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

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 Maine
No. 1:12-cv-00254-GZS (Hon. George Z. Singal)

SUPPLEMENTAL BRIEF OF THE UNITED STATES ON REHEARING EN BANC

[continued on next page]

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INTRODUCTION

The panel majority held that the Penobscot Indian Reservation includes only the dry uplands of the islands in the "Main Stem" of the Penobscot River, i.e., the 60-mile reach from the confluence of the River's East and West branches south to Indian Island. Those boundaries, according to the majority, entirely exclude the submerged lands of the Penobscot River where the Penobscots have fished since time immemorial. The majority improperly based its conclusion on dictionary definitions of the word "islands" as used in the Maine Implementing Act. But that word signifies a geographic concept, not a legal term of art, and its use does not independently signify any common understanding of the legal boundary of an island parcel.

As Judge Torruella correctly explained in dissent, use of the ordinary tools of statutory construction—which includes interpreting the word "islands" in the context of the Settlement Acts as a whole with due consideration of statutory purpose and background legal principles—leads to the conclusion that these island parcels include the surrounding riverbed. The riverbed and the River's resources were reserved from cession in the Penobscot Nation's 1796 and 1818 treaties with Massachusetts, and they were confirmed as part of the Penobscot Reservation by the Settlement Acts. The only place where the Penobscot can exercise the on-reservation sustenance-fishing right expressly granted by the Maine Implementing

Act is in the Penobscot River. Indeed, Maine itself long understood that the Reservation included the riverbed and associated riverine resources surrounding the islands in the Main Stem, before abruptly changing position in 2012.

The majority's unanchored reliance on dictionary definitions erroneously deprives the Penobscot Nation of the heart of the Penobscot homeland and culture. In accord with Judge Torruella's dissent, this Court should hold that the Penobscot Reservation includes not just the island uplands but extends to the surrounding riverbed and associated riverine resources.

BACKGROUND

A. Statutory background

In 1975, the United States filed suits against Maine on behalf of the Passamaquoddy Tribe and the Penobscot Nation claiming that their cessions of land—including in the Penobscot treaties with Massachusetts in 1796 and 1818—violated the federal Nonintercourse Act, 25 U.S.C. § 177, and were thus void. The assertedly illegal cessions covered about two-thirds of the land in Maine. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379-80 (1st Cir. 1975) (holding that the United States had a trust responsibility to protect land taken from the Maine tribes in violation of the Nonintercourse Act without deciding which lands were unlawfully ceded). Those suits were resolved by a 1980 settlement codified in the Maine Implementing Act ("MIA"), 30 M.R.S.A.

§§ 6201-6214, and ratified by Congress in the Maine Indian Claims Settlement Act ("MICSA"), Pub. L. No. 96-420, 94 Stat. 1785 (1980) (formerly codified at 25 U.S.C. §§ 1721-1735) (collectively, the "Settlement Acts").

The Settlement Acts confirmed as the Penobscot Reservation the lands reserved from cession in the treaties. *See* Panel Opinion 31. MIA § 6203(8) defines the Reservation to include

> the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, 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.

MICSA § 1722(i) defines the "Penobscot Indian Reservation" as "those lands as defined in the Maine Implementing Act." Within the Reservation boundaries, the Penobscot were guaranteed rights to sustenance fishing, hunting, and trapping, as well as regulatory authority over hunting and trapping. *See* U.S. Principal Brief 6-11 (summarizing the most important provisions of MIA and MICSA).

B. Procedural background

The claims. The present litigation was triggered by a 2012 opinion by Maine's then-Attorney General William Schneider asserting that the Penobscot Reservation is limited to the island uplands and that the State of Maine has "exclusive regulatory jurisdiction over activities taking place on the River." Panel

Opinion 4-5; J.A. 72-73. That opinion contradicted the State's long-standing position that the Reservation extends into the River. *See* U.S. Principal Brief 50-53; U.S. Response/Reply Brief 46-48.

The Nation's complaint sought a declaratory judgment that it could exercise its on-reservation rights under the Settlement Acts within the Main Stem bank-to-bank, including its sustenance fishing rights and regulatory authority over hunting and trapping. J.A. 59-63. Maine asserted a counterclaim seeking a declaration that the entire Main Stem lies outside of the Reservation for all purposes. J.A. 125. A number of municipal entities and corporations holding permits to discharge pollutants into the Main Stem (State Intervenors) intervened as defendants and asserted a similar counterclaim. J.A. 82-83. The United States then intervened on behalf of the Nation and filed a complaint similar to the Nation's. J.A. 92-94.

District court decision. In an order on cross-motions for summary judgment, the district court held that the definitions of Penobscot Reservation in MIA § 6203(8) and MICSA § 1722(i) unambiguously include "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). It further held, however, that the reference to "reservations" in MIA § 6207(4), which guarantees Penobscots an on-reservation sustenance-fishing right, is ambiguous and is properly interpreted to include the Main Stem bank-to-bank. *Id*. at 222-23.

Panel opinion. The panel majority affirmed the district court's first holding that MIA § 6203(8) unambiguously restricts the Penobscot Reservation to the island uplands and excludes the surrounding submerged land and riverine resources; it relied principally on dictionary definitions of the word "island," the phrase "islands in the Penobscot River," and the word "solely." Panel Opinion 10-12. The majority vacated the district court's second holding on the ground that there was no ripe controversy or cognizable injury supporting standing with respect to the geographic scope of the sustenance-fishing right. *Id.* at 23-29.

Judge Torruella dissented. Panel Opinion 30-67. He rejected "the majority's dictionary-driven conclusion." *Id.* at 31. In his view, the Reservation included the River bank-to-bank for three principal reasons: (1) Supreme Court precedent holding that a grant of "islands" to Indians includes the surrounding submerged lands; (2) Congress's intent that the Nation would retain its aboriginal lands and resources not ceded in the treaties; and (3) the "key" on-reservation sustenance fishing right of MIA § 6207(4). *Id.* at 30-31. He explained that there was no need to address standing and ripeness when the Reservation is properly defined to include the river where the Penobscot fish; and that, in any event, Maine's declaration that the Nation has no sovereign *right* to fish in the river is a sufficient injury to seek declaratory relief. *Id.* at 64-65 n.40.

C. En banc order

The Penobscot Nation and the United States filed petitions for rehearing en banc. This Court granted the Petitions on April 8, 2020 and asked the parties to brief 12 questions. Those questions are answered below, arranged as they fit in the overall argument rather than in numerical sequence.

SUMMARY OF ARGUMENT

1. Questions 3, 4, 5, 6, and 10. Application of the ordinary tools of statutory construction leads to the conclusion that the Reservation includes the submerged lands and associated riverine resources of the Main Stem. The definitions of the Penobscot Reservation in MIA § 6203(8) and MICSA § 1722(i) do not unambiguously exclude the riverbed even when read in isolation. Those definitions certainly do not so exclude when read in context, which encompasses the critical *on-reservation* sustenance-fishing right, MIA § 6207(4). There is no basis for overcoming the presumption that "Reservation" means the same thing in all provisions.

The conclusion that the Reservation includes the riverbed is reinforced by *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89-90 (1918), in which the Supreme Court held that Congress intended a federal reservation of islands to include the surrounding submerged lands and waters so that the reservation would meet the Indians' "situation and needs." That interpretation is also supported by

the Nation's treaties with Massachusetts, which are reasonably interpreted to reserve to the Nation the riverbed and associated riverine resources bank-to-bank. In addition, background principles of state common law—that the riverbed in a nontidal river like the Main Stem is privately owned and that private island owners presumptively own the surrounding riverbed to the thread of the channels—compel the conclusion that the Reservation's island parcels include *at least* the surrounding submerged lands to the threads. Finally, consideration of legislative history and the parties' post-enactment understanding is appropriate and further supports the interpretation that the Penobscot Reservation includes the Penobscot River.

2. Questions 1, 2, and 4. Both the treaties and the Settlement Acts should be interpreted in light of two canons of construction favorable to Indians, which reinforce the foregoing conclusion. No MICSA provision precludes use of the canons. Nor are the canons overcome by the presumption of the Equal Footing Doctrine that submerged lands will pass to states upon their admission to the Union, as that doctrine does not apply here.

3. Question 9. The Nation did not "transfer" the riverbed to the State prior to 1980 so as to exclude it from the Reservation.

4. Question 10. The Penobscot Reservation includes the submerged land surrounding the islands *at least* to the channel threads, but the more reasonable interpretation is that it includes the Main Stem bank-to-bank.

5. Questions 7 and 8. The United States' and Nation's claims are not barred by MICSA § 1723(a)(2) or by any equitable principle.

6. Questions 11 and 12. The question whether the Penobscot Reservation includes the submerged lands and resources of the Main Stem requires consideration of the on-reservation sustenance-fishing provision, MIA § 6207(4), regardless of whether a separate claim is stated under that provision. But in any event, the Nation and United States have standing to assert such a claim, and the question is ripe.

ARGUMENT

I. Proper application of the traditional rules of statutory construction shows that the Penobscot Reservation includes the riverbed (Questions 3, 4, 5, 6, and 10).

The majority asserted that it was applying "traditional rules of statutory construction" to the Settlement Acts, Panel Opinion 8, but it did not actually do so. Rather, it focused on the single principle that an undefined term is generally given "its ordinary or natural meaning." *Id.* at 10 (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). But as elaborated in Section I.A.4 below (pp. 21-22), the majority failed to appreciate that an island parcel in a Maine nontidal river *ordinarily includes* the surrounding riverbed, and it ignored other important principles of statutory interpretation. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and

consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006).

This Court has, of course, undertaken such analyses of other statutes. In *United States v. Gordon*, 875 F.3d 26, 34 (1st Cir. 2017), for example, the Court acknowledged that "the plain meaning of a statute can feasibly suggest two results." When one result "appears consistent with Congress's intent and the other not—the consistent result should carry the day." *Id*. An apparently plain meaning "sometimes must yield if its application would bring about results that are antithetical to Congress's discernible intent." *Id*. (internal quotation marks omitted). Declining "to read the statute woodenly," *id*. at 35, the Court determined congressional intent by "examination of the statute as a whole" and by inspection of "[s]tatutory history and legislative context," *id*. at 34. *See also Boston & Maine Corp. v. Lenfest*, 799 F.2d 795, 799 (1st Cir. 1986) (even where statutory language appears to be "plain," it may not actually be "so 'plain' as to control, without more, the precise question posed by the facts of [a] case" in light of the statute's "stated purpose and design").

Judge Torruella explained the relevant statutory context here: the Settlement Acts resulted from the Maine tribes' claims of legal title to their aboriginal lands, and a central purpose was to confirm as the Penobscot Reservation the land that the Nation reserved from cession in its treaties. Panel Opinion 38-39 (explaining that

the Settlement Acts "retroactively ratified the land transfers of 1796, 1818, and 1833," while confirming the tribes' sovereign rights—most importantly to fish and to hunt—within their retained reservations). That purpose is revealed in the text and legislative history of the Settlement Acts. *Id.* at 51-53. Judge Torruella's interpretation "should carry the day," *Gordon*, 875 F.3d at 34, because it is consistent with legislative intent and the majority's is not, for all the reasons explained below.

A. MIA § 6203(8) and MICSA § 1722(i) are properly read to include the riverbed.

1. Neither statutory provision unambiguously excludes the riverbed (Question 4).

The majority's conclusion turns on the dictionary definition of the word "island" in MIA § 6203(8): "a piece of land that is completely surrounded by water." Panel Opinion 10. But that definition merely describes the geographic concept of an island and does not specify a legal boundary as a matter of property rights or sovereign authority, which is the question presented here. "Island" is not a legal term of art in which is "accumulated the legal tradition and meaning of centuries of practice." *Carter v. United States*, 530 U.S. 255, 264 (2000). The legal boundary of an island cannot be specified in a simple dictionary definition because there is no universal rule for drawing a legal boundary around an island. *See* Panel Opinion 46 (proper statutory analysis "looks not to a dictionary, but

rather places the statute in its context, and looks to Congressional intent"). A boundary must be determined by applying various legal principles to specific factual circumstances. Most basically, the line between dry land and the water surface continually shifts even in nontidal rivers; as Judge Torruella pointed out, the majority never specifies whether the Reservation boundary moves or, if it is fixed, "at what water level the boundaries of the Penobscot Indian Reservation are to be determined." *Id.* at 50 n.27. There is simply no way to avoid consideration of background legal principles.

Decisions involving the state boundaries around Rhode Island's Block Island and New York's Long Island illustrate that dictionary definitions of geographic formations are of limited utility in determining jurisdictional boundaries. The first of these is *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976), which held that Rhode Island had authority to require vessels traversing Block Island Sound to take on Rhode Island-licensed pilots under 46 U.S.C. § 211, which authorizes state regulation within "bays." Crucially, this Court did not look to a dictionary definition of "bay"—e.g., an "indentation of the sea into the land with a wide opening." The Court looked instead to the detailed definition provided in the Convention on the Territorial Sea and the Contiguous Zone, 532 F.2d at 768-69, based on the Supreme Court's direction in *United States v. California*, 381 U.S. 139, 162 (1965). Block Island Sound was concededly not a "bay" under that

definition, but this Court concluded that the relevant body of water was Block Island Sound and Long Island Sound combined (which satisfied the definition), rejecting the argument that Long Island could not border a "bay" because it was an "island" and not part of the mainland. 532 F.2d at 769-70.

In response to *Warner*, the United States moved for a supplemental proceeding in *United States v. Maine* (an original action in the Supreme Court) to determine Rhode Island's coast line. The Special Master concluded that Long Island Sound is a "juridical bay" because Long Island is properly treated as an extension of the mainland. *United States v. Maine*, 469 U.S. 504, 509 (1985). The United States filed exceptions, arguing that a "geographical island is an island in the eye of the law except only in very rare and truly unusual circumstances." *Id*. at 510. The Supreme Court rejected that view, adopting instead a "realistic approach," *id*. at 517, that considered "the interests of the territorial sovereign" in internal waters, including bays, *id*. at 519. Judge Torruella's analysis comports with *Warner* and *United States v. Maine* in looking beyond dictionary definitions and considering background legal principles that take into account the Nation's critical interests in utilizing riverine resources and in regulating riverine hunting and trapping, interests specifically recognized in the Settlement Acts.

Just as the word "islands" in MIA § 6203(8) does not itself denote any specific boundary for purposes of determining property or sovereign rights, the

majority's reliance on the phrase "islands in the Penobscot River" in that same provision, Panel Opinion 14-15, is misplaced. As Judge Torruella explained, that phrase does not necessarily separate uplands from submerged lands but may reasonably be read "to situate the Reservation" and to exclude islands in other rivers. *Id.* at 46-47 n.26.

The majority read the word "solely" before the list of included islands to "add emphasis to the limits of" the word "island." Panel Opinion 12. But because "island" does not specify a legal boundary, "solely" cannot function to emphasize any particular boundary. Judge Torruella reasonably explained that "solely" "serves to specify which islands in the Penobscot River are included in the Reservation, and which are not." *Id.* at 46-47 n.26. The legislative history on this point reveals that the drafters wanted to exclude islands created after the 1818 treaty by dam construction in the West Branch, not to separate island uplands from the surrounding riverbed. *See id.*; U.S. Principal Brief 28-29.

The majority also erred in reading the word "lands" in MICSA § 1722(i)—defining the Penobscot Reservation as "those lands as defined in the Maine Implementing Act"—to unambiguously exclude submerged lands. Panel Opinion 14. Submerged land is a form of land. *See* U.S. Principal Brief 18-19. The Supreme Court has held that congressional authorization of a reservation of "public lands" for Indians may include submerged lands, rejecting an asserted

dictionary definition. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 115-16 (1949). Moreover, the Submerged Lands Act notably addresses "lands beneath navigable waters." 43 U.S.C. § 1301(a).

In sum, the statutory definitions do not necessarily exclude submerged lands from the Reservation.

2. *Alaska Pacific Fisheries* and other Supreme Court precedent on the inclusion of submerged lands within federal reservations is relevant backdrop for interpreting the Reservation definitions (Question 3).

It is a fundamental principle of statutory construction that a legislature is presumed to legislate with knowledge of existing law and that statutes are to be construed against the backdrop of that law. *See* 2B Sutherland, *Statutes and Statutory Construction* § 50:1 (7th ed. Oct. 2019 update) (common law); *see also id*. at § 51:3 (prior statutes). This Court has specifically acknowledged in interpreting the Settlement Acts that "courts have long presumed that Congress acts against the background of prior law." *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997); *accord Penobscot Nation v. Fellencer*, 164 F.3d 706, 712 (1st Cir. 1999).

The Reservation definitions must be interpreted in light of *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), and subsequent Supreme Court precedent holding that Congress intended to include submerged land within federal reservations. *Alaska Pacific Fisheries* concluded that Congress's 1891 reservation

of "the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska" for the Metlakahtla Indians necessarily included the surrounding fishing grounds on which they depended. *Id*. at 88-89. It interpreted that "geographical name" to mean "the intervening and surrounding waters as well as the upland" because the Indians living on the islands relied on the adjacent fishing grounds and "naturally looked on the fishing grounds as part of the islands." *Id*. at 89. The Court did not read the words "lands" and "islands" to limit the reservation to the uplands, but instead looked to Congress's intent to give meaning to that language. Question 3 refers to the Court's application of "the Indian Canon" in *Alaska Pacific Fisheries*, but it does not appear that the decision turned on the canon. The Court briefly noted the canon as providing "support" for its conclusion, which was based on Congress's intent to establish a reservation that would "conform" to the Metlakahtlas' "situation and needs." *Id*. at 89-90.

The majority rejected *Alaska Pacific Fisheries*' analytical approach based on the erroneous conclusion that the Reservation definitions unambiguously exclude submerged lands. Panel Opinion 18. Maine has attempted to distinguish *Alaska Pacific Fisheries* by pointing to a 1916 presidential proclamation specifying that "the waters within 3,000 feet from the shore lines" were reserved for the Metlakahtlas. State Petition Response 11-12. But that reliance is plainly mistaken: the Ninth Circuit understood this proclamation to specify an area *within* the 1891

congressional reservation, *Alaska Pacific Fisheries v. United States*, 240 F. 274, 281 (9th Cir. 1917), and the Supreme Court did not consider the proclamation relevant enough to its analysis of the 1891 statute to even mention it.

Maine has also argued that the Penobscots are not entitled to the same consideration as the Metlakahtlas because the Main Stem fishery was so "depleted" by 1980 when the Settlement Acts were enacted. Maine Principal Brief 42. But that argument is belied by the Penobscots' insistence on their rights to sustenance use of the riverine resources, and Congress's express intent to provide the Nation "with a fair and just settlement of their land claims." MICSA § 1721(a)(7). Congress understood that MIA's fishing and hunting provisions were "expressly retained sovereign activities." S. Rep. No. 96-957, at 15 (1980) ("Senate Report") (J.A. 627); H.R. Rep. No. 96-1353, at 15 (1980) ("House Report") (J.A. 689).

Nor can *Alaska Pacific Fisheries* be dismissed as having only historical interest. The Supreme Court has repeatedly relied on it in concluding that other federal reservations included submerged lands. *See Hynes*, 337 U.S. at 110-11; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). In *United States v. Alaska*, 521 U.S. 1, 39-40 (1997), the Court held that federal reservations of two barrier islands for the National Petroleum Reserve within Alaska's three-mile coastal zone included the submerged lands shoreward of the islands. The Court explained that "the *purpose* of a conveyance or reservation [during the territorial

period] is a critical factor in determining federal intent" regarding whether title to submerged lands is retained by the federal government or passes to a state upon statehood. *Id*. at 39. Because oil deposits extended under the submerged lands as well as the uplands, the purpose of the reservation would have been undermined if the submerged lands had passed to Alaska: "It is simply not plausible that the United States sought to reserve only the upland portion of the area." *Id*. at 39. The Court described *Alaska Pacific Fisheries* as holding that the reservation for the Metlakahtla Indians "included adjacent waters and submerged lands, because fishing was necessary for Indians' subsistence." *Id*. It distinguished *Montana v. United States*, 450 U.S. 544, 556 (1981), and *Utah Division of State Lands v. United States*, 482 U.S. 93 (1997), which held that title to a riverbed and lakebed respectively passed to the states upon statehood, because reserving title to the submerged lands was not necessary for the government's purposes in making the reservations. 521 U.S. at 37-38.

The continuing significance of *Alaska Pacific Fisheries* is further demonstrated by *Idaho v. United States*, 533 U.S. 262 (2001), in which the Court held that the United States had reserved the lakebed of Coeur d'Alene Lake for the benefit of the Coeur d'Alene Tribe during the territorial period and that the lakebed did not convey to Idaho upon statehood. Its conclusion was based on the fact that the "right to control the lakebed and adjacent waters was traditionally important to

the Tribe" and that "it continued to depend on fishing." *Id*. at 274. The Tribe had only agreed to cede its lands outside its reservation based on the assurance that its reservation would include the submerged lands of the Lake and rivers. *Id*. at 275-76. As in *Alaska Pacific Fisheries*, the tribe wanted the submerged lands included within the reservation to assure the right to fish above the bed. *Id*. at 276-77 (the Surveyor General was warned in 1873 that "[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians").

Like the Metlakahtla Reservation and Coeur d'Alene Reservation, the Penobscot Reservation must include the submerged lands surrounding the islands because fishing, hunting, and trapping in the River is an essential part of the very Penobscot way of life that the Reservation was intended to protect. Moreover, Judge Torruella carefully and thoroughly explained how the Supreme Court's approach to determining the boundaries of the Metlakahtla Reservation necessarily leads to the similar conclusion that Congress intended the "islands in the Penobscot River" to embrace the surrounding waters and riverbed. Panel Opinion 43-50.

3. The treaties reserved to the Nation the riverbed and associated riverine resources (Questions 4 and 5).

MIA § 6203(8) expressly references the Penobscot "agreement[s] with Massachusetts and Maine" in defining the Reservation, and MICSA § 1723(a)(1) expressly ratifies "any transfer pursuant to any treaty." Judge Torruella well explains that the treaties are properly interpreted to reserve the River to the

Penobscot bank-to-bank, and that the Settlement Acts confirm as the Reservation the land (both upland and submerged) the Nation retained in its treaties. Panel Opinion 51-60. The Penobscot were a riverine people whose life and livelihood depended on the River, and they could not have intended to give up their rights to the River's resources in their treaties with Massachusetts in 1796 and 1818 when they ceded their lands "on both sides" of the River. *See* U.S. Principal Brief 35-43; U.S. Response/Reply Brief 19-23. Massachusetts similarly would have understood that, under Massachusetts common law, the mechanism by which the Nation would reserve those rights was to reserve the riverbed from cession, i.e., by including it within the Penobscot Reservation. *See infra* Section I.A.4 (pp. 21-22). The Nation's acknowledgment in the 1818 treaty of the public right of passage further indicated its retention of the riverbed. *See* U.S. Principal Brief 39-40.

The majority incorrectly rejected our reliance on the treaties on the ground that they "were subsumed within the Acts" and served to "merely specify[] which 'islands' are involved." Panel Opinion 17. To the contrary, the text and legislative history of the Settlement Acts make clear that their most fundamental purpose was to confirm as the Penobscot Reservation the area that the Nation reserved in the treaties, which included the riverbed, and to make lawful the Nation's cessions of land "on both sides" of the River. The word "islands" in MIA § 6203(8) must be read in light of the Treaty of 1796, which "reserve[d] to [the Penoboscot] all the

Islands in said River, above Old Town, including said Old Town Island," J.A. 186; and in light of the Treaty of 1818, which provided that the Penobscot "shall have, enjoy and improve . . . all the islands in the Penobscot River above Oldtown and including said Oldtown island," J.A. 197. As the Supreme Court has explained, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). Here, the word "islands" brings the surrounding riverbed with it, because that was how both the Penobscot and Massachusetts understood that term in the treaties.

4. The state common law of riverbed ownership is also a relevant backdrop for interpreting the Reservation definition (Question 5).

Question 5 asks about the applicability of "state common law and interpretive rules." As explained in Section I.A.2 above (p. 19), statutes are properly construed against the background of existing law, including the common law, as in *Varity v. Howe*, 516 U.S. 489, 502 (1996). In the instant case, when the Reservation definitions are interpreted against the backdrop of the Maine common law of riverbed ownership, it is readily seen that the boundaries are not reasonably drawn around the island uplands but must include the riverbed surrounding the islands at least to the thread of the channels.

The common-law background includes both the meaning of common-law terms, *e.g.*, *Neder v. United States*, 527 U.S. 1, 21 (1999) (meaning of "defraud"), and more broadly, common-law *principles*, *e.g.*, *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, No. 18-1584, 2020 U.S. LEXIS 3251, at *4 (June 15, 2020) (reading the "plain language" of a statute "in light of basic property law principles"). Even where a statute defines a term, proper application of the term to specific circumstances is informed by the common law. For example, in *Stewart v. Dutra Construction Co.*, 230 F.3d 461, 466-67 (1st Cir. 2000), this Court concluded that a dredge digging a trench below Boston Harbor was not a "vessel"—defined at 1 U.S.C. § 3—for purposes of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G). The Supreme Court reversed, explaining that "vessel" "should be construed consistently with the general maritime law," *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 492 (2005), which has repeatedly treated dredges as "vessels" in cases dating back to 1878, *id*. at 490-92.

Under English common law and the common law of Massachusetts (which until 1820 included the area that is now Maine), nontidal reaches of rivers like the Main Stem were not characterized as "navigable" even if they were navigable in fact by smaller watercraft that enjoyed the public right of passage. *See* U.S. Principal Brief 19-21. Riparian landowners, not the state, presumptively owned the bed of nontidal rivers. *Id*.; *see also* U.S. Response/Reply Brief 11-12. In

the early decades of the 19th century, many original states rejected the English common-law approach through legislation or judicial decision and characterized both the nontidal and tidal reaches of rivers as "navigable" if they were navigable in fact, but Massachusetts and Maine continued to adhere to the tidal distinction. *See* U.S. Principal Brief at 20-21. Under their common law, the nontidal Main Stem of the Penobscot River has never been a "navigable" water. *Id*. at 19. An island parcel in a nontidal reach of a river presumptively includes the riverbed to the thread of the channels. *Id*. at 19, 23, 27-28. But parties may agree to a different boundary, such as here, where the Nation and Massachusetts agreed that the Nation reserved the entire riverbed in the treaties. Riverbed ownership assures the rights to fish and to use other riverine resources above the bed. *Id*. at 21-24.

The common law of Massachusetts and Maine governing riverbed ownership and associated rights in riverine resources is likewise relevant to the interpretation of the Settlement Acts for four reasons:

First, as Question 5 notes, MIA § 6203(8) expressly references the boundaries related to the Nation's 1796 and 1818 treaties with Massachusetts. Judge Torruella properly considered relevant state common-law principles in his interpretation of those treaties. Panel Opinion 54-57. As explained in the previous section, the treaties are properly interpreted to reserve to the Nation use of the River's resources, and the mechanism by which that reservation was most readily

accomplished under Massachusetts common law was to reserve the riverbed bank-to-bank (subject to the public right of passage).

Second, at the time of the Settlement Acts, Maine common law provided that the legal boundary of an island parcel in a nontidal river presumptively includes the riverbed to the thread of the channels, although the presumptive boundary may be modified by specific agreement. This common-law understanding precludes the majority's view that the Settlement Acts limit the Reservation to the island uplands, as there is no plausible basis for concluding that the Nation agreed to less than a private island owner would presumptively own. To the contrary, the Settlement Acts' confirmation of the unceded lands as the Reservation and the MIA's express provision of an *on-reservation* sustenance-fishing right, § 6207(4), demonstrate that the parties intended the Reservation definition to include the River bank-to-bank, an interpretation entirely consistent with state common law.

Third, as Judge Torruella noted, Panel Opinion 56-57, the parties' agreement in MIA § 6204 that Maine law would generally apply to Indian lands in Maine following ratification also supports consideration of Maine common law in interpreting the Settlement Acts. (To be sure, we think that our interpretation of the Reservation boundaries under the Settlement Acts would be correct even if the parties had agreed to some different jurisdictional arrangement going forward.)

Fourth, even though federal law applies, federal law may look to state law as the rule of decision. For example, in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), the Supreme Court addressed whether the ownership of land within the Omaha Indian Reservation in Nebraska was affected when the Missouri River (the Reservation's eastern boundary) moved west, leaving some land on the eastern side of the river. The Court concluded that federal law governed but that federal law should adopt Nebraska law on avulsion and accretion as the rule of decision: there was "no need for a uniform national rule" on whether a river change affecting federal or Indian land was avulsive or accretive. *Id*. at 673. Here, *Alaska Pacific Fisheries* controls, but consideration of state common law leads to the same conclusion: the boundaries of the Penobscot Reservation are not reasonably drawn around the island uplands.

B. MIA § 6207(4), the on-reservation sustenance-fishing right, precludes an uplands-only interpretation of MIA § 6203(8) (Question 4).

For the Penobscot Nation, the Penobscot River is its very life. The Penobscot have fished in the River for their sustenance since time immemorial. *See Penobscot Nation*, 151 F. Supp. 3d at 198-201. MIA § 6207(4) guarantees the Penobscot Nation's *on-reservation* sustenance fishing right:

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

The River is the only place where the Penobscot may fish within the Reservation. *See* 151 F. Supp. 3d at 186, 220. The district court correctly concluded that it had to interpret "reservation" for purposes of § 6207(4)'s on-reservation sustenance-fishing right to include the riverbed bank-to-bank in order to avoid the "untenable and absurd results that flow" from interpreting "Reservation" to include only the island uplands where there are no fish. *Id*. at 221. The majority's conclusion that the Penobscot Reservation as defined in MIA § 6203(8) excludes the riverbed and associated riverine resources cannot be correct because it is flatly inconsistent with § 6207(4).

1. A statute must be read as a whole.

It is a cardinal rule that a statute must be read as a whole. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Statutory provisions are not read "in isolation, as if other provisions in the same Act do not exist." *Miller v. Albright*, 523 U.S. 420, 456-57 (1998). "Words are not pebbles in alien juxtaposition," but "they have only a communal existence" and "the meaning of each interpenetrate[s] the other." *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19, 25 n.6 (1988). This Court has repeatedly acknowledged this fundamental rule in construing both state and federal statutes. *See, e.g., Reisman v. Associated Faculties of University of Maine*, 939 F.3d 409, 412 (1st Cir. 2019) (provisions in Maine statute must be read "in the context of the statute as a whole and not

in isolation"); *Lapine v. Town of Wellesley*, 304 F.3d 90, 97-98 (1st Cir. 2002) (statutory provision "needs to be read, not in isolation, but in the context of the history and evolution of the entire statute of which it forms a part").

The panel majority improperly truncated its statutory analysis by erroneously characterizing one provision—MIA § 6203(8)—as unambiguous. The Supreme Court has repeatedly instructed that a statute must be read as a whole even where a word or phrase, read in isolation, seems clear. "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, (2000); *see also Corley v. United States*, 556 U.S. 303, 314 n.5 (2009) (the "literal" meaning of one provision may not be the "clear" meaning when read together with another provision); *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (it is a "cardinal rule that a statute is to be read as a whole" because "the meaning of statutory language, plain or not, depends on context" (internal quotation marks omitted)). Judge Torruella similarly cautioned against too readily characterizing "[e]ven seemingly straightforward text" as unambiguous. Panel Opinion 32 (quoting *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 192 (1st Cir. 1999)). The panel majority erred in failing to test a preliminary interpretation of § 6203(8), read in isolation, against other provisions of the Settlement Acts.

The *on-reservation* sustenance fishing right in MIA § 6207(4) most clearly calls into question an uplands-only interpretation. The majority sidestepped proper consideration of § 6207(4) by holding that there was no justiciable question as to the geographic scope of the sustenance fishing right. Panel Opinion 15-16. But as explained in Section VI below (pp. 50-52), that conclusion is incorrect as a matter of standing and ripeness. And in any event, the majority may not evade its duty to interpret each provision of the Settlement Acts "in the context of the statute as a whole and not in isolation," *Reisman*, 939 F.3d at 412, by holding that the Nation has not stated a separate claim for declaratory relief under § 6207(4). We know of no precedent requiring a plaintiff to state a separate claim under a provision of a statute in order to have that provision considered in interpreting the statute as a whole.[1]

2. The term "reservation" presumptively has the same meaning in each provision of a statute.

"Reservation" in MIA § 6207(4) must be read to include submerged lands, and the majority erred in giving a different—and incompatible—meaning to the same term used in § 6203(8).

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[1] The majority saw support for its uplands-only interpretation in some other provisions of MIA and MICSA. Panel Opinion 12-14. But those provisions may reasonably be read as consistent with the interpretation that the Penobscot Reservation includes submerged lands and riverine resources. *See* U.S. Response/ Reply Brief 32-33; U.S. Petition 12-13. And Judge Torruella agreed. Panel Opinion 53 n.28.

There is "a presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Bruce v. Samuels*, 136 S. Ct. 627, 631-32 (2016) (concluding that it would be "anomalous" for Congress to have shifted its perspective from a per-case basis to a per-prisoner basis "partway through" the in forma pauperis statute); *Stewart*, 543 U.S. at 496-97 (finding additional support for the conclusion that "vessel" in the provision at issue included dredges because this Court had interpreted "vessel" in another provision of the statute to include dredges). Most recently, the Supreme Court reiterated that "we do not lightly assume that Congress silently attaches different meanings to the same term in the same . . . statute." *Cowpasture River Preservation Ass'n*, 2020 U.S. LEXIS 3251, at *15 (internal quotation marks omitted). That presumption may be overcome only by "strong evidence that Congress did not intend the language to be used uniformly." *Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 261 (2005) (O'Connor, J. concurring in the judgment).

There is no such "strong evidence" here. Nothing in the text of either provision indicates that the Penobscot Reservation should have different boundaries for different purposes. The majority briefly considered § 6207(4) but then dismissed its significance based on the phrase "unless the context indicates otherwise" in the introductory text to MIA's definitional provision (§ 6203). Panel

Opinion 15-16. Judge Torruella correctly rejected the majority's effort to resolve the asserted tension between § 6203(8) and § 6207(4) through that "boilerplate phrase": the "majority never explains in what way the 'context indicates otherwise,' " and 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." Panel Opinion 64.

It is insufficient simply to point to the common phrase "unless the context indicates otherwise" in MIA's definitional provision § 6203. That phrase does not function as a *carte blanche* to choose a different meaning in derogation of the presumption of uniformity. The majority identified no contextual features in § 6207(4) or any other provision indicating that the parties intended "Reservation" to have different geographic scopes in the detailed and apparently interrelated provisions for on-reservation fishing rights, hunting rights, and regulatory authority. Absent such clues, "Reservation" has the same meaning in both § 6203(8) and § 6207(4) and includes the riverbed for all purposes.

The majority belittles the critical on-reservation sustenance-fishing guarantee as "ancillary" to the question of the Reservation boundaries, indeed calling it a "mousehole." *See* Panel Opinion 16 (legislatures do not "hide elephants in mouseholes" (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001))). But the "mousehole" here is the boilerplate phrase "unless

the context indicates otherwise" on which the majority relied, not the provision guaranteeing on-reservation sustenance-fishing rights. Judge Torruella was properly incredulous 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." Panel Opinion 34. In short, the express right to on-reservation sustenance fishing is not "ancillary" to the definition of the Penobscot Reservation in MIA § 6203(8). The definition is not a stand-alone abstraction, but serves to describe the area within which the Nation may exercise its expressly guaranteed on-reservation fishing and hunting rights and related regulatory authorities.

C. Legislative history properly informs the conclusion that the Penobscot Reservation includes submerged lands (Question 6).

This Court has considered the Settlement Acts' legislative history in other cases, and it should do so here as well. *Maine v. Johnson*, 498 F.3d 37, 41-48 (1st Cir. 2007); *Fellencer*, 164 F.3d at 708; *Akins*, 130 F.3d at 488-89. The majority declined to consider it in this case on the asserted ground that the statutory text "is unambiguous" in restricting the Penobscot Reservation to the island uplands: "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." Panel Opinion 20 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1748 (2017)). That refusal was plainly wrong: as explained above, MIA § 6203(8) is not unambiguous and, particularly considering the on-reservation sustenance-fishing guarantee, the majority's interpretation of the Settlement Acts as a whole is not "coherent and consistent." Even where the text of a statute appears plain, it is appropriate to check that sense "against undisputed legislative history as a guard against judicial error." *Greebel*, 194 F.3d at 192; *see also Gordon*, 875 F.3d at 33 (where plain language allows for two interpretations, "[s]tatutory history and legislative context furnish additional sources of insight that a court may inspect when attempting to discern congressional purpose"). The majority failed to do so.

The MIA is effectively a treaty (an agreement among the Passamaquoddy, the Penobscot, and Maine), and MICSA is Congress's ratification of that treaty. The legislative history may be considered part of the negotiation history, which is routinely considered in interpreting treaties. *See, e.g.*, *Idaho v. United States*, 533 U.S. at 281 (the "negotiating history" makes it clear that Congress "intended to bar passage to Idaho of title to the submerged lands at issue here"); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) ("courts may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties to determine a treaty's meaning" (internal quotation marks omitted)). For these various reasons, the district court properly relied on

legislative history in its interpretation of the sustenance-fishing right. 151 F. Supp. 3d at 219-20. The State, the United States, and the Nation have all relied on legislative history in interpreting the Settlement Acts. *See* State Principal Brief 18, 26, 31, 48-49, 54-55; U.S. Principal Brief 3, 10, 33, 44, 47-49; U.S. Response/Reply Brief 38-44.

Most fundamentally, the legislative history confirms that Congress understood that the Penobscot Nation is "riverine in [its] land-ownership orientation," and that the "aboriginal territory of the Penobscot Nation is centered on the Penobscot River." Senate Report 11 (J.A. 623); House Report 11 (J.A. 685). Congress further understood that the "Penobscot Nation lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818," Senate Report 12 (J.A. 624), House Report 12 (J.A. 686), but that MICSA "provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them," Senate Report 18 (J.A. 630), House Report 18 (J.A. 692). And the legislative history clearly acknowledges the importance of the Nation's fishing and hunting rights. These rights were addressed as a "Special Issue[]" in the Committee Reports. Senate Report 16-17 (J.A. 628-29); House Report 16-17 (J.A. 690-91). Congress understood that the Nation would have the "permanent right to control hunting and

fishing . . . within their reservations," subject only to the State's limited "residual power" for conservation purposes. *Id.*

D. The parties' post-enactment understanding confirms that the Reservation includes the River (Question 3, second sentence; Question 10, second sentence).

The "practical construction adopted by the parties" is appropriately considered in interpreting treaties. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *see also Idaho v. United States*, 533 U.S. at 279 ("Idaho's position is at odds" with "later congressional understanding that statehood had not affected the submerged lands in question."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-08 (1978) (holding that post-treaty practice may be considered). Post-enactment understanding is also informative in interpreting statutes. In *Alaska Pacific Fisheries*, 248 U.S. at 89-90, for example, the Supreme Court found support for its interpretation of the 1891 statute establishing the Metlakahtla Reservation in evidence indicating that the Metlakahtlas, the public, and the Secretary of the Interior all later understood that the fishing grounds were reserved as well as the uplands.

The Court inquired in Question 10 about 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 Indian Reservation" (quoting J.A. 784 (Maine permit for taking eels)). That concession undermines the State's

current position, and the concession does not stand alone. The Penobscots, Maine, and the United States all repeatedly demonstrated their understanding following the Settlement Acts that the Penobscot Reservation extends into the River. *See* U.S. Principal Brief 49-54; U.S. Response/Reply Brief 46-48.

The Court also inquired in Question 3 about the effect of *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). As Judge Torruella explained, the parties' positions and this Court's decision in that case—a dispute over authority under the Clean Water Act to regulate discharges from facilities into the Penobscot, St. Croix, and Piscatiquis Rivers—demonstrate the shared understanding that the Penobscot Reservation includes at least some part of the Penobscot River. Panel Opinion 41-43, 57-59. Maine specifically acknowledged the significance of the treaties and Maine common law. *See id.* at 42 (quoting Maine's statement in its brief that the Penobscot Reservation includes the islands "and the usual accompanying riparian rights"); *see also id.* at 57 (pointing out Maine's statement in the same brief that determining the reservation boundary requires analysis of the treaties and "aspects of Maine property law").

This Court agreed with the State. The Court first analyzed whether the Penobscot Nation and Passamaquoddy Tribe had jurisdiction over these discharges under MIA § 6206(1), which provides for tribal jurisdiction over "internal tribal matters," and it concluded that they did not. 498 F.3d at 44-46. It also analyzed

whether the tribes had jurisdiction under MICSA § 1724(h), which the Court read to govern management of the land that the Secretary of the Interior was to acquire in trust for the tribes under MIA § 6205 but not to apply to their reservations. *Id.* at 46-47. As Judge Torruella explained, the Court concluded in *Maine v. Johnson* that § 1724(h) did not apply because the facilities in question discharged into the reservations. Panel Opinion 58.

Maine professed to be puzzled that anyone could think that "some of the boundary question was decided twelve years ago." State Petition Response 13. Notably, however, Maine did not argue that Judge Torruella misunderstood Maine's own representations about the Penobscot Reservation in that case, which supported this Court's conclusion that the reservations included "waters *retained* by the tribes under the Settlement Act, based on earlier agreements between the tribes and Massachusetts and Maine." *Maine v. Johnson*, 498 F.3d at 47. Maine should be held to its many concessions that the Reservation includes a meaningful portion, if not all, of the Main Stem in order that the Penobscots' most important hunting and fishing grounds would be protected.

* * *

In sum, the Reservation definitions are not reasonably interpreted to unambiguously exclude from the Reservation the riverbed and associated riverine resources. A statute providing for an on-reservation sustenance-fishing right

cannot reasonably be interpreted as a whole to limit the Reservation to island uplands where there are no fish. When background principles of federal and state law are considered, along with legislative history and the parties' post-enactment understanding, the only reasonable interpretation is that the Penobscot Reservation includes the Main Stem riverbed and associated riverine resources.

II. Application of Indian-related canons of construction to the Settlement Acts confirms that the Penobscot Reservation includes the bed of the Penobscot River (Questions 1, 2, and 4).

Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," and the words of a treaty must be construed "in the sense in which they would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1699 (internal quotation marks omitted); *accord South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 527 (1986); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). In addition, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 758, 766 (1985). This Court has acknowledged that courts employ these two Indian-related canons "to comport with the[] traditional notions of sovereignty and with the federal policy of encouraging tribal independence," and that the canons "are rooted in the unique trust relationship between the United States and the Indians." *Fellencer*, 164 F.3d at 709 (internal quotation marks omitted).

As explained in Part I above, the traditional tools of statutory construction lead to the conclusion that the Penobscot Reservation confirmed in the Settlement Acts includes submerged lands in the Penobscot River and the associated riverine resources. These special rules of construction underscore that conclusion.

A. The treaty canon applies without regard to ambiguity, and the statutory canon applies to both MIA and MICSA (Questions 1 and 4).

The panel majority declined to apply the "canon construing statutory ambiguities in favor of Indian tribes" based solely on its view that "the plain meaning of the Settlement Acts resolves the question of the scope of the Reservation." Panel Opinion 8, 9 n.3. As we have explained, the view that the Settlement Acts unambiguously exclude the riverbed is incorrect. But in any event, the majority erred in failing to apply the treaty canon to both the treaties and the Settlement Acts.

The treaties referenced in MIA § 6203(8) must be interpreted in light of the Indian treaty canon. Judge Torruella correctly explained, based on *Jones v. Meehan*, 175 U.S. 1, 11 (1899), and subsequent Supreme Court precedent, that "treaties must . . . be construed . . . in the sense in which they would naturally be understood by the Indians" without regard to whether the words may be considered unambiguous by others. Panel Opinion 33-34 (internal quotation marks omitted). The treaty canon also applies to the provisions of the Settlements Acts at issue

because they, like treaties, are the instruments by which the Nation formally agreed to cede its aboriginal title except for its retained Reservation. It cannot reasonably be disputed that the Penobscots understood that they reserved in their treaties their rights to the critical resources in the Penobscot River and that they successfully bargained to retain them in the Settlement Acts. *See id.* at 34.

Although it is not necessary to invoke the Indian canon governing *statutory* construction in addition to the treaty canon, the statutory canon also applies to both MIA (a state statute) and to MICSA (a federal statute). This Court applied the Indian canon to MIA in interpreting the phrase "internal tribal matters" in MIA § 6206(1), explaining that this question "raises a question of federal law" because MIA "was incorporated by reference into" MICSA, a federal statute. *Fellencer*, 164 F.3d at 708-09 (citing MICSA § 1721(b)(3)). The Court applied the Indian canon even though MICSA does not specifically reference § 6206(1). The applicability of the Indian canon in interpreting MIA § 6203(8) is even clearer because MICSA § 1722(i) expressly incorporates that provision.

The Supreme Court has repeatedly applied the two Indian-related canons in a wide range of contexts. Based on the strong federal policy "to respect the Indian right of occupancy," *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941), congressional intent to extinguish Indian title must be "plain and unambiguous," *id*. at 346, and will not be "lightly implied," *id*. at 354. The canons

apply to the scope of Congress's ratification of the Penobscot Nation's cession of its aboriginal territory in MICSA. The Indian-favoring canon of construction has particular force in the context of "diminishing" an Indian reservation. As the Supreme Court recently and unanimously reaffirmed: " 'Only Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). Although this litigation is not a traditional diminishment case, the majority's decision would have precisely that effect on the Penobscot Reservation, since Maine recognized for years that the Reservation extends into the River. Congress did not clearly express any intent in MICSA to ratify a cession of the riverbed and thus diminish the Penobscot Reservation. The Indian-related canons thus disfavor that interpretation.

B. MICSA §§ 1725(h) and 1735(b) do not preclude application of the Indian canons (Question 1, second sentence).

Maine argued that MICSA §§ 1725(h) and 1735(b) bar courts from applying the Indian-related canons of construction in interpreting its provisions. State Principal Brief 24-27. The majority declined to address this argument. Panel Opinion 10 n.4. These provisions do not bar application of the canons.

Section 1725(h) provides that federal laws "generally applicable to . . . Indian nations . . . or to lands owned by . . . Indian nations" apply in Maine, except that no federal law "(1) which accords or relates to a special status . . . of . . .

Indian reservations . . . , and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine" shall apply. The exception clause is most reasonably understood to address the jurisdictional arrangements within the Passamaquoddy and Penobscot Territories (which include the Reservations) following the Settlement Acts, not the process of interpreting the Settlement Acts, which is implicated here. Indeed, this Court acknowledged the applicability of the Indian-related canons of construction to the Settlement Acts even where the issue was the balance under § 1725(h) between "Maine's interest in continuing to exercise jurisdiction over the Nation's land and members" and the Nation's inherent authority to self-government recognized by federal law. *Fellencer*, 164 F.3d at 708; *see also* U.S. Response/Reply Brief 4 (explaining that Maine based its argument regarding § 1725(h) on a misinterpretation of the Senate Report).

Maine's reliance on MICSA § 1735(b) is obviously misplaced, as that provision addresses only the applicability to Indian lands in Maine of federal laws "enacted after October 10, 1980." Accordingly, § 1735(b) "signals courts that, if a later Congress enacts a law for the benefit of Indians and intends the law to have effect within Maine, that intent will be made manifest." *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 628 (1st Cir. 2017) (quoting *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1996)). In *Passamaquoddy*, this Court relied on § 1735(b) in holding that the Indian Gaming

Regulatory Act of 1988 did not authorize gaming in Maine. *Id*. at 787-89. The Court separately addressed the Indian-related canons and decided that there was no ambiguity for the canons to resolve, not that § 1735(b) precluded their application. *Id*. at 793.

C. The presumption against the United States conveying the bed of navigable waters within public lands prior to statehood does not apply here (Question 2).

Defendants argued that any ambiguities in the Settlement Acts should be construed with a presumption against finding that the State has conveyed its navigable waters, an argument the majority did not reach. Panel Opinion 10 n.4. Question 2 asks whether "the canon against conveying navigable waters" applies and takes precedence over the Indian canon, referencing the "strong presumption of state ownership" of "navigable waters" discussed in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1997). No such canon or presumption regarding navigable waters applies here. *See* U.S. Response/Reply Brief at 7-8.

The issue in *Coeur d'Alene Tribe* was whether the United States reserved the bed of Coeur d'Alene Lake when it established a reservation for the Tribe during the territorial period, or whether ownership of the lakebed passed to Idaho when the territory subsequently became a state. The Court explained that the colonies became sovereigns upon independence and, as sovereigns, the original 13 states came to "hold the absolute right to all their navigable waters and the soils under

them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 283 (internal quotation marks omitted). The Court ruled that states later admitted to the Union were admitted on an "equal footing" with the original 13 states, *id.*, and that the federal government "is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States," such that "disposals by the United States during the territorial period are not lightly to be inferred," *id.* (internal quotation marks omitted). But the Court has never required that states define "navigable" in the same way, and states are free to determine their own rules of riverbed ownership. *See, e.g.*, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (even where a state enters the Union with title to the beds of "navigable" waters, each state is nonetheless free to decide whether it will hold title to the bed in trust for the public or allow it to be acquired by private owners).

The Equal Footing Doctrine has no relevance in this case for two reasons. First, Maine was separated from Massachusetts in 1820 and was never a territory to which the federal government held title. Second, the Main Stem has never been characterized as a "navigable water" under Massachusetts or Maine common law and, as explained in Section I.A.4 above (pp. 21-22), Maine does not claim title to submerged lands under nontidal reaches of rivers. The Maine Supreme Court held in *Bell v. Town of Wells*, 557 A.2d 168, 172-73 (Me. 1989), that the Equal Footing

Doctrine does not require any change in the Maine law of bed ownership inherited from Massachusetts. That decision addressed both Massachusetts and Maine law governing bed ownership within the intertidal zone along the coast, but it applies equally to Maine law governing riverbed ownership.

Moreover, as explained in Section I.A.2 above (pp. 14-18), even if the Equal Footing Doctrine's presumption against the conveyance of the beds of navigable waters somehow applied, that presumption would be overcome here, as it was with respect to the Metlakahtla Reservation and the Coeur d'Alene Reservation. That is because the riverbed must be included in the Penobscot Reservation in order to fulfill central purposes of the Settlement Acts—to affirm to the Penobscot the lands retained in the treaties and to ensure the Penobscot Nation's rights to the riverine resources on which it so greatly depends.

Nor is the public interest in navigation a basis for precluding application of the Indian-related canons to the Settlement Acts. Regardless of who holds title to the bed of a waterbody that is navigable in fact, the federal navigational servitude applies. *Oregon ex rel. State Land Board*, 429 U.S. at 375-76. And the 1818 Treaty recognized the public right of passage. J.A. 198.

III. The Nation did not "transfer" the riverbed to Maine (Question 9).

MICSA § 1722(n) defines transfer to include a "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." MICSA § 1722(i) confirmed as the Penobscot Reservation the land the Nation had not transferred, and MICSA § 1723(a)(1) ratified the treaties' unlawful transfers and any subsequent unlawful transfers made through 1980.

Defendants made the sweeping argument that the Nation had "transferred" the entire Main Stem riverbed within the meaning of MICSA § 1723, and that MICSA had accordingly ratified that transfer, offering two alternative theories: (1) the Nation ceded the riverbed to Massachusetts in the treaties of 1796 and 1818; or (2) Maine's exercise of regulatory authority over the Main Stem constituted a change in "dominion" or "control" over it. The majority did not reach the defendants' transfer argument. Panel Opinion 10 n.5. The treaty-transfer theory is refuted in Section I.A.3 above (pp. 18-20). We rest on the detailed argument in our Response/Reply Brief (at 18-31) that the regulatory-transfer argument is not supported by MICSA's text, purpose, or legislative history.

IV. The boundaries of the Penobscot Reservation properly include the riverbed bank-to-bank, but at least to the thread of the channels surrounding the islands (Question 10).

For all the reasons presented in our panel briefs, rehearing briefs, and herein, the proposition that the Reservation includes only the island uplands must be rejected as an unreasonable interpretation of the Settlement Acts. The Reservation must extend *at least* to the thread of the channels surrounding the islands. Given

the fundamental importance of riverine resources to the Penobscot, the Nation could not possibly have intended to cede in its treaties or in the Settlement Acts the submerged land and the associated rights to riverine resources that are ordinarily part of an island estate in a nontidal river under Massachusetts and Maine common law. *At a minimum*, the Nation's rights to exercise its on-reservation fishing, hunting, and trapping rights and regulatory authorities as specified in the Settlement Acts must be confirmed in these areas of the River. Prior to the 2012 opinion that precipitated this action, Maine conceded that the Reservation extended to the thread of the channels, and it has offered no persuasive explanation for its new restricted interpretation. The States' recent protestations that such a reservation boundary would be "impractical" and an "enforcement nightmare," State Principal Brief 52, do not support an uplands-only interpretation but instead lead to the conclusion that the Reservation includes the Main Stem bank-to-bank.

For the reasons explained by Judge Torruella, the far better interpretation of the Settlement Acts is that the Reservation extends bank-to-bank in the Main Stem. That is the most reasonable interpretation of the Settlement Acts after construing the acts as wholes, particularly given the on-reservation sustenance-fishing right, MIA § 6207(4), and the common understanding of Congress, Maine, and the Nation that the Nation has continuously used the River bank-to-bank. The district court's conclusion that the Reservation extends bank-to-bank for purposes of the

sustenance-fishing right is correct, 151 F. Supp. 3d at 218-22, and it should be expanded to include all other purposes. The bank-to-bank interpretation is also the most reasonable interpretation under the guiding precedent of *Alaska Pacific Fisheries* and its progeny because the Penobscot rely on the entire Main Stem. The bank-to-bank interpretation is further supported by the interpretation of the treaties under federal law, which requires treaties to be interpreted as the Indians would have understood them, as well as under state law, which similarly requires that the benefit of the doubt be given to an unsophisticated party. *See* Panel Opinion 56 (citing *Hatch v. Dwight*, 17 Mass. 289, 298 (Mass. 1821)).

V. The United States' and Nation's claims are not barred (Questions 7 and 8).

MICSA § 1723(a)(2) bars the United States from claiming that a "transfer of land or natural resources" "was not made in accordance with" Maine law if the claim arose before MICSA's enactment. The majority noted but did not reach Maine's argument that this provision bars the United States' claim in this case. Panel Opinion 6 n.1. If the Court now reaches that issue, it should conclude that Section 1723(a)(2) has no bearing on the United States' complaint for two reasons. First, the United States' interpretation of the treaties and the Settlement Acts is *informed by* background principles of state common law, but the United States is not claiming that the treaty cessions or any other transfer *violated* Maine law. Second, the claim of the United States seeking a declaration that the Penobscot

Reservation confirmed in MICSA includes the riverbed did not arise "before" MICSA, but arises *from* MICSA. Congress agreed in 1980 to settle the land dispute, but it did not agree that the United States would have no recourse in the event Maine reneged on the bargain struck in the Settlement Acts.

Nor is Maine correct that the doctrines of laches, acquiescence, or impossibility bars the Nation's claims, an argument the majority also noted but did not reach. Panel Opinion 10 n.5. Maine's reliance on *City of Sherrill v. Oneida Nation*, 544 U.S. 197 (2005), is wholly misplaced. The land at issue in that case had been out of tribal control for more than 200 hundred years; the question was whether the tribe could repurchase the land piecemeal, "unif[y] fee and aboriginal title," and thereby "assert sovereign dominion over the parcels" in a dispute over tax obligations on the repurchased land. 544 U.S. at 213; *see also id*. at 202. The very different question here is whether the riverbed was reserved from the Nation's treaty cessions and thus has always been part of its existing Reservation, confirmed by MICSA in 1980, as Maine acknowledged until 2012. *Sherrill* does not bar the Nation from seeking to vindicate the rights Congress confirmed in MICSA. *See United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017) (distinguishing *Sherrill* on the ground that the relevant tribes did not abandon their reservations or relinquish their rights under the treaty), *aff'd*, 138 S. Ct. 1832 (2018); *see also Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 284 n.14 (2d Cir.

2015) (*Sherrill* held that "the Oneida Indians could not *unilaterally* revive tribal sovereignty over lands that had been subject to state jurisdiction for over two hundred years.").

Moreover, the State is in no position to seek such equitable relief against the Nation when it is the State (not the Nation) that is trying to change the deals made in the treaties and Settlement Acts. *See Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945) ("He who comes into equity must come with clean hands.").

VI. The plaintiffs have standing, and the sustenance-fishing claim is ripe (Questions 11 and 12).

The panel majority erred in vacating the district court's holding that the Penobscot Reservation includes the Penobscot River bank-to-bank for purposes of the on-reservation sustenance-fishing right based on lack of standing and ripeness. *See* Panel Opinion 23-29. Contrary to the majority's analysis, neither doctrine precludes consideration of the sustenance-fishing provision, MIA § 6207(4), in determining the Reservation boundaries. As Judge Torruella explained, the pertinent question is the geographic scope of the Penobscot Reservation under the Settlement Acts, including § 6207(4). Panel Opinion 64-65 n.40. If the reservation-boundary question is justiciable, then so is the geographic scope of the sustenance-fishing right, because the two questions are the same.

The stated impetus for the 2012 Attorney General opinion that triggered this suit was the Nation's exercise of tribal regulatory authority over nonmembers, J.A. 71, but the opinion completely denied the Nation's sovereignty over the Penobscot River, J.A. 73. The claims and prayers for relief of the Nation and United States asserted all of "the Nation's rights and authorities confirmed by Congress" in the Main Stem, including (1) the Nation's right to engage in sustenance fishing and to regulate sustenance fishing; (2) the Nation's right to regulate hunting, trapping, or other taking of wildlife (including by nonmembers); and (3) the tribal game wardens' right to enforce the Nation's laws regarding hunting, trapping, or other taking of wildlife. J.A. 59-63 (Nation); J.A. 92-94 (United States).

Defendants did not move to dismiss these claims for lack of jurisdiction but instead answered and asserted counterclaims. Maine's counterclaim asserted that the Penobscot Reservation excluded the waters and bed of the Penobscot River for all purposes, including sustenance fishing:

> 12. "Notwithstanding any rule or regulation promulgated by the [Maine Indian Tribal-State Commission] or any other law of the State, the members of . . . the Penobscot Nation may take fish, within the boundaries of [its] respective Indian reservation[] for their individual sustenance . . . ." 30 M.R.S. § 6207(4).
>
> 13. The Penobscot Indian Reservation does not include the waters or bed of the Penobscot River.

J.A. 125, J.A. 137-38. State Intervenors agree that there is only one Reservation boundary for all purposes. J.A. 82-83 (Counterclaim); State Intervenors Reply Brief 4.

This Court correctly determined that the question of the Reservation boundaries is a justiciable controversy. The geographic scope of the sustenance-fishing right is not a separable claim. Once this Court decided that it was proper for the federal courts to exercise jurisdiction to declare the Reservation boundary under MIA § 6203(8), it was obligated to construe the Settlement Acts as a whole, including MIA § 6207(4), the on-reservation sustenance-fishing provision which most clearly demonstrates that the uplands-only interpretation cannot be correct. Maine erroneously argued that the "familiar rules of construction" should be applied separately "to each provision," citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 330, 351-53 (2006). State Reply Brief 12-13. Neither decision even remotely suggests that a single statute need not be construed as a whole.

The "justiciability doctrines of standing and ripeness" are "interrelated." *Reddy v. Foster*, 845 F.3d 493, 499 (1st Cir. 2017). While "standing doctrine seeks to keep federal courts out of disputes involving conjectural or hypothetical injuries," "ripeness doctrine seeks to prevent the adjudication of claims relating to contingent future events that may not occur as anticipated, or indeed may not occur

at all.'' *Id*. at 500 (internal quotation marks omitted). "Standing doctrine is designed to determine who may institute the asserted claim for relief. Ripeness doctrine addresses a timing question: when in time is it appropriate for a court to take up the asserted claim." *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986). There should be no doubt that the Penobscot Nation, and the United States as its trustee, are the appropriate parties to challenge Maine's denial of the Nation's rights under the Settlement Acts. If there is any question of justiciability here, the issue is more one of ripeness than of standing.

The question of the Reservation boundaries is currently fit for review. The Maine Attorney General categorically denied the Nation's sovereignty over the River—both its regulatory and proprietary interests—which currently denies the authority of Penobscot game wardens to enforce tribal hunting and trapping laws applicable to nonmembers. *See* J.A. 816, 951-70, 983-85, 1003, 1039 (referencing the work of the Nation's Game Warden Service to enforce tribal laws regulating the hunting, trapping, and other taking of wildlife on the Main Stem).

It does not matter that the Maine Warden Service announced in this litigation an "informal policy" that it would not also interfere with the Penobscots' sustenance fishing. Panel Opinion 25. Judge Torruella correctly concluded that Maine's declaration that the Nation has no sovereign *right* to fish in the river is a sufficient injury for seeking declaratory and injunctive relief. *Id.* at 65 n.40 (citing

Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 468 n.7 (1976)). The Nation suffered legal injury from the Maine Attorney General's 2012 directive that "the River itself is not part of the Penobscot Nation's Reservation," J.A. 73, because it clouded the Nation's sovereign rights over the River and thus is a cognizable injury to "tribal self-government," 425 U.S. at 468 n.7. Accordingly, there is a ripe case or controversy regarding the Reservation boundary.

CONCLUSION

This Court should hold that the Penobscot Reservation includes the submerged land of the Penobscot River for all purposes, including the on-reservation sustenance-fishing right.

Respectfully submitted,

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