Nos. 2016-1424, 2016-1435, 2016-1474, 2016-1482

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.

AARON M. FREY, Attorney General for the State of Maine; JUDY A. CAMUSO, 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.

Appeal from the United States District Court for the District of Maine

SUPPLEMENTAL BRIEF OF PENOBSCOT NATION

Kaighn Smith, Jr.
David M. Kallin
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
Phone: (207) 772-1941
Fax: (207) 772-3627
ksmith@dwmlaw.com

Pratik A. Shah
Lide E. Paterno
Akin Gump Strauss Hauer & Feld LLP
2001 K Street, NW
Washington, DC 20006-1037
Phone: (202) 887-4000
Fax: (202) 887-4288
pshah@akingump.com

Counsel for Penobscot Nation

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[1] Formerly codified at 25 U.S.C. §§ 1721-1735, MICSA remains in effect, but was removed from the United States Code as of 25 U.S.C. Supp. IV (Sep. 2016) by codifiers to improve the Code's organization. This brief refers to MICSA's sections as previously codified.

STATEMENT OF ISSUES

1. Whether the Settlement Acts—consistent with Supreme Court precedent and established tools of statutory construction—codify the historical understanding of the Penobscot Nation, the United States, and the State that the Reservation encompasses the Main Stem of the Penobscot River.

2. Whether the Nation's claim to an on-Reservation sustenance-fishing right in the Main Stem, as recognized by the district court, is ripe for affirmance in light of the State's new position that the Reservation excludes the Main Stem.

INTRODUCTION

Fishing is the lifeblood of the Penobscot Nation. That is why the Settlement Acts, which memorialize and ratify an agreement between the Nation and the State of Maine to settle claims brought by the United States (as trustee) for loss of the Nation's aboriginal homelands through unlawful treaty cessions, expressly protect the Nation's fishing rights "within the boundaries of [its] *** Indian reservation[]." 30 M.R.S.A. § 6207(4). Yet the district court and a divided panel of this Court found that the Acts' use of the term "islands" in defining the Penobscot Reservation requires total exclusion of the Penobscot River—the Nation's historic fishing grounds and the only place within its Reservation where members could conceivably fish.

That untenable conclusion—a devastating blow to the Nation's sovereign borders and cultural identity—contravenes the statutory text and structure; ignores the Settlement Acts' treaty-based context revealing that the Nation retained aboriginal title to the Penobscot River's Main Stem; disregards Congress's manifest intent to protect sustenance fishing on the Reservation; and conflicts with the parties' contemporaneous and post-enactment understandings (until the State's 2012 about-face). It also flouts Supreme Court precedent, well established when the Settlement Acts were adopted, interpreting "island" reservations as encompassing surrounding waters.

Traditional tools of statutory construction point to the best interpretation of the Settlement Acts: that the Nation's Reservation includes the Main Stem of the Penobscot River, the heart of its homeland. Applying the Indian canons, principles deeply rooted in federal Indian law, compels that interpretation. This Court should not permit the State unilaterally to renege on the hard-fought compromises embodied in the Settlement Acts—especially in a manner that so blatantly upends precedent, overrides the Nation's (and the State's) long-held understandings, and extinguishes a sovereign interest fundamental to the Nation's history, culture, and livelihood.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

1. The Penobscot Nation is a "riverine" American Indian tribe. S. REP. NO. 96-957, at 11 (1980) ("S.R.") (J.A.623); H. REP. NO. 96-1353, at 11 (1980) ("H.R.") (J.A.685). Its "aboriginal territory" is "centered on the Penobscot River." *Id.* Referring to itself as "*Pa'nawampske 'wiak*"—"People of where the river broadens out"—the Nation's culture and way of life have always depended upon subsistence fishing, trapping, and hunting in and on the River. J.A.1153; *see* Add.88 n.19 (explaining Penobscot locution "to fish my islands" refers to subsistence fishing in waters surrounding Penobscot island communities in River's Main Stem);[2] J.A.1002, 1046 (Penobscots considered the uplands, where families reside, and the River, the families' food source, to be Reservation); *see also, e.g.,* J.A.1002, 1038 (Penobscot island families "always relied upon the Penobscot River as a source for food," including fish, eel, muskrat, and other animals caught or trapped from River); J.A.1153-1174, 1256-1262 (anthropologist reports discussing Penobscots' historic, cultural, and subsistence ties to River).

Early historical records show the River was "well understood" before the United States' founding as "the exclusive tribal domain of the Penobscot people,"

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[2] The Main Stem is the 60-mile stretch of the River flowing from Indian Island north to the confluence of the East and West Branches. J.A.144.

whom European explorers and colonists named after it. J.A.1153-1160. In 1775, the Third Provincial Congress obtained the Nation's support in the Revolutionary War by promising to respect that exclusive domain, "beginning at the head of the tide on Penobscot [R]iver, extending six miles on each side of said [R]iver." J.A.182.

Following American independence, in 1796, Massachusetts entered into a treaty with the Nation to obtain certain of its lands along a thirty-mile stretch "on both sides of the River." Add.160-161; J.A.184-187. In 1818, a second treaty purported to cede the Nation's remaining lands "on both sides of the Penobscot [R]iver, and the branches thereof, above the tract of thirty miles in length" ceded in the prior treaty, with the exception of four townships abutting the River. Add.162-165; J.A.190-199. The treaties reserved to the Nation "all the islands in the Penobscot [R]iver above Oldtown and including *** Oldtown island." Add.163; Add.160. Now commonly called Indian Island, the Nation's name for Old Town Island—"*Pe'no'om skee'ok*" or "*Panawamskeag*"—expressed the Nation's understanding that it was the "place from which the River is called." J.A.1159-1160.

The Nation did not cede submerged lands surrounding their island-based villages. In the 1818 treaty, the Nation instead granted the citizens of Massachusetts the "right to pass and repass any of the rivers *** which run through any of the lands hereby reserved for the purpose of transporting their timber and other articles."

Add.164.

In 1820, upon its separation from Massachusetts, Maine entered into an agreement with the Nation to accede to the prior treaties. J.A.200-211. In 1833, Maine purported to purchase the four reserved townships. J.A.1520.

2. The federal government did not consent to the Nation's land cessions. Accordingly, in 1974, the United States, as trustee for the Nation, sued Maine to challenge the validity of the land cessions under the Nonintercourse Act, 25 U.S.C. § 177, which prohibits transfers of Indian land without congressional approval. That lawsuit was resolved in a 1980 settlement codified in two statutes—the Maine Implementing Act ("MIA"); and the federal statute ratifying that Act, the Maine Indian Claims Settlement Act ("MICSA")—collectively known as the "Settlement Acts."

As relevant here, the MIA defines the Reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed [in] *** 1818." 30 M.R.S.A. § 6203(8). The MICSA refers to that definition, providing that "'Penobscot Indian Reservation' means those lands as defined in the [MIA]." 25 U.S.C. § 1722(*i*).

Another MIA provision, entitled "Sustenance fishing within the Indian

reservation[],” provides that (subject to certain limitations) members of the “Penobscot Nation may take fish, within the boundaries of the[] *** Indian reservation[], for their individual sustenance,” free from state regulation. 30 M.R.S.A. § 6207(4). These Reservation-based fishing rights, and related hunting and trapping prerogatives (*id.* § 6207(1)(A)), were of such central concern to the Nation that Congress saw fit to address them as “Special Issues” in its final committee reports. S.R. 14-17 (J.A.626-629); H.R. 14-17 (J.A.688-691). Section 6207, Congress explained, protects the Nation’s “permanent right to control hunting and fishing *** within [its] reservation[],” and “ended” the power the State claimed “to alter such rights without the consent of the *** [N]ation.” S.R. 16-17 (J.A.628-629); H.R. 17 (J.A.691). Underscoring the Nation’s “exclusive authority to regulate sustenance fishing within [its] respective reservation[],” Congress described these prerogatives as attributes of “inherent sovereignty” the Nation “retain[ed]” under established principles of federal Indian law. S.R. 13-15, 37 (J.A.625-627, 649); H.R. 13-15 (J.A.687-689). It is undisputed that, apart from the River, no other body of water in the Reservation supports those sustenance-fishing rights. J.A.994, 1535.

3. In the aftermath of the Settlement Acts, the State (like the federal government and the Nation) repeatedly acknowledged that the Reservation includes portions of the River. The State asserted in regulatory and judicial filings that the Reservation “includ[es] the islands in the Penobscot River *** and a portion of the

riverbed between any reservation island and the opposite shore." J.A.859-860; *see* Principal Br., *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), 2006 WL 6194740, at *54 (discussing Nation's sustenance-fishing rights "within [its] Reservation[]"). State game wardens transferred cases involving the River to the Nation's tribal court, J.A.1039, and State permits 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," J.A.1566-1567.

Departing from those representations, in 2012, Maine's Attorney General directed State game wardens that "the River itself is not part of the Penobscot Nation's Reservation" and "therefore" the State has "exclusive regulatory jurisdiction over activities" on the Main Stem. J.A.948-950. The Nation's "authority to regulate hunting, trapping, and [fishing,]" the State declared, is confined to the island surfaces. J.A.949-950.

II. PROCEDURAL HISTORY

Soon after the State adopted its new position, the Nation sued for declaratory relief confirming that section 6207 protects its sustenance fishing, trapping, and hunting prerogatives in the Main Stem. J.A.47-73. The State filed a counterclaim seeking a declaration that "[t]he waters and bed of the main stem of the Penobscot River are not within the Penobscot Nation reservation." J.A.126, 139. The United States intervened in support of the Nation; private interests, towns, and other

political entities intervened in support of the State. Add.7.

On cross-motions for summary judgment, the district court held that the Reservation includes only the island uplands—not the surrounding waters or submerged lands—but that section 6207 entitles the Nation to sustenance fish in the entirety of the Main Stem free from State regulation.[3] Add.72-135. A divided panel of this Court affirmed the first holding and vacated the second on standing and ripeness grounds. Add.5-71. (The district court and panel proceedings are described more fully in the Nation's prior briefing. *See* Pet. 7-10; Panel Br. 24-27.)

The Court then granted rehearing en banc, vacated the panel's judgment, and directed the parties to address several questions. Add.1-4. The Nation answers each question where it most naturally fits herein:

- Question 1, *infra*, at 13-19;
- Question 2, *infra*, at 20-22 & n.4;
- Question 3(a), *infra*, at 22-29;
- Question 3(b), *infra*, at 39-40;
- Question 4, *infra*, at 22-47;
- Question 5, *infra*, at 41-42 & n.7;

[3] The district court did not address the Nation's claim seeking confirmation of its related hunting and trapping prerogatives.

- Question 6, *infra*, at 37-39 & n.6;
- Question 7, *infra*, at 44 n.8;
- Question 8, *infra*, at 43-44;
- Question 9, *infra*, at 32-37;
- Question 10(a), *infra*, at 42 n.7;
- Question 10(b), *infra*, at 41-47;
- Question 11, *infra*, at 47-48, 51-53;
- Question 12, *infra*, at 47-51.

STANDARD OF REVIEW

This Court reviews an entry of summary judgment de novo. *Segrets, Inc. v. Gillman Knitwear Co.,* 207 F.3d 56, 61 (1st Cir. 2000).

SUMMARY OF ARGUMENT

The Indian canons and Supreme Court precedent reinforce what the text, structure, and historical context of the Settlement Acts already reveal: The Reservation must include the River's Main Stem, the only place where the Nation can exercise the on-Reservation sustenance-fishing rights that the Acts expressly confirm.

I. As this Court has recognized (and other courts have agreed), the Indian canons of construction govern settlement acts, including MIA/MICSA. Those longstanding principles—enshrined in Supreme Court precedent—require that

courts consider historical context to construe statutory and treaty terms as the Nation naturally would have understood them, to resolve any ambiguity in favor of the Nation, and to avoid interpretations that would diminish its Reservation absent unequivocal evidence of Congress's intent.

The State nevertheless argues that the Indian canons are inapplicable to the Settlement Acts generally and cannot be invoked with respect to the River specifically. Neither section 1725(h) nor section 1735(b) of MICSA, however, limits operation of the Indian canons or disturbs this Court's recognition that Congress "explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act[s]." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 712 (1st Cir. 1999). The State's invocation of the presumption against conveying navigable waters, which applies to conveyances by the United States of lands held in trust for future States, has no bearing on the Settlement Acts' preservation of the Nation's aboriginal title to the Main Stem. Nor could that presumption trump the Indian canons.

II. The district court and panel decisions disregarded the Indian canons by reasoning that the Settlement Acts' use of the terms "islands" and "lands" compels exclusion of the Main Stem from the Reservation. That conclusion flouts the reasoning and result of *Alaska Pacific Fisheries Co. v. United States*, in which the Supreme Court, drawing on the reservation's history and the statute's context,

understood the statutory phrase "the body of *lands* known as Annette *Islands*" to embrace "the intervening and surrounding waters." 248 U.S. 78, 89 (1918) (emphasis added). Given that Congress ratified the MIA against that backdrop, as well as the uncontested evidence of the River's centrality to the Nation's livelihood and identity, the same conclusion follows here.

Traditional tools of statutory interpretation lead to the same result. The panel majority's dictionary-driven analysis, focused on a single provision (section 6203(8) of the MIA), is irreconcilable with a neighboring provision (section 6207(4)) guaranteeing the Nation's fishing rights "within *** [its] Indian reservation[]." The Supreme Court's (and this Court's) insistence that statutes be construed as a whole requires an interpretation of the Reservation that encompasses the Main Stem—undisputedly the only place where the Nation can exercise its statutorily protected fishing rights.

That conclusion is bolstered by the treaty-based history, incorporated in the Settlement Acts, which shows the Nation retained aboriginal title to the Main Stem (never ceded in its treaties with Massachusetts and Maine). It is reinforced by legislative history emphasizing Congress's intent to preserve on-Reservation sustenance-fishing rights. And it comports with the parties' contemporaneous and post-enactment understandings—including the State's own position, grounded in Maine common law and conveyed to this Court, until its 2012 reversal—that the

Reservation includes at least a portion of the River. Were any doubt to remain, the Indian canons easily foreclose the State's revisionist position.

III. If the Court properly determines that the Main Stem is "within the boundaries of" the Reservation, nobody could dispute the Nation's sustenance-fishing rights in the Main Stem "[n]otwithstanding any rule or regulation promulgated by the commission or any other law of the State." 30 M.R.S.A. § 6207(4). A decision excluding the Main Stem from the Reservation, however, requires this Court to affirm the district court's ruling upholding those rights and to confirm the Nation's related hunting and trapping prerogatives for the same reasons.

The Nation has standing to bring those claims because the Attorney General's 2012 opinion, predicated on exclusion of the River from the Reservation, tramples the Nation's sovereign regulatory authority over its sustenance practices. The State's incorrect interpretation of the Settlement Acts presents a ripe legal question, resolution of which will dictate whether the Nation can resume activities central to its historical and cultural identity. The State's "informal policy" of non-interference cannot block judicial review of that question: Congress expressly rejected—as an affront to the Nation's "inherent sovereignty"—the notion that the Nation's fishing, hunting, and trapping activities in the Main Stem are subject to the State's nonbinding solicitude.

ARGUMENT

I. THE INDIAN CANONS OF CONSTRUCTION GOVERN THE SETTLEMENT ACTS

Three mutually reinforcing Indian canons inform the construction of the Settlement Acts on both the front end and back end: (1) Because the Acts ratify an agreement between the Nation and Maine that in turn defines the Reservation by reference to lands reserved in earlier treaties between those parties, the terms must be construed in their historical context consistent with how the Nation would have understood them. (2) Because the Acts are statutes affecting an Indian tribe, any ambiguity must be construed in the Nation's favor. And (3) because the State's reading would diminish the existing Reservation, even though the Acts were designed to settle claims brought by the United States on behalf of the Nation, the State must show that Congress unequivocally intended that result. The State cannot escape application of any of these time-honored canons, let alone all three.

A. Indian Law Treaties And Statutes Must Be Read In Context And Any Resulting Ambiguity Resolved In Favor Of Indians

The Supreme Court has developed, and Congress drafts legislation against the background of, "special canons of construction" "'to comport with the[] traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Fellencer*, 164 F.3d at 709 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980)). "[D]eeply rooted in *** Indian

jurisprudence" is a principle requiring that treaties and statutes "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *see* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (2019) (explaining Indian canons apply to "treaties, agreements, statutes, and executive orders"). The Supreme Court reaffirmed that rule just last term when upholding the Crow Tribe's hunting rights: "Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)).

In identifying such ambiguities, courts must consult "the history of the treaty, the negotiations, and the practical construction adopted by the parties" to construe relevant terms in "the sense in which they would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1699. Courts in Indian law cases thus "look beyond the written words to the larger context," as that context typically "sheds light on how the [Tribe] *** understood the agreement" at issue. *Mille Lacs*, 526 U.S. at 196; *see also, e.g.*, *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942) (interpreting treaty in context to further "the strong desire the Indians had to retain the right to hunt and fish in accordance with the[ir] immemorial customs").

These two foundational principles—that ambiguity must be resolved in favor of tribes, and that such ambiguity may arise from context rather than from text alone—have particular force when the construction may "diminish" a reservation. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-1079 (2016). Because "'[o]nly Congress can divest a reservation of its land and diminish its boundaries,'" the rule is "well settled" that Congress's "intent to do so must be clear." *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). "'[U]nequivocal evidence' of the contemporaneous and subsequent understanding of the status of the reservation" must confirm the diminishment. *Id.* at 1079; *see Solem*, 465 U.S. at 471 (historical record must "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation"). Absent clear evidence that Congress meant to reduce a reservation's scope, courts cannot adopt an interpretation that would have such effect.

B. The Indian Canons Apply To The Settlement Acts

1. For decades, this Court has recognized that, because the (federal) MICSA "ratif[ied]," "incorporated by reference," and "adopted" the (state) MIA, the meaning of phrases in both Settlement Acts "raises a question of federal law" subject to federal principles of statutory interpretation. *Fellencer*, 164 F.3d at 708. One of those "rules" "obligate[s] [the Court] to construe 'acts diminishing the sovereign rights of Indian tribes strictly,' 'with ambiguous provisions interpreted to the

Indians' benefit.'" *Id.* at 709 (alteration, ellipsis, and citation omitted). Looking to the "statutory origins" of the issue in *Fellencer* (the Nation's employment of a community nurse) alongside the "statutory language, judicial precedent, legislative history and federal Indian common law," the Court construed the MIA term "internal tribal matter" to the Nation's benefit. *Id.* at 712-713.

The historical origins of the issue in this case counsel even more strongly in favor of application of the Indian canons. As this Court has said before, whether the Reservation boundaries encompass the River turns on whether the waters were "*retained* by the tribe[] under the Settlement Act, based on earlier agreements between the tribe[] and Massachusetts and Maine." *Maine v. Johnson*, 498 F.3d 37, 47 (1st Cir. 2007). That is because the Settlement Acts, which themselves reflect an agreement between the Nation and the State, expressly define the Reservation by reference to those early treaty "agreement[s]." 30 M.R.S.A. § 6203(5). Thus, layered on top of the principle that the statutes "are to be construed liberally in favor of the Indians," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), is the requirement that the Acts and incorporated "treat[ies] must be construed in the sense in which they would naturally be understood by the Indians"—again "with any ambiguities resolved in favor of the Indians," *Herrera*, 139 S. Ct. at 1699 (internal quotation marks omitted).

2. Consistent application of the Indian canons to similar settlement statutes reinforces their application to the Settlements Acts here. In *Maynard v. Narragansett Indian Tribe*, for example, this Court explained that the Rhode Island Indian Claims Settlement Act must be "liberally construed in [the tribe's] favor." 984 F.2d 14, 16 n.2 (1st Cir. 1993). The following year, applying the principle that "acts diminishing the sovereign rights of Indian tribes should be strictly construed," this Court held that the Narragansett Indian Tribe had "retain[ed] that portion of jurisdiction they possess by virtue of their sovereign existence" "[s]ince the [Rhode Island] Settlement Act does not unequivocally articulate an intent to deprive the Tribe of jurisdiction" over the settlement lands then in question. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994); *see id.* (explaining Maine Settlement Acts were "to some extent modeled after" Rhode Island Settlement Act). The Court applied that standard to the Massachusetts Indian Land Claims Settlement Act just a few years ago. *See Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 624-625 (1st Cir. 2017).

Similarly, the Second Circuit has applied the Indian canons to the Connecticut Indian Land Claims Settlement Act, a statute "model[ed]" after the Maine Settlement Acts. *Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 90-93 (2d Cir. 2000). Examining "the statute as a whole," including its "purpose" and historical context, as well as its "legislative history and other extrinsic material," the

Second Circuit grounded its holding concerning "the geographical limits of the Tribe's sovereignty" in its determination that the Act must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* at 87, 89-92 (quoting *Blackfeet Tribe*, 471 U.S. at 766). The Second Circuit rejected Connecticut's (and the district court's) contrary view, explaining "[t]he fact that the Tribe today is at no practical disadvantage does not strip the Indian canon of its force." *Id.* at 92-93 (citing *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 758, 766 (1985)); *see* COHEN § 2.02[2] (explaining Supreme Court has "grounded the Indian law canons in the values of structural sovereignty, not judicial solicitude for powerless minorities").

C. The State's Attempts To Evade The Indian Canons Fail

In a stunning rebuke to that Supreme Court and circuit precedent, as well as to the Nation's sovereignty, the State has taken the position that the Indian canons can *never* be invoked against Maine or vis-à-vis the River. Even the panel majority, relegating the State's assertion to a footnote, did not go that far. Add.14 n.4. With good reason: both attempts to evade the canons are meritless.

1. The State urges that sections 1725(h) and 1735(b) of MICSA bar application of the Indian canons. That argument fails. Section 1735(b), by its terms, addresses only federal laws "enacted after October 10, 1980." 25 U.S.C. § 1735(b). The Indian canons predate 1980. *See Antoine v. Washington*, 420 U.S. 194, 199

(1975) (recognizing Indian "canon[s] of construction [have been] applied over a century and a half"). And they are principles "deeply rooted in [the Supreme] Court's Indian jurisprudence," *Yakima*, 502 U.S. at 269, not "enacted." As this Court has explained, section 1735(b) serves as a "signal to *later Congresses*"; it does not foreclose courts from applying *preexisting* canons to determine the intent of the Congress that ratified the Settlement Acts themselves. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1996) (emphasis added).

Nor does section 1725(h) prohibit application of the Indian canons in suits involving the jurisdiction of Maine. That provision states that "no law or regulation of the United States" that (1) "accords or relates to a special status *** of *** Indian reservations" *and* (2) "affects or preempts the civil, criminal or regulatory jurisdiction of the State of Maine" "shall apply within the State." 25 U.S.C. § 1725(h). That is a discrete exception to the section's baseline instruction that "generally applicable" Indian laws "shall be applicable in the State of Maine." *Id.* Even if the Indian canons could be deemed a "law or regulation of the United States" (dubious at best), they remain quintessential "general principles" meant to "inform [the Circuit's] analysis of the [Acts'] statutory language." *Fellencer*, 164 F.3d at 709. In any event, applying the Indian canons to resolve ambiguities in favor of the Nation here would not "accord[] or relate[] to a special status" of Indian reservations; the canons apply generally to any ambiguity affecting Indian tribes.

2. Stretching even further, the State has argued that the Indian canons must give way to a presumption against conveying navigable waters. But that presumption concerns a "conveyance *by the United States*" "of navigable waters" from lands held "in trust *for future States*." *Montana v. United States*, 450 U.S. 544, 552-553 (1981) (emphasis added). As the State acknowledged in its principal brief before the panel (at 29), "[t]he Supreme Court has applied this principle when evaluating the claims of western tribes," *i.e.*, when considering whether the "new States" west of the original colonies "succeed[ed] to the United States' title to the beds of navigable waters within their boundaries" or whether the federal government had expressly "divest[ed] a future State" of that title. *United States v. Alaska*, 521 U.S. 1, 5 (1997).

That presumption is inapt here, as the United States never held lands in trust for Maine (or Massachusetts). The Settlement Acts ratify aboriginal title "*retained* by the tribe[] *** based on earlier agreements *between the tribe[] and Massachusetts and Maine*," *Johnson*, 498 F.3d at 47 (second emphasis added), rather than rely on "disposals by the United States during the territorial period," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283-284 (1997) (citation omitted); *see Idaho v. United States*, 533 U.S. 262, 274 n.5 (2001) (noting, without reaching, "theory that, notwithstanding the scope of any reservation, the Tribe retained aboriginal title to the submerged lands, which cannot be extinguished without explicit action by

Congress"). Congress's ratification of the Nation's grant of the public right of way within the Main Stem in the 1818 treaty underscores that distinction. Add.164. Moreover, as the State conceded before the panel, "in Maine submerged lands of non-tidal, navigational rivers are typically privately owned." State Br. 28 n.16; *see* pp. 41-42 & n.7, *infra* (discussing Maine common law). Maine law thus diverges from the majoritarian view underlying the "presumption of state ownership" that applies to newly admitted states. *Coeur d'Alene*, 521 U.S. at 284-286.[4]

In any event, "the Indian law canons, which are rooted in structural, normative values, usually should displace other competing canons." COHEN § 2.02[3]. The Supreme Court in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), held as much with respect to the presumption against conveying navigable waters. There, the Court found "it clear *** that the parties to the treaties *** did not pause specifically to provide for the ownership of the river bed." *Id.* at 633-634. The Court

[4] Despite the State's invocation of *Coeur d'Alene*, the Court there made explicit that its discussion of sovereign state interests in submerged lands—for the sole purpose of considering state immunity from suit—was "not in derogation of the Tribe's own claim." 521 U.S. at 287. At most, *Coeur d'Alene* highlights that, even when a state may have a sovereign interest in a navigable waterway, the submerged lands "are just as necessary, perhaps even more so, to [tribes'] own dignity and ancient right." *Id.* Indeed, when considering the merits a few years later, the Court looked to the relevant historical context—including that "the submerged lands and related water rights had been continuously important to the Tribe"—to conclude that Congress intended to reserve title in the submerged lands for the tribe rather than pass it to the new state. *Idaho*, 533 U.S. at 275-276.

nevertheless rejected the State's contention that transfer of title to the riverbed "should not be regarded as intended unless the intention was definitely declared or otherwise made very plain" in light of "the countervailing rule of construction that well-founded doubt should be resolved in [Indians'] favor." *Id.* at 634. And just last Term, the Court in *Herrera* emphasized that its precedent had "entirely rejected the 'equal footing' reasoning" underlying the navigable-waters presumption as applied to "an Indian tribe's treaty-based hunting, fishing, and gathering rights." 139 S. Ct. at 1695 (citing *Mille Lacs*, 526 U.S. at 204-205).

II. THE SETTLEMENT ACTS MUST BE CONSTRUED TO INCLUDE THE MAIN STEM WITHIN THE RESERVATION

Brushing aside those established Indian canons, the district court and panel decisions reasoned that the Settlement Acts' use of the terms "islands" and "lands" compels exclusion of the River from the Reservation. That blinkered conclusion cannot be reconciled with on-point Supreme Court precedent, or with the text, structure, and history of the Acts. And if any doubt remains, the Indian canons easily foreclose the State's revisionist position depriving the Reservation of any portion of the Main Stem.

A. *Alaska Pacific Fisheries* Controls This Case

1. Construing the phrase "the islands in the Penobscot River" in the MIA's definitional provision, 30 M.R.S.A. § 6203(8), the panel confined the Reservation to the upland surfaces of the islands because "[i]n its ordinary use, 'island' refers to

a piece of land that is completely surrounded by water." Add.14; *see* Add.18 ("In its ordinary meaning, the unadorned term 'land' does not mean water. It means land, as distinct from water." (interpreting 25 U.S.C. § 1722(*i*))). That conclusion runs headlong into *Alaska Pacific Fisheries*, in which the Supreme Court faced a nearly identical "question *** of construction—of determining what Congress intended by the words 'the body of *lands* known as Annette *Islands*'" when defining another Indian reservation. 248 U.S. at 87 (emphasis added). As Judge Torruella's dissent makes clear, the Supreme Court's answer in that case "definitively established the rule of law that determines" the only plausible answer here: "the Penobscot Indian Reservation includes the Main Stem." Add.47.

"[I]n approaching *** the question" "whether the reservation created by the [statute] embrace[d] only the upland of the islands or include[d] as well the adjacent waters and submerged land," the Supreme Court in *Alaska Pacific Fisheries*—consistent with the Indian canons—"[kept] in mind the circumstances in which the reservation was created," including "the situation and needs of the Indians and the object to be attained." 248 U.S. at 87. The Court concluded that "[t]he use of the adjacent fishing grounds was *** essential" to effectuating Congress's purpose of creating self-sustaining community because "[w]ithout this the colony could not prosper." *Id.* at 89. Relatedly, the Court observed, the "Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting

the reservation." *Id.* In view of these considerations, the Court found that the reservation "embrac[ed] the intervening and surrounding waters as well as the upland" of the islands. *Id.*

Applying that reasoning here compels the same conclusion. As Judge Torruella noted, "[t]he Penobscots *** have fished in the Main Stem since time immemorial, and *** fishing [is for them] not only a key means of sustenance, but also an inextricable part of their culture." Add.51-52. Hence, the waters of the River, like the waters surrounding the Annette Islands, "gave 'to the islands a value for settlement and inhabitance which otherwise they would not have.'" Add.51 (quoting *Alaska Pac. Fisheries*, 248 U.S. at 88). And "just like the Indians in *Alaska Pacific Fisheries*, '[t]he [Penobscot Nation] naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the [R]eservation.'" Add.52 (quoting *Alaska Pac. Fisheries*, 248 U.S. at 89).

2. *Alaska Pacific Fisheries* was no one-off. The Supreme Court has invoked *Alaska Pacific Fisheries* to construe the boundaries of other Indian reservations as encompassing submerged lands and contiguous waters, despite definitional terms that did not expressly include them. In *Hynes v. Grimes Packing Company*, the Court leaned on *Alaska Pacific Fisheries* when interpreting the statutory phrase "any other public *lands* which are actually occupied by Indians" to authorize the inclusion of both "the uplands and [adjacent] waters" within a tribe's

reservation. 337 U.S. 86, 110-111 (1949) (emphasis added). "Taking into consideration the importance of the fisheries" to the tribe and "the purpose of Congress to assist the natives," the Court explained, "one may not fully comprehend the statute's scope by extracting from it a single phrase, such as 'public lands' and getting the phrase's meaning from the dictionary." *Id.* at 115-116.

The Supreme Court again applied *Alaska Pacific Fisheries* when determining whether a grant of "land" to the Choctaw Nation, based in part on earlier treaties, included submerged lands in the Arkansas River. *Choctaw Nation*, 397 U.S. at 621, 625, 633. Where the relevant boundary definitions lacked any express reference to a conveyance of the river itself, "[t]he State argue[d] that the treaty terms 'up the Arkansas' and 'down the Arkansas' should be read to mean 'along the bank of the Arkansas River.'" *Id.* at 631. The Court disagreed, concluding that the Arkansas River itself was "within the metes and bounds of the treaty grants." *Id.* As discussed above (pp. 21-22, *supra*), the Court looked to the tribe's river-based sovereign interests, and what those interests indicated about what the tribe "would have considered," to hold that the riverbed was not excluded from "the land granted to them" in the treaties. *Id.* at 635.

3. *Alaska Pacific Fisheries* dictates the proper approach in this case not merely because it is Supreme Court precedent, but also because Congress legislated against that backdrop. This Court has "long presumed that Congress acts against the

background of prior law," *Fellencer*, 164 F.3d at 712, and that Congress "explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act," *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997).

Instead of aligning its analysis with that background (and binding) law, the panel dismissed as "superficial" the similarities between the Settlement Acts and the statute construed in *Alaska Pacific Fisheries*. Add.22. The definition of the Reservation, the panel asserted, lacked "any comparable ambiguity," making "resort to 'the circumstances in which the reservation was created' *** wholly unnecessary." *Id.* As Judge Torruella explained, that cursory treatment "downgrade[s] the holding" of the Supreme Court case and overlooks "profound" similarities between it and the one at bar. Add.47.

In *Alaska Pacific Fisheries*, the relevant statute defined the reservation as "the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska." 248 U.S. at 86. Here, the MICSA defines the Reservation as "those lands as defined in the [MIA]," 25 U.S.C. § 1722(*i*), and the MIA principally defines the Reservation as

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

30 M.R.S.A. § 6203(8). Thus, as Judge Torruella's "step-by-step" analysis demonstrates, the two sets of statutory definitions run in close parallel in several key respects:

- "Neither definition mentions waters or submerged lands, but refers only to 'lands' and 'islands.'"
- "Both definitions specify which islands are included in the reservations. One definition does this by using the name the islands are known under ('Annette Islands'); the other definition does this by referring back to previous treaties in which the Nation retained islands, then using the name of one island ('Indian Island, also known as Old Town Island'), and then detailing which other islands are intended ('all islands in that river northward thereof.')."
- "Finally, both definitions also specify where these islands are located: one is "situated in Alexander Archipelago in Southeastern Alaska" and the other "in the Penobscot River."

Add.48-49.

Grasping for textual distinctions, the panel mustered only two: (1) "[t]he definition in *Alaska Pacific* has no limiting term comparable to the adverb 'solely'"; and (2) "[t]the definition of the Penobscot [R]eservation refers only to 'islands *in* the Penobscot River'" while "the definition in *Alaska Pacific* uses a much vaguer phrase." Add.22-23. As to the first, the word "solely" in the MIA does not speak to whether the term "islands" includes "adjacent waters and submerged lands," but rather specifies which islands are included. The legislative history "reveals that Maine was particularly concerned" that "islands in the Penobscot River south of

Indian Island *** and also islands north of Indian Island that were created after 1818" "might be deemed included in the Reservation" without the qualifying language. Add.50 n.26; *see* J.A.286 (Maine Attorney General explaining "some currently existing islands upstream *** did not exist in 1818 but are the result of subsequent flooding"). In fact, because the common law recognized the owner of the riverbed as the presumptive owner of new islands that appear, s*ee Deerfield v. Arms*, 34 Mass. 41, 43 (1835), the exclusion of islands created after 1818 via the use of "solely" indicates the parties' understanding that the Reservation encompasses the riverbed.

As to the second purported distinction, it is unclear how the reference to the "Alexander Archipelago" is "much vaguer" than the reference to the "Penobscot River"; both serve to situate the respective reservations geographically. That the latter does so with more explicit reference to the relevant body of water underscores the legislative intent to connect the islands to the River for which the "riverine" Nation was named. S.R. 11 (J.A.623); H.R. 11 (J.A.685). Moreover, "the words 'in the Penobscot River' limit the size of the Reservation—without these words, the Nation could claim all islands northward of Indian Island, regardless of which body of water they are in." Add.50-51 n.26.

The panel's strained attempts to distinguish *Alaska Pacific Fisheries* reveals another tension: If "islands" and "land" actually imparted a "clear and

unambiguous" meaning "as distinct from water," Add.15-16 & n.6, 18, there would be no need for the additional terms "solely" and "in the Penobscot River" to "form[] a clear distinction between the uplands and the river itself," Add.22-23. At the same time, the panel failed to grapple with the only significant textual difference: the Settlement Acts' concurrent guarantee of sustenance-fishing rights *within the Reservation*. As discussed next, that critical feature makes this a stronger case than *Alaska Pacific Fisheries* for concluding that the Reservation encompasses the River's "adjacent waters" (the only place the Nation can fish).

B. Traditional Tools of Statutory Construction Favor The Nation's Interpretation

1. *The Reservation Must Encompass The Main Stem To Give Effect To The Settlement Acts' Guarantee Of On-Reservation Sustenance-Fishing Rights.*

Even putting aside *Alaska Pacific Fisheries*, traditional tools of statutory interpretation lead to the same result. As the Supreme Court instructs, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion) (alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "[A] court engaged in the task of statutory interpretation must examine the statute as a whole," because "[t]erms in an act whose meaning may appear plain outside the scheme of the statute can take on

different meaning when read in their proper context." *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88, 101 (1st Cir. 1999) (citation omitted).

The panel majority ignored that fundamental principle when it trained its analysis on a single provision (section 6203(8)) and the dictionary definitions of select words therein. In reading that provision to "unambiguously" exclude the River from the Reservation, the panel disregarded the neighboring provision explicitly preserving the Nation's fishing rights "*within* *** [its] Indian reservation[]," 30 M.R.S.A. § 6207(4) (emphasis added)—rights that undisputedly can be exercised only *in the River*, Add.44 (Torruella, J., dissenting) ("the uplands of [the Nation's] islands have no surface water where [fishing] can be conducted"). Properly read together, section 6207(4) requires that the Reservation identified in section 6203(8) encompass at least some portion of the River. Otherwise, the Nation would be left to exercise its sustenance-fishing right on island uplands—"on dry land where there are no fish and no places to fish," Add.35 (Torruella, J., dissenting)—rendering Section 6207(4) a nullity in violation of "one of the most basic interpretive canons": "'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative ***, void or insignificant.'" *Corley v. United*

States, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).[5]

That leaves the State with only one argument: The term "reservation[]" in section 6207(4) imparts a different meaning than the term "Reservation" in section 6203(8). But such a construction would upend the Supreme Court's command that the same terms be construed, whenever possible, to carry "a consistent meaning throughout the Act." *Gustafson v. Alloyd Co.,* 513 U.S. 561, 568 (1995); *see, e.g.*, *Textron Inc. v. C.I.R.*, 336 F.3d 26, 33 (1st Cir. 2003) ("These variable definitions of 'member' and 'nonmember' ignore 'the basic canon of statutory construction that identical terms within an Act bear the same meaning.'"). "Although § [6207(4)] does not define what [the "Reservation"] is, it does instruct us what [the "Reservation"] cannot be if the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning

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[5] Section 6207(4)'s sustenance-fishing rights guarantee "applies 'within the boundaries' of both the Passamaquoddy Tribe's and the Nation's respective reservations." Add.20. Contrary to the panel majority's suggestion, the sustenance-fishing provision plainly requires that *each* reservation encompass at least some water for fishing. So whether the Passamaquoddy Tribe might still be able to exercise the fishing rights within its reservation does not avoid rendering the provision a nullity with respect to the Penobscot Nation. Indeed, because the panel understood the statutory term "lands" to mean only "land, as distinct from water," Add.18 (interpreting 25 U.S.C. § 1722(*i*)), and the Settlements Acts define the "Passamaquoddy Indian Reservation" as "those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts," 30 M.R.S.A. § 6203(5), the panel's reasoning would deny both tribes the fishing rights guaranteed by section 6207(4).

throughout," *Gustafson*, 513 U.S. at 569—*i.e.*, the Reservation, as defined in section 6203(8), cannot be wholly exclusive of the River.

Rather than harmonize the two provisions, the panel relied on section 6203's boilerplate preamble that its definitions apply throughout the Act unless "the context indicates otherwise." Add.19-20. On top of leaving the term "Indian reservation" (as used in section 6207(4)'s operative provision) without any coherent meaning, the panel offered no explanation of how—or why—its meaning differs from that of "Penobscot Indian Reservation" in section 6203(8)'s definitional provision. *Id.* No explanation exists, and the State cannot meet its high burden to show otherwise. *See Gustafson*, 513 U.S. at 573 ("burden should be on the proponents of the view that the term" carries different meanings "to adduce strong textual support for that conclusion"). The State "gets the presumption backwards[:] Had Congress meant the term ["reservation"] in § [6207(4)] to have a different meaning than the same term in § [6203(8)], *** one would have expected Congress to have been explicit," *id.* at 573, rather than to have relied on a general qualifier (applicable to all definitions) about what the "context indicates."

2. *The History Of The Settlement Acts Confirms That The Reservation Includes The Main Stem.*

a. The unique historical context buttresses the unbroken understanding, as reflected in the Settlement Acts' terms, that the Reservation includes the Main Stem. *See*, *e.g.*, *Klamath Indian Tribe*, 473 U.S. at 774 (explaining "plain language" of

Indian treaties should be "viewed in historical context"); *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992) ("To understand the [historical] reference" in a statute, the Court "examine[s] the historical context."). The MIA defines the Reservation by reference to the lands the Nation *retained*: "'Penobscot Indian Reservation' means the islands in the Penobscot River *reserved* to the Penobscot Nation by agreement with the States of Massachusetts and Maine." 30 M.R.S.A. § 6203(8) (emphasis added); *id.* § 6202 (discussing historical transfers in violation of Nonintercourse Act). MICSA retroactively ratified the historical "transfer[s]" of lands not reserved and extinguished the Nation's "aboriginal title" only to those "transfer[red] *** lands." 25 U.S.C. § 1723(a), (b).

That framework raises two questions: whether the Nation held aboriginal title to the submerged lands of the River *before* the treaties, and if so, whether the Nation ceded those lands through conveyances *in* or *after* those agreements. The answer to the first question flows from the longstanding rule that "the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government." *Leavenworth, Lawrence, & Galveston R.R. Co. v. United States*, 92 U.S. 733, 742 (1875) (describing right as "sacred"); *see Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680-681 (1979) (viewing treaty not as "grant of rights to the Indians, but a grant of rights from them—a reservation of

those not granted"). Early historical records confirm that the Nation occupied the River before the United States' founding, *see, e.g.*, J.A.1153-1160, and that on the eve of the Revolutionary War, the Third Provincial Congress pledged to protect that domain, J.A.182-183. Accordingly, the Settlement Acts are premised on "the uncontested proposition that [the Nation's] aboriginal title included the Penobscot River and its bed." Add.55 (Torruella, J., dissenting); *see* J.A.1191-1195 (discussing Massachusetts's and federal government's contemporaneous understanding of Nation's "aboriginal title").

Nothing in the subsequent treaties ceded the Nation's aboriginal title to the Main Stem. To the contrary, those agreements ceded only "lands on both sides of the River Penobscot" and later-sold "townships." Add.160-165; J.A.1520. Otherwise the 1818 treaty would have had no need to confer on the citizens of Massachusetts a "right to pass and repass" the water. Add.164. The absence of any similar right of passage for the Nation's members, even though the River was the only means of connection between the reserved islands and townships, demonstrates that the parties understood the Nation to retain title to those submerged lands. *See* J.A.1266-1267.

The panel majority discounted that compelling evidence by reading the express "reference to the treaties [as] merely language specifying which 'islands' are" in the Reservation. Add.21. But that reading "renders the language

superfluous," as Judge Torruella explained, "because the MIA already specifies which islands are included in the Reservation: 'solely *** Indian Island, also known as Old Town Island, and all islands in [the Penobscot R]iver northward thereof that existed on June 29, 1818.'" Add.56 (ellipsis and alteration in original) (quoting 30 M.R.S.A. § 6203(8)). It also ignores that MICSA ratified the treaties and made the transfer of interests therein "effective as of the date of said transfer"—including the easement granted from the Nation to Massachusetts and Maine. 25 U.S.C. § 1723(a).

For its part, the State did not seriously challenge that the treaties reserved the Main Stem, but instead argued the Nation subsequently "transferred" it to the State. State Br. 51. The State has not pointed (and cannot point) to any particular transfer; rather, it has relied on its purported "dominion and control over the Main Stem" over time. State Br. 56. The State's vague assertion of a "transfer" that transpired at some point in the almost-200 years between the treaties and the Settlement Acts falls far short of the "'clear evidence' th[at] [Supreme Court] precedent requires." *Herrera*, 1139 S. Ct. at 1698-1699 (quoting *Mille Lacs*, 526 U.S. at 203). As this Court has recognized, "the mere passage of time with its erosion of the full exercise of the sovereign powers" cannot be "considered a voluntary abandonment of [the tribe's] sovereignty." *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979); *see* S.R. 14 (J.A.626), H.R. 14 (J.A.688) (citing *Bottomly* in recognizing

Nation "still possess[es] inherent sovereignty"). "Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning [the Nation's] status as a self governing entity." *Fellencer*, 164 F.3d at 709 (citation omitted).

In any event, the State also regulated the Nation's uplands before the Settlement Acts and still retains aspects of such authority. *See* 25 U.S.C. § 1725(b)(1). Construing "transfer" to encompass any lands the State's regulations have touched would extinguish the Nation's aboriginal title to its submerged lands *and* its uplands. Avoiding that absurd result requires acknowledging that the State's history of regulating the River (whether lawful or unlawful), like its history of regulating the island uplands, does not preclude the Nation's retention of aboriginal title. The record is replete with examples of the Nation engaging in (and, to the extent necessary and able, exercising sovereign authority over) activities in the Main Stem prior to (and since) the Settlement Acts. *See* Add.44 ("[T]he Penobscots have fished, hunted, and trapped on the River since time immemorial."); *see also, e.g.*, J.A.1038-1039 (discussing Nation's members' taking fish from River without State permits); J.A.738-739, 816, 983-985, 1043-1044 (discussing Nation's fishing regulations, permits, patrols, and enforcement on River). In fact, when enacting the MIA, the State simultaneously repealed its own preceding law recognizing "the right of Indians to take fish and wildlife for their own sustenance *on their own reservation*

lands." Add.129 (emphasis added) (quoting former 12 M.R.S.A § 7076(9)(B)). That preexisting provision also underscores that "lands" in this context necessarily includes bodies of water, namely rivers, because fish obviously do not live on land.

b. Because "[o]nly Congress can divest a reservation of its land and diminish its boundaries," the "history surrounding the passage of the [Settlement Acts]" is relevant to the extent it provides evidence of Congress's understanding of the Reservation's scope. *Parker*, 136 S. Ct. at 1078-1080; *see Akins*, 130 F.3d at 487-488 (consulting "legislative history" when "language of the Implementing and Settlement Acts [did] not clearly dispose of the question" at issue); *see also Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 548 (1st Cir. 1997) (inquiry into legislative history is "particularly appropriate in the context of federal Indian law"). The legislative history of the Settlement Acts confirms what the text, structure, and context demonstrate: Congress understood the Reservation to be defined by the Nation's treaty-retained boundaries, and Congress protected the Nation's core sustenance-fishing practices within those boundaries.

Both the House and Senate Reports recognize the Nation as "riverine in [its] land-ownership orientation," and acknowledge "[t]he aboriginal territory of the Penobscot Nation is centered on the Penobscot River." S.R. 11 (J.A.623); H.R. 11 (J.A.685). The Reports explain that, at the direction of General George Washington, the "director of the Federal Government's Eastern Indian Department" secured the

Nation's support in the Revolutionary War "in return for protection of their lands by the United States" and that the Nation "played a crucial role in the Revolutionary War." *Id.* And they show an expectation that "the Penobscot Nation will retain as reservation[] those lands and natural resources which were reserved to [it] in [its] treaties with Massachusetts and not subsequently transferred by [it]." S.R. 18 (J.A.630); H.R. 18 (J.A.692). Congress thus understood the Settlement Acts to ratify the Nation's "existing reservation land" as historically defined (and to allow for "newly-acquired tribal land" as part of its new territory), rather than to diminish the Nation's aboriginal title. S.R. 15, 18, 35-36 (J.A.627, 630, 647-648); H.R. 15, 18 (J.A.689, 692).

The legislative history also makes undeniable Congress's recognition of the significance of the Nation's fishing rights within the Reservation. The House and Senate Reports acknowledge that the Nation "still possess[es] inherent sovereignty" in light of decisions by this Court and the Maine Supreme Judicial Court preceding the Settlement Acts. S.R. 14 (J.A.626); H.R. 14-15 (J.A.688-689). The Nation agreed to a "compromise in which state authority is extended over Indian territory," with notable exceptions meant to "protect[]" its sovereignty with respect to "Special Issues." *Id.* One of those "expressly retained sovereign activities" is the Nation's "permanent right to control hunting and fishing *** within [its] reservation[]." S.R. 15-16 (J.A.627-628); H.R. 15, 17 (J.A.619, 691). Thus, as Judge Torruella reasoned,

the boundaries of the Reservation are hardly "ancillary" to the "detailed scheme allocating authority over fishing," which expressly limits the State's exercise of authority within the Reservation. Add.66-67 (discussing 30 M.R.S.A. § 6207).[6]

3. *The Post-Enactment Record Reinforces That The Reservation Encompasses The Main Stem.*

The post-enactment understanding of the Settlement Acts—including as revealed through this Court's decision in *Maine v. Johnson* and the State's position in that case and elsewhere—reinforces that the Reservation encompasses the Main Stem. *See Mille Lacs*, 526 U.S. at 196 (explaining that courts determine whether treaty rights were abrogated by, *inter alia*, considering "practical construction adopted by the parties").

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[6] The MIA's (state) legislative history is of less relevance not only because that statute's effect is dependent on the federal statute ratifying it, but also because Maine alone compiled the legislative history. *See* Add.87 n.18. That one-sided view of the agreement between the State and the Nation sheds limited light on "the sense in which [the agreement] would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1699. In any event, the MIA's legislative history also supports the Nation's interpretation. *See, e.g.*, J.A.286 (indicating term "solely" used to identify islands retained, not to distinguish uplands from submerged lands); J.A.303 (describing statute as covering "historic reservations"); J.A.377-378, 393-394 (acknowledging Nation's authority to regulate sustenance fishing "right across" the Main Stem); J.A.329 (recognizing statute meant to account for "historical Indian concerns"); J.A.408 (explaining that Reservation boundaries "include any riparian *** rights expressly reserved by the original treaties with Massachusetts or by operation of State law"). The Nation's negotiators declared that the Nation maintained throughout the negotiations that it had not ceded the Main Stem. J.A.1010-1011, 1045-1050, 1059-1061.

a. In *Johnson*, consolidated appeals by the Nation and the State concerned the EPA's adjudication of Maine's application to assume permitting responsibilities under the Clean Water Act. That issue "presented questions as to what authority the State had vis-à-vis" the Nation, "in particular, as to discharges connected to *** tribal waters." 498 F.3d at 40. To be sure, the Court "assume[d] (without deciding) that each of the disputed discharge points [was] within the tribe['s] territor[y]." *Id.* at 40 n.3. But the Court expressly considered whether the facilities discharged into territory "acquired by the secretary [of the Interior] in trust" for the Nation or whether they instead discharged into the Reservation. *Id.* at 47; *see also id.* n.11 (explaining Settlement Acts "clearly differentiat[e] between reservation land and land acquired by the Secretary in trust"). The Court found the latter: "the facilities appear[ed] *** to discharge onto reservation waters *retained* by the [Nation] *** based on earlier agreements between the [Nation] and Massachusetts and Maine." *Id.* at 47.

At a minimum, as Judge Torruella observed, *Johnson* thus "h[e]ld that the Reservation was defined in terms of what the Nation retained, and that the Reservation included some part of the Penobscot River." Add.63. Those two holdings "directly conflict[] with the [panel's] view that the Reservation is defined by the dictionary, and includes no part of [the] River." *Id.*

b. So, too, does the position the State asserted in *Johnson*. The State was adamant that resolving the "boundary issue" would require "analysis of the relevant treaties referenced in the Reservation definitions in the Maine Settlement Act including the historical transfers of Reservation lands and natural resources, and aspects of Maine property law." Principal Br., *Johnson*, at *58 (citation omitted). Specifically, the State insisted that section 6207(4) "makes clear" that the Nation's sustenance-fishing rights apply "without regard to Maine's otherwise applicable seasonal and catch limits *within [its] Reservation[]*," and that, "importantly, *** sustenance fishing is *limited to Indian Reservations*." *Id.* at *54 (emphasis added).

The State was even more explicit in its later brief:

> To be clear, it is the State's position that the Penobscot Reservation includes those islands in the main stem above and including Indian Island that have not otherwise been transferred, *as well as the usual accompanying riparian rights that likewise have not been transferred*[.]

Intervenor-Resp't State Br., *Johnson*, 2006 WL 6194742, at *3 n.2 (emphasis added). Under the common law the State invoked, "the river beds of non-tidal rivers are consider[ed] submerged lands, and are privately owned, presumptively by the owner of the abutting uplands"; that fact affords the owner "certain rights, such as the exclusive right to fish in the waters above the submerged lands." Add.59-60

(Torruella, J., dissenting) (footnote omitted) (citing *In re Opinion of the Justices*, 106 A. 865, 868-869 (Me. 1919)).[7]

c. The State's position in *Johnson* is consistent with its other post-enactment representations. In 1988, Maine's Attorney General issued a formal opinion that the Settlement Acts "clearly" permitted the Nation to "place gill nets in the Penobscot River within the boundaries of the Penobscot Reservation" despite state law prohibiting gill-net fishing. J.A.753-754. In the 1990s, State game wardens turned over to the Nation's tribal court a case involving a member apprehended for hunting

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[7] In addition to principles of federal Indian law, state common law may inform the construction of the Reservation boundaries adopted in the Settlement Acts. *See, e.g.*, *United States v. Texas*, 507 U.S. 529, 534 (1993) (discussing "presumption favoring the retention of long-established and familiar principles," appropriate "with respect to state common law" and "federal common law"). Under the State's view in *Johnson*, the common law requires that the Reservation include the Nation's islands and surrounding submerged lands—extending (at a minimum) from the island shores to the thread of the River. *See also* U.S. Panel Br. 56-57. But state common law, consistent with other historical evidence, offers at least two reasons why the Reservation stretches beyond the thread and encompasses the Main Stem bank-to-bank. First, state common law adopts the established rule that, when a granting "nation[] or state[]" is "the original proprietor [of a river], and grants the territory on one side only, it retains the river within its own domain, and the newly-created State [territory] extends to the river only." *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 379 (1820) (cited with approval in *City of Boston v. Richardson*, 95 Mass. 146, 156-157 (1866) and *Lincoln v. Wilder*, 29 Me. 169, 179 (1848)). Second, even if the treaties were considered private transactions, the presumption that the Nation's ownership of submerged lands would extend only to the thread "is defeated where the transaction was not at arm's length, especially where, as here, the grantor does not understand that he or she is relinquishing title to the submerged lands." Add.60 (Torruella, J., dissenting) (citing *Hatch v. Dwight*, 17 Mass. 289, 298 (1821); *Hines v. Robinson*, 57 Me. 324, 330 (1869)).

a deer swimming in the River. J.A.1039; *see* 30 M.R.S.A. § 6206(3) (recognizing tribal court's "exclusive jurisdiction" within Nation's territory). Around the same time, State permits for eel potting 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." J.A.1566-1567. And in a 1997 filing before FERC, Maine stated that "Penobscot fishing rights under the Maine Settlement Act exist *in that portion of the Penobscot River which falls within the boundaries of the Penobscot Indian Reservation*," which the State described as "including the islands in the Penobscot River *** and a portion of the riverbed between any reservation island and the opposite shore." J.A.859-860 (internal quotation marks omitted). In fact, the State expressly disavowed the position it now asserts. J.A.858-859 ("While DOI contends that the State is arguing that the Penobscot Reservation does not include any portion of the river, *** that is not the State's position.").

d. The State's invocation of equitable defenses to deny a position it long asserted is curious, if not foreclosed. *See, e.g.*, *K–Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 910 (1st Cir. 1989) ("[H]e who seeks equity must do equity."). To the extent any equitable doctrines apply, they weigh against the State, not the Nation.

The State's reliance on *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217-221 (2005), which neither the district court nor the panel embraced, is misguided. That case concerned territory that the tribe had "transferred *** to one

of its members in 1805, who sold the land to a non-Indian in 1807." *Id.* at 204-205, 211. The properties "thereafter remained in non-Indian hands until [the tribe's] acquisitions in 1997 and 1998 in open-market transactions." *Id.* at 202, 211. The Court ruled that the 200-year absence of the tribe from the lands precluded its new assertion of sovereignty. *Id.* at 214.

That ruling has no application here. The Nation's claim is based on statutes Congress adopted—and lands retained by treaties those statutes ratify—rather than equitable relief from a "unification theory" involving open-market transactions. *Sherrill*, 544 U.S. at 213-214. In any event, as the district court found, "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." Add.128. And, unlike in *Sherrill*, the Nation always has asserted its authority over the Main Stem, including since the Settlement Acts. *See, e.g.*, Add.113-117 (discussing tribal court's jurisdiction over offenses committed in Main Stem); J.A.738-739, 816, 983-985 (Nation's regulations governing sustenance hunting, trapping, and fishing).[8]

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[8] Additionally, "[t]he United States has consistently taken the position that the Reservation includes the Main Stem." U.S. Principal Br. 49 (capitalization omitted); *see* J.A.273-281, 740-763, 785-788, 854, 881-884, 901-903. For the reasons explained in its brief, nothing in section 1723(a)(2) bars the United States from asserting that position here.

C. Indian Canons Foreclose An Interpretation That Excludes The Main Stem From The Reservation

All the traditional tools of statutory construction point to the same conclusion: the Reservation encompasses the Main Stem. To the extent any doubt remains, however, the Indian canons easily resolve the boundary dispute.

First, because the Nation's construction is at least "possible" (if not required) for all the reasons discussed in Parts II.A and B, the Court's "choice between [it and the State's construction] *must be dictated*" by the principle that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Yakima*, 502 U.S. at 269 (emphasis added). As explained above, ordinary principles—separate and apart from the Indian canons—render untenable the panel majority's dictionary-driven conclusion that the statutory terms (principally "islands" and "lands") are "unambiguous" so as to foreclose the possibility that the Reservation encompasses any portion of the Main Stem. The panel majority erred in blinding itself to the overwhelming textual and contextual evidence to the contrary.

Second, even if those particular terms were not ambiguous under traditional tools of statutory construction, "the Indian canon would still apply, because it mandates that 'treaties must *** be construed *** in the sense in which they would naturally be understood by the Indians.'" Add.37 (Torruella, J., dissenting) (ellipses in original) (quoting *South Dakota v. Bourland*, 508 U.S. 679, 701 (1993)). That

principle, which requires consideration of the relevant context and history, must guide the Court's interpretation of the MIA, which itself represents an "agreement between the Indian claimants and the State" while referencing the prior treaties. 30 M.R.S.A. § 6202. "As the record establishes, the natural understanding of the [Nation] is that the River and the Islands are one and the same; to the Nation, the waters and the bed of the River are so intimately connected to the uplands of the islands, that no distinction between the two is made." Add.38 (Torruella, J., dissenting); *see, e.g.*, J.A.1002, 1046, 1153-1174, 1256-1262, 1172. That understanding makes it impossible to assume from any silence about the River in the early treaties and the MIA itself that the "riverine" Nation necessarily meant to cede the Main Stem on which its Reservation has always "centered." S.R. 11 (J.A.623); H.R. 11 (J.A.685). The fact that the Nation negotiated the MIA "from a position of strength—having just established before this [C]ourt that," together with the Passamaquoddy Tribe, "it had a claim to approximately two-thirds of Maine" (relative to less than 14,000 acres of the Main Stem, bank-to-bank, *see* J.A.1370)—underscores that impossibility. Add.38 (Torruella, J., dissenting).

Third, the State bears the burden of showing Congress's "clear" intent to diminish the boundaries of the existing Reservation before this Court can declare that the Settlement Acts did so. *Parker*, 136 S. Ct. at 1078-1079. The legislative history and the parties' own post-enactment representations, like the statutory text

itself, are bereft of *any* evidence, let alone "*unequivocal* evidence[,] of [a] contemporaneous and subsequent understanding," "widely held," that Congress meant to strip the Main Stem from the existing Reservation. *Id.* at 1078-1080 (emphasis added) (internal quotation marks omitted).

Although the Court need not rely on the Indian canons to hold that the Reservation encompasses the Main Stem, the canons make plain that the Court *cannot* hold that the Reservation excludes it. Tellingly, the State has never made (and the panel majority did not suggest) any argument that it could prevail under a faithful application of the Indian canons. That silence speaks volumes.

III. THE NATION'S CLAIM TO SUSTENANCE-FISHING RIGHTS IN THE MAIN STEM, AS RECOGNIZED BY THE DISTRICT COURT, IS RIPE FOR AFFIRMANCE

If (and only if) the Court holds that the Reservation encompasses the Main Stem in its entirety, there would be no real dispute about the Nation's sustenance-fishing (or related hunting and trapping) rights: Everyone agrees the Nation may exercise those rights "within the boundaries of [its] reservation[]." 30 M.R.S.A. § 6207(4); *see id.* § 6207(1)(A); *see also* Add.68-69 n.40 (Torruella, J., dissenting). So, for all practical purposes, reversal on the first question presented should end this case.

In a perverse twist, however, the panel majority held that the Nation's claim to sustenance-fishing rights was not justiciable *despite agreeing with the State's*

counterclaim that the Reservation excludes the Main Stem. That gets things backwards: The Nation brought this suit to protect its sustenance-fishing, hunting, and trapping rights, as well as related regulatory authority, in light of the State Attorney General's directive putting those rights into jeopardy. It is the State that interjected the Reservation boundary issue as a separate counterclaim, and the State's position in this litigation—that it permits the Nation to fish the River as a matter of grace only—crystalizes the threat to the Nation's sovereignty and related sustenance practices. A decision excluding the Main Stem (in whole or in part) from the Reservation would imperil the Nation's sustenance-fishing rights, and, in that event, the district court's ruling upholding those rights should be affirmed.[9]

A. The Nation Has Standing To Bring Its Sustenance-Fishing Claim

The Attorney General's 2012 opinion, asserting that the River falls outside the Reservation, casts a dark cloud over the Nation's on-Reservation sustenance-fishing rights and related regulatory authority. "[I]nfringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing *** because tribes, like states, are afforded 'special solicitude in our standing analysis.'" *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013)

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[9] Neither the district court nor the panel adjudicated the Nation's related claim as to its hunting and trapping prerogatives on the Main Stem (or explained the omission). This Court should do so for the same reasons it should affirm the Nation's sustenance-fishing rights.

(quoting *Massachuetts v. EPA*, 549 U.S. 497, 520 (2007)). A tribe's standing thus exceeds its individual members' standing, "[s]ince the substantive interest which Congress has sought to protect is tribal self-government." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.7 (1976). A state's attempt to restrict the boundaries of that self-government undermines the "significant geographical component to tribal sovereignty." *White Mountain Apache Tribe*, 448 U.S. at 151.

Congress understood the Nation's "permanent right to control hunting and fishing *** within [its] reservation[]" to be one of the "expressly retained sovereign activities" in the Settlement Acts. S.R. 15-16 (J.A.627-628); H.R. 15, 17 (J.A.689, 691). The Nation regularly exercises that sovereign regulatory authority. The Nation's Game Warden Service has worked tirelessly to enforce tribal laws regulating the hunting, trapping, and other taking of wildlife on the Main Stem. J.A.738-739, 816, 946-970, 983-985, 1003, 1039; ECF No. 119 ¶ 179 (referencing permits issued to non-tribal members). The Nation's tribal court, in turn, has prosecuted members and non-members alike for violating those laws on the River. J.A.1039; *see* ECF No. 105-47, at 4 (tribal court judgment concluding non-tribal member's collection of sunken logs constituted "unlawful taking of tribal resources" and "trespass to tribal land"). Accordingly, the Attorney General's 2012 directive that "the River itself is not part of the Penobscot Nation's Reservation, and therefore

is not subject to its regulatory authority or proprietary control," J.A.950, constitutes concrete, particularized, and actual harm to the "inherent sovereignty" that Congress meant to protect from encroachment by Maine, S.R. 14-17 (J.A.626-629); H.R. 14-17 (J.A.688-691).

The State seeks to undercut the Nation's standing by invoking a supposed "informal policy" of non-interference with the Nation's sustenance-fishing activities. Add.32; J.A.1141. But that is cold comfort. As the district court found, the "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." Add.131. Congress expressly rejected the position that those activities are subject to the State's nonbinding solicitude. Before adoption of the Settlement Acts, the State had "claimed the right to alter or terminate [the Nation's sustenance-fishing] rights at any time." S.R. 16 (J.A.628); H.R. 16-17 (J.A.690-691). In response, both the House and Senate Reports made clear that the Settlement Acts end any "power of the State of Maine to alter such rights without the consent of the affected tribe or nation." *Id.*; *see* 30 M.R.S.A. § 6207(4) (guaranteeing sustenance-fishing rights "[n]otwithstanding any *** law of the State"). The Court should not countenance the State's attempt to duck review of its revival of a position Congress repudiated.

The Attorney General's opinion, moreover, directly challenges the Nation's sovereign regulatory authority. If, as the Supreme Court has held, "the *proposed* exercise of state authority is impermissible" where a state asserts *concurrent* jurisdiction within a reservation, then *a fortiori* the State's *actual* exercise of purportedly *exclusive* regulatory authority constitutes a cognizable harm. *White Mountain Apache Tribe*, 448 U.S. at 151 (emphasis added). The Nation's standing is particularly apparent given that the State's policy targets an essential component of the "substantive interest which Congress has sought to protect" in the Settlement Acts. *Moe*, 425 U.S. at 468 n.7.

B. The Nation's Sustenance-Fishing Claim is Ripe

For the same reasons the Nation has standing to bring its sustenance-fishing claim, it satisfies both the fitness and hardship requirements for ripeness. *See Town of Barnstable v. O'Connor*, 786 F.3d 130, 143 (1st Cir. 2015). As to the former, resolution of the claim "hinges on an assessment of events that have already occurred." *Id.* In 1980, Congress guaranteed the Nation's sovereign regulatory authority over sustenance-fishing in the Reservation, and, in 2012, the State unilaterally determined the Nation's authority no longer applies to the only body of water where the Nation can exercise it. "[T]he required interpretation of the Settlement Act[s]"—*i.e.*, whether the sustenance-fishing rights that section 6207(4) guarantees to the Nation and its members reside in the Main Stem—"projects a

purely legal issue." *Narragansett Indian Tribe*, 19 F.3d at 694 (internal quotation marks omitted) (interpreting Rhode Island Settlement Act). Because further factual development "cannot effect the existence *vel non* of state [or tribal] jurisdiction," "the case for a finding of adverseness is very powerful." *Id.* at 693-694 (discussing "adverseness" as "linchpin of ripeness" which "should not be applied woodenly").

Although the State's trampling of the Nation's sovereign prerogatives (and the corresponding threat to its members' essential practices) would continue to impose concrete hardship on the Nation if judgment were withheld, the second ripeness prong "is best articulated in a positive vein." *Town of Barnstable*, 786 F.3d at 143 (internal quotation marks omitted). There can be no question here that "granting relief would serve a useful purpose, or, put another way, *** the sought-after declaration would be of practical assistance in setting the underlying controversy to rest." *Id.* "Whether state [or tribal] authorities retain *any* jurisdiction over the settlement lands is a question of immediate importance to all parties," *Narragansett Indian Tribe*, 19 F.3d at 693, as both parties "would undoubtedly act differently tomorrow" depending on the answer, *Town of Barnstable*, 786 F.3d at 143. If the Court rules in favor of the Nation, the Nation will resume its regulatory activities on the Main Stem, and the State will be forced to withdraw the Attorney General's proclamation denying that exercise of inherent sovereignty.

The State's actions in this litigation—going further than the controversy over the Nation's fishing, hunting, and trapping rights by asserting that the Reservation is limited to the island surfaces—only underscore the need for resolution of the Nation's claim. Indeed, the State already has invoked the panel's decision in an attempt to sidestep EPA disapprovals of Maine water-quality standards by claiming that (i) any guarantee of fishing rights under the Settlement Acts "would not extend beyond reservation boundaries per the express limitation in 6207(4)," and (ii) the "reservation d[oes] not include the Penobscot River." State's Mot. for J. on Admin. R. 48 & n.55, *Maine v. Wheeler*, No. 14-cv-264 (D. Me. Feb. 16, 2018), ECF No. 118.

It is mystifying how the State's sweeping counterclaim to exclude the River from the Reservation altogether is ripe, yet the dispute over the Nation's on-Reservation sustenance-fishing rights and related prerogatives within the River is not. By granting the State's counterclaim while withholding adjudication of the Nation's request for more modest yet concrete relief, the panel majority turned this case (and ripeness doctrine) on its head.[10]

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[10] The panel majority was mistaken in asserting that "all parties agree" the State's counterclaim is ripe. Add.9. The State has never substantiated a current controversy to contest the Reservation boundaries, and the panel majority ignored the Nation's clear objection on that basis. *See* Panel Reply Br. 36. As the Nation has maintained throughout, it respects the general public's "right to pass and repass

C. The District Court's Grant Of The Nation's Sustenance-Fishing Claim Should Be Affirmed

On the merits, this Court should affirm the district court's holding that section 6207(4) "allows the Penobscot Nation to sustenance fish in the entirety of the Main Stem," Add.134, and extend that holding to the Nation's hunting and trapping prerogatives. The State does not and cannot dispute those on-Reservation rights if the Reservation is determined to encompass the Main Stem bank-to-bank; after all, the State's 2012 assault on the Nation's sovereign authorities is predicated on exclusion of the River from the Reservation. J.A.948-950.

But the State cannot subvert the Nation's sustenance-fishing rights regardless. As explained above, the "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." Add.132. In fact, "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." *Id.*

Because it remains undisputed that there is nowhere else for the Nation to exercise the sustenance-fishing rights confirmed by the Settlement Acts, Add.44;

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any of the rivers * * * which run through the lands [of the Penobscot Nation]," *i.e.*, non-tribal access to the River. Add.123 (quoting Add.164).

J.A.994, the Nation must be permitted to exercise those rights in the Main Stem. The State has offered no alternative (other than the frivolous suggestion that the sustenance-fishing rights apply only when a tribal member has "one foot on the island"). Add.130. Were there any doubt, "the special tribal canons of statutory construction" foreclose the State's new "interpretation of section 6207(4) that [implicitly] diminishes or extinguishes the Penobscot Nation's retained right to sustenance fish." Add.134-135.

CONCLUSION

By reading the Settlement Acts to exclude from the Reservation the Penobscot River—the heart (and soul) of the Nation's aboriginal territory—the State urges this Court to contravene Supreme Court and Circuit precedent; the text, structure, and historical context of the statutes; the Nation's (and the State's) long-held understanding; and the Indian canons of construction. The Court should instead hold that the Reservation encompasses (and the Nation's sustenance-fishing rights extend across) the Main Stem.

Dated: July 8, 2020

Respectfully submitted,

*/s/*Pratik A. Shah

Pratik A. Shah
Lide E. Paterno
Akin Gump Strauss Hauer & Feld LLP
2001 K Street, NW
Washington, DC 20006-1037
Phone: (202) 887-4000
Fax: (202) 887-4288
pshah@akingump.com

Kaighn Smith, Jr.
David M. Kallin
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
Phone: (207) 772-1941
Fax: (207) 772-3627
ksmith@dwmlaw.com

Counsel for Penobscot Nation

CERTIFICATE OF COMPLIANCE

I certify that: (i) this supplemental brief complies with the type-volume limitation prescribed by Federal Rules of Appellate Procedure 28.1(e)(2) because it contains 12,872 words, excluding the parts of the supplemental brief exempted by Federal Rule of Appellate Procedure 32(f); and (ii) this supplemental brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this reply has been prepared using Microsoft Word in 14-point Times New Roman.

*/s/*Pratik A. Shah
Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2020, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 8, 2020

*/s/*Pratik A. Shah
Pratik A. Shah

ADDENDUM

ADDENDUM

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[1] Formerly codified at 25 U.S.C. §§ 1721-1735, MICSA remains in effect, but was removed from the United States Code as of 25 U.S.C. Supp. IV (Sep. 2016) by codifiers to improve the Code's organization. This brief and addendum refer to MICSA's sections as previously codified.

United States Court of Appeals
For the First Circuit

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

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

Plaintiffs-Appellants/Cross-Appellees,

v.

AARON M. FREY, Attorney General for the State of Maine; JUDY A. CAMUSO, 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.

Before
Howard, Chief Judge,
Torruella, Selya, Lynch, Thompson, Kayatta* and Barron, Circuit Judges.

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* Judge Kayatta is recused from this case and did not participate in the determination of this matter.

ORDER OF COURT
Entered: April 8, 2020

A majority of the active judges who are not disqualified have voted to hear this case en banc. Accordingly, Penobscot Nation's petition for rehearing en banc and the United States' petition for rehearing en banc are each granted. In accordance with customary practice, the panel opinion and the dissent released on June 30, 2017 are withdrawn, and the judgment entered the same date is vacated. See 1st Cir. I.O.P. X(D).

The en banc court will have copies of the parties' previously filed briefs. The parties are also directed to file supplemental briefs addressing the following questions, in addition to any other questions the parties may wish to address.

1. Does the Indian Canon of Construction apply to the Maine Settlement Acts, the Maine Implementing Act ("MIA"), Me. Rev. Stat. Ann. tit. 30 ("30 M.R.S.A."), §§ 6201-6214, and/or the Maine Indian Claims Settlement Act ("MICSA"), 25 U.S.C. §§ 1721-1735? Also address the effects of 25 U.S.C. § 1725(h) and 25 U.S.C. § 1735(b).

2. Does the canon against conveying navigable waters affect the application of the Indian Canon, assuming the Indian Canon otherwise would apply? See Idaho v. Coeur d'Alene, 521 U.S. 261, 284 (1997) (holding that, because "navigable waters uniquely implicate sovereign interests," there exists a "strong presumption of state ownership" of these waters). If the canon against conveying navigable waters generally takes precedence over the Indian Canon, does the navigational waters canon apply here, given the fact that Congress ratified the Tribe's grant of the public right of way in the 1818 treaty?

3. How does the holding in Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) (applying the Indian Canon in determining whether surrounding waters were within the "body of lands" comprising a reservation), impact this case, if at all? How does this Court's ruling in Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007), impact this case, if at all?

4. Are there any material ambiguities in the relevant provisions of any of the Settlement Acts, for purposes of applying the Indian Canon of Construction? Please specifically address whether and how the word "solely" in 30 M.R.S.A. § 6203(8) is ambiguous and, if so, how it should be construed; whether the word "Reservation" in 30 M.R.S.A. § 6207(4) must be construed to have the same meaning as the word "Reservation" in 30 M.R.S.A. § 6203(8), and if not why not; and how, 30 M.R.S.A. § 6203, which provides that its subsections' definitions, including "Penobscot Indian Reservation," will apply "unless the context indicates otherwise," affect how we interpret the relevant statutes and construe any ambiguities.

5. Because the MIA's definition of the Reservation references boundaries related to the 1796 and 1818 treaties between the Nation and Massachusetts and because Indian lands in Maine are subject to Maine law, do state common law and interpretive rules apply and therefore govern the meaning of the Settlement Acts?

6. May the Court consider legislative history? If so, what legislative history is relevant to the proper interpretation of the Settlement Acts and how does the relevant legislative history inform our interpretation of the statutes and any material ambiguities?

7. Does 25 U.S.C. § 1723(a)(2) bar the United States from asserting to this Court the claims it previously articulated to the panel?

8. Do the doctrines of laches, acquiescence, and/or impossibility, as argued by the State of Maine, bar the Nation's claims? See City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 217-21 (2005).

9. Did the Penobscot Nation transfer the Main Stem of the Penobscot River to Maine under the Settlement Acts?

10. What are the proper boundaries of the Reservation? What is the effect of Maine's former position that "portions of the Penobscot River and submerged lands surrounding the islands in the river are part of the Penobscot Reservation"?

11. Is the Penobscot Nation's claim ripe that the Settlement Acts accord it the right to take fish for individual sustenance in the entire Main Stem section of the Penobscot River? See Reddy v. Foster, 845 F.3d 493, 501 (1st Cir. 2017) (describing the two prongs of the ripeness analysis, fitness and hardship); Town of Barnstable v. O'Connor, 786 F.3d 130, 143 (1st Cir. 2015) (discussing the fitness prong of the ripeness analysis).

12. Does the Nation have standing to bring this claim? Specifically, does a declaration by a state's Attorney General confining a tribe's regulatory authority to dry land, despite statutory sustenance fishing rights, constitute state action amounting to a cognizable injury? Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 463 (2d Cir. 2013) ("Although Article III's standing requirement is not satisfied by mere assertions of trespass to tribal sovereignty, actual infringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing. . . . This rule exists because tribes, like states, are afforded 'special solicitude in our standing analysis.'" (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007))). Would a finding limiting the Reservation to the uplands constitute a viable threat to self-government? And is there evidence that Maine's actions have created or will create events that are neither "uncertain" nor "contingent," O'Connor, 786 F.3d at 143, and that there is a "harm . . . from our 'withholding of a decision' at this time," Reddy, 845 F.3d at 501 (quoting Labor Relations Div. of Constr. Indus. of Mass., Inc. v.

Healey, 844 F.3d 318, 330 (lst Cir. 2016)), including in regards to whether Maine's actions constitute a questioning of the tribe's sovereignty? See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 468 n.7 (1976).

The supplemental briefs should be filed simultaneously on, or before, June 8, 2020, and shall comply with applicable rules concerning format, service, and other requirements. Any reply supplemental briefs must be filed no later than 21 days after the principal supplemental briefs are filed. Seventeen paper copies of all briefs filed should be provided to the Clerk's Office no later than one business day after the electronic brief is filed. Amici are welcome to submit amicus briefs addressing the aforementioned questions.

By the Court:
Maria R. Hamilton, Clerk

cc:
Hon. George Z. Singal
Christa Berry, Clerk, United States District Court for the District of Maine
Mary Gabrielle Sprague
Steven Miskinis
Bella Sewall Wolitz
James T. Kilbreth III
Kaighn Smith Jr.
Elizabeth Ann Peterson
Pratik A. Shah
David M. Kallin
Adrianne Elizabeth Fouts
Michael L. Buescher
Susan P. Herman
Christopher C. Taub
Paul Stern
Kimberly Leehaug Patwardhan
Matthew D. Manahan
Catherine R. Connors
Lindsay Scott Gould
Graydon Stevens
Daniel D. Lewerenz
Joel West Williams
Gregory A. Smith
Elliott A. Milhollin
Kaitlyn E. Klass
Gerald Donohue Reid

United States Court of Appeals
For the First Circuit

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

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.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. George Z. Singal, U.S. District Judge]

Before

Torruella, Selya, and Lynch,
Circuit Judges.

Kaighn Smith, Jr., with whom James T. Kilbreth, III, David M. Kallin, Drummond Woodsum, and Mark A. Chavaree were on brief, for appellant Penobscot Nation.

Mary Gabrielle Sprague, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, with whom John C. Cruden, Assistant Attorney General, Bella Sewall Wolitz, Office of the Solicitor, U.S. Department of the Interior, Steven Miskinis, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, and Elizabeth Ann Peterson, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, were on brief, for appellant United States.

Gerald D. Reid, Assistant Attorney General, Chief, Natural Resources Division, with whom Janet T. Mills, Attorney General, Kimberly L. Patwardhan, Assistant Attorney General, Susan P. Herman, Deputy Attorney General, Chief, Litigation Division, and Christopher C. Taub, Assistant Attorney General, Senior Litigation Counsel, were on brief, for state defendants appellees.

Catherine R. Connors, with whom Matthew D. Manahan and Pierce Atwood LLP were on brief, for state intervenors appellees.

June 30, 2017

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LYNCH, **Circuit Judge**. The Penobscot Nation (the "Nation") filed suit in federal court against the State of Maine and various state officials (the "State Defendants"), claiming rights as to a 60-mile stretch of the Penobscot River, commonly known as the "Main Stem." The United States intervened in support of the Nation. Private interests, towns, and other political entities, whom we shall call the "State Intervenors," intervened in support of the State Defendants' position.

The district court, on cross-motions for summary judgment, made two rulings: (1) "[T]he Penobscot Indian Reservation as defined in [the Maine Implementing Act ("MIA"), Me. Rev. Stat. Ann. tit. 30 ("30 M.R.S.A."),] § 6203(8) and [the Maine Indian Claims Settlement Act ("MICSA")], 25 U.S.C. § 1722(i), includes the islands of the Main Stem, but not the waters of the Main Stem," Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 222 (D. Me. 2015); and (2) "[T]he sustenance fishing rights provided in . . . 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," id. at 222–23. The court issued declaratory relief to that effect on both points. Id.

In these cross-appeals, we affirm the first ruling and hold that the plain text of the definition of "Penobscot Indian Reservation" in the MIA and the MICSA (together, the "Settlement Acts"), includes the specified islands in the Main Stem, but not

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the Main Stem itself. As to the second ruling on sustenance fishing, we vacate and order dismissal. That claim is not ripe, and under these circumstances, the Nation lacks standing to pursue it.

Those interested in further details of this dispute will find them in the district court opinion. See Penobscot Nation, 151 F. Supp. 3d at 185–212. Given that the plain text of the statutes resolves the first issue and that there is no Article III jurisdiction as to the second, we do not and may not consider that history. Instead, we get directly to the point on both issues.

I.

This litigation began shortly after the Maine Warden Service and the Maine Department of Inland Fisheries and Wildlife requested a legal opinion from Maine's then-Attorney General William Schneider "regarding the respective regulatory jurisdictions of the . . . Nation and the State of Maine . . . relating to hunting and fishing on the [M]ain [S]tem of the Penobscot River." Attorney General Schneider issued his opinion (the "Schneider Opinion" or "Opinion") on August 8, 2012. On the same day, Attorney General Schneider sent a copy of the Opinion to the Governor of the Nation and noted in a cover letter: "I also understand that there have been several incidents in recent years in which . . . Nation representatives have confronted state employees, including game wardens, as well as members of [the]

public, on the River for the purpose of asserting jurisdiction over activities occurring on the River."

The Schneider Opinion states that "the . . . Nation may lawfully regulate hunting on, and restrict access to, the islands within the River from Medway to Old Town that comprise its Reservation, but may not regulate activities occurring on, nor restrict public access to, the River itself" and that "the State of Maine has exclusive regulatory jurisdiction over activities taking place on the River."

The Nation filed suit in federal court against the State Defendants on August 20, 2012. In its second amended complaint, the Nation sought a declaratory judgment that the Schneider Opinion misinterprets federal law -- namely, MISCA --and that both the Nation's regulatory authority and its sustenance fishing rights extend to and include the Main Stem of the Penobscot River. The State Defendants answered the Nation's complaint and filed counterclaims. The State Defendants sought a declaratory judgment that, among other things, "[t]he waters and bed of the [M]ain [S]tem of the Penobscot River are not within the Penobscot Nation reservation." All parties agree that the State Defendants' declaratory judgment claim on this point is ripe.

The United States, through the Department of Justice, filed a motion to intervene on behalf of the Nation on August 16, 2013, and the district court granted the United States intervenor

status on February 4, 2014.[1] The State Intervenors filed their motion to intervene in support of the State Defendants on February 18, 2013, which the district court granted on June 18, 2013. The parties engaged in discovery and further procedural sparring, after which the Nation, the State Defendants, and the United States each moved for summary judgment, and the State Intervenors moved for judgment on the pleadings.

The positions of the Nation and the United States differed slightly. The Nation defined the term "Reservation" to include the entire Main Stem, bank-to-bank, and its submerged lands. The United States said that that was its preferred reading, but it offered as another possible reading that the "Reservation" reaches the "thread" or centerline of the River. This alternative reading would create "halos" around each of the Nation's islands, in which the Nation could engage in sustenance fishing.

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[1] The State Defendants objected to the United States' motion to intervene on the ground that it was barred by 25 U.S.C. § 1723(a)(2), and they continue that objection on appeal.

The State Defendants filed an amended answer and counterclaims against the United States on November 3, 2014, asserting affirmative defenses that, among other things, the United States' complaint should be dismissed for failure to join indispensable parties and as barred by 25 U.S.C. § 1723(a)(2), and seeking declaratory relief along the lines of what they requested in their counterclaims against the Nation. Given our disposition, we do not reach these questions.

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After oral argument, the district court issued its opinion.[2] The Nation and the United States then filed motions to amend the judgment, seeking to "clarify" that the Penobscot Indian Reservation includes submerged lands on each side of the Nation's islands to the thread of the Penobscot River, or alternatively "clarify" that the court had not decided the issue. The State Defendants opposed the motions, and the court summarily denied the motions.

These cross-appeals followed.

II.

We review orders granting summary judgment de novo. McGrath v. Tavares, 757 F.3d 20, 25 (1st Cir. 2014). The parties agreed before the district court that the record was "amenable to resolution" by summary judgment, and the court agreed, concluding that it could "disregard as immaterial many factual disputes appearing in the record." Penobscot Nation, 151 F. Supp. 3d at 185 & n.4. All of the issues here are ones of law, which we review

[2] On the same day that it issued its opinion, the court, in a separate order, granted in part and denied in part the State Intervenors' motion for judgment on the pleadings for the same reasons and also granted in part and denied in part the State Intervenors' motion to exclude expert testimony submitted by the plaintiffs. The expert testimony ruling is not at issue in this appeal.

de novo. Franceschi v. U.S. Dep't of Veterans Affairs, 514 F.3d 81, 84–85 (1st Cir. 2008).

A. Construction of 30 M.R.S.A. § 6203(8)

Section 6203(8) of the MIA, which sets out what "Penobscot Indian Reservation" "means" under the MIA, in turn controls what "Penobscot Indian Reservation" "means" for federal law purposes, 25 U.S.C. § 1722(i) ("'Penobscot Indian Reservation' means those lands as defined in the [the MIA]."). "As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." Burgess v. United States, 553 U.S. 124, 130 (2008) (alterations in original) (quoting Colautti v. Franklin, 439 U.S. 379, 392-93 n.10 (1979)).

The interpretation of section 6203(8) presents a question of statutory construction. We apply traditional rules of statutory construction to the Settlement Acts. See Maine v. Johnson, 498 F.3d 37, 41–47 (1st Cir. 2007); Aroostook Band of Micmacs v. Ryan, 484 F.3d 41, 50, 56 (1st Cir. 2007). The canon construing statutory ambiguities in favor of Indian tribes does not apply when the statutory language is unambiguous. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986); see also, e.g., Carcieri v. Salazar, 555 U.S. 379, 387 (2009)

(holding that where the language of the Indian Reorganization Act is unambiguous, the court must enforce its plain meaning).[3]

"As in any statutory construction case, '[w]e start, of course, with the statutory text . . . .'" Sebelius v. Cloer, 133 S. Ct. 1886, 1893 (2013) (alteration in original) (quoting BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006)). The MIA states that

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

30 M.R.S.A. § 6203(8). Where the meaning of the statutory text is plain and works no absurd result, the plain meaning controls. See Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) ("It is well

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[3] We reject the plaintiffs' and dissent's argument that we must apply the Indian canon of construction resolving ambiguities in favor of Indian tribes. In fact, it would be an error of law to apply the canon here, under Catawaba Indian Tribe. 476 U.S. at 506 ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."). Because the plain meaning of the Settlement Acts resolves the question of the scope of the Reservation, there are no ambiguities to resolve in favor of the Nation. Carcieri, 555 U.S. at 387.

The reference to the canon in Penobscot Nation v. Fellencer, 164 F.3d 706, 709 (1st Cir. 1999), noted by the dissent, does not apply here. That case concerned whether a decision by the Nation's Tribal Council to terminate a community health nurse's employment was an "internal tribal matter" within the meaning of the Settlement Acts. Id. at 707. Whatever ambiguities may have been presented by that question, there are none here, and so the canon cannot apply.

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established that 'when 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.'" (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000))). Such is the case here.[4]

The analysis turns on what "the islands in the Penobscot River" means. "Island" is not given a special definition in the MIA, and so we "construe [it] in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994).[5] In its ordinary use, "island" refers to a piece of land that is completely surrounded by water. See, e.g., Island, Oxford English Dictionary Online, http://www.oed.com/view/Entry/99986 (last visited June 20, 2017) (first definition) ("A piece of land completely surrounded by water."); Island, Merriam-Webster's Dictionary Online, https://www.merriam-webster.com/dictionary/island (last visited June 20, 2017) (first definition) ("[A] tract

[4] We do not reach the defendants' argument that the terms of the MICSA itself, in 25 U.S.C. §§ 1725(h) and 1735(b), bar the application of the Indian canons of construction to the MIA. And we do not reach the defendants' argument that any ambiguities in the Settlement Acts should be construed with a presumption against finding that a state has conveyed its navigable waters.

[5] Because we find that the plain meaning of section 6203(8) resolves the issue of the meaning of the "Reservation," we do not reach several of the defendants' alternative arguments that the Main Stem has been "transfer[red]" from the Nation to Maine under the Settlement Acts, see 25 U.S.C. §§ 1722(b),(n), 1723; 30 M.R.S.A. §§ 6203(13), 6213, and that the doctrines of laches, acquiescence, and impossibility bar the Nation's claims.

of land surrounded by water and smaller than a continent[.]"); Island, Dictionary.com, http://www.dictionary.com/browse/island (last visited June 20, 2017) (first definition) ("[A] tract of land completely surrounded by water, and not large enough to be called a continent.").[6] Its ordinary meaning is clear and

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[6] The dissent argues that if "island" is to be understood in terms of "land," then we should look to dictionary definitions of "land" that the dissent claims include water. What the dissent does not reveal is that the primary definitions of "land" in all the sources it cites exclude water. The only definitions arguably helpful to the dissent are subordinate to these primary definitions. See Land, Webster's 1913 Dictionary, http://www.webster-dictionary.org/definition/land (last visited June 19, 2017) (listing as first definition "[t]he solid part of the surface of the earth; - opposed to water as constituting a part of such surface, especially to oceans and seas; as, to sight land after a long voyage," and listing the definition offered by the dissent eighth); Wordreference.com, Land, http://www.wordreference.com/definition/land (last visited June 19, 2017) (listing as first definition "any part of the earth's surface, as a continent or an island, not covered by a body of water," and listing the definitions arguably most helpful to the dissent -- "an area of ground with specific boundaries" and "any part of the earth's surface that can be owned as property, and everything connected to it" -- third and fifth, respectively); Dictionary.com, Land, http://www.dictionary.com/browse/land (last visited June 19, 2017) (listing as first definition "any part of the earth's surface not covered by a body of water; the part of the earth's surface occupied by continents and islands," and listing the definition arguably most helpful to the dissent -- "any part of the earth's surface that can be owned as property, and everything annexed to it, whether by nature or by the human hand" -- fifth).

We do not, as the dissent suggests, contend that a subordinate definition can never supply the operative meaning of a term. But as a general rule, a term's "most common[,] . . . ordinary and natural" meaning controls, Mallard v. U.S. Dist. Court for S. Dist. of Iowa, 490 U.S. 296, 301 (1989), and "[a]ny definition of a word that is absent from many dictionaries" or consistently subordinate where included is "hardly a common or ordinary meaning," Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct.

unambiguous. See also Carcieri, 555 U.S. at 388–90 (interpreting the use of "now" in 25 U.S.C. § 479 through its ordinary meaning and use in the statute, and finding the term unambiguous).

To add emphasis to the limits of this definitional term, the statute further states that the Reservation "islands" "consist[] solely" of the enumerated islands. 30 M.R.S.A. § 6203(8) (emphasis added). "'Solely' leaves no leeway." Helvering v. Sw. Consol. Corp., 315 U.S. 194, 198 (1942).

Our holding that the term "island" does not refer to the surrounding water itself or to the land submerged by the surrounding water is also compelled by other text within the Settlement Acts. See, e.g., Henson v. Santander Consumer USA Inc., No. 16-349, 2017 WL 2507342, at *4 (U.S. June 12, 2017) (confirming plain meaning reading by "[l]ooking to other neighboring provisions in the [statute]"). When the Settlement Acts mean to address the various topics of water, water rights, or submerged land, they do so explicitly and use different language. See, e.g., 25 U.S.C. § 1721(b)(2) ("It is the purpose of this subchapter . . . to clarify the status of . . . natural resources in the State of Maine."); id. § 1722(b) (defining the phrase "land or natural

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1997, 2003 (2012). It is clear what the ordinary meaning of "land" is from the fact that all of the dictionaries cited above define it primarily as excluding water, while none ranks a definition inclusive of water higher than third. See id. "Were the meaning of ['land'] that [the dissent] advocates truly common or ordinary, we would expect to see more support for that meaning." Id.

resources" in the MICSA as "any real property or natural resources . . . including . . . water and water rights"); 30 M.R.S.A. § 6203(3) (defining the phrase "land or other natural resources" in the MIA as "any real property or other natural resources . . . including . . . water and water rights"); 25 U.S.C. § 1722(n) and 30 M.R.S.A. § 6203(13) (including "natural resources" as things that can be "transferred" as that word is used in the Settlement Acts); 30 M.R.S.A. § 6207 (discussing regulation of "waters"); id. § 6207(1)(B) (addressing regulation of "[t]aking of fish on any pond in which all the shoreline and all submerged lands are wholly within Indian territory," and using the term "territory" rather than "Reservation" (emphasis added)).

Further, section 6205(3)(A), which deals with purchases of land to compensate for regulatory takings within Indian reservations, states that "[f]or purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation," thus implying that otherwise the "Reservation" is not contiguous to land along and adjacent to the Penobscot River. 30 M.R.S.A. § 6205(3)(A). The Nation's and United States' construction of "Penobscot Indian Reservation" would render that language superfluous, a result forbidden by the canons of construction. See In re Montreal, Me. & Atl. Ry., Ltd., 799 F.3d 1, 9 (1st Cir. 2015) ("[C]ourts should

construe statutes to avoid rendering superfluous any words or phrases therein.").

The MICSA's definitional provision for "Penobscot Indian Reservation" itself reinforces this plain-meaning reading of the MIA. Section 1722(i) of the MICSA provides that "'Penobscot Indian Reservation' means those lands as defined in [the MIA]." 25 U.S.C. 1722(i) (emphasis added). In its ordinary meaning, the unadorned term "land" does not mean water. It means land, as distinct from water.[7] The MICSA does not say waters are included within the boundaries of the "Penobscot Indian Reservation." Taken together, the Settlement Acts unambiguously define "Penobscot Indian Reservation" as specified islands in the Main Stem of the Penobscot River, and not the Main Stem itself or any portion of the Main Stem. The plain meaning of "islands in the Penobscot River" is

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[7] See, e.g., Land, Oxford English Dictionary Online, http://www.oed.com/view/Entry/105432 (last visited June 20, 2017) (first definition) ("The solid portion of the earth's surface, as opposed to sea, water."); Land, Merriam-Webster's Dictionary Online, https://www.merriam-webster.com/dictionary/land (last visited June 20, 2017) (first definition) ("[T]he solid part of the surface of the earth[.]"); Land, Dictionary.com, http://www.dictionary.com/browse/land (last visited June 20, 2017) (first definition) ("[A]ny part of the earth's surface not covered by a body of water; the part of the earth's surface occupied by continents and islands.").

As we have shown at note 6, supra, the dissent's attempt to argue that "land" includes water by reference to subordinate definitions of "land" from dictionaries that primarily define "land" as excluding water is unconvincing. The ordinary meaning of land, as even the sources cited by the dissent make clear, obviously excludes water.

the islands in the River, not the islands and the River or the riverbed.

The Nation and the United States agree that a plain-meaning reading must control. They offer a different reading of what that plain meaning is. They argue that the definition of "Penobscot Indian Reservation" in section 6203(8) is modified by section 6207(4)'s grant of sustenance fishing rights to the Nation "within the boundaries of [the Nation's] Indian reservation[]." 30 M.R.S.A. § 6207(4).[8] They contend that because section 6207(4) was meant to protect the Nation's sustenance fishing rights in the Penobscot River, a reading of section 6203(8) based on the otherwise plain meaning of the term "islands" must be rejected because it would lead to the absurd result of nullifying section 6207(4).

Not so. The two provisions -- sections 6203(8) and 6207(4) -- are not in tension. The Nation's and United States' argument selectively omits relevant text and also ignores the differences in text between the two sections. Section 6203 itself specifically articulates that definitions in its subsections do

[8] The Nation also makes similar contentions based on section 6207's provisions for sustenance hunting and trapping and "related authorities." These arguments are even less persuasive than those based on section 6207(4), as the provisions of section 6207 at issue reference the Nation's "territor[y]," a distinct term encompassing both the Reservation and over 130,000 acres of trust lands acquired by the United States on behalf of the Nation. See 30 M.R.S.A. §§ 6205(2), 6207(1).

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not apply when "the context indicates otherwise," 30 M.R.S.A. § 6203, which governs section 6207(4). This clause avoids any supposed conflict between section 6203(8) and section 6207(4) through the statute's own provisions. There is no need to distort the plain meaning of "islands" in section 6203(8).

Also, the sustenance fishing provision refers to "Indian reservations," not just the "Penobscot Indian Reservation," as it applies "within the boundaries" of both the Passamaquoddy Tribe's and the Nation's respective reservations. Id. § 6207(4). If the term "island" in section 6203(8) was meant to include all or any portion of the surrounding waters, the text would have said so. As Justice Scalia observed in a Chevron case, see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), legislatures do not "hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001). The ancillary reference to "Indian reservations" referring to both the Passamaquoddy Tribe and the Nation in section 6207(4) cannot dramatically alter the plain meaning of section 6203(8)'s definition of "Penobscot Indian Reservation."

The Nation and the United States also point to the reference to previous "agreement[s]" in section 6203(8): "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island . . . and all islands in that river

northward thereof that existed on June 29, 1818, excepting any island transferred [after] June 29, 1818." 30 M.R.S.A. § 6203(8). They argue that the reference to the previous treaties found in the "by agreement" clause means that the definition of "Penobscot Indian Reservation" incorporates the Nation's understanding of the treaties and state common law. Again, not so. The reference to the treaties is merely language specifying which "islands" are involved, not language modifying the meaning of "islands." The treaties no longer have meaning independent of the Maine Settlement Acts. Rather, upon the passage of the Acts, the treaties were subsumed within the Acts, and we look only to the statutory text to understand the reservation's boundaries.

The Nation and the United States further argue that, regardless of text, the district court's reading of section 6203(8) must be incorrect because it contradicts the Supreme Court's holding in Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918). It does not. Alaska Pacific concerned the interpretation of a distinct phrase, "the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska," in an unrelated congressional statute that was enacted in 1891 before Alaska became a state. Id. at 86 (quoting Act of March 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101). The Court considered not only the statute's plain text but also the legislative history of the statute and the "general rule that statutes passed for the benefit

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of dependent Indian tribes . . . are to be liberally construed, doubtful expression resolved in favor of the Indians." Id. at 78. In light of those considerations, the Court held that Congress "did not reserve merely the site of [the Metlakahtlans'] village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands." Id. at 89.

Alaska Pacific's holding does not affect the question before us. Despite the superficial similarities between the definition of the Penobscot reservation and the statute at issue in Alaska Pacific, they differ materially. The Alaska Pacific Court found it "important," if not "essential," to consider "the circumstances in which the reservation was created." Id. at 87. Not so here: the definition of the Penobscot reservation lacks any comparable ambiguity, and any resort to "the circumstances in which the reservation was created" would be neither important nor essential but, rather, wholly unnecessary. The definition of the Penobscot Indian Reservation specifies that it consists "solely of Indian Island . . . and all islands in that river." 30 M.R.S.A. § 6203(8) (emphasis added). The definition in Alaska Pacific has no limiting term comparable to the adverb "solely." Moreover, the definition of the Penobscot reservation refers only to "islands in the Penobscot River" and "islands in that river." Id. (emphases added). As discussed above, this forms a clear distinction between

uplands and the river itself. In contrast, the definition in Alaska Pacific uses a much vaguer phrase: "the body of lands known as Annette Islands, situated in Alexander Archipelago." 248 U.S. at 86. Unlike the Alaska Pacific Court, we have no need to consider legislative history or the Indian canons of construction, see supra note 3, because the plain text of the definition of the Penobscot reservation is unambiguous.[9]

We are forbidden by law from varying from the plain text based on arguments made as to the nature of the Agreement reached. We do not look to either side's understanding of the Agreement when the meaning of the text of the Settlement Acts is plain.[10] See Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct.

[9] Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), and Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), cited by the dissent as applying Alaska Pacific, are inapposite for the same reasons. Those cases also interpreted materially distinct language in enactments unrelated to the Settlement Acts.

[10] We reject the position of the United States that we should not use normal canons of statutory construction and should instead use Maine's state law rules for the construction of deeds. We are not construing a deed.

We also reject the United States' arguments more generally that state common law informs the definition of Reservation. Nothing in the text of the Settlement Acts permits the use of state common law to construe the statutes' definitional provisions. The meaning of Reservation in the Settlement Acts is plain, and we cannot use state common law to alter that plain meaning.

Finally, we reject the United States' argument that the Settlement Acts grant to the Nation "halos" of riparian rights around each island. Nothing in the plain language of the statutes supports this position.

1002, 1010 (2017) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992))); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) (question of statutory interpretation "begins 'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain'" (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989))).

The Nation's and United States' arguments from history and each party's intent would be relevant only if the statutory language were ambiguous. See Matal v. Tam, No. 15-1293, 2017 WL 2621315, at *10 (U.S. June 19, 2017) ("These arguments are unpersuasive. As always, our inquiry into the meaning of the statute's text ceases when 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002))); Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."). The language is not ambiguous.

The district court was correct to hold that the Settlement Acts mean what they plainly say. The Penobscot Indian Reservation consists of the specified "islands in" the Main Stem of the Penobscot River. It does not include the Main Stem itself, any portion thereof, or the submerged lands underneath.

As to the dissent's three reasons to reach the opposite conclusion, as explained, the Alaska Pacific opinion does not provide the rule for decision because it concerned an entirely different provision in a different statute. The dissent departs from the Supreme Court's mandate that courts must interpret statutes according to their plain text. See Tam, 2017 WL 2621315, at *10 (noting that a party's "argument is refuted by the plain terms of the [statute]"); Henson, 2017 WL 2507342, at *6 ("And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about [congressional intent]."); Star Athletica, LLC, 137 S. Ct. at 1010 ("We . . . begin and end our inquiry with the text . . . ."); Samsung Elecs. Co. v. Apple Inc., 137 S. Ct. 429, 434 (2016) ("The text resolves this case."). Second, the statute is clear that the role of the treaties is simply to define which "islands" are included in the Reservation, not to alter the plain meaning of the term Reservation itself.

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Third, the question of the definition of Reservation is not the same as the unripe question of sustenance fishing. The MIA itself provides for how to resolve tensions between the definition of Reservation and the use of that term in the sustenance fishing provision.

Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007), cited heavily by the dissent, concerned an entirely different issue and did not present the issue of the meaning of Penobscot Indian Reservation in the Settlement Acts. Footnote 11 of Johnson, which the dissent suggests controls this case, merely distinguishes between Reservation lands and land later acquired in trust. Id. at 47 n.11. It is simply not true that this court has held in Johnson that the definition of Reservation embraced the waters of the Penobscot River. Johnson addressed a distinct question and, in doing so, explicitly bypassed any territorial dispute that might have been implicated by that question. See id. at 40 n.3 ("The territorial boundaries are disputed but, for purposes of this case, we assume (without deciding) that each of the disputed . . . points lies within the tribes' territories."); see also id. at 47. It has no bearing on the precise boundaries of the Nation's Reservation as that term is used in the Settlement Acts.

Moreover, while the Nation and the United States referred glancingly in their briefing to footnote 11 in Johnson, they did not argue that the issue presented in this case was

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already decided by Johnson. The dissent has made this argument for them.[11] The dissent's version of history does not illuminate the plain meaning of the text and is impermissible to consider.[12]

We affirm the entry of declaratory judgment for the defendants on this point.

B. Sustenance Fishing Rights

We hold that the federal courts lack jurisdiction in the circumstances of this case to adjudicate the question of the Nation's sustenance fishing rights. The district court erred in reaching this issue because the issue is not ripe and the plaintiffs presently lack standing. As a result, we vacate the district court's ruling on this issue, without adjudicating the

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[11] The dissent, but not the United States or the Nation, argues that Maine -- in its briefing in Johnson -- has been inconsistent as to whether the term "islands" includes waters. Maine has had no notice of this argument or an opportunity to respond. Further, we see no necessary contradiction, especially since the issue here was not at issue in Johnson.

Similarly, as to the 1988 letter from the Maine Attorney General, the question was whether Maine law prohibited the use of gill nets to take about 20 Atlantic salmon, for the sole use of tribal members for their individual consumption, and not to be sold or processed for sale. The Attorney General's answer was there was no prohibition, under section 6207(4) of the MIA (the sustenance fishing clause). The Attorney General did not purport to address whether any portion of the River was a part of the Reservation. Me. Op. Atty. Gen. No. 13 88-2 (Me. A.G.), 1988 WL 483316.

[12] Similarly, the dissent invokes an argument regarding the views expressed in a report commissioned by the Maine Indian Tribal-State Commission. We do not read that report as the dissent does and, in any event, the Commission's views do not displace the rules of construction courts must follow.

merits of the sustenance fishing issue, and order dismissal of this claim for relief.

The Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. Two "interrelated" "manifestations" of that limitation "are the justiciability doctrines of standing and ripeness." Reddy v. Foster, 845 F.3d 493, 499, 505 (1st Cir. 2017) (affirming dismissal of challenge to never-implemented statute). The plaintiffs cannot satisfy either doctrine as to the sustenance fishing issue.

The standing doctrine requires, inter alia, that a plaintiff show an "injury in fact," which is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

The Nation alleges that the Schneider Opinion poses a "threat" to its sustenance fishing rights. We see no such threat. Allegations of future injury confer standing only "under circumstances that render the threatened enforcement sufficiently imminent." Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014). That test is not met.

The Schneider Opinion does not confer standing on the Nation now to obtain relief as to the sustenance fishing issue. The Opinion itself does not address or even mention the scope of

the Nation's fishing rights. Nothing about the Opinion evidences that Maine threatens an injury -- imminent or otherwise -- to the Nation's sustenance fishing activities. See Blum v. Holder, 744 F.3d 790, 792 (1st Cir. 2014) (holding that animal rights activists lacked standing to challenge the Animal Enterprise Terrorism Act where they had not been prosecuted or threatened with prosecution under the statute).

On the contrary, Maine has affirmatively represented that it has a "longstanding, informal policy" not to "interfere[] with [Nation] members engaged in sustenance fishing on the Maine Stem." In Reddy, where we held there was neither standing nor ripeness, we found that the challenged unimplemented legislation did not presently interfere with the plaintiffs' relevant activities and that the government had "affirmatively disavowed prosecution . . . unless and until" certain absent preconditions were met. 845 F.3d at 502; see also Blum, 744 F.3d at 798 ("Particular weight must be given to the Government disavowal of any intention to prosecute . . . ."). The Nation's claims that the Schneider Opinion presently threatens the Tribe's "exclusive sovereign authority to govern [sustenance fishing]" or "tribal self-government" have no support in the record.

Nor can the Nation generate standing or ripeness by its own actions. The Nation points to an Internet "alert" from a Nation official to Nation members stating that they are "at risk

of prosecution by Maine law enforcement officers" if they practice sustenance fishing in the Main Stem. The State of Maine has said no such thing.

These kinds of general and hypothetical allegations of injury cannot succeed at the summary judgment stage, where the plaintiffs must do more than merely allege legal injury and must instead provide a factual basis for the alleged injury. See Lujan, 504 U.S. at 561. The Nation and the United States have not even attempted to show that any member of the Nation has suffered any injury related to sustenance fishing practices in response to the Schneider Opinion. See Reddy, 845 F.3d at 503 (rejecting "conjectural fear" as sufficient for standing); see also Wittman v. Personhuballah, 136 S. Ct. 1732, 1737 (2016) ("When challenged by a court (or by an opposing party) concerned about standing, the party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more.").

The Nation and the United States also attempt to create standing by arguing that the State Defendants' own counterclaims in this lawsuit "necessarily place in controversy the location of the Penobscot Nation's sustenance fishery." The counterclaims do not do so. The State Defendants' counterclaims referenced allegations from Maine officials and recreational users of the Main Stem that the Nation had attempted to assert exclusive control over the Main Stem by, inter alia, demanding payment for access

permits. While this may establish standing as to the issue about the meaning of "Penobscot Indian Reservation" (for which standing has not been contested), it does not go to the issue of sustenance fishing rights. The allegations do not show there has been any injury to the Nation's sustenance fishing activities. The plaintiffs cannot bootstrap the justiciability of their own claims by use of the State Defendants' counterclaims. Cf. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press.").

The sustenance fishing claim is also not ripe. Plaintiffs must show both "fitness" and "hardship" to satisfy the ripeness analysis. Reddy, 845 F.3d at 501. The fitness prong asks "whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all," Town of Barnstable v. O'Connor, 786 F.3d 130, 143 (1st Cir. 2015) (quoting Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 536 (1st Cir. 1995)), and the hardship prong "concerns the harm to the parties seeking relief that would come to those parties from our 'withholding of a decision' at this time," Reddy, 845 F.3d at 501 (quoting Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey, 844 F.3d 318, 330 (1st Cir. 2016)).

Both prongs of the ripeness analysis prevent justiciability here. The sustenance fishing claim on this record is merely speculative. There is no evidence in this record that

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Maine has interfered with or threatened to interfere with the Nation's sustenance fishing in the Main Stem, and there is not even an allegation that the State plans to change its informal policy of not interfering with sustenance fishing. We have no concrete dispute before us and so have no facts to frame the appropriate inquiry, or even any relief. See Reddy, 845 F.3d at 497.

As to hardship, "there is no apparent prejudice to the plaintiffs if they must wait until their claims ripen to sue," because "[t]hey are 'not required to engage in, or to refrain from, any conduct, unless and until'" Maine actually takes some step to interfere with or at least officially proposes to interfere with sustenance fishing in the Main Stem. Id. at 505 (quoting Texas v. United States, 523 U.S. 296, 301 (1998)). The claim is not ripe for adjudication and the district court lacked jurisdiction to review it.[13]

III.

The judgment of the district court is affirmed as to the declaratory judgment regarding the definition of "Penobscot Indian Reservation" under 30 M.R.S.A. § 6203(8) and 25 U.S.C. § 1722(i), and vacated with instructions to dismiss for want of jurisdiction

[13] In response to the defendants' ripeness arguments, Penobscot Nation cites case law on the requirements for the Ex Parte Young exception to the Eleventh Amendment. These citations are inapposite and add nothing to the ripeness analysis.

as to the declaratory judgment regarding the sustenance fishing rights under 30 M.R.S.A. § 6207(4). No costs are awarded.

-Dissenting Opinion Follows-

TORRUELLA, Circuit Judge (dissenting). "Everything in US history is about the land—[including] who . . . fished its waters . . . ."[14] This statement is particularly relevant in the dealings by the U.S. majority with the indigenous Indian population, and lies at the heart of the present appeal. Although the United States has ratified over 370 treaties with Indian nations[15] -- it unfortunately "has a long and appalling history of breaking treaties with Indian nations whenever it was convenient . . . to do so."[16] In the present case, the United States is on the right side of history and the law, but regrettably the same cannot be said of the State of Maine and its co-parties.

As will be presently detailed, the Reservation of the Penobscot Indian Nation includes the Main Stem of the Penobscot River, bank-to-bank, for three principal reasons.[17] First, the Supreme Court has held that a grant of "lands" and "islands" to Indians includes "submerged lands"[18] and "surrounding waters,"

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[14] Roxanne Dunbar-Ortiz, An Indigenous Peoples' History of the United States 1, (2014).

[15] The interested reader may find a complete database of these treaties at: http://digital.library.okstate.edu/kappler/vol2/ tocy1.htm.

[16] Singer, Joseph, Legal Theory: Sovereignty and Property, 86 Nw. U.L. Rev. 1, 2 (1991).

[17] For the sake of clarity, I here refer to the Penobscot Indian Nation as the "Nation" or the "Penobscots"; to its reservation as the "Reservation"; and to the "the Main Stem of the Penobscot River, bank-to-bank," as "the Main Stem."

[18] As a matter of both Maine and Massachusetts law, the river

Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87-89 (1918). See infra Section II. Second, the Settlement Acts reserve to the Nation what it retained in its treaties with Massachusetts and Maine, see 30 M.R.S.A. § 6203(8) -- including the Main Stem. See infra Section III. Third, in a carefully negotiated key provision, the Settlement Acts provide for the Penobscot Nation to have the right to fish within its Reservation, 30 M.R.S.A. § 6207(4) -- yet if the majority view prevails, the Nation's "fishing" will only take place in the uplands of their islands, on dry land where there are no fish and no places to fish. See infra Section IV. These three reasons render the definition of the Reservation in the Settlement Acts ambiguous to say the least, and are therefore individually and collectively bolstered by the Indian canon of construction, "a principle deeply rooted in this Court's Indian jurisprudence [whereby] 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"[19] This clearly defeats the majority's dictionary-driven conclusion to the contrary.

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bed of the Penobscot River is submerged land, and, because that river is non-tidal, this submerged land is not owned by the state, but rather privately owned. See infra Section III.

[19] Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).

The majority opinion "doth protest too much"[20] that the Settlement Acts define the Reservation unambiguously, and that considerations such as history and purpose are therefore irrelevant. Not only is the statute equivocal for the three reasons just stated, but as this court has cogently ruled

> [although] [t]he usual maxim is that courts do not go beyond the text of the statute if the meaning is plain. . . . [T]hat maxim has inherent flexibility. Even seemingly straightforward text should be informed by the purpose and context of the statute. Both this court and the Supreme Court have checked a sense of a statute's plain meaning against undisputed legislative history as a guard against judicial error.

Greebel v. FTP Software, Inc., 194 F.3d 185, 192 (1st Cir. 1999) (Lynch, J.) (emphasis added). Yet the majority ignores this precedent and -- elevating the dictionary above the law -- bypasses the Supreme Court's warning (made in the context of Indian law) that "one may not fully comprehend the statute's scope by extracting from it a single phrase, such as 'public lands' and getting the phrase's meaning from the dictionary," Hynes v. Grimes Packing Co., 337 U.S. 86, 115-16 (1949).[21]

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[20] William Shakespeare, Hamlet act 3, sc. 2 137 (T.J.B. Spencer Ed., Penguin Books 1996) (1603).

[21] Even if the majority were correct to rely solely on dictionaries here -- and it is not -- its methodology is fallacious. The majority acknowledges that dictionaries offer multiple definitions of "land," but asserts that the definition listed first must govern, and that it unambiguously establishes the meaning of "land." Yet the existence of multiple, contradictory definitions is a textbook example of ambiguity. See

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Further relying on its erroneous conclusion that the Settlement Acts are unambiguous, the majority claims that the Indian canon of construction does not apply. As stated, the majority is wrong on both counts. But even if the Settlement Acts were not ambiguous, the Indian canon would still apply, because it mandates that "treaties 'must . . . be construed . . . in the sense in which they would naturally be understood by the Indians.'" South Dakota v. Bourland, 508 U.S. 679, 701 (1993) (quoting

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e.g., Watt v. Western Nuclear, Inc., 462 U.S. 36, 41-42 (1983) ("As this Court observed . . . the word 'minerals' is 'used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case.'") (quoting Northern Pacific R. Co. v. Soderberg, 188 U.S. 526, 530 (1903)). See also United States v. Williams, 553 U.S. 285, 294-95 (2008) (Scalia, J.) (relying on the fourth dictionary definition of "promotes" and dictionary definition 3a of "presents.")

A good example of a definition of "land" that does include water can be found in the very dictionary that Maine relies on in its brief: "Any ground, soil, or earth whatsoever, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc.; real estate." http://www.webster-dictionary.org/definition/land (eighth definition) (last visited June 23, 2017) (emphasis added). Similar definitions can be found in other dictionaries. See, e.g., http://www.wordreference.com/definition/land (last visited June 23, 2017)(fifth definition) ("any part of the earth's surface that can be owned as property, and everything connected to it"); http://www.dictionary.com/browse/land (last visited June 23, 2017) (definition 5a) ("any part of the earth's surface that can be owned as property, and everything annexed to it, whether by nature or by the human hand.") See also http://www.dictionary.com/browse/land (last visited June 23, 2017) (seventh definition) ("A part of the surface of the earth marked off by natural or political boundaries or the like; a region or country" -- which plainly can include water.")

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Washington v. Wash. State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 676 (1979); Jones v. Meehan, 175 U.S. 1, 11 (1899)). As the record establishes, the natural understanding of the Penobscots is that the River and the Islands are one and the same; to the Nation, the waters and the bed of the River are so intimately connected to the uplands of the islands, that no distinction between the two is made. Indeed, the Penobscot locution "to fish my islands" means to fish the waters surrounding the uplands of those islands. The majority, however, believes that the Nation, negotiating the Settlement Agreements from a position of strength -- having just established before this court that it had a claim to approximately two-thirds of Maine, see, e.g., Joint Passamaquoddy Tribal Council v. Morton, 528 F.2d 370, 370 (1st Cir. 1975) -- ceded the Penobscot River that it has fished since time immemorial and values so greatly.

Indeed, at the urging of none other than Maine itself, this court previously had no difficulty in accepting that both the Penobscot and Passamaquoddy reservation "lands" embraced "waters." See Maine v. Johnson, 498 F.3d 37, 47 (1st Cir. 2007). [22] But

[22] Clutching at straws the majority claims that, in the present dispute, Maine was not on notice of its own position in Johnson. Supra at 22 n.10. The majority also claims that Johnson "concerned an entirely different issue;" that "[i]t is simply not true that this court has held in Johnson that the definition of Reservation embraced the waters of the Penobscot River;" that this dissent relies merely on a footnote in Johnson; that the Nation and the United States refer only "glancingly" to that footnote;

today, the majority gives short shrift to our holding in Johnson. The majority also "see[s] no necessary contradiction" between Maine's position in Johnson that the Reservation includes a part of the Penobscot River, and its present position (and the majority's holding) that no part of the River is included. But there is a clear contradiction -- for which Johnson's words speak the loudest and clearest.

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and that this dissent therefore makes the argument for them that Johnson decides the present case. Supra at 22.

I have difficulty accepting that Maine must be put on notice of its own position. In any event, both the Nation and the United States have extensively argued that Maine (until its sudden change of heart in 2012) had consistently taken the position that the Reservation includes at least some of the waters of the Penobscot River, citing various documents which I lay out in Section I infra. Maine was thus on notice that its present position is in conflict with its prior position. As I will explain in further detail, the majority's decision is in fact in direct contradiction with the holding of Johnson, and that holding is based on much more than a single footnote. See infra Section III. Furthermore, the Nation and the United States have both referred to Johnson much more that "glancingly" in their arguments. For instance, in a section of its brief dedicated to showing that the Nation has retained as its reservation that which it has not ceded in its treaties with Massachusetts and Maine, the Nation writes that

> this Court has said that the question of whether the boundaries of the Penobscot Indian Reservation include the waters of the River turns on whether those waters were "retained by the tribe[] . . . based on earlier [treaty] agreements between the tribe[] and Massachusetts and Maine." Johnson, 498 F.3d at 47 (emphasis in original)

Both the Nation and the United States also rely on Johnson in their reply briefs; indeed, the United States does so on the very first page of its reply brief.

I. Context and History

Contrary to the majority's myopic view, it is necessary to understand the "unique history" of the Settlement Acts to decide the present case. Johnson, 498 F.3d at 47. Supreme Court precedent and the Settlement Acts require that we look at that history.[23] See infra Sections II and III.

What the majority terms "the dissent's version of history," supra at 23, is principally drawn from primary sources, such as the 1796, 1818, and 1833 treaties between Massachusetts or Maine and the Nation, from Congressional Reports, and from letters and filings by Maine's own attorneys general and one of its solicitors general. The history here is also drawn from our own case law.

The relevant history commences with the epoch of the American Revolution, a time when the Nation had aboriginal title to land which was "centered on the Penobscot River," located in the then-Massachusetts territory of Maine. H.R. Rep. No. 96-1353, at 11 (1980). As the Revolution began, General George Washington sought the assistance of the Native American tribes in Maine, including the Penobscots. Id. Colonel John Allan of the

[23] I summarize only the most relevant history here. The interested reader may find more extensive descriptions of the history in, among others: Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983), and Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996).

Massachusetts militia negotiated a treaty with the Penobscots and the other tribes, promising the protection of their lands in exchange for their assistance in the war. Id. at 11-12.

Unfortunately, this promise did not last much past the birth of the United States. Id. at 12. Massachusetts (which then still included the territory of Maine), cash-strapped at the time, sought to buy land from the Indians to resell at a profit. Id. After the Penobscots successfully rebuffed numerous such attempts, they eventually yielded, and entered into two treaties ceding some of their lands. In the first treaty, in 1796, the Nation ceded, within a 30-mile tract, "all the lands on both sides of the Penobscot River." Vine Deloria, Jr. et al., Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions 1094 (1st Ed. 1999). These lands were six miles wide. Id. The bargain was typically one-sided. The Nation received no money, but rather specified quantities of "blue cloth for blankets," "shot," "[gun][p]owder," "hats," "[s]alt," "New England Rum," and "corn." Id. In the second treaty, in 1818, the Nation ceded the remainder of its lands on both sides of the river, reserving only four townships on those lands for the Nation's "perpetual use." Treaty Made by the Commonwealth of Massachusetts with the Penobscot Tribe of Indians, 1843, Me. Acts 243 (1818). In exchange, the Nation again received tokens, inter alia, a "cannon," "knives," and "drums." Id.

When Maine obtained statehood in 1820, it assumed Massachusetts's treaty obligations to the Indians. In 1833, Maine purchased, for $50,000, the four townships on the shore of the Penobscot River that had been euphemistically reserved for the Nation's "perpetual use."

As it turned out, however, in all these dealings with the Nation, both Massachusetts and Maine had proceeded in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, which prohibited any transfer of land from Indians without Congressional approval. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975). These two states neither sought nor obtained Congressional ratification of their treaties with the Nation. H.R. Rep. No. 96-1353, at 11 (1980).

When this violation surfaced in the 1970s, the Penobscot Nation initiated litigation claiming that, because neither Maine nor Massachusetts ever sought the required approval from Congress the treaties with Congress, the land transfers were void ab initio and the Nation had therefore retained legal title to its aboriginal lands, which amounted to nearly two-thirds of Maine's land mass. Other tribes initiated several similar claims. These litigations led to settlement discussions, and resulted in the passage of the Settlement Acts in 1980.

The Settlement Acts embodied a compromise, the core of which was that the Nation received increased sovereignty (previous

to the Settlement Acts, Maine did not consider the Nation to have any sovereignty[24]) and a fund was provided by the federal government to reacquire some of the Nation's lost lands. To the benefit of Maine, Congress retroactively ratified the land transfers of 1796, 1818, and 1833, and provided that the Nation would be generally subject to Maine law. See 25 U.S.C. § 1723; 30 M.R.S.A. § 6204. In essence, the Nation became akin to a municipality under Maine law, but one with additional sovereignty over, inter alia, "internal tribal matters," "sustenance fishing," and "hunting and trapping." See 30 M.R.S.A. §§ 6206, 6207.

Congress -- House and Senate alike -- ratified the MIA on the understanding that the Nation's rights to hunt and to fish were both "expressly retained sovereign activities," and that the tribes had the "permanent right to control hunting and fishing within . . . their Reservations," whereas the State had only a "residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially

[24] See, e.g., Great Northern Paper v. Penobscot Nation, 770 A.2d 574, 581 (Me. 2001) ("[Prior to the Settlement Acts] Indians residing within Maine's borders were subjected to the general laws of the state like 'any other inhabitants' of Maine. Although the Tribes were recognized in a cultural sense, they were simply not recognized by the state or the federal government in an official or 'political sense.'") (quoting State v. Newell, 24 A. 943, 944 (1892); United States v. Levesque, 681 F.2d 75 (1st Cir. 1982) (Criminal cases committed in Indian country still outstanding after passage of the Settlement Acts were tried in the United States District Court for the District of Maine).

adverse effect on stock in or on adjacent lands or waters." S. Rep. No. 96-957, at 15, 17 (1980); H.R. Rep. No. 96-1353, at 15, 17 (1980). That these provisions would receive such importance is only natural, given that Congress understood that the Penobscots were a "riverine" people, whose "aboriginal territory . . . is centered on the Penobscot River." H.R. Rep. 96-1353 at 11 (1980). In fact, the sustenance fishing provision was amended several times to accommodate the concerns of the parties.

Indeed, the Penobscots have fished, hunted, and trapped on the River since time immemorial. The River is the only place within their Reservation where the Penobscots can fish, because the uplands of their islands have no surface water where this activity can be conducted. Fishing is central to Penobscot culture, because fish is not only a major traditional source of sustenance, but is also central to many of the Nation's rituals and traditions.

It is not only the Penobscots who have understood the Main Stem to be part of their Reservation since the Settlement Acts came into force; the United States has consistently taken this position as well (and does so once more in the present case). Thus, in 1995 and 1997 filings before the Federal Energy Regulatory Commission ("FERC"), the Department of the Interior ("DOI"), took the position that the Main Stem is part of the Reservation, principally because the 1818 Treaty did not cede the Penobscot

River to Massachusetts. The federal government has also repeatedly granted the Nation funding for water resources planning, fisheries management, and water-quality monitoring of the River.

The Maine Indian Tribal-State Commission -- an entity created by the Settlement Acts for the purpose of, inter alia, "continually review[ing] 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 . . . ," 30 M.R.S.A. § 6212(3) -- has also consistently taken the position that the Main Stem is within the Nation's Reservation. See Friederichs, Zyl-Navarro, and Bertino, The Drafting and Enactment of the Maine Indian Claims Settlement Act, (February 2017) (commissioned by the Maine Indian Tribal-State Commission), available at http://www.mitsc.org/.

Maine has also understood the Main Stem, or at least a portion thereof, to fall within the Reservation. Thus, in a 1988 letter, Maine's then-Attorney General Tierney stated that the Nation could "place gill nets in the Penobscot River within the boundaries of the Penobscot Reservation." Me. Op. Atty. Gen. No. 88-2 (Me.A.G.), 1988 WL 483316 (emphasis added). In a 1997 filing before the FERC, Maine's then-Solicitor General Warren stated that "the boundaries of the Penobscot Reservation . . . includ[e] the islands in the Penobscot River . . . and a portion of the riverbed between any reservation island and the opposite shore." (emphasis

added). In fact, Maine's eel permits 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." Maine reaffirmed its position before this court in 2006, when it argued in its brief that:

> To be clear, it is the State's position that the Penobscot Reservation includes those islands in the main stem above and including Indian Island that have not otherwise been transferred, as well as the usual accompanying riparian rights that likewise have not been transferred . . . . [25]

Brief of State of Maine as Intervenor-Respondent, at 3 n.2, Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007) (Nos. 04-1363, 04-1375) (emphasis added). In the same litigation, Maine insisted that in order to determine the exact boundaries of the Reservation, it was necessary to analyze "the relevant treaties referenced in the Reservation definitions in the [MIA] including historical transfers of Reservation lands and natural resources (30 M.R.S.A. §§ 6203(5) and (8)), and aspects of Maine property law." Brief for Petitioner State of Maine at 58, Johnson, 498 F.3d (Nos. 04-1363, 04-1375).

In that same litigation, this court accepted that the Penobscot Reservation included at least a part of the Penobscot

[25] The usual riparian rights include ownership of the submerged lands (i.e. the river bed) around the islands. See infra Section III.

River, but did not resolve what part that was. The court had no difficulty in referring to Indian "lands" as encompassing "waters." See Johnson, 498 F.3d at 47.

Yet, thereafter in 2012, only five years after Maine had argued to this court that the Penobscot Indian Reservation included a part of the Penobscot River -- and more than 30 years after the Settlement Acts came into force -- Maine's then-Attorney General William Schneider wrote to the Nation informing it that no part of the River is within its Reservation. This sudden change in Maine's position, embodying an attempt to breach the agreement contained in the Settlement Acts, sparked the present litigation.

II. Supreme Court Precedent is Dispositive

Alaska Pacific Fisheries definitively established the rule of law that determines that the Penobscot Indian Reservation includes the Main Stem. Although the majority acknowledges that there are "superficial similarities" between Alaska Pacific Fisheries and the present case, it tries to downgrade the holding. Supra at 18. In fact, the similarities are not "superficial," they are profound.

In Alaska Pacific Fisheries,

> [t]he principal question for decision [was] whether the reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged land. The question is one of construction -- of determining what Congress

> intended by the words 'the body of lands known as Annette Islands.'

248 U.S. at 87 (quoting Comp. St. 1916, § 5096a) (emphasis added). The Supreme Court unmistakably held that the reservation included the adjacent waters and submerged land. Id. at 89.

To arrive at this conclusion, the Supreme Court looked not to a dictionary, but rather observed that

> As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created -- the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

Id. at 87 (emphasis added).

If one follows the Supreme Court's analysis step-by-step, the majority's grievous errors become clearly apparent. At the threshold, a comparison between the language at issue in Alaska Pacific Fisheries and the language at issue here is in order.

In Alaska Pacific Fisheries, the relevant phrase was "the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska," Id. at 86 (quoting Act of March 3, 1891, c. 561, § 15, 26 Stat. 1095, 1101). In the present case, there is a two-part relevant text. First, the MICSA defines

the Reservation as "those lands as defined in the [the MIA]." 25 U.S.C. § 1722(i). Second, the MIA defines the Reservation as

> the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act.

30 M.R.S.A. § 6203(8). The definition in Alaska Pacific Fisheries and the definition here are highly similar. Neither definition mentions waters or submerged lands, but refers only to "lands" and "islands." Both definitions specify which islands are included in the reservations. One definition does this by using the name the islands are known under ("Annette Islands"); the other definition does this by referring back to previous treaties in which the Nation retained islands, then using the name of one island ("Indian Island, also known as Old Town Island"), and then detailing which other islands are intended ("all islands in that river northward thereof"). Finally, both definitions also specify where these islands are located: one is "situated in Alexander Archipelago in Southeastern Alaska" and the other "in the Penobscot River." Rather than being "superficial[ly] similar[]," Alaska Pacific Fisheries unquestionably establishes the proper methodology for

determining the demarcation of the Nation's Reservation in the present case.

Alaska Pacific Fisheries mandates an approach to interpreting statutes that do not expressly grant waters or submerged lands to the Indians -- an approach that looks not to a dictionary, but rather places the statute in its context, and looks to Congressional intent. If the Supreme Court had applied the majority's approach to the definition at issue in Alaska Pacific Fisheries, then it would not have held that the reservation at issue included waters or submerged lands. But the Supreme Court did not apply the majority's approach, and concluded that the reservation did include waters and submerged lands. The majority's approach is thus precluded by binding Supreme Court precedent.[26]

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[26] Based on the language of the respective statutes, the majority attempts to distinguish Alaska Pacific Fisheries from the present case. This attempt fails. The majority cites the word "solely" in the MIA. But the majority fails to see that "solely" serves to specify which islands in the Penobscot River are included in the Reservation, and which are not -- not whether the Main Stem is excluded from the Reservation. Specifically, there are islands in the Penobscot River south of Indian Island (such as Marsh Island which is on the west side of Indian Island), and also islands north of Indian Island that were created after 1818, such as Gero Island. The legislative history reveals that Maine was particularly concerned that those post-1818 islands might be deemed included in the Reservation. The majority also argues that the phrase "in the Penobscot River" means that no part of the River is included in the Reservation. But the reference to the Penobscot River, like the reference to the "Alexander Archipelago" in Alaska Pacific Fisheries, serves to situate the Reservation. In addition, the words "in the Penobscot River" limit the size of the Reservation -- without these words, the Nation could claim all islands northward of Indian Island, regardless of which body of water they

Returning to the approach that Alaska Pacific Fisheries sets out, I commence with the statement in Alaska Pacific Fisheries, "[t]hat Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement." Id. Similarly, in the present case, Congress had the power to ratify -- or to decline to ratify -- any territorial arrangement between the Nation and Maine.

Next, it can easily be concluded that the analysis of the location and character of the islands in the present case is clearly in line with Alaska Pacific Fisheries. The Annette Islands are "separated from other islands by well-known bodies of water." Id. at 88. In the present case, the islands that are part of the Penobscot Indian Reservation are separated from other islands (such as those to the south of Indian Island), as well as from the banks of the Penobscot River, by a well-known body of water: the Main Stem of that very Penobscot River. The Supreme Court also remarked that the "salmon and other fish," that passed through the waters of the Annette Islands Reservation, gave "to the islands a value for settlement and inhabitance which otherwise they would not have." Id. Again, this applies in the present case. The Penobscots are a riverine people who have fished in the Main Stem since time immemorial, and for whom fishing is not only a key means

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are in.

of sustenance, but also an inextricable part of their culture. The fish in the Main Stem thus give the Reservation islands a "value for settlement and inhabitance which otherwise they would not have."

Turning to the final step of the analysis, a major purpose of the Nation in entering into the Settlement Acts -- in addition to the fishing -- was increased sovereignty over its territory, and the regaining of some of the territory it had lost to Massachusetts and Maine in 1796, 1818, and 1833. Thus, surrendering the River upon which its aboriginal lands were centered was plainly not part of the Nation's purpose -- retaining the Main Stem was. Indeed, just like the Indians in Alaska Pacific Fisheries, "[t]he Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation." Alaska Pacific Fisheries, 248 U.S. at 89.

The Supreme Court in Alaska Pacific Fisheries bolstered its holding by noting that, pursuant to the Indian canon of construction, "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Id. at 89. Most assuredly, this applies in the present case as well. See Penobscot Nation, 164 F.3d at 709 (1st Cir. 1999) (applying the Indian canon of construction to the Settlement Acts). In Alaska Pacific Fisheries, the Court found further support for its holding

in the fact that, following enactment, the statute was treated by the Indians, the public, and the Secretary of the Interior as including the adjacent waters in the reservation. As previously stated, this situation also exists in the present case. Since the enactment of the Settlement Acts, the Nation and the United States have understood that the Reservation included the Main Stem. Supra Section I. Even Maine, until it recently reversed course, and the public it informed, understood that at least a part of the Main Stem was within the Nation's Reservation. Id.

Alaska Pacific Fisheries has been applied in other cases that are instructive for present purposes. Two cases -- which the majority addresses only in a conclusory footnote -- are particularly so. First, in Hynes v. Grimes Packing Co., the Supreme Court applied Alaska Pacific Fisheries to conclude that "any other public lands which are actually occupied by Indians or Eskimos within said Territory [Alaska]," included "waters." 337 U.S. 86, 110-11 (1949) (emphasis added). The Supreme Court observed that "one may not fully comprehend the statute's scope by extracting from it a single phrase, such as 'public lands' and getting the phrase's meaning from the dictionary," rather, the statute "must 'be taken as intended to fit into the existing system' and interpreted in that aspect." Id. at 115-116. Second, in Choctaw Nation v. Oklahoma, the Supreme Court had to determine whether a grant of "land" to the Choctaw Indians included submerged

lands in the Arkansas River. 397 U.S. 620, 621, 625 (1970). The relevant boundary was described simply as "'up the Arkansas' and 'down the Arkansas,'" and there was no reference in the grant to conveying that river or any submerged lands to the Indians. Id. at 631. Citing Alaska Pacific Fisheries, the Supreme Court noted that "the question is whether the United States intended to convey title to the river bed to petitioners," id. at 633, and concluded that the grant of "land" bounded by the Arkansas River included the submerged lands of that river. Id. at 635.

In light of Alaska Pacific Fisheries, the proposition that the words "lands" and "islands" refer only to land above the waters of the Penobscot River can very well be put to rest.[27] Additionally, the notion that one can resort to dictionary definition to resolve the present case can similarly rest in peace. The Reservation includes the Main Stem.

I continue, however, because the Nation and the United States have both presented arguments that, even without Alaska Pacific Fisheries, demonstrate that the Penobscot Indian Reservation includes the Main Stem.

[27] The majority never specifies at what water level the boundaries of the Penobscot Indian Reservation are to be determined. Indeed, according to the majority's interpretation, it would appear that the Penobscot Indian Reservation shrinks when the water levels in the River rise, and then expands when those levels fall.

III. The Nation Never Ceded the Main Stem to Massachusetts

> [T]he Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government; and . . . that right was declared to be as sacred as the title of the United States to the fee.

Leavenworth v. United States, 92 U.S. 733, 742 (1876). The Settlement Acts were enacted against the backdrop of an unextinguished and "sacred" right of the Indians inhabiting Maine to approximately two-thirds of that state's landmass. I commence with the uncontested proposition that this aboriginal title included the Penobscot River and its bed. Congress enacted the Settlement Acts on the understanding that the tribes would surrender their aboriginal title, but "would retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts." S. Rep. No. 96-957, at 18 (1980); H.R. Rep. No. 96-1353, at 18 (1980).

This understanding is reflected in the language of both MICSA and the MIA. Thus, MICSA retroactively ratified the transfer of lands in the 1796, 1818, and 1833 treaties: "Any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of . . . the Penobscot Nation . . . shall be deemed to have been made in accordance with the Constitution and all laws of the United States . . . ." 25 U.S.C. § 1723(a)(1). MICSA then extinguishes the Nation's aboriginal claim as to the

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lands or natural resources transferred in the 1796, 1818, and 1833 treaties. 25 U.S.C. § 1723(b). But the Nation did not transfer the Main Stem in those treaties.

The language of the MIA also reflects Congress's understanding that the Nation would retain what it had not ceded in its treaties with Massachusetts and Maine. The MIA refers those treaties in the very definition of the 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 . . . ." 30 M.R.S. § 6203(8). The majority effectively reads this language out of the MIA. By taking this language as "merely language specifying which 'islands' are involved," supra at 16, the majority renders the language superfluous -- because the MIA already specifies which islands are included in the Reservation: "solely . . . Indian Island, also known as Old Town Island, and all islands in [the Penobscot R]iver northward thereof that existed on June 29, 1818 . . . ." 30 M.R.S. § 6203(8). The majority's reading "is thus at odds with one of the most basic interpretive canons, that '"[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous,

void or insignificant . . . ."'" Corley v. United States, 556 U.S. 303, 314 (2009).[28]

Admittedly, if one relies on the text of the MIA standing alone, the majority's reading -- that the reference to the 1796, 1818, and 1833 treaties merely serves to specify which islands are part of the Reservation -- is not impossible. However, "[w]hen we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).

Thus, not only do the purpose and legislative history of the Settlement Acts lead to the conclusion that the Nation has

[28] The majority attempts a similar argument with respect to section 6205(3)(A) of the MIA, which states that "[f]or purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation." 30 M.R.S.A. § 6205(3)(A). The majority argues that this implies "that otherwise the 'Reservation' is not contiguous to land along and adjacent to the Penobscot River;" and that including the Main Stem in the Reservation "would render that language superfluous." Supra at 13. What the majority apparently fails to take into account is that the Penobscot River also runs for approximately 30 miles south of the Main Stem. Thus, section 6205(3)(A), far from being redundant, serves the purpose of rendering land along and adjacent to any part of the Penobscot River (including south of the Reservation) contiguous to the Reservation.

retained what it has not ceded -- but the Indian canon of construction mandates that conclusion, for the Indians never ceded the Penobscot River in the 1796, 1818, and 1833 treaties. To understand why this is the case, it is essential to examine those treaties.

In the 1796 and 1818 treaties, the Nation ceded its "land" on both sides of the Penobscot River -- but Old Town Island, and all the islands in the River northward thereof, were reserved for the Tribe; the 1818 treaty also reserved four townships to the Nation, which were then sold to Maine in the 1833 treaty. None of these treaties explicitly mention the River being conveyed to Massachusetts or to Maine, nor do they mention it being reserved for the Indians.

> [W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.'

United States v. Winans, 198 U.S. 371, 380-81 (1905). The Nation views the Penobscot River as part of the islands, and in the 1796, 1818, and 1833 treaties, the Nation retained those islands, and thus naturally understood that it retained the River as well. The Nation ceded only "land" on both sides of the River, which it naturally understood to refer only to the uplands on both sides of

the River. Thus, the Nation retained the River in the 1796, 1818, and 1833 treaties.

But even reading the treaties technically leads to the conclusion that the Nation retained the Main Stem. Under Massachusetts, as well as Maine, common law,[29] the river beds of non-tidal rivers are considers submerged lands, and are privately owned,[30] presumptively by the owner of the abutting uplands, who may be referred to as a riparian owner. McFarlin v. Essex Co., 64 Mass. 304, 309-10 (Mass. 1852); In re Opinion of the Justices, 106 A. 865, 868-69 (Me. 1919). The Penobscot River, in relevant part, is non-tidal. Veazie v. Dwinel, 50 Me. 479, 479 (Me. 1862). When two different persons own land on opposite sides of the River, each presumptively owns the submerged land to the "thread" (i.e. midline) of the river; the same holds true for owners of islands -- they, too, presumptively own the submerged lands to the thread of the river between the island upland and the upland on the river bank. See Warren v. Westbrook Mfg. Co., 86 Me. 32, 40 (Me. 1893). Ownership of submerged lands brings with it certain rights, such as the exclusive right to fish in the waters above the submerged

[29] Because Massachusetts and Maine common law are identical in all respects that are material here, I here cite to both, leaving to the side the question of whether Maine or Massachusetts law should apply to a given treaty or issue.

[30] Unlike the beds of tidal rivers, which cannot be privately owned, but are rather owned by the state for the benefit of all citizens. Storer v. Freeman, 6 Mass. 435, 438 (Mass. 1810).

lands; it also brings with it certain obligations, such as allowing the public passage through the waters above the submerged lands. McFarlin, 64 Mass. at 309-10; In re Opinion of the Justices, 106 A. at 868-69.

In an arm's-length transaction, the presumption would be that the Nation ceded its submerged lands until the thread between its retained islands and the banks of the River. But Massachusetts, as well as Maine, law recognizes that the presumption is defeated where the transaction was not at arm's length, especially where, as here, the grantor does not understand that he or she is relinquishing title to the submerged lands. See Hatch v. Dwight, 17 Mass. 289, 298 (Mass. 1821); Hines v. Robinson, 57 Me. 324, 330 (Me. 1869).

Note that, even if (as the majority) one reads the 1796, 1818, and 1833 treaties out of the Settlement Acts, state law still informs the meaning of those Acts. Varity v. Howe, 516 U.S. 489, 502 (1996) ("The dissent looks to the dictionary for interpretive assistance. Though dictionaries sometimes help in such matters, we believe it more important here to look to the common law . . . .") (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)). This is especially true in this case, because Maine insisted that Maine law apply to the Penobscots. Supra Section I; 30 M.R.S.A. §§ 6202, 6204. Section 6204 of the MIA is

even entitled "Laws of the State to apply to Indian Lands."[31] "Laws of the State," in turn, is defined to include "common law." 30 M.R.S.A. § 6203(4). And if islands include submerged lands, and the Nation's Reservation includes islands, then, by simple deduction, the Nation's Reservation includes submerged lands.[32]

The United States, the Nation, and Maine (until Maine suddenly changed its mind in 2012) have consistently taken the position that the Reservation was defined with reference to the 1796, 1818, and 1833 treaties and state common law. Supra Section I. In fact, it was Maine who -- before this court in Johnson -- was adamant that the boundary issue "involves analysis of the relevant treaties referenced in the Reservation definitions in the [MIA] including the historical transfers of Reservation lands and natural resources (30 M.R.S.A. §§ 6203(5) and (8)), and aspects of Maine property law." Brief for Petitioner State of Maine at 58, Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007) (Nos. 04-1363, 04-1375) (emphasis added).

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[31] Although the Penobscots did negotiate a few exceptions to the general rule that they are subject to Maine law, none of those exceptions could support the proposition that the Indians somehow surrendered their property rights under Maine law. See, e.g., 30 M.R.S.A. §§ 6206, 6207.

[32] Citing no authority, the majority, however, asserts that state common law, including law for the construction of deeds, should not figure in our construction of the Settlement Acts. Supra at 19 n.9.

Contrary to the majority's protestation that Johnson "did not present the issue of the meaning of Penobscot Indian Reservation in the Settlement Acts," Johnson did just that. Johnson concerned a dispute over the allocation of regulatory authority over waste discharges into water between Maine, the EPA, and the Indians (specifically, the Nation and the Passamaquoddy Tribe). In order to resolve that dispute, this court had to address the meaning of the Reservation.[33] For in order to determine that the Nation did not have regulatory authority as to two discharge facilities, this court had to decide whether those facilities discharged into territory "acquired by the Secretary [of the Interior] in trust" for the Nation, or whether it discharged into the Reservation.[34] Johnson, 498 F.3d at 47. As the majority itself puts it, in Johnson, we "distinguishe[d] between Reservation lands and land later acquired in trust." Supra at 22. We made that distinction by observing that the Reservation,

[33] Note that in order for the Nation to have standing in a case concerning waste discharges into water, its Reservation had to include at least some part of the Penobscot River. We decided the Nation's claims in Johnson on the merits, thus determining that the Nation had standing and, implicitly, that the Reservation included some part of the River. Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd., 325 F.3d 54, 59 (1st Cir. 2003) (We do not assume the existence of Article III jurisdiction).

[34] The Nation's Territory is comprised of its Reservation plus any lands acquired by the Secretary of the Interior for the benefit of the Nation. 30 M.R.S.A. § 6205(2). The Nation's regulatory authority is different in its territory and its reservation. See, e.g., 30 M.R.S.A. § 1724(h).

unlike the Territory, contained "reservation waters retained by the [Penobscot and Passamaquoddy] tribes under the [MIA], based on earlier agreements between the tribes and Massachusetts and Maine." Johnson, 498 F.3d at 47 (original emphasis). We then clarified that we arrived at this conclusion because we read the MIA as "defin[ing] [the Nation's] reservation lands as those reserved to the tribe[] by agreement with Massachusetts and Maine and not subsequently transferred." Id. at 47 n.11 (citing 30 M.R.S.A. § 6203(5), (8)) (emphasis added).[35] The majority is correct insofar as it notes that, in Johnson, we bypassed the issue of the Reservation's exact boundaries. But we did hold that the Reservation was defined in terms of what the Nation retained, and that the Reservation included some part of the Penobscot River -- which directly conflicts with the majority's view that the Reservation is defined by the dictionary, and includes no part of River.

It is therefore nothing short of stunning that the majority today holds that the 1796, 1818, and 1833 treaties are unambiguously excluded from the Settlement Acts. Apparently, the majority believes that this court in Johnson was not merely wrong,

[35] The majority seeks to characterize my reliance on Johnson as being based merely on footnote 11 in that case. Supra at 22. As this discussion makes clear, I am not relying merely on that footnote, although it does provide useful clarification. As for the majority's other attempts to argue that reliance on Johnson is not proper, I have addressed those in footnote 22, supra.

but that it completely misread an unambiguous provision. Notwithstanding the majority's protestations, in Johnson, this Court had no difficulty in referring to Indian "lands" as including "waters." Id. at 45 ("[T]wo source points . . . drain into navigable waters within what we assume to be tribal land.") (emphasis added); Id. at 47 ("[T]he facilities . . . discharge onto reservation waters . . . . That such lands may be subject to . . . .") (emphasis added).

IV. The Nation's Right to Fish "within" its Reservation

In a section entitled "Sustenance fishing within the Indian reservations," the MIA provides that

> Notwithstanding any rule or regulation promulgated by the commission[36] 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 . . . .

30 M.R.S.A. § 6207(4) (emphasis added).

This provision was carefully negotiated and was amended several times to accommodate the concerns of the parties. The provision was understood by all involved to be central to the Nation's position -- and indeed to its very existence and culture

[36] Referring to the Maine Indian Tribal-State Commission. See supra Section I.

-- and was one of the very few exclusions in the MIA to the applicability of Maine law to the Nation and its lands.[37]

The fact that the Indians can fish "within" their Reservation implies that there is a place to do so. Unless the majority is of the view that one can fish where there is no water, there is no place to fish on the uplands of the Nation's islands -- which implies that some part of the River has to be a part of the Reservation. The previous two sections of this dissent have already explained why that part of the River is the Main Stem, so I will not belabor that point here.

What is worth repeating, however, is just how strongly the sustenance fishing provision implies that the Nation's Reservation embraces a part of the River. Given the attention paid to this provision and to the importance of sustenance fishing to the Nation, the grant of fishing rights within the boundaries of the Reservation was not accidental. This is especially so given that Congress knows how to grant fishing or others rights to Indians outside of their reservations. See, e.g., Washington v.

[37] The majority appears to believe, however, that this provision (or at least the reference to the Reservation therein) is "ancillary," because the provision applies to both the Passamaquoddy and the Penobscot Reservations. Supra at 16. I fail to see how a provision that grants additional rights not only to the Penobscots, but also to the Passamaquoddy, is thereby rendered less significant to the Nation's position -- if anything, because the provision applies to two distinct reservations, rather than only to one, it carries more weight, not less.

Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674 and n.21 (1979) (holding that six treaties granted Indians off-reservation fishing rights, through the following language (or language materially identical thereto): "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .").

The majority correctly points out that the Nation has hunting and trapping rights as well within its territory, which is much larger than its Reservation. Supra at 14 n.6, 15; 30 M.R.S.A. §§ 6207(1)(A), 6205(2), 6207(1). However, the majority -- incorrectly -- views this hunting and trapping provision as providing only weak support for the position of the United States and the Nation. What the majority fails to see is that section 6207 sets up a detailed scheme allocating authority over fishing between the Nation, the Maine Indian Tribal State Commission,[38] and the state. Thus, section 6207(1)(A) (which gives the Indians hunting and trapping rights) is part of section 6207(1), which gives Indians the "exclusive authority within their respective Indian territories to promulgate and enact ordinances regulating" not only "[h]unting, trapping or other taking of wildlife," but also "[t]aking of fish on any pond in which all the shoreline and

[38] Referring to the Maine Indian Tribal-State Commission. See supra Section I.

all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area." 30 M.R.S.A. §§ 6207(1). Section 6207(3) then goes on, in painstaking detail, to delineate the areas in which the commission shall have "exclusive authority to promulgate fishing rules or regulations," again with reference to "Indian territory."[39] 30 M.R.S.A. §§ 6207(3). Section 6207(6) then lays out what authorities and duties Maine's Commissioner of Inland Fisheries and Wildlife has within Indian territories.

Given this meticulous delineation of who has what authority over fishing -- and where, exactly, that authority applies -- a provision that gives Indians sustenance fishing rights within their reservations "[n]otwithstanding any rule or regulation promulgated by the commission or any other law of the State" is highly significant. 30 M.R.S.A. § 6207(4). This provision plainly implies that those reservations include places

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[39] To wit, the commission has such authority in:

> 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;
>
> B. Any section of a river or stream both sides of which are within Indian territory; and
>
> C. Any section of a river or stream one side of which is within Indian territory for a continuous length of ½ mile or more.

30 M.R.S.A. § 6207(3).

in which to fish. In the case of the Penobscot Reservation, that means that the Main Stem is part of the Reservation.

The majority, however, argues against this necessary implication by relying on the boilerplate phrase "unless the context indicates otherwise" that applies to the definitions section of the MIA. 30 M.R.S.A. § 6203; supra at 15. But the majority never explains in what way the "context indicates otherwise." In fact, as I have just explained, the context indicates that "reservations" in the sustenance fishing provision was used to mean exactly that -- reservations, as including the Main Stem. 30 M.R.S.A. § 6207(4). It is only through the majority's forced reading of the definition of the Nation's Reservation that a tension is even created between that definition and the sustenance fishing provision. But even assuming that this tension exists, that the Settlement Acts somehow offer two definitions of the Reservation, I am forced to repeat that "[w]hen we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" Cty. of Yakima, 502 U.S. at 269 (quoting Montana, 471 U.S. at 766).[40]

[40] Because the Main Stem is part of the Reservation, there is no need for this court to reach the second issue, namely whether

V. Conclusion

As previously elaborated, there are at least three reasons -- each of which is sufficient by itself -- why the Penobscot Indian Reservation includes the Main Stem of the Penobscot River. First, the Supreme Court's binding precedent, especially Alaska Pacific Fisheries, establishes that the words "lands" and "islands" can include contiguous waters and submerged

---

the Nation has standing to sue for a declaratory judgment that it has a right to sustenance fishing in the Main Stem. Plainly, section 6207(4) of the MIA gives the Nation this right. The 2012 letter from Maine's then-Attorney General Schneider (the letter that has given rise to this dispute) acknowledges that "the Penobscot Nation has authority to regulate hunting and fishing on those islands included in its Reservation . . . ." The letter proceeds to explain that "[t]he River itself is not part of the Penobscot Nation's Reservation, and therefore is not subject to its regulatory authority or proprietary control." But the Main Stem of the River is, in fact, part of the Reservation, and the question of whether the Penobscots can fish in the Main Stem is therefore moot.

If I were to reach the issue of standing and ripeness, however, I would still find that the Indians have standing and that their claim is ripe. An Indian Nation or Tribe has the standing to seek declaratory and injunctive relief where its sovereignty is put in question, even absent any other concrete harm. See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 468 n.7 (1976). As already amply elaborated upon herein, the Nation views its right to sustenance fishing as an essential element of its sovereignty, and Congress understood the hunting and fishing provision as recognizing the Nation's exercise of "inherent sovereignty," and considered hunting and fishing "expressly retained sovereign activities." S. Rep. No. 96-957, at 14-15 (1980); H.R. Rep. No. 96-1353, at 14-15 (1980). A declaration from Maine, therefore, that the Nation has no such right (even if Maine does not, at present, intend to interfere with the Nation's sustenance fishing) is calling the Nation's sovereignty into question.

lands. On the facts of the present case, there is no question that they do include the waters and submerged lands of the Main Stem. Second, in the 1796, 1818, and 1833 treaties -- with reference to which the Reservation is defined -- the Nation retained the Main Stem; this is true even if we interpret the treaties technically in light of Maine and Massachusetts common law. Third, the Settlement Acts provide the Nation with sustenance fishing rights within its Reservation -- a right that only makes sense and can only be exercised if the Reservation includes at least a part of the waters of the Penobscot River.

These three reasons are also mutually reinforcing. For instance, Alaska Pacific Fisheries calls for an appraisal of, inter alia, the purposes which the Settlement Acts sought to attain; the sustenance fishing provision underscores that one of those purposes was to guarantee to the Nation sustenance fishing rights within its Reservation, without otherwise disturbing the carefully crafted regulatory balance of the Settlement Acts. Alaska Pacific Fisheries also calls for an appraisal of the situation of the Nation -- which situation is clarified by the 1796, 1818, and 1833 treaties and state common law establishing that the Nation was in possession of the Main Stem when it entered into the Settlement Acts.

I cannot join in the majority's overreliance on dictionaries, to the exclusion of far more persuasive and common sense authority.

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Watt v. Alaska, 451 U.S. 259, 266 n.9 (1981) (quoting Cabell v. Markham, 148 F.2d 737, 739 (L. Hand, J.), aff'd, 326 U.S. 404 (1945)).

Respectfully, but most emphatically, I dissent.

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.

Maine Revised Statutes

Title 30. Federally Recognized Indian Tribes

Part 4. Indian Territories

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."

Maine Revised Statutes

Title 30. Federally Recognized Indian Tribes

Part 4. Indian Territories

Chapter 601. Maine Indian Claims Settlement

§ 6202. Legislative findings and declaration of policy

The Legislature finds and declares the following.

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.

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

The claims also have produced disagreement between the Indian claimants and the State over the extent of the state's jurisdiction in the claimed areas. This disagreement has resulted in litigation and, if the claims are not resolved, further litigation on jurisdictional issues would be likely.

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

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

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

Maine Revised Statutes

Title 30. Federally Recognized Indian Tribes

Part 4. Indian Territories

Chapter 601. Maine Indian Claims Settlement

§ 6203. Definitions

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

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

***

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.

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.

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.

***

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.

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

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.

***

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.

Maine Revised Statutes

Title 30. Federally Recognized Indian Tribes

Part 4. Indian Territories

Chapter 601. Maine Indian Claims Settlement

§ 6206. Powers and duties of the Indian tribes within their respective Indian territories

***

3. Ordinances. The Passamaquoddy Tribe and the Penobscot Nation each has 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 must be made by each tribal governing body. If either tribe or nation chooses not to exercise, or to terminate its exercise of, jurisdiction as authorized by this section or section 6207, the State has 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 has exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation except as provided in the section or sections referenced in the following:

A. Section 6209-A.

Maine Revised Statutes

Title 30. Federally Recognized Indian Tribes

Part 4. Indian Territories

Chapter 601. Maine Indian Claims Settlement

§ 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

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.

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.

2. Registration stations. 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.

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;

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

C. Any section of a river or stream one side of which is within Indian territory for a continuous length of ½ mile or more.

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

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

***

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

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

6. Supervision by Commissioner of Inland Fisheries and Wildlife. The Commissioner of Inland Fisheries and Wildlife, or his successor, shall be entitled to conduct fish and wildlife surveys within the Indian territories and on waters subject to the jurisdiction of the commission to the same extent as he is authorized to do so in other areas of the State. Before conducting any such survey the commissioner shall provide reasonable advance notice to the respective tribe or nation and afford it a reasonable opportunity to participate in such survey. If the commissioner, at any time, has reasonable grounds to believe that a tribal ordinance or commission regulation adopted under this section, or the absence of such a tribal ordinance or commission regulation, is adversely affecting or is likely to adversely affect the stock of any fish or wildlife on lands or waters outside the boundaries of land or waters subject to regulation by the commission, the Passamaquoddy Tribe or the Penobscot Nation, he shall inform the governing body of the tribe or nation or the commission, as is appropriate, of his opinion and attempt to develop appropriate remedial standards in consultation with the tribe or nation or the commission. If such efforts fail, he may call a public hearing to investigate the matter further. Any such hearing shall be conducted in a manner consistent with the laws of the State applicable to adjudicative hearings. If, after hearing, the commissioner determines that any such ordinance, rule or regulation, or the absence of an ordinance, rule or regulation, is causing, or there is a reasonable likelihood that it will cause, a significant depletion of fish or wildlife stocks on lands or waters outside the boundaries of lands or waters subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or the commission, he may adopt appropriate remedial measures including rescission of any such ordinance, rule or regulation and, in lieu thereof, order the enforcement of

the generally applicable laws or regulations of the State. In adopting any remedial measures the commission shall utilize the least restrictive means possible to prevent a substantial diminution of the stocks in question and shall take into consideration the effect that non-Indian practices on non-Indian lands or waters are having on such stocks. In no event shall such remedial measure be more restrictive than those which the commissioner could impose if the area in question was not within Indian territory or waters subject to commission regulation.

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

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.

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

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

United States Code

Title 25. Indians

Chapter 19. Indian Land Claims Settlements

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.

United States Code

Title 25. Indians

Chapter 19. Indian Land Claims Settlements

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§ 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.

United States Code

Title 25. Indians

Chapter 19. Indian Land Claims Settlements

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§ 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.

United States Code

Title 25. Indians

Chapter 19. Indian Land Claims Settlements

Subchapter II. Maine Indian Claims Settlement

§ 1725. State laws applicable

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(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.

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(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 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.

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United States Code

Title 25. Indians

Chapter 19. Indian Land Claims Settlements

Subchapter II. Maine Indian Claims Settlement

§ 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.

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