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 UNITED STATES

[*continued on next page*]

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STATEMENT OF JURISDICTION

On August 8, 2012, Maine Attorney General William Schneider sent a letter to the Penobscot Nation ("Nation") asserting that the Penobscot Reservation is limited to the uplands of the islands in the Penobscot River and that the State has exclusive jurisdiction over the River. In response, the Nation filed suit against the Attorney General[1] and two other state officials in their official capacities, seeking, *inter alia*, a declaration that this new legal position was inconsistent with (1) the 1796 and 1818 treaties between the Penobscot Nation and the Commonwealth of Massachusetts; (2) the Maine Implementing Act ("MIA"), 30 M.R.S.A. 6201-6214; and (3) the Maine Indian Claims Settlement Act ("MICSA"), Pub. L. No. 96-420, 94 Stat. 1785 (1980).[2]

A number of municipalities and paper companies holding federal permits to discharge pollutants into the Penobscot River intervened as defendants ("NPDES Permittees"). The United States intervened as a plaintiff and named the State of Maine as a defendant.

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[1] The current Maine Attorney General, Janet Mills, has been substituted as defendant. The state officials and State are collectively referred to as "Maine."

[2] MICSA was formerly codified at 25 U.S.C. 1721-1735. MICSA and other settlement acts remain in effect but were removed from the United States Code as of September 2016 in an effort by codifiers to improve the code's organization. For ease of reference, we continue to refer to MICSA's sections as previously codified.

On December 16, 2015, the district court entered an order granting in part and denying in part cross-motions for summary judgment filed by the Nation, the United States, and Maine ("Order," Add.1), as well as an order granting in part and denying in part NPDES Permittees' motion for judgment on the pleadings (Add.65), and entered judgment (Add.68). On February 18, 2016, the district court denied without opinion the motions of the Nation and the United States to amend the orders and judgment. Add.70.

The Nation and United States filed timely notices of appeal on April 18, 2016. Maine and the NPDES Permittees filed timely notices of cross-appeal on April 28 and 29, 2016. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

It is undisputed that under MIA and MICSA (collectively the "Settlement Acts"), the Reservation includes more than a hundred islands in the "Main Stem"—a 60-mile reach of the River flowing from the confluence of the River's East and West Branches south to Indian Island (situated north of Bangor, Maine just above the influence of the tides).

The district court held that the Settlement Acts' general definitions of Reservation, 30 M.R.S.A. 6203(8) and MICSA § 1722(i), unambiguously limit the Reservation to the island uplands, but that the term "reservation" in 30 M.R.S.A.

6207(4), which provides for an on-reservation sustenance fishing right, is ambiguous and is properly construed to include the Main Stem bank to bank.

This appeal presents the issue whether the Reservation includes (1) the island uplands and the Main Stem riverbed bank to bank, (2) the island uplands and the riverbed to the middle ("thread") of the channel surrounding each island, or (3) only the island uplands.

STATEMENT OF THE CASE

A. The Penobscot People

The Penobscot Nation is "riverine in [its] land-ownership orientation." H.R. Rep. 96-1353 at 11 (1980) ("House Report") [JA___]. "The aboriginal territory of the Penobscot Nation is centered on the Penobscot River." *Id*. The Penobscot located their principal villages along the River, which provided them with resources and a means of travel. See Harald Prins Expert Report, ECF105-88 ("Prins Report"), at 3716-3737 [JA___]; Pauleena MacDougall Expert Report, ECF110-37 ("MacDougall Report"), at 6395-6398 [JA___].

The Penobscot have fished, hunted, and trapped for their sustenance in the River since time immemorial. *Id*.; Order 24 (fishing in early 1800s); Order 28 (fishing and trapping in twentieth century). Indeed, the River is the only place Penobscot can fish within the Reservation. Order 6, 60. This intimate connection

between the Penobscot and the River and its resources has been central to their social organization and worldview. Prins Report at 3729,3737-3746 [JA___].

B. The Treaties

The Penobscot pledged to aid the Massachusetts colonists during the Revolutionary War, and Massachusetts in 1775 guaranteed that they would be secure in their possession of lands extending six miles out on both sides of the River. ECF107-17 [JA___]. Shortly after the war, however, burdened by debt, Massachusetts commenced trying to purchase Penobscot land to sell at a profit. The Penobscot resisted three successive efforts (in 1784, 1786, and 1788) at a land-cession treaty. Prins Report at 3759-3769 [JA___]. Despite Congress's 1790 enactment of the Indian Nonintercourse Act, codified as amended at 25 U.S.C. 177, which provided that Indian land could only be sold with the United States' authorization (Order 7), Massachusetts continued pressing the Penobscot to cede land. Prins Report at 3770-3775 [JA___]. There was little non-Indian settlement in Penobscot territory above the head of the tide in 1790. ECF102-8 at 1238 [JA___].

In the Treaty of August 8, 1796, executed without federal approval, the Penobscot Nation agreed to "grant, release, relinquish and quit claim to the [Commonwealth of Massachusetts], … the said Tribe[']s right, Interest, and claim to all the lands on both sides of the River Penobscot, beginning near ... Nichol's

rock ... and extending up the [Penobscot] River thirty miles ... excepting however, and reserving to the said tribe, all the Islands in said River, above Old Town, including said Old Town Island, within the limits of the said thirty miles." Add.72; Prins Report at 3775-3790 [JA___].

In the Treaty of June 29, 1818, again executed without federal approval, the Penobscot Nation ceded "all the lands they claim, occupy and possess by any means whatever on both sides of the Penobscot river, and the branches thereof, above the tract of thirty miles in length on both sides of said river, which said tribe conveyed and released to said commonwealth by their deed of the eighth of August, one thousand seven hundred and ninety six." Add.74. The treaty reserved to the Penobscot Nation four townships and "all the islands in the Penobscot river above Oldtown and including said Oldtown island," and provided that "the citizens of said commonwealth shall have a right to pass and repass any of the rivers, streams, and ponds, which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same." *Id*.; Prins Report at 3790-3801 [JA___].

In 1820, after Maine became a separate state, it entered into a treaty with the Nation in which it assumed Massachusetts' treaty obligations. P.D.10 [JA___]; Prins Report at 3806-3807 [JA___]. In 1833, Maine purchased from the Penobscot

the four townships reserved in the 1818 treaty, again without federal approval. Order 9-10.

C. The Settlement Acts

Maine asserted jurisdiction over Indian affairs in Maine until the 1970s. The Passamaquoddy Tribe sued federal officials in 1972 claiming that the Nonintercourse Act protected the land of Maine tribes and that the United States had a trust responsibility under the Nonintercourse Act to protect land taken from them in violation of that act. The district court agreed, and this Court affirmed. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (1975), *aff'd*, 528 F.2d 370, 373 (1st Cir. 1975).

The United States filed suits against Maine on behalf of the Passamaquoddy Tribe and Penobscot Nation claiming that their cessions of tribal land violated the Nonintercourse Act and were thus void. See 388 F. Supp. at 654. These suits were resolved by a 1980 settlement codified and ratified by the Settlement Acts.[3]

1. MIA

The settlement terms were codified in MIA, 30 M.R.S.A. 6201-6214. MIA defines the "Penobscot Indian Reservation" to include

[3] The United States recognized the Passamaquoddy Tribe and Penobscot Indian Nation, including them on the first list of "Indian Tribal Entities that Have a Government-to-Government Relationship with the United States." 44 Fed. Reg. 7235 (Jan. 31, 1979).

> 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.

Section 6203(8).[4]

MIA also provides for a larger "Penobscot Indian Territory" ("Territory") which includes the Reservation and up to 150,000 acres of land to be acquired by the Secretary of the Interior for the Nation, as specified in MIA. Section 6205(2).

MIA sets forth a unique jurisdictional arrangement that differs in certain respects from the default jurisdictional arrangements under federal Indian law. The Nation generally has the powers and duties of a municipality within its Territory, and state law generally applies within the Territory, with important exceptions. Sections 6204, 6206(1). "Internal tribal matters" are not subject to state regulation. Section 6206(1). And, of relevance to this case, the Nation has specified rights to, and jurisdiction over, fish and wildlife. Both sides understood these to be "'areas of particular cultural importance.'" Order 13 (quoting Penobscot counsel Thomas Tureen, P.D.258 at 3763 [JA___]); P.D.258 at 3895

[4] The Reservation also includes three other specified parcels that are not relevant to the questions presented.

(Deputy Attorney General Paterson recognizing fishing and hunting as "traditional Tribal interests" and "particularized cultural interests") [JA___].

MIA gives the Nation "exclusive authority" within its Territory to regulate "[h]unting, trapping, or other taking of wildlife" by members and nonmembers, "subject to the limitations of subsection 6." Sections 6207(1) & (1)(A).[5] The Nation is allowed to "include special provisions for the sustenance of the individual members," but these tribal ordinances are otherwise "equally applicable, on a nondiscriminatory basis, to all persons regardless of whether such person is a member of the respective tribe or nation." Section 6207(1).

In contrast, tribal regulation of fishing is limited to ponds within Penobscot Territory with less than 10 acres of surface area. Section 6207(1)(B). MIA established the Maine Indian Tribal-State Commission ("Commission") to regulate most fishing within Penobscot and Passamaquoddy Territory, Section 6207(3)(A)-(C), taking into account the interests of both Indians and non-Indians.[6] See

[5] Section 6207(6) provides a mechanism for the Maine Commissioner of Inland Fisheries and Wildlife to adopt remedial measures where there is a reasonable likelihood that fish or wildlife stocks may be depleted.

[6] The Commission regulates fishing in (1) ponds with 50% or more shoreline in Indian Territory; (2) any section of a river or stream where both sides lie in Indian Territory; and (3) any section of a river or stream one side of which falls within Indian territory for at least a half mile. Section 6207(3)(A-C). Thus, except for sustenance fishing by tribal members under Section 6207(4), either the Commission or the State regulates fishing in the River.

P.D.258 at 3893 (Deputy Attorney General Paterson explaining regulation of fishing—"for small ponds, it's the Tribe. For rivers, streams and large ponds, it's the Commission.") [JA___].

Of significance in this case, MIA provides for a sustenance fishing right within the Reservations (but not within the Territories outside the Reservations) not subject to State or Commission regulation:

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of Passamaquoddy Tribe or 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.

Section 6207(4). See Order 12-17 (summarizing MIA's legislative history).

Section 6210 sets forth the authority of tribal and state law enforcement officers, and allows for agreements for cooperation and mutual aid. The Nation has adjudicatory jurisdiction over its members' violations of tribal ordinances, and the State has "exclusive jurisdiction over violations of tribal ordinances" by nonmembers. Section 6206(3).

2. MICSA

MIA, as a state statute defining Maine's relationship with federally recognized tribes, gains force and effect only through ratification by Congress. Congress ratified MIA in 1980 through MICSA.

MICSA ratified the unlawful land transfers and extinguished any aboriginal title to "land or natural resources" "involve[d]" in the challenged transfers. Section 1723(a)(1), (b). It also established a land acquisition fund "for the purpose of acquiring land or natural resources" to reconstitute the tribes' land bases. Section 1724(d). Congress understood that "[t]he Penobscot Nation lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818," and then lost four townships in an 1833 sale to Maine. House Report at 12 [JA___]. The House Report explains that MICSA "provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them." *Id*. at 18 [JA___]. MICSA defines "Penobscot Indian Reservation" as "those lands as defined in the Maine Implementing Act." Section 1722(i).

MICSA also ratified MIA's jurisdictional arrangements. It provides that the Nation is "subject to the jurisdiction of the State of Maine to the extent and the manner provided in the Maine Implementing Act," Section 1725(b)(1), that the Nation is "authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act," Section 1725(f), and that the application of federal

Indian law is limited in Maine in specified respects, Section 1725(h). See Order 17-20 (summarizing MICSA's legislative history).

D. Procedural Background

By letter dated August 8, 2012, Maine repudiated its longstanding position that the Nation's Reservation extends into the River, informing the Nation that its Reservation was limited to its island uplands, that the State had "exclusive" jurisdiction over the River, and that if the Nation disagreed, the dispute should be resolved in "an appropriate forum." ECF105-78 [JA___].

The Nation filed this suit seeking a declaratory judgment that it could exercise its on-reservation right to sustenance fishing, and its on-reservation rights with respect to hunting and trapping, within the Main Stem bank to bank. Maine (ECF10) and the NPDES Permittees (ECF25) filed counterclaims seeking a declaratory judgment that the Main Stem is not within the Reservation.

The parties engaged expert anthropologists, an historian, and a surveyor to offer opinions relating to treaty interpretation. The parties compiled and filed 785 Joint Exhibits, including the experts' reports and deposition transcripts, stipulating that "[f]or the purpose of summary judgment, the parties waive all objections to [their] admissibility … , including hearsay, but reserve all arguments related to relevancy." ECF111 [JA___]. The parties also provided for the court's convenience a CD including 289 Public Documents ("P.D.") and similarly

stipulated as to their admissibility. *Id*. The Nation, the United States, and Maine filed statements of material facts, and responses thereto, based on the stipulated record.

The Nation (ECF121) and United States (ECF120) filed motions for summary judgment arguing that, properly construed, the 1796 and 1818 treaties ceded to Massachusetts only the uplands on both sides of the River, and that the Settlement Acts accordingly included in the Reservation the Main Stem bank to bank. The United States argued in the alternative that, under Maine common law, the Reservation extends at least to the thread of the channel surrounding each island. Members of Congress filed an amicus brief supporting the Nation. ECF131-1.

Maine filed a motion for summary judgment arguing that the plain language of the Settlement Acts limits the Reservation to the island uplands. ECF117. In the alternative, Maine moved to dismiss the action on the ground that the landowners along the River's sides are required parties under Fed. R. Civ. P. 19 who were not joined and that the case could not proceed in their absence.

The NPDES Permittees moved for judgment on the pleadings, ECF116, and to exclude plaintiffs' expert reports, ECF138.

In a December 16, 2015 Order, the district court granted in part and denied in part the cross-motions for summary judgment. Add.1. The court ruled that the

plain language of MIA's and MICSA's general definitions of "Penobscot Indian Reservation," 30 M.R.S.A. 6203(8) and 25 U.S.C. 1722(i), includes the "islands of the Main Stem," which it defined to include only the uplands, but not "the waters of the Main Stem." Order 54-56. The court reasoned that MICSA's reference to "lands" and MIA's reference to "islands" unambiguously exclude the River.

The court further held, however, that MIA's reference to the Nation's "reservation" in 30 M.R.S.A. 6207(4), which guarantees Penobscot an on-reservation sustenance fishing right, was ambiguous. Order 59. Given the undisputed evidence that Penobscot had continuously exercised that right in the River with Maine's authorization, and relying on *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (holding that a reservation of islands can include surrounding waters), the court held that "reservation" in Section 6207(4) includes the Main Stem bank to bank. Order 57-64.

With respect to the United States' argument that the Penobscot Reservation extends at least to the middle of the channel on each side of the islands, the court stated 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." Order 63 n.48.

Having limited the Reservation to the island uplands except for the on-reservation sustenance fishing right, the court noted that the landowners along the River's sides were not required parties under Rule 19(a)(1). Order 61 n.47.

That same day, consistent with the Order, the court also granted in part and denied in part NPDES Permittees' motion for judgment on the pleadings, and denied their motion to exclude the expert reports except to the extent the expert testimony "amounts to legal conclusions." Add.65.

While reserving their position that the Reservation extends bank to bank, the United States and the Nation moved to amend the judgment to confirm that the Reservation at least includes adjacent submerged lands to the thread of the surrounding channels under Maine common law or, in the alternative, to make clear that the court had not addressed whether such submerged lands surrounding the islands are part of the Reservation. ECF164, 165. Otherwise, hunting and trapping rights would be limited to the island uplands. The court denied those motions without opinion on February 18, 2016. Add.70.

SUMMARY OF ARGUMENT

The balance struck by the Nation, Maine, and the United States in the Settlement Acts was that Maine law would generally apply within the Reservation but that the Nation would enjoy within its Reservation sustenance fishing rights largely free of State control and would also be able to exercise its retained inherent

sovereign authority with respect to hunting and trapping, activities which are of particular significance to the Penobscot people. Maine now seeks to upset that balance and to rewrite the Settlement Acts in disregard of well-established Maine common-law principles and contrary to its own prior interpretation.

The district court understood the importance of the River to the Penobscot people and properly recognized that the sustenance fishing right extends bank to bank. However, the district court erred in holding that the general definitions of "Penobscot Indian Reservation" in the Settlement Acts unambiguously limit the Reservation to the island uplands. The district court failed to appreciate that submerged lands are "lands," and that, under Maine common law, an "island" in a nontidal river presumptively includes the surrounding submerged land. The district court's uplands-only holding is also inconsistent with its holding that the same term—"reservation"—is properly construed to extend bank to bank for purposes of MIA's sustenance fishing right, 30 M.R.S.A. 6207(4). Congress intended the Penobscot hunting and trapping rights to have the same geographic scope in the River as the sustenance fishing right.

When the Settlement Acts are interpreted with a proper understanding of the background common law and the Indian canon of construction which requires ambiguities to be resolved in the Nation's favor, "Reservation" should be

construed to include the River bank to bank, or at a minimum, to the thread of the channels surrounding the islands.

The Nation, Maine, and Congress all intended to confirm as the Reservation the area reserved by the Nation from cession to Massachusetts in the 1796 and 1818 treaties. The treaties must be interpreted as the Penobscot would have understood them with ambiguities resolved in their favor. As a people whose existence and identity depended on the River and its resources, it cannot be concluded that the Penobscot intended to cede their rights in the River. Under Massachusetts and Maine common law, private landowners own the beds of nontidal rivers and the riverbed owner presumptively has a right of fishery in the waters above the bed. The mechanism by which the Nation would have reserved its right of fishery was to reserve the riverbed. The treaties are thus properly interpreted as a cession to Massachusetts only of the uplands "on both sides" of the River, reserving to the Nation the islands in the River and the riverbed from bank to bank, which preserved the Nation's right to fish in the waters above the bed.

At a minimum, however, "Reservation" must be construed to include the riverbed surrounding the islands to the thread of the channels. This is what a private island owner in a nontidal river is presumed to own under Massachusetts and Maine common law. There is no basis for interpreting the treaties to convey,

through silence, the halo of submerged land that would normally be part of the island estate, particularly given the Indian canon of construction.

The conclusion that the Nation's Reservation under the Settlement Acts includes the River bank to bank is also supported by the undisputed evidence of the Penobscot's continuous use of the River bank to bank, with the knowledge and support of the federal government. For its part, Maine conceded in 1997 that the Reservation extends to the thread of the channels surrounding the islands based on an analysis of the Settlement Acts and Maine common law, and has offered no reasoned basis for disavowing that concession. Maine also supported in various ways prior to 2012 the Nation's right to fish in the River. The district court's reasons for holding that the Reservation is nonetheless limited to the island uplands (except for the sustenance fishing right) are unpersuasive.

STANDARD OF REVIEW

This Court reviews an entry of summary judgment de novo, including when the matter is resolved on cross-motions. *Segrets, Inc. v. Gillman Knitwear Co.*, Inc., 207 F.3d 56, 61 (1st Cir. 2000).

ARGUMENT

I. THE COMMON-LAW BACKGROUND

Congress is presumed to legislate with knowledge of existing law, including common law, and statutes are to be construed against the backdrop of that law.

Varity v. Howe, 516 U.S. 489, 502 (1996); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). The following Massachusetts and Maine common-law principles are critical to interpreting the Settlement Acts and the treaties. The district court's erroneous conclusion that the Reservation is limited to the island uplands resulted in large measure from its misunderstanding of these background common-law principles.

A. Submerged Land is "Land," Not "Water"

Under English common law, which the colonists brought with them to Massachusetts, submerged land was a form of land. According to Sir William Blackstone,[7] land covered by water, like dry land, was a "corporeal hereditament," while the water flowing over it was not:

> For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain, substantial property; of which the law will take notice, and not of the other.

[7] Blackstone's Commentaries on the Laws of England, which had been reprinted in Philadelphia in 1771, were well known to the Massachusetts bar. See, *e.g.*, *Freary v. Cooke*, 14 Mass. 488 (1779) (attorneys for both sides referring to Blackstone's Commentaries).

2 Black. Comm. 18.[8] Massachusetts and Maine common law is premised on this fundamental distinction between land and water.

B. The Beds of Nontidal Rivers Like the Main Stem Are Privately Owned

English common law drew an important distinction between tidal and nontidal bodies of water. Tidal waters in England were ordinarily navigable by ships and thus characterized as "navigable." *Veazie v. Dwinel*, 50 Me. 479, 483-85 (1862). Nontidal bodies of water were not characterized as "navigable" even if they were useful for transportation by smaller watercraft and were thus subject to the public right of passage. *Id.* The Main Stem is nontidal. Order 6; see *Pearson v. Rolfe*, 76 Me. 380, 385 (1884) (Penobscot River "floatable" starting at Oldtown).

It was generally understood that, under English common law, the crown owned the bed of tidal waters up to the high-water mark, including both the coastal seas and the tidal reaches of rivers. *Storer v. Freeman*, 6 Mass. 435, 438 (1810). Riparian landowners presumptively owned the bed of nontidal rivers (and ponds), and if a nontidal river was the boundary between two estates, each landowner presumptively owned the bed to the thread of the channel. *Id.* ("By the common law of England, which our ancestors brought with them, claiming it as their

[8] See also *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954) ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right" in flowing waters.).

birthright, the owner of land bounded on a fresh water river owned the land to the centre of the channel of the river, as of common right."). An island owner presumptively owned the riverbed extending outward from its islands to the thread of the channels. See *Warren v. Westbrook Mfg. Co.*, 86 Me. 32, 40, 29 A. 927-28 (1893).

The Massachusetts colonists generally followed these principles, although they adapted them with respect to the intertidal zone and ponds, but not nontidal rivers.[9] In contrast, the great majority of states adapted the English common law to the great rivers of North America by holding that the state owns the bed of rivers that are navigable in fact even if they are not tidal. The Pennsylvania Supreme Court was the first to do so in *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810), 1810 WL 1292 (Pa.). The Supreme Court has endorsed this approach as consistent with "sound principles of public policy." *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

[9] The Massachusetts Bay Colony Ordinance of 1641-47 provided that an upland owner's land did not end at the high-tide line but extended seaward to the low-tide line, although no farther than 100 rods. *Storer v. Freeman*, 6 Mass. at 438; *Bell v. Town of Wells*, 557 A.2d 168, 171 (Me. 1989). Private ownership of this intertidal zone (also called the "flats" or "seashore") is limited, however, by "the public's right to fish, fowl, and navigate." *Bell*, 557 A.2d at 171. The Ordinance also provided that the beds of ponds of ten acres or more (called "great ponds"), which otherwise would have been privately owned, were to be owned by the Colony. *In re Opinions of the Justices*, 118 Me. 503, 106 A. 865, 867 (Me. 1919). The rules of this Ordinance became part of the common law of Massachusetts and then of Maine. *Bell*, 557 A.2d at 171.

But Massachusetts never altered the English common-law rule that the beds of nontidal rivers are privately owned.

The District of Maine, formerly part of Massachusetts, became a separate state in 1820. All laws (including the common law) in force in the District of Maine were to remain in force in the new State unless repugnant to the constitution of Maine. See *Bell*, 557 A.2d at 172. The Massachusetts law of bed ownership has never been found repugnant to the Maine Constitution.[10]

C. The Right of Fishery Is Tied to the Bed

Under English common law, the bed owner in a nontidal river (and ponds) presumptively had the exclusive right to fish in the water above the bed. Blackstone expressly tied the right in the soil under a nontidal river to the exclusive right of fishing above that soil (called a "several" fishery). 2 Black. Comm. 261. In tidal waters, in contrast, where the crown owned the bed, the public had the right to fish. Although the crown once granted to individuals

[10] While federal law, following the majority approach, presumes that each new state owns the bed of both tidal and nontidal navigable-in-fact rivers under the Equal Footing Doctrine, *United States v. Holt State Bank*, 270 U.S. 49, 55-59 (1926), each state is free to decide whether it will hold title to the bed in trust for the public or allow it to be acquired by private owners, *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). The Maine Supreme Court held, in the context of bed ownership within the intertidal zone, that the Equal Footing Doctrine did not require any change in the Maine law of bed ownership. *Bell*, 557 A.2d at 172-73.

exclusive rights of fishing in "public" (*i.e.* tidal) rivers (called a "free" fishery), the practice was abolished by the Magna Carta. 2 Black. Comm. 417.

This connection between bed ownership and the right of fishery has been recognized by American courts. For example, the Pennsylvania Supreme Court in *Carson v. Blazer* began with the premise that "[t]he right of piscary must be a right appurtenant to the soil covered with water." 1810 WL 1292 at *11. In that case, the riverside landowner claimed to own the bed and the exclusive right to fish in the Susquehanna River (a nontidal river) adjacent to his property. The court rejected that claim, holding that the Commonwealth of Pennsylvania owned the bed of the Susquehanna River, a navigable-in-fact river, and that the public thus had the right to fish above it.

The state courts in Massachusetts and Maine, however, have continued to adhere to the principle that the bed of nontidal rivers is privately owned (regardless of whether the river is navigable in fact), and that the riverbed owners have an exclusive right of fishing in the waters above the bed. The Massachusetts Supreme Court explained in 1827 that the public has a right of passage on nontidal rivers but that "each proprietor of the land adjoining has a several or exclusive right of fishery in the river, immediately before his land, down to the middle of the river, and may prevent all others from participating in it, and will have a right of action

against any who shall usurp the exercise of it without his consent."

Commonwealth v. Chapin, 22 Mass. 199, 206 (1827).

The Massachusetts Supreme Court again summarized the law as follows in 1852:

> It is now perfectly well established as the law of this commonwealth, that in all waters not navigable in the common-law sense of the term, that is, in all waters above the flow of the tide, the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water, to the middle or thread of the river. … This is recognized in many cases as the common right of riparian proprietors, subject in Massachusetts, to regulation for the common benefit, by the legislature.

McFarlin v. Essex Co., 64 Mass. 304, 309-10 (1852).

The Maine Supreme Court has similarly stated the law:

> Where lands border upon a nontidal stream, although it may be floatable for logs or boats, each of the riparian proprietors owns the fee in the land which constitutes the bed of the stream to the thread of the stream, "ad medium filum aquae," as it was anciently expressed, and if the same person owns on both sides he owns the entire bed, unless, of course, it is excluded by the express terms of the grant itself. … The riparian proprietor has the right to take fish from the water over his own land, to the exclusion of the public. *Waters v. Lilley*, [21 Mass. 145 (1826)]. … The only limitation upon the absolute rights of riparian proprietors in nontidal rivers and streams is the public right of passage for fish, and also for passage of boats and logs, provided the streams in their natural condition are of sufficient size to float boats or logs. Subject to this qualified right of passage, nontidal rivers and streams are absolutely private. *Wadsworth v.*

> *Smith*, 11 Me. 281 [1834]; *Pearson v. Rolfe*, 76 Me. [380, 386 (1884)].

In re Opinions of the Justices, 106 A. at 868-69. It is evident from this discussion that the "public right of passage for fish" is not a public "right to take fish." These fundamental principles continue to be recognized in Maine common law.[11]

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SETTLEMENT ACTS' GENERAL DEFINITIONS OF PENOBSCOT RESERVATION UNAMBIGUOUSLY EXCLUDE THE RIVERBED

A. MICSA's Definition Does Not Exclude the Bed

The district court's conclusion that MICSA's general definition of the Reservation unambiguously excludes the riverbed, Order 54-55, is based on a fundamental misunderstanding of background common-law principles of riverbed ownership.

MICSA defines "Penobscot Indian Reservation" as "those lands as defined in the Maine Implementing Act." Section 1722(i). According to the court, "MICSA is explicitly silent on the issue of any waters being included within the boundaries of the Penobscot Indian Reservation because Section 1722(i) speaks only of 'lands.'" Order 54-55. MICSA defines "land and natural resources" as

[11] The Order reveals some confusion between rivers that are navigable in fact and rivers characterized as "navigable" under Massachusetts and Maine common law (only tidal rivers). Order 6, 53. The United States acknowledged the public's right to navigate on all rivers, but the bundle of common-law public rights to "fish, fowl, [and] navigate," referenced at Order 53, are rights in tidal waters. See ECF151 at 8872-8873.

"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). The court believed that Congress would have used the phrase "land and natural resources" if it had intended to include the River in the Reservation. *Id*. at 55.

The district court incorrectly assumed that a river can only be characterized as "water," which is a "natural resource," and not "land." The court failed to appreciate that "land" includes both upland and submerged land. This is true under federal law. See *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (referring to "beds of waters" as "lands"); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 110-11 (1949) (same). It is also true under Maine common law, as explained in Part I.B and summarized by Maine Attorney General James Tierney in 1982. Maine Attorney General Opinion No. 82-33 (June 2, 1982), 1982 WL 188242 ("Tierney Opinion").

The Tierney Opinion discussed four categories of submerged land and separately discussed "waters of the State." First, "[l]ands submerged beneath the ocean and the tidal rivers of the State are held in trust for the public by the State of Maine." *Id*. at *1 (citing *Opinion of the Justices*, 437 A.2d 597, 605 (Me. 1981)). Second, the State similarly "holds submerged lands of great ponds in the trust for

the people of Maine," pursuant to "the Colonial Ordinance of the Massachusetts Bay Colony 1641-47, which has since been incorporated into the common law of Maine." *Id*. Third, "[t]itle to the land within the intertidal zone, under the Colonial Ordinance of 1641-47, is held by the riparian owner, but is subject to such public use rights as fishing, fowling and navigation." Id. at *2. Fourth, with respect to lands beneath non-tidal rivers:

> The riparian owner on a non-tidal river owns the adjacent submerged land to the middle of the river, thereby precluding State ownership of such land, except in a riparian capacity. *Central Maine Power Co. v. Public Utilities Commission*, 156 Me. 295, 327 (1960); *Brown v. Chadbourne*, 31 Me. 9 (1849). The State, therefore, has no rights to the use of such land, nor does the public.

Id.

With respect to waters, Attorney General Tierney explained that "[t]he waters of the State, whether located in tidal areas, non-tidal areas or great ponds, are held in trust by the State for the use of its people." *Id*. Specifically, "[t]he public has the right to navigate on those waters of the State, whether tidal or non-tidal, which are of sufficient size in their natural state to float boats or even logs," *id*., and there is also a public right of fish passage, *id*. at n.3. These public rights in the waters coexist with private bed ownership.

Maine Attorney General Richard Cohen's description of MIA (Order 14) is consistent with the Tierney Opinion: "[T]he 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." P.D.263 at 3965 (emphasis added) [JA___]. He did not say that the Tribes will not own the *bed of any river*, but only that they will not own the *waters* of the river.

In sum, the district court erred in concluding that MICSA's use of the term "lands" excludes the riverbed.

B. MIA's Definition Does Not Exclude the Bed

The district court similarly erred in concluding that MIA's definition of the Reservation, 30 M.R.S.A. 6203(8), see *supra* pp. 6-7, unambiguously excludes the riverbed. Order 54-55.

1. "Islands in the Penobscot River"

The district court concluded that the Reservation cannot plausibly include any portion of the riverbed because MIA's definition references "the islands in the Penobscot River" not "the islands and the Penobscot River." Order 55. This conclusion is incorrect. The court correctly rejected Maine's argument that only *riverside* landowners on nontidal rivers presumptively own the bed to the thread of the river because the argument "simply ignores *Skowhegan Water-Power Co.* [*v. Weston*], 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)." Order 53 n.41. But the court then failed to appreciate that

this precedent refutes a conclusion that the word "island" unambiguously excludes submerged land. To the contrary, an "island" presumptively includes the surrounding riverbed to the thread of the channels.

MIA's drafters obviously understood Maine common-law principles of bed ownership. MIA's distinction between ponds ten acres in area or larger and smaller ponds traces back to the Colonial Ordinance of 1641-47, which is expressly referenced in MIA's legislative history. Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037, P.D.264 at 3971 [JA___]. That same report states that "[t]he boundaries of the [Penobscot and Passamaquoddy] 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." *Id*. It also notes that "[t]he jurisdictional rights granted by this bill are coextensive and coterminous with land ownership," *id*., which presumptively includes submerged lands under Maine common law.

2. "Solely"

The district court incorrectly concluded that the only plausible function of the word "solely" in MIA's definition was to separate upland from submerged land. Order 55. To the contrary, "solely" is reasonably understood to exclude islands in the River other than those specified.

First, the word "solely" is reasonably interpreted as distinguishing the Reservation islands from those located south of Indian Island, including Marsh Island on the west side of Indian Island.

Second, MIA's legislative history reveals that Maine was concerned about islands created after the 1818 treaty when dam construction caused some areas along the River to become islands in the newly created lakes. The definition was drafted to exclude "some currently existing islands upstream, such as Gero Island in Chesuncook Lake, [which] did not exist in 1818 but are the result of subsequent flooding." ECF102-31 at 1355 [JA___]; ECF110-20 at 6298 [JA___]. Under the common law, the owner of the riverbed presumptively owns new islands that appear. See *Deerfield v. Arms*, 34 Mass. 41, 43 (Mass. 1835). If the parties understood that the Nation did not own the riverbed, it arguably would not have been necessary to specify that the Nation did not own any post-treaty islands. The express exclusion of post-treaty islands from the Reservation suggests that the parties understood that the Nation owns the riverbed.

Both of these functions for the word "solely" are plausible, whereas the district court's interpretation runs contrary to Maine common law by severing the upland estate from the submerged land without a clear statement of intent to do so.

3. 1988 Amendment

The district court's reliance on the 1988 amendment adding land to the Reservation to compensate for uplands flooded by the West Enfield Dam is similarly misplaced. Order 55 n.42. The district court pointed out that "[i]f section 6203(8) was intended to include the waters of the Main Stem, flowage would not result in the loss of designated reservation space." *Id*. That may be true, but that does not mean that an acre of submerged land is as valuable to the Nation as an acre of uplands. This amendment still makes sense if the Reservation includes submerged land.

4. A Term Given Two Different Meanings Within the Same Statute Cannot Be "Unambiguous"

The district court's holding that "reservation" extends bank to bank for purposes of Section 6207(4)'s on-reservation sustenance fishing right conflicts with its conclusion that Section 6203(8) *unambiguously* excludes the riverbed for all other purposes.

It is theoretically possible that a term can have two different meanings in a statute. Section 6203 provides that its definitions apply "unless the context indicates otherwise." But by invoking this proviso (Order 61), the district court could not characterize the Section 6203(8) definition as unambiguous.

The district court recognized the "'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the

same meaning.'" Order 61 (quoting *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2004-05 (2012)). But instead of "examin[ing] the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language," *Cablevision of Boston, Inc. v. Public Improvement Comm'n of City of Boston*, 184 F.3d 88, 101 (1st Cir. 1999), the court stuck to its incorrect holding that the general definition of "Reservation" unambiguously excludes the riverbed. See also *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 46 (1st Cir. 2009) (interpreting a statute requires a court to "consider its plain text and design, structure, and purpose"). The appropriate way to avoid the "untenable and absurd results that flow" from interpreting "Reservation" to include only the island uplands where there are no fish, Order 61, is to recognize that there is a definition that makes sense in all contexts—one that includes the River.

In concluding that the "Reservation" must include the River bank to bank for the purpose of sustenance fishing, the district court properly relied on *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), in which the Supreme Court interpreted language defining an island reservation which did not expressly mention the surrounding waters as necessarily including the surrounding waters. Order 62-63. The Supreme Court interpreted "the body of lands known as Annette Islands" as encompassing "the intervening and surrounding waters as well as the up-land," because the Indians living on the islands relied on the adjacent fishing

grounds and "naturally looked on the fishing grounds as part of the islands." 248 U.S. at 89. For the same reason, the Settlement Acts should be construed to include the River in the Reservation.

III. THE SETTLEMENT ACTS ARE PROPERLY CONSTRUED TO INCLUDE THE MAIN STEM IN THE PENOBSCOT RESERVATION BANK TO BANK

The Settlement Acts were enacted to settle the Penobscot's claims (along with similar claims by the Passamaquoddy and Houlton Band) that the land cessions in the 1796 and 1818 treaties with Massachusetts violated the Nonintercourse Act and were thus invalid. Only Congress can approve transfers of tribal land and modify jurisdictional relationships between states, Indian tribes, and the federal government. *See Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-35 (1985); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978). MICSA ratified the treaties' unlawful transfers and subsequent unlawful transfers made through 1980. Section 1723(a)(1); Section 1722(n) (defining "transfer"). At the same time, MICSA confirmed as the Penobscot Reservation the land the Nation had not transferred, Section 1722(i), and placed it under federal restraints on alienation, Section 1724(g)(2).[12]

[12] MIA codified an agreement between the Nation and Maine, and the United States joined the settlement through MICSA after Congress held hearings and considered testimony and evidence from the tribes and state and federal officials. Congress's intent in MICSA controls over any contrary intent in MIA because,

The House and Senate Reports explained "that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them." House Report at 18 [JA___]; S. Rep. 96-957 at 18 (1980) ("Senate Report"); see also House Report at 15 (settlement envisions "existing reservation land" and "newly-acquired tribal land") [JA___]; Senate Report at 35 ("The Maine Act recognizes and defines the existing Passamaquoddy and Penobscot 'Reservations.'") [JA___].[13] Congress thus did not intend that MICSA would *itself* diminish their reservations. Only Congress can diminish the boundaries of an Indian reservation "and its intent to do so must be clear." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). MICSA instead confirmed as the Reservation what was not ceded in the treaties or transferred prior to MICSA's enactment.[14]

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without Congressional ratification, MIA would be of no effect. See MICSA § 1735(a) (MICSA controls where MIA provisions conflict).

[13] This Court has looked to MICSA's legislative history in construing both MICSA and MIA. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 712 (1st Cir. 1999); *Akins v. Penobscot Nation*, 130 F.3d 482, 488-89 (1st Cir. 1997).

[14] It is unnecessary to determine whether the Nation's ownership interest in the land it has retained is best characterized as aboriginal title, beneficial title, fee title, or some other form of title because the Settlement Acts specify the rights and authorities that follow from its status as Reservation land.

The parties have offered three possible interpretations of the Reservation. Maine's current interpretation must be rejected for multiple reasons, most obviously because excluding the River would render MIA's significant on-reservation sustenance fishing provision, 30 M.R.S.A. 6207(4), a nullity, as the district court correctly recognized. See *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). Maine conceded in the district court that there are no meaningful opportunities for Penobscot sustenance fishing outside the River, yet argued that the Reservation is nonetheless limited to the island uplands. The district court properly rejected Maine's new theory that Penobscot members could fish in the River as long as they kept one foot on dry land. Order 59-60. That absurd interpretation effectively renders Section 6207(4) a nullity.

However, the Settlement Acts do not unambiguously provide whether the Reservation extends only to the thread of the channels surrounding each island or whether the Reservation extends bank to bank.

When faced with two (or more) possible constructions of a statute, the choice must be guided by the longstanding principle of Indian law that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cty. of Yakima v. Yakima Indian Nation*, 502 U.S.

251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767–68 (1985)); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) ("federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with … traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence'" (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (alterations in original)); *Fellencer*, 164 F.3d at 709 (the Settlement Acts are construed "strictly" in favor of the tribes); see also *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (settlement acts "diminishing the sovereign status of Indian tribes should be strictly construed").

Properly interpreting the treaties, and taking into account continual Penobscot use of the River bank to bank, the Settlement Acts should be construed to include the River in the Reservation bank to bank.

A. In the 1796 and 1818 Treaties, the Nation Intended to Cede to Massachusetts Only the Uplands on Both Sides of the Penobscot River and to Reserve the Islands and Riverbed

The district court avoided all consideration of the treaties by adopting its incorrect "plain language" interpretation of the general definitions of "Reservation."[15] Nevertheless, the record before this Court provides an adequate

[15] The court also avoided any consideration of the expert reports, which addressed treaty interpretation, by characterizing them as inadmissible hearsay, Order 4 n.3,

basis for the Court to conclude that the Penobscot did not intend to cede any part of the Main Stem riverbed in the 1796 and 1818 treaties.

Treaties, like statutes, must be interpreted in light of the Indian canon of construction. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 527 (1986) ("the entire treaty must be interpreted as the Indians would have understood"); *Cty. of Oneida*, 470 U.S. at 247 ("it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (treaties "are to be construed, so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people") (internal quotation marks omitted). The historical milieu and post-treaty practice may be considered. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-08 (1978).

Congress understood that the Penobscot are a "riverine" people. The district court correctly acknowledged the River's importance to the Penobscot at the time of the treaties. Order 24 (fishing in early 1800s); Order 29-31 (discussing the Penobscots' repeated assertions of their right to fish in the River); see also Prins

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contrary to the parties' stipulation (see *supra* p. 11). The plaintiffs' experts support the conclusion that the Penobscot did not intend to cede any part of the riverbed, but detailed analysis of these reports is not necessary to reach that conclusion.

Report at 3782-3789 [JA___]; MacDougall Report at 6411-6414 [JA___]. A riverine people whose life and livelihood depended on the River could not have intended to give up their rights to the River. The Indian canon of construction precludes construing the 1796 and 1818 treaties, which lack an express reference to the riverbed, to include the riverbed in the cession along with the land on the River's sides.

Cases sometime contrast "the technical meaning of [a treaty's] words to learned lawyers" and "the sense in which they would naturally be understood by the Indians." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979). In this case, however, interpreting the treaties in light of Massachusetts common law leads to the same result.

The Treaties ceded land "on both sides" of the River. Under Massachusetts and Maine common law, a grantor can convey the upland and the submerged land together or separately. It is presumed that a conveyance of an upland parcel bordering on a body of water also conveys the adjacent submerged land and associated riparian rights, but the parties can intend to separate the estates. See *Wilson & Son v. Harrisburg*, 77 A. 787, 790 (Me. 1910).

Despite the presumption in favor of conveying adjacent submerged lands with the uplands, Massachusetts and Maine courts have held in numerous cases that the parties intended to convey only the uplands. See, *e.g.*, *Hatch v. Dwight*, 17

Mass. 289 (1821) (grant of parcel did not convey the mill privilege in the stream); *Nickerson v. Crawford*, 16 Me. 245, 246 (1839) (grant bounded by "shore" did not convey the "flats" (the intertidal zone) and grant bounded by "bank" did not convey the bed of a nontidal river).

Where a deed grants a parcel bordering on a river, the word "side" does not necessarily limit the grant to the upland, but neither does it preclude the conclusion that the parties intended to exclude the bed. See *Bradford v. Cressey*, 45 Me. 9, 13 (1858) (where the language clearly shows that the grantor intended to bound a grant by "the bank, margin, side, or shore of a stream of water," they become "monuments, and are to be treated as such").

While research revealed many early Massachusetts and Maine cases interpreting deeds for parcels *bordering* the sea or a river (both tidal and nontidal), we found only one case addressing a grant of land on both sides of a river. *Winthrop v. Curtis*, 3 Me. 110 (1824), involved a 1629 grant from the Council of Plymouth to William Bradford of a tract between two named points on a river and "fifteen English miles on each side of the said river, commonly called the Kennebec river, and all the said river called Kennebec, that lies within the said limits and bounds," as well as specified rights including "fishings." The issue decided by the court was whether the grant was bounded by straight lines along the river or followed the river's winding course. Of interest here, however, is that a

grant which was intended to include the river and the associated right of fishery expressly referenced the river as well as the "fishings."[16] The grant in the Penobscot treaties did not, because the Penobscot intended to maintain their riverine home and life, which required the River and its fisheries.

An 1834 deed by which the Nation conveyed Pine Island and Shad Island is also informative. Under Maine common law, the grant of the islands presumptively conveyed the surrounding submerged land and the associated right of fishery, but the Nation expressly reserved "the right of taking fish on the eastern shore of Shad Island and the small islands east of Shad Island in the season of taking shad and alewives in said river and the same is hereby reserved to said Penobscot Tribe of Indians as their exclusive right and privilege." ECF109-87 [JA___]. There is no similar reservation of the Nation's fishery right in the treaties, as one would expect if they intended to convey the riverbed.

To the contrary, the 1818 treaty expressly provided for the *public's* right of passage on "rivers, streams, and ponds" for timber and other articles through the reserved lands. This provision would have been unnecessary under Massachusetts common law if the parties had intended the Nation's cession to include the

[16] A 1694 deed from Penobscot Chief Madokowando to Massachusetts Royal Governor Sir William Phipps conveying a tract "on both Sides" of the St. George's River also expressly included the "River" along with "all … Profits, Commodities and Appurtenances whatsoever." Harald Prins Declaration, ECF119-18 [JA___].

riverbed. Its inclusion is consistent with the view that the Nation retained the riverbed but that Massachusetts wanted to ensure that the Nation would respect the common-law right of passage. See *Pearson v. Rolfe*, 76 Me. at 386 (a riparian owner owns all but the public right of passage). See also Prins Report at 3775-3801 [JA___].

The treaty was so interpreted by a Penobscot County deputy sheriff in 1896. In *Stevens v. Thatcher*, 91 Me. 70, 72 (1897), a case involving logs rafted on the shore of White Squaw Island, he argued that the area belonged to the Nation under the 1818 treaty: "The Indians therefore took the dry land, the shore and the water as it flows, to the bank across stream upon either side of the island."[17] The Maine Supreme Court decided the case without addressing this issue.

Under Massachusetts common law at the time of the treaties, as explained in Part I.C, a riverside landowner on a nontidal river either owned the adjacent riverbed and presumptively had an exclusive right of fishery in the waters over the bed, or did not own the adjacent riverbed and presumptively had no right of fishery at all. A conveyance of the riverbed would presumptively have conveyed the right of fishery above the bed. The presumptive mechanism for the Penobscot to retain their right to fish in the River was to retain the bed. If the parties intended to sever

[17] Plaintiff's argument quoted here is included in the Lexis report, 1897 Me. LEXIS 132, but not in 39 A. 282 or the Westlaw report.

the right of fishery from the riverbed, they needed to make that intent clear. But there is no provision reserving the Nation's right of fishery in the Penobscot River.

The absence of such a provision leads to the conclusion that the parties did not intend the riverbed to be conveyed to Massachusetts along with the uplands on both sides of the River. The Supreme Court has recognized that treaty drafters are "masters of a written language, understanding the modes and forms of creating the various technical estates known to their law." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). The technical meaning of treaty language may not be enforced against Indians if it is contrary to the Indians' natural understanding.[18] *Id*. But in this case, it is Maine that is seeking to escape the technical meaning of the treaties Massachusetts drafted. Maine contended in the district court that the Penobscot had no concept of exclusive property rights and thus could not have intended to reserve the River for their exclusive use. This misses the point. Given the indisputable intent of the Nation to reserve its right to use the River (whether

[18] Massachusetts common law is consistent with the Indian canon of construction. In *Hatch v. Dwight*, 17 Mass. at 298, the court noted that the grantor, Mercy Hatch, "had given a large and adequate consideration" for the upland parcel and the mill privilege in the riverbed, and received only a "nominal consideration" for the parcel she conveyed, which the court held was only the upland parcel. "If [conveyance of the mill privilege] had been the legal effect of her deed of release, her sex, and probable incapacity of business, would afford room for suspicion that an unfair advantage had been taken of her ignorance, by one who better knew the force and effect of language in instruments of conveyance." *Id*.

exclusively or in common with others), the drafters' failure to sever the estates must be held against Massachusetts and Maine. The treaties do not convey the riverbed or the associated right of fishery in the waters above the bed.[19]

Moreover, Massachusetts understood that the grantor was a sovereign. The conclusion that the Nation retained the riverbed is also supported by cases involving river borders between two states. In *Handly's Lessee v. Anthony*, 18 U.S. 374 (1820), the Supreme Court held that Kentucky's northern border is the opposite (north) shore of the Ohio River. Virginia ceded the territory northwest of the Ohio River to the United States in 1781. The Court explained:

> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the property on one side only, it retains the river within its own domain, and the newly-created State extends to the river only.

18 U.S. at 379. The Court drew the boundary at the low-water line. Similarly, the Supreme Court held that the New Hampshire/Vermont boundary is the low-water line on the Connecticut River's west side. *Vermont v. New Hampshire*, 289 U.S. 593, 619-20 (1933).

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[19] While we have explained that the common-law right of fishery in a nontidal river is presumptively exclusive, the Nation has not taken the position in this case that it has an exclusive right of fishery in the River under the Settlement Acts. This case was brought because Maine denied that the Nation has any rights in the Main Stem.

At a minimum, however, the treaties' reservation of the islands in the River must be construed to include at least the riverbed surrounding the islands to the thread of the channels. There is no basis under Massachusetts and Maine common law for arguing that even a private landowner retained less than that.

B. The Nation's Continuous Bank-to-Bank Use of the River Supports a Bank-to-Bank Interpretation of "Reservation"

MIA preserves the Nation's right to engage in sustenance fishing "within the boundaries of [its] ... Indian reservation[]." 30 M.R.S.A. 6207(4). The district court properly recognized that the Penobscot "have continuously sustenance fished in the waters of the Main Stem," and that Maine understood that the area where the Penobscot were fishing—the River—was its "reservation." Order 57-58 (discussing repealed 12 M.R.S.A. 7076(9)(B), P.D.111 [JA___]). Further, the district court properly recognized that Congress also so understood: "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." Order 61.

The record that led the district court to conclude that the on-reservation sustenance fishing right extends throughout the entire Main Stem also leads to the conclusion that the Reservation includes the Main Stem bank to bank for other purposes. Congress intended the settlement to be fair to all parties. "In ratifying

[MIA], Congress sought to balance Maine's interest in continuing to exercise jurisdiction over the Nation's land and members (which it had done without interference for almost two centuries) with the Nation's 'independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.'" *Fellencer*, 164 F.3d at 708 (quoting Senate Report at 29 [JA___]); see also 30 M.R.S.A. 6202 (the agreement "represents a good faith effort by the Indian claimants and the State to achieve a just and fair resolution of their disagreement over jurisdiction on the present Passamaquoddy and Penobscot Indian reservations and in the claimed areas").

Both the fishing provisions and the hunting and trapping provisions are essential elements of the bargain memorialized in the Settlement Acts. The House Report (at 15) and Senate Report (at 15) described *both* the fishing and the hunting provisions in MIA as "expressly retained sovereign activities." [JA___] The tribes have the "permanent right to control hunting and fishing … within their reservations," and "[t]he State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters." House Report at 17 [JA___]; Senate Report at 17 [JA___]. Maine similarly recognized the importance of both fishing and hunting. See *supra* pp. 7-8. Indeed, MIA § 6207(1) recognizes the Nation's hunting and trapping rights and regulatory

authority throughout its larger Territory, while Section 6207(4) provides for a sustenance fishing right only within the Reservation. Given this structure and the legislative history, the best interpretation of these statutes is that the fishing, hunting, and trapping provisions have the same geographic scope in the River—bank to bank.

None of the district court's reasons for construing the general definitions of "Reservation" to exclude the riverbed is persuasive.

1. Maine's Historic Regulation of the River Does Not Preclude the Conclusion that the Reservation Includes the River

The district court observed that "the record provided to this Court includes ample evidence that the waters of the Main Stem have been treated and regulated like all other portions of the Penobscot River since Maine became a state in 1820."[20] Order 55-56; Order 29-35 (discussing state regulation of the Main Stem). The district court appeared to equate state regulation of the waters with state

[20] Maine argued in the district court that its long history of regulating the River effected a prior "transfer" of the Nation's interests in the River, which Congress ratified in MICSA § 1723. We pointed out in response that Maine regulated the Nation's islands as well. Thus, if Maine's broad interpretation of what constitutes a "transfer" were adopted, it would nullify Congress's clear intent to confirm a reservation for the Nation. Relatedly, the Settlement Acts established an agreed framework for the exercise of the Nation's inherent sovereign authority, and any prior non-exercise of such authority is no basis for interpreting the Settlement Acts to limit that authority. The district court did not expressly accept or reject Maine's broad "transfer" theory, but invoked Maine's history of River regulation as a confirming rationale for its conclusion that the Settlement Acts' general definitions exclude the River.

ownership of the River in a way that precluded Penobscot ownership of the riverbed. Under Maine common law, however, state regulation of nontidal river waters is not inconsistent with private ownership of the riverbed. Maine has not argued that state regulation of nontidal rivers has divested the riverbed title of other riparian landowners, and we are aware of no authority for that proposition. To the contrary, as explained above, Maine decisions have repeatedly restated the common-law principles that the beds of nontidal rivers are private property and that the bed owner holds the right of fishery in the waters above the bed.

Maine's assertion in the district court that "the river belongs to all the people," ECF117 at 6859, is too broad. Nontidal rivers are of course subject to the common-law rights of public passage and passage for fish. Nontidal rivers are also subject to regulation by statute and ordinance, including for the purpose of preserving fish populations for the benefit of all with fishing rights on the river. See *Commonwealth v. Chapin*, 22 Mass. at 206-07 (the exclusive right of fishery of riparian landowners on nontidal waters "is subject to a reasonable qualification, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it, if their neighbors below them on a stream or river might with impunity wholly impede the passage of fish into the lakes or ponds, where they by instinct prepare for the multiplication of the species"). Numerous legislative enactments from colonial times to the present

have prohibited obstructions to the spawning runs of salmon, shad, and alewives, including affirmative requirements for fishways through dams. See, *e.g.*, *Holyoke Co. v. Lyman*, 82 U.S. 500, 513 (1872). These regulatory statutes have not been held to disturb the common-law property right to the bed of nontidal rivers or the right of fishery above the bed.

2. MIA's Legislative History Does Not Support Excluding the Riverbed

The legislative history compiled by Maine[21] reports unresolved disagreement on certain terms, including "sides" of a river, which is relevant to the Reservation boundary. P.D.263 at 3964 [JA___]. In addition, three persons involved in the negotiations have declared that the Penobscot consistently maintained throughout the negotiations that the Nation's treaties did not cede the River, and that "Reservation" thus includes the River. Declarations of Jonathan Hull (ECF119-32 [JA___]), Michael Pearson (ECF119-37 [JA___]), and Reuben Phillips (ECF124, ECF119-2 to ECF119-9 [JA___]).[22]

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[21] The Nation did not participate in deciding which documents were included in the legislative-history compilation. Order 16 n.18.

[22] Former Deputy Attorney General Paterson disagreed in a responding declaration. ECF141-1 [JA___]. However, Bennett Katz, Majority Leader of the Maine Senate in 1980, in a November 1, 1995 letter, rejected Great Northern Paper's suggestion that the Penobscot gave up all rights in the River in the Settlement Acts, stating that he "cannot imagine that this meaning was intended by my colleagues in the Legislature who voted in support of the Settlement." ECF104-61 [JA___]; Order 56 n.43 (acknowledging this letter).

The district court acknowledged this "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." Order 15 n.17. But the district court then inexplicably disregarded this acknowledgment in stating, without further discussion, that "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." Order 56. Moreover, under the Indian canon of construction, ambiguity in the legislative history must be resolved in favor of the Nation.

The court's assertion that "no one expressed the view that passage of the Settlement Acts would change the ownership of the waters of the Main Stem," *id.*, appears to be another example of the court's failure to appreciate the distinction between moving waters and submerged land. The Settlement Acts confirmed as the Reservation the land (including submerged land) and associated rights (including the right of fishery) the Nation had not ceded in the 1796 and 1818 treaties.

The court's similar assertion, *id.*, that no one said the Settlement Acts would "recognize an aboriginal title in the Main Stem waters" is misguided for the same reason. The Nation's aboriginal fishing, hunting, and trapping rights acknowledged in the Settlement Acts did not depend on title to the River "waters."

As the government explained in a January 1995 amicus brief filed to support the Nation's on-reservation sustenance fishing right in a proceeding related to the Basin Mills hydroelectric project:

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

ECF104-32 at 2123 [JA___].[23]

C. The United States Has Consistently Taken the Position that the Reservation Includes the Main Stem and Maine Conceded Riverbed Ownership to the Thread in 1997

Recognizing the central importance of the River to the Penobscot, the United States has consistently supported the Nation in using the River and exercising jurisdiction as provided in the Settlement Acts, including by participating in proceedings involving hydroelectric projects. Order 36-39.

In Federal Energy Regulatory Commission ("FERC") proceedings involving licensing of hydroelectric projects in the River, Great Northern Paper in 1995 made the argument Maine is making in this case—that the Reservation is limited to the

[23] The Maine Supreme Court did not decide this issue. *Atlantic Salmon Federation v. BEP*, 662 A.2d 206, 211 (Me. 1995).

island uplands and excludes the riverbed. The Department of the Interior ("Interior") disagreed in a December 13, 1995 filing, stating that the Reservation includes the Main Stem bank to bank. ECF109-42 [JA___].[24] Interior noted the acknowledgment in MIA's legislative history that the Reservation includes riparian rights, and explained that the 1818 treaty did not cede the River: "By its language, the Treaty demarcated the extent of the cession from the Tribe as beginning at the river's edge and extending upland." *Id*. at 5863-5864 [JA___]. Interior also stated that "even absent retention by treaty of riparian rights to the Penobscot River, Maine law provides that island owners possess riparian rights extending from the island to the midpoint between island and upland." *Id*. at 5864 (citing *Warren v. Westbrook Mfg. Co.*, 86 Me. 32 (1893)) [JA___].

In an April 1997 FERC filing involving the Milford hydroelectric project, Interior reiterated and expanded upon its earlier analysis, explaining that the riparian proprietor in a nontidal river, under Maine common law, has the exclusive right of fishery in the water over his submerged land, citing *In re Opinions of the Justices*, 118 Me. at 507. ECF104-96 at 2389 [JA___].

In a May 30, 1997 filing in this proceeding, State Solicitor Thomas Warren conceded that the Penobscot Reservation includes the riverbed surrounding each of

[24] The 1993 and 1994 Interior letters the district court discussed (Order 37-38) addressed the West Branch, not the Main Stem.

the Nation's islands. ECF105 [JA___]. He reasoned that, as a result of the 1796 and 1818 treaties, "Massachusetts owned the land on both sides of the Penobscot River, and the Tribe retained the islands in the River," but not the islands in the branches and tributaries. *Id*. at 2559 [JA___]. He recognized that the islands include the surrounding riverbed:

> Maine law follows the rule that a riparian owner's title extends to the thread of the stream, *Brown v. Chadbourne*, 31 Me. 9 (1849), *Pearson v. Rolfe*, 76 Me. 380 (1884); *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787 (1910), and that an island landowner's title extends to the center of the channel between the island and the opposite shore. *E.g., Warren v. Westbrook Mfg. Co.*, 86 Me. 32, 29 A. 927 (1893); 78 Am.Jur.2d § 437 at 883 n.53. Thus, the boundaries of the Penobscot Reservation may generally be described as including the islands in the Penobscot River above Old Town (except those conveyed away between 1818 and 1980) and a portion of the riverbed between any reservation island and the opposite shore.

Id. at 2559-2560 [JA___]. He disagreed, however, that bed ownership gives the Nation an *exclusive* right to fish, asserting that Maine law had evolved since 1919 such that the public currently has a right to fish in "navigable" waters.[25] *Id*. at 2561-2562 n.11 [JA___]. He further argued that, in any event, "the provisions of the Maine Settlement Act and the history of the Penobscot River negate the

[25] Interior pointed out in a November 10, 1997 response that the nontidal Penobscot River is characterized as "non-navigable" under Maine common law. ECF105-4 at 2605 [JA___].

retention of any such right by the Penobscot Nation with respect to the islands in the Penobscot River." *Id*.[26]

The federal government has consistently recognized the Nation's rights in the River in other contexts as well, repeatedly granting the Nation funding for water resources planning, fisheries management, and water-quality monitoring of the River, and to support the Nation's game wardens in patrolling the River. Order 46-48. The Army Corps of Engineers also issued a permit in 1996 to salvage timber in the River on "Penobscot Indian Nation lands." ECF104-71 [JA___].

Maine has similarly acknowledged the Penobscots' right to fish, hunt, and trap in the River in numerous other contexts. Notably, Attorney General Tierney stated in a February 16, 1988 letter that the Penobscot were authorized to take up to 20 Atlantic salmon from the River by gill nets for consumption by Nation members under 30 M.R.S.A. 6207(4). Order 26; ECF103-30 [JA___]. Penobscot game wardens patrolled the Main Stem beginning in 1976, and Maine wardens have often collaborated with them using a "rule of thumb" that the channel thread

[26] Interior also supported the Nation in connection with EPA proceedings involving Lincoln Pulp & Paper's discharge to the River of dioxin and other pollutants. Order 39-40. Maine still acknowledged that ownership of islands includes ownership of the surrounding riverbed, but emphasized its right to regulate the River's waters and fisheries. ECF105-1 at 2569-2573 [JA___]. Interior and Maine reprised their positions stated in the Milford FERC proceeding. ECF105-3 [JA___]; ECF105-5 [JA___].

was the division line between tribal and State jurisdiction. Order 22-23. Maine eel permits have advised the public that "[t]he portions of the Penobscot River and submerged lands surrounding the islands in the river are part of the Penobscot Indian Reservation." Order 27-28; ECF104-2 [JA___]. And the United States Fish and Wildlife Service and Maine wildlife agencies have cooperated with the Nation on the restoration of shad in the River. ECF105-36 [JA___].

In sum, the post-enactment record supports the conclusion that the "Reservation" confirmed in the Settlement Acts includes the entire River, but extends at a minimum to the thread of the surrounding channels. The district court summarized the parties' positions in the FERC proceedings (Order 36-39), but failed to appreciate the importance of Interior's consistent position on bed ownership and Maine's 1997 concession that the Reservation includes the riverbed to the thread.

The district court incorrectly dismissed the interpretive significance of "post-passage" statements. Order 56 n.43. Courts routinely consider administrative constructions made shortly after enactment in interpreting ambiguous statutes. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993); *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984). In contrast, Maine's unexplained change of position in 2012 is not entitled to any deference. Maine has offered no persuasive rationale for its new position, but has

largely offered misinterpretations of Massachusetts and Maine common law resulting from reliance on cases involving tidal waters and confusion between public rights in *waters* and private rights in the riverbed and fisheries of nontidal rivers.

D. Rule 19 Provides No Basis for Rejecting the Bank-to-Bank Construction of the Settlement Acts

At the end of its summary-judgment motion, Maine argued that if the district court did not grant its motion and hold that the Settlement Acts unambiguously limited the Reservation to the island uplands, the Nation's claims should be dismissed based on Fed. R. Civ. P. 19. ECF117 at 44-49. Maine reasoned that the landowners along the riversides were required parties under Rule 19(a) because the Nation's claims could adversely affect their interests, but that these landowners were not required parties with respect to Maine's counterclaims because the counterclaims sought to limit the Reservation to the island uplands and thus promoted their interests.

The Nation and the United States opposed Maine's provisional motion to dismiss on numerous grounds, including that Maine adequately represents the riverside landowners' interests. ECF143 at 9-22. "Where an existing party has 'vigorously addressed' the interests of absent parties, we have no need to protect a possible required party from a threat of serious injury." *Bacardi Int'l Ltd. v. V. Suarez & Co.*, 719 F.3d 1, 12 (1st Cir. 2013) (quoting *Nat'l Ass'n of Chain Drug*

Stores v. New Eng. Carpenters Health Benefits Fund, 582 F.3d 30, 43-44 (1st Cir. 2009)). Maine's reply did not contend that it was an inadequate representative, ECF147 at 8744-8747, thus conceding that the riverside landowners are not required parties.

The district court nevertheless agreed with Maine: "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." Order 61 n.47 (citing ECF117 and Rule 19(a)(1)). The court provided no analysis. This Court has held that it is an abuse of discretion "not to provide reasoned analysis" on the conclusion that an absent party is a required party under Rule 19(a). *Bacardi*, 719 F.3d at 9. And the district court failed even to cite Rule 19(b), the second step in the analysis.

The district court improperly used its unexplained and incomplete Rule 19 conclusion as support for a restricted substantive interpretation of the Settlement Acts. *Id*. ("[A] case involving hundreds of parties … is precisely what the Settlement Acts were designed to preclude.").

If this Court concludes that a remand is unnecessary with respect to the other issues related to interpretation of the Settlement Acts addressed above, the case

need not be remanded solely for the district court to undertake a proper Rule 19 analysis. As in *Bacardi*, 719 F.3d at 9, the record before the Court is adequate to decide that Maine is an adequate representative of the absent riverside landowners with respect to interpretation of the Settlement Acts and treaties, the questions presented in this case. If this Court agrees that the Settlement Acts confirmed a Reservation including the River, individual landowners could still address in future cases any specific disputes that might arise (such as about specific improvements in the River); to the extent a riverside landowner could establish a "transfer" of a portion of the riverbed, that transfer would be ratified by MICSA § 1723.

IV. SUMMARY OF THE THREE POSSIBLE INTERPRETATIONS OF "RESERVATION"

For the reasons explained above, the proposition that the Reservation includes only the island uplands must be rejected as an unreasonable interpretation of the Settlement Acts.

In contrast, there is no reasonable basis for rejecting the interpretation that the Reservation extends at least to the thread of the channels surrounding each island. The Nation could not possibly have intended to cede submerged land and the associated right of fishery that are ordinarily part of an island estate in a nontidal river under Massachusetts and Maine common law. The district court's interpretation of the general definitions of Reservation as entirely excluding the riverbed discriminates against the Nation, giving it less than private landowners

would otherwise be accorded. In addition, prior to this action, Maine conceded that the Reservation extends to the thread of the channels, and has offered no persuasive explanation for its new restricted interpretation. The Nation and the United States are entitled to summary judgment holding that the Reservation extends at least to the thread of the channels surrounding the islands. This would mean that, at a minimum, the Nation can exercise its on-reservation fishing, hunting, and trapping rights as specified in the Settlement Acts in these areas of the River.

However, the Settlement Acts are not unambiguous as to whether the Reservation extends to the thread, or extends bank to bank in the River. For the reasons explained above, this record supports the conclusion that the Reservation extends bank to bank. That is the best interpretation of the treaties under Massachusetts and Maine common law. It is the best interpretation of the Settlement Acts under *Alaska Pacific Fisheries* and the common understanding of Congress, Maine, and the Nation that the Nation has continuously used the River bank to bank. The district court's holding that the Reservation extends bank to bank for the purpose of the sustenance fishing right is correct, but should be expanded to include other purposes. Given the Indian canons of construction which require ambiguities in treaties and statutes to be construed in favor of

Indians, this Court can grant on this record summary judgment to the Nation and the United States holding that the Reservation extends bank to bank.

In the alternative, if this Court concludes that summary judgment cannot be granted on the bank-to-bank interpretation on this record, this Court should remand for the district court to determine whether the Reservation extends only to the thread or bank to bank.

CONCLUSION

The district court's judgment holding that the Settlement Acts' general definitions of Reservation are limited to the island uplands should be reversed.

Respectfully submitted,

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DJ 90-6-13-01057

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 13,976 words in 14-point Times New Roman font (excluding the parts of the brief exempted by Rule 32(a)(7)).

s/ Mary Gabrielle Sprague

CERTIFICATE OF SERVICE

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

s/ Mary Gabrielle Sprague

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.)

3. The Passage of the Settlement Acts[16]

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

a. MIA: 30 M.R.S.A. §§ 6201-6214

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

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

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

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

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

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

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

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

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

(Id. at 3894.)

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

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

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

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

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

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

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

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

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

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

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

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

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

b. MICSA: 25 U.S.C. §§ 1721-1735

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Atlantic Salmon

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

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

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

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

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

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

2. Eel Potting

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

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

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

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

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

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

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

3. Sustenance Fishing

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

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

D. The History of Regulation of the Main Stem

1. Regulation by the State

a. Pre-Settlement Acts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Post-Settlement Acts

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Regulation by FERC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Regulation by the EPA

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

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

E. The Jurisdiction and Operation of the Penobscot Tribal Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Post-Settlement Act Funding from the Federal Government

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

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

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

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

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

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

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

III. DISCUSSION

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

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

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

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

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

> First, Congress' authority to legislate over Indian affairs is plenary and only Congress can abrogate or limit an Indian tribe's sovereignty. See U.S. CONST., art. I, § 8, cl. 3; Morton v. Mancari, 417 U.S. 535, 551–53 (1974) (discussing the plenary power of Congress to deal with special problems of Indians); see also F. Cohen, *Handbook of Federal Indian Law* 231 (1982 ed.) ("Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self governing entity."). Second, special rules of statutory construction obligate us to construe "acts diminishing the sovereign rights of Indian tribes . . . strictly," Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 702 (1st Cir. 1994), "with ambiguous provisions interpreted to the [Indians'] benefit," County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 247, (1985). These special canons of construction are employed "in order to comport with the[ ] traditional notions of sovereignty and with the federal policy of encouraging tribal independence," White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44, (1980), and are "rooted in the unique trust relationship between the United States and the Indians," County of Oneida, 470 U.S. at 247.

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

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

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

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

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

A. The Differing Positions of the Parties Seeking Summary Judgment

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

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

1. Penobscot Nation's Position

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

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

2. United States' Position

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

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

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

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

3. State Defendants' Position

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

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

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

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

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

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

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

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

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

B. The Boundaries of the Penobscot Indian Reservation

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

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

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

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

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

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

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

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

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

C. Sustenance Fishing by the Penobscot Nation

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

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

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

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

30 M.R.S.A. § 6207(9).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 16th day of December, 2015.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

ORDER ON THE PENDING MOTIONS OF STATE INTERVENORS

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

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

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

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

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

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

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

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 16th day of December, 2015.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

JUDGMENT

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

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

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

CHRISTA K. BERRY
CLERK

By: /s/Lindsey Caron
Deputy Clerk

Dated: December 16, 2015

From: cmecf@med.uscourts.gov [mailto:cmecf@med.uscourts.gov]
Sent: Thursday, February 18, 2016 2:42 PM
To: cmecfnef@med.uscourts.gov
Subject: Activity in Case 1:12-cv-00254-GZS PENOBSCOT NATION v. SCHNEIDER et al Order on Motion to Amend

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U.S. District Court

District of Maine

Notice of Electronic Filing

The following transaction was entered on 2/18/2016 at 2:42 PM EST and filed on 2/18/2016
Case Name: PENOBSCOT NATION v. SCHNEIDER et al
Case Number: 1:12-cv-00254-GZS
Filer:
WARNING: CASE CLOSED on 12/16/2015
Document Number: 172(No document attached)

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

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

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

of writing who being duly sworn doth depose and say that he saw the several parties to the said Treaty or Instrument of writing and whose names or marks are signed or made thereto Seal and Deliver the same as their and each of their Act and Deed for the Uses and purposes therein mentioned and that he this deponent together with John Tayler Recorder of the City of Albany and Samuel Jones Recorder of the City of New York the other subscribing witnesses thereto signed their names as evidences thereof. And there not appearing any material Erazures or Interlineations in the same Instrument of Writing I do allow the same to be recorded.

JNO. SLOSS HOBART.

I am of the opinion that the foregoing proof is sufficient for the purpose of Authorizing the Secretary to Record the within Instrument of Writing.

Nov: 29, 1797.

JOS: OGDEN HOFFMAN
Atty-Genl.

The preceding Instrument is a true Copy of the Original (word *"next"* at 25th line page 189 interlined) Compared therewith this 1st day of December 1797. By Me

LEWIS A. SCOTT
Secretary.

SOURCE: *New York Assembly Report* 51: 366–68.

TREATY BETWEEN THE PENOBSCOT AND MASSACHUSETTS

August 8, 1796

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

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

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

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

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

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

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

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

INDENTURE BETWEEN THE NANTICOKE AND MARYLAND

April 6, 1799

Be it remembered that the following Deed was recorded the Eighth day of April Seventeen hundred and Ninety nine to wit.
THIS INDENTURE made the sixth day of April in the year seventeen hundred and Ninety nine, between Mary Mulberry, Henry Mulberry, Henry Sixpence, and Thomas Joshua of Locust Neck Indians in Dorchester County, and State of Maryland, of the one part, and Henry Waggaman, William Bond Martin, James Steele and William Marbury, Commissioners for the State of Maryland of the other part. Whereas the said Henry Waggaman, William Bond Martin, James Steele, Moses Lecompte and William Marbury or a majority of them were appointed by an Act of Assembly of Maryland held at the City of Annapolis on the fifth day of November in the year seventeen hundred and Ninety eight Commissioners to contract for and purchase the Lands commonly called The Choptank Indian Lands, and whereas the said Mary Mulberry, Henry Mulberry, Henry Sixpence, and Thomas Joshua, are all that remain of those Indian[s] who possessed the Choptank Indian lands aforesaid & are now inhabiting the same. NOW THIS INDENTURE WITNESSETH that they the said Mary Mulberry, Henry Mulberry, Henry Sixpence and Thomas Joshua for and in consideration of the covenants and agreements herein after mentioned to be done and performed on the part of the said State of Maryland as agreed to by the said Commissioners parties to these presents, have bargained, sold, aliened, released, enfeoffed and confirmed & by these presents, do bargain, sell, alien, release, enfeoff and confirm unto the said State of Maryland all the lands, Tenements and Appurtenances which they hold and possess, commonly known by the name of The Choptank Indian Lands, situate [on] the river Choptank in the county aforesaid agreeable to the metes and

STATE OF MAINE.

IN COUNCIL, March 20, 1843.

Ordered, That the secretary of state be requested to cause the treaties, bonds and other documents, now on file in the secretary's office, in relation to the Penobscot and Passamaquoddy tribes of Indians, necessary to be preserved as evidence of their title to their lands, and their claims against the state, to be printed with the resolves for the year 1843.

CYRUS MOORE, per order.

Read and passed.

ATTEST: P. C. JOHNSON, *Sec'y of State.*

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

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

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

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

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

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

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

his
Sock ⋈ Joseph, Captain. (Seal.)
mark.
his
John ⋈ Nicholas, Captain. (Seal.)
mark.
his
Etien ⋈ Mitchell, Captain. (Seal.)
mark.
his
Piel ⋈ Marie. (Seal.)
mark.
his
Piel ⋈ Peruit, Colo. (Seal.)
mark.
his
Piel ⋈ Tomah. (Seal.)
mark.

Signed, sealed and delivered in presence of us:

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

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

BEFORE ME,
WILLIAM D. WILLIAMSON, Justice of the Peace.

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

Copy examined.

A. BRADFORD, Secretary
of commonwealth of Massachusetts.

Treaty made with the Penobscot tribe of Indians, August 17, 1820.

Whereas, The state of Maine by her commissioner, Lothrop Lewis, Esq., has engaged to assume and perform all the duties and obligations of the commonwealth of Massachusetts towards us and

Title 30: FEDERALLY RECOGNIZED INDIAN TRIBES

Chapter 601: MAINE INDIAN CLAIMS SETTLEMENT

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Maine Revised Statutes

Title 30: FEDERALLY RECOGNIZED INDIAN TRIBES

Chapter 601: MAINE INDIAN CLAIMS SETTLEMENT

§6201. SHORT TITLE

This Act shall be known and may be cited as "AN ACT to Implement the Maine Indian Claims Settlement." [1979, c. 732, §§ 1, 31 (NEW).]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW).

§6202. LEGISLATIVE FINDINGS AND DECLARATION OF POLICY

The Legislature finds and declares the following. [1979, c. 732, §§1, 31 (NEW).]

The Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians are asserting claims for possession of large areas of land in the State and for damages alleging that the lands in question originally were transferred in violation of the Indian Trade and Intercourse Act of 1790, 1 Stat. 137, or subsequent reenactments or versions thereof. [1979, c. 732, §§1, 31 (NEW).]

Substantial economic and social hardship could be created for large numbers of landowners, citizens and communities in the State, and therefore to the State as a whole, if these claims are not resolved promptly. [1979, c. 732, §§1, 31 (NEW).]

The claims also have produced disagreement between the Indian claimants and the State over the extent of the state's jurisdiction in the claimed areas. This disagreement has resulted in litigation and, if the claims are not resolved, further litigation on jurisdictional issues would be likely. [1979, c. 732, §§1, 31 (NEW).]

The Indian claimants and the State, acting through the Attorney General, have reached certain agreements which represent a good faith effort on the part of all parties to achieve a fair and just resolution of those claims which, in the absence of agreement, would be pursued through the courts for many years to the ultimate detriment of the State and all its citizens, including the Indians. [1979, c. 732, §§1, 31 (NEW).]

The foregoing agreement between the Indian claimants and the State also represents a good faith effort by the Indian claimants and the State to achieve a just and fair resolution of their disagreement over jurisdiction on the present Passamaquoddy and Penobscot Indian reservations and in the claimed areas. To that end, the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State. [1979, c. 732, §§1, 31 (NEW).]

It is the purpose of this Act to implement in part the foregoing agreement. [1979, c. 732, §§1, 31 (NEW).]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW).

§6203. DEFINITIONS

As used in this Act, unless the context indicates otherwise, the following terms have the following meanings. [1979, c. 732, §§1, 31 (NEW).]

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

[1979, c. 732, §§1, 31 (NEW) .]

2. **Houlton Band of Maliseet Indians.** "Houlton Band of Maliseet Indians" means the Maliseet Tribe of Indians as constituted on March 4, 1789, and all its predecessors and successors in interest, which, as of the date of passage of this Act, are represented, as to lands within the United States, by the Houlton Band Council of the Houlton Band of Maliseet Indians.

[1979, c. 732, §§1, 31 (NEW) .]

2-A. **Houlton Band Trust Land.** "Houlton Band Trust Land" means land or natural resources acquired by the secretary in trust for the Houlton Band of Maliseet Indians, in compliance with the terms of this Act and the Maine Indian Claims Settlement Act of 1980, United States Public Law 96-420, with moneys from the original $900,000 congressional appropriation and interest thereon deposited in the Land Acquisition Fund established for the Houlton Band of Maliseet Indians pursuant to United States Public Law 96-420, Section 5, United States Code, Title 25, Section 1724, or with proceeds from a taking of Houlton Band Trust Land for public uses pursuant to the laws of this State or the United States.

[1981, c. 675, §§1, 8 (NEW) .]

3. **Land or other natural resources.** "Land or other natural resources" means any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, minerals and mineral rights, timber and timber rights, water and water rights and hunting and fishing rights.

[1979, c. 732, §§1, 31 (NEW) .]

4. **Laws of the State.** "Laws of the State" means the Constitution and all statutes, rules or regulations and the common law of the State and its political subdivisions, and subsequent amendments thereto or judicial interpretations thereof.

[1979, c. 732, §§1, 31 (NEW) .]

5. **Passamaquoddy Indian Reservation.** "Passamaquoddy Indian Reservation" means those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19, 1794, excepting any parcel within such lands transferred to a person or entity other than a member of the Passamaquoddy Tribe subsequent to such agreement and prior to the effective date of this Act. If any lands reserved to the Passamaquoddy Tribe by the aforesaid agreement hereafter are acquired by the Passamaquoddy Tribe, or the secretary on its behalf, that land shall be included within the Passamaquoddy Indian Reservation. For purposes of this subsection, the lands reserved to the Passamaquoddy Tribe by the aforesaid agreement shall be limited to Indian Township in Washington County; Pine Island, sometimes referred to as Taylor's Island, located in Big Lake, in Washington County; 100 acres of land located on Nemcass Point, sometimes referred to as Governor's Point, located in Washington County and shown on a survey of John Gardner which is filed in the Maine State Archives, Executive Council Records, Report Number 264 and dated June 5, 1855; 100 acres of land located at Pleasant Point in Washington County as described in a deed to Captain John Frost from Theodore Lincoln, Attorney for Benjamin Lincoln, Thomas Russell, and John Lowell dated July 14, 1792, and recorded in the Washington County Registry of Deeds on April 27, 1801, at Book 3, Page 73; and those 15 islands in the St. Croix River in existence on September 19, 1794 and located between the head of the tide of that river and the falls below the forks of that river, both of which points are shown on a 1794 plan of Samuel Titcomb which is filed in the Maine State Archives in Maine Land Office Plan Book Number 1, page 33. The "Passamaquoddy Indian Reservation" includes those lands which have been or may be acquired by the Passamaquoddy Tribe within that portion of the Town of Perry which lies south of Route 1 on the east side of Route 190 and south of lands now owned or formerly

owned by William Follis on the west side of Route 190, provided that no such lands may be included in the Passamaquoddy Indian Reservation until the Secretary of State receives certification from the treasurer of the Town of Perry that the Passamaquoddy Tribe has paid to the Town of Perry the amount of $350,000, provided that the consent of the Town of Perry would be voided unless the payment of the $350,000 is made within 120 days of the effective date of this section. Any commercial development of those lands must be by approval of the voters of the Town of Perry with the exception of land development currently in the building stages.

[1985, c. 747, §1 (AMD) .]

6. **Passamaquoddy Indian territory.** "Passamaquoddy Indian territory" means that territory defined by section 6205, subsection 1.

[1979, c. 732, §§1, 31 (NEW) .]

7. **Passamaquoddy Tribe.** "Passamaquoddy Tribe" means the Passamaquoddy Indian Tribe as constituted on March 4, 1789, and all its predecessors and successors in interest, which, as of the date of passage of this Act, are represented by the Joint Tribal Council of the Passamaquoddy Tribe, with separate councils at the Indian Township and Pleasant Point Reservations.

[1979, c. 732, §§1, 31 (NEW) .]

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

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

The "Penobscot Indian Reservation" also includes a certain parcel of land located in Argyle, Penobscot County consisting of approximately 714 acres known as the Argyle East Parcel and more particularly described as Parcel One in a deed from the Penobscot Indian Nation to the United States of America dated November 22, 2005 and recorded at the Penobscot County Registry of Deeds in Book 10267, Page 265.

[2009, c. 636, Pt. B, §1 (AMD); 2009, c. 636, Pt. B, §2 (AFF) .]

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

[1979, c. 732, §§1, 31 (NEW) .]

10. **Penobscot Nation.** "Penobscot Nation" means the Penobscot Indian Nation as constituted on March 4, 1789, and all its predecessors and successors in interest, which, as of the date of passage of this Act, are represented by the Penobscot Reservation Tribal Council.

[1979, c. 732, §§1, 31 (NEW) .]

11. **Secretary.** "Secretary" means the Secretary of the Interior of the United States.

[1979, c. 732, §§1, 31 (NEW) .]

12. **Settlement Fund.** "Settlement Fund" means the trust fund established for the Passamaquoddy Tribe and Penobscot Nation by the United States pursuant to congressional legislation extinquishing aboriginal land claims in Maine.

[1979, c. 732, §§1, 31 (NEW) .]

13. **Transfer.** "Transfer" includes, but is not necessarily limited to, 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 other conveyance; and any act, event or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or other natural resources.

[1979, c. 732, §§1, 31 (NEW) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1981, c. 675, §§1,8 (AMD). 1985, c. 747, §1 (AMD). 1987, c. 712, §§1,2 (AMD). 2009, c. 636, Pt. B, §1 (AMD). 2009, c. 636, Pt. B, §2 (AFF).

§6204. LAWS OF THE STATE TO APPLY TO INDIAN LANDS

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. [1979, c. 732, §§ 1, 31 (NEW).]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW).

§6205. INDIAN TERRITORY

1. **Passamaquoddy Indian territory.** Subject to subsections 3, 4 and 5, the following lands within the State are known as the "Passamaquoddy Indian territory:"

A. The Passamaquoddy Indian Reservation; [1993, c. 713, §1 (AMD); 1993, c. 713, §2 (AFF).]

B. The first 150,000 acres of land acquired by the secretary for the benefit of the Passamaquoddy Tribe from the following areas or lands to the extent that those lands are acquired by the secretary prior to January 31, 1991, are not held in common with any other person or entity and are certified by the secretary by January 31, 1991, as held for the benefit of the Passamaquoddy Tribe:

The lands of Great Northern Nekoosa Corporation located in T.1, R.8, W.B.K.P. (Lowelltown), T.6, R.1, N.B.K.P. (Holeb), T.2, R.10, W.E.L.S. and T.2, R.9, W.E.L.S.; the land of Raymidga Company located in T.1, R.5, W.B.K.P. (Jim Pond), T.4, R.5, B.K.P.W.K.R. (King and Bartlett), T.5, R.6, B.K.P.W.K.R. and T.3, R.5, B.K.P.W.K.R.; the land of the heirs of David Pingree located in T.6, R.8, W.E.L.S.; any portion of Sugar Island in Moosehead Lake; the lands of Prentiss and Carlisle Company located in T.9, S.D.; any portion of T.24, M.D.B.P.P.; the lands of Bertram C. Tackeff or Northeastern Blueberry Company, Inc. in T.19, M.D.B.P.P.; any portion of T.2, R.8, N.W.P.; any portion of T.2, R.5, W.B.K.P. (Alder Stream); the lands of Dead River Company in T.3, R.9, N.W.P., T.2, R.9, N.W.P., T.5, R.1, N.B.P.P. and T.5, N.D.B.P.P.; any portion of T.3, R.1, N.B.P.P.; any portion of T.3, N.D.; any portion of T.4, N.D.; any portion of T.39, M.D.; any portion of T.40, M.D.; any portion of T.41, M.D.; any

portion of T.42, M.D.B.P.P.; the lands of Diamond International Corporation, International Paper Company and Lincoln Pulp and Paper Company located in Argyle; and the lands of the Dyer Interests in T.A.R.7 W.E.L.S., T.3 R.9 N.W.P., T.3 R.3. N.B.K.P. (Alder Brook Township), T.3 R.4 N.B.K.P. (Hammond Township), T.2 R.4 N.B.K.P. (Pittston Academy Grant), T.2 R.3 N.B.K.P. (Soldiertown Township), and T.4 R.4 N.B.K.P. (Prentiss Township), and any lands in Albany Township acquired by the Passamaquoddy Tribe before January 1, 1991; [2001, c. 251, §1 (AMD); 2001, c. 251, §4 (AFF).]

C. Any land not exceeding 100 acres in the City of Calais acquired by the secretary for the benefit of the Passamaquoddy Tribe as long as the land is acquired by the secretary prior to January 1, 2001, is not held in common with any other person or entity and is certified by the secretary by January 31, 2001, as held for the benefit of the Passamaquoddy Tribe, if:

(1) The acquisition of the land by the tribe is approved by the legislative body of that city; and

(2) A tribal-state compact under the federal Indian Gaming Regulatory Act is agreed to by the State and the Passamaquoddy Tribe or the State is ordered by a court to negotiate such a compact; [2007, c. 221, §1 (AMD); 2007, c. 221, §4 (AFF); 2007, c. 223, §1 (AMD); 2007, c. 223, §4 (AFF).]

D. All land acquired by the secretary for the benefit of the Passamaquoddy Tribe in T. 19, M.D. to the extent that the land is acquired by the secretary prior to January 31, 2020, is not held in common with any other person or entity and is certified by the secretary by January 31, 2020 as held for the benefit of the Passamaquoddy Tribe; [2007, c. 1, §14 (COR).]

D-1. Land acquired by the secretary for the benefit of the Passamaquoddy Tribe in Centerville consisting of Parcels A, B and C conveyed by Bertram C. Tackeff to the Passamaquoddy Tribe by quitclaim deed dated July 27, 1981, recorded in the Washington County Registry of Deeds in Book 1147, Page 251, to the extent that the land is acquired by the secretary prior to January 31, 2017, is not held in common with any other person or entity and is certified by the secretary by January 31, 2017 as held for the benefit of the Passamaquoddy Tribe; [2013, c. 91, §1 (AMD); 2013, c. 91, §3 (AFF).]

D-2. Land acquired by the secretary for the benefit of the Passamaquoddy Tribe in Centerville conveyed by Bertram C. Tackeff to the Passamaquoddy Tribe by quitclaim deed dated May 4, 1982, recorded in the Washington County Registry of Deeds in Book 1178, Page 35, to the extent that the land is acquired by the secretary prior to January 31, 2023, is not held in common with any other person or entity and is certified by the secretary by January 31, 2023 as held for the benefit of the Passamaquoddy Tribe; and [2013, c. 91, §2 (NEW); 2013, c. 91, §3 (AFF).]

E. Land acquired by the secretary for the benefit of the Passamaquoddy Tribe in Township 21 consisting of Gordon Island in Big Lake, conveyed by Domtar Maine Corporation to the Passamaquoddy Tribe by corporate quitclaim deed dated April 30, 2002, recorded in the Washington County Registry of Deeds in Book 2624, Page 301, to the extent that the land is acquired by the secretary prior to January 31, 2017, is not held in common with any other person or entity and is certified by the secretary by January 31, 2017 as held for the benefit of the Passamaquoddy Tribe. [2007, c. 223, §3 (NEW); 2007, c. 223, §4 (AFF).]

[2013, c. 91, §§1, 2 (AMD); 2013, c. 91, §3 (AFF) .]

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

A. The Penobscot Indian Reservation; and [1979, c. 732, §1 (NEW).]

B. The first 150,000 acres of land acquired by the secretary for the benefit of the Penobscot Nation from the following areas or lands to the extent that those lands are acquired by the secretary prior to January 31, 2021, are not held in common with any other person or entity and are certified by the secretary by January 31, 2021, as held for the Penobscot Nation:

The lands of Great Northern Nekoosa Corporation located in T.1, R.8, W.B.K.P. (Lowelltown), T.6, R.1, N.B.K.P. (Holeb), T.2, R.10, W.E.L.S. and T.2, R.9, W.E.L.S.; the land of Raymidga Company located in T.1, R.5, W.B.K.P. (Jim Pond), T.4, R.5, B.K.P.W.K.R. (King and Bartlett), T.5, R.6, B.K.P.W.K.R. and T.3, R.5, B.K.P.W.K.R.; the land of the heirs of David Pingree located in T.6, R.8, W.E.L.S.; any portion of Sugar Island in Moosehead Lake; the lands of Prentiss and Carlisle Company located in T.9, S.D.; any portion of T.24, M.D.B.P.P.; the lands of Bertram C. Tackeff or Northeastern Blueberry Company, Inc. in T.19, M.D.B.P.P.; any portion of T.2, R.8, N.W.P.; any portion of T.2, R.5, W.B.K.P. (Alder Stream); the lands of Dead River Company in T.3, R.9, N.W.P., T.2, R.9, N.W.P., T.5, R.1, N.B.P.P. and T.5, N.D.B.P.P.; any portion of T.3, R.1, N.B.P.P.; any portion of T.3, N.D.; any portion of T.4, N.D.; any portion of T.39, M.D.; any portion of T.40, M.D.; any portion of T.41, M.D.; any portion of T.42, M.D.B.P.P.; the lands of Diamond International Corporation, International Paper Company and Lincoln Pulp and Paper Company located in Argyle; any land acquired in Williamsburg T.6, R.8, N.W.P.; any 300 acres in Old Town mutually agreed upon by the City of Old Town and the Penobscot Nation Tribal Government, provided that the mutual agreement must be finalized prior to August 31, 1991; any lands in Lakeville acquired by the Penobscot Nation before January 1, 1991; and all the property acquired by the Penobscot Indian Nation from Herbert C. Haynes, Jr., Herbert C. Haynes, Inc. and Five Islands Land Corporation located in Township 1, Range 6 W.E.L.S. [1999, c. 625, §1 (AMD).]

[1999, c. 625, §1 (AMD) .]

3. Takings under the laws of the State.

A. Prior to any taking of land for public uses within either the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation, the public entity proposing the taking, or, in the event of a taking proposed by a public utility, the Public Utilities Commission, shall be required to find that there is no reasonably feasible alternative to the proposed taking. In making this finding, the public entity or the Public Utilities Commission shall compare the cost, technical feasibility, and environmental and social impact of the available alternatives, if any, with the cost, technical feasibility and environmental and social impact of the proposed taking. Prior to making this finding, the public entity or Public Utilities Commission, after notice to the affected tribe or nation, shall conduct a public hearing in the manner provided by the Maine Administrative Procedure Act, on the affected Indian reservation. The finding of the public entity or Public Utilities Commission may be appealed to the Maine Superior Court.

In the event of a taking of land for public uses within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation, the public entity or public utility making the taking shall, at the election of the affected tribe or nation, and with respect to individually allotted lands, at the election of the affected allottee or allottees, acquire by purchase or otherwise for the respective tribe, nation, allottee or allottees a parcel or parcels of land equal in value to that taken; contiguous to the affected Indian reservation; and as nearly adjacent to the parcel taken as practicable. The land so acquired shall, upon written certification to the Secretary of State by the public entity or public utility acquiring such land describing the location and boundaries thereof, be included within the Indian Reservation of the affected tribe or nation without further approval of the State. For purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation. The acquisition of land for the Passamaquoddy Tribe or the Penobscot Nation or any allottee under this subsection shall be full compensation for any such taking. If the affected tribe, nation, allottee or allottees elect not to have a substitute parcel acquired in accordance with this subsection, the moneys received for such taking shall be reinvested in accordance with the provisions of paragraph B. [1979, c. 732, §1 (NEW).]

B. If land within either the Passamaquoddy Indian Territory or the Penobscot Indian Territory but not within either the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation is taken for public uses in accordance with the laws of the State the money received for said land shall be reinvested in other lands within 2 years of the date on which the money is received. To the extent that any moneys received are so reinvested in land with an area not greater than the area of the land taken and located within an unorganized or unincorporated area of the State, the lands so acquired by such reinvestment

shall be included within the respective Indian territory without further approval of the State. To the extent that any moneys received are so reinvested in land with an area greater than the area of the land taken and located within an unorganized or unincorporated area of the State, the respective tribe or nation shall designate, within 30 days of such reinvestment, that portion of the land acquired by such reinvestment, not to exceed the area taken, which shall be included within the respective Indian territory. No land acquired pursuant to this paragraph shall be included within either Indian Territory until the Secretary of Interior has certified, in writing, to the Secretary of State the location and boundaries of the land acquired. [1979, c. 732, §1 (NEW).]

[1979, c. 732, §1 (NEW) .]

4. **Taking under the laws of the United States.** In the event of a taking of land within the Passamaquoddy Indian territory or the Penobscot Indian territory for public uses in accordance with the laws of the United States and the reinvestment of the moneys received from such taking within 2 years of the date on which the moneys are received, the status of the lands acquired by such reinvestment shall be determined in accordance with subsection 3, paragraph B.

[1979, c. 732, §§1, 31 (NEW) .]

5. **Limitations.** No lands held or acquired by or in trust for the Passamaquoddy Tribe or the Penobscot Nation, other than those described in subsections 1, 2, 3 and 4, shall be included within or added to the Passamaquoddy Indian territory or the Penobscot Indian territory except upon recommendation of the commission and approval of the State to be given in the manner required for the enactment of laws by the Legislature and Governor of Maine, provided, however, that no lands within any city, town, village or plantation shall be added to either the Passamaquoddy Indian territory or the Penobscot Indian territory without approval of the legislative body of said city, town, village or plantation in addition to the approval of the State.

Any lands within the Passamaquoddy Indian territory or the Penobscot Indian territory, the fee to which is transferred to any person who is not a member of the respective tribe or nation, shall cease to constitute a portion of Indian territory and shall revert to its status prior to the inclusion thereof within Indian territory.

[1979, c. 732, §§1, 31 (NEW) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1983, c. 493, §1 (AMD). 1983, c. 494, §1 (AMD). 1983, c. 660, §§1,2 (AMD). 1983, c. 676, §§1,2 (AMD). 1985, c. 69, §1 (AMD). 1985, c. 637, §§1,2 (AMD). 1985, c. 639, §§1,2 (AMD). 1985, c. 747, §2 (AMD). 1987, c. 153, §§1-3 (AMD). 1991, c. 720, §1 (AMD). 1991, c. 720, §2 (AFF). 1991, c. 721, §1 (AMD). 1991, c. 721, §2 (AFF). 1993, c. 713, §1 (AMD). 1993, c. 713, §2 (AFF). 1995, c. 601, §1 (AMD). 1995, c. 601, §2 (AFF). 1999, c. 625, §1 (AMD). 2001, c. 251, §§1-3 (AMD). 2001, c. 251, §4 (AFF). RR 2007, c. 1, §§14, 15 (COR). 2007, c. 221, §§1-3 (AMD). 2007, c. 221, §4 (AFF). 2007, c. 223, §§1-3 (AMD). 2007, c. 223, §4 (AFF). 2013, c. 91, §§1, 2 (AMD). 2013, c. 91, §3 (AFF).

§6205-A. ACQUISITION OF HOULTON BAND TRUST LAND

1. **Approval.** The State of Maine approves the acquisition, by the secretary, of Houlton Band Trust Land within the State of Maine provided as follows.

A. No land or natural resources acquired by the secretary may have the status of Houlton Band Trust Land, or be deemed to be land or natural resources held in trust by the United States, until the secretary files with the Maine Secretary of State a certified copy of the deed, contract or other instrument of conveyance, setting forth the location and boundaries of the land or natural resources so acquired. Filing by mail shall be complete upon mailing. [1981, c. 675, §§2, 8 (AMD).]

B. No land or natural resources may be acquired by the secretary for the Houlton Band of Maliseet Indians until the secretary files with the Maine Secretary of State a certified copy of the instrument creating the trust described in section 6208-A, together with a letter stating that he holds not less than $100,000 in a trust account for the payment of Houlton Band of Maliseet Indians' obligations, and a copy of the claim filing procedures he has adopted. [1981, c. 675, §§2, 8 (AMD).]

C. No land or natural resources located within any city, town, village or plantation may be acquired by the secretary for the Houlton Band of Maliseet Indians without the approval of the legislative body of the city, town, village or plantation. [1981, c. 675, §§2, 8 (AMD).]

[1981, c. 675, §§2, 8 (AMD) .]

2. Takings for public uses. Houlton Band Trust Land may be taken for public uses in accordance with the laws of the State of Maine to the same extent as privately-owned land. The proceeds from any such taking shall be deposited in the Land Acquisition Fund. The United States shall be a necessary party to any such condemnation proceeding. After exhausting all state administrative remedies, the United States shall have an absolute right to remove any action commenced in the courts of this State to a United States' court of competent jurisdiction.

[1981, c. 675, §§2, 8 (AMD) .]

3. Restraints on alienation. Any transfer of Houlton Band Trust Land shall be void ab initio and without any validity in law or equity, except:

A. Takings for public uses pursuant to the laws of this State; [1981, c. 675, §§2, 8 (AMD).]

B. Takings for public uses pursuant to the laws of the United States; [1981, c. 675, §§2, 8 (AMD).]

C. Transfers of individual use assignments from one member of the Houlton Band of Maliseet Indians to another band member; [1981, c. 675, §§2, 8 (AMD).]

D. Transfers authorized by United States Public Law 96-420, Section 5(g)(3), United States Code, Title 25, Section 1724(g)(3); and [1981, c. 675, §§2, 8 (AMD).]

E. Transfers made pursuant to a special act of Congress. [1981, c. 675, §§2, 8 (AMD).]

If the fee to the Houlton Band Trust Fund Land is lawfully transferred to any person or entity, the land so transferred shall cease to have the status of Houlton Band Trust Land.

[1981, c. 675, §§2, 8 (AMD) .]

SECTION HISTORY
1981, c. 675, §§2,8 (NEW).

§6206. POWERS AND DUTIES OF THE INDIAN TRIBES WITHIN THEIR RESPECTIVE INDIAN TERRITORIES

1. General Powers. Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of

and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. The Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to implement and administer those laws of the State applicable to the respective Indian territories and the residents thereof. Any resident of the Passamaquoddy Indian territory or the Penobscot Indian territory who is not a member of the respective tribe or nation nonetheless shall be equally entitled to receive any municipal or governmental services provided by the respective tribe or nation or by the State, except those services which are provided exclusively to members of the respective tribe or nation pursuant to state or federal law, and shall be entitled to vote in national, state and county elections in the same manner as any tribal member residing within Indian territory.

[1979, c. 732, §§ 1, 31 (NEW) .]

2. **Power to sue and be sued.** The Passamaquoddy Tribe, the Penobscot Nation and their members may sue and be sued in the courts of the State to the same extent as any other entity or person in the State provided, however, that the respective tribe or nation and its officers and employees shall be immune from suit when the respective tribe or nation is acting in its governmental capacity to the same extent as any municipality or like officers or employees thereof within the State.

[1979, c. 732, §§ 1, 31 (NEW) .]

3. **Ordinances.** The Passamaquoddy Tribe and the Penobscot Nation each shall have the right to exercise exclusive jurisdiction within its respective Indian territory over violations by members of either tribe or nation of tribal ordinances adopted pursuant to this section or section 6207. The decision to exercise or terminate the jurisdiction authorized by this section shall be made by each tribal governing body. Should either tribe or nation choose not to exercise, or to terminate its exercise of, jurisdiction as authorized by this section or section 6207, the State shall have exclusive jurisdiction over violations of tribal ordinances by members of either tribe or nation within the Indian territory of that tribe or nation. The State shall have exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation.

[1979, c. 732, §§ 1, 31 (NEW) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW).

§6206-A. POWERS OF THE HOULTON BAND OF MALISEET INDIANS

The Houlton Band of Maliseet Indians shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers. [1981, c. 675, §§3, 8 (NEW).]

SECTION HISTORY
1981, c. 675, §§3,8 (NEW).

§6206-B. LAW ENFORCEMENT POWERS OF HOULTON BAND OF MALISEET INDIANS

1. **Appointment of tribal law enforcement officers.** The Houlton Band of Maliseet Indians may appoint law enforcement officers who have the authority to enforce all the laws of the State within the Houlton Band Trust Land. This section does not limit the existing authority of tribal officers under tribal law or affect the performance of federal duties by tribal officers.

[2005, c. 310, §1 (NEW); 2005, c. 310, §2 (AFF) .]

2. **Authority of state, county and local law enforcement officers.** State and county law enforcement officers and law enforcement officers appointed by the Town of Houlton have the authority to enforce all laws of the State within the Houlton Band Trust Land.

[2005, c. 310, §1 (NEW); 2005, c. 310, §2 (AFF) .]

3. **Agreements for cooperation and mutual aid.** The Houlton Band of Maliseet Indians and any state, county or local law enforcement agency may enter into agreements for cooperation and mutual aid.

[2005, c. 310, §1 (NEW); 2005, c. 310, §2 (AFF) .]

4. **Powers, duties and training requirements.** Law enforcement officers appointed by the Houlton Band of Maliseet Indians pursuant to this section possess the same powers, enjoy the same immunities and are subject to the same duties, limitations and training requirements as other corresponding law enforcement officers under the laws of the State.

[2005, c. 310, §1 (NEW); 2005, c. 310, §2 (AFF) .]

5. **Report to Legislature.** By January 1, 2010, the Houlton Band of Maliseet Indians shall file a report with the joint standing committee of the Legislature having jurisdiction over judiciary matters detailing the band's experience with the exercise of law enforcement authority under this section. The report must include observations and comments from the state and county law enforcement agencies providing law enforcement services in Aroostook County and from the Houlton Police Department.

[2005, c. 310, §1 (NEW); 2005, c. 310, §2 (AFF) .]

6. **Repeal.**

[2009, c. 384, Pt. A, §4 (AFF); 2009, c. 384, Pt. A, §1 (RP) .]

SECTION HISTORY
2005, c. 310, §1 (NEW). 2005, c. 310, §2 (AFF). 2009, c. 384, Pt. A, §1 (AMD). 2009, c. 384, Pt. A, §4 (AFF).

§6207. REGULATION OF FISH AND WILDLIFE RESOURCES

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

A. Hunting, trapping or other taking of wildlife; and [1979, c. 732, §§1, 31 (NEW).]

B. Taking of fish on any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area. [1979, c. 732, §§1, 31 (NEW).]

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

[1979, c. 732, §§1, 31 (NEW) .]

2. The Passamaquoddy Tribe and the Penobscot Nation shall establish and maintain registration stations for the purpose of registering bear, moose, deer and other wildlife killed within their respective Indian territories and shall adopt ordinances requiring registration of such wildlife to the extent and in substantially the same manner as such wildlife are required to be registered under the laws of the State. These ordinances requiring registration shall be equally applicable to all persons without distinction based on tribal membership. The Passamaquoddy Tribe and the Penobscot Nation shall report the deer, moose, bear and other wildlife killed and registered within their respective Indian territories to the Commissioner of Inland Fisheries and Wildlife of the State at such times as the commissioner deems appropriate. The records of registration of the Passamaquoddy Tribe and the Penobscot Nation shall be available, at all times, for inspection and examination by the commissioner.

[1979, c. 732, §§1, 31 (NEW) .]

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

A. Any pond other than those specified in subsection 1, paragraph B, 50% or more of the linear shoreline of which is within Indian territory; [1979, c. 732, §§1, 31 (NEW).]

B. Any section of a river or stream both sides of which are within Indian territory; and [1979, c. 732, §§1, 31 (NEW).]

C. Any section of a river or stream one side of which is within Indian territory for a continuous length of 1/2 mile or more. [1979, c. 732, §§1, 31 (NEW).]

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

Said rules or regulations shall be equally applicable on a nondiscriminatory basis to all persons regardless of whether such person is a member of the Passamaquoddy Tribe or Penobscot Nation. Rules and regulations promulgated by the commission may include the imposition of fees and permits or license requirements on users of such waters other than members of the Passamaquoddy Tribe and the Penobscot Nation. In adopting rules or regulations pursuant to this subsection, the commission shall comply with the Maine Administrative Procedure Act.

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

[1979, c. 732, §§1, 31 (NEW) .]

3-A. **Horsepower and use of motors.** Subject to the limitations of subsection 6, the commission has exclusive authority to adopt rules to regulate the horsepower and use of motors on waters less than 200 acres in surface area and entirely within Indian territory.

Subsection 3-A not in effect as to Passamaquoddy Tribe or Penobscot Nation because requirements of PL 1997, c. 739, §§13, 14 were not met

[1997, c. 739, §12 (NEW); 1997, c. 739, §§13, 14 (AFF) .]

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

[1979, c. 732, §§1, 31 (NEW) .]

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

[1979, c. 732, §§1, 31 (NEW) .]

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

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

[1979, c. 732, §§1, 31 (NEW) .]

7. **Transportation of game.** Fish lawfully taken within Indian territory or in waters subject to commission regulation and wildlife lawfully taken within Indian territory and registered pursuant to ordinances adopted by the Passamaquoddy Tribe and the Penobscot Nation, may be transported within the State.

[1979, c. 732, §§1, 31 (NEW) .]

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

[1979, c. 732, §§1, 31 (NEW) .]

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

[1979, c. 732, §§1, 31 (NEW) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1997, c. 739, §12 (AMD). 1997, c. 739, §§13,14 (AFF).

§6208. TAXATION

1. **Settlement Fund income.** The Settlement Fund and any portion of such funds or income therefrom distributed to the Passamaquoddy Tribe or the Penobscot Nation or the members thereof shall be exempt from taxation under the laws of the State.

[1979, c. 732, §§1, 31 (NEW) .]

2. **Property taxes.** The Passamaquoddy Tribe and the Penobscot Nation shall make payments in lieu of taxes on all real and personal property within their respective Indian territory in an amount equal to that which would otherwise be imposed by a county, a district, the State, or other taxing authority on such real and personal property provided, however, that any real or personal property within Indian territory used by either tribe or nation predominantly for governmental purposes shall be exempt from taxation to the same extent that such real or personal property owned by a municipality is exempt under the laws of the State. The Houlton Band of Maliseet Indians shall make payments in lieu of taxes on Houlton Band Trust Land in an amount equal to that which would otherwise be imposed by a municipality, county, district, the State or other taxing authority on that land or natural resource. Any other real or personal property owned by or held in trust for any Indian, Indian Nation or tribe or band of Indians and not within Indian territory, shall be subject to levy and collection of real and personal property taxes by any and all taxing authorities, including but without limitation municipalities, except that such real and personal property owned by or held for the benefit of and used by the Passamaquoddy Tribe or the Penobscot Nation predominantly for governmental purposes shall be exempt from property taxation to the same extent that such real and personal property owned by a municipality is exempt under the laws of the State.

[1985, c. 672, §§2, 4 (AMD) .]

2-A. **Payments in lieu of taxes; authority.** Any municipality in which Houlton Band Trust Land is located has the authority, at its sole discretion, to enter into agreements with the Houlton Band of Maliseet Indians to accept other funds or other things of value that are obtained by or for the Houlton Band of Maliseet Indians by reason of the trust status of the trust land as replacement for payments in lieu of taxes.

Any agreement between the Houlton Band of Maliseet Indians and the municipality must be jointly executed by persons duly authorized by the Houlton Band of Maliseet Indians and the municipality and must set forth the jointly agreed value of the funds or other things identified serving as replacement of payments in lieu of taxes and the time period over which such funds or other things may serve in lieu of the obligations of the Houlton Band of Maliseet Indians provided in this section.

[2009, c. 384, Pt. A, §2 (NEW); 2009, c. 384, Pt. A, §4 (AFF) .]

3. **Other taxes.** The Passamaquoddy Tribe, the Penobscot Nation, the members thereof, and any other Indian, Indian Nation, or tribe or band of Indians shall be liable for payment of all other taxes and fees to the same extent as any other person or entity in the State. For purposes of this section either tribe or nation, when acting in its business capacity as distinguished from its governmental capacity, shall be deemed to be a business corporation organized under the laws of the State and shall be taxed as such.

[1985, c. 672, §§3, 4 (AMD) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1981, c. 675, §§4-6,8 (AMD). 1985, c. 672, §§2-4 (AMD). 2009, c. 384, Pt. A, §2 (AMD). 2009, c. 384, Pt. A, §4 (AFF).

§6208-A. HOULTON BAND TAX FUND

1. **Fund.** The satisfaction of obligations, described in section 6208, owed to a governmental entity by the Houlton Band of Maliseet Indians shall be assured by a trust fund to be known as the Houlton Band Tax Fund. The secretary shall administer the fund in accordance with reasonable and prudent trust management standards. The initial principal of the fund shall be not less than $100,000. The principal shall be formed with moneys transferred from the Land Acquisition Fund established for the Houlton Band of Maliseet Indians pursuant to United States Public Law 96-420, Section 5, United States Code, Title 25, Section 1724. Any interest earned by the Houlton Band Tax Fund shall be added to the principal as it accrues and that interest shall be exempt from taxation. The secretary shall maintain a permanent reserve of $25,000 at all times and that reserve shall not be made available for the payment of claims. The interest earned by the reserved funds shall also be added to the principal available for the payment of obligations.

[1981, c. 675, §§7, 8 (NEW) .]

2. **Claims.** The secretary shall pay from the fund all valid claims for taxes, payments in lieu of property taxes and fees, together with any interest and penalties thereon, for which the Houlton Band of Maliseet Indians is liable pursuant to section 6208, provided that such obligation is final and not subject to further direct administrative or judicial review under the laws of the State of Maine. No payment of a valid claim may be satisfied with moneys from the fund unless the secretary finds, as a result of his own inquiry, that no other source of funds controlled by the secretary is available to satisfy the obligation. The secretary shall adopt written procedures, consistent with this section, governing the filing and payment of claims after consultation with the Maine Commissioner of Finance and Administration and the Houlton Band of Maliseet Indians.

[1981, c. 675, §§7, 8 (NEW) .]

3. **Distributions.** If the unencumbered principal available for the payment of claims exceeds the sum of $100,000, the secretary shall, except for good cause shown, provide for the transfer of such excess principal to the Houlton Band of Maliseet Indians. The secretary shall give 30 days' written notice to the Commissioner of Finance and Administration of a proposed transfer of excess principal to the Houlton Band of Maliseet Indians. Any distribution of excess principal to the Houlton Band of Maliseet Indians shall be exempt from taxation.

[1981, c. 675, §§7, 8 (NEW) .]

4. **Other remedies.** The existence of the Houlton Band Tax Fund as a source for the payment of Houlton Band of Maliseet Indians' obligations shall not abrogate any other remedy available to a governmental entity for the collection of taxes, payments in lieu of taxes and fees, together with any interest or penalty thereon.

[1981, c. 675, §§7, 8 (NEW) .]

SECTION HISTORY
1981, c. 675, §§7,8 (NEW).

§6209. JURISDICTION OVER CRIMINAL OFFENSES, JUVENILE CRIMES, CIVIL DISPUTES AND DOMESTIC RELATIONS

(REPEALED)

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1987, c. 756, §§1,2 (AMD). 1989, c. 169, §§1,2 (AMD). 1991, c. 484, §8 (AMD). 1991, c. 484, §9 (AFF). 1991, c. 766, §1 (AMD). 1991, c. 766, §2 (AFF). 1995, c. 388, §8 (AFF). 1995, c. 388, §5 (RP).

§6209-A. JURISDICTION OF THE PASSAMAQUODDY TRIBAL COURT

1. **Exclusive jurisdiction over certain matters.** Except as provided in subsections 3 and 4, the Passamaquoddy Tribe has the right to exercise exclusive jurisdiction, separate and distinct from the State, over:

A. Criminal offenses for which the maximum potential term of imprisonment is less than one year and the maximum potential fine does not exceed $5,000 and that are committed on the Indian reservation of the Passamaquoddy Tribe by a member of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation, except when committed against a person who is not a member of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation or against the property of a person who is not a member of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation; [2009, c. 384, Pt. E, §1 (AMD); 2009, c. 384, Pt. E, §3 (AFF).]

B. Juvenile crimes against a person or property involving conduct that, if committed by an adult, would fall within the exclusive jurisdiction of the Passamaquoddy Tribe under paragraph A, and juvenile crimes, as defined in Title 15, section 3103, subsection 1, paragraphs B and C, committed by a juvenile member of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation on the reservation of the Passamaquoddy Tribe; [2009, c. 384, Pt. E, §1 (AMD); 2009, c. 384, Pt. E, §3 (AFF).]

C. Civil actions between members of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation arising on the Indian reservation of the Passamaquoddy Tribe and cognizable as small claims under the laws of the State, and civil actions against a member of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation under Title 22, section 2383 involving

conduct on the Indian reservation of the Passamaquoddy Tribe by a member of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation; [2009, c. 384, Pt. E, §1 (AMD); 2009, c. 384, Pt. E, §3 (AFF).]

D. Indian child custody proceedings to the extent authorized by applicable federal law; and [1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF).]

E. Other domestic relations matters, including marriage, divorce and support, between members of the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians or the Penobscot Nation, both of whom reside within the Indian reservation of the Passamaquoddy Tribe. [2009, c. 384, Pt. E, §1 (AMD); 2009, c. 384, Pt. E, §3 (AFF).]

The governing body of the Passamaquoddy Tribe shall decide whether to exercise or terminate the exercise of the exclusive jurisdiction authorized by this subsection. If the Passamaquoddy Tribe chooses not to exercise, or chooses to terminate its exercise of, jurisdiction over the criminal, juvenile, civil and domestic matters described in this subsection, the State has exclusive jurisdiction over those matters. Except as provided in paragraphs A and B, all laws of the State relating to criminal offenses and juvenile crimes apply within the Passamaquoddy Indian reservation and the State has exclusive jurisdiction over those offenses and crimes.

[2009, c. 384, Pt. E, §1 (AMD); 2009, c. 384, Pt. E, §3 (AFF) .]

2. Definitions of crimes; tribal procedures. In exercising its exclusive jurisdiction under subsection 1, paragraphs A and B, the Passamaquoddy Tribe is deemed to be enforcing Passamaquoddy tribal law. The definitions of the criminal offenses and juvenile crimes and the punishments applicable to those criminal offenses and juvenile crimes over which the Passamaquoddy Tribe has exclusive jurisdiction under this section are governed by the laws of the State. Issuance and execution of criminal process are also governed by the laws of the State. The procedures for the establishment and operation of tribal forums created to effectuate the purposes of this section are governed by federal statute, including, without limitation, the provisions of 25 United States Code, Sections 1301 to 1303 and rules or regulations generally applicable to the exercise of criminal jurisdiction by Indian tribes on federal Indian reservations.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

3. Lesser included offenses in state courts. In any criminal proceeding in the courts of the State in which a criminal offense under the exclusive jurisdiction of the Passamaquoddy Tribe constitutes a lesser included offense of the criminal offense charged, the defendant may be convicted in the courts of the State of the lesser included offense. A lesser included offense is as defined under the laws of the State.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

4. Double jeopardy, collateral estoppel. A prosecution for a criminal offense or juvenile crime over which the Passamaquoddy Tribe has exclusive jurisdiction under this section does not bar a prosecution for a criminal offense or juvenile crime, arising out of the same conduct, over which the State has exclusive jurisdiction. A prosecution for a criminal offense or juvenile crime over which the State has exclusive jurisdiction does not bar a prosecution for a criminal offense or juvenile crime, arising out of the same conduct, over which the Passamaquoddy Tribe has exclusive jurisdiction under this section. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a Passamaquoddy tribal forum does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a state court. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a state court does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a Passamaquoddy tribal forum.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

5. Future Indian communities. Any 25 or more adult members of the Passamaquoddy Tribe residing within their Indian territory and in reasonable proximity to each other may petition the commission for designation as an extended reservation. If the commission determines, after investigation, that the petitioning

Passamaquoddy tribal members constitute an extended reservation, the commission shall establish the boundaries of the extended reservation and recommend to the Legislature that, subject to the approval of the governing body of the Passamaquoddy Tribe, it amend this Act to extend the jurisdiction of the Passamaquoddy Tribe to the extended reservation. The boundaries of an extended reservation may not exceed those reasonably necessary to encompass the petitioning Passamaquoddy tribal members.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

SECTION HISTORY
1995, c. 388, §6 (NEW). 1995, c. 388, §8 (AFF). 2009, c. 93, §14 (AMD). 2009, c. 384, Pt. E, §1 (AMD). 2009, c. 384, Pt. E, §3 (AFF).

§6209-B. JURISDICTION OF THE PENOBSCOT NATION TRIBAL COURT

1. **Exclusive jurisdiction over certain matters.** Except as provided in subsections 3 and 4, the Penobscot Nation has the right to exercise exclusive jurisdiction, separate and distinct from the State, over:

A. Criminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Indian reservation of the Penobscot Nation by a member of any federally recognized Indian tribe, nation, band or other group, except when committed against a person who is not a member of any federally recognized Indian tribe, nation, band or other group or against the property of a person who is not a member of any federally recognized Indian tribe, nation, band or other group; [1997, c. 595, §1 (AMD); 1997, c. 595, §2 (AFF).]

B. Juvenile crimes against a person or property involving conduct that, if committed by an adult, would fall within the exclusive jurisdiction of the Penobscot Nation under paragraph A, and juvenile crimes, as defined in Title 15, section 3103, subsection 1, paragraphs B and C, committed by a juvenile member of either the Passamaquoddy Tribe or the Penobscot Nation on the Indian reservation of the Penobscot Nation; [2009, c. 1, §19 (COR).]

C. Civil actions between members of either the Passamaquoddy Tribe or the Penobscot Nation arising on the Indian reservation of the Penobscot Nation and cognizable as small claims under the laws of the State, and civil actions against a member of either the Passamaquoddy Tribe or the Penobscot Nation under Title 22, section 2383 involving conduct on the Indian reservation of the Penobscot Nation by a member of either the Passamaquoddy Tribe or the Penobscot Nation; [1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF).]

D. Indian child custody proceedings to the extent authorized by applicable federal law; and [1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF).]

E. Other domestic relations matters, including marriage, divorce and support, between members of either the Passamaquoddy Tribe or the Penobscot Nation, both of whom reside on the Indian reservation of the Penobscot Nation. [1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF).]

The governing body of the Penobscot Nation shall decide whether to exercise or terminate the exercise of the exclusive jurisdiction authorized by this subsection. If the Penobscot Nation chooses not to exercise, or chooses to terminate its exercise of, jurisdiction over the criminal, juvenile, civil and domestic matters described in this subsection, the State has exclusive jurisdiction over those matters. Except as provided in paragraphs A and B, all laws of the State relating to criminal offenses and juvenile crimes apply within the Penobscot Indian reservation and the State has exclusive jurisdiction over those offenses and crimes.

[2009, c. 1, §19 (COR) .]

2. **Definitions of crimes; tribal procedures.** In exercising its exclusive jurisdiction under subsection 1, paragraphs A and B, the Penobscot Nation is deemed to be enforcing Penobscot tribal law. The definitions of the criminal offenses and juvenile crimes and the punishments applicable to those criminal offenses and

juvenile crimes over which the Penobscot Nation has exclusive jurisdiction under this section are governed by the laws of the State. Issuance and execution of criminal process are also governed by the laws of the State. The procedures for the establishment and operation of tribal forums created to effectuate the purposes of this section are governed by federal statute, including, without limitation, the provisions of 25 United States Code, Sections 1301 to 1303 and rules or regulations generally applicable to the exercise of criminal jurisdiction by Indian tribes on federal Indian reservations.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

3. Lesser included offenses in state courts. In any criminal proceeding in the courts of the State in which a criminal offense under the exclusive jurisdiction of the Penobscot Nation constitutes a lesser included offense of the criminal offense charged, the defendant may be convicted in the courts of the State of the lesser included offense. A lesser included offense is as defined under the laws of the State.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

4. Double jeopardy, collateral estoppel. A prosecution for a criminal offense or juvenile crime over which the Penobscot Nation has exclusive jurisdiction under this section does not bar a prosecution for a criminal offense or juvenile crime, arising out of the same conduct, over which the State has exclusive jurisdiction. A prosecution for a criminal offense or juvenile crime over which the State has exclusive jurisdiction does not bar a prosecution for a criminal offense or juvenile crime, arising out of the same conduct, over which the Penobscot Nation has exclusive jurisdiction under this section. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a tribal forum does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a state court. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a state court does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a tribal forum.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

5. Future Indian communities. Any 25 or more adult members of the Penobscot Nation residing within their Indian territory and in reasonable proximity to each other may petition the commission for designation as an extended reservation. If the commission determines, after investigation, that the petitioning tribal members constitute an extended reservation, the commission shall establish the boundaries of the extended reservation and recommend to the Legislature that, subject to the approval of the governing body of the Penobscot Nation, it amend this Act to extend the jurisdiction of the Penobscot Nation to the extended reservation. The boundaries of an extended reservation may not exceed those reasonably necessary to encompass the petitioning tribal members.

[1995, c. 388, §6 (NEW); 1995, c. 388, §8 (AFF) .]

SECTION HISTORY
1995, c. 388, §6 (NEW). 1995, c. 388, §8 (AFF). 1997, c. 595, §1 (AMD). 1997, c. 595, §2 (AFF). RR 2009, c. 1, §19 (COR).

§6209-C. JURISDICTION OF THE HOULTON BAND OF MALISEET INDIANS TRIBAL COURT

1. Exclusive jurisdiction over certain matters. Except as provided in subsections 3 and 4, the Houlton Band of Maliseet Indians has the right to exercise exclusive jurisdiction, separate and distinct from the State, over:

A. Criminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Houlton Band Jurisdiction Land by a member of the Houlton Band of Maliseet Indians, except when committed against

a person who is not a member of the Houlton Band of Maliseet Indians or against the property of a person who is not a member of the Houlton Band of Maliseet Indians; [2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF).]

B. Juvenile crimes against a person or property involving conduct that, if committed by an adult, would fall within the exclusive jurisdiction of the Houlton Band of Maliseet Indians under paragraph A and juvenile crimes, as defined in Title 15, section 3103, subsection 1, paragraphs B and C, committed by a juvenile member of the Houlton Band of Maliseet Indians on the Houlton Band Jurisdiction Land; [2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF).]

C. Civil actions between members of the Houlton Band of Maliseet Indians arising on the Houlton Band Jurisdiction Land and cognizable as small claims under the laws of the State and civil actions against a member of the Houlton Band of Maliseet Indians under Title 22, section 2383 involving conduct on the Houlton Band Jurisdiction Land by a member of the Houlton Band of Maliseet Indians; [2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF).]

D. Indian child custody proceedings to the extent authorized by applicable federal law; and [2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF).]

E. Other domestic relations matters, including marriage, divorce and support, between members of the Houlton Band of Maliseet Indians, both of whom reside within the Houlton Band Jurisdiction Land. [2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF).]

The governing body of the Houlton Band of Maliseet Indians shall decide whether to exercise or terminate the exercise of the exclusive jurisdiction authorized by this subsection. The decision to exercise, to terminate the exercise of or to reassert the exercise of jurisdiction under each of the subject areas described by paragraphs A to E may be made separately. Until the Houlton Band of Maliseet Indians notifies the Attorney General that the band has decided to exercise exclusive jurisdiction set forth in any or all of the paragraphs in this subsection, the State has exclusive jurisdiction over those matters. If the Houlton Band of Maliseet Indians chooses not to exercise or chooses to terminate its exercise of exclusive jurisdiction set forth in any or all of the paragraphs in this subsection, the State has exclusive jurisdiction over those matters until the Houlton Band of Maliseet Indians chooses to exercise its exclusive jurisdiction. When the Houlton Band of Maliseet Indians chooses to reassert the exercise of exclusive jurisdiction over any or all of the areas of the exclusive jurisdiction authorized by this subsection it must first provide 30 days' notice to the Attorney General. Except as provided in subsections 2 and 3, all laws of the State relating to criminal offenses and juvenile crimes apply within the Houlton Band Trust Land and the State has exclusive jurisdiction over those offenses and crimes.

[2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF) .]

1-A. Exclusive jurisdiction over Penobscot Nation members. The Houlton Band of Maliseet Indians has the right to exercise exclusive jurisdiction, separate and distinct from the State, over:

A. Criminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Houlton Band Jurisdiction Land by a member of the Penobscot Nation against a member or property of a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection, and by a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection against a member or the property of a member of the Penobscot Nation; [2009, c. 384, Pt. D, §1 (NEW); 2009, c. 384, Pt. D, §2 (AFF).]

B. Juvenile crimes against a person or property involving conduct that, if committed by an adult, would fall within the exclusive jurisdiction of the Houlton Band of Maliseet Indians under paragraph A and juvenile crimes, as defined in Title 15, section 3103, subsection 1, paragraphs B and C, committed by a juvenile member of the Penobscot Nation on the Houlton Band Jurisdiction Land; [2009, c. 384, Pt. D, §1 (NEW); 2009, c. 384, Pt. D, §2 (AFF).]

C. Civil actions between a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection and members of the Penobscot Nation arising on the Houlton Band Jurisdiction Land and cognizable as small claims under the laws of the State and civil actions against a member of the Penobscot Nation under Title 22, section 2383 involving conduct on the Houlton Band Jurisdiction Land by a member of the Penobscot Nation; [2009, c. 384, Pt. D, §1 (NEW); 2009, c. 384, Pt. D, §2 (AFF).]

D. Indian child custody proceedings to the extent authorized by applicable federal law; and [2009, c. 384, Pt. D, §1 (NEW); 2009, c. 384, Pt. D, §2 (AFF).]

E. Other domestic relations matters, including marriage, divorce and support, between members of either those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection or the Penobscot Nation, both of whom reside on the Houlton Band Jurisdiction Land. [2009, c. 384, Pt. D, §1 (NEW); 2009, c. 384, Pt. D, §2 (AFF).]

The Houlton Band of Maliseet Indians may assert, terminate or reassert exclusive jurisdiction over these areas as described in subsection 1.

(Subsection 1-A as enacted by PL 2009, c. 384, Pt. E, §2 and affected by §3 is REALLOCATED TO TITLE 30, SECTION 6209-C, SUBSECTION 1-B)

[2009, c. 384, Pt. D, §1 (NEW); 2009, c. 384, Pt. D, §2 (AFF) .]

1-B. (REALLOCATED FROM T. 30, §6209-C, sub-§1-A) **Exclusive jurisdiction over Passamaquoddy Tribe members.** The Houlton Band of Maliseet Indians has the right to exercise exclusive jurisdiction, separate and distinct from the State, over:

A. Criminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Houlton Band Jurisdiction Land by a member of the Passamaquoddy Tribe against a member or property of a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection, and by a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection against a member or the property of a member of the Passamaquoddy Tribe; [2011, c. 1, §45 (RAL).]

B. Juvenile crimes against a person or property involving conduct that, if committed by an adult, would fall within the exclusive jurisdiction of the Houlton Band of Maliseet Indians under paragraph A and juvenile crimes, as defined in Title 15, section 3103, subsection 1, paragraphs B and C, committed by a juvenile member of the Passamaquoddy Tribe on the Houlton Band Jurisdiction Land; [2011, c. 1, §45 (RAL).]

C. Civil actions between a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection and members of the Passamaquoddy Tribe arising on the Houlton Band Jurisdiction Land and cognizable as small claims under the laws of the State and civil actions against a member of the Passamaquoddy Tribe under Title 22, section 2383 involving conduct on the Houlton Band Jurisdiction Land by a member of the Passamaquoddy Tribe; [2011, c. 1, §45 (RAL).]

D. Indian child custody proceedings to the extent authorized by applicable federal law; and [2011, c. 1, §45 (RAL).]

E. Other domestic relations matters, including marriage, divorce and support, between members of either those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians under this subsection or the Passamaquoddy Tribe, both of whom reside on the Houlton Band Jurisdiction Land. [2011, c. 1, §45 (RAL).]

The Houlton Band of Maliseet Indians may assert, terminate or reassert exclusive jurisdiction over these areas as described in subsection 1.

[2011, c. 1, §45 (RAL) .]

2. Definitions of crimes; tribal procedures. In exercising its exclusive jurisdiction under subsection 1, paragraphs A and B, the Houlton Band of Maliseet Indians is deemed to be enforcing tribal law of the Houlton Band of Maliseet Indians. The definitions of the criminal offenses and juvenile crimes and the punishments applicable to those criminal offenses and juvenile crimes over which the Houlton Band of Maliseet Indians has exclusive jurisdiction under this section are governed by the laws of the State. Issuance and execution of criminal process are also governed by the laws of the State. The procedures for the establishment and operation of tribal forums created to effectuate the purposes of this section are governed by federal statute, including, without limitation, the provisions of 25 United States Code, Sections 1301 to 1303 and rules and regulations generally applicable to the exercise of criminal jurisdiction by Indian tribes on federal Indian reservations.

[2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF) .]

3. Lesser included offenses in state courts. In any criminal proceeding in the courts of the State in which a criminal offense under the exclusive jurisdiction of the Houlton Band of Maliseet Indians constitutes a lesser included offense of the criminal offense charged, the defendant may be convicted in the courts of the State of the lesser included offense. A lesser included offense is as defined under the laws of the State.

[2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF) .]

4. Double jeopardy; collateral estoppel. A prosecution for a criminal offense or juvenile crime over which the Houlton Band of Maliseet Indians has exclusive jurisdiction under this section does not bar a prosecution for a criminal offense or juvenile crime arising out of the same conduct over which the State has exclusive jurisdiction. A prosecution for a criminal offense or juvenile crime over which the State has exclusive jurisdiction does not bar a prosecution for a criminal offense or juvenile crime arising out of the same conduct over which the Houlton Band of Maliseet Indians has exclusive jurisdiction under this section. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a tribal forum does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a state court. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a state court does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a tribal forum.

[2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF) .]

5. Houlton Band Jurisdiction Land. For the purposes of this section, "Houlton Band Jurisdiction Land" means only the Houlton Band Trust Land described as follows:

A. Lands transferred from Ralph E. Longstaff and Justina Longstaff to the United States of America in trust for the Houlton Band of Maliseet Indians, located in Houlton, Aroostook County and recorded in the Aroostook County South Registry of Deeds in Book 2144, Page 198; and [2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF).]

B. Lands transferred from F. Douglas Lowrey to the United States of America in trust for the Houlton Band of Maliseet Indians, located in Houlton and Littleton, Aroostook County and recorded in the Aroostook County South Registry of Deeds in Book 2847, Page 114. [2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF).]

The designation of Houlton Band Jurisdiction Land in this subsection in no way affects the acquisition of additional Houlton Band Trust Land pursuant to applicable federal and state law, nor limits the Houlton Band of Maliseet Indians from making additional requests that portions of the trust land be included in this subsection.

[2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF) .]

6. Effective date; full faith and credit. This section takes effect only if the State, the Passamaquoddy Tribe and the Penobscot Nation agree to give full faith and credit to the judicial proceedings of the Houlton Band of Maliseet Indians and the Houlton Band of Maliseet Indians agrees to give full faith and credit to the judicial proceedings of the State, the Passamaquoddy Tribe and the Penobscot Nation.

[2009, c. 384, Pt. B, §1 (NEW); 2009, c. 384, Pt. B, §2 (AFF) .]

SECTION HISTORY
2009, c. 384, Pt. B, §1 (NEW). 2009, c. 384, Pt. B, §2 (AFF). 2009, c. 384, Pt. D, §1 (AMD). 2009, c. 384, Pt. D, §2 (AFF). 2009, c. 384, Pt. E, §2 (AMD). 2009, c. 384, Pt. E, §3 (AFF). RR 2011, c. 1, §45 (COR).

§6209-D. FULL FAITH AND CREDIT

The Passamaquoddy Tribe, the Penobscot Nation and the State shall give full faith and credit to the judicial proceedings of the Houlton Band of Maliseet Indians. [2009, c. 384, Pt. C, §1 (NEW); 2009, c. 384, Pt. C, §2 (AFF).]

The Houlton Band of Maliseet Indians shall give full faith and credit to the judicial proceedings of the Passamaquoddy Tribe, the Penobscot Nation and the State. [2009, c. 384, Pt. C, §1 (NEW); 2009, c. 384, Pt. C, §2 (AFF).]

SECTION HISTORY
2009, c. 384, Pt. C, §1 (NEW). 2009, c. 384, Pt. C, §2 (AFF).

§6210. LAW ENFORCEMENT ON INDIAN RESERVATIONS AND WITHIN INDIAN TERRITORY

1. Exclusive authority of tribal law enforcement officers. Law enforcement officers appointed by the Passamaquoddy Tribe and the Penobscot Nation have exclusive authority to enforce, within their respective Indian territories, ordinances adopted under section 6206 and section 6207, subsection 1, and to enforce, on their respective Indian reservations, the criminal, juvenile, civil and domestic relations laws over which the Passamaquoddy Tribe or the Penobscot Nation have jurisdiction under section 6209-A, subsection 1 and section 6209-B, subsection 1, respectively.

[1995, c. 388, §7 (AMD); 1995, c. 388, §8 (AFF) .]

2. Joint authority of tribal and state law enforcement officers. Law enforcement officers appointed by the Passamaquoddy Tribe or the Penobscot Nation have the authority within their respective Indian territories and state and county law enforcement officers have the authority within both Indian territories to enforce rules or regulations adopted by the commission under section 6207, subsection 3 and to enforce all laws of the State other than those over which the Passamaquoddy Tribe or the Penobscot Nation has exclusive jurisdiction under section 6209-A, subsection 1 and section 6209-B, subsection 1, respectively.

[1995, c. 388, §7 (AMD); 1995, c. 388, §8 (AFF) .]

3. **Agreements for cooperation and mutual aid.** This section does not prevent the Passamaquoddy Tribe or the Penobscot Nation and any state, county or local law enforcement agency from entering into agreements for cooperation and mutual aid.

[1995, c. 388, §7 (AMD); 1995, c. 388, §8 (AFF) .]

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

[1995, c. 388, §7 (AMD); 1995, c. 388, §8 (AFF) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1983, c. 498, §1 (AMD). 1995, c. 388, §7 (AMD). 1995, c. 388, §8 (AFF).

§6211. ELIGIBILITY OF INDIAN TRIBES AND STATE FUNDING

2-A. **Limitation on eligibility.**

[1997, c. 626, §3 (AFF); 1997, c. 626, §2 (RP) .]

1. **Eligibility generally.** The Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible for participation and entitled to receive benefits from the State under any state program which provides financial assistance to all municipalities as a matter of right. Such entitlement shall be determined using statutory criteria and formulas generally applicable to municipalities in the State. To the extent that any such program requires municipal financial participation as a condition of state funding, the share for the Passamaquoddy Tribe, the Penobscot Nation or the Houlton Band of Maliseet Indians may be raised through any source of revenue available to the respective tribe, nation or band, including but without limitation taxation to the extent authorized within its respective Indian territory. In the event that any applicable formula regarding distribution of moneys employs a factor for the municipal real property tax rate, and in the absence of such tax within the Indian territory, the formula applicable to such Indian territory shall be computed using the most current average equalized real property tax rate of all municipalities in the State as determined by the State Tax Assessor. In the event any such formula regarding distribution of moneys employs a factor representing municipal valuation, the valuation applicable to such Indian territory shall be determined by the State Tax Assessor in the manner generally provided by the laws of the State, provided, however, that property owned by or held in trust for either tribe or nation and used for governmental purposes shall be treated for purposes of valuation as like property owned by a municipality.

[2007, c. 697, Pt. C, §11 (AMD); 2007, c. 697, Pt. C, §14 (AFF) .]

1. **Eligibility generally.** The Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians are eligible for participation and entitled to receive benefits from the State under any state program that provides financial assistance to all municipalities as a matter of right. Such entitlement must be determined using statutory criteria and formulas generally applicable to municipalities in the State. To the extent that any such program requires municipal financial participation as a condition of state funding, the share for the Passamaquoddy Tribe, the Penobscot Nation or the Houlton Band of Maliseet Indians may be raised through any source of revenue available to the respective tribe, nation or band, including but without limitation taxation to the extent authorized within its respective Indian territory. In the event that any applicable formula regarding distribution of money employs a factor for the municipal real property tax rate, and in the absence of such tax within the Indian territory, the formula applicable to such Indian territory must be computed using the most current average equalized real property tax rate of all municipalities in the State as determined by the State Tax Assessor. In the event any such formula regarding distribution of money employs a factor representing municipal valuation, the valuation applicable to such Indian territory must be

determined by the State Tax Assessor in the manner generally provided by the laws of the State as long as property owned by or held in trust for a tribe, nation or band and used for governmental purposes is treated for purposes of valuation as like property owned by a municipality.

[2009, c. 384, Pt. A, §3 (AMD); 2009, c. 384, Pt. A, §4 (AFF) .]

2. Limitation on eligibility. In computing the extent to which either the Passamaquoddy Tribe, the Penobscot Nation or the Houlton Band of Maliseet Indians is entitled to receive state funds under subsection 1, other than funds in support of education, any money received by the respective tribe, nation or band from the United States within substantially the same period for which state funds are provided, for a program or purpose substantially similar to that funded by the State, and in excess of any local share ordinarily required by state law as a condition of state funding, must be deducted in computing any payment to be made to the respective tribe, nation or band by the State. Unless otherwise provided by federal law, in computing the extent to which either the Passamaquoddy Tribe, the Penobscot Nation or the Houlton Band of Maliseet Indians is entitled to receive state funds for education under subsection 1, the state payment must be reduced by 15% of the amount of federal funds for school operations received by the respective tribe, nation or band within substantially the same period for which state funds are provided, and in excess of any local share ordinarily required by state law as a condition of state funding. A reduction in state funding for secondary education may not be made under this section except as a result of federal funds received within substantially the same period and allocated or allocable to secondary education.

[2007, c. 697, Pt. C, §11 (AMD); 2007, c. 697, Pt. C, §14 (AFF) .]

2. Limitation on eligibility. In computing the extent to which the Passamaquoddy Tribe, the Penobscot Nation or the Houlton Band of Maliseet Indians is entitled to receive state funds under subsection 1, other than funds in support of education, any money received by the respective tribe, nation or band from the United States within substantially the same period for which state funds are provided, for a program or purpose substantially similar to that funded by the State, and in excess of any local share ordinarily required by state law as a condition of state funding, must be deducted in computing any payment to be made to the respective tribe, nation or band by the State. Unless otherwise provided by federal law, in computing the extent to which the Passamaquoddy Tribe, the Penobscot Nation or the Houlton Band of Maliseet Indians is entitled to receive state funds for education under subsection 1, the state payment must be reduced by 15% of the amount of federal funds for school operations received by the respective tribe, nation or band within substantially the same period for which state funds are provided, and in excess of any local share ordinarily required by state law as a condition of state funding. A reduction in state funding for secondary education may not be made under this section except as a result of federal funds received within substantially the same period and allocated or allocable to secondary education.

[2009, c. 384, Pt. A, §3 (AMD); 2009, c. 384, Pt. A, §4 (AFF) .]

2-A. Limitation on eligibility.

[1997, c. 626, §3 (AFF); 1997, c. 626, §2 (RP) .]

3. Eligibility for discretionary funds. The Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible to apply for any discretionary state grants or loans to the same extent and subject to the same eligibility requirements, including availability of funds, applicable to municipalities in the State.

[2007, c. 697, Pt. C, §11 (AMD); 2007, c. 697, Pt. C, §14 (AFF) .]

3. **Eligibility for discretionary funds.** The Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians are eligible to apply for any discretionary state grants or loans to the same extent and subject to the same eligibility requirements, including availability of funds, applicable to municipalities in the State.

[2009, c. 384, Pt. A, §3 (AMD); 2009, c. 384, Pt. A, §4 (AFF) .]

4. **Eligibility of individuals for state funds.** Residents of the Indian territories shall be eligible for and entitled to receive any state grant, loan, unemployment compensation, medical or welfare benefit or other social service to the same extent as and subject to the same eligibility requirements applicable to other persons in the State, provided, however, that in computing the extent to which any person is entitled to receive any such funds, any moneys received by such person from the United States within substantially the same period of time for which state funds are provided and for a program or purpose substantially similar to that funded by the State, shall be deducted in computing any payment to be made by the State.

[2007, c. 697, Pt. C, §11 (AMD); 2007, c. 697, Pt. C, §14 (AFF) .]

4. **Eligibility of individuals for state funds.** Residents of the Indian territories or Houlton Band Trust Land are eligible for and entitled to receive any state grant, loan, unemployment compensation, medical or welfare benefit or other social service to the same extent as and subject to the same eligibility requirements applicable to other persons in the State as long as in computing the extent to which any person is entitled to receive any such funds any money received by such person from the United States within substantially the same period of time for which state funds are provided and for a program or purpose substantially similar to that funded by the State is deducted in computing any payment to be made by the State.

[2009, c. 384, Pt. A, §3 (AMD); 2009, c. 384, Pt. A, §4 (AFF) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1991, c. 705, §§1,2 (AMD). 1991, c. 705, §§4,5 (AFF). 1997, c. 626, §§1,2 (AMD). 1997, c. 626, §3 (AFF). 2009, c. 384, Pt. A, §3 (AMD). 2009, c. 384, Pt. A, §4 (AFF).

§6212. MAINE INDIAN TRIBAL-STATE COMMISSION

1. **Commission created.** The Maine Indian Tribal-State Commission is established. The commission consists of 13 members, 6 to be appointed by the Governor, subject to review by the Joint Standing Committee on Judiciary and to confirmation by the Legislature, 2 to be appointed by the Houlton Band of Maliseet Indians, 2 to be appointed by the Passamaquoddy Tribe, 2 to be appointed by the Penobscot Nation and a chair, to be selected in accordance with subsection 2. The members of the commission, other than the chair, each serve for a term of 3 years and may be reappointed. In the event of the death, resignation or disability of a member, the appointing authority may fill the vacancy for the unexpired term.

[2009, c. 384, Pt. F, §1 (AMD); 2009, c. 384, Pt. F, §4 (AFF) .]

2. **Chair.** The commission, by a majority vote of its 12 members, shall select an individual who is a resident of the State to act as chair. In the event of the death, resignation, replacement or disability of the chair, the commission may select, by a majority vote of its 12 remaining members, a new chair. When the commission is unable to select a chair within 120 days of the death, resignation, replacement or disability, the Governor, after consulting with the chiefs of the Houlton Band of Maliseet Indians, the Penobscot Nation and the Passamaquoddy Tribe, shall appoint an interim chair for a period of one year or for the period until the commission selects a chair in accordance with this section, whichever is shorter. The chair is a full-voting member of the commission and, except when appointed for an interim term, shall serve for 4 years.

[2009, c. 384, Pt. F, §2 (AMD); 2009, c. 384, Pt. F, §4 (AFF) .]

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

Nine members constitute a quorum of the commission and a decision or action of the commission is not valid unless 7 members vote in favor of the action or decision.

[2009, c. 384, Pt. F, §3 (AMD); 2009, c. 384, Pt. F, §4 (AFF) .]

4. Personnel, fees, expenses of commissioners. The commission may employ personnel as it considers necessary and desirable in order to effectively discharge its duties and responsibilities. These employees are not subject to state personnel laws or rules.

The commission members are entitled to receive $75 per day for their services and to reimbursement for reasonable expenses, including travel.

[1993, c. 600, Pt. A, §24 (AMD); 1993, c. 600, Pt. A, §25 (AFF) .]

5. Interagency cooperation. In order to facilitate the work of the commission, all other agencies of the State shall cooperate with the commission and make available to it without charge information and data relevant to the responsibilities of the commission.

[1993, c. 600, Pt. A, §24 (AMD); 1993, c. 600, Pt. A, §25 (AFF) .]

6. Funding. The commission may receive and accept, from any source, allocations, appropriations, loans, grants and contributions of money or other things of value to be held, used or applied to carry out this chapter, subject to the conditions upon which the loans, grants and contributions may be made, including, but not limited to, appropriations, allocations, loans, grants or gifts from a private source, federal agency or governmental subdivision of the State or its agencies. Notwithstanding Title 5, chapter 149, upon receipt of a written request from the commission, the State Controller shall pay the commission's full state allotment for each fiscal year to meet the estimated annual disbursement requirements of the commission.

The Governor or the Governor's designee and the chief executive elected leader or the chief executive elected leader's designee of the following tribes shall communicate to produce a proposed biennial budget for the commission and to discuss any adjustments to funding:

A. The Houlton Band of Maliseet Indians; [2009, c. 636, Pt. C, §3 (NEW); 2009, c. 636, Pt. C, §4 (AFF).]

B. The Passamaquoddy Tribe; and [2009, c. 636, Pt. C, §3 (NEW); 2009, c. 636, Pt. C, §4 (AFF).]

C. The Penobscot Nation. [2009, c. 636, Pt. C, §3 (NEW); 2009, c. 636, Pt. C, §4 (AFF).]

[2009, c. 636, Pt. C, §3 (AMD); 2009, c. 636, Pt. C, §4 (AFF) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW). 1983, c. 492, §1 (AMD). 1983, c. 812, §§186,187 (AMD). 1985, c. 295, §§46,47 (AMD). 1993, c. 600, §A24 (AMD). 1993, c. 600, §A25 (AFF). 2001, c. 173, §1 (AMD). 2001, c. 173, §2 (AFF). 2009, c. 384, Pt. F, §§1-3 (AMD). 2009, c. 384, Pt. F, §4 (AFF). 2009, c. 636, Pt. C, §3 (AMD). 2009, c. 636, Pt. C, §4 (AFF). 2013, c. 81, §§1-5 (AMD). 2013, c. 81, §6 (AFF).

§6213. APPROVAL OF PRIOR TRANSFERS

1. **Approval of tribal transfers.** Any transfer of land or other natural resources located anywhere within the State, from, by, or on behalf of any Indian nation, or tribe or band of Indians including but without limitation any transfer pursuant to any treaty, compact or statute of any state, which transfer occurred prior to the effective date of this Act, shall be deemed to have been made in accordance with the laws of the State.

[1979, c. 732, §§1, 31 (NEW) .]

2. **Approval of certain individual transfers.** Any transfer of land or other natural resources located anywhere within the State, from, by or on behalf of any individual Indian, which occurred prior to December 1, 1873, including but without limitation any transfer pursuant to any treaty, compact or statute of any state, shall be deemed to have been made in accordance with the laws of the State.

[1979, c. 732, §§1, 31 (NEW) .]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW).

§6214. TRIBAL SCHOOL COMMITTEES

The Passamaquoddy Tribe and the Penobscot Nation are authorized to create respective tribal school committees, in substitution for the committees heretofore provided for under the laws of the State. Such tribal school committees shall operate under the laws of the State applicable to school administrative units. The presently constituted tribal school committee of the respective tribe or nation shall continue in existence and shall exercise all the authority heretofore vested by law in it until such time as the respective tribe or nation creates the tribal school committee authorized by this section. [1979, c. 732, §§1, 31 (NEW).]

SECTION HISTORY
1979, c. 732, §§1,31 (NEW).

States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided*, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

(Pub. L. 95–395, § 13, Sept. 30, 1978, 92 Stat. 817.)

REFERENCES IN TEXT

The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), referred to in subsec. (a)(1), was not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

PART B—TAX TREATMENT

§ 1715. Exemption from taxation

(a) General exemption

Except as otherwise provided in subsections (b) and (c) of this section, the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

(b) Income-producing activities

The exemption provided in subsection (a) of this section shall not apply to any income-producing activities occurring on the settlement lands.

(c) Payments in lieu of taxes

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

(Pub. L. 95–395, title II, § 201, as added Pub. L. 96–601, § 5(a), Dec. 24, 1980, 94 Stat. 3498.)

EFFECTIVE DATE

Pub. L. 96–601, § 5(b), Dec. 24, 1980, 94 Stat. 3499, provided that: "The amendment made by subsection (a) [enacting this part] shall take effect on September 30, 1978."

§ 1716. Deferral of capital gains

For purposes of title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of title 26.

(Pub. L. 95–395, title II, § 202, as added Pub. L. 96–601, § 5(a), Dec. 24, 1980, 94 Stat. 3499; amended Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

AMENDMENTS

1986—Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954" wherever appearing, which for purposes of codification was translated as "title 26" thus requiring no change in text.

SUBCHAPTER II—MAINE INDIAN CLAIMS SETTLEMENT

§ 1721. Congressional findings and declaration of policy

(a) Findings and declarations

Congress hereby finds and declares that:

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

(2) The Indians, Indian nations, and tribes and bands of Indians, other than the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, that once may have held aboriginal title to lands within the State of Maine long ago abandoned their aboriginal holdings.

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

(4) The Passamaquoddy Tribe, as represented as of the time of passage of this subchapter by the Joint Tribal Council of the Passamaquoddy Tribe, is the sole successor in interest to the aboriginal entity generally known as the Passamaquoddy Tribe which years ago claimed aboriginal title to certain lands in the State of Maine.

(5) The Houlton Band of Maliseet Indians, as represented as of the time of passage of this subchapter by the Houlton Band Council, is the sole successor in interest, as to lands within the United States, to the aboriginal entity generally known as the Maliseet Tribe which

years ago claimed aboriginal title to certain lands in the State of Maine.

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

(7) This subchapter represents a good faith effort on the part of Congress to provide the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians with a fair and just settlement of their land claims. In the absence of congressional action, these land claims would be pursued through the courts, a process which in all likelihood would consume many years and thereby promote hostility and uncertainty in the State of Maine to the ultimate detriment of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, their members, and all other citizens of the State of Maine.

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

(9) Since 1820, the State of Maine has provided special services to the Indians residing within its borders, including the members of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. During this same period, the United States provided few special services to the respective tribe, nation, or band, and repeatedly denied that it had jurisdiction over or responsibility for the said tribe, nation, and band. In view of this provision of special services by the State of Maine, requiring substantial expenditures by the State of Maine and made by the State of Maine without being required to do so by Federal law, it is the intent of Congress that the State of Maine not be required further to contribute directly to this claims settlement.

(b) Purposes

It is the purpose of this subchapter—

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

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

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

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

(Pub. L. 96–420, § 2, Oct. 10, 1980, 94 Stat. 1785.)

REFERENCES IN TEXT

The Trade and Intercourse Act of 1790 (1 Stat. 137), referred to in subsec. (a)(1), is act July 22, 1790, ch. 33, 1 Stat. 137, which was not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

SHORT TITLE

Pub. L. 96–420, § 1, Oct. 10, 1980, 94 Stat. 1785, provided: "That this Act [enacting this subchapter] may be cited as the 'Maine Indian Claims Settlement Act of 1980'."

AROOSTOOK BAND OF MICMACS SETTLEMENT

Pub. L. 102–171, Nov. 26, 1991, 105 Stat. 1143, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Aroostook Band of Micmacs Settlement Act'.

"SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY.

"(a) FINDINGS AND POLICY.—Congress hereby finds and declares that:

"(1) The Aroostook Band of Micmacs, as represented as of the time of passage of this Act by the Aroostook Micmac Council, is the sole successor in interest, as to lands within the United States, to the aboriginal entity generally known as the Micmac Nation which years ago claimed aboriginal title to certain lands in the State of Maine.

"(2) The Band was not referred to in the Maine Indian Claims Settlement Act of 1980 [25 U.S.C. 1721 et seq.] because historical documentation of the Micmac presence in Maine was not available at that time.

"(3) This documentation does establish the historical presence of Micmacs in Maine and the existence of aboriginal lands in Maine jointly used by the Micmacs and other tribes to which the Micmacs could have asserted aboriginal title but for the extinguishment of all such claims by the Maine Indian Claims Settlement Act of 1980.

"(4) The Aroostook Band of Micmacs, in both its history and its presence in Maine, is similar to the Houlton Band of Maliseet Indians and would have received similar treatment under the Maine Indian Claims Settlement Act of 1980 if the information available today had been available to Congress and the parties at that time.

"(5) It is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefited from inclusion in the Maine Indian Claims Settlement Act of 1980.

"(6) Since 1820, the State of Maine has provided special services to the Indians residing within its borders, including the members of the Aroostook Band of Micmacs. During this same period, the United States provided few special services to the Band and repeatedly denied that it had jurisdiction over or responsibility for the Indian groups in Maine. In view of this provision of special services by the State of Maine, requiring substantial expenditures by the State of Maine and made by the State of Maine without being required to do so by Federal law, it is the intent of Congress that the State of Maine not be required further to contribute directly to this settlement.

"(b) PURPOSE.—It is the purpose of this Act to—

"(1) provide Federal recognition of the Band;

"(2) provide to the members of the Band the services which the United States provides to Indians because of their status as Indians; and

"(3) place $900,000 in a land acquisition fund and property tax fund for the future use of the Aroostook Band of Micmacs; and

"(4) ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs.

"SEC. 3. DEFINITIONS.

"For the purposes of this Act:

"(1) The term 'Band' means the Aroostook Band of Micmacs, the sole successor to the Micmac Nation as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in interest. The Aroostook Band of Micmacs is

represented, as of the date of enactment of this Act [Nov. 26, 1991], as to lands within the United States, by the Aroostook Micmac Council.

"(2) The term 'Band Tax Fund' means the fund established under section 4(b) of this Act.

"(3) The term 'Band Trust Land' means land or natural resources acquired by the Secretary of the Interior and held in trust by the United States for the benefit of the Band.

"(4) The term 'land or natural resources' means any real property or natural resources, or any interest in or right involving any real property or natural resources, including (but not limited to) minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights.

"(5) The term 'Land Acquisition Fund' means the fund established under section 4(a) of this Act.

"(6) The term 'laws of the State' means the constitution, and all statutes, regulations, and common laws of the State of Maine and its political subdivisions and all subsequent amendments thereto or judicial interpretations thereof.

"(7) The term 'Maine Implementing Act' means the Act entitled 'Act to Implement the Maine Indian Claims Settlement' that was enacted by the State of Maine in chapter 732 of the Maine Public Laws of 1979, as amended by chapter 675 of the Maine Public Laws of 1981 and chapter 672 of the Maine Public Laws of 1985, and all subsequent amendments thereto.

"(8) The term 'Micmac Settlement Act' means the Act entitled 'Act to implement the Aroostook Band of Micmacs Settlement Act' that was enacted by the State of Maine in chapter 148 of the Maine Public Laws of 1989, and all subsequent amendments thereto.

"(9) The term 'Secretary' means the Secretary of the Interior.

"SEC. 4. AROOSTOOK BAND OF MICMACS LAND ACQUISITION AND PROPERTY TAX FUNDS.

"(a) LAND ACQUISITION FUND.—There is hereby established in the Treasury of the United States a fund to be known as the Aroostook Band of Micmacs Land Acquisition Fund, into which $900,000 shall be deposited by the Secretary following the appropriation of sums authorized by section 10.

"(b) BAND TAX FUND.—(1) There is hereby established in the Treasury of the United States a fund to be known as the Aroostook Band of Micmacs Tax Fund, into which shall be deposited $50,000 in accordance with the provisions of this Act.

"(2) Income accrued on the Land Acquisition Fund shall be transferred to the Band Tax Fund until a total of $50,000 has been transferred to the Band Tax Fund under this paragraph. No transfer shall be made under this subsection if such transfer would diminish the Land Acquisition Fund to a balance of less than $900,000.

"(3) Whenever funds are transferred to the Band Tax Fund under paragraph (2), the Secretary shall publish notice of such transfer in the Federal Register. Such notice shall specify when the total amount of $50,000 has been transferred to the Band Tax Fund.

"(4) The Secretary shall manage the Band Tax Fund in accordance with section 1 of the Act of June 24, 1938 (52 Stat. 1037; 25 U.S.C. 162a), and shall utilize the principal and interest of the Band Tax Fund only as provided in paragraph (5) and section 5(d) and for no other purpose.

"(5) Notwithstanding the provisions of title 31, United States Code, the Secretary shall pay out of the Band Tax Fund, all valid claims for taxes, payments in lieu of property taxes, and fees, together with any interest and penalties thereon—

"(A) for which the Band is determined to be liable;

"(B) which are final and not subject to further administrative or judicial review; and

"(C) which have been certified by the Commissioner of Finance in the State of Maine as valid claims that meet the requirements of this paragraph.

"(c) SOURCE FOR CERTAIN PAYMENTS.—Notwithstanding any other provision of law, if—

"(1) the Band is liable to the State of Maine or any county, district, municipality, city, town, village, plantation, or any other political subdivision thereof for any tax, payment in lieu of property tax, or fees, together with any interest and penalties thereon, and

"(2) there are insufficient funds in the Band Tax Fund to pay such tax, payment, or fee (together with any interest or penalties thereon) in full,

the deficiency shall be paid by the Band only from income-producing property owned by the Band which is not held in trust for the Band by the United States and the Band shall not be required to pay such tax, payment, or fee (or any interest or penalty thereon) from any other source.

"(d) PROCEDURE FOR FILING AND PAYMENT OF CLAIMS.—The Secretary shall, after consultation with the Commissioner of Finance of the State of Maine, and the Band, prescribe written procedures governing the filing and payment of claims under this section.

"SEC. 5. AROOSTOOK BAND TRUST LANDS.

"(a) IN GENERAL.—Subject to the provisions of section 4, the Secretary is authorized and directed to expend, at the request of the Band, the principal of, and income accruing on, the Land Acquisition Fund for the purposes of acquiring land or natural resources for the Band and for no other purposes. Land or natural resources acquired within the State of Maine with funds expended under the authority of this subsection shall be held in trust by the United States for the benefit of the Band.

"(b) ALIENATION.—(1) Land or natural resources acquired with funds expended under the authority of subsection (a) and held in trust for the benefit of the Band may be alienated only by—

"(A) takings for public use pursuant to the laws of the State of Maine as provided in subsection (c);

"(B) takings for public use pursuant to the laws of the United States; or

"(C) transfers made pursuant to an Act or joint resolution of Congress.

All other transfers of land or natural resources acquired with funds expended under the authority of subsection (a) and held in trust for the benefit of such Band shall be void ab initio and without any validity in law or equity.

"(2) The provisions of paragraph (1) shall not prohibit or limit transfers of individual use assignments of land or natural resources from one member of the Band to another member of such Band.

"(3) Land or natural resources held in trust for the benefit of the Band may, at the request of the Band, be—

"(A) leased in accordance with the Act of August 9, 1955 (25 U.S.C. 415 et seq.);

"(B) leased in accordance with the Act of May 11, 1938 (25 U.S.C. 396a et seq.);

"(C) sold in accordance with section 7 of the Act of June 25, 1910 (25 U.S.C. 407);

"(D) subjected to rights-of-way in accordance with the Act of February 5, 1948 (25 U.S.C. 323 et seq.);

"(E) exchanged for other land or natural resources of equal value, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary for deposit in the land acquisition fund for the benefit of the Band, as the circumstances require, so long as payment does not exceed 25 percent of the total value of the interests in land to be transferred by the Band; and

"(F) sold, only if at the time of sale the Secretary has entered into an option agreement or contract of sale to purchase other lands of approximate equal value.

"(c) CONDEMNATION BY STATE OF MAINE AND POLITICAL SUBDIVISIONS THEREOF.—(1) Land or natural resources acquired with funds expended under the authority of subsection (a) and held in trust for the benefit of the Band may be condemned for public purposes by the State of Maine, or any political subdivision thereof, only upon such terms and conditions as shall be agreed

upon in writing between the State and such Band after the date of enactment of this Act [Nov. 26, 1991].

"(2) The consent of the United States is hereby given to the State of Maine to further amend the Micmac Settlement Act for the purpose of embodying the agreement described in paragraph (1).

"(d) ACQUISITION.—(1) Lands and natural resources may be acquired by the Secretary for the Band only if the Secretary has, at any time prior to such acquisition—

"(A) transmitted a letter to the Secretary of State of the State of Maine stating that the Band Tax Fund contains $50,000; and

"(B) provided the Secretary of State of the State of Maine with a copy of the procedures for filing and payment of claims prescribed under section 4(d).

"(2)(A) No land or natural resources may be acquired by the Secretary for the Band until the Secretary files with the Secretary of State of the State of Maine a certified copy of the deed, contract, or other conveyance setting forth the location and boundaries of the land or natural resources to be acquired.

"(B) For purposes of subparagraph (A), a filing with the Secretary of State of the State of Maine may be made by mail and, if such method of filing is used, shall be considered to be completed on the date on which the document is properly mailed to the Secretary of State of the State of Maine.

"(3) Notwithstanding the provisions of the first section of the Act of August 1, 1888 (40 U.S.C. 257) [now 40 U.S.C. 3113] and the first section of the Act of February 26, 1931 (40 U.S.C. 258a) [now 40 U.S.C. 3114(a)–(d)], the Secretary may acquire land or natural resources under this section from the ostensible owner of the land or natural resources only if the Secretary and the ostensible owner of the land or natural resources have agreed upon the identity of the land or natural resources to be sold and upon the purchase price and other terms of sale. Subject to the agreement required by the preceding sentence, the Secretary may institute condemnation proceedings in order to perfect title, satisfactory to the Attorney General of the United States, in the United States and condemn interests adverse to the ostensible owner.

"(4)(A) When trust or restricted land or natural resources of the Band are condemned pursuant to any law of the United States other than this Act, the proceeds paid in compensation for such condemnation shall be deposited into the Land Acquisition Fund and shall be reinvested in acreage within unorganized or unincorporated areas of the State of Maine. When the proceeds are reinvested in land whose acreage does not exceed that of the land taken, all the land shall be acquired in trust. When the proceeds are invested in land whose acreage exceeds the acreage of the land taken, the Band shall designate, with the approval of the United States, and within 30 days of such reinvestment, that portion of the land acquired by the reinvestment, not to exceed the area taken, which shall be acquired in trust. The land acquired from the proceeds that is not acquired in trust shall be held in fee by the Band. The Secretary shall certify, in writing, to the Secretary of State of the State of Maine the location, boundaries, and status of the land acquired from the proceeds.

"(B) The State of Maine shall have initial jurisdiction over condemnation proceedings brought under this section. The United States shall be a necessary party to any such condemnation proceedings. After exhaustion of all State administrative remedies, the United States is authorized to seek judicial review of all relevant matters involved in such condemnation proceedings in the courts of the United States and shall have an absolute right of removal, at its discretion, over any action commenced in the courts of the State.

"(5) Land or natural resources acquired by the Secretary in trust for the Band shall be managed and administered in accordance with terms established by the Band and agreed to by the Secretary in accordance with section 102 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f) or other applicable law.

"SEC. 6. LAWS APPLICABLE.

"(a) FEDERAL RECOGNITION.—Federal recognition is hereby extended to the Aroostook Band of Micmacs. The Band shall be eligible to receive all of the financial benefits which the United States provides to Indians and Indian tribes to the same extent, and subject to the same eligibility criteria, generally applicable to other federally recognized Indians and Indian tribes.

"(b) APPLICATION OF FEDERAL LAW.—For the purposes of application of Federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of the Maine Indian Claims Settlement Act of 1980 [25 U.S.C. 1721 et seq.].

"(c) ELIGIBILITY FOR SPECIAL SERVICES.—Notwithstanding any other provision of law authorizing the provision of special programs and services by the United States to Indians because of their status as Indians, any member of the Band in Aroostook County, Maine, shall be eligible for such services without regard to the existence of a reservation or the residence of members of the Band on or near a reservation.

"(d) AGREEMENTS WITH STATE REGARDING JURISDICTION.—The State of Maine and the Band are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by, or held in trust for the benefit of, the Band or any member of the Band. The consent of the United States is hereby given to the State of Maine to amend the Micmac Settlement Act for this purpose: *Provided*, That such amendment is made with the agreement of the Aroostook Band of Micmacs.

"SEC. 7. TRIBAL ORGANIZATION.

"(a) IN GENERAL.—The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and any amendments thereto.

"(b) MEMBERS.—For purposes of benefits provided by reason of this Act, only persons who are citizens of the United States may be considered members of the Band except persons who, as of the date of enactment of this Act [Nov. 26, 1991], are enrolled members on the Band's existing membership roll, and direct lineal descendants of such members. Membership in the Band shall be subject to such further qualifications as may be provided by the Band in its organic governing document, or amendments thereto, subject to approval by the Secretary.

"SEC. 8. IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT.

"For the purposes of this section, the Band is an 'Indian tribe' within the meaning of section 4(8) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(8)), except that nothing in this section shall alter or affect the jurisdiction of the State of Maine over child welfare matters as provided by the Maine Indian Claims Settlement Act of 1980 [25 U.S.C. 1721 et seq.].

"SEC. 9. FEDERAL FINANCIAL AID PROGRAMS UNAFFECTED BY PAYMENTS UNDER THIS ACT.

"(a) STATE OF MAINE.—No payments to be made for the benefit of the Band pursuant to this Act shall be considered by any agency or department of the United States in determining or computing the eligibility of the State of Maine for participation in any financial aid program of the United States.

"(b) BAND AND MEMBERS OF THE BAND.—(1) The eligibility for, or receipt of, payments from the State of Maine by the Band or any of its members shall not be considered by any department or agency of the United States in determining the eligibility of, or computing payments to, the Band or any of the members of the Band under any Federal financial aid program.

"(2) To the extent that eligibility for the benefits of any Federal financial aid program is dependent upon a

showing of need by the applicant, the administering agency shall not be barred by this subsection from considering the actual financial situation of the applicant.

"SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated $900,000 for the fiscal year 1992 for transfer to the Aroostook Band of Micmacs Land Acquisition Fund.

"SEC. 11. INTERPRETATION.

"In the event of a conflict of interpretation between the provisions of the Maine Implementing Act, the Micmac Settlement Act, or the Maine Indian Claims Settlement Act of 1980 [25 U.S.C. 1721 et seq.] and this Act, the provisions of this Act shall govern.

"SEC. 12. LIMITATION OF ACTIONS.

"No provision of this Act may be construed to confer jurisdiction to sue, or to grant implied consent to the Band to sue, the United States or any of its officers with respect to the claims extinguished by the Maine Indian Claims Settlement Act of 1980 [25 U.S.C. 1721 et seq.]."

§ 1722. Definitions

For purposes of this subchapter, the term—

(a) "Houlton Band of Maliseet Indians" means the sole successor to the Maliseet Tribe of Indians as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in interest. The Houlton Band of Maliseet Indians is represented, as of October 10, 1980, as to lands within the United States, by the Houlton Band Council of the Houlton Band of Maliseet Indians;

(b) "land or natural resources" means 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;

(c) "Land Acquisition Fund" means the Maine Indian Claims Land Acquisition Fund established under section 1724(c) of this title;

(d) "laws of the State" means the constitution, and all statutes, regulations, and common laws of the State of Maine and its political subdivisions and all subsequent amendments thereto or judicial interpretations thereof;

(e) "Maine Implementing Act" means section 1, section 30, and section 31, of the "Act to Implement the Maine Indian Claims Settlement" enacted by the State of Maine in chapter 732 of the public laws of 1979;

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

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

(h) "Passamaquoddy Tribe" means the Passamaquoddy Indian Tribe, as constituted in aboriginal times and all its predecessors and successors in interest. The Passamaquoddy Tribe is represented, as of October 10, 1980, by the Joint Tribal Council of the Passamaquoddy Tribe, with separate councils at the Indian Township and Pleasant Point Reservations;

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

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

(k) "Penobscot Nation" means the Penobscot Indian Nation as constituted in aboriginal times, and all its predecessors and successors in interest. The Penobscot Nation is represented, as of October 10, 1980, by the Penobscot Nation Governor and Council;

(*l*) "Secretary" means the Secretary of the Interior;

(m) "Settlement Fund" means the Maine Indian Claims Settlement Fund established under section 1724(a) of this title; and

(n) "transfer" includes but is not limited to 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.

(Pub. L. 96–420, § 3, Oct. 10, 1980, 94 Stat. 1786.)

§ 1723. Approval of prior transfers and extinguishment of Indian title and claims of Indians within State of Maine

(a) Ratification by Congress; personal claims unaffected; United States barred from asserting claims on ground of noncompliance of transfers with State laws or occurring prior to December 1, 1873

(1) Any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, and any transfer of land or natural resources located anywhere within the State of Maine, from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including but without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, Sec. 4, 1 Stat. 137, 138), and all amendments thereto and all subsequent reenactments and versions thereof, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer: *Provided however*, That nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian (except for any Federal common law fraud claim) which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(2) The United States is barred from asserting on behalf of any Indian, Indian nation, or tribe or band of Indians any claim under the laws of the State of Maine arising before October 10, 1980, and arising from any transfer of land or natural resources by any Indian, Indian nation, or tribe or band of Indians, located anywhere within the State of Maine, 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.

(3) The United States is barred from asserting by or on behalf of any individual Indian any claim under the laws of the State of Maine arising from any transfer of land or natural resources located anywhere within the State of Maine from, by, or on behalf of any individual Indian, which occurred prior to December 1, 1873, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State.

(b) Aboriginal title extinguished as of date of transfer

To the extent that any transfer of land or natural resources described in subsection (a)(1) of this section may involve land or natural resources to which the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, or any other Indian, Indian nation, or tribe or band of Indians had aboriginal title, such subsection (a)(1) of this section shall be regarded as an extinguishment of said aboriginal title as of the date of such transfer.

(c) Claims extinguished as of date of transfer

By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians or any of their members or by any other Indian, Indian nation, tribe or band of Indians, or any predecessors or successors in interest thereof, arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy, shall be deemed extinguished as of the date of the transfer.

(d) Effective date; authorization of appropriations; publication in Federal Register

The provisions of this section shall take effect immediately upon appropriation of the funds authorized to be appropriated to implement the provisions of section 1724 of this title. The Secretary shall publish notice of such appropriation in the Federal Register when such funds are appropriated.

(Pub. L. 96–420, § 4, Oct. 10, 1980, 94 Stat. 1787.)

REFERENCES IN TEXT

The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, Sec. 4, 1 Stat. 137, 138), referred to in subsec. (a)(1), was not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

§ 1724. Maine Indian Claims Settlement and Land Acquisition Funds in the United States Treasury

(a) Establishment of Maine Indian Claims Settlement Fund; amount

There is hereby established in the United States Treasury a fund to be known as the Maine Indian Claims Settlement Fund in which $27,000,000 shall be deposited following the appropriation of sums authorized by section 1733 of this title.

(b) Apportionment of settlement fund; administration; investments; limitation on distributions; quarterly investment income payments; expenditures for aged members; cessation of trust responsibility following Federal payments

(1) One-half of the principal of the settlement fund shall be held in trust by the Secretary for the benefit of the Passamaquoddy Tribe, and the other half of the settlement fund shall be held in trust for the benefit of the Penobscot Nation. Each portion of the settlement fund shall be administered by the Secretary in accordance with reasonable terms established by the Passamaquoddy Tribe or the Penobscot Nation, respectively, and agreed to by the Secretary: *Provided*, That the Secretary may not agree to terms which provide for investment of the settlement fund in a manner not in accordance with section 162a of this title, unless the respective tribe or nation first submits a specific waiver of liability on the part of the United States for any loss which may result from such an investment: *Provided, further*, That until such terms have been agreed upon, the Secretary shall fix the terms for the administration of the portion of the settlement fund as to which there is no agreement.

(2) Under no circumstances shall any part of the principal of the settlement fund be distributed to either the Passamaquoddy Tribe or the Penobscot Nation, or to any member of either tribe or nation: *Provided, however*, That nothing herein shall prevent the Secretary from investing the principal of said fund in accordance with paragraph (1) of this subsection.

(3) The Secretary shall make available to the Passamaquoddy Tribe and the Penobscot Nation in quarterly payments, without any deductions except as expressly provided in section 1725(d)(2) of this title and without liability to or on the part of the United States, any income received from the investment of that portion of the settlement fund allocated to the respective tribe or nation, the use of which shall be free of regulation by the Secretary. The Passamaquoddy Tribe and the Penobscot Nation annually shall each expend the income from $1,000,000 of their portion of the settlement fund for the benefit of their respective members who are over the age of sixty. Once payments under this paragraph have been made to the tribe or nation, the United States shall have no further trust responsibility to the tribe or nation or their members with respect to the sums paid, any subsequent distribution of these sums, or any property or services purchased therewith.

(c) Establishment of Maine Indian Claims Land Acquisition Fund; amount

There is hereby established in the United States Treasury a fund to be known as the Maine Indian Claims Land Acquisition Fund in which $54,500,000 shall be deposited following the appropriation of sums authorized by section 1733 of this title.

(d) Apportionment of land acquisition fund; expenditures for acquisition of land or natural resources; trust acreage; fee holdings; interests in corpus of trust for Houlton Band following termination of Band's interest in trust; agreement for acquisitions for benefit of Houlton Band: scope, report to Congress

The principal of the land acquisition fund shall be apportioned as follows:

(1) $900,000 to be held in trust for the Houlton Band of Maliseet Indians;

(2) $26,800,000 to be held in trust for the Passamaquoddy Tribe; and

(3) $26,800,000 to be held in trust for the Penobscot Nation.

The Secretary is authorized and directed to expend, at the request of the affected tribe, nation or band, the principal and any income accruing to the respective portions of the land acquisition fund for the purpose of acquiring land or natural resources for the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians and for no other purpose. The first 150,000 acres of land or natural resources acquired for the Passamaquoddy Tribe and the first 150,000 acres acquired for the Penobscot Nation within the area described in the Maine Implementing Act as eligible to be included within the Passamaquoddy Indian Territory and the Penobscot Indian Territory shall be held in trust by the United States for the benefit of the respective tribe or nation. The Secretary is also authorized to take in trust for the Passamaquoddy Tribe or the Penobscot Nation any land or natural resources acquired within the aforesaid area by purchase, gift, or exchange by such tribe or nation. Land or natural resources acquired outside the boundaries of the aforesaid areas shall be held in fee by the respective tribe or nation, and the United States shall have no further trust responsibility with respect thereto. Land or natural resources acquired within the State of Maine for the Houlton Band of Maliseet Indians shall be held in trust by the United States for the benefit of the band: *Provided*, That no land or natural resources shall be so acquired for or on behalf of the Houlton Band of Maliseet Indians without the prior enactment of appropriate legislation by the State of Maine approving such acquisition: *Provided further*, That the Passamaquoddy Tribe and the Penobscot Nation shall each have a one-half undivided interest in the corpus of the trust, which shall consist of any such property or subsequently acquired exchange property, in the event the Houlton Band of Maliseet Indians should terminate its interest in the trust.

(4) The Secretary is authorized to, and at the request of either party shall, participate in negotiations between the State of Maine and the Houlton Band of Maliseet Indians for the purpose of assisting in securing agreement as to the land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band. Such agreement shall be embodied in the legislation enacted by the State of Maine approving the acquisition of such lands as required by paragraph (3). The agreement and the legislation shall be limited to:

(A) provisions providing restrictions against alienation or taxation of land or natural resources held in trust for the Houlton Band no less restrictive than those provided by this subchapter and the Maine Implementing Act for land or natural resources to be held in trust for the Passamaquoddy Tribe or Penobscot Nation;

(B) provisions limiting the power of the State of Maine to condemn such lands that are no less restrictive than the provisions of this subchapter and the Maine Implementing Act that apply to the Passamaquoddy Indian Territory and the Penobscot Indian Territory but not within either the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation;

(C) consistent with the trust and restricted character of the lands, provisions satisfactory to the State and the Houlton Band concerning:

(i) payments by the Houlton Band in lieu of payment of property taxes on land or natural resources held in trust for the band, except that the band shall not be deemed to own or use any property for governmental purposes under the Maine Implementing Act;

(ii) payments of other fees and taxes to the extent imposed on the Passamaquoddy Tribe and the Penobscot Nation under the Maine Implementing Act, except that the band shall not be deemed to be a governmental entity under the Maine Implementing Act or to have the powers of a municipality under the Maine Implementing Act;

(iii) securing performance of obligations of the Houlton Band arising after the effective date of agreement between the State and the band.

(D) provisions on the location of these lands.

Except as set forth in this subsection, such agreement shall not include any other provisions regarding the enforcement or application of the laws of the State of Maine. Within one year of October 10, 1980, the Secretary is directed to submit to the appropriate committees of the House of Representatives and the Senate having jurisdiction over Indian affairs a report on the status of these negotiations.

(e) Acquisitions contingent upon agreement as to identity of land or natural resources to be sold, purchase price and other terms of sale; condemnation proceedings by Secretary; other acquisition authority barred for benefit of Indians in State of Maine

Notwithstanding the provisions of sections 3113 and 3114(a) to (d) of title 40, the Secretary may acquire land or natural resources under this section from the ostensible owner of the land or natural resources only if the Secretary and the ostensible owner of the land or natural resources have agreed upon the identity of the land or natural resources to be sold and upon the purchase price and other terms of sale. Subject to the agreement required by the preceding sentence, the Secretary may institute condemnation proceedings in order to perfect title,

satisfactory to the Attorney General, in the United States and condemn interests adverse to the ostensible owner. Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.

(f) Expenditures for Tribe, Nation, or Band contingent upon documentary relinquishment of claims

The Secretary may not expend on behalf of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians any sums deposited in the funds established pursuant to the subsections (a) and (c) of this section unless and until he finds that authorized officials of the respective tribe, nation, or band have executed appropriate documents relinquishing all claims to the extent provided by sections 1723, 1730, and 1731 of this title and by section 6213 of the Maine Implementing Act, including stipulations to the final judicial dismissal with prejudice of their claims.

(g) Transfer limitations of section 177 of this title inapplicable to Indians in State of Maine; restraints on alienation as provided in section; transfers invalid ab initio except for: State and Federal condemnations, assignments, leases, sales, rights-of-way, and exchanges

(1) The provisions of section 177 of this title shall not be applicable to (A) the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians or any other Indian, Indian nation, or tribe or band of Indians in the State of Maine, or (B) any land or natural resources owned by or held in trust for the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians or any other Indian, Indian nation or tribe or band of Indians in the State of Maine. Except as provided in subsections (d)(4) and (g)(2) of this section, such land or natural resources shall not otherwise be subject to any restraint on alienation by virtue of being held in trust by the United States or the Secretary.

(2) Except as provided in paragraph (3) of this subsection, any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory, except (A) takings for public uses consistent with the Maine Implementing Act, (B) takings for public uses pursuant to the laws of the United States, or (C) transfers of individual Indian use assignments from one member of the Passamaquoddy Tribe or Penobscot Nation to another member of the same tribe or nation, shall be void ab initio and without any validity in law or equity.

(3) Land or natural resources within the Passamaquoddy Indian Territory or the Penobscot Indian Territory or held in trust for the benefit of the Houlton Band of Maliseet Indians may, at the request of the respective tribe, nation, or band, be—

(A) leased in accordance with sections 415 to 415d of this title;

(B) leased in accordance with sections 396a to 396g of this title;

(C) sold in accordance with section 407 of this title;

(D) subjected to rights-of-way in accordance with sections 323 to 328 of this title;

(E) exchanged for other land or natural resources of equal value, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary for deposit in the land acquisition fund for the benefit of the affected tribe, nation, or band, as the circumstances require, so long as payment does not exceed 25 per centum of the total value of the interests in land to be transferred by the tribe, nation, or band, and

(F) sold, only if at the time of sale the Secretary has entered into an option agreement or contract of sale to purchase other lands of approximate equal value.

(h) Agreement on terms for management and administration of land or natural resources

Land or natural resources acquired by the Secretary in trust for the Passamaquoddy Tribe and the Penobscot Nation shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 450f of this title, or other existing law.

(i) Condemnation of trust or restricted land or natural resources within Reservations: substitute land or monetary proceeds as medium of compensation; condemnation of trust land without Reservations: use of compensation for reinvestment in trust or fee held acreage, certification of acquisitions; State condemnation proceedings: United States as necessary party, exhaustion of State administrative remedies, judicial review in Federal courts, removal of action

(1) Trust or restricted land or natural resources within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. In the event that the compensation for the taking is in the form of substitute land to be added to the reservation, such land shall become a part of the reservation in accordance with the Maine Implementing Act and upon notification to the Secretary of the location and boundaries of the substitute land. Such substitute land shall have the same trust or restricted status as the land taken. To the extent that the compensation is in the form of monetary proceeds, it shall be deposited and reinvested as provided in paragraph (2) of this subsection.

(2) Trust land of the Passamaquoddy Tribe or the Penobscot Nation not within the Passamaquoddy Reservation or Penobscot Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. The proceeds from any such condemnation shall be deposited in the land acquisition fund established by subsection (c) of this section and shall be reinvested in acreage within unorganized or unincorporated areas of the State of Maine. When the proceeds are reinvested in land whose acreage does not exceed that of the land taken, all the land shall be acquired in trust. When the proceeds are invested in land whose acreage exceeds the acreage of the land taken, the respective tribe or nation shall designate, with the approval of the United States, and within thirty days of such re-

investment, that portion of the land acquired by the reinvestment, not to exceed the area taken, which shall be acquired in trust. The land not acquired in trust shall be held in fee by the respective tribe or nation. The Secretary shall certify, in writing, to the Secretary of State of the State of Maine the location, boundaries, and status of the land acquired.

(3) The State of Maine shall have initial jurisdiction over condemnation proceedings brought under this section. The United States shall be a necessary party to any such condemnation proceedings. After exhaustion of all State administrative remedies, the United States is authorized to seek judicial review of all relevant matters in the courts of the United States and shall have an absolute right of removal, at its discretion, over any action commenced in the courts of the State.

(j) Federal condemnation under other laws; deposit and reinvestment of compensatory proceeds

When trust or restricted land or natural resources of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians are condemned pursuant to any law of the United States other than this subchapter, the proceeds paid in compensation for such condemnation shall be deposited and reinvested in accordance with subsection (i)(2) of this section.

(Pub. L. 96–420, § 5, Oct. 10, 1980, 94 Stat. 1788.)

CODIFICATION

"Sections 3113 and 3114(a) to (d) of title 40" substituted in subsec. (e) for "section 1 of the Act of August 1, 1888 (25 Stat. 357), as amended, and section 1 of the Act of February 26, 1931 (46 Stat. 1421)" on authority of Pub. L. 107–217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

HOULTON BAND OF MALISEET INDIANS SUPPLEMENTARY CLAIMS SETTLEMENT

Pub. L. 99–566, Oct. 27, 1986, 100 Stat. 3184, provided: "That this Act may be cited as the 'Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986'.

"DEFINITIONS

"SEC. 2. For purposes of this Act—

"(1) The term 'Houlton Band Tax Fund' means the fund established under section 3.

"(2) The term 'Houlton Band trust land' means land or natural resources acquired by the Secretary of the Interior and held in trust by the United States for the benefit of the Houlton Band of Maliseet Indians in accordance with section 5(d) of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1724(d); 94 Stat. 1789).

"(3) The term 'amended Maine Implementing Act' means the Maine Implementing Act (defined in section 3(e) of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1722(e); 94 Stat. 1787)) as amended by—

"(A) the 'Act to amend the Maine Implementing Act with respect to the Houlton Band of Maliseet Indians', enacted by the State of Maine in chapter 675 of the Public Laws of 1981, and

"(B) the State of Maine in chapter 672 of the Public Laws of 1985.

"(4) The term 'Secretary' means the Secretary of the Interior.

"(5) The term 'Houlton Band of Maliseet Indians' has the meaning given to such term by section 3(a) of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1722(a)).

"HOULTON BAND TAX FUND

"SEC. 3. (a) There is hereby established in the United States Treasury a fund to be known as the Houlton Band Tax Fund in which shall be deposited $200,000 in accordance with the provisions of this Act.

"(b)(1) Income accrued on the land acquisition fund established for the Houlton Band of Maliseet Indians pursuant to subsections (c) and (d)(1) of section 5 of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1724; 94 Stat. 1789) shall be transferred to the Houlton Band Tax Fund. No transfer shall be made under this subsection if such transfer would diminish such land acquisition fund to a balance of less than $900,000.

"(2) Whenever funds are transferred to the Houlton Band Tax Fund pursuant to paragraph (1), the Secretary shall publish notice of such transfer in the Federal Register. Such notice shall specify when the full amount of $200,000 has been transferred to the Houlton Band Tax Fund.

"(c) The Secretary shall manage the Houlton Band Tax Fund in accordance with the first section of the Act of June 24, 1938 (25 U.S.C. 162a), and shall utilize the principal and interest of such Fund only as provided in subsection (d) and for no other purpose.

"(d) Notwithstanding the provisions of section 3727 of title 31, United States Code, the Secretary shall pay out of the Houlton Band Tax Fund all valid claims for taxes, payments in lieu of property taxes, and fees, together with any interest and penalties thereon—

"(1) for which the Houlton Band of Maliseet Indians are determined to be liable under the terms of section 6208–A(2) of the amended Maine Implementing Act,

"(2) which are final and not subject to further administrative or judicial review, and

"(3) which have been certified by the Commissioner of Finance and Administration of the State of Maine as valid claims (within the meaning of section 6208–A(2) of the amended Maine Implementing Act) that meet the requirements of this subsection.

"(e) Notwithstanding any other provision of law, if—

"(1) the Houlton Band of Maliseet Indians is liable to the State of Maine or any county, district, municipality, city, town, village, plantation, or any other political subdivision thereof for any tax, payment in lieu of property tax, or fees, together with any interest or penalties thereon, and

"(2) there are insufficient funds in the Houlton Band Tax Fund to pay such tax, payment, or fee (together with any interest or penalties thereon) in full, the deficiency shall be paid by the Houlton Band of Maliseet Indians only from income-producing property owned by such Band which is not held in trust for such Band by the United States, and such Band shall not be required to pay such tax, payment, or fee (or any interest or penalty thereon) from any other source.

"(f) The Secretary shall, after consultation with the Commissioner of Finance and Administration of the State of Maine and the Houlton Band of Maliseet Indians, prescribe written procedures governing the filing and payment of claims under this section and section 6208–A of the amended Maine Implementing Act.

"HOULTON BAND TRUST LAND

"SEC. 4. (a) Subject to the provisions of section 3 of this Act, the Secretary is authorized and directed to expend, at the request of the Houlton Band of Maliseet Indians, the principal of, and income accruing on, the land acquisition fund established for such Band under subsections (c) and (d)(1) of section 5 of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1724; 94 Stat. 1789) for the purposes of acquiring land or natural resources for such Band and for no other purpose. Land or natural resources so acquired within the State of Maine for such Band shall be held in trust by the United States for the benefit of such Band.

"(b)(1) Land or natural resources acquired with funds expended under the authority of subsection (a) and held

in trust for the benefit of the Houlton Band of Maliseet Indians may be alienated only by—

"(A) takings for public use pursuant to the laws of the State of Maine as provided in subsection (c),

"(B) takings for public use pursuant to the laws of the United States,

"(C) transfers authorized by section 5(g)(3) of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. 1724(g)(3); 94 Stat. 1791), or

"(D) transfers made pursuant to an Act or joint resolution of Congress.

All other transfers of land or natural resources acquired with funds expended under the authority of subsection (a) and held in trust for the benefit of such Band shall be void ab initio and without any validity in law or equity.

"(2) The provisions of paragraph (1) shall not prohibit or limit transfers of individual use assignments of land or natural resources from one member of the Houlton Band of Maliseet Indians to another member of such Band.

"(c)(1) Land or natural resources acquired with funds expended under the authority of subsection (a) and held in trust for the benefit of the Houlton Band of Maliseet Indians may be condemned for public purposes by the State of Maine, or any political subdivision thereof, only upon such terms and conditions as shall be agreed upon in writing between the State and such Band after the date of enactment of this Act [Oct. 27, 1986].

"(2) The consent of the United States is hereby given to the State of Maine to further amend the amended Maine Implementing Act for the purpose of embodying the agreement described in paragraph (1).

"(d)(1) Lands and natural resources may be acquired by the Secretary for the Houlton Band of Maliseet Indians only if the Secretary has, at any time prior to such acquisition—

"(A) transmitted a letter to the Secretary of State of the State of Maine stating that the Houlton Band Tax Fund contains $200,000, and

"(B) provided the Secretary of State of the State of Maine with a copy of the procedures for filing and payment of claims prescribed under section 3(f).

"(2)(A) No land or natural resources may be acquired by the Secretary for the Houlton Band of Maliseet Indians until the Secretary—

"(i) files with the Secretary of State of the State of Maine a certified copy of the deed, contract, or other conveyance setting forth the location and boundaries of the land or natural resources to be acquired by the Secretary, or

"(ii) files with the Secretary of State of the State of Maine a certified copy of any instrument setting forth the location and boundaries of the land or natural resources to be acquired.

"(B) For purposes of subparagraph (A), filing with the Secretary of State of the State of Maine may be made by mail and, if such method of filing is used, shall be considered to be completed on the date on which the document is properly mailed to the Secretary of State of the State of Maine."

§ 1725. State laws applicable

(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State

Except as provided in section 1727(e) and section 1724(d)(4) of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States

(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

(2) Funds appropriated for the benefit of Indian people or for the administration of Indian affairs may be utilized, consistent with the purposes for which they are appropriated, by the Passamaquoddy Tribe and the Penobscot Nation to provide part or all of the local share as provided by the Maine Implementing Act.

(3) Nothing in this section shall be construed to supersede any Federal laws or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine unless expressly provided by this subchapter.

(4) Not later than October 30, 1982, the Secretary is directed to submit to the appropriate committees of the House of Representatives and the Senate having jurisdiction over Indian affairs a report on the Federal and State funding provided the Passamaquoddy Tribe and Penobscot Nation compared with the respective Federal and State funding in other States.

(c) Federal criminal jurisdiction inapplicable in State of Maine under certain sections of title 18; effective date: publication in Federal Register

The United States shall not have any criminal jurisdiction in the State of Maine under the provisions of sections 1152, 1153, 1154, 1155, 1156, 1160, 1161, and 1165 of title 18. This provision shall not be effective until sixty days after the publication of notice in the Federal Register as required by section 1723(d) of this title.

(d) Capacity to sue and be sued in State of Maine and Federal courts; section 1362 of title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; and section 1362 of title 28 shall be applicable to civil actions

brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: *Provided, however*, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act.

(2) Notwithstanding the provisions of section 3727 of title 31, the Secretary shall honor valid final orders of a Federal, State, or territorial court which enters money judgments for causes of action which arise after October 10, 1980, against either the Passamaquoddy Tribe or the Penobscot Nation by making an assignment to the judgment creditor of the right to receive income out of the next quarterly payment from the settlement fund established pursuant to section 1724(a) of this title and out of such future quarterly payments as may be necessary until the judgment is satisfied.

(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band lands

(1) The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation: *Provided*, That such amendment is made with the agreement of the affected tribe or nation, and that such amendment relates to (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation; or (C) the allocation of jurisdiction between tribal courts and State courts.

(2) Notwithstanding the provisions of subsection (a) of this section, the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members.

(f) Indian jurisdiction separate and distinct from State civil and criminal jurisdiction

The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.

(g) Full faith and credit

The Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other.

(h) General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine

Except as other wise[1] provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

(i) Eligibility for Federal special programs and services regardless of reservation status

As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation and any lands which are held by the respective tribe, nation, or band subject to a restriction against alienation or which are held in trust for the benefit of the respective tribe, nation, or band shall be considered Federal Indian reservations for purposes of Federal taxation. Notwithstanding any other provision of law authorizing the provision of special programs and services by the United States to Indians because of their status as Indians, any member of the Houlton Band of Maliseet Indians in or near the town of Houlton, Maine, shall be eligible for such programs and services without regard to the existence of a reservation or of the residence of such member on or near a reservation.

(Pub. L. 96–420, § 6, Oct. 10, 1980, 94 Stat. 1793; Pub. L. 97–428, § 3, Jan. 8, 1983, 96 Stat. 2268.)

CODIFICATION

In subsec. (d)(2), "section 3727 of title 31" substituted for "section 3477 of the Revised Statutes, as amended" on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

AMENDMENTS

1983—Subsec. (i). Pub. L. 97–428 inserted provision that notwithstanding any other provision of law authorizing provision of special programs and services by United States to Indians because of their status as Indians, any member of Houlton Band of Maliseet Indians in or near town of Houlton, Maine, be eligible for such programs and services without regard to existence of a reservation or of residence of such member on or near a reservation.

§ 1726. Tribal organization

(a) Appropriate instrument in writing; filing of organic governing document

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians

[1] So in original. Probably should be "otherwise".

may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this subchapter and the Maine Implementing Act. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall each file with the Secretary a copy of its organic governing document and any amendments thereto.

(b) Membership

For purposes of benefits under this subchapter and the recognition extended the Houlton Band of Maliseet Indians, no person who is not a citizen of the United States may be considered a member of the Houlton Band of Maliseets, except persons who, as of October 10, 1980, are enrolled members on the band's existing membership roll, and direct lineal descendants of such members. Membership in the band shall be subject to such further qualifications as may be provided by the band in its organic governing document or amendments thereto subject to the approval of the Secretary.

(Pub. L. 96–420, § 7, Oct. 10, 1980, 94 Stat. 1795.)

§ 1727. Implementation of Indian Child Welfare Act

(a) Petition for assumption of exclusive jurisdiction; approval by Secretary

The Passamaquoddy Tribe or the Penobscot Nation may assume exclusive jurisdiction over Indian child custody proceedings pursuant to the Indian Child Welfare Act of 1978 (92 Stat. 3069) [25 U.S.C. 1901 et seq.]. Before the respective tribe or nation may assume such jurisdiction over Indian child custody proceedings, the respective tribe or nation shall present to the Secretary for approval a petition to assume such jurisdiction and the Secretary shall approve that petition in the manner prescribed by sections 108(a)–(c) of said Act [25 U.S.C. 1918(a)–(c)].

(b) Consideration and determination of petition by Secretary

Any petition to assume jurisdiction over Indian child custody proceedings by the Passamaquoddy Tribe or the Penobscot Nation shall be considered and determined by the Secretary in accordance with sections 108(b) and (c) of the Act [25 U.S.C. 1918(b) and (c)].

(c) Actions or proceedings within existing jurisdiction unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction.

(d) Reservations within section 1903(10) of this title

For the purposes of this section, the Passamaquoddy Indian Reservation and the Penobscot Indian Reservation are "reservations" within section 4(10) of the Act [25 U.S.C. 1903(10)].

(e) Indian tribe within section 1903(8) of this title; State jurisdiction over child welfare unaffected

For the purposes of this section, the Houlton Band of Maliseet Indians is an "Indian tribe" within section 4(8) of the Act [25 U.S.C. 1903(8)], provided, that nothing in this subsection shall alter or effect the jurisdiction of the State of Maine over child welfare matters as provided in section 1725(e)(2) of this title.

(f) Assumption determinative of exclusive jurisdiction

Until the Passamaquoddy Tribe or the Penobscot Nation has assumed exclusive jurisdiction over the Indian child custody proceedings pursuant to this section, the State of Maine shall have exclusive jurisdiction over Indian child custody proceedings of that tribe or nation.

(Pub. L. 96–420, § 8, Oct. 10, 1980, 94 Stat. 1795.)

REFERENCES IN TEXT

The Indian Child Welfare Act of 1978 (92 Stat. 3069), referred to in subsec. (a), is Pub. L. 95–608, Nov. 8, 1978, 92 Stat. 3069, as amended, which is classified principally to chapter 21 (§ 1901 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1901 of this title and Tables.

§ 1728. Federal financial aid programs unaffected by payments under subchapter

(a) Eligibility of State of Maine for participation without regard to payments to designated Tribe, Nation, or Band under subchapter

No payments to be made for the benefit of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians pursuant to the terms of this subchapter shall be considered by any agency or department of the United States in determining or computing the eligibility of the State of Maine for participation in any financial aid program of the United States.

(b) Eligibility of designated Tribe, Nation, or Band for benefits without regard to payments from State of Maine except in considering actual financial situation in determining need of applicant

The eligibility for or receipt of payments from the State of Maine by the Passamaquoddy Tribe and the Penobscot Nation or any of their members pursuant to the Maine Implementing Act shall not be considered by any department or agency of the United States in determining the eligibility of or computing payments to the Passamaquoddy Tribe or the Penobscot Nation or any of their members under any financial aid program of the United States: *Provided*, That to the extent that eligibility for the benefits of such a financial aid program is dependent upon a showing of need by the applicant, the administering agency shall not be barred by this subsection from considering the actual financial situation of the applicant.

(c) Availability of settlement or land acquisition funds not income or resources or otherwise used to affect federally assisted housing programs or Federal financial assistance or other Federal benefits

The availability of funds or distribution of funds pursuant to section 1724 of this title may not be considered as income or resources or otherwise utilized as the basis (1) for denying any Indian household or member thereof participation in any federally assisted housing program, (2) for denying or reducing the Federal fi-

nancial assistance or other Federal benefits to which such household or member would otherwise be entitled, or (3) for denying or reducing the Federal financial assistance or other Federal benefits to which the Passamaquoddy Tribe or Penobscot Nation would otherwise be eligible or entitled.

(Pub. L. 96–420, § 9, Oct. 10, 1980, 94 Stat. 1795.)

§ 1729. Deferral of capital gains

For the purpose of subtitle A of title 26, any transfer by private owners of land purchased or otherwise acquired by the Secretary with moneys from the land acquisition fund whether in the name of the United States or of the respective tribe, nation or band shall be deemed to be an involuntary conversion within the meaning of section 1033 of title 26.

(Pub. L. 96–420, § 10, Oct. 10, 1980, 94 Stat. 1796; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

AMENDMENTS

1986—Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954" wherever appearing, which for purposes of codification was translated as "title 26" thus requiring no change in text.

§ 1730. Transfer of tribal trust funds held by the State of Maine

All funds of either the Passamaquoddy Tribe or the Penobscot Nation held in trust by the State of Maine as of October 10, 1980, shall be transferred to the Secretary to be held in trust for the respective tribe or nation and shall be added to the principal of the settlement fund allocated to that tribe or nation. The receipt of said State funds by the Secretary shall constitute a full discharge of any claim of the respective tribe or nation, its predecessors and successors in interest, and its members, may have against the State of Maine, its officers, employees, agents, and representatives, arising from the administration or management of said State funds. Upon receipt of said State funds, the Secretary, on behalf of the respective tribe and nation, shall execute general releases of all claims against the State of Maine, its officers, employees, agents, and representatives, arising from the administration or management of said State funds.

(Pub. L. 96–420, § 11, Oct. 10, 1980, 94 Stat. 1796.)

CODIFICATION

"October 10, 1980," substituted in text for "the effective date of this Act".

§ 1731. Other claims discharged by this subchapter

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

(Pub. L. 96–420, § 12, Oct. 10, 1980, 94 Stat. 1796.)

§ 1732. Limitation of actions

Except as provided in this subchapter, no provision of this subchapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, or to grant implied consent to any Indian, Indian nation, or tribe or band of Indians to sue the United States or any of its officers with respect to the claims extinguished by the operation of this subchapter.

(Pub. L. 96–420, § 13, Oct. 10, 1980, 94 Stat. 1797.)

§ 1733. Authorization of appropriations

There is hereby authorized to be appropriated $81,500,000 for the fiscal year beginning October 1, 1980, for transfer to the funds established by section 1724 of this title.

(Pub. L. 96–420, § 14, Oct. 10, 1980, 94 Stat. 1797.)

§ 1734. Inseparability of provisions

In the event that any provision of section 1723 of this title is held invalid, it is the intent of Congress that the entire subchapter be invalidated. In the event that any other section or provision of this subchapter is held invalid, it is the intent of Congress that the remaining sections of this subchapter shall continue in full force and effect.

(Pub. L. 96–420, § 15, Oct. 10, 1980, 94 Stat. 1797.)

§ 1735. Construction

(a) Law governing; special legislation

In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this subchapter should emerge, the provisions of this subchapter shall govern.

(b) General legislation

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

(Pub. L. 96–420, § 16, Oct. 10, 1980, 94 Stat. 1797.)

SUBCHAPTER III—FLORIDA INDIAN (MICCOSUKEE) LAND CLAIMS SETTLEMENT

PART A—FLORIDA INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982

§ 1741. Congressional findings and declaration of policy

Congress finds and declares that—

(1) there is pending before the United States District Court for the Southern District of