden Service,
Defendants,

and

CITY OF BREWER, et al.,
Defendants-Intervenors.

_____

Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Oral Argument** held before **THE HONORABLE GEORGE Z. SINGAL,** United States District Court Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 14th day of October 2015 at 9:04 a.m. as follows:

promised the tribe that they were protected from interference by the State. At the hearings before Congress, Your Honor, the Senate committee --

THE COURT: I'm sorry, I -- I understand what you've written. I'm trying to cut through the case law and cut through lawyer speak.

MR. SMITH: Okay.

THE COURT: So let's focus here.

MR. SMITH: Fine, so these -- these specific rights and authorities at issue were clear --

THE COURT: What is it that you -- does the -- what do you believe, what is your assertion, that the Penobscot Indian Tribe owns in the Penobscot stem?

MR. SMITH: The Penobscot Tribe has retained aboriginal use and occupation rights in the river, never ceded, for the purposes of these rights and authorities at issue in this case.

THE COURT: And those rights are sustenance fishing, hunting, and trapping.

MR. SMITH: Yes, indeed, Your Honor.

THE COURT: And those came because, in your view, the Indian Lands Claims Settlement Act did not impact those rights.

MR. SMITH: Did not expressly extinguish them, which is the term of art used by the Supreme Court.

THE COURT: That's what your position is.
MR. SMITH: Correct, Your Honor.
THE COURT: And, therefore, the Penobscot Indian Tribe continues to have the right to sustenance hunt, fish, and trap in the Main Stem of the Penobscot.
MR. SMITH: Bank to bank. Attending --
THE COURT: One bank to the other.
MR. SMITH: Attending the islands in the intervening the surrounding waters bank to bank, because otherwise they'd be rendered meaningless.
THE COURT: That's fine. Is it your view that the Indian tribe owns the bottom of the river?
MR. SMITH: No.
THE COURT: Is it your view that the Indian tribe owns any portion of the land on either side of the river?
MR. SMITH: No, Your Honor, unless the tribe has acquired it post settlement.
THE COURT: Unless purchased, obviously.
MR. SMITH: Ownership -- the ownership concept is not in this case, Your Honor.
THE COURT: Okay. Is it your view that the Penobscot Indian Reservation extends beyond the islands in the Penobscot?
MR. SMITH: Yes, for the purpose -- for the

purpose of sustenance hunting, trapping, and other taking of wildlife, it extends into the river, which was the aboriginal domain never ceded by the tribe, and expressly confirmed by Congress.

THE COURT: So your view is, just so I'm clear, that the reservation extends throughout the Main Stem of the Penobscot.

MR. SMITH: For the purposes of the specific rights and authorities at issue in this case.

THE COURT: And as far as the land in the Penobscot Main Stem or bordering the Penobscot Main Stem, forgetting later purchases, is the reservation the islands as described in the MIA or the Indian Land Claims Settlement Act?

MR. SMITH: Congress described the --

THE COURT: Your position, I don't care what Congress said.

MR. SMITH: Let me make sure I understand the question, Your Honor. You're asking whether the Penobscot Indian Reservation includes the islands?

THE COURT: I understand you say it also includes the right to hunt, fish, et cetera, let's put that aside.

MR. SMITH: Yes.

THE COURT: Does it go beyond the islands?

aboriginal rights the Indians only had sustenance fishing rights?

MR. MISKINIS: Under the -- their aboriginal rights gave them much more, the --

THE COURT: Just so I'm clear.

MR. MISKINIS: Those aboriginal rights are subject --

THE COURT: Included hunting, fishing, trapping, for mercantile rights, correct?

MR. MISKINIS: They had rights to do -- they had the possession of that land, and in most Indian country aboriginal rights mean you have the -- you -- state sovereignty is preempted by the tribe's right to govern itself.

THE COURT: I understand. So just follow me along because you understand this a lot better than I do in terms of treaties, et cetera. In 1818, when the first of the treaties we've been discussing earlier took place, is it your view that before that treaty was signed the Indians had rights on the Penobscot that went beyond sustenance fishing?

MR. MISKINIS: Yes, Your Honor.

THE COURT: They could fish to their heart's extent; could they not?

MR. MISKINIS: They could.

THE COURT: Even if they sold the fish, correct?

MR. MISKINIS: Yes.

THE COURT: Okay. Your view is, correct me if I'm wrong, that even after that treaty was signed they continued to have those rights, correct?

MR. MISKINIS: Subject to in that treaty they -- they gave to the State -- they opened the river up for purposes of public commerce and other uses.

THE COURT: But they didn't give up their fishing rights.

MR. MISKINIS: No, in fact, they protested when they felt their fisheries were infringed upon.

THE COURT: So when was the first time that the Penobscot Nation lost those unlimited rights to fish?

MR. MISKINIS: Well, according to federal courts in the state of Maine they never did. What happened in the next --

THE COURT: Do they have those today?

MR. MISKINIS: They -- all their aboriginal rights are now subject to the Maine Implementing Act. So, no, their rights are now what are described in the Maine Implementing Act. They do not have rights independent of that.

THE COURT: Just so I'm clear, then, your view is that after the 1818 treaty their rights were for -- for fishing, just to be very narrow and easy, unlimited, correct?

MR. MISKINIS: In -- in theory they were; in practice they were unable to maintain control.

THE COURT: But in terms of a right, it doesn't mean what they exercised, it's what they had.

MR. MISKINIS: That is correct.

THE COURT: That right continued until --

MR. MISKINIS: In 1980.

THE COURT: Because they never gave up those rights --

MR. MISKINIS: That's correct.

THE COURT: -- in 1818, correct?

MR. MISKINIS: That's right, and in the 1970s --

THE COURT: Then we had the Indian Land Claims Settlement Act, correct?

MR. MISKINIS: Yes.

THE COURT: And you're telling me, just correct me if I'm wrong, that that act restricted their rights to fish.

MR. MISKINIS: Yes.

THE COURT: So that something happened to that