No.

In The Supreme Court of the United States

PENOBSCOT NATION,

Petitioner,

v.

AARON M. FREY, ATTORNEY GENERAL FOR THE STATE OF MAINE, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Maine Indian Settlement Acts—consistent with this Court's precedents on statutory interpretation and the Indian canons of construction—codify the historical understanding of the Penobscot Nation, the United States, and the State that the Penobscot Reservation encompasses the Main Stem of the Penobscot River.

PARTIES TO THE PROCEEDINGS

1. Petitioner, the Penobscot Nation, was plaintiff/counter-defendant in the district court and appellant/cross-appellee in the court of appeals.

2. The United States intervened on its own behalf and as trustee for the Penobscot Nation. The United States was intervenor-plaintiff/counter-defendant in the district court and appellant/cross-appellee in the court of appeals.

3. The following State-related parties (or their predecessor State officials) were defendants/counterclaimants in the district court and appellees/cross-appellants in the court of appeals:

- State of Maine
- Aaron M. Frey, Attorney General for the State of Maine;
- Judy A. Camuso, Commissioner for the Maine Department of Inland Fisheries and Wildlife; and
- Dan Scott, Colonel for the Maine Warden Service.

4. The following private parties, municipalities, and related entities were intervenor-defendants/counterclaimants in the district court and appellees/cross-appellants in the court of appeals:

- 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; and
- Verso Paper Corporation.

5. The following private parties and municipalities were intervenor-defendants/counterclaimants in the district court and appellees in the court of appeals:

- Expera Old Town;
- Town of Bucksport;
- Lincoln Paper and Tissue LLC; and
- Great Northern Paper Company LLC.

6. The Town of Orono and Red Shield Acquisition LLC were intervenor-defendants/counterclaimants in the district court, but did not participate in the court of appeals.

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* 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 (Sept. 2016) by codifiers to improve the Code's organization. This petition and appendix refer to MICSA's sections as previously codified.

TABLE OF AUTHORITIES

CASES:

STATUTES:

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INTRODUCTION

The Penobscot River is the lifeblood of the Penobscot Nation. The Settlement Acts 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. Those Acts expressly protect the Nation's authority over its members' fishing rights "within the boundaries of [its] *** Indian reservation[]," 30 M.R.S.A. § 6207(4)—long understood to include the River's Main Stem. Yet a divided (and depleted) en banc First Circuit found that the Acts' use of the term "islands" in defining the Penobscot Reservation requires total exclusion of the waters of the Penobscot River—the Nation's historic fishing grounds and the only place within its Reservation where its members could conceivably fish.

That untenable conclusion flouts this Court's repeated instruction that the meaning of statutory language should not be based solely on dictionary definitions of isolated terms, but must be determined by considering those terms in context. The Settlement Acts expressly reference treaties reserving aboriginal title to the Main Stem of the Nation's namesake River and explicitly guarantee the Nation's continued exercise of sovereign authority over *on-Reservation* sustenance practices that undisputedly can occur only there. The text and structure of the Acts, read as a whole, support only one conclusion: that the Nation's Reservation includes the water and submerged lands of the Main Stem, not just the uplands where the State's newfound position seeks to confine it.

If there were any doubt, application of the Indian canons dispels it. But the First Circuit turned this Court's precedents upside down on that front too. Instead of looking to the Nation's contemporaneous understanding of the relevant terms, resolving ambiguities in favor of the Nation, or seeking clear evidence of Congress's intent to diminish the Reservation, the en banc majority fixated on a dictionary definition of "islands." According to the majority, the historical status of the Penobscot River's Main Stem and its indispensability to on-Reservation cultural practices preserved in the Acts are "beside the point." That misguided approach subverts the meaning of the Settlement Acts at issue and unsettles expectations for other tribes subject to settlement acts.

In rebuking this Court's jurisprudence, the en banc decision strikes a devastating blow to the Nation's sovereignty. Since time immemorial, the Nation has centered not only its domain, but also its economy, culture, and spiritual beliefs, on the Main Stem of the Penobscot River. The decision below strips the Nation of the heart of its homeland, deprives its on-River hunting/trapping/fishing regulations of effect, guts its game warden service, and constricts its tribal court jurisdiction. The exceptionally important question of the scope of the Nation's Reservation, as well as of the proper approach for interpreting settlement acts more broadly, warrants this Court's review.

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 3 F.4th 484 and reproduced at App. 1a-124a. The prior opinion of the court of appeals is reported at 861 F.3d 324 and reproduced at App. 125a-187a. The order of the district court on cross-motions for summary judgment is reported at 151 F. Supp. 3d 181 and reproduced at App. 188a-278a. The order of the district court on the motions of state intervenors is unreported and reproduced at App. 279a-281a.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2021. This petition is subject to the Court's July 19, 2021 Order extending the time to file a petition for a writ of certiorari to 150 days from the date of a judgment issued by a court of appeals on or before July 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND TREATY PROVISIONS

The relevant statutory and treaty provisions are reproduced in the Appendix. App. 290a-336a.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. The Penobscot Nation is a "riverine" American Indian tribe. S. REP. NO. 96-957, at 11 (1980); H. REP. NO. 96-1353, at 11 (1980). "[F]rom time immemorial the Penobscot Nation has centered its domain, originally consisting of many thousands of acres of territory in what today is the State of Maine, on the Penobscot River." App. 89a (Barron, J., dissenting).

Referring to itself as "Pa'nawampske 'wiak"—"People of where the river broadens out"—the Nation regards "the Penobscot River and its natural resources [as] 'not much less necessary to [its] existence *** than the atmosphere they breathe[].'" *Id.* at 90a n.45, 91a (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The River has long provided the Nation "with the main resources upon which its members depended to live by way of fishing, hunting, and trapping, as well as a means of travel." *Id.* at 90a. And the River's "foundational influence" is deeply "embedded in the Nation's language, culture, traditions, and belief systems." *Id.* at 91a.

"[T]here is little question—and certainly no contention to the contrary by the State of Maine in this litigation"—that the Penobscot Nation's aboriginal title "encompass[ed] use and occupancy of the Main Stem of the Penobscot River" "when the European colonists arrived in New England in the early seventeenth century." App. 90a.[1] Early historical records confirm as much: In exchange for the "friendship and assistance" offered by the Penobscot Nation in the Revolutionary War, the Third Provincial Congress of Massachusetts and the Massachusetts militia promised to respect and protect that domain, "beginning at the head of the tide on Penobscot River, extending six miles on each side of said [R]iver." *Id.* at 92a-93a.

2. Following American independence, in 1796, Massachusetts purported to enter into a treaty with

[1] 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. App. 4a-5a, 195a.

the Penobscot Nation to obtain certain of its lands along a thirty-mile stretch "on both sides of the River." App. 93a-94a; *see id.* at 319a-321a (1796 Agreement). In exchange, Massachusetts pledged to provide specified quantities of "blue cloth for blankets," hats, salt, ammunition, corn, and rum. *Id.* at 93a-94a.

In 1818, a second treaty between Massachusetts and the Nation purposed 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" purportedly ceded in the prior treaty, with the exception of four townships abutting the River. App. 95a-96a; *see id.* at 322a-327a (1818 Agreement). In exchange, Massachusetts again offered "seemingly minimal consideration": four hundred dollars, in addition to a pledge to provide various articles, like "two drums" and "one box of pipes." *Id.* at 95a-96a.

The treaties do not so much as "hint that [they] disclaimed the Penobscot Nation's historic rights to the [Penobscot] [R]iver." App. 96a. Instead, the treaties expressly reserved for the Nation's "enjoy[ment] and improve[ment] *** all the islands in the Penobscot [R]iver above Oldtown and including *** Oldtown island." *Id.* at 324a; *see id.* at 319a-320a. 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; *see* App. 90a n.46. Rather than cede submerged lands and waters surrounding its island-based villages, in the 1818 treaty, the Nation 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 through the same." *Id.* at 325a-326a.

In 1820, upon its separation from Massachusetts, Maine entered into an agreement with the Nation to accede to the prior treaties. App. 328a-336a. In 1833, Maine purported to purchase the four reserved townships. *Id.* at 99a.

3. The federal government had not authorized the land cessions, as required under the Nonintercourse Act. *See* Trade and Intercourse Act of 1793, 1 Stat. 329, 330 (codified as amended at 25 U.S.C. § 177) ("[N]o purchase or grant of lands, or any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution[.]"). Accordingly, in the 1970s, the United States, as trustee for the Nation, sued Maine to challenge the validity of the land cessions. Alongside land claims by two other tribes, the potential area in dispute totaled "up to two-thirds of the area of what is now the State of Maine." App. 102a-103a. The 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." *Id.* at 6a.

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 on June 29, 1818." 30 M.R.S.A. § 6203(8). The MICSA incorporates and gives effect to that definition, providing that "'Penobscot Indian Reservation' means those lands as defined in the [MIA]." 25 U.S.C. § 1722(i). The MICSA further ratifies "[a]ny transfer of land or natural resources *** from, by, or on behalf of *** the Penobscot Nation *** pursuant to any treaty *** of any State *** effective as of the date of said transfer." 25 U.S.C. § 1723(a)(1).

The Settlement Acts also include a provision entitled "Sustenance fishing within the Indian reservation[]." 30 M.R.S.A. § 6207(4). That provision states 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. *Id.* These on-Reservation 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. REP. NO. 96-957, at 14-17; H. REP. NO. 96-1353, at 14-17. Section 6207, Congress explained, protects the Nation's "permanent right to control hunting and fishing *** within [its] reservation[]," and "ended" the power the State had claimed "to alter such rights without the consent of the *** [N]ation." S. REP. NO. 96-957, at 16-17; H. REP. NO. 96-1353, at 17. 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. REP. NO. 96-957, at 13-15, 37; H. REP. NO. 96-1353, at 13-15.

It is undisputed that, apart from the River, no other body of water in the Reservation supports those sustenance-fishing rights. App. 42a n.21, 74a, 196a.

4. In the aftermath of the Settlement Acts, the Nation, the federal government, and the State acknowledged repeatedly that the Reservation includes portions of the River. In regulatory and judicial filings, for example, the State recognized that a "portion of the Penobscot River *** falls within the boundaries of the Penobscot Indian Reservation," which "includ[es] the islands in the Penobscot River *** and a portion of the riverbed between any reservation island and the opposite shore." App. 116a-117a. When paper companies first posited in the 1990s that the River was outside the Reservation, the then-chair of the Maine Indian Tribal-State Commission explained that "the State ha[d] never questioned the existence of the right of the Penobscot Indian Nation to sustenance fishing in the Penobscot River," and that such a restrictive understanding of the Reservation could not be "imagine[d]." App. 115a-116a (alteration in original).

Those positions were reflected in practice. 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; *see* App. 113a-114a. In the 1990s, state game wardens transferred cases involving the River to

Penobscot Nation wardens, who were "largely [supported] through federal funding from the U.S. Department of the Interior for the Nation's exercise of governmental authority on 'Reservation lands and waterways.'" App. 112a. The Nation's tribal court, in turn, prosecuted these violations of tribal laws regulating the hunting, trapping, and other taking of wildlife on the Main Stem. *See id.* at 113a. 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." *Id.* at 114a (alteration in original).

5. In 2012, for the first time, the State of Maine departed from that uniform understanding. Maine's Attorney General announced, by directive to the State game wardens and letter to the Nation's Chief, 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. App. 7a, 129a; J.A. 948-950. Accordingly, the State declared, the Nation's "authority to regulate hunting, trapping, and [fishing]" is confined to the island surfaces. J.A. 949-950. As a result, the Nation has been forced to cease its regular patrols of the River, leaving unenforced its ordinances passed to protect its members' sustenance rights.

B. Procedural History

1. Soon after the State adopted its new position, the Nation sued for declaratory and injunctive relief to protect its on-Reservation sustenance fishing, trapping, and hunting prerogatives in the Main Stem. App. 8a. The State filed a counterclaim seeking a

declaration that "[t]he waters of the main stem of the Penobscot River are not within the Penobscot Nation reservation." *Id.* The United States intervened in support of the Nation; private interests, towns, and other political entities "that border the River and use it for discharges or other purposes" intervened in support of the State. *Id.*

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 the Nation was entitled to sustenance fish in the entirety of the Main Stem free from State regulation. App. 8a-9a, 188a-278a.

2. A divided panel of the court of appeals affirmed the first holding and vacated the second on standing and ripeness grounds. App. 125a-152a. Judge Torruella dissented "most emphatically." *Id.* at 187a; *see id.* at 153a-187a.

3. The court of appeals granted rehearing en banc. Judge Kayatta recused, and Judge Torruella passed away following oral argument. A divided five-judge (3-2) en banc court affirmed the district court's judgment on the scope of the Reservation.

a. "The plain text of the definition of Reservation" in the Settlement Acts, the en banc majority held, "plainly and unambiguously includes certain islands in the Main Stem but not the Main Stem itself." App. 5a, 10a-14a. That conclusion flowed from dictionary definitions, which "make two things clear." *Id.* at 13a. First, "an island is 'a piece of land'" and "land is ordinarily defined in opposition to water." *Id.* Second, although "the presence of water around a piece of land is what makes that piece of land an

island[,] [t]he surrounding water is not itself part of an island." *Id.* The majority added that section 6203(8) uses the word "solely" to limit the Reservation's reach to the designated islands, and uses the phrase "*in* the Penobscot River" to describe "where the islands are located and which body of water surrounds them." *Id.* at 13a-14a.

The majority found no conflict between a definition of the Reservation that excludes the River and the Nation's retention of on-Reservation fishing rights that can only be exercised therein. App. 5a, 42a-47a. The majority "agree[d] with the Nation and the United States" that section 6207(4) of the MIA preserves "the Nation['s] sustenance fishing rights in the Main Stem." *Id.* at 45a. It also acknowledged that section 6207(4) meant "to strengthen" "the Nation's [and Passamaquoddy Tribe's] 'right to control Indian subsistence hunting and fishing within their reservations.'" *Id.* at 46a (quoting S. REP. NO. 96-957, at 16; H. REP. NO. 96-1353, at 17-18). The majority reasoned, however, that "[its] inquiry [was] focused on the meaning of Reservation under § 6203(8), not the scope of the Nation's sustenance fishing rights under § 6207(4)," and that the latter does not "have anything to do with" the former. *Id.* at 5a, 42a.

The majority dismissed *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78 (1918), and related decisions from this Court that, taking account of the context and nature of an underlying tribal agreement, understood statutory terms like "islands" and "lands" to "embrac[e] the intervening and surrounding waters as well as the upland." App. 15a-18a. The majority also held more broadly "that the Indian canons are inapplicable" to this case. *Id.* at 36a-40a & n.20.

Even if the treaties referenced in the statutory definition of the Reservation "could arguably be thought to induce any ambiguity," the majority concluded, "the drafters [of the Settlement Acts] never intended the Reservation to include the River itself." App. 27a. The "importance of the River to the Nation" and "the Nation's understanding" of "the various treaties the Nation entered into," the majority explained, were "beside the point." *Id.* at 31a-32a. Factoring in "practical consequences," the majority ultimately found that "[t]he stakes of reading the definition of Reservation to include the River" were too disruptive to support a construction of the Acts that would "carry out such a massive change in ownership and control over the Main Stem." *Id.* at 34a-36a.[2]

b. Judge Barron, joined by Judge Thompson, dissented in an opinion spanning more than 70 pages. App. 52a-124a.

The Settlements Acts' definition of the Reservation should be construed to encompass the Main Stem, he explained, for three textual reasons. *First*, the Settlement Acts define the Reservation using "not just the word 'islands'—or 'lands'—but a larger phrase referring to a specific set of 'islands.'" App. 63a. "On more than one occasion," in *Alaska Pacific Fisheries* and elsewhere, this Court has held

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[2] The majority held separately that the "assertion that Maine has infringed [the Nation's] subsistence fishing rights is not ripe and the Nation lacks standing to pursue that claim" because of the State's "policy" of allowing the Nation's members to fish in the River. App. 47a-48a (formatting omitted). The Nation does not seek this Court's review of that subsidiary question, which becomes moot if the River's Main Stem is recognized as part of the Nation's Reservation.

that similar phrases in "reservation-defining statutes refer to waters despite their failure to make any express reference to those waters." *Id.* at 61a.

Second, the Settlement Acts' Reservation definition "specifies that it is referring to what was 'reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine.'" App. 64a. In particular, by "express reference to the 1818 date," the statute invokes "an agreement excluding 'all islands' in the river from the cessions of lands 'on both sides of' it that the Nation had purported to make." *Id.* at 67a. That language indicates "the drafters were intent on capturing past understandings arising from past dealings." *Id.* at 69a. "[A]n area-based reading *** give[s] a meaningful role to th[is] 'reserved *** by agreement' language" that the majority's "ahistorical, dictionary-based understanding of what is meant by 'islands'" does not. *Id.*

Third, the dissent explained that a fair construction of the Reservation requires "at least consider[ing] th[e] [definitional] provision's text in the context of the text of the other provisions of the Settlement Acts." App. 73a. In section 6207, the neighboring provision guaranteeing the Nation's on-Reservation sustenance-fishing rights, "Penobscot Nation *** Indian reservation[]" "must be understood—at least when read in context—to include the area comprising the islands at issue in this case, waters included, rather than merely the discrete uplands that are situated in that area." *Id.* at 74a (ellipsis and alteration in original). "This conclusion follows from the District Court's factual finding, accepted by all parties to this appeal, that '[n]one of

[the uplands of] those islands contains a body of water in which fish live.'" *Id.* (alterations in original).

This "focus" on the "four corners" of the Settlement Acts reveals, according to the dissent, "that it is at the very least far from clear on the face of the overall statutory scheme" that the definition of the Reservation excludes the waters of the River. App. 84a. "[C]onsider[ing] the relevant 'circumstances' in which the settlement that produced these Acts was forged," *id.*, *see* pp. 3-9, *supra*, "reinforce[s] the reasons to find the relevant words in the provision here at least *** ambiguous with respect to whether the waters at issue are included as a textual analysis of them suggests that they are," App. 85a; *see id.* at 85a-119a (canvassing pre- and post-enactment history).

The Indian canons, according to the dissent, are thus "responsive to [any] interpretative question that we are left with." App. 123a. Indeed, there is "especially good reason to think that a construction in the Nation's favor is in fact a fair proxy for Congress's intent, given the particular role Congress was playing in settling these land claims in the face of assertions that the Nonintercourse Act had been violated." *Id.* To "conclude that a statute purporting to honor what this riverine Nation had 'reserved *** by agreement' in fact deprives it of the sovereign rights that it had long enjoyed in the river that defines it," as the majority held, requires "a clearer indication than is present here that the statute was intended to have such a dramatic and potentially devastating consequence." *Id.* at 124a (ellipsis in original).

REASONS FOR GRANTING THE WRIT

The divided en banc decision interpreting the Settlement Acts conflicts with this Court's precedents in two significant respects.

First, by training its analysis on dictionary definitions of individual words in the statutory provision defining the Reservation, and by detaching its construction of that provision from the rest of the Acts, the decision contravenes this Court's instruction that statutory terms must be considered in context. Congress ratified the Settlement Acts against the background principle from this Court's cases that a reservation defined by reference to a specific set of "islands" or "lands" may encompass both the uplands and the adjacent water and submerged lands. The Settlement Acts not only use a similar phrase, but attach to it an express reference to (and ratification of) treaties "reserving" the Nation's aboriginal territory. Critically, a neighboring provision guarantees the exercise of the Nation's sustenance-fishing rights *within the Reservation*—undermining an uplands-only construction that would exclude any water to fish. But the en banc majority gave short shrift to those critical textual and contextual points.

Second, the decision contravenes well-established Indian canons of construction that this Court has recently reaffirmed. The en banc majority refused to consider the Nation's understanding of the relevant terms on the ground that the Settlement Acts are "statutes" rather than "treaties." But that distinction misconceives the nature of these (and other) Settlement Acts, which (i) invoke historical treaties that must be viewed from the perspective of the

Nation, and (ii) memorialize and ratify an agreement between the Nation and the State. Having found no ambiguity based on its improperly narrow construction, the en banc majority declined to resolve the interpretive dispute in favor of the Nation. The en banc majority also rejected the diminishment canon, which requires a clear indication of Congress's intent to reduce the Reservation, even though the majority's interpretation contracts the Nation's sovereign boundaries.

In the rare First Circuit en banc proceedings below, all parties acknowledged that the proper construction of the Reservation poses a profoundly important question. For the Nation, the stakes could not be higher. The en banc majority's incorrect interpretation inflicts an existential strike at the core of its remaining Reservation that Congress recognized the Settlement Acts were meant to protect. Not only have the Nation's regulatory, enforcement, and judicial authorities been decimated in practical ways; its sovereign identity as a riverine tribe, inextricably linked to the River since time immemorial, now hangs in the balance.

This Court should grant review to undo that manifest injustice and to reinforce the proper approach to interpreting settlement acts affecting tribes more broadly.

I. THE DIVIDED EN BANC DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Decision Below Disregards This Court's Instruction That Statutory Language Cannot Be Considered In Isolation.

The court of appeals' dictionary-driven interpretation of the Settlement Acts, adopting an untenable definition of the Reservation "islands" divorced from its statutory context, conflicts with this Court's precedents.

"Whether a statutory term is unambiguous," this Court has insisted, "does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality). "Rather, '[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.'" *Id.* (alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). That precedent reflects the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Indeed, "that the meaning of a word cannot be determined in isolation" is a basic principle "of language itself." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 70 (2012) ("One should assume the

contextually appropriate ordinary meaning unless there is reason to think otherwise *** which ordinarily comes from context.").

This Court has invoked that rule time and again across varied contexts to construe statutory terms differently than a blinkered understanding of the words might support. *See, e.g.*, *Yates*, 574 U.S. at 537 ("tangible object"); *King v. Burwell*, 576 U.S. 473, 486-490 (2015) ("an Exchange established by the State"); *Robinson*, 519 U.S. at 341 ("employees"); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477-479 (1992) ("entitled"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("pay or compensation"); *McBoyle v. United States*, 283 U.S. 25, 25-26 (1931) ("vehicles"). It should do so again here.

1. The scope of the Reservation must be construed against the backdrop of Alaska Pacific Fisheries *and the Acts' incorporation of relevant treaties.*

a. The en banc majority eschews all else for the dictionary definition of "islands" as excluding offshore water. In doing so, it disregards this Court's decision interpreting statutory language defining an Indian reservation as specified "islands" to "embrace[] [not] only the upland of the islands [but] include[] as well the adjacent waters and submerged land." *Alaska Pac. Fisheries Co.*, 248 U.S. at 87. In *Alaska Pacific Fisheries*, this Court faced a nearly identical "question *** of construction—of determining what Congress intended by the words 'the body of *lands* known as Annette *Islands*.'" *Id.* at 87 (emphases added). The Court held that the phrase could refer to "the area comprising the islands"—*i.e.*, an area inclusive of

waters—rather than only to the uplands. *Id*. at 86-89. A broader consideration, informed by the Indian tribe's historical relationship to the waters, therefore was necessary to reveal the intended meaning of the larger phrase in which the words "lands" and "islands" were embedded. *Id*. at 87.

This Court applied the same principle 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. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 110-111 (1949) (emphasis added). The Court warned against the exact approach taken in this case: "extracting from [a reservation-defining statute] a single phrase, such as 'public lands'[,] and getting the phrase's meaning from the dictionary." *Id.* at 115-116. Recognizing that *Alaska Pacific Fisheries* provided the relevant background drafting principles, the Court understood that the text could not be construed to unambiguously exclude water, even though it did not expressly include that term. *Id.* at 116.

Those cases provided the default legislative rule—if not controlling law—guiding Congress's ratification of the Settlement Acts: an "island"-based reservation may in fact include surrounding waters and submerged lands. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."). In light of that background precedent, the relevant phrase here—"all the islands in the Penobscot River"—"is configured in a way that at least raises the question whether it refers to an area inclusive of waters, despite the fact that the only

geographic terms used in connection with that phrase are 'islands' and 'lands.'" App. 63a (Barron, J., dissenting). The en banc majority's contrary holding that the dictionary definition of "islands" *unambiguously* strips the Reservation of any waters is not a defensible analysis.

b. The Settlement Acts confirm that the "islands" must be understood as those "*reserved* to the Penobscot Nation by agreement with the States of Massachusetts and Maine." 30 M.R.S.A. § 6203(8) (emphasis added). That text reinforces that the scope of the Reservation is grounded in the Nation's historical agreements, which comprise not a "grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680-681 (1979); *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., 2017) ("COHEN") (describing "reserved rights doctrine"). The historical record leaves "little question" that the Nation's aboriginal title, since "time immemorial" and through the founding of the United States, "encompass[ed] use and occupancy of the Main Stem of the Penobscot River and not merely land masses (individual islands, which may come and go over time) within it." App. 90a; *see* pp. 3-4, *supra*. And nothing in the subsequent treaties invoked in the Settlement Acts ceded the Nation's aboriginal title to the Main Stem. *See* pp. 4-6, *supra*.

By reference to "all islands in that river *** that existed on June 29, 1818," 30 M.R.S.A. § 6203(8), the Settlement Acts emphasize the treaty of that date that ceded (only) "lands *** on both sides of the Penobscot [R]iver," App. 323a. Underscoring that this transfer

did not encompass the water (or lands) in between, the 1818 treaty conferred on the citizens of Massachusetts (and, later, Maine) a "right to pass and repass" the water. *Id.* at 325a-326a. The Settlement Acts ratified the treaties and made the transfer of interests therein—including the easement granted from the Nation—"effective as of the date of said transfer." 25 U.S.C. § 1723(a)(1).

"Quite obviously, no dictionary can reveal the nature of an earlier agreed-to reservation between specific historically rooted sovereign actors," which must inform the meaning of the Reservation given the Settlement Acts' express ratification of these agreements. App. 65a (Barron, J., dissenting). That is why even the State asserted in prior litigation that "a proper determination of the 'Reservation' necessarily '*involves analysis of the relevant treaties* referenced in the Reservation definitions in the [Settlement Acts] *including the historical transfers* of Reservation lands and natural resources.'" *Id.*

Yet the en banc majority refused to factor any consideration of these sources into the definition of the Reservation. App. 20a-26a. According to the majority, because "[t]he treaties no longer have any meaning independent of the Settlement Acts," there is "no plausible argument" that the Acts' "reference to these treaties *** alter[s] the plain meaning of 'islands' and creates *** ambiguity." *Id.* at 21a, 26a. That construction runs afoul of the canon against superfluity, *id.* at 66a (Barron, J. dissenting) (phrase treated as "wasted"), and it contradicts this Court's instruction that such historical "circumstances" imported by a statute's text may "shed much light on

what Congress intended," *Alaska Pacific Fisheries*, 248 U.S. at 89.

2. "Reservation" must be construed in light of the statute as a whole.

Worse yet, the decision below divorces the definition of the Reservation from the text of neighboring provisions. The en banc majority "agree[d] with the Nation and the United States" that section 6207(4) of the MIA confirms "the Nation['s] sustenance fishing rights in the Main Stem." App. 45a. That provision explicitly preserves the Nation's rights "within the boundaries of [its] *** reservation[]." 30 M.R.S.A. § 6207(4). And it is uncontested that the Nation's uplands do not "contain[] a body of water in which fish live." App. 74a (Barron, J., dissenting). Read together, section 6207(4) thus requires that the Reservation identified in section 6203(8) encompass at least some portion of the Main Stem. Otherwise, the Nation would be left to exercise its on-Reservation sustenance-fishing rights "on dry land where there are no fish and no places to fish." App. 154a (Torruella, J., dissenting).

The en banc majority asserted that its "inquiry [was] focused on the meaning of Reservation under § 6203(8), not the scope of the Nation's sustenance fishing rights under § 6207(4)." App. 42a. That blithe demarcation of the provision defining the Nation's Reservation and the neighboring provision preserving the Nation's rights within that Reservation inverts this Court's established presumption that the same words "used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v.*

Secretary of Treasury, 475 U.S. 851, 860 (1986)). Although it is theoretically possible that Congress could have chosen silently "to refer to the Penobscot Indian Reservation in two fundamentally inconsistent ways," "it seems far more natural to read § 6207(4) to incorporate the definition of the 'Indian Reservation' set forth in § 6203(8), precisely because that definition has a purpose *only* once it is plugged into such rights-granting provisions." App. 77a, 79a (Barron, J., dissenting).

The en banc majority's silo-like approach cannot be squared with this Court's commands that statutes must be interpreted "as a symmetrical and coherent regulatory scheme." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995). Under that precedent, the definition of the Reservation cannot be separated from its "place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133. But instead of endeavoring "to fit, if possible, all parts into an harmonious whole," *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)), the majority looked for reasons to discount a consistent reading of the Nation's on-Reservation rights to maintain its uplands-only reading, *see, e.g.*, App. 46a (questioning "[w]hether Congress was aware or not that there are no places to fish on the Reservation's [upland] islands").

B. The Decision Below Dismisses The Indian Canons Of Construction.

The en banc majority does violence to another line of this Court's precedent: that establishing the Indian

canons of construction. The decision below implicates three related aspects of the Indian canons.

a. The en banc majority holds that "the Indian canons are inapplicable" because "the definition of Reservation in the Settlement Acts is not ambiguous." App. 36a-37a & n.20. But that determination itself suffers from a misunderstanding of the Indian canons.

Beyond the generally applicable principles of statutory construction requiring courts to consult context in assessing (and not merely resolving) ambiguity, the Indian canons require that courts "look beyond the written words to the larger context" to "shed[] light on how the [Tribe] *** understood the agreement" at issue. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). The relevant terms of an agreement, as this Court recently reaffirmed, "must be construed 'in the sense in which they would naturally be understood by the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Washington State Com. Passenger Fishing Vessel Assn.*, 443 U.S. at 676). For example, this Court looked to a tribe's river-based sovereign interests, and what those interests indicated about what the tribe "would have considered," to hold that a grant of "land" to the Choctaw Nation included submerged lands in the Arkansas River. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970).

On the premise that this canon applies only to treaties per se, and that "the Settlement Acts are not treaties" but "statutes," the en banc majority held that the canon "has no bearing on their interpretation." App. 38a. That syllogism overlooks that the Settlement Acts define the Reservation by

incorporating the territory "reserved to the Penobscot Nation" in prior treaties. 30 M.R.S.A. § 6203(8); *see* 20-21, *supra*. Properly construing the meaning of that clause requires analyzing "how the [Nation] understood the treat[ies'] terms." *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring).

More fundamentally, the majority's holding disregards that the Settlement Acts themselves represent an "agreement between the [Nation] and the State" that could take effect only upon ratification by Congress. 30 M.R.S.A. § 6202; *see* App. 102a-103a (Barron, J., dissenting) (explaining that Acts ratified agreement to settle then-pending claims covering "up to two-thirds of the area of what is now the State of Maine"). Since the United States stopped entering into treaties with Indian Tribes in the late nineteenth century, this Court has regarded statutes ratifying agreements with Tribes as "treaty substitutes." FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 311-326 (1994); *see Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985) ("The Court has applied similar canons of construction in nontreaty matters."); *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (applying canon with respect to "the wording of treaties and statutes ratifying agreements with the Indians"); *Choate v. Trapp*, 224 U.S. 665, 671 (1912) ("[A]lthough the Atoka agreement is in the form of a contract, it is still an integral part of the Curtis act, and, if not a treaty, is a public law relating to tribal property[.]"). The Court has rejected a State's "attempted distinction" between "ratification of a contract [with a tribe] by treaty effected by

concurrence of two-thirds of the Senate *** [and] ratification of a contract [with a tribe] effected by legislation passed by the House and the Senate." *Antoine*, 420 U.S. at 200-201.

The Second Circuit has interpreted the Connecticut Settlement Act, modeled on the Settlement Acts at issue, by drawing on this Court's "early formulations" of the Indian canon "construing any treaty between the United States and an Indian tribe"—without distinguishing between "statutes or treaties." *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 92-93 (2d Cir. 2000); *see id.* at 91 n.3 (analogizing settlement acts to "compact between two states that had been ratified by Congress," which this Court has viewed as "both a contract and a statute"). The en banc majority's conflicting approach foreclosed any consideration of whether the Nation—and the United States, acting pursuant to its "unique trust relationship," *Oneida County, N.Y.*, 470 U.S. at 247—would have understood their settlement of aboriginal claims to impliedly strip from the Reservation the River on which everyone agreed the Nation's "aboriginal territory *** is centered." S. REP. NO. 96-957, at 11; H. REP. NO. 96-1353, at 11.

b. Had the en banc majority properly considered the Nation's understanding, it should have resolved the resulting ambiguity "in favor of the Indians." *Herrera*, 139 S. Ct. at 1699; *see, e.g., County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). After all, the State of Maine "drew up this contract,

and we normally construe any ambiguities against the drafter who enjoys the power of the pen." *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring).

The majority's skewed discussion of the record confirms that it did just the opposite. The majority found the Nation's "view of history," as accurately recited by Jude Barron, "beside the point," because "the drafters were motivated by *** their stated purpose of 'remov[ing] the cloud on the titles to land in the State of Maine resulting from Indian claims.'" App. 32a (alteration in original) (quoting 25 U.S.C. § 1721(b)(1)). That circumscribed perspective does not account for the fact that the cloud on title resulted from the State's having entered into agreements to transfer the Nation's territory without the federal authorization Congress required "to protect tribes from states swindling them." *Id.* at 53a (Barron, J., dissenting); *see id.* at 123a ("There is *** especially good reason to think that a construction in the Nation's favor is in fact a fair proxy for Congress's intent, given the particular role Congress was playing in settling these land claims in the face of assertions that the Nonintercourse Act had been violated.").

The majority also allowed the State's self-asserted control over the Main Stem to displace the Nation's understanding and flip the proper presumption in favor of tribal interests. App. 27a-36a. That reasoning credits the sort of constructive (and unlawful) possession this Court recently warned against: "A State could encroach on the tribal boundaries or legal rights *** and, with enough time and patience, nullify the promises made[.]" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

c. The en banc majority's decision also tramples this Court's "well settled" principle that "'[o]nly Congress can divest a reservation of its land and diminish its boundaries,' and [Congress's] intent to do so must be clear." *Nebraska v. Parker*, 577 U.S. 481, 487-488 (2016) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)); *see United States v. Sante Fe Pac. R.R. Co.*, 314 U.S. 339, 345-346 (1941) (given strong federal policy "to respect the Indian right of occupancy," congressional intent to extinguish Indian title must be "plain and unambiguous").

"Under [this Court's] precedents," before determining that Congress meant to diminish a tribe's sovereign territory, courts must examine "all the circumstances" providing the relevant context for the congressional enactment: its text but also "the history surrounding [its] passage," including "the text of earlier treaties" and the legislative history; and the "contemporaneous and subsequent understanding of [its] effect on the reservation boundaries." *Parker*, 577 U.S. at 488-490. A statute can be construed to reduce the scope of the reservation only if its language, considered in light of the relevant context, "unequivocally reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471.

Here, there is at best "mixed historical evidence" supporting an uplands-only interpretation of the Reservation. *Parker*, 577 U.S. at 490; *see* pp. 3-9, *supra*. As the en banc majority recognized in a discussion it viewed as "entirely separate" from the meaning of the Reservation, "[t]he House and Senate Reports explain that Maine previously recognized the

Nation's 'right to control Indian subsistence hunting and fishing within their reservation[]"—before the Settlement Acts were passed. App. 42a-43a, 46a (quoting S. REP. NO. 96-957, at 16; H. REP. NO. 96-1353, at 17-18). Yet the majority declined to consider that context to evaluate whether Congress clearly intended to diminish the Nation's preexisting reservation. App. 38a-40a. Believing that "[t]his is not a traditional diminishment case," the majority summarily concluded that the canon is "inapplicable." *Id.* at 38a.

The result is "tragically ironic": under the en banc majority's construction, "the Acts [now] leave the Nation with even fewer sovereign rights in the river that has been its lifeblood than it had reserved for itself in its own unprotected dealings with [Massachusetts and Maine] so early on in our history." App. 54a (Barron, J., dissenting). Because "courts have no proper role in the adjustment of reservation borders," no matter how much they "might wish an inconvenient [part of the] reservation would simply disappear," *McGirt*, 140 S. Ct. at 2462, this Court's review is required to bring the First Circuit's law in line with this Court's jurisprudence.

II. WHETHER THE SETTLEMENT ACTS DEPRIVE THE PENOBSCOT NATION OF ITS RIGHTFUL RESERVATION IS A QUESTION OF EXCEPTIONAL IMPORTANCE WITH IMPLICATIONS FOR OTHER SETTLEMENT ACT TRIBES

As made apparent by the "emphatic[]" statements of the many parties, intervenors, amici, and dissents throughout this long-running litigation,

App. 187a (Torruella, J., dissenting), the question presented is one of exceptional importance to all affected—and to many other tribes subject to settlement acts of their own.

a. On one side, the State and intervenors (municipal and private) claim the longstanding understanding of the Settlement Acts represents "an enormous change" concerning the status of "the largest river running through the heart of the state, used by myriad mills, municipalities, and the public." App. 33a-34a & n.18. The purported loss of the State's "control" over this "important water artery," according to the en banc majority, would have "massive" "practical consequences." *Id.* Under that view, "[t]he stakes of reading the definition of Reservation to include the River are *** great[]." *Id.* at 36a.

On the other side, the consequences of construing the Reservation to exclude the River's Main Stem cannot be understood as anything less than "dramatic," "tragic[]," and "devastating" for the Nation. App. 54a, 124a (Barron, J., dissenting). Under the decision below, the hard-fought settlement "purporting to honor what this riverine Nation had 'reserved *** by agreement' in fact deprives it of the sovereign rights that it had long enjoyed in the river that defines it." *Id.* at 124a (ellipsis in original). The Main Stem is and always has been the Nation's lifeblood. *Id.* at 54a. No less than other tribes for which uplands-adjacent water is considered "essential," *Alaska Pacific Fisheries Co.*, 248 U.S. at 89, and for which this Court has expressed a "responsibility" and "obligation" to protect river-based "immemorial customs" retained in prior agreements, *Tulee v. Washington*, 315 U.S. 681, 684 (1942), the

Nation has forever "centered" its domain, economy, culture, and spiritual beliefs on the Main Stem, S. Rep. No. 96-957, at 11; H. Rep. No. 96-1353, at 11.

That undisputed and nonnegotiable fact was a fundamental assumption of the settlement discussions and guided the United States' role as trustee—a relationship that the State's own highest court recognized at the time to provide "protection in the most primal aspect of the tribe's existence." *State v. Dana*, 404 A.2d 551, 561 (Me. 1979); *see Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942) (explaining that, in acting as trustee, the federal government "has charged itself with moral obligations of the highest responsibility and trust"). Chief among the features of "inherent sovereignty" that Congress acknowledged the Nation "retain[ed]," and that the United States has a duty to preserve, is the Nation's "exclusive authority to regulate sustenance fishing within [its] respective reservation[]." S. REP. NO. 96-957, at 13-15, 37; H. REP. NO. 96-1353, at 13-15. As Judge Torruella explained—before his death prevented his participation in the en banc decision—the River-stripping interpretation that the State adopted (and that the en banc First Circuit has now enshrined) is "nothing short of stunning." App. 180a.

The en banc majority's attempt to soften its extreme construction—by relying on the State's "informal policy" to permit the Nation's members to fish the Main Stem as a matter of grace—only crystalizes the threat to the Nation's sovereignty. *See* App. 49a, 148a. In addition to protecting tribal members' ability to exercise sacred rights, "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations."

United States v. Mazurie, 419 U.S. 544, 558 (1975) (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)). Accordingly, "[t]he Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *see Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (tribes' sovereignty "centers on the land held by the tribe and on tribal members within the reservation"); *Mazurie*, 419 U.S. at 557 (tribes "possess[] attributes of sovereignty over both their members and their territory").

Curtailing the Nation's borders by stripping its namesake River from the Reservation is no less offensive and intrusive to the Nation's core sovereignty than if an international court were to afford Canada exclusive jurisdiction over the entirety of the Great Lakes. Canada could hardly blunt that blow with halfhearted pledges to allow Americans to continue to fish the lakes that it suddenly insists are outside U.S. territory.

b. The decision below also has profound practical consequences for the Nation. Before the State Attorney General issued the 2012 directive, the Nation regularly exercised regulatory authority, through its natural resources department and its game warden service, to promulgate and enforce tribal laws governing hunting, trapping, and fishing on the Main Stem. App. 112a (Barron, J., dissenting); *see id.* at 218a-221a, 224a-227a. The Nation began operating its warden service on the River before the Settlement Acts and continued doing so for decades after they were enacted, largely through federal funding for the Nation's exercise of governmental authority on

"Reservation lands and waterways." App. 112a. Consistent with its "exclusive authority" to regulate critical activities within the Reservation, *see, e.g.*, 30 M.R.S.A. §§ 6207(1), 6210(1), the Nation's wardens patrolled the Main Stem daily, "from sun up to sun down," J.A. 1043-1044, to protect the Nation's sacred territory and related sustenance hunting, trapping, and fishing rights.

The State's abrupt change in position in 2012 brought these regulatory and enforcement activities to a standstill. Indeed, that was the stated purpose of the State Attorney General's 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." App. 194a.

The decision below also has a substantial impact on the Nation's tribal court. That sovereign court has regularly exercised its power over enforcement proceedings relating to activities in the Main Stem. App. 244a-252a (discussing examples of proceedings); *see, e.g.*, *id.* at 113a & n.51 (discussing tribal court prosecution of tribal member who unlawfully hunted deer from boat in the River). The curtailed Reservation boundary strips from the jurisdiction of the tribal court various criminal offenses committed on the River by members of federally recognized tribes, 30 M.R.S.A. § 6209-B(1)(A) & (B), as well as certain civil actions arising on the River filed against a Nation member, *id.* § 6209-B(1)(C).

c. Other collateral consequences flow as well. At a minimum, the decision below unsettles the baseline understanding of federal-state-tribal jurisdiction and regulation over this critical waterway. In fact, the

State has already invoked the uplands-only construction of the Reservation in an attempt to sidestep EPA disapprovals of Maine water-quality standards meant to protect the Nation's enjoyment of resources in the River. *See* State's Mot. for J. on Admin. R. 48 & n.55, *Maine v. McCarthy*, No. 14-cv-264 (D. Me. Feb. 16, 2018), ECF No. 118. The decision thus both prevents the Nation from enforcing tribal regulations to sustain the fishing (and hunting and trapping) rights of its members and hampers the federal government from carrying out its duty as trustee to protect those rights.

The decision, moreover, casts serious doubt on the jurisdiction of the Maine Indian Tribal-State Commission, the expert intergovernmental body established by the Settlement Acts to "continually review the effectiveness" of the landmark settlement and "the social, economic and legal relationship" between the tribes and the State. 30 M.R.S.A. § 6212(3). The Commission has the power to promulgate fishing regulations within the Nation's (and other tribes') territory, taking into account the interests of both the Indians and non-Indians. *Id.* § 6207(3)(A)-(C). In that role, the Commission has "consistently supported the Nation's claim to on-Reservation sustenance fishing rights in the Main Stem." Amicus Br. of Maine Indian Tribal-State Commission 1 (July 14, 2020) (formatting modified). By construing the Reservation to exclude the River, the decision below not only flouts that expert body's position; it also deprives the Commission of authority with respect to the Main Stem.

d. Finally, the en banc majority's interpretation threatens to constrict the reservations of other Maine

tribes affected by the same Settlement Acts and of tribes outside Maine subject to other settlement acts.

For example, the construction of "land" as necessarily "in opposition to water," App. 13a, risks diminishing the scope of the Passamaquoddy Reservation, which the Settlement Acts define in reference to "land" and "lands" only, 25 USC § 1722(f); 30 M.R.S.A. § 6203(5); *see* App. 75a-76a n.37 (Barron, J., dissenting).

More broadly, the en banc majority's dismissal of the Indian canons, including its holding that certain canons are categorically inapplicable, reflects a sea change with serious implications for tribes affected by other settlement acts. *See, e.g.*, *Connecticut ex rel. Blumenthal*, 228 F.3d at 90 (explaining MICSA "was a model for" the Connecticut Settlement Act); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (explaining Maine and Massachusetts Settlement Acts were "modeled after" Rhode Island Settlement Act). The prevalent use of settlement acts in lieu of treaties makes the decision below all the more alarming for Indian tribes. *See* 25 U.S.C. ch. 19 (codification of settlement acts with various tribes); COHEN § 1.07 (discussing "increasing significance" of settlement acts as "one of the most dramatic changes" in Indian law and policy in the twentieth century given that "[m]any states had assumed that nineteenth-century state treaties or agreements had extinguished tribal land claims and legal existence when, in fact, states were not authorized to so act").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 3, 2021

APPENDIX

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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* 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 (Sept. 2016) by codifiers to improve the Code's organization. This petition and appendix 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; DAN SCOTT, 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 STATE DISTRICT COURT FOR THE DISTRICT OF MAINE

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

Before

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

Pratik A. Shah, with whom Lide E. Paterno, Akin Gump Strauss Hauer & Feld LLP, Kaighn Smith, Jr., David M. Kallin, and Drummond Woodsum were on brief, for appellant/cross-appellee Penobscot Nation.

Mary Gabrielle Sprague, Attorney, Environment and Natural Resources Division, United States Department of Justice, with whom Jeffrey Bossert Clark, Assistant Attorney General, and Eric Grant, Deputy Assistant Attorney General, were on brief, for appellant/cross-appellee United States.

Kimberly Leehaug Patwardhan, Assistant Attorney General for the State of Maine, with whom Aaron M. Frey, Attorney General for the State of

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* Judge Torruella heard oral argument in this matter and participated in the semble, but he did not participate in the issuance of the opinion in this case.

Maine, and Christopher C. Taub, Deputy Attorney General for the State of Maine, were on brief, for state defendant appellees/cross-appellants.

Joshua D. Dunlap, with whom Matthew D. Manahan and Pierce Atwood LLP were on brief, for state intervenor appellees/cross-appellants.

Opinion En Banc

July 8, 2021

LYNCH, **Circuit Judge**. On August 20, 2012, the Penobscot Nation (the "Nation") brought suit against the State of Maine and various state officials (the "State Defendants"). The Nation stated in its original complaint, later amended, that when it entered into an agreement with Maine to settle its land claims in the state, "the Nation never intended to relinquish its ownership rights" to a 60-mile stretch of the Penobscot River (the "River") known as the Main Stem and that Congress intended "that the Nation's reservation encompass ownership rights within and attending" the Main Stem. The complaint sought (1) a declaratory judgment that the Nation had exclusive regulatory authority over the Main Stem; and (2) a declaratory judgment that the Nation had sustenance fishing rights in the Main Stem. The United States intervened in support of the Nation. Private interests, towns, and other political entities (the "State Intervenors") intervened in support of the State Defendants.

"Penobscot Indian Reservation" (the "Reservation") is defined in a pair of statutes -- the Maine Implementing Act ("MIA") and the Maine Indian Claims Settlement Act ("MICSA") -- collectively known as the Settlement Acts. See Me. Rev. Stat. Ann. tit. 30; 25 U.S.C. § 1721 et seq. The district court, on cross-motions for summary judgment, issued declaratory relief saying that the Reservation does not include the waters of the Main Stem or the submerged lands of the riverbed underneath it but holding that the Nation has sustenance fishing rights in the Main Stem. See Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 222-23 (D. Me. 2015). A divided panel of this court affirmed the district court's holding as to the

definition of Reservation and vacated its holding as to the Nation's sustenance fishing rights. The Nation and the United States petitioned for rehearing en banc. We vacated the panel opinion and dissent and granted the petition. Penobscot Nation v. Frey, 954 F.3d 453, 453 (1st Cir. 2020).

In this en banc decision, we hold that the Reservation does not include the waters and submerged lands constituting the riverbed of the Main Stem. The plain text of the definition of Reservation in MIA and MICSA plainly and unambiguously includes certain islands in the Main Stem but not the Main Stem itself. We also hold that even if there were some arguable ambiguity as to the language at issue, the context, history, and clear legislative intent require rejection of the Nation's claim. As to the Nation's sustenance fishing claim, we do not accept the Nation's argument that its sustenance fishing rights alter the meaning of Reservation. We disagree that they have anything to do with the definition of Reservation. Such fishing rights do not alter or call into question the clear definition of Reservation. As to the Nation's claim that Maine has infringed those fishing rights, that claim is not ripe and the Nation lacks standing.

I. Facts and Procedural History

The Penobscot River runs through the state of Maine. Its East and West Branches meet at the River's Main Stem, and the Main Stem stretches south for 60 miles. Within the Main Stem are a number of islands, including Indian Island, the Nation's headquarters.

Going back centuries, various iterations of the Indian Nonintercourse Act, 25 U.S.C. § 177, along with a series of treaties and transactions between the Nation and Massachusetts[1] and the Nation and Maine, clouded title to certain land and natural resources in Maine. See id. § 1721(a)(1). In 1980, the United States, Maine, the Nation, and other Indian tribes in Maine reached an agreement which "represent[ed] a good faith effort . . . 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 [Maine] and all its citizens, including the Indians." Me. Rev. Stat. Ann. tit. 30, § 6202; see 25 U.S.C. § 1721(7). To implement this agreement, Maine passed MIA, Me. Rev. Stat. Ann. tit. 30, § 6201 et seq., and Congress passed MICSA, 25 U.S.C. § 1721 et seq.

MICSA defines "Penobscot Indian Reservation" as "those lands as defined in [MIA]." 25 U.S.C. § 1722(i). MIA defines the Reservation as:

> [T]he 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

[1] Present-day Maine was part of Massachusetts until 1820.

> subsequent to June 29, 1818, and prior to the effective date of this Act.

Me. Rev. Stat. Ann. tit. 30, § 6203(8).[2]

MIA also addresses the Nation's sustenance fishing rights, saying:

> Notwithstanding any rule or regulation promulgated by the [Maine Indian Tribal-State 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.

Id. § 6207(4).[3]

On August 8, 2012, Maine's then-Attorney General, William Schneider, issued a legal opinion (the "Schneider Opinion") interpreting MIA and MICSA. This opinion said that the River is not part of the Nation's Reservation and that Maine has "exclusive regulatory jurisdiction over activities taking place on the River." The Schneider Opinion did not mention § 6207(4) of MIA or the Nation's sustenance fishing rights.

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[2] The Reservation also includes a few other parcels not at issue here. See Me. Rev. Stat. Ann. tit. 30, § 6203(8).

[3] Subsection 6 gives Maine's Commissioner of Inland Fisheries and Wildlife the right "to conduct fish and wildlife surveys within Indian territories." Me. Rev. Stat. Ann. tit. 30, § 6207(6).

Twelve days later, on August 20, 2012, the Nation filed suit against the State Defendants. In its second amended complaint, it disputed the Schneider Opinion's interpretation of federal law. It sought a declaratory judgment that the Nation has exclusive regulatory authority over the Main Stem and that the Nation's members have the right to take fish for their individual sustenance from the Main Stem which Maine has infringed.

On February 15, 2013, the State Defendants answered the Nation's complaint and filed a counterclaim for declaratory relief. They sought a declaratory judgment that "[t]he waters of the main stem of the Penobscot River are not within the Penobscot Nation reservation."

The State Intervenors -- a group of eighteen private parties, municipalities, and related entities that border the River and use it for discharges or other purposes -- moved to intervene in support of the State Defendants. The district court granted this motion on June 18, 2013. It also granted the United States' motion to intervene in support of the Nation on February 4, 2014.

In 2015, the State Defendants, the Nation, and the United States moved for summary judgment. The State Intervenors filed a motion for judgment on the pleadings. After holding oral argument on these motions, the district court declared that (1) "the Penobscot Indian Reservation as defined in [MIA and MICSA] includes the islands of the Main Stem, but not the waters of the Main Stem" and (2) "the sustenance fishing rights provided in [MIA] allows the Penobscot Nation to take fish for individual sustenance in the

entirety of the Main Stem." Penobscot Nation, 151 F. Supp. 3d at 222-23.[4] The parties cross-appealed.

On June 30, 2017, a divided panel affirmed the district court's declaratory judgment regarding the definition of "Penobscot Indian Reservation" under MIA and MICSA and vacated with instructions to dismiss for want of jurisdiction its declaratory judgment regarding the Nation's sustenance fishing rights under MIA. Penobscot Nation v. Mills, 861 F.3d 324, 338 (1st Cir. 2017). The Nation and the United States petitioned for rehearing en banc. We granted these petitions on April 8, 2020, and vacated the panel opinion and dissent. Penobscot Nation, 954 F.3d at 453. We heard oral argument on September 22, 2020.

II. Analysis

We review grants of summary judgment de novo including when, as here, there were cross-motions for summary judgment before the district court. Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 99 (1st Cir. 2020).

A. The "Penobscot Indian Reservation" Does Not Include the Waters or Submerged Lands of the Main Stem.

The State Defendants and the State Intervenors argue that the Reservation includes only the islands identified in § 6203(8) of MIA, not the water or bed of the Main Stem. In contrast, the Nation says that the Reservation includes both the islands

[4] On the same day, in a separate order, the district court granted in part and denied in part the State Intervenors' motion for judgment on the pleadings for the same reasons the court gave in its order on the other parties' summary judgment motions.

referred to in § 6203(8) of MIA and the entire Main Stem, bank-to-bank, including its submerged lands. The United States agrees with the Nation. Alternatively, it says that the Reservation extends, at the very least, from the islands referenced in § 6203(8) to the "thread," or centerline, of the River. Under this interpretation, the Reservation would include portions of the River that surround each of its islands.

1. "Penobscot Indian Reservation" is Unambiguously Defined in the Settlement Acts to Exclude the Main Stem.

To determine whether "Penobscot Indian Reservation" includes the River's waters and submerged lands, we must interpret that term as it is defined in the text of the Settlement Acts. We begin with the text itself. See, e.g., Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute."); United States v. Alvarez-Sanchez, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text."). When interpreting the Settlement Acts, we use ordinary tools of statutory construction. See Maine v. Johnson, 498 F.3d 37, 44-45 (1st Cir. 2007) (treating the Settlement Acts "as a matter of federal law" and using "ordinary statutory construction" when interpreting them). As we discuss later, none of the Indian canons of construction alter the Settlement Acts' definition of Reservation.

Our "first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" Barnhart, 534 U.S. at 450 (quoting Robinson v.

Shell Oil Co., 519 U.S. 337, 340 (1997)). "[I]f the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" Robinson, 519 U.S. at 340 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989)), then "[o]ur inquiry must cease," id.; see Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021); Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020); Aroostook Band of Micmacs v. Ryan, 484 F.3d 41, 50-51, 53 (1st Cir. 2007) (following MICSA's plain meaning when "MICSA is clear" and the "statutory scheme is a consistent whole on the issue in question"); see also id. at 64 n.28. When the text is unambiguous and the statutory scheme is coherent and consistent, we do not look to legislative history or Congressional intent. Carcieri v. Salazar, 555 U.S. 379, 392 (2009) ("We need not consider [arguments about Congress's intent behind the Indian Reorganization Act] because Congress' use of the word 'now' . . . speaks for itself and 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992))).

In relevant part, § 6203(8) of MIA says: "'Penobscot Indian Reservation' means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with [Massachusetts and Maine] consisting solely of Indian Island . . . and all islands in that river northward thereof that existed on June 29, 1818 . . . ." It is clear from MIA's text that the Reservation includes "islands." Because "islands" is an undefined term, we "construe it 'in accordance with [its] ordinary meaning.'" See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014) (alteration in original) (quoting Sebelius v. Cloer, 569

U.S. 369, 376 (2013)). Dictionaries are useful aids in determining a word's ordinary meaning.[5] See, e.g., id. at 553-54 (citing dictionary definitions of "exceptional" to determine its ordinary meaning); Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter, 575 U.S. 650, 662 (2015) (citing dictionary definitions of "pending" to determine its ordinary meaning).

An "island" is "[a] piece of land completely surrounded by water." Oxford English Dictionary Online, https://www.oed.com/view/Entry/99986 (last visited Jan. 14, 2021) (first definition). Other dictionaries confirm this ordinary meaning. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/island (last visited Jan. 14, 2021) (first definition) ("An island is a piece of land that is completely surrounded by water."); Black's Law Dictionary (11th ed. 2019) (first and only definition) (defining "island" as "[a] tract of land surrounded by water and smaller than a continent").

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[5] We interpret a statute's language in accordance with its ordinary meaning at the time of its enactment. See Niz-Chavez, 141 S. Ct. at 1480; Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020). The Settlement Acts were enacted in 1980. The meaning of the word "island" has not changed over the past few decades. See Oxford English Dictionary (2d ed. 1989), https://www.oed.com/oed2/00121797 (defining "island" as "[a] piece of land completely surrounded by water," the same definition as in the most recent version of the dictionary). "Island" has had the same meaning for at least the past few centuries. See Noah Webster, Compendious Dictionary of the English Language 166 (1806) (defining "island" as "land surrounded by water"); Samuel Johnson, Dictionary of the English Language (6th ed. 1785) (defining island as "[a] tract of land surrounded by water").

These definitions make two things clear. First, an island is "a piece of land." Land does not ordinarily mean land and water. Indeed, land is ordinarily defined in opposition to water. Oxford English Dictionary Online, https://www.oed.com/view/Entry/105432 (last visited Jan. 14, 2021) (first definition) (defining "land" as "[t]he solid portion of the earth's surface, as opposed to sea, water" (emphasis added)). MICSA incorporates MIA's definition of "Penobscot Indian Reservation" by saying that that Reservation means "those lands as defined [in MIA]," 25 U.S.C. § 1722(i) (emphasis added), reinforcing that the Reservation consists of land only. MICSA does not say "lands and waters" or "land or other natural resources."[6] Second, the piece of land constituting an island is "surrounded by water." Water is important to the definition of "island" because the presence of water around a piece of land is what makes that piece of land an island. The surrounding water is not itself part of an island. Indeed, Black's Law Dictionary goes on to say that the word island is used "esp[ecially]" to mean "land that is continually surrounded by water and not submerged except during abnormal circumstances." Black's Law Dictionary (11th ed. 2019) (emphasis added).

The plain meaning of "island" is reinforced by § 6023(8)'s use of the phrase "in the Penobscot River" (emphasis added). The definition references the Penobscot River to tell us where the islands are located and which body of water surrounds them.

[6] "Land or other natural resources" is a defined term in both MIA and MICSA that explicitly includes water. See Me. Rev. Stat. Ann. tit. 30, § 6203(3); 25 U.S.C. § 1722(b).

That is what the preposition "in" means. Oxford English Dictionary Online, https://www.oed.com/view/Entry/92970 (last visited Jan. 14, 2021) (defining "in" to mean "[o]f position or location").

MIA's use of the word "solely" in the Reservation's definition also precludes any interpretation of § 6203(8) that includes the River's submerged lands or its waters. The Reservation includes "solely . . . Indian Island . . . and all islands in [the River] northward thereof . . . ." Me. Rev. Stat. Ann. tit. 30, § 6203(8). We have already explained why an "island" plainly does not include its surrounding waters or submerged lands. Because the Reservation's definition excludes any definition that is not stated, see Burgess v. United States, 553 U.S. 124, 130 (2008), because it does not say that it includes the River or its submerged lands, and because the Supreme Court has said that "'[s]olely' means 'alone,'" Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1842 (2018), and that "'[s]olely' leaves no leeway" for anything more, Helvering v. Sw. Consol. Corp., 315 U.S. 194, 198 (1942), the Reservation includes only the specified islands and not the Main Stem of the River or its submerged lands.[7]

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[7] Because MIA's definition of Reservation clearly includes only the islands, we reject the United States' alternative argument that that the Reservation extends from the islands to the thread of the River. There is no support in the text for this reading.

We also reject the Nation and United States' argument that state common law informs the definition of Reservation. The text of the Settlement Acts does not allow us to use state common law in interpreting the Acts' definitional provisions.

The Nation and the United States argue that Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), controls this case. More than a century ago, in Alaska Pacific, the Supreme Court interpreted the phrase "the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska" used in an 1891 statute establishing an Indian reservation. Id. at 86 (quoting Act of March 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101). It held that "the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland -- in other words, as descriptive of the area comprising the islands." Id. at 89. In reaching this conclusion, the Court relied on the statute's plain text, legislative history, and the Indian canon of construction that "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.

The Court found that the phrase "body of lands known as the Annette Islands" at issue in Alaska Pacific was ambiguous and had no plain meaning. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 548 n.14 (1987) ("There is no plain meaning to 'the body of lands' of an island group." (citing Alaska Pacific, 248 U.S. at 89)). As the Court explained in a later case, "body of lands" is ambiguous because it has no precise geographic meaning. Id. (stating that "body of lands" "did not have [a] precise geographic/political meaning[] which would have been commonly understood[] without further inquiry" (citing Alaska Pacific, 248 U.S. at 89)). It was unclear if the water between the lands was part of the "body." To resolve

the ambiguity, the Court relied on legislative history. Alaska Pacific, 248 U.S. at 89.

There is no ambiguity here, and so for that and other reasons Alaska Pacific does not help the Nation, the United States, or the dissent. A recent ruling by the Supreme Court involving the boundaries of an Indian reservation has confirmed that reliance on legislative history is only appropriate when a statute is ambiguous. McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear."). Similarly, Alaska Pacific only relied on an Indian canon that resolves "doubtful expressions" in favor of Indian tribes because there was an ambiguity. 248 U.S. at 89. When it was decided in 1918, Alaska Pacific did not establish a special rule of construction when tribes' claims involve water rights. It certainly did not establish a special rule of construction meant to govern a different statute enacted for a different purpose a century later. Indeed, the Court has repeatedly recognized that in its past cases "address[ing] the unique circumstances of Alaska and its indigenous population," "[t]he 'simple truth' . . . is that 'Alaska is often the exception, not the rule.'" Yellen v. Confederated Tribes of Chehalis Rsrv., No. 20-543, 2021 WL 2599432, at *3 (U.S. June 25, 2021) (quoting Sturgeon v. Frost, 577 U.S. 424, 440 (2016)). The general rule applicable to statutes is, as the Supreme Court recently reinforced, that the "inquiry into the meaning of [a] statute's text ceases when 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" Matal v. Tam, 137 S. Ct. 1744, 1756 (2017) (quoting Barnhart, 534 U.S. at 450).

As we have explained, the definition of Reservation in the Settlement Acts is not ambiguous. It does not refer to a nebulous "body of lands." Instead, it says the Reservation consists "solely" of islands "in the Penobscot River." Me. Rev. Stat. Ann. tit. 30, § 6203(8). The word "islands" has a plain and precise geographic meaning, "solely" tells us that the Reservation includes nothing else, and the phrase "in the Penobscot River" specifies where the islands are. The fact that the Supreme Court interpreted different language in a different statute that was not a settlement act to reach a different result cannot be used to create ambiguity in this statute. See McGirt, 140 S. Ct. at 2469 ("The only role [extratextual sources] can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." (quoting Milner v. Dep't of Navy, 562 U.S. 562, 574 (2011))). For similar reasons, the Nation and United States' citations to Hynes v. Grimes Packing Co., 337 U.S. 86 (1949),[8] Choctaw Nation v. Oklahoma, 397

[8] The dissent relies on Hynes to muddy the waters. There, the Supreme Court interpreted the statutory phrase "any other public lands which are actually occupied by Indians or Eskimos within [the Territory of Alaska]" to include coastal waters for purposes of authorizing the Secretary of the Interior to designate such territory as part of an Indian reservation. 337 U.S. at 110-16. It considered a number of extratextual factors in reaching that conclusion. Id. As the Court later clarified, it did so because that statutory phrase "did not have [a] precise geographic/political meaning[] which would have been commonly understood, without further inquiry, to exclude the waters," nor did the narrower phrase "'public lands,' in and of itself, ha[ve] a precise meaning." Amoco Prod., 480 U.S. at 548 nn.14-15. Hynes does nothing to dispel the fact that the term "lands" in isolation ordinarily excludes water, see, e.g., Hynes, 337 U.S. at 102 (referring to the "lands or waters" of a reservation), and that

U.S. 620 (1970),[9] and other cases interpreting different language in different treaties or statutes in different contexts are also unconvincing.

The Nation and the United States next argue that our holding in Maine v. Johnson conflicts with our reading of Reservation. Johnson addressed whether the Settlement Acts reserved to the Nation and the Passamaquoddy Tribe "authority (vis-à-vis the State) to regulate pollution by non-Indians within the tribes' territories." 498 F.3d at 41. The court held that they did not. Id. at 45-47. In doing so, it explicitly refused to decide the boundaries of the tribes' territories. 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 discharge points lies within the tribes' territories."); id. at 45 (describing "navigable waters within what we assume to be tribal land"). The Nation and United States point to dicta in Johnson where the court said "the facilities appear . . . to discharge onto reservation waters retained by the tribes under the Settlement Act." But

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additional definitional or qualifying language is required for it to encompass water. The term "lands" in the context of MICSA's definition of the Reservation stands alone, and its incorporation by reference of MIA's definition of the Reservation as consisting "solely" of specified islands "in" water indicates that it should retain its ordinary meaning.

[9] In Choctaw Nation, the language at issue was very different from the language in the definition of Reservation. The Court found the language ambiguous because it granted the Choctaw Nation land "up the Arkansas [River]" and "down the Arkansas [River]." 397 U.S. at 631. Additionally, unlike here, the Court was interpreting a treaty and applied the canon of construction interpreting "treaties with the Indians . . . as they would have understood them." Id.

in citing this dicta, they ellipt the court's parenthetical explaining that it was not resolving any boundary disputes. Id. at 47 ("[T]he facilities appear (even assuming the tribes' boundary claims) to discharge onto reservation waters retained by the tribes under the Settlement Act." (first emphasis added)). Any dicta about boundaries in Johnson cannot alter the plain meaning of Reservation and does not bind us. See Municipality of San Juan v. Rullan, 318 F.3d 26, 28 n.3 (1st Cir. 2003) ("Dicta -- as opposed to a court's holdings -- have no binding effect in subsequent proceedings in the same (or any other) case.").

The Nation, United States, and dissent also say that Maine's arguments to us in its brief in Johnson are a concession that the Nation's Reservation contains the Main Stem in its entirety. Not so, either on a reading of that brief or under the law. In a recent dispute related to the boundaries of an Indian reservation, the Supreme Court confirmed that a party's prior litigation position on a reservation's boundaries in a single case does not concede the point in future cases. See McGirt, 140 S. Ct. at 2473 n.14 (rejecting the dissent's reliance on "a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation"); see also Alt. Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 33 (1st Cir. 2004) (outlining the doctrine of judicial estoppel, which requires that "the estopping position and the estopped position . . . be directly inconsistent" and that "the responsible party . . . have succeeded in persuading a court to accept its prior position"). In a footnote of a brief that it submitted in Johnson, Maine stated that it was its "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, and that those riparian rights are subject to state regulation." Brief of State of Maine as Intervenor-Respondent at 3 n.2, 498 F.3d 37 (Nos. 04-1363, 04-1375). It went no further than this. Maine did not explain what it understood to be the sort of riparian rights that would "usual[ly] accompany[]" an island reservation, and it is unclear whether it was asserting that none of those rights had "been transferred" or that the Reservation retained only those rights that had not been transferred. Nor did it explain to what extent those rights were "subject to state regulation." In any case, the Johnson court did not adopt any version of Maine's statement and that issue was not before it. Maine's past arguments in Johnson cannot override the Settlement Acts' plain text.

2. The Definition of Reservation Is Not Altered by the Limitation of the Reservation to Islands as Earlier Described in Historic Treaties Between the Nation and Massachusetts and Maine.

The Nation, United States, and dissent argue that, when construing the definition of Reservation in the Settlement Acts, we must look to the Nation's past treaties with Massachusetts and Maine. They say that because § 6203(8) describes the islands in the Reservation as those "reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine," Me. Rev. Stat. Ann. tit. 30, § 6203(8),

these past treaties govern what "island" means in the Settlement Acts.[10] They argue that "island" does not carry its ordinary meaning but instead is a term of art that means "anything reserved to the Nation by the 1796 and 1818 treaties." They make the disputed assertion that the Nation never gave up any rights to the River in those treaties and from this they conclude that the term Reservation must include the River. To support this reading of § 6203(8), the Nation cites § 1723 of MICSA, which it says extinguished the Nation's aboriginal title only to lands it transferred, and the House and Senate Reports, which say that "[t]he 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." S. Rep. No. 96-957 at 18 ("Senate Report"); H.R. Rep. No. 96-1353 at 18 ("House Report").

MIA's reference to these treaties does not alter the plain meaning of "islands" and creates no ambiguity. The phrase "islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine" is not a term of art. See Confederated Tribes of Chehalis Rsrv.,

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[10] The 1796 treaty between the Nation and Massachusetts says that the Nation gave up their rights to "all the lands on both sides of the River Penobscot" but reserved "all the Islands in said River, above Old Town, including said Old Town island." The 1818 treaty reaffirmed the Nation's 1796 surrender of land on both sides of the River and the reservation of certain islands in the River to the Nation. It also gave the citizens of Massachusetts "a right to pass and repass any of the rivers, streams, and ponds which run through any of the lands hereby reserved."

2021 WL 2599432, at *7 (refusing to "discard the plain meaning of [a statute's] 'Indian tribe' definition in favor of a term-of-art construction" because the statutory context did not support such a reading). MIA mentions the treaties to identify which islands in the River are part of the Reservation. The Reservation includes the "islands in the Penobscot River," minus any islands that were not "reserved to the Penobscot Nation by agreement with [Massachusetts and Maine]." Me. Rev. Stat. Ann. tit. 30, § 6203(8). Within this subset of islands, MIA further limits the Reservation: it "consist[s] solely of Indian Island" and the islands north of Indian Island "that existed on June 29, 1818," minus 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." Id.

The dissent states that this interpretation of Reservation treats the phrase "reserved to the Penobscot Nation by agreement" "as if it were superfluous." Not so. The phrase "reserved to the Penobscot Nation by agreement" serves an important purpose: it makes the definition of Reservation consistent with § 1723 of MICSA. If the phrase "reserved . . . by agreement" were removed from the definition, then the Reservation would plainly include any islands in the River north of Indian Island that were transferred before June 29, 1818 but never reserved by agreement.[11] Such a definition would

[11] This is so because § 6203(8) only excludes islands transferred "subsequent to June 29, 1818" (emphasis added), the date of a treaty between the Nation and Massachusetts, from the Reservation. Without the reference to islands "reserved . . . by

conflict with 25 U.S.C. § 1723, which ratified all transfers the Nation made before December 1, 1873. See Van Buren v. United States, 141 S. Ct. 1648, 1656 (2021) (holding that statutory text is not superfluous where removing it changes a statute's meaning).

The dissent's interpretation of § 6203(8), independent of its flawed account of the history and meaning of the treaties, is inconsistent with the applicable rules of statutory interpretation. Its reading of Reservation would render superfluous other language in the definition. If the dissent were correct that the Nation reserved "all the islands in the Penobscot [R]iver above Oldtown and including . . . Oldtown [I]sland" in its 1818 treaty with Massachusetts and that the Settlement Acts intended to import this meaning into the definition, then the statutory phrase "consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof" would serve no purpose. The canon against surplusage counsels against such an interpretation.[12] See City of Chicago v. Fulton, 141 S. Ct. 585, 591 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory

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agreement," the definition would say nothing about pre-1818 transfers.

[12] Removing the superfluous language, the statutory definition would read: "'Penobscot Indian Reservation' means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine that existed on June 29, 1818 . . . ." Even after almost all of the "consisting" phrase is removed, the definition would still make clear that post-1818 islands are not part of the Reservation.

scheme." (quoting Yates v. United States, 574 U.S. 528, 543 (2015))).

The dissent's proposed reading would also make other parts of § 6203(8) inoperative. The definition says that the Reservation includes "all islands" north of Indian Island "that existed on June 29, 1818." If, as the dissent posits, the Settlement Acts intended the Reservation to include the entire Main Stem by referencing the treaties, then anything in the Main Stem north of Indian Island would be read to be part of the Reservation. Under the dissent's reading, this would be true regardless of whether the land was submerged on June 29, 1818. The phrase "that existed on June 29, 1818" would be redundant and would have no meaning under the dissent's interpretation. Further, the inclusion of the phrase reinforces that "islands" means only the uplands.

In attempt to avoid these evident problems with its interpretation, the dissent proposes that the "consisting solely of . . ." phrase was included to clarify that the Reservation includes the entire Main Stem, including Indian Island and all of the islands north of Indian Island, minus any uplands in the river that did not exist on June 29, 1818. This proposed reading by the dissent is impermissible for a different reason: it requires the word "islands" to have two different meanings within the definition of Reservation. Under the dissent's proposed reading, when "islands" is used in the phrase "islands in the Penobscot River," it must mean "an area that includes waters." Then, when "islands" is used later in the same sentence in the nearly identical phrase "all islands in that river," it

must mean "uplands alone."[13] That proposed reading is flatly at odds with the text. It also would violate the "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning.'" See Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (quoting Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986)). This rule is "surely at its most vigorous when a term is repeated within a given sentence." Brown v. Gardner, 513 U.S. 115, 118 (1994) (stating that, given the "presumption that a given term is used to mean the same thing throughout a statute," it would be "virtually impossible" to read a statute in a way that would give a word two different meanings in the same sentence); cf. Mohamad v. Palestinian Auth., 566 U.S. 449, 456 (2012) ("[I]t is difficult indeed to conclude that Congress employed the term 'individual' four times in one sentence to refer to a natural person and once to refer to a natural person and any nonsovereign organization."). The dissent's reading is "implausible in context." Confederated Tribes of Chehalis Rsrv., 2021 WL 2599432, at *11.

Our reading of § 6203(8)'s reference to the treaties is also consistent with how MIA defines the Passamaquoddy Indian Reservation. That definition similarly begins by referencing a treaty, saying that the Passamaquoddy Indian Reservation "means those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19, 1794." Me. Rev. Stat. Ann. tit. 30,

[13] The dissent does not appear to dispute that, in the phrase "all islands in that river" in § 6203(8), the word "islands" must mean "uplands only."

§ 6203(5). It then says that "[f]or the purposes of this subsection, the lands reserved to the Passamaquoddy Tribe by the aforesaid agreement shall be limited to" various islands and parcels. Id. (emphasis added). Like in the definition of Penobscot Indian Reservation, the agreement is referenced to limit which islands the reservation includes. Also like in the definition of Penobscot Indian Reservation, the islands referenced in the treaty are then further restricted to mean less than what the treaty reserved for the tribe. The definition of Reservation accomplishes this restriction by using the word "solely," while the definition of Passamaquoddy Indian Reservation does so by saying "shall be limited to." The fact that the drafters clearly intended the Passamaquoddy Indian Reservation to cover less than what was reserved to the Passamaquoddy Tribe in its agreement with Massachusetts undercuts the dissent's theory that, when defining Penobscot Indian Reservation, "the drafters of the Settlement Acts intended in defining the 'Reservation' to preserve what had been 'reserved . . . by agreement' prior to the Acts' passage."

There is no plausible argument that the historic treaties referenced in § 6203(8) govern the interpretation of the Settlement Acts. The treaties no longer have any meaning independent of the Settlement Acts, and MICSA is clear that Maine no longer has any responsibilities to the Nation under the treaties. 25 U.S.C. § 1731 ("[This Act] shall constitute a general discharge and release of all obligations of the State of Maine . . . arising from any treaty or agreement with, or on behalf of any Indian nation.").

Even if the treaties could arguably be thought to induce any ambiguity in § 6203(8), we reach the same conclusion. When the text of a statute is ambiguous, we resolve the ambiguity by looking to other evidence of the drafters' intent. Carnero v. Bos. Sci. Corp., 433 F.3d 1, 7 (1st Cir. 2006) ("In searching for clear evidence of Congress's intent, courts consider 'all available evidence' about the meaning of the statute."); see Robinson, 519 U.S. at 345–46. Here, the legislative history, context, and purpose of the Settlement Acts show that the drafters never intended the Reservation to include the River itself.

Before the Settlement Acts were passed, Massachusetts, then Maine, had exercised regulatory authority over the River for more than a century. Massachusetts regulated the River before its 1818 treaty with the Nation. See 1810 Mass. Laws ch. LXXXVIII (outlining penalties for obstructing the River or taking fish from it outside of approved times) ; 1813 Mass. Laws ch. CXLIV (same); 1816 Mass. Laws ch. XCIX (providing for the appointment of fish wardens for the River). After the 1818 treaty, once Maine separated from Massachusetts and became a state in 1820, it regulated the River in Massachusetts's stead. See 1843 Me. Laws ch. 25 (providing for the appointment of fish wardens to supervise fisheries in the River).

Massachusetts and Maine also conveyed parcels along the Main Stem, including adjacent submerged lands, to municipalities and private parties in publicly recorded deeds. These entities relied on the title given to them by Maine and Massachusetts. They used the Main Stem and built on its submerged lands. For

example, several dams were constructed in and adjacent to the Main Stem beginning in the 19th and 20th centuries. See, e.g., Penobscot Chem. Fibre Co., 30 F.P.C. 1465, 1465–66 (1963) (describing the Great Works Dam, which was "built prior to 1900"); Bangor Hydro-Elec. Co., 42 F.P.C. 1302, 1302 (1969) (describing two dams in the Main Stem which were acquired in 1925). The Nation admits that it did not execute leases or grant any interest in connection with any of these dams. As amended in 1988, § 6203(8) even mentions the owner of some of these dams, Bangor-Pacific Hydro Associates. It says that the Reservation includes certain "parcels of land that have been or may be acquired by [the Nation] from [Bangor-Pacific] as compensation for flowage of reservation lands by the West Enfield dam." Notably, the compensation is only for flowage.[14] It is not for building a dam on the submerged lands of the Main Stem.

The Settlement Acts' stated intention was to resolve outstanding disputes among the Nation, Maine, and parties represented by the State Intervenors. The Settlement Acts were passed after the Nation, along with two other tribes, claimed title to two-thirds of Maine, an area "on which more than 250,000 private citizens now reside." Senate Report at 11; House Report at 11. In response to these claims, President Carter appointed retired Georgia Supreme

[14] "Flowage" is "an overflowing onto adjacent land" or "a body of water formed by overflowing or damming." See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/flowage (last visited Jan. 25, 2021) (first and second definition).

Court Justice William B. Gunter to recommend a settlement. Senate Report at 13. Gunter's recommendation to the President, which served as the basis for the Settlement Acts and which is included in the Senate Report, explained that the Nation's claims had caused "economic stagnation within the claims area" and had resulted in "a slow-down or cessation of economic activity because property cannot be sold, mortgages cannot be acquired, title insurance becomes unavailable, and bond issues are placed in jeopardy." Id. at 55. Justice Gunter wrote that "[w]ere it not for this adverse economic result, these cases could take their normal course through the courts, and there would be no reason or necessity" for President Carter to take any action to facilitate a settlement. Id. He ultimately recommended a settlement with terms similar to those in MIA and MICSA. Id. at 56. However, emphasizing the need to address the economic consequences of the Nation's land claims and settle the land disputes, he wrote that "Congress should immediately extinguish all aboriginal title, if any, to all lands within the claims area except that held in the public ownership by the State of Maine" if a settlement could not be reached. Id. at 57.

The text of MICSA explicitly incorporates Justice Gunter's concern about avoiding litigation and clarifying title to land in Maine. It states MICSA's purpose is to "to remove the cloud on titles to land in [Maine] resulting from Indian Claims" and "to clarify the status of other land and natural resources in [Maine]." 25 U.S.C. § 1721(b)(1)-(2). Other parts of the House and Senate Reports on MICSA further support the idea that the Settlement Acts were passed to avoid litigation in which "the court would be

required to decide questions of fact concerning events which began before this country was founded." Senate Report at 13; House Report at 12-14.

A key provision of the Settlement Acts, § 1723 of MICSA, helped Congress achieve this purpose. Through § 1723, Congress retroactively ratified "any transfer of land or natural resources located anywhere within the State of Maine" made by any Indian tribe, including the Nation. 25 U.S.C. § 1723(a)(1). "Transfer" is defined extremely broadly[15] and includes "any act, event, or circumstance that resulted in a change of title to, possession of, dominion over, or control of land or natural resources." Id. § 1722(n). The Settlement Acts also extinguished aboriginal title to any land or natural resources the Nation transferred and barred the Nation from making claims "based on any interest in or right involving such land or natural resources." Id. § 1723(c). Through this provision, Congress intended to extinguish all of the Nation's land claims in Maine. See House Report at 18 ("[Section 1723] provides for the extinguishment of the land claims of the . . . the Penobscot Nation . . . in the State of Maine.").

Maine and the Nation "each . . . benefitted from the settlement." Akins v. Penobscot Nation, 130 F.3d 482, 484 (1st Cir. 1997). Indeed, the Nation benefited greatly. It largely received "the powers of a municipality under Maine law." Id.; see Me. Rev. Stat.

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[15] The Senate Report says that the word "transfer" covers "all conceivable events and circumstances under which title, possession, dominion, or control of land or natural resources can pass from one person or group of persons to another person or group of persons." Senate Report at 21.

Ann. tit. 30, § 6206. The settlement "confirmed [the Nation's] title to designated reservation lands, memorialized federal recognition of its tribal status, and opened the floodgate for the influx of millions of dollars in federal subsidies." Akins, 130 F.3d at 484 (quoting Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787 (1st Cir. 1996) (alteration in original)). It also established two multi-million-dollar trusts for the Nation: (1) a $26.8 million trust to buy land and (2) a $13.5 million trust whose income is paid quarterly to the Nation. See 25 U.S.C. § 1724(a)-(d); Penobscot Nation v. Stilphen, 461 A.2d 478, 487 n.6 (Me. 1983)(describing the trusts). Indeed, the Native American Rights Fund, which represented the Nation in its land claim cases before the Settlement Acts were passed, said shortly after the settlement that "[t]he Maine settlement is far and away the greatest Indian victory of its kind in the history of the United States." See Penobscot Nation, 151 F. Supp. 3d at 196.

Discounting the history of the Settlement Acts themselves, the dissent tells a one-sided story about the importance of the River to the Nation, details the various treaties the Nation entered into, and speculates about the Nation's understanding of those treaties and how they must have reserved the River for the Nation. It ends its history in the early 1800s, saying that it is this history that "formed the backdrop for the Settlement Acts." It also relies on "post-enactment history of the Settlement Acts" to reinforce its understanding, something the Supreme Court has specifically counseled against. See McGirt, 140 S. Ct. at 2452 ("[E]vidence of the subsequent treatment of the disputed land . . . has 'limited interpretive value.'" (quoting Nebraska v. Parker, 136 S. Ct. 1072, 1082

(2016))); see also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998) (calling post-enactment history the "least compelling" form of evidence). It insists without textual support that the Settlement Acts "were intended in significant part to make up for the fact that the Nation had entered into . . . treaties . . . without . . . federal authorization" in violation of the Nonintercourse Act.

The dissent's view of history is disputed,[16] and, regardless, beside the point. The record does not support the contention that the drafters were motivated by anything other than their stated purpose of "remov[ing] the cloud on the titles to land in the State of Maine resulting from Indian claims." 25 U.S.C. § 1721(b)(1). They removed this cloud and settled all of the Nation's claims by giving the Nation certain land, power, recognition, and money. As we have recounted, the Settlement Acts' drafters wanted to avoid expensive, protracted litigation about aboriginal title. They did not want courts to decide if, when, or how the Nation's aboriginal title was extinguished by interpreting centuries-old documents. And, as they stated explicitly, they did not want the Nation's claims of aboriginal title rooted in these treaties to muddy otherwise-valid title to lands or natural resources in Maine.

Interpreting § 6203(8)'s reference to the treaties as a resurrection of the Nation's claim to aboriginal title contravenes all of these purposes. The dissent

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[16] For example, the State Intervenors argue that the Nation's aboriginal title to the River was extinguished by the Nation's 1713 treaty with Great Britain, the Treaty of Portsmouth.

would have us undo MIA and MICSA's settlement of all ownership disputes. But "[w]e cannot interpret . . . statutes to negate their own stated purposes." King v. Burwell, 576 U.S. 473, 493 (2015) (quoting N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20 (1973)). It is implausible that the drafters intended to give the Nation exclusive control of the Main Stem -- something it did not have in 1980 -- through a reference (which serves a different purpose) to long-since-replaced historic treaties.[17] This is especially so when the Settlement Acts released Maine from any obligation under those same treaties, abolished the Nation's aboriginal title to anything it ever voluntarily or involuntarily transferred, and purported to settle all of the Nation's land and natural resource claims against Maine and private parties.

Further, it is noteworthy that the Settlement Acts' text and legislative history clearly indicate that the drafters did not intend to give control of the Main Stem to the Nation. Doing so would have been an enormous change. The River is an important water artery that Maine (and Massachusetts before it) has

[17] The legislative history of the Settlement Acts provides even more evidence that the Reservation does not include the River. In background information provided to the House Committee on Interior and Insular Affairs, the Reservation was described as "a 4,000-acre reservation on a hundred islands in the Penobscot River." Settlement of Indian Land Claims in the State of Maine: Hearing on H.R. 7919 Before the Comm. on Interior and Insular Affairs, 96th Cong. 159 (1980) (background on H.R. 7919). If the Reservation included the entirety of the Main Stem, bank-to-bank, it would have had a surface area of approximate 13,760 acres.

controlled for centuries.[18] When the Settlement Acts were drafted and passed, the Nation's claim to the River and other lands or natural resources in Maine was speculative. If the drafters had intended to shift Maine's longstanding ownership and control of the Main Stem to the Nation, we would expect to see language in the Settlement Acts' text or legislative history demonstrating this intent and addressing the consequences of doing so. See, e.g., Me. Rev. Stat. Ann. tit. 30, § 6207(3) (explicitly providing for "an orderly transfer of regulatory authority" between Maine and the Maine Indian Tribal-State Commission over specified bodies of water); id. § 6207(6) (describing procedures by which Maine's Commissioner of Inland Fisheries and Wildlife may intervene in the event that "a tribal ordinance or commission regulation . . . adversely affect[s] 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 [tribal or commission authority]"). But we see none. It is improbable that, without addressing the issue, the drafters intended to carry out such a massive change in ownership and control over the Main Stem.

The dissent tries to limit the practical consequences of its argument by saying that "the Nation has not . . . claimed a right to exclude non-tribal members from any of the waters of the Penobscot

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[18] As the State Intervenors put it, "it defies credulity that in 1980, after almost two hundred years of State control, the Settlement Acts would place the largest river running through the heart of the state, used by myriad mills, municipalities, and the public, within the boundaries of the Reservation, to be regulated, for the first time since colonists arrived, by the Nation." (internal citations omitted).

River or to control passage in those waters." It calls the State Defendants' and State Intervenors' arguments about ownership a "distraction." The idea that the Nation only seeks to assert limited ownership rights in the River is purely speculative and contrary to the record. In its original complaint,[19] the Nation asserted that it "never intended to relinquish its ownership rights within the Penobscot River" and argued that Congress "inten[ded] that the Nation's reservation encompass ownership rights within and attending the Penobscot River." It asked for a declaratory judgment that it has "exclusive authority to regulate hunting, trapping or other taking of wildlife within the waters of the Main Stem" and that its "law enforcement officers have exclusive authority to enforce the Nation's laws governing hunting, trapping or other taking of wildlife within the waters of the Main Stem." And it has previously sued a non-tribal member who removed submerged logs from the River in tribal court for "trespass to tribal land" and

[19] These statements do not appear in the Nation's second amended complaint, and the Nation's brief to the original panel says that the second amended complaint "is narrowly drawn to address the only live controversy." However, in that same brief, the Nation argues that "it retains aboriginal title to the submerged lands of the Main Stem." It describes aboriginal title as "not identical to ownership" but, quoting Oneida County v. Oneida Indian Nation of New York, 470 U.S. 226, 235 (1985), "as sacred as the fee simple of the whites." Black's Law Dictionary describes "fee simple" as "the broadest property interest allowed by law." Black's Law Dictionary 760 (11th ed. 2019). In its brief to the original panel, the United States says that the Nation has an "ownership interest" in its Reservation and that "[i]t is unnecessary to determine whether the Nation's ownership interest in the land it has retained is best characterized as aboriginal title . . . ."

"unlawful taking of tribal resources." Penobscot Nation v. Coffman, No. 7-31-03-CIV-04, slip op. at 4 (Penobscot Tribal Ct. Mar. 2, 2005). The tribal court, invoking a version of the treaty argument, held that the River is part of the Reservation. Id. at 3. The tribal court then held that MIA "does not limit or define the tribal court's jurisdiction" and that the Supreme Court "has recognized that tribal courts retain jurisdiction over [civil] disputes arising on a reservation." Id. at 2. Because the Nation "retains aboriginal ownership of the Penobscot River, from bank to bank, limited only by the right of the public to use the river for navigation," the tribal court held that the Nation could successfully sue the non-tribal member and stated that "there is no right granted to an individual to conduct any . . . enterprise [other than the "limited public easement to pass up and down the river for the purpose of commercial transportation"] without tribal permission." Id. at 3-4. The stakes of reading the definition of Reservation to include the River are far greater than the dissent is willing to acknowledge.

3. The Indian Canons of Construction Do Not Alter the Settlement Acts' Plain Meaning or Override Clear Expressions of Tribal and Legislative Intent.

The Nation and the United States next argue that three Indian canons apply to this case. None of these canons alter the plain meaning of the Reservation's definition.[20]

[20] The State Defendants and State Intervenors argue that § 1725(h) and § 1735(b) of MICSA bar the application of any

The first canon they cite says that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." See County 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) (alteration in original)). This canon only applies to ambiguous provisions. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist."); Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30, 40 (1st Cir. 2020). As we have explained, the definition of Reservation in the Settlement Acts is not ambiguous. And even if the definition of Reservation were ambiguous and the canon applied, interpreting ambiguities to benefit the tribe does not mean that we must "disregard clear expressions of tribal and congressional intent." DeCoteau v. Dist. Cnty. Ct., 420 U.S. 425, 445 (1975) (finding the canon did not support a tribe's interpretation of a statute when "the 'face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point[ed] unmistakably" to a different interpretation); see also Yankton Sioux Tribe, 522 U.S. at 349; Catawba, 476 U.S. at 506–07; Ore. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985); Rice v. Rehner, 463 U.S. 713, 732-33 (1983); Andrus v. Glover Constr. Co., 446 U.S. 608, 618-19 (1980). The context, history, and purpose of the Settlement Acts point unmistakably to an

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Indian canons of construction. Because we hold that the Indian canons are inapplicable for other reasons, we do not reach this issue.

interpretation of the Reservation that excludes the Main Stem.

Next, they cite the Indian treaty canon: "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, 206 (1999)); Jones v. Meehan, 175 U.S. 1, 11 (1899) (stating that treaties must be construed "in the sense in which they would naturally be understood by the Indians"). But the Settlement Acts are not treaties. See Aroostook Band of Micmacs, 484 F.3d at 53 (refusing to apply "rules of statutory construction favoring Indians" applicable to treaties because interpreting MICSA "does not involve any treaty"). They are statutes. The treaty canon has no bearing on their interpretation.

Finally, they cite the Indian canon saying that Congress's intent to diminish a reservation must be clear. See Parker, 136 S. Ct. at 1078–79 ("'[O]nly Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear." (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984))); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345-46 (1941). This is not a traditional diminishment case, as the United States admits in its brief to us, making the canon inapplicable. Regardless, the text of the Settlement Acts makes Congress's intent clear. "The most probative evidence of congressional intent [to change a reservation's boundaries] is the statutory language used." Solem, 465 U.S. at 470. The "unconditional commitment from Congress to compensate the Indian tribe for its opened

land" creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." Id. at 470-71; see also McGirt, 140 S. Ct. at 2468 ("When interpreting Congress's work in [a diminishment case], no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us."). As we have stated, the statutory language defining the Reservation makes it clear that Congress did not intend to include the River or submerged lands as part of the Reservation. Congress also agreed to put $13,500,000 into the Maine Indian Claims Settlement Fund and $26,800,000 into the Maine Indian Claims Land Acquisition Fund for the benefit of the Nation. 25 U.S.C. § 1724(a), (c). Congress intended these funds to compensate the Nation for giving up any claims to the land or natural resources not included in the Settlement Acts' definition of Reservation. See Me. Rev. Stat. Ann. tit. 30, § 6203(12) (defining "Settlement Fund" as "the trust fund established for the . . . Penobscot Nation by the United States pursuant to congressional legislation extinguishing aboriginal land claims in Maine"). Indeed, MICSA forbids the Secretary of the Interior from using settlement fund money for the benefit of the Nation unless the Nation has "executed appropriate documents relinquishing all claims to the extent provided by sections [of this Act approving prior transfer and discharging Maine from all obligations arising from any treaties or agreements with the Nation]." 25 U.S.C. § 1724(f). Congress intended the Settlement Acts to "provide the . . . Nation . . . with a fair and just settlement of their land claims," id. § 1721(a)(7), and "clarify the status of other land and

natural resources in the state of Maine," id. § 721(b)(2), so any diminishment was intended.

4. The Nation's Reading of Reservation Makes Other Parts of the Settlement Acts Incoherent and Inconsistent.

Adopting the Nation and United States' reading of "Penobscot Indian Reservation" would make other parts of the Settlement Acts incoherent and inconsistent. See Robinson, 519 U.S. at 341. One section of MIA dealing with regulatory takings of land within the Reservation says 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." Me. Rev. Stat. Ann. tit. 30, § 6205(3)(A). This statutory language makes it clear that, outside of § 6205(3)(A), land along and adjacent to the River is not contiguous to the Reservation. If land along and adjacent to the River is not contiguous to the Reservation, then the Reservation cannot possibly include the River itself. To interpret it otherwise would render § 6205(3)(A)'s language superfluous, something we must avoid. See City of Chicago, 141 S. Ct. at 91; Nielsen v. Preap, 139 S. Ct. 954, 969 (2019).

Next, other provisions of the Settlement Acts explicitly address water, water rights, and submerged lands using different and more specific language. Reading "Penobscot Indian Reservation" to include these things when they are not mentioned anywhere in the definition would make the Settlement Acts inconsistent. For example, the Settlement Acts define the phrase "land or other natural resources" -- not simply "land" -- to include "water and water rights."

25 U.S.C. § 1722(b); Me. Rev. Stat. Ann. tit. 30, § 6203(3). Equating "land" with "land or other natural resources" in MICSA's definition of Reservation collapses this difference. See 25 U.S.C. § 1722(i) (defining the Reservation to include "lands," not "lands or other natural resources"). Another section of the Settlement Acts, Me. Rev. Stat. Ann. tit. 30, § 6207, shows that the drafters knew how to say "lands or waters" when that is what they intended. See Me. Rev. Stat. Ann. tit. 30, § 6207(5)-(6) (using "lands or waters" instead of "lands").

MIA also addresses the Nation's authority to regulate "any pond in which all the shoreline and all submerged lands are wholly within Indian territory." Id. § 6207(1)(B) (emphasis added). Penobscot Indian Territory is a defined term distinct from Penobscot Indian Reservation. There is no reference in the Settlement Acts to any submerged lands in the Reservation, and the use of "submerged lands" in § 6207(1)(B) is the only time the phrase is used. Like their use of "land or other natural resources" and "lands or waters" in other parts of MIA and MICSA, the drafters knew how to -- and did -- include more than land when they wanted to do so. Cf. Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 416 (2012) ("[I]f we needed any proof that Congress knew how to say [a phrase] when it meant [that phrase], here we find it.").

5. The Settlement Acts' Grant of Sustenance Fishing Rights to the Nation Does Not Alter § 6203(8)'s Plain Meaning.

The Nation and the United States next argue that § 6207(4)'s grant of sustenance fishing rights to the Passamaquoddy Tribe and the Nation "within the boundaries of their. . . Indian reservations" means that § 6203(8)'s definition of Reservation must include the River and its submerged lands. They say that interpreting § 6203(8) to exclude the River's waters and submerged lands is inconsistent with § 6207(4)'s grant of sustenance fishing rights because the Nation can only exercise these rights in the River.[21]

At this stage, our inquiry is focused on the meaning of Reservation under § 6203(8), not the scope of the Nation's sustenance fishing rights under § 6207(4). We consider whether the statutory scheme is coherent and consistent if Reservation is given its plain meaning and this meaning is applied consistently throughout the Settlement Acts, including to § 6207(4)'s grant of sustenance fishing rights. See Barnhart, 534 U.S. at 450. We hold that it is. Whether the phrase "Indian reservations" used in § 6207(4)'s grant of sustenance fishing rights is itself ambiguous and susceptible to an interpretation

[21] The Nation says that there are no waters on the surfaces of the islands to support fish. The State Defendants have admitted to this fact. MIA was amended in 1988 and 2009 to include lands other than the islands in the definition of "Penobscot Indian Reservation," but when the statute was originally passed in 1980, only the islands were included in that definition.

that includes the Main Stem is an entirely separate issue that we address later. The fact that the Settlement Acts are coherent and consistent when "Indian reservations" is taken to incorporate the plain meaning of Penobscot Indian Reservation and exclude the Main Stem reinforces our conclusion that the plain meaning of "islands" controls.

Section 6207(4) uses the phrase "Indian reservations" to refer to two tribes' reservations, the Passamaquoddy Indian Reservation and the Penobscot Indian Reservation. Even if the Nation cannot exercise its sustenance fishing rights on its islands, there is nothing in the record to indicate that the sustenance fishing rights guaranteed to the Passamaquoddy Tribe by § 6207(4) is meaningless.[22] The Nation and United States' argument that § 6207(4) is incoherent as applied to the Nation alone ignores § 6207(4)'s broader application and context.

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[22] The dissent argues that for the Passamaquoddy Tribe to have sustenance fishing rights, the definition "'Passamaquoddy Indian Reservation' means those lands as defined in [MIA]" in § 1722(f) of MICSA must mean that the Passamaquoddy Reservation includes lands and waters. It says that this creates a "fatal flaw" in our argument that § 1722(i)'s similarly worded definition of Penobscot Indian Reservation means only lands. We see no flaw, as the language used to describe the parcels included in the Passamaquoddy Indian Reservation is very different from the language used in the definition of Penobscot Indian Reservation. For example, the inclusion of "Indian Township in Washington County" in the definition of Passamaquoddy Indian Reservation, Me. Rev. Stat. Ann. tit. 30, § 6203(5), closely resembles the reservation of an "undivided tract of land described merely by exterior metes and bounds" that the Court has held includes "all of the land inside those boundaries including the river," Choctaw Nation, 397 U.S. at 628.

The section still has meaning as applied to the Passamaquoddy Tribe and is not, as the Nation and United States argue, rendered a nullity when "islands" is given its plain meaning.

The Nation, the United States, and the dissent read too much into the § 6207(4)'s grant of sustenance fishing rights. Section § 6203(8) gives a clear definition of "Penobscot Indian Reservation" that does not include the Main Stem. The Settlement Acts' context and purpose confirm this reading, and they are fully coherent when the Reservation is given this meaning. We have not, as the dissent argues, "set aside" § 6207(4) in determining what § 6203(8) means. We have explicitly considered whether § 6207(4) makes sense when § 6203(8) is understood to exclude the Main Stem, and we conclude that it does. See Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 222 (2008) ("[O]ur construction . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent."). The dissent insists that the "Penobscot Indian Reservation" defined in § 6203(8) must have a meaning consistent with the "Indian reservation[]" used in § 6207(4), but, as we have explained, the dissent's interpretation would create an inconsistency within § 6203(8) itself. We cannot conclude, as the dissent would, that the Settlement Acts' drafters intended to override the text of § 6203(8) by implication when they used a different term in a different section of MIA that applies to more than one tribe. We presume that the drafters did not "hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

Despite our conclusion that § 6207(4) is still coherent when Reservation is given its plain meaning, we agree with the Nation and the United States that "Indian reservations" as used in § 6207(4) is itself ambiguous and that § 6207(4) grants the Nation sustenance fishing rights in the Main Stem.[23] We do not, as the dissent says, hold that § 6207(4) must be read in this way. And we do not agree that reading § 6207(4) this way means we must deprive § 6203(8) of its plain meaning. The two provisions can and do coexist.

Nothing in § 6207(4)'s use of the phrase "Indian reservations" alters the plain meaning of § 6203(8). MIA itself tells us this. Section 6203 says that the statute's definitions do not apply when "the context indicates otherwise." Me. Rev. Stat. Ann. tit. 30, § 6203. The Supreme Court has also held that "context counts" and that "[t]here is . . . no 'effectively irrebuttable' presumption that the same defined term in different provisions of the same statute must 'be interpreted identically.'" Env't. Def. v. Duke Energy Corp., 549 U.S. 561, 575–76 (2007) (quoting United States v. Duke Energy Corp., 411 F.3d 539, 550 (4th Cir. 2005)); see also Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 207 (2009) ("[T]he statutory definition . . . does not apply to every use of the term 'political subdivision' in the Act."). The fact that § 6207(4) does not even use the defined term "Penobscot Indian Reservation" and nowhere

[23] This is a separate issue from whether Maine has violated the Nation's rights under § 6207(4). As we explain later, we do not reach the Nation's sustenance fishing claim because the Nation lacks standing and the claim is not ripe.

indicates that "Indian reservations" incorporates § 6203(8)'s definition provides even more evidence that the Nation's sustenance fishing right is not necessarily limited to the Reservation.

Section 6207(4) has meaning and that meaning is consistent with our holding as to § 6203(8). Whether Congress was aware or not that there are no places to fish on the Reservation's islands, § 6207(4) means that the Nation has the right to engage in sustenance fishing in the Main Stem. That is a different right than the ownership rights the Nation is asserting under § 6203(8).

Nothing in the legislative history indicates that the drafters of the Settlement Acts intended to restrict the Nation's existing right to fish in the Main Stem.[24] To the contrary, their aim was to strengthen it. The House and Senate Reports explain that Maine previously recognized the Nation's "right to control Indian subsistence hunting and fishing within their reservations" and that § 6207(4) ends "[t]he power of [Maine] to alter" these rights.[25] See Senate Report at 16; House Report at 17-18. Legislative history from the passage of MIA also confirms that the drafters understood that the right to sustenance fish could be exercised in the Main Stem. See Hearing on Legis.

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[24] The record is clear that some members of the Nation have relied on sustenance fishing for generations before the Settlement Acts were passed.

[25] Before the Settlement Acts, Maine law said that the Commissioner of Inland Fisheries and Wildlife "shall issue a . . . fishing license to any [Penobscot] Indian." 1979 Me. Laws ch. 420 § 9(A). It also recognized the "right of Indians to take fish and wildlife for their own sustenance on their reservation lands." Id. § 9(B).

Doc. 2037 Before the Joint Select Comm. on Indian Land Claims, 109th Leg., 2d Reg. Sess. 55-56 (Me. 1980) (statement of Mr. Patterson that "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"); id. at 120 (raising concern that the sustenance fishing right would allow the Nation to cast a net "right across these rivers [including the Penobscot River] and completely wipe out . . . the spawning stock").

Given this context, we conclude that the drafters did not intend for the phrase "Indian reservations," as used in § 6207(4) and applied to the Nation, to have the same meaning as "Penobscot Indian Reservation." Under this interpretation, the Settlement Acts give the Nation sustenance fishing rights in the Main Stem even though the River and its submerged lands are not part of the Reservation. There is no serious dispute about whether the Settlement Acts give the Nation sustenance fishing rights in the Main Stem. They do. The dispute here is over ownership of the River and its submerged lands, and we have explained why we have reached the interpretation we have.

B. The Nation's Assertion that Maine Has Infringed Its Sustenance Fishing Rights Is Not Ripe and the Nation Lacks Standing to Pursue That Claim.

We view differently the claim that Maine has infringed those fishing rights and that infringement justifies the issuance of a declaratory judgment. See Me. Rev. Stat. Ann. tit. 30, § 6207(4). The district court erred in issuing a declaratory judgment because

the Nation lacks standing to pursue this claim and the claim is not ripe. "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945). We vacate the district court's ruling on this issue and order dismissal of the claim without prejudice.

Article III of the Constitution limits federal courts' jurisdiction to cases or controversies. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F. 3d 157, 182–83 (1st Cir. 2020) (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)). "The doctrines of standing and ripeness 'originate' from the same Article III limitation." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014).

1. The Nation Does Not Have Standing to Pursue Its Claim That Maine Has Violated the Sustenance Fishing Rights Guaranteed to it Under MIA.

To have standing, a plaintiff must "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). The Nation has suffered no injury in fact.

An injury in fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Sometimes, the threat of enforcement alone "may suffice as an

'imminent' Article III injury in fact." Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (quoting Susan B. Anthony List, 573 U.S. at 158). The Nation argues that it has suffered an injury in fact because the Schneider Opinion is a concrete and particularized imminent threat to its sustenance fishing rights.

We see no imminent threat. The Schneider Opinion does not even mention the Nation's sustenance fishing rights. It does not prevent any tribal member from engaging in sustenance fishing. Maine has not prevented any Nation member from engaging in sustenance fishing. Indeed, Maine has a "long-standing policy of not interfering with tribal members' sustenance fishing in the Main Stem" and has represented to us that it has "no intention of changing that policy." Under circumstances like these, when "a future injury is 'too speculative for Article III purposes' and no prosecution is even close to impending," a plaintiff lacks standing. See Reddy, 845 F.3d at 500 (quoting Blum v. Holder, 744 F.3d 790, 799 (1st Cir. 2014)).

There is no support in the record for the Nation's claims that the Schneider Opinion threatens its sovereignty or regulatory authority. The cases cited by the Nation for the proposition that tribes are granted special solicitude as sovereigns in the standing analysis are also inapposite. In those cases, there was actual harm to tribal members or people operating in tribal territory that threatened the tribes' sovereignty. See Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463, 468-69, 469 n.7 (1976) (tribe had standing to challenge Montana's statutory scheme for assessment and

collection of personal property taxes from tribe's members); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 139-40 (1980) (tribe had standing to challenge Arizona's taxes on a logging company operating solely on an Indian reservation when the tribe agreed to reimburse the company for taxes it paid for its on-reservation activity). The Nation has not shown that it faces an actual or imminent harm in this case.

2. The Nation's Claim That Maine Has Violated the Sustenance Fishing Rights Guaranteed to it Under MIA Is Not Ripe.

The Nation's claim is also not ripe. Our "[r]ipeness analysis has two prongs: 'fitness' and 'hardship.'" See Reddy, 845 F.3d at 501 (citing Texas v. United States, 523 U.S. 296, 300-01 (1998)). 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)). The hardship prong is prudential and asks what harm would come to those seeking relief if we withheld a decision. Reddy, 845 F.3d at 501 (citing Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey, 844 F.3d 318, 326 (1st Cir. 2016)).

Neither prong is met here. On the fitness prong, the Nation's claim depends on uncertain or contingent events. There is no evidence that Maine has interfered with the Nation's sustenance fishing rights or that it may do so in the future. Cf. McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 72 (1st Cir.

2003) ("[T]hat the future event may never come to pass augurs against a finding of fitness."). There is no concrete dispute before us.

The hardship prong is also not met. Our analysis "focuses on 'direct and immediate' harm." Id. at 73. "[T]here is no apparent prejudice to the plaintiffs if they must wait until their claims ripen to sue" here because "[t]hey are not 'required to engage in, or to refrain from, any conduct, unless and until'" Maine either interferes with the Nation's sustenance fishing rights or demonstrates an intent to do so. Reddy, 845 F.3d at 505 (quoting Texas, 523 U.S. at 301).

III.

The judgment of the district court is affirmed as to the definition of "Penobscot Indian Reservation" under Me. Rev. Stat. Ann. tit. 30, § 6203(8) and 25 U.S.C. § 1722(i) and vacated with instructions to dismiss without prejudice for want of jurisdiction as to the declaratory judgment regarding the sustenance fishing rights under Me. Rev. Stat. Ann. tit. 30, § 6207(4). No costs are awarded.

- Concurring and Dissenting Opinion Follows -

BARRON, Circuit Judge, with whom THOMPSON, Circuit Judge, joins, concurring in part and dissenting in part. The State of Maine enacted the Maine Implementing Act ("MIA") in 1980 in tandem with Congress's passage that same year of the Maine Indian Claims Settlement Act ("MICSA"). Together, the measures sought to settle then-pending litigation that had called into question, among other things, the legal status of cessions of land "on both sides of the Penobscot [R]iver" that the Penobscot Nation had made first to Massachusetts, and then to Maine, in treaties around the turn of the nineteenth century. The questions that we must resolve in this appeal concern one aspect of the settlement that these Acts brought about -- the nature of the rights in certain waters of the Penobscot River that the Nation would continue to enjoy.

I agree with the majority that the Settlement Acts, in effectively blessing the Penobscot Nation's long-ago transfers of land beyond the banks of the river, did not leave the Nation with nothing in return as to the waters in between. In particular, I agree with the majority that those Acts secure to the Nation a limited right that entitles its members to fish in those waters for their own sustenance. But, I cannot agree with the majority's further and more consequential conclusion that the Acts give the Nation no further rights in those waters.

The majority arrives at this result by narrowly construing the provision in the Acts that purports to define the "Penobscot Indian Reservation" so that it excludes altogether the waters of the Penobscot River. The consequence is that the sovereign rights to

regulate the taking of wildlife that the Settlement Acts expressly entitle this riverine Nation to exercise throughout its "Reservation" extend to no portion of the Penobscot River itself.

Yet, as I will explain, the statutory text does not compel such a landlocked construction of the "Penobscot Indian Reservation." In fact, a different provision of the same statute that defines the "Reservation" expressly describes the "boundaries" of the "Penobscot Nation . . . Indian reservation[]" in terms that even the majority agrees include the portions of the Penobscot River that are in dispute. See Me. Rev. Stat. Ann. tit. 30, § 6207(4).

The problem with the majority's narrow construction, however, runs deeper still. The Settlement Acts were intended in significant part to make up for the fact that the Nation had entered into the treaties at the heart of the underlying disputes over land transfers without the federal authorization that Congress had early on required in the Trade and Intercourse Act of 1790 ("the Nonintercourse Act"), see 25 U.S.C. § 1721(a)(1), to protect tribes from states swindling them.[26] After all, it was the lack of any such congressional authorization for those treaties that led the Nation to assert that the land transfers that it had

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[26] In Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), this Court confirmed that the Nonintercourse Act applied to the Passamaquoddy Tribe and created a trust relationship between the United States and that tribe. See id. at 373. The Penobscot Nation's land claims preceding the MICSA were premised on the theory -- which is not challenged here -- that the same would be true of the Penobscot Nation. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 654 n.6 (D. Me. 1975).

made in them were without legal effect, thereby precipitating the title disputes that the Settlement Acts aimed to resolve. It is thus tragically ironic, in my view, that the majority now construes the Acts to leave the Nation with even fewer sovereign rights in the river that has been its lifeblood than it had reserved for itself in its own unprotected dealings with those two states so early on in our history.

Moreover, precisely because text, history, and purpose undermine the notion that the definition of the Nation's "Reservation" in the Settlement Acts clearly excludes the waters at issue, longstanding principles of interpretation require that we construe that definition to include those waters. For, those principles require that we resolve an ambiguity on that score in the Nation's favor, see County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992), and, at the very least, we confront such an ambiguity here.

I.

The MICSA provides that the "'Penobscot Indian Reservation' means those lands as defined in the [MIA]." 25 U.S.C. § 1722(i). The MIA in turn provides that the

> "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.

Me. Rev. Stat. Ann. tit. 30, § 6203(8).

The ultimate question that we must decide on appeal, in light of these two provisions, is a relatively discrete one of statutory interpretation. It concerns whether the definition of the "Penobscot Indian Reservation" in § 6203(8) of the MIA encompasses only the uplands of the individual islands to which it refers -- which is all the majority concludes that it includes -- or also the whole of the area comprising the uplands of those islands, waters included -- which is what the Penobscot Nation contends that it does.[27]

Before answering that question, however, it helps to clarify more precisely what is at stake in this interpretive dispute, as there appears to be some confusion on that point. Critical to sorting out that confusion is a recognition that § 6203(8) of the MIA, by its own terms, is definitional rather than substantive. It only purports to define, in other words, what the term "Penobscot Indian Reservation" in the

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[27] In construing the Settlement Acts, we have held that because the MICSA adopted the MIA, interpretative questions about provisions of the MIA are federal questions. See Penobscot Nation v. Fellencer, 164 F.3d 706, 708 (1st Cir. 1999) (explaining that "[b]ecause the phrase 'internal tribal matters' was adopted by the federal Settlement Act, the meaning of that phrase [which does not appear in the MICSA itself] raises a question of federal law"). Accordingly, although § 6203(8) of the MIA is itself a provision of state law, the parties do not dispute that its meaning is a question of federal law such that we have jurisdiction under 28 U.S.C. § 1331.

Settlement Acts themselves -- when used elsewhere in them -- means. It does not itself purport to establish a reservation in the typical sense.

This fact is significant. In consequence of it, the meaning assigned to "Penobscot Indian Reservation" in § 6203(8) of the MIA must be understood in connection with the concrete rights and authorities that the Settlement Acts themselves provide that the Penobscot Nation enjoys within what those same Acts call the Nation's "Reservation." As a result, the lengthy arguments of the State of Maine and the Intervenors that "ownership" of the relevant stretch of the river, including its submerged lands, is at issue in this appeal are, in the end, a distraction. Whatever claims the Penobscot Nation might have in that regard, the Nation seeks here to prove with respect to the definition of the "Penobscot Indian Reservation" in § 6203(8) of the MIA only that the definition is broad enough to ensure that, when it is plugged into the substantive provisions of the MIA that are keyed to it, the Nation will have the same right to regulate hunting and trapping in the waters in that stretch of the river that the Nation generally has under those same substantive provisions within the boundaries of the "Penobscot Indian Reservation."[28]

Having clarified that much up front, though, there is still one further threshold point to address. It concerns the interpretive resources that we may draw upon to decide how best to determine whether the

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[28] For that reason, I do not consider the argument that adjudication of the ownership of the river would require joinder of riverfront landowners or that fee simple title in the river is owned in trust by the State.

definition of the term "Penobscot Indian Reservation" in § 6203(8) of the MIA refers to the relevant waters or only to the uplands located in them. I thus begin my analysis there, as a consideration of this question of interpretive method demonstrates, in my view, the errors in the majority's rationale for its lead holding, in which the majority gives this definition in § 6203(8) of the MIA a narrow, uplands-only construction.

A.

The majority explains that in construing the definition of the "Penobscot Indian Reservation" in § 6203(8) of the MIA we may not draw upon what history shows about the Penobscot Nation's past understandings regarding its rights in the waters at issue. The majority further explains that in construing that definitional provision we may not rely on any of the canons of construction relating to Indian tribes.

In the majority's view, we must labor under these interpretive constraints because this statutory provision's text -- given the ordinary meaning of the words in it -- in and of itself compels an uplands-only reading. The majority emphasizes that a statute's words should be given their ordinary meaning if the legislature does not define them. See Maj. Op. 11-12, 11 n.5. It then asserts that the ordinary meaning of the word "islands" in § 6203(8) of the MIA -- and "lands" in the provision of the MICSA that cross-references that provision of the MIA -- conveys an uplands-only, not a waters-inclusive, understanding. Maj. Op. 12-13. Thus, the majority concludes, because neither the word "islands" nor the word "lands" is

defined in either the MIA or the MICSA, the ordinary, water-less meaning of "islands" and "lands" controls.

The majority finds additional support for this dictionary-based reading of the relevant statutory text in the fact that the Settlement Acts do not use a single geographic name for the islands referred to in § 6203(8). Nor, the majority points out, do those Acts describe the islands at any point with reference to any words that require the islands to be treated as a collective -- and thus as an area including the surrounding waters -- rather than as individual land masses. See Maj. Op. 17.

The majority does address the contention that the qualifier "reserved to the Penobscot Nation by agreement" in § 6203(8) of the MIA suggests that we should set the dictionary aside and consult history to discern whether what had been "reserved . . . by agreement" encompasses any of the waters that surround the islands' uplands. Maj. Op. 21-22. The majority concludes, however, that the text of § 6203(8) makes perfectly clear that the "islands" to which that definitional provision is referring are only those that the "consisting" phrase within that same provision describes them to be. See Maj. Op. 22-23.

The majority explains in this regard that the word "islands" is used in that phrase in conjunction with the words "solely" and "in the Penobscot River," and it concludes that those two modifiers themselves support a dictionary-based (and thus, in the majority's view, uplands-only) understanding of "islands." See Maj. Op. 13-14, 17. In fact, the majority asserts, the word "islands" in § 6203(8) of the MIA would have to bear two distinct meanings in the same provision --

one including waters and one not -- for the area-based construction of § 6203(8) of that statute for which the Nation advocates to be a viable one. See Maj. Op. 25-26.

B.

The majority is right that we have no warrant to rely on extra-textual interpretive aids to construe the definition in § 6203(8) of the MIA if that text is as clear as the majority concludes that it is. But, even when a statute uses words that on their own bear an ordinary meaning that is plain, there may still be ambiguity as to whether it is plain that those words should be given that ordinary meaning. See Yates v. United States, 574 U.S. 528, 537 (2015) ("Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words. Rather, '[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.'" (alterations in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997))); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 70 (2012) ("One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise . . . . which ordinarily comes from context."); id. at 73 ("Sometimes context indicates that a technical meaning applies.").

Thus, even if the majority is right that the words "lands" and "islands" in isolation bear an ordinary meaning that plainly excludes waters offshore, we still must assess whether those words

carry their ordinary meanings here, given the specific way in which those words are used in the statutory provisions at hand. In my view, there is good reason to conclude from the text of § 6203(8) of the MIA alone that those words do not.

1.

For starters, the word "islands" appears in § 6203(8) of the MIA only as a constituent part of a larger phrase. See Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020). That larger phrase, moreover, refers to a specific group of islands both for the purpose of defining where as part of a settlement of rights to land and natural resources the Nation may exercise certain sovereign rights and in terms of what had been "reserved to the Penobscot Nation by agreement," Me. Rev. Stat. Ann. tit. 30, § 6203(8).

The plain text of § 6203(8) of the MIA in these ways supplies a reason why the word "islands" as it appears in this context might not mean what it ordinarily would if it were considered on its own. That being so, the same is necessarily also true of the word "lands." That word, after all, appears in the provision of the MICSA that directs the reader to § 6203(8) of the MIA to find the definition of the "Penobscot Indian Reservation."[29]

Precedent from the Supreme Court of the United States supports the conclusion that the features of the text of § 6203(8) of the MIA that I have

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[29] No party has argued on appeal that we should understand the fact that this provision of the MICSA refers to "those lands as defined in the [MIA]," 25 U.S.C. § 1722(i) (emphasis added), to limit the definition in § 6203(8) of the MIA.

just described render that provision more ambiguous in the relevant respect than the majority allows. On more than one occasion, the Court has held that reservation-defining statutes refer to waters despite their failure to make any express reference to those waters and despite their use of geographic terms that, in and of themselves, ordinarily might be understood to refer to dry land only.

For example, in Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), the Court considered a statute that defined a reservation as consisting of "the body of lands known as Annette Islands" and held that, textually speaking, that larger phrase arguably could refer to "the area comprising the islands" -- and thus an area inclusive of waters -- rather than only to the uplands in that area. Id. at 86-89. For that reason, the Court determined, only an inquiry into sources beyond those that would merely disclose the ordinary meaning of the words "lands" or "islands" could reveal the intended meaning of the larger phrase in which those words were embedded. See id. at 87.[30]

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[30] The majority notes, Maj. Op. 16, that Alaska Pacific Fisheries concerns Alaska and that, as the Supreme Court just observed, "[t]he 'simple truth' . . . is that 'Alaska is often the exception, not the rule.'" Yellen v. Confederated Tribes of the Chehalis Rsrv., S. Ct. , 2021 WL 2599432, at *3 (2021) [No. 20-543] (quoting Sturgeon v. Frost, 577 U.S. 424, 440 (2016)). But, there is no suggestion in Alaska Pacific Fisheries, Confederated Tribes of the Chehalis Reservation (which does not reference Alaska Pacific Fisheries), or any case in between that would provide a basis for concluding that the Court would find the relevant text in the statute set forth in Alaska Pacific Fisheries to exclude the waters surrounding the Annette Islands if that

Similarly, in Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), the Court held that the statutory phrase "any other public lands which are actually occupied by Indians or Eskimos within said Territory" did not, in consequence of the ordinary meaning of the word "lands" alone, resolve whether the reservation that it purported to define included coastal waters. See id. at 91-92, 110-11. Thus, the Court there, too, concluded that only a broader consideration of legislative purpose, as informed by the history of how the native peoples interacted with those waters, could resolve whether the phrase invoking the word "lands" did or did not include those waters. Id. at 115-16.[31]

The Court later explained in Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987), that an extra-textual, historically informed inquiry was proper in each of those earlier cases precisely because the reservation-defining statute had in each instance used a phrase that, despite the common geographic terms embedded therein, had no "precise geographic/political meaning[] which would have been commonly understood, without further inquiry, to exclude the waters." Id. at 547 n.14. Accordingly, the Court determined that, given the larger phrase used, fidelity to text had required in each case the conclusion that "[t]he meaning of the phrase[] had to be derived from [its] context in the statute[]." Id.

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collection of islands happened to have been located somewhere other than Alaska.

[31] True, Hynes is also a case from Alaska, but not even the majority suggests that its state of origin was what made the relevant phrase there not susceptible of being construed with only a dictionary as an aid.

Against that precedential backdrop, the fact that we confront here not just the word "islands" -- or "lands" -- but a larger phrase referring to a specific set of "islands" should give us some reason to pause before we turn to the dictionary's definition of those discrete words to discern the meaning of that larger phrase. As in Alaska Pacific Fisheries and Hynes, the phrase that matters here is configured in a way that at least raises the question whether it refers to an area inclusive of waters, despite the fact that the only geographic terms used in connection with that phrase are "islands" and "lands." That is not because we have no choice but to conclude that the word "islands" is itself being used -- unusually -- as a "term of art." See Maj. Op. 21-22. It is because we are construing a larger phrase, of which "islands" is just a key part, and not that word on its own.

Consider that, like the reference to "Annette Islands" in Alaska Pacific Fisheries, the reference to "islands" in the relevant phrase here concerns a discrete and definable grouping, rather than a disparate assortment, of land masses that is located in one continuous and discernable stretch of waters. For this reason, geographic reality no more rules out an area-based reading of the relevant phrase than it did in Alaska Pacific Fisheries.

Consider also that, like the statute in Alaska Pacific Fisheries, this one refers to the "islands" as an undifferentiated group -- "all islands" -- without purporting to distinguish which among them are "the site of [the tribe's] village[s], or the island[s] on which they were dwelling," Alaska Pac. Fisheries, 248 U.S. at 89. For this reason as well, the text is arguably

suggestive of an area comprising the islands, waters included.[32]

There is, however, yet one more reason to be wary of reaching too quickly for the dictionary -- and thus looking at no other extra-textual source -- to determine the meaning of § 6203(8) of the MIA with respect to the uplands/waters issue. As I have mentioned, the larger phrase that we are concerned with in that provision specifies that it is referring to what was "reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine." That same phrase then goes on to reference a specific date in 1818 in defining what was "reserved," and that date, of course, is the one on which the Penobscot Nation signed the "treaty" with Massachusetts in which the Nation purported to cede the lands "on both sides of the . . . river" while keeping "all the islands" in the relevant stretch of the river. Treaty Made by the Commonwealth of Massachusetts with the Penobscot Tribe of Indians, June 29, 1818, in Acts and Resolves Passed by the Twenty-Third

[32] The United States argues that "islands" could be broader than the discrete uplands because, under Massachusetts and Maine common law, island estates ordinarily included submerged lands and associated rights to riverine resources -- thus, with respect to any individual island, there may be an ambiguity at least as to whether it would include submerged lands to the thread of the river. The State challenges this understanding of the relevant common law. In light of Alaska Pacific Fisheries, and for the reasons set forth below, I find that "islands in the Penobscot River reserved to the Penobscot Nation by agreement" is sufficiently susceptible of an area-based understanding that it is not necessary to reach this dispute about what each individual island may include in terms of attendant waters under state common law.

Legislature of the State of Maine, A.D., 1843, at 253, 253-54 (Augusta, Wm. R. Smith & Co. 1843) [hereinafter 1818 Treaty].

Quite obviously, no dictionary can reveal the nature of an earlier agreed-to reservation between specific historically rooted sovereign actors, see Amoco Prod. Co., 480 U.S. at 547 n.14, just as no dictionary could have given content to the use-based qualifier that the relevant statute in Hynes included. Given that the "Reservation" here concerns a group of islands in a stretch of water that marks out a cohesive area in its own right, there is no reason rooted in fidelity to text that would require us to construe the phrase as if the terms of, and understandings about, that prior agreement are wholly beside the point insofar as those terms and understandings would support an area-based rather than uplands-only construction. Rather, the text would seem rather strongly to suggest that the drafters intended to give effect to these very understandings in § 6203(8) even if they would support such an area-based construction. Indeed, even Maine adamantly took the position in earlier litigation that a proper determination of the "Reservation" necessarily "involves analysis of the relevant treaties referenced in the Reservation definitions in the [MIA] including the historical transfers of Reservation lands and natural resources." Brief of Petitioner State of Maine at 58, Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007) (Nos. 04-1363, 04-1375) (emphases added).

2.

For all these reasons, the majority's uplands-only construction of § 6203(8) -- rooted as it is in a

claim about the limited, dictionary-based interpretive method that we must use -- is less clearly one that the text in and of itself compels than the majority contends. That is especially so when one recognizes that the majority's construction is hard to square with standard interpretive practices, because it appears to attribute no independent meaning to the phrase "reserved . . . by agreement."

As we have seen, the majority appears to treat the "reserved . . . by agreement" qualifier as if it were superfluous. In fact, because that qualifier precedes the "consisting" phrase, § 6203(8) changes not a bit in the majority's view if the qualifier is omitted.[33]

We are generally loath, however, to treat statutory words as wasted. Nor would there appear to be any special reason to conclude that the words to

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[33] The majority asserts that the qualifier is necessary to clarify that islands transferred by the Nation prior to 1818 are not part of the Penobscot Indian Reservation. Maj. Op. 23-24, 23 n.11. The majority does not assert, however, that any island was transferred by the Nation before 1818, and the 1818 treaty's "covenant . . . that [the Nation] shall have, enjoy and improve . . . all the islands in the Penobscot river above Oldtown and including said Oldtown island," 1818 Treaty, supra, at 254, suggests that there had been no such transfer, at least in the relevant stretch of the river. If any island not in that stretch of the river had been transferred before that date, § 6203(8) would already exclude that island by virtue of the "consisting solely" phrase. The "reserved . . . by agreement" language thus would not in that event be necessary to make that exclusion clear. Aside from the counterfactual nature of the majority's explanation of the function of "reserved . . . by agreement," it would be strange in light of the drafters' explicit exclusion of post-1818 transfers to conclude that the drafters effected the exclusion of pre-1818 transfers in such an oblique way.

which the majority assigns no import here are ones that need not have been included at all.

Those words appear alongside the provision's express reference to the 1818 date. That is the date of an agreement excluding "all islands" in the river from the cessions of lands "on both sides of" it that the Nation had purported to make. The joint inclusion of the reference to islands that had been "reserved . . . by agreement" and the date of a past agreement making a reservation involving those very islands surely provides some reason to think that the ordinary meaning of "islands" might not be an entirely reliable guide to § 6203(8)'s meaning insofar as the agreement that had been struck by the Nation on that date reflected a different understanding of what the Nation had reserved than the dictionary definition of "island" would supply. And, as I have noted, Maine itself once read the text in just this historically informed manner, taking the position that the definition of the "Penobscot Indian Reservation" in § 6203(8) of the MIA had to be construed in light of the understandings of the parties to the 1818 treaty and not without considering them at all.

Perhaps, then, the initial phrase in § 6203(8) of the MIA, which contains this backward-looking qualifier about what had been agreed to in the past, is best construed to have been intended to give effect to the outcome of an agreement as the parties to it understood it when it was struck centuries before. True, the definition does not just end with the reference to what had been "reserved . . . by agreement." It goes on to include the trailing "consisting" and "excepting" phrases. But, the

inclusion of those phrases hardly compels a reading that would make the reference to the prior agreement of no import. Instead, those phrases may comfortably be read to be usefully clarifying -- just as settlements of disputes over the meaning of old agreements often do -- critical details concerning what the parties to the settlement that the Settlement Acts effected understood to have been reserved in the earlier treaty.

Indeed, a comparison of the 1818 treaty and § 6203(8) of the MIA reveals that the drafters of the MIA merely revised the more encompassing "including" phrase of that treaty by substituting for it the more limiting "consisting solely" and "excepting" phrases. By doing so, they accounted for post-treaty developments (whether man-made or naturally occurring) that obviously could not have been known in 1818. They thus ensured through that revision of the treaty's language that § 6203(8) of the MIA would account for matters that -- given their late-breaking nature -- cannot have been understood to have been carefully considered by the treaty parties at that earlier time.

Of course, even on this reading of § 6203(8), the question would remain as to whether the larger phrase containing "the islands" in § 6203(8) of the MIA is referring to merely the uplands in the area demarcated by those "islands" or to the area comprising them and thus the waters in that area, too. The text of this provision -- at least in and of itself -- cannot be said to resolve that question conclusively in the Nation's favor, even if it <u>might</u> be so read. It all would depend, even on such a historically informed reading, on what the parties to the 1818 treaty

understood to have been "reserved . . . by agreement" way back when.

But, I do note that an area-based reading does give a meaningful role to the "reserved . . . by agreement" language that the majority's uplands-only reading does not. It reads that language to have been included because the drafters were intent on capturing past understandings arising from past dealings. For this reason, too, the "reserved . . . by agreement" language should warn the reader away from an ahistorical, dictionary-based understanding of what is meant by "islands."

I recognize that the majority contends that the "consisting" phrase's own text in and of itself rules out an area-based reading, no matter what the history of past dealings might show. The majority explains that this is so in part because the word "solely" in that phrase compels the conclusion that the drafters of § 6203(8) of the MIA intended to debar the islands' surrounding waters from being within the "Reservation." See Maj. Op. 14.

But, I cannot agree with that analysis. The word "solely," given its placement, is, as a matter of grammar, merely narrowing the general set of "islands" that precedes it to a smaller set of "islands" that are thereafter described. It thus cannot be specifying an uplands-only rather than area-based understanding of "islands" any more than the use of the word "solely" in the phrase "ship the bikes that had been ordered, consisting solely of the bikes in storage" could be read to be sorting between bikes that have baskets and those that do not. And that is especially so because the group of islands described after "solely,"

like the group of islands described before that term, is a group that, by virtue of how the islands are situated relative to one another, may easily be understood to demarcate an area comprising the islands.

Nor can I agree with the majority's related contention that the phrase "in the Penobscot River" requires an uplands-only reading. Maj. Op. 13-14. The reference to the islands "in the [river]" running from a southward point A to a northward point B is easily read to be merely part and parcel of the effort, partly carried out by the "consisting" phrase, to demarcate the bounds of the area as a whole, rather than to distinguish between the land masses and the surrounding waters within that area.

That leaves, then, only the majority's assertion that an area-based reading impermissibly requires that we give the word "islands" two distinct meanings in the same provision -- one referencing an area that includes waters and another referencing uplands alone. Maj. Op. 25-26. But, I do not see how such a reading does so.

The two phrases in § 6203(8) of the MIA that use that same word "islands" comfortably may be understood to be working together to specify the area comprising the "islands." The "islands" referenced each time are ones that are grouped together in a continuous stretch of water and that are expressly referred to only in connection with the 1818 "agreement" that "reserved" them to the Nation. The latter phrase does, on such a reading, demarcate the area in a way that the former on its own does not. But, that does not mean the latter is not referring to an area just as the former is.

In fact, the "excepting" phrase that then follows accords with this same understanding -- even though, of course, it does not compel it. Unlike the phrases that contain the two prior references to "islands," the "excepting" phrase refers to "any island" that has certain specified attributes and so does not refer to the group of "islands" previously referenced at all. The singular-form reference to "any island" in the "excepting" phrase thus may be read to suggest that any discrete land mass with the attributes denominated -- that is, any individual land mass in that area that had been "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," Me. Rev. Stat. Ann. tit. 30, § 6203(8) -- is being excepted from the area comprising the "islands" already mentioned.

In this respect, the text admits of being read much as an admittedly stilted advertisement for "a tour of the U.S. Virgin Islands, consisting solely of all those islands excepting the island of Saint Croix" might be. Such an advertisement is easily read to suggest that the tour will be of the entirety of the waters-inclusive area comprising the U.S. Virgin Islands, though not of the one particular upland portion of it that has been expressly excluded.

Finally, I realize that, as the majority notes, § 6203(8) of the MIA was amended in 1988 to add to the definition of "Penobscot Indian Reservation" certain parcels of land "acquired by the Penobscot Nation from Bangor Pacific Hydro Associates as compensation for flowage of reservation lands by the West Enfield dam." 1988 Me. Laws 1300. I also

realize that the majority stresses that the compensation is only for flowage and not for the construction of a dam on the submerged lands of the Main Stem, which is the part of the Penobscot River that contains the waters in dispute.[34] Maj. Op. 30. The District Court relied on this amendment too, for the distinct point that it supports reading § 6203(8) of the MIA to include only the uplands given that, if the "Reservation" included the relevant waters of the Main Stem, flowage would not result in the loss of reservation space. See Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 217 n.42 (D. Me. 2015).

But, the Penobscot Nation, like anyone, has different uses for uplands and waters, and the loss of an upland area is still a loss even if the flowage remains part of the "Reservation." The amendment makes sense, therefore, even if § 6203(8) of the MIA is read to mean the relevant area as a whole -- especially given the limited nature of the rights to regulate hunting and trapping in the waters in the area at issue that the Penobscot Nation contends that it would enjoy, at a minimum, if the "Reservation" does not exclude those waters altogether.

3.

For all these reasons, then, the text of § 6203(8) of the MIA itself may be read to be making a less-than-generic reference to the "islands" no less than the text in the reservation-defining statute in Alaska Pacific Fisheries. That said, there are textual differences between § 6203(8) of the MIA and the provision at

[34] The dam was built in 1894 in the Penobscot River above Old Town.

issue in Alaska Pacific Fisheries, just as there are textual differences between § 6203(8) of the MIA and the provision at issue in Hynes.

I do not disagree that those differences supply some reason to hesitate before relying on those cases to find the kind of ambiguity here that would permit us to do what the Court did in each of those earlier cases: look beyond a dictionary to history and context to determine what was intended. But, as I will next explain, in light of the potential ambiguity in § 6203(8) of the MIA, we cannot look to that provision alone to determine whether its text is ambiguous. We must at least consider that provision's text in the context of the text of the other provisions of the Settlement Acts. See Maj. Op. 43-45. And, when I consider one such provision, § 6207(4) of the MIA, any hesitancy that I might have about finding § 6203(8) to be ambiguous in the relevant respect dissipates. For, once that provision is brought into view, the textual case for reading § 6203(8) to be referring to the area comprising the islands "reserved . . . by agreement" rather than only to the uplands of the islands in that area is at the very least strong enough to render the provision unclear as to whether that area-based, waters-inclusive understanding is to be preferred.

C.

Section 6207 of the MIA addresses the control over wildlife resources that the Penobscot Nation retains in Indian territory, including as to the part of such territory that is itself within the "Penobscot

Indian Reservation."[35] As a discrete provision within that larger section, § 6207(4) addresses just one aspect of that control. It states that "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." Me. Rev. Stat. Ann. tit. 30, § 6207(4).[36]

The reason that § 6207(4) of the MIA is so significant for present purposes is that the "Penobscot Nation . . . Indian reservation[]" to which this provision refers must be understood -- at least when read in context -- to include the area comprising the islands at issue in this case, waters included, rather than merely the discrete uplands that are situated in that area. See Maj. Op. 48-51.

This conclusion follows from the District Court's factual finding, accepted by all parties to this appeal, that "[n]one of [the uplands of] those islands contains a body of water in which fish live." Penobscot Nation, 151 F. Supp. 3d at 186. In light of that finding, an interpretation of § 6207(4) of the MIA that permits fishing only from the uplands is an untenable one. Given the "long-accepted practice of Penobscot Nation members sustenance fishing [from boats] in the Main

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[35] In the Settlement Acts, Penobscot "territory" is not coextensive with the "Reservation." The latter refers to only the area set forth in § 6203(8). The former covers both the "Reservation" area and a number of other areas throughout Maine. Me. Rev. Stat. Ann. tit. 30, §§ 6203(9), 6205(2).

[36] With the passage of the MIA, Maine repealed a state law that had established "the right of Indians to take fish and wildlife for their own sustenance on their own reservation lands." Me. Rev. Stat. Ann. tit. 12, § 7076(9)(B) (emphasis added), repealed by 1979 Me. Laws 2409.

Stem," id. at 220, and how ill-suited the uplands are to that practice, this sustenance fishing provision would have no practical meaning as to the Penobscot Nation if the "reservation[]" to which it refers encompassed only those uplands.

But, precisely because § 6207(4) of the MIA must be so understood despite the ambiguities that its text alone might contain -- as even the majority agrees, Maj. Op. 48[37] -- I do not see how the text of the MIA

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[37] The majority does point out that § 6207(4) refers to the "reservations" of the Penobscot Nation and the Passamaquoddy Tribe. Maj. Op. 46-47. But, the plain text of that provision specifically provides that members of the Penobscot Nation and the Passamaquoddy Tribe "may take fish[] within the boundaries of their respective Indian reservations." Me. Rev. Stat. Ann. tit. 30, § 6207(4) (emphasis added). This language is much more specific than the similar state law provision that was repealed with the enactment of the MIA. See Me. Rev. Stat. Ann. tit. 12, § 7076(9)(B) (establishing "the right of Indians to take fish and wildlife for their own sustenance on their own reservation lands" (emphasis added)). Moreover, the legislative history makes clear that sustenance fishing in the Penobscot River, not merely within the Passamaquoddy Indian Reservation, was an issue of concern. See, e.g., Penobscot Nation, 151 F. Supp. 3d at 191 (citing discussions of salmon fishing in the Penobscot River).

In addition to these reasons to think that § 6207(4) cannot be understood to have meaning only as to the Passamaquoddy Tribe, there is another. The majority's conclusion that the Settlement Acts are "coherent and consistent" if "Reservation" in § 6203(8) excludes waters and that term is given a consistent meaning throughout the Settlement Acts depends on § 6207(4) having meaning as applied to the Passamaquoddy Tribe. See Maj. Op. 46-47. But, it has such meaning only if there are areas within the Passamaquoddy Indian Reservation where members of the Passamaquoddy Tribe can engage in sustenance fishing. Assuming as the majority must for this argument about § 6207(4) that such areas do exist, there then becomes a fatal flaw in the

alone makes clear that § 6203(8) of that same statute is referring only to the uplands and not to the area comprising the islands. To so conclude, one would have to think it clear that the drafters of the MIA did not intend in referring to the "Penobscot Nation . . . Indian reservation[]" in § 6207(4) to have in mind the "Penobscot Indian Reservation" that § 6203(8) defines. But, how could we be certain of that? See Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (explaining that we presume that "identical words used in different parts of the same act are intended to have the same meaning" (quoting Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 860 (1986))).

The majority is right, see Maj. Op. 49, that § 6203 of the MIA expressly states that the definitions that follow in the various subsections of that provision apply "unless the context indicates otherwise," Me. Rev. Stat. Ann. tit. 30, § 6203. But, that provision obviously does not command that every term defined in § 6203 of the MIA must be given a variant meaning at some point.

Nor does the majority explain what "reservations" in § 6207(4) of the MIA would mean if it does not refer to the definitions of "Passamaquoddy Indian Reservation" and "Penobscot Indian

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majority's argument that "lands" in § 1722(i) of the MICSA excludes water. See Maj. Op. 13, 18 n.8, 44. That is because "lands" in § 1722(f), the identically worded MICSA provision that incorporates the MIA's definition of "Passamaquoddy Indian Reservation," would then have to refer to an area including waters. Yet, if "lands," standing alone, is waters-inclusive in § 1722(f), how can that same word, in an identical phrase, "reinforc[e]," Maj. Op. 13, a waters-excluding reading of the Settlement Acts' definition of "Penobscot Indian Reservation"?

Reservation" in § 6203(5) and § 6203(8), respectively. The absence of any such explanation is especially conspicuous given that other provisions of the MIA in fact support reading "Indian reservation[]" in § 6207(4) to have the same meaning as "Penobscot Indian Reservation" in § 6203(8).[38]

The principle that elephants do not hide in mouseholes also would appear to counsel against the conclusion that the drafters of the MIA chose silently to refer to the Penobscot Indian Reservation in two fundamentally inconsistent ways. The term "Penobscot Indian Reservation" is of special

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[38] In § 6209-B of the MIA, which explains the jurisdiction of the Penobscot Nation Tribal Court, the statute refers to "[c]riminal offenses . . . committed on the Indian reservation of the Penobscot Nation" and to application of laws "within the Penobscot Indian reservation" (both without capitalizing "reservation"). Me. Rev. Stat. Ann. tit. 30, § 6209-B(1). By all indications, § 6209-B(1) uses "Indian reservation of the Penobscot Nation" and "Penobscot Indian reservation" interchangeably, and there is no indication that these uses of "reservation" were not meant to incorporate the definition at § 6203(8). Thus, § 6209-B(1) suggests -- especially in light of the fact that there are very few verbatim uses of the precise defined term "Penobscot Indian Reservation," which appears outside of § 6203(8) only in§ 6205 -- that references to "reservations" in the MIA are meant to incorporate the definitions of "Penobscot Indian Reservation" and "Passamaquoddy Indian Reservation" even if they do not use those exact terms. Moreover, other provisions of § 6207 of the MIA suggest that the drafters of the Settlement Acts were not using "reservation" as a catch-all term, as many of its provisions refer to the "respective Indian territories" of the Penobscot Nation and Passamaquoddy Tribe, see, e.g., Me. Rev. Stat. Ann. tit. 30, § 6207(1) (emphasis added) -- a reference that, by all indications, also refers to the definitions in § 6203, albeit to those for "Passamaquoddy Indian territory" and "Penobscot Indian territory."

importance to the statutory scheme, and, as we will see, sustenance fishing rights were central to the settlement discussions that led to the passage of the Settlement Acts. It would not have gone unnoticed that the same word was being used to convey such different meanings, and so the absence of any attempt to explain the decision to use the word in that nonuniform way would be surprising. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); see also Gustafson v. Alloyd Co., 513 U.S. 561, 573 (1995) (explaining that "[t]he burden should be on the proponents of the view that" a term carries different meanings "to adduce strong textual support for that conclusion").[39]

There is yet one more reason, though, to question the majority's insistence that "reservation[]" in § 6207(4) of the MIA cannot be referring to the "Reservation" that § 6203(8) of this same statute defines. As I have emphasized, the definitional provision at § 6203(8) of the MIA explains what the term "'Penobscot Indian Reservation' means" when used in the MIA. Me. Rev. Stat. Ann. tit. 30, § 6203(8) (emphasis added). In this way, the definition contained in that provision of the MIA serves to give

[39] I note that, by holding in the course of construing § 6203(8) of the MIA that the Nation has sustenance fishing rights under § 6207(4) of the MIA in the disputed portions of the Penobscot River, the majority necessarily renders moot the Nation's stand-alone request for a declaratory judgment to that exact same effect. Accordingly, I do not join the majority's separate holding that we lack Article III jurisdiction on ripeness and standing grounds to entertain the Nation's request for such declaratory relief, as, in my view, there is no reason for us to reach that constitutional issue here. See Maj. Op. 51-55.

content to the rights in the Nation's "Indian Reservation" that the statute elsewhere confers. Because the definition performs this function in the MIA, however, it is hardly evident that "Penobscot Nation . . . Indian reservation[]" must be understood to mean something different and undefined in the provision of the MIA that lays out the Nation's rights with respect to sustenance fishing -- § 6207(4) -- from what the Nation's "Indian Reservation" in § 6203(8) of that statute means when that term appears in other provisions of the MIA that similarly specify the Nation's rights. To the contrary, it seems far more natural to read § 6207(4) to incorporate the definition of the "Indian Reservation" set forth in § 6203(8), precisely because that definition has a purpose only once it is plugged into such rights-granting provisions.[40]

To be clear, I am not arguing that § 6207(4) of the MIA "alters" the meaning of § 6203(8) of that statute. See Maj. Op. 49. I am arguing that § 6207(4) constitutes part of the statutory context that helps us decide the meaning of § 6203(8).

I can see no other way to proceed. It cannot be that we must set aside a provision purporting to refer to the "boundaries of the[]" "Penobscot Nation . . . Indian reservation[]" in determining what another

[40] For this same reason, the grant of sustenance fishing rights in § 6207(4) is in no way rendered unnecessary if the "Penobscot Indian Reservation" does include some waters of the Penobscot River. Under the MIA, the Nation's rights do not come from the definition of "Penobscot Indian Reservation." They come from provisions like § 6207(4). Otherwise, under the MIA, Maine maintains a large measure of regulatory authority even over areas within the "Reservation."

provision in the same statute, which expressly purports to define the boundaries of the "Penobscot Indian Reservation," means.

That being so, a consideration of these two provisions of the MIA together would suggest, if anything, that the drafters of the Settlement Acts understood the "Penobscot Indian Reservation" to be inclusive of the area comprising the islands named and not to consist only of the discrete -- water-less -- uplands in that area. Only that reading harmonizes the provisions. But, even if we cannot be certain that reading is intended, the two provisions together at the very least undermine the notion that § 6203(8) of the MIA clearly adopts an uplands-only understanding of "Reservation," given that § 6207(4) of that very statute (as even the majority agrees) rejects such a waters-excluding reading of that very same word.

D.

The majority does make the fair point that if we are to look outside of § 6203(8) of the MIA to other provisions of the Settlement Acts for guidance about that definitional provision's intended meaning, then we cannot confine that review only to § 6207(4) of the MIA. But, that wider review does not itself suggest that § 6203(8) clearly defines the "Reservation" to include only the uplands of the islands "reserved . . . by agreement."

The majority emphasizes, Maj. Op. 44, that the MIA expressly defines "land or other natural resources" to include water and at other points references water rights or submerged land. Me. Rev. Stat. Ann. tit. 30, §§ 6203(3), 6207; see also 25 U.S.C. §§ 1721(b)(2), 1722(b). It thus considers the absence

of those terms in § 6203(8) of that statute conspicuous. But, the possible ambiguity in § 6203(8) that is our concern arises from the use of the word "islands" in the course of a larger phrase that refers back to what was "reserved . . . by agreement." Thus, the bare reference elsewhere in the Settlement Acts to "lands" and "waters" fails to demonstrate that there is no such ambiguity to resolve.

The majority also points to § 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." Maj. Op. 43. On a waters-inclusive understanding of § 6203(8), however, that language in § 6205(3)(A) would still be doing useful work. It would be clarifying what it means to be "contiguous" to a river. So, too, could it be making clear that lands that abut parts of the Penobscot River that are not part of the "Reservation" are considered contiguous to the "Reservation."[41]

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[41] The Intervenors argue that understanding "land along and adjacent to the Penobscot River" to include lands far away from the "Reservation" along other stretches of the Penobscot River is in tension with the language in § 6205(3)(A) providing that such replacement lands are to be "as nearly adjacent to the parcel taken as practicable." But, because the reference in § 6205(3)(A) to "land along and adjacent to the Penobscot River" does not itself demarcate any particular stretch of the river, it can be understood as reflecting the understanding that it may not be practicable to acquire land that is on the bank of the stretch of the river within the "Reservation." Moreover, "along and adjacent" need not necessarily refer to land far downriver on this understanding. "Adjacent" can mean "not distant" or "nearby," see Adjacent, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/adjacent (last

Finally, the majority invokes § 1723 of the MICSA, see Maj. Op. 32, which retroactively ratifies all "transfer[s] of land or natural resources located anywhere within the United States from, by, or on behalf of the . . . Penobscot Nation . . . or any of [its] members" and extinguishes aboriginal title to those lands or resources as of the date of any such transfer. 25 U.S.C. § 1723(a)-(b). That provision's import, however, is limited. It does not purport to extinguish aboriginal title to land not transferred.

The MICSA does broadly define "transfer" to include

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

Id. § 1722(n). In doing so, though, the provision just takes us back to the question of whether the relevant area here -- waters included, but sans uplands -- was transferred.

In any event, there is reason to think that the state regulation of the river that Maine and the

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visited May 13, 2021) (first definition), a definition that finds support in the very language the Intervenors point to -- "as nearly adjacent to the parcel taken as practicable." Thus, "along and adjacent to the Penobscot River" could refer to land both along the river and close to it.

majority point to is not an "act" or "circumstance" that resulted in a "change in title to, possession of, dominion over, or control of" the river so as to effect a transfer.[42] As the Penobscot Nation has pointed out, Maine also regulated -- and continues to regulate -- aspects of the uplands that are undisputedly part of the "Penobscot Indian Reservation."

And, even if one were to accept that the sort of state regulation that the State and the Intervenors point to could effect a transfer, a conclusion that the river itself was subject to such a transfer would leave empty the grant of sustenance fishing rights in § 6207(4) of the MIA to the Penobscot Nation "within the boundaries of" its "Indian reservation[]." Thus, while the MICSA controls in the event of a conflict between that federal statute and the MIA, 25 U.S.C. § 1735(a), I see no reason why we must read § 1723 of the MICSA to create a conflict when it is hardly clear that the text of the Settlement Acts mandates that result.

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[42] The State relies on the interpretation of a similar transfer provision in the Rhode Island Indian Claims Settlement Act in Greene v. Rhode Island, 398 F.3d 45, 52 (1st Cir. 2005). But, as the Penobscot Nation points out, in Greene the Seaconke Wampanoag Tribe itself claimed to have been "dispossessed" of the lands at issue and does not seem to have occupied or controlled those lands even at the time the Union was formed. See id. at 48, 50, 52.

For similar reasons, Maine's arguments based on the doctrines of laches, acquiescence, and impossibility also fail. Maine relies on City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005), but the lands in that case had been out of tribal control for over 200 years. See id. at 215-16.

E.

To this point, my focus has been on the four corners of the MICSA and the MIA. That focus reveals in my view that it is at the very least far from clear on the face of the overall statutory scheme that the definition of the "Penobscot Indian Reservation" in § 6203(8) of the MIA must be read as the majority reads it. But, of course, that conclusion does not resolve the ultimate interpretive dispute at hand. It just highlights that there is much interpretive work left to do -- in terms of consulting what the history shows regarding what was understood to have been reserved by the "agreement" to which § 6203(8) of the MIA refers, both at the time of that agreement and in the run-up to the enactment of the Settlement Acts that make reference to it. I thus now move on to undertake that further work.

II.

In Alaska Pacific Fisheries, the Court resolved the ambiguity in the text there at issue by broadening the view to include "[t]he circumstances in which the reservation was created," as the Court explained that these circumstances could "shed much light on what Congress intended by 'the body of lands known as Annette Islands.'" 248 U.S. at 87-89. Following that same interpretive approach to the textual ambiguity present here, I will consider the relevant "circumstances" in which the settlement that produced these Acts was forged, as those circumstances, too, may "shed much light on," id. at 89, what the drafters of the Settlement Acts intended in using the words that they did in § 6203(8) of the MIA.

As I will explain, at a minimum, those circumstances reinforce the reasons to find the relevant words in the provision here at least as ambiguous with respect to whether the waters at issue are included as a textual analysis of them suggests that they are. Thus, at the very least, those circumstances support the application of the Indian canon in construing those words to resolve the ambiguity.

But, before reviewing the circumstances leading up to the Acts' passage, it first helps to get certain things straight about which specific circumstances are relevant to the Acts' proper construction and how they differ in certain respects from the circumstances that mattered most in Alaska Pacific Fisheries itself.

A.

In Alaska Pacific Fisheries, the Court explained that Congress, in defining that reservation as it did, was aware, among other things, that "[t]he Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation" and that "[e]vidently Congress intended to conform its action to their situation and needs." 248 U.S. at 89. Many of those same circumstances are at least as present here, as we will see, given the Nation's historic ties to the river. In fact, the relevant statutory text here, unlike that at issue in Alaska Pacific Fisheries, describes an area that the tribe has inhabited since time immemorial.

But, as I have already explained, the relevant text does more than refer to a geographic feature to which the Nation has ties. That statutory text also indicates that the drafters of the Settlement Acts

intended in defining the "Reservation" to preserve what had been "reserved . . . by agreement" prior to the Acts' passage.

Thus, the statute that contains the definition of the term at issue here would not only appear to direct us to consider what history shows regarding the Nation's past usages of the waters in question. It would also appear to direct us to consider past understandings of what rights the Nation had reserved as to those waters.

In that regard, it is important to keep in mind the following understanding in reviewing the relatively detailed history of the Nation's ties to the river that is set forth below: § 6203(8) of the MIA plainly sets forth what the term "Penobscot Indian Reservation" "means" with reference to treaties in which the Penobscot Nation gave up holdings centuries ago to Massachusetts and then to Maine. That is notable because those treaties did not themselves purport to be grants of rights from either of those states to the Penobscot Nation. Those treaties were by their terms grants of rights to prior holdings from the Penobscot Nation to those other sovereigns.

Thus, we must be wary of reading those treaties to establish the limits of what the Nation was reserving rather than to be merely specifying what it was relinquishing. Otherwise we will fail to grasp just what the parties to those agreements understood them to have accomplished. See United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted. And the form of the instrument and its language was adapted to that

purpose."); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680-81 (1979) (citing Winans, 198 U.S. at 380-81); Cohen's Handbook of Federal Indian Law § 2.02 (Nell Jessup Newton ed., 2017) (describing the "reserved rights doctrine").

It is equally important to keep in mind one more thing in reviewing the account of the history that follows. As I noted earlier, the Penobscot Nation does not argue that what was "reserved . . . by agreement" necessarily includes all forms of "ownership" of the waters and submerged lands of the river at issue.[43] For example, the Nation has not, for purposes of this litigation, claimed a right to exclude non-tribal members from any of the waters of the Penobscot River or to control passage in those waters. Nor would the Penobscot Nation have "exclusive control of the Main Stem" -- the portion of the Penobscot River that includes the waters in question -- as the majority suggests, Maj. Op. 35, if those waters were within what § 6203(8) defines to be the "Penobscot Indian Reservation."

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[43] The Penobscot Nation explained to the panel that in the proceedings before the District Court, its position was that its "circumscribed sustenance rights and related authorities" outlined in the second amended complaint "did not implicate riverbed ownership, but if they did, the Tribe's position was that it retained aboriginal title to the riverbed." The Nation explained that this is a "different concept than ownership" but nevertheless a largely semantic distinction given that "the Indians' right of occupancy is 'as sacred as the fee simple of the whites,'" County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 235 (1985) (quoting Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835)).

Under the Settlement Acts, the Penobscot Nation would have on its preferred reading of § 6203(8) of the MIA "exclusive authority . . . to promulgate and enact ordinances regulating . . . [h]unting, trapping or other taking of wildlife" within the relevant area of the river, because the MIA expressly grants the Nation that right in its "Reservation." See Me. Rev. Stat. Ann. tit. 30, § 6207(1)(A).[44] And, violations of these and other tribal ordinances by tribal members within the portions of the Penobscot River at issue -- as well as certain criminal offenses committed by tribal members in these areas -- then would be within the exclusive jurisdiction of the Penobscot Nation (unless it chooses not to exercise such jurisdiction, in which case the

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[44] Under the Settlement Acts, these ordinances must be "equally applicable . . . to all persons regardless of whether such person is a member of the [Penobscot Nation]," except that there may be "special provisions for the sustenance of individual members of the . . . Penobscot Nation." Me. Rev. Stat. Ann. tit. 30, § 6207(1). This regulatory authority does not include regulating the taking of fish except on ponds "wholly within Indian territory and . . . less than 10 acres in surface area." See id. § 6207(1)(B), (3). And, notwithstanding this authority, the Maine Department of Inland Fisheries and Wildlife is entitled to "conduct fish and wildlife surveys" within the Penobscot Indian Reservation and in some circumstances may exercise regulatory authority to prevent "significant depletion of fish or wildlife stocks on lands or waters outside the boundaries of lands or waters subject to regulation by . . . the Penobscot Nation or the [Maine Indian Tribal-State Commission]." Id. § 6207(6).

Section 6207(1) refers to Penobscot Indian territory, which, as I have explained, is broader than the "Penobscot Indian Reservation." But, it is clear from the MIA that the relevant area of the river is within Penobscot Indian territory if and only if it is within the "Reservation." See id. § 6205(2).

state has jurisdiction), because, again, the MIA itself gives that measure of regulatory authority to the Nation within its "Reservation." Id. §§ 6206(3), 6209-B(1).

There is no suggestion by the Nation here, however, that either the MIA or the MICSA would give the Nation additional rights if its understanding of § 6203(8) of the MIA were controlling. Thus, we need to keep an eye only on the following in looking to the past: Does the history suggest that those who drafted these Settlement Acts intended clearly to exclude all waters in the river from the definition of the "Penobscot Indian Reservation" in § 6203(8) of the MIA, such that the Penobscot Nation would not have the rights related to hunting, trapping, and taking wildlife in those waters that the MIA itself gives the Nation in that "Reservation"?

B.

I begin by canvassing the history that bears on the nature of the Penobscot Nation's rights in the area in question before the Nation purported to cede any of those rights to either Massachusetts or Maine. That inquiry, which is foundational to any understanding of what the Nation had "reserved" over the years, necessarily takes us quite far back in time.

1.

So far as the record reveals, from time immemorial the Penobscot Nation has centered its domain, originally consisting of many thousands of acres of territory in what today is the State of Maine, on the Penobscot River. S. Rep. No. 96-957, at 11 (1980); H.R. Rep. No. 96-1353, at 11 (1980), reprinted

in 1980 U.S.C.C.A.N. 3786, 3787 (stating that "[t]he aboriginal territory of the Penobscot Nation is centered on the Penobscot River" and its "land-ownership orientation" is "riverine").[45] In consequence, there is little question that the Penobscot Nation had aboriginal title to the lands in that area when the European colonists arrived in New England in the early seventeenth century. And there is little question -- and certainly no contention to the contrary by the State of Maine in this litigation -- that such aboriginal title did encompass use and occupancy of the Main Stem of the Penobscot River and not merely land masses (individual islands, which may come and go over time) within it. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-35 (1985) (explaining that "Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial" while "discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use"); Leavenworth, Lawrence & Galveston R.R. Co. v. United States, 92 U.S. 733, 742-43 (1875).

Consistent with this understanding, the members of the Penobscot Nation located their principal villages along that portion of the river.[46] And, in turn, the river provided the Penobscot Nation with the main resources upon which its members depended to live by way of fishing, hunting, and trapping, as well as a means of travel.

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[45] The Penobscot refer to themselves as Pa'nawampske'wiak, or "People of where the river broadens out."

[46] The Penobscot's principal village was variously called Panawamskeag or Pem ta guaiusk took ("great or long River").

The river's foundational influence on the Penobscot Nation is also embedded in the Nation's language, culture, traditions, and belief systems. For example, Penobscot family names, ntútems ("totems"), reflect the creatures of the river: Neptune (eel), Sockalexis (sturgeon), Penewit (yellow perch), Nicola/Nicolar (otter), and Orno/Tama'hkwe (beaver). Each family group also has its own district known as nzibum, meaning "my river."

In addition, the river features centrally in the Penobscot Nation's creation myths and is linked to many water-based totem animals, including fish. This is articulated in its creation myth about Anglebému ("Guards the water"), the giant frog that gulped up all the water in the Penobscot River and was killed by Gluskábe, the Penobscot Nation's "culture hero," who then released the waters, rescued his "grandchildren," and settled "up the river."

Thus, it is evident that the Penobscot River and its natural resources were "not much less necessary to the existence of the [Penobscot Nation] than the atmosphere they breathed." Winans, 198 U.S. at 381. And so, when we consider -- as we next will -- the treaties that the Penobscot Nation purported to make with Massachusetts and Maine regarding its aboriginal holdings in subsequent years, we must do so with this understanding of the nature of the Penobscot Nation's ties to the river. It would be strange to construe those agreements -- and the reservations that the Nation made in them -- without doing so, for I can see no reason to interpret the terms of those agreements as if the Penobscot Nation were, in entering into them, as indifferent to preserving its

sovereign rights in the river as Maine now appears to suggest that we must understand the Nation to have been.

2.

We consider first the various late seventeenth- and early eighteenth-century peace treaties between the Penobscot Nation and the British provinces. In them, the Penobscot Nation and other tribes in the same general area agreed to "cease and forbear all acts of Hostility," acknowledged themselves as lawful subjects of Great Britain, and agreed to British colonists' use and possession of the colonists' former settlements and properties. See Treaty of Portsmouth, July 13, 1713, reprinted in Penhallow's Indian Wars 74 (Edward Wheelock ed., 1924); Dummer's Treaty, Dec. 15, 1725, reprinted in 3 Collections of the Maine Historical Society 416 (Portland, Brown Thurston 1853).

But, notably, these treaties also "sav[ed] unto the Indians their own Ground," Treaty of Portsmouth, supra, at 76; Dummer's Treaty, supra, at 417-18 ("Saving unto the Penobscot . . . all their Lands, Liberties and Properties not by them conveyed or Sold to or Possessed by any of the English Subjects as aforesaid, as also the Priviledge of Fishing, Hunting, and Fowling as formerly."). And, subsequent events provide some idea of what those reserved Penobscot "lands" were understood to be.

In 1775, for example, a committee report of the third Provincial Congress of Massachusetts "forb[ade] any person or persons whatsoever[] from trespassing or making waste[] upon any of the lands and territories, or possessions, beginning at the head of the

tide on Penobscot river, extending six miles on each side of said river, now claimed by our brethren, the Indians of the Penobscot tribe." The Journals of Each Provincial Congress of Massachusetts in 1774 and 1775, at 371 (Boston, Dutton & Wentworth 1838). The report also noted the "friendship and assistance" offered by the Penobscot in the war with Great Britain. Id. Indeed, a subsequent treaty, which Colonel John Allan of the Massachusetts militia negotiated with the Penobscot Nation and other Maine tribes on June 23, 1777, promised to the Penobscot the protection of their territory in exchange for their assistance in the Revolutionary War. S. Rep. No. 96-957, at 11-12; H.R. Rep. No. 96-1353, at 11-12. Crucially for present purposes, however, that treaty contained no terms that divested the Penobscot Nation of any of its aboriginal lands or sovereign rights and so does not itself provide any basis for concluding that the Penobscot Nation had no claim to the river as of that date.

There followed nearly twenty years later a 1796 treaty between representatives of the Penobscot Nation and officials from the State of Massachusetts (Maine still not yet being a state). That treaty, for the first time, did involve a putative cession of land by the Penobscot Nation.

Despite the Nonintercourse Act being in effect at that time, this land cession was not approved by Congress. See Trade and Intercourse Act of 1793, 1 Stat. 329, 330 (codified as amended at 25 U.S.C. § 177) ("[N]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall

be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . .”). But, this agreement purported nonetheless to provide in exchange for “[o]ne hundred and forty nine and a half yards blue cloth for blankets, four hundred pounds of shot, one hundred pounds of Powder, thirty six hats, thirteen bushels of Salt . . . , one barrel of New England Rum, and one hundred bushels of corn,” to be delivered upon signing the treaty, as well as similar specified items every year thereafter, “so long as [the Penobscot Nation] shall continue to be a nation and shall live within this Commonwealth,” that the Penobscot Nation would cede a thirty-mile tract, six miles wide, of “all the lands on both sides of the River Penobscot . . . excepting however, and reserving to the [Penobscot Nation], all the Islands in said River, above Old Town, including said Old Town Island, within the limits of the said thirty miles.” Treaty Between the Penobscot and Massachusetts, Aug. 8, 1796, in 2 Documents of American Indian Diplomacy 1094, 1094 (Vine Deloria, Jr. & Raymond J. DeMallie eds., 1999).

There is no question that the Nation gave up a fair amount through this treaty -- seemingly for not much in return. But, the terms of this treaty in no sense indicate that the Nation was relinquishing rather than reserving its historic rights to use and occupancy of the river itself or its longstanding sovereign rights relating to hunting and fishing therein.

Indeed, in June 1797, the then-Governor of Massachusetts, Increase Sumner, reported in his executive address to the Massachusetts General Court

(the Massachusetts Legislature) that a delegation of Penobscot representatives had rightly complained to state officials of settler incursions that had "almost deprived [the Penobscot] of the Benefit of their Salmon Fishery." Acts and Laws of the Commonwealth of Massachusetts 653 (Boston, Young & Minns 1896) (emphasis added). And, consistent with that same understanding, in 1807, a delegation of the Penobscot Nation headed by its Chief, Attian Elmut, met with Massachusetts Governor James Sullivan to seek protection of the Nation's fishing rights on the river next to its head village on Old Town. A notetaker quoted Chief Attian as saying, "the God of Nature gave them their fishery, and no man without their consent has a right to take it from them." Wabanaki Homeland and the New State of Maine: The 1820 Journal and Plans of Survey of Joseph Treat 43 (Micah A. Pawling ed., 2007) (emphasis added). Thereafter, in 1812, following attempts by multiple other Penobscot Nation delegations to obtain redress for incursions upon these fisheries, the Massachusetts legislature responded with protective legislation.

This is the history, then, that supplied the context for when representatives of the Penobscot Nation entered into the treaty with officials from Massachusetts -- Maine still not yet being a state in its own right -- that serves as the MIA's specific reference point: the one signed on June 29, 1818. It, too, was made without congressional approval and in apparent contravention of the Nonintercourse Act. But, the treaty was sealed by the payment of four hundred dollars, in addition to "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 [the receipt of certain similar articles] . . . every year, so long as they shall remain a nation, and reside within the commonwealth of Massachusetts." 1818 Treaty, supra, at 253, 255. And, in exchange for that seemingly minimal consideration, the Penobscot Nation ceded "all the lands they claim, occupy and possess by any means whatever on both sides of the Penobscot river, and the branches thereof, above the tract of thirty miles in length on both sides of said river, which said tribe conveyed and released to said commonwealth" by the treaty of 1796. Id. at 253-54.

This treaty, then, purported to confirm the prior limited cession of lands in the 1796 treaty and to cede more lands "on both sides of the . . . river." It did not, however, give any more of a hint that it disclaimed the Penobscot Nation's historic rights to the river than the earlier treaty had. Indeed, this treaty expressly stipulated that reserved for the Penobscot Nation to "enjoy and improve" were four townships and "all the islands in the Penobscot river above Oldtown and including said Oldtown island." Id. at 254.[47]

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[47] The text of the 1818 treaty, unlike its predecessor, did specifically provide that "the citizens of [Massachusetts] shall have a 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 through the same." 1818 Treaty, supra, at 255 (emphasis added). The parties dispute the import of this provision. According to the Penobscot Nation, it must refer to the Penobscot River. To the extent it does so, it reinforces an area-based reading given that the river does not "run through" any of the uplands but instead "run[s] through" the area comprising them, suggesting that the "lands hereby reserved" include that area. For its part, the State argues that this language was only necessary given that in the 1818 treaty

Reflective of that understanding, in a colloquy thereafter in July of 1820 between representatives of the Penobscot Nation and officials from the new state of Maine -- once Maine had separated from Massachusetts and gained statehood and was therefore to assume Massachusetts's treaty obligations -- John Neptune, representing the Penobscot Nation, again protested incursions into the river affecting the Penobscot Nation: "The white people take the fish in the river so they do not get up to us. They take them with weirs; they take them with dip-net. They are all gone before they get to us. The Indians get none." History of Penobscot County, Maine 593 (Cleveland, Williams, Chase & Co. 1882). Then-Governor of Maine William King agreed that the protest was justified, replying that the Penobscot Nation's complaint would be "attended to." XVIII

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the Penobscot Nation also reserved the four townships (which were, as we will see, later ceded to Maine). The "right to pass and repass any of the rivers, streams, and ponds, which run through any of the lands hereby reserved," Maine argues, was an "affirmative grant to non-tribal members" to pass through the waters running through those reserved townships. Maine does not point to any rivers running through those townships, much less ones that would have been important in timber transportation, as the record makes clear that the Main Stem of the Penobscot River was. But, it is true that per the 1818 treaty, the first reserved township "cross[ed] the mouth of the Mattawamkeag river." Id. at 254. Thus, the treaty provision granting a "right to pass" is not a conclusive indication that the 1818 treaty contemplated a reservation of the area comprising the islands, including their attendant waters. Nonetheless, the fact that the provision could still have meaning even if it did not refer to the waters surrounding the reserved uplands hardly eliminates the ambiguity that inheres in what was "reserved" in the 1818 treaty.

Niles' Weekly Register 563 (Baltimore, Franklin Press 1820).

The following month, on August 17, 1820, Penobscot leaders signed two more treaties. Together, these treaties released Massachusetts from its obligations under the 1818 treaty and substituted the new state of Maine in its place. But, they did not suggest that the Nation was relinquishing what it had retained to that point.

The 1820 treaty with Maine provided that the Penobscot Nation "shall have and enjoy, all the reservations made to them, by virtue of" the 1818 treaty while any "lands, rights, immunities or privileges" held by Massachusetts pursuant to the 1818 treaty would be transferred to Maine. Wabanaki Homeland, supra, at 289. And, notably, in 1821, Neptune, after having raised concerns about the Penobscot Nation's fishing rights before the Nation signed the 1820 treaty with Maine, followed up with a petition to the Maine Legislature in which he stated that

> [T]he waters of our Penobscot River was one of the greatest sources by which they obtained their [living] . . . . But . . . our brethren the white Men who live near the tide waters of our River every year built so many weares . . . . and killed so[ ]many of the fish that there is hardly any comes up the River where we live so that we cannot [c]atch enough for the use of our families . . . . We have asked the general Court at Boston to make laws to stop the white people from building wares and

> they have made Laws but they have done [us] no good . . . . [N]ow we ask you to make a Law to stop the white folks . . . .

There is no record of the Maine Legislature responding with protective legislation, as Massachusetts had done. But, in 1833, the State of Maine purchased for $50,000 from the Penobscot Nation -- again without the requisite federal approval for such a land purchase -- four townships on the banks of the Penobscot River that had been reserved for the Penobscot Nation's "perpetual use" in the prior treaties.

3.

There were no more "agreements" between the Penobscot Nation and the States of Massachusetts and Maine, and such developments as occurred over the course of the next century are not especially clarifying with respect to the issue that is our concern. But, to the extent they do shed light, they underscore how difficult it is to find any clear indication that the parties to any of the past agreements understood the Penobscot Nation to have given up all claims to sovereign rights in the waters at issue.

The State of Maine did pass legislation over the course of these years that authorized the construction and operation of log booms, piers, and dams in the Main Stem of the Penobscot River, and lumber companies built lumber mills on and over parts of the Main Stem during that same time. See Penobscot Nation, 151 F. Supp. 3d at 201-02. It is also undisputed that this construction happened without any lease or other grant from the Penobscot Nation.

But, the record shows that the Penobscot Nation itself signed leases for dam and mill owners to build on some of the islands near Old Town. And, those leases reserved fishing rights for the Nation and required that fish passages be left open. The leases also specifically allowed for the grantees' use of parts of the river itself -- including "coves and eddies," river ledges, and other landmarks within the channel of the river. Throughout this period, moreover, the Penobscot continued to engage in fishing, hunting, and trapping from the river and to pass between its islands on the river.

This somewhat mixed picture of the understandings that prevailed following the treaties is in itself significant. As we have seen, the history that led up to the forging of the last treaty involving the Penobscot Nation hardly supports an uplands-only understanding of what had been reserved to the Nation up until that time. It is thus hard to see how what followed does so with any clarity.[48]

C.

In sum, the "circumstances," Alaska Pac. Fisheries, 248 U.S. at 87-89, that formed the backdrop

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[48] The Intervenors do argue that the river (or even a right to use and occupancy of its waters of a sort that the Penobscot Nation now asserts) could not have been part of what was "reserved," given that -- whatever its aboriginal holdings may once have been -- the Nation ceded the river as early as the 1713 treaty. But, the history just recounted -- including the very fact of the later treaties -- and what it shows about the parties' understandings disposes of the Intervenors' argument that the 1713 treaty can be understood to have divested the Penobscot Nation of all of its aboriginal holdings.

for the Settlement Acts suggest at a minimum that it is plausible that Congress, Maine, and the Penobscot Nation understood the Nation to have "reserved . . . by agreement," through the limited (but substantial) cessions of lands "on both sides of the . . . river" that were made, the Nation's use of the river and its historic sovereign rights with respect to fishing, trapping, and hunting therein. See Winans, 198 U.S. at 381. Thus, these circumstances support -- even if they do not compel -- an understanding of the phrase "islands in the Penobscot River reserved to the Penobscot Nation by agreement" in the MIA's definition of the "Penobscot Indian Reservation" that would include the area comprising the islands and not simply the uplands.

Given that such an understanding results in a reading of § 6203(8) of the MIA that is just as inclusive of the waters in that area as is the "reservation[]" to which the majority agrees that § 6207(4) of that same statute refers, I can see no reason why we would not then be confronted at the very least with an ambiguity in § 6203(8) to which the Indian canon would apply. And, if we were to apply that canon, we then would be required to construe the term that it purports to define -- "Penobscot Indian Reservation" -- in the waters-inclusive, area-based manner that the Penobscot Nation favors, with all the follow-on consequences that would entail under the Settlement Acts.

In fact, for that not to be the case, either of two things would have to be true. The legislative history of the Settlement Acts would have to compel us to conclude what the statutory text itself does not: that the definition of the "Reservation" in § 6203(8) of the

MIA was intended to encompass only the uplands of the islands at issue. Or, alternatively, the Indian canons simply would have to have no application in this context. I thus now wind up the analysis by considering each possibility.

III.

The majority does conclude, in an independent holding, that the legislative history in and of itself compels the uplands-only reading. But, I cannot agree.

A.

The majority asserts that it would be odd for legislation purporting to settle the Maine tribes' land claims to resolve title disputes by ratifying reservations in prior agreements without explaining what the reservations in those agreements were. See Maj. Op. 28-37. After all, why would the drafters have wanted to make consideration of the complicated history necessary, especially given that the disputes concern a navigable waterway? For this purpose-based reason, the majority contends that it makes sense to read § 6203(8) of the MIA -- to which the MICSA directs the reader to find the definition of "Penobscot Indian Reservation" -- to encompass only the uplands. That reading, after all, lays to rest any disputes about what rights to the waters the Nation retains within the "Reservation" by making clear that no such waters lie within it.

This argument disregards, however, the fact that the Settlement Acts were a response to potential land claims to areas that were "ceded" by the Maine tribes -- up to two-thirds of the area of what is now the

State of Maine, see Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787 (1st Cir. 1996) -- without regard to the Nonintercourse Act. In other words, the dispute being settled was, in the main, about whether the putative treaty-based cessions of lands "on both sides of the Penobscot river" themselves were to be given legal effect. It was not about the dispute that is front and center in this litigation, which concerns only whether what had been "reserved . . . by agreement" in the treaty making those cessions of land included the area comprising the islands or only the uplands in that area.

Thus, it is hardly implausible that the drafters thought it sufficient to accomplish their chief task -- settling potentially dramatically destabilizing land claims -- to use the 1818 agreement between the Nation and Massachusetts as the reference point. That agreement clearly established that land "on both sides of the . . . river" had not been "reserved" by the Nation. See 1818 Treaty, supra, at 253-54.

This understanding, which would take the drafters to have been relying on past understandings reflected in that treaty, is even less implausible when one considers the repeated references in the legislative history that reflect comfort with the notion that the Nation would retain sovereign rights relating to hunting and fishing. Congress's final committee reports provide that the MICSA would extinguish the Nation's land claims resulting from the purported invalidity of the land transfers. But, the reports also expressly describe the settlement as providing 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 by them." S. Rep. No. 96-957, at 18 (emphasis added); H.R. Rep. No. 96-1353, at 18. Those committee reports further explain that the Nation will "retain[] sovereign activities," including those relating to hunting and fishing, under the Settlement Acts. S. Rep. No. 96-957, at 15; H.R. Rep. No. 96-1353, at 15.

It is also notable that the legislative history does not evidence a legislative understanding -- let alone a clear one -- that the Nation was relinquishing those rights in the waters relating to hunting and fishing that it had long claimed as an aspect of its sovereignty. To the contrary, Congress heard testimony from members of the Penobscot Nation about the waters' importance, including testimony from a tribal member who relied on food sources from the river to feed her children, explaining that her son "fishes my islands," meaning that he fished from a canoe in the waters surrounding the islands. And though members of the Penobscot Nation testifying before Congress expressed concerns that settlement provisions might be construed to destroy the Nation's "sovereign rights," in particular those related to hunting and fishing and the Nation's culture, the committee report for the MICSA called these concerns "unfounded" and emphasized that the hunting and fishing provisions in the MIA recognized the Penobscot Nation's "inherent sovereignty" and were "examples of expressly retained sovereign activities." S. Rep. No. 96-957, at 14-15; H.R. Rep. No. 96-1353, at 14-15.

That part of the legislative history is important for present purposes. As I have explained, § 6207(4) of

the MIA, in securing sustenance fishing rights to the Penobscot Nation "within the boundaries" of its "Indian reservation[]," is plainly referring to the area comprising the islands in the Penobscot River that are the very same "islands" referenced in § 6203(8) of the MIA. That being so, it is hard to see how this part of the legislative history supports the construction of § 6203(8)'s definition of the "Reservation"'s boundaries, landlocked as it would make them, that Maine urges us to adopt.

But, the case for rejecting Maine's position regarding the legislative history is even stronger when one considers what that history most conspicuously does not disclose -- any suggestion whatsoever that the "reservation[]" referenced in § 6207(4) of the MIA is not the "Penobscot Indian Reservation" defined in § 6203(8) of that same statute. That is quite an omission if -- in order to clarify things in the face of title disputes -- the legislature must have intended for the latter definition to be an uplands-only one and the former to be a waters-inclusive one.

The omission becomes all the harder to explain -- if one accepts the majority's view of the definition in § 6203(8) of the MIA -- when one considers still other features of the legislative history. Those features underscore the reasons that I have already given to doubt that the drafters of the MIA meant to refer to two distinct Penobscot Nation reservations rather than merely one in two different provisions of that statute.

For example, in a public hearing held by the Maine Legislature's Joint Select Committee on Indian Land Claims in March 1980, the tribes' attorney

explained that the exercise of "tribal powers in certain areas of particular cultural importance such as hunting and fishing" was an issue that had been important for the State to understand in negotiations. See Hearing on L.D. 2037 Before the Joint Select Comm. on Indian Land Claims, 109th Leg., 2d Sess. 25 (Me. 1980). The Committee heard concerns about hunting and fishing from non-tribal members, too. A 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 "could spell danger to the salmon." Id. at 117-18. But, significantly, rather than refuting this premise, Maine's Deputy Attorney General 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 . . . .

Id. at 55-56 (emphases added).

It is also worth noting that those aspects of the legislative history suggesting that the Penobscot Nation did not have fee title to the submerged lands are not inconsistent with the idea that the Settlement Acts codified the use- and occupancy-based hunting and fishing rights that the Penobscot Nation had long enjoyed, which are all the Nation must establish that it reserved to prevail in the present litigation. See

Winans, 198 U.S. at 381; Cohen's Handbook § 18.01 (explaining that aboriginal title includes "component hunting, fishing, and gathering rights"); id. § 15.02 ("An Indian reservation is a place within which a tribe may exercise tribal powers, but not all land within a reservation may belong to the tribe."). And, according to the Penobscot Nation's negotiators, the Penobscot Nation had maintained through the negotiations that it retained aboriginal title to the waters of the Main Stem in the area comprising the islands referenced in § 6203(8).

True, the stated purposes of the MICSA include "remov[ing] the cloud on the titles to land in the State of Maine resulting from Indian claims" and "clarify[ing] the status of other land and natural resources in the State of Maine." 25 U.S.C. § 1721(b). True as well, the U.S. Department of the Interior's Federal Register notice describes the MICSA as "extinguish[ing] any claims of aboriginal title of the Maine Indians anywhere in the United States and bar[ring] all claims based on such title." Extinguishment of Indian Claims, 46 Fed. Reg. 2390, 2391 (Jan. 9, 1981).

But, as I have explained -- and as the extensive history that I have reviewed makes clear -- the Settlement Acts responded to aboriginal title claims to the land that was ceded in the eighteenth- and nineteenth-century agreements. See 25 U.S.C. § 1721(a)(1). There is no indication that the Settlement Acts were intended to upset use- and occupancy-based sovereign rights in those areas not previously ceded in the suspect agreements -- at least insofar as those rights are no broader than the ones

recognized in the Settlement Acts themselves as ones that the Nation would retain in its "Reservation." To the contrary, the focus in the federal legislative history on the Penobscot Nation's retained sovereignty with respect to activities that could only occur within the waters in question -- such as, for example, the activity that is the subject of § 6207(4) itself -- suggests that upsetting those rights was not the intended result.

The rights that the Penobscot Nation claims, moreover, are a function of the substantive provisions of the Settlement Acts themselves. The federal legislative history just canvassed shows that these provisions of those Acts -- which ensure that the Penobscot Nation can exercise within its "Reservation" the rights related to the taking of wildlife that it claims in this litigation -- are best understood as encompassing the area in which the Nation has long exercised these rights.

Thus, the legislative history does not support the purpose-based assertion that the majority makes about why the definition of "Penobscot Indian Reservation" in § 6203(8) of the MIA must be construed to exclude altogether everything but the uplands. Rather, that legislative history at most merely underscores the ambiguity that arises from the reference in that provision to what was "reserved . . . by agreement," given the waters-inclusive reference to the "Penobscot Nation . . . Indian reservation[]" in § 6207(4) of that same statute.

In sum, a purpose to clear title to lands and natural resources that have been transferred cannot itself reveal what was understood to have been transferred, and the Penobscot Nation seeks here only

to ensure that the Nation will enjoy the same sovereign rights over taking wildlife in the waters in question that the Settlement Acts plainly give the Nation throughout the Penobscot Indian Reservation. I thus do not see how a recognition of those limited rights can be said to be beyond the comprehension of the drafters of these measures when the legislative history reveals the repeated contemplation of just such recognition.

B.

The majority does also conclude, less generally, that the legislative history shows that the legislature deliberately included only the uplands of the islands in the "Reservation." See Maj. Op. 35 n.17. But, here, too, the evidence is weaker than advertised.

In a "background" paper that the U.S. Department of the Interior included in a hearing submission to the House Committee on Interior and Insular Affairs, the Penobscot Nation was described as having a "4,000 acre reservation on a hundred islands in the Penobscot River." Had the entire Main Stem been included, bank-to-bank, the majority concludes, the reservation would be 13,760 acres. Maj. Op. 35 n.17.

In support of its contention that this point is a salient one, the State cites Idaho v. United States, 533 U.S. 262 (2001). There, the Court used as evidence of the intent to include submerged lands in a reservation the fact that the acreage description in a government survey purporting to define the reservation's total area "necessarily included" submerged lands. Id. at 267, 274. As the Penobscot Nation and the United States point out, however, citing examples from the

website for the Maine Department of Inland Fisheries and Wildlife, "it is not unusual to specify only upland acreage when adjacent submerged lands also are within the boundaries." Therefore, there is a weaker inference to be drawn from an acreage description that excludes submerged lands than from one that necessarily includes submerged lands. Cf. id. at 267. Moreover, in Idaho the acreage description came from a formal survey of the reservation that was undertaken by the United States for the very purpose of setting the reservation boundaries and "fix[ing] the reservation's total area." Id. The brief reference to acreage included in the hearing submission, in contrast, cannot bear the weight the majority or the State would put on it.

Similarly, a map was provided to the Senate in the run-up to the MICSA's enactment that shaded only the islands and not the river in the color denoting the "Reservation."[49] But, that map was introduced into the record for purposes of identifying the newly acquired trust lands under the settlement, not to define the boundaries of the existing reservation. See Proposed Settlement of Maine Indian Land Claims: Hearing on S. 2829 Before the S. Select Comm. on Indian Affairs, 96th Cong. 282 (1980) (statement of Sen. William S. Cohen, Member, S. Comm. on Indian Affairs) (requesting a "map of the State of Maine designating the areas that are now under

[49] The District Court found that pursuant to the map's key, the islands in the Main Stem were shaded in red, which represented "Indian Reservation," and the Main Stem was shaded in white, which represented "river and lakes adjacent to settlement lands." Penobscot Nation, 151 F. Supp. 3d at 194, 218.

consideration for sale" and stating that such a map "should become a part of the record as far as what areas are being contemplated for sale and what range of parcels are being contemplated for purchase"). Particularly in these circumstances, the shading hardly indicates that Congress understood the Penobscot Nation to retain no reservation-based rights in the Main Stem.

C.

The post-enactment history of the Settlement Acts reinforces this same understanding. It cannot reveal a legislative meaning not otherwise indicated, but it does usefully give some indication of the understandings that prevailed at the time of the Settlement Acts' passage. Those understandings comport with the understanding of the "Reservation" boundaries that the Penobscot Nation favors. See Alaska Pac. Fisheries, 248 U.S. at 89-90 (citing, as support for the conclusion that the reservation included the adjacent waters, the fact that "the statute from the time of its enactment has been treated . . . by the Indians and the public as reserving the adjacent fishing grounds as well as the upland, and that in [post-enactment] regulations prescribed by the Secretary of the Interior . . . the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands"); cf. McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020) (explaining that the Supreme Court has recognized "that '[e]vidence of the subsequent treatment of the disputed land'" may play a limited interpretive role "to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption"

(alteration in original) (quoting Nebraska v. Parker, 577 U.S. 481, 493 (2016))).

1.

Consider that the Penobscot Nation began operating its own warden service in 1976, Penobscot Nation, 151 F. Supp. 3d at 196-97, largely through federal funding from the U.S. Department of the Interior for the Nation's exercise of governmental authority on "Reservation lands and waterways,"[50] and that the Nation continued doing so after the Settlement Acts were enacted. In fact, since 1982, Penobscot Nation wardens have been cross-deputized under state law to "have the powers of [state] game wardens" within "Penobscot Indian Territory." Me. Rev. Stat. Ann. tit. 12, § 10401; 1981 Me. Laws 1886, 1887; see also Penobscot Nation, 151 F. Supp. 3d at 197.

To be sure, in the years following the Settlement Acts, Maine and Penobscot Nation game wardens collaborated on some patrols and enforcement actions in the Main Stem. Penobscot Nation, 151 F. Supp. 3d at 197. According to affidavits of state game wardens, those wardens enforced Maine

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[50] The Penobscot Nation has consistently received federal funding related to the river. For example, in 1993, the Penobscot Nation received funding for a water resources management program that included monitoring of the Penobscot River. Penobscot Nation, 151 F. Supp. 3d at 212. In 1999, the Nation received funding to educate tribal members on the risks of consuming contaminated fish, in light of the fact that tribal members continued to rely on the river to feed their families. Id. And, in 2007 and 2010, the Nation again received funding for game warden patrols, acknowledging that the tribe patrolled in the Penobscot River. Id.

fish and game laws against tribal and non-tribal members. But, the record shows, in 1990, when state game wardens responded to a report involving a tribal member deer hunting from a boat in the Penobscot River in violation of state hunting regulations, the state wardens contacted Penobscot Nation wardens, and the tribal member was ultimately turned over to Penobscot Nation wardens for prosecution in the Tribal Court after an initial joint investigation.[51] See id. at 209. Thus, this aspect of the post-enactment history accords with a conclusion that the Settlement Acts were not understood to have conferred to Maine full authority with respect to hunting, trapping, and fishing in the relevant waters, such that the Nation was divested of them.

2.

Other post-enactment developments and representations by state officials support this same conclusion. For example, eight years after the Settlement Acts were negotiated and went into effect, an issue arose as to the application within the river of state-wide rules against the use of gill nets to harvest fish. See id. at 199. Members of the Penobscot Nation wanted to use gill nets to fish in the Penobscot River, within what they understood to be part of the "Reservation," as was consistent with the Nation's

[51] The Penobscot Nation's exercise of jurisdiction suggests that the river was understood to be within the "Reservation" in part because the Settlement Acts gave the Penobscot Nation exclusive jurisdiction over certain criminal offenses committed on the Penobscot Indian Reservation by a tribal member. The Tribal Court would not have had jurisdiction over a crime not committed on its reservation. See 1989 Me. Laws 249-50; 1979 Me. Laws 2404.

traditional practices and permitted under its own regulations.

In a letter dated February 16, 1988, Maine Attorney General James E. Tierney opined that the Penobscot Nation's use of gill nets was permissible:

> In the opinion of this Department, . . . [p]ursuant to Section 6207(4) of the [MIA], members of the . . . Penobscot Nation are authorized to take fish, within the boundaries of their . . . Indian Reservation[], and "notwithstanding any rule or regulation promulgated by the Commission or any other law of the State," so long as the fish so taken are used for "their individual sustenance."

Letter from James E. Tierney, Att'y Gen. of Me., to William J. Vail, Chairman, Atl. Sea Run Salmon Comm'n (Feb. 16, 1988). There was notably no indication in this response that the "Indian Reservation[]" to which he referred was not the one defined in § 6203(8). Indeed, the capitalized reference to the "Reservation" appears to reflect the understanding that they were the same.

Similarly, in the mid-1990s, Maine issued permits for eel pots in waters of the Penobscot River that provided that "[t]he portions of the Penobscot River and submerged lands surrounding the islands in the river are part of the Penobscot Indian Reservation and [gear] should not be placed on these lands without permission from the Penobscot Nation." Penobscot Nation, 151 F. Supp. 3d at 199. Again, it is hardly logical to think that this reference to the "Penobscot

Indian Reservation" meant something different than that term as defined in § 6203(8) of the MIA.

In fact, the Penobscot Nation maintained in the years following the Settlement Acts its own permitting system and issued permits to non-tribal members for duck hunting and eel trapping in the relevant waters. And, the Penobscot Nation passed regulations concerning tribal members' sustenance fishing in those waters.[52]

Illuminating, too, are the disputes that arose in the 1990s over the relicensing of hydro-electric dams on the Penobscot River. In proceedings before the Federal Energy Regulatory Commission ("FERC"), Bangor Pacific Hydro Associates and various papermaking companies with facilities located in or near the river asserted the position that the river was outside the reservation boundaries. Then-Chair of the Maine Indian Tribal-State Commission Bennett Katz, who was Majority Leader of the Maine Senate at the time of the MIA's passage, explained in a letter to FERC that this was "the first time these particular arguments ha[d] come to the attention of the Commission" and that, "[t]o [his] knowledge, the State ha[d] never questioned the existence of the right of the Penobscot Indian Nation to sustenance fishing in the Penobscot River." Letter from Bennett Katz, Chair, Me. Indian Tribal-State Comm'n, to Lois Cashell, Sec'y, Fed. Energy Regul. Comm'n (Nov. 1, 1995). Moreover, he stated that he could not "imagine that [such a restrictive] meaning was intended by [his]

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[52] Consistent with the Settlement Acts, the Penobscot Nation is not seeking here to regulate fishing other than tribal members' sustenance fishing.

colleagues in the Legislature who voted in support of the Settlement." Id.

Indeed, the State of Maine subsequently expressed its view in a brief to FERC that "Penobscot fishing rights under the [MIA] exist in that portion of the Penobscot River which falls within the boundaries of the Penobscot Indian Reservation," which "may generally be described as including the islands in the Penobscot River above Old Town . . . and a portion of the riverbed between any reservation island and the opposite shore." State of Maine's Response to the Department of the Interior's April 9, 1997 Filings Pursuant to Sections 4(e) and 10(e) of the Federal Power Act at 12-13, Project No. 2534 (FERC May 29, 1997). So, there, too, the equation between the "reservation[]" referenced in § 6207(4) of the MIA and the "Reservation" referenced in § 6203(8) of that statute seemed to be one that came naturally even to Maine itself.

3.

There is still more evidence from these years that it was not thought that the Settlement Acts defined an uplands-only "Reservation." Also in the 1990s, the Penobscot Nation began lobbying the U.S. Environmental Protection Agency ("EPA") for water quality standards that would protect the Nation's right to sustenance fish in the Main Stem. Penobscot Nation, 151 F. Supp. 3d at 207. Maine's Attorney General wrote to the EPA asserting that the sustenance fishing rights established in the Settlement Acts did "not guarantee a particular quality or quantity of fish." Letter from Andrew Ketterer, Att'y Gen. of Me., to John DeVillars, Reg'l

Adm'r, Env't Prot. Agency (June 3, 1997). But, notably, in the course of that letter, he did not reject the view that the Nation had rights in the waters owing to its rights to the islands, stating that "[a]lthough there may be a certain portion of the river bed that goes along with the ownership of an island in the river, . . . ownership of a portion of the bed does not constitute ownership of the 'river.'" Id.

There is, finally, a 2006 brief to this Court involving Maine's environmental regulatory authority concerning discharges into the river. Maine acknowledged there that there was "strong[] disagree[ment]" between the parties -- the State, the Penobscot and Passamaquoddy Tribes, and the federal government -- concerning the "boundaries of Indian Territory in the Penobscot basin." Brief of Petitioner State of Maine at 58, Johnson, 498 F.3d 37 (Nos. 04-1363, 04-1375). But, in that same litigation, the State made clear that it viewed the definition of the "Reservation" in the Settlement Acts as including the "accompanying riparian rights" to the islands that "have not been transferred." Brief of State of Maine as Intervenor-Respondent at 3 n.2, Johnson, 498 F.3d 37 (Nos. 04-1363, 04-1375). This statement, though not a concession of the point in dispute here, is also in no sense a clear embrace of the uplands-only view now said to be crystal clear in § 6203(8).

In fact, it was only when, around 2012, the Maine Commissioner of Inland Fisheries and Wildlife and the Colonel of Maine's Warden Service requested an opinion from the Maine Attorney General addressing the "respective regulatory jurisdictions" of the Penobscot Nation and the State "relating to

hunting and fishing on the main stem of the Penobscot River" that the uplands-only view became Maine's in any clear way. Att'y Gen. of Me., Opinion Letter (Aug. 8, 2012). In a formal opinion issued on August 8, 2012, Maine Attorney General William Schneider adopted the interpretation of the MIA that Maine had previously disavowed when it was proposed by the paper companies in the FERC proceedings -- 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." Id.

D.

In sum, neither the text of the Settlement Acts nor their pre- or post-enactment history requires the conclusion that the definition of the term "Penobscot Indian Reservation" in the Settlement Acts unambiguously excludes the waters at issue, such that the rights in the "Reservation" under the Settlement Acts themselves that are actually at issue in this case do not extend to those waters. It is hardly unambiguous, therefore, that the Settlement Acts' definition of "Penobscot Indian Reservation" excludes the waters at issue, such that the Nation's sole right in them is conferred by § 6207(4) and that the Nation has no rights in them in consequence of what was "reserved to the Penobscot Nation by agreement." For, as I have explained, "islands in the Penobscot River reserved to the Penobscot Nation by agreement" is not itself a term with a fixed and readily identifiable geopolitical meaning. See Amoco Prod. Co., 480 U.S. at 547 & n.14. And, as the Supreme Court has made clear, the use of terms like "lands" and "islands" in a larger phrase does not, depending on context,

necessarily exclude attendant waters. See, e.g., Alaska Pac. Fisheries, 248 U.S. at 89; Hynes, 337 U.S. at 110-11.

IV.

The Penobscot Nation urges us, not unpersuasively, to conclude that the history (legislative and otherwise) itself suffices to demonstrate that its reading of § 6203(8) of the MIA -- given the ambiguity inherent in that provision's text and the text of § 6207(4) of that same statute -- is superior. But, the Nation recognizes that we need not do so for it to win.

"When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in . . . Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" County of Yakima, 502 U.S. at 269 (third alteration in original) (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)); see also Antoine v. Washington, 420 U.S. 194, 199 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice."). Thus, the Nation contends, and I agree, that the canon itself suffices to resolve this case in the Nation's favor.

Maine does argue that the Indian canons cannot apply here, even if the relevant statutory provision defining the "Reservation" is not itself clear. But, in light of this Court's opinion in Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999), I cannot agree.

See id. at 709 (construing the phrase "internal tribal matters" in the MIA and noting that it is a "general principle[] that inform[s] our analysis of the statutory language" that "special rules of statutory construction obligate us to construe 'acts diminishing the sovereign rights of Indian tribes . . . strictly,' 'with ambiguous provisions interpreted to the [Indians'] benefit'" (third and fourth alterations in original) (first quoting Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 702 (1st Cir. 1994); and then quoting County of Oneida, 470 U.S. at 247)); see also Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 16 & n.2 (1st Cir. 1993) (noting that the Rhode Island Indian Claims Settlement Act and its enacting legislation "would have to be construed to afford the Tribe the benefit of any ambiguity on the waiver-abrogation issue"); Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82, 92-93 (2d Cir. 2000) (construing the Connecticut Indian Land Claims Settlement Act to the benefit of the Mashantucket Pequot even though "the Tribe today is at no practical disadvantage" because the Supreme Court has applied the Indian canon even "where Indians were at no legal disadvantage").[53] Indeed, the majority does not

[53] Maine and the Intervenors argue that specific provisions of the MICSA providing 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 . . . [or] Indian lands . . . , and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine . . . shall apply within the State" preclude application of the canon of construction. 25 U.S.C. § 1725(h); see also id. § 1735(b) (providing that "[t]he 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

dispute that the canon would apply in the event of an ambiguity. See Maj. Op. 39-40.

Nor do Maine's and the Intervenors' arguments that, even if the Indian canon does apply, the canon against conveying navigable waters must take precedence over it change the result here. Even if the navigable waters canon could apply to the circumstances here, where the federal government never held title to the river in trust for a state, there is no apparent tension between the idea that the state could hold "title" in the manner contemplated by the navigable waters canon and the notion that at the

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laws of the State of Maine . . . shall not apply within the State of Maine" unless specifically provided). Even assuming that Fellencer did not resolve this issue, the claim is unavailing. The Senate Report supports the view that these provisions apply to statutes enacted and rules promulgated and not to interpretive principles. See S. Rep. No. 96-957, at 30-31 (citing as examples the Indian Child Welfare Act and the federal Clean Air Act). Moreover, the MICSA's baseline is that "the laws and regulations of the United States which are generally applicable to Indians . . . shall be applicable in the State of Maine." 25 U.S.C. § 1725(h). Although Maine argues that the case "has direct jurisdictional implications for the State" and that applying the canons would affect Maine's "jurisdiction" -- a term that the Senate Report suggests is to be "broadly construed," S. Rep. No. 96-957, at 30 -- there is a difference between an interpretive principle that could result in jurisdictional implications and statutes that control how state jurisdiction applies in Indian country. Nothing in the legislative history clearly reaches the former as opposed to merely the latter. The reference to Bryan v. Itasca County, 426 U.S. 373 (1976), in the Senate Report is no different. It makes clear that the MICSA's reference to "civil jurisdiction" should not be construed to mean only jurisdiction over private civil litigation (i.e., adjudicative jurisdiction) but could also include the state's legislative jurisdiction. But, it does not speak to whether interpretive canons fall within § 1725(h) of the MICSA.

same time the Penobscot Nation has what it claims here: use- and occupancy-based rights. Thus, as an ambiguity-resolving principle, the navigable waters canon can do little work here.[54]

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[54] To the extent Maine and the Intervenors make a separate argument that states presumptively gain title to beds of navigable waters upon statehood, see, e.g., United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283-84 (1997), and thus that by the time the treaties were signed the Penobscot Nation no longer had any rights in the waters to reserve, there is no reason to think the drafters of the Settlement Acts incorporated the understanding that what was "reserved" never could have included the river for this reason and thus intended § 6203(8) of the MIA to refer only to uplands. Even if one thought there was some legal reason that the Nation could not have reserved rights in an area that included the waters in the treaties, notwithstanding an intent on the part of the treaty parties to permit the Nation to make such a reservation, the better understanding of the Settlement Acts is that Congress meant to incorporate the understanding of the treaty parties at the time. And, as I have noted, the evidence from the history shows that the treaty parties understood what had been reserved by the Nation at each juncture to include rights in waters and fisheries. In addition, the 1818 treaty itself granted to citizens of the Commonwealth the "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." 1818 Treaty, supra, at 255. Whether or not that portion of the treaty refers to the Penobscot River, it at the least demonstrates that it was not the parties' understanding that the Penobscot Nation had no claim to any such navigable waters once Massachusetts became a state. Thus, especially when § 6207(4) of the MIA is brought into view, Maine and the Intervenors' contention about states presumptively gaining title to the beds of navigable waters upon statehood does nothing to clear up the ambiguity in the text that is plainly there and thus does nothing to preclude the application of the Indian canon.

The Indian canon, in contrast, is responsive to the interpretive question that we are left with. This canon is "rooted in the unique trust relationship between the United States and the Indians," Fellencer, 164 F.3d at 709 (quoting County of Oneida, 470 U.S. at 247), and that relationship applies here, see Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 373 (1st Cir. 1975). There is, moreover, especially good reason to think that a construction in the Nation's favor is in fact a fair proxy for Congress's intent, given the particular role Congress was playing in settling these land claims in the face of assertions that the Nonintercourse Act had been violated.

V.

Notwithstanding the differences between Congress's reference to the "body of lands known as Annette Islands" in the statute at issue in Alaska Pacific Fisheries and the Settlement Acts' way of referring to these islands here, this much is -- at the very least -- clear: § 6203(8) of the MIA does not compel an uplands-only reading, whether it is considered in the context of the Settlement Acts as a whole or in the context of the circumstances that led to their enactment. We thus are obliged to resolve the ambiguity in the Penobscot Nation's favor. For, while the Settlement Acts confirm that the Penobscot Nation gave up any claim (aboriginal or otherwise) to the lands with which they had parted through earlier treaties made without the required federal authorization, I cannot see how we could say that it is equally plain that the text of those Acts also confirms that the Acts do not protect the Penobscot Nation's

historic rights to the area comprising the islands that the Nation now claims in this appeal. Before we conclude that a statute purporting to honor what this riverine Nation had "reserved . . . by agreement" in fact deprives it of the sovereign rights that it had long enjoyed in the river that defines it, we must have a clearer indication than is present here that the statute was intended to have such a dramatic and potentially devastating consequence.

Accordingly, I respectfully dissent.

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 STATE 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

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 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

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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

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.

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

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requested in their counterclaims against the Nation. Given our disposition, we do not reach these questions.

[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.

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 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

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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. Ca rcieri, 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.

> 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 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."

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[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.

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 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

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[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.

[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

clear and 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

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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. 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.

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 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]

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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.").

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 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

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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.

[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).

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 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 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. 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

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[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.

(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.

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 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]

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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

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 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)).

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.

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

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[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.

-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

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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 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.

waters," 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.

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

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[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)).

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

> [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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[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 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)

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 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

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(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.")

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 today, the majority gives short shrift

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[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; 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

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.

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

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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.

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 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

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[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).

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.

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[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).

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 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

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

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 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

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 of

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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 are in.

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.

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

[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.

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 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

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[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.

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 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

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[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).

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 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, unlike the Territory, contained "reservation waters retained by the [Penobscot and Passamaquoddy] tribes under the [MIA], based on

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[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).

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, 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);

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[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.

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

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

[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

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. 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

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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.

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 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.

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

[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.

§§ 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 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,

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30 M.R.S.A. § 6207(3).

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]

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

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 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,

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intend to interfere with the Nation's sustenance fishing) is calling the Nation's sovereignty into question.

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.

[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.

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 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]

[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

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

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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

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 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:

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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).

[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.

[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 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.

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[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.

(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.)

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, 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:

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[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).

> 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]

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[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

(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 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

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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.

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

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[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).

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 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.)

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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,

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

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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.

similar land transactions that had occurred since 1790.[15]

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

[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.

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

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[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.

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 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]

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[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

(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

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(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.

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 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]

[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

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 "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

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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.

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 (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

[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.

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

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[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

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 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.

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matters, this case could not have been resolved based on the present cross-motions.

(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, 6-8; Georgia Decl. (ECF NO. 148-2) ¶¶ 4, 12; Wilkinson Aff. (ECF No. 118-6) at PageID #

[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).

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

[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.

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]

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

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[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 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.

> 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.

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:

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[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.

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. 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

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[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.

> 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.

[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.

(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 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

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[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.

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.

. . . .

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

[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.

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 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 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

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[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.

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 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

[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).

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]

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[31] In this same FERC proceeding, the Penobscot Nation also made a written submission asserting that the Great

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,

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Northern project in fact "occup[ied] lands of the Penobscot Indian Nation." See Jt. Ex. 110-20 (ECF No 110-20) at PageID # 6243.

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]

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[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

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.)

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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.

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.)

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[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

[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.

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; 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,

[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.

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:

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 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

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[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).

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.

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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).

(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 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.

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[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).

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

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[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.

that the waters of the Main Stem have been treated and regulated like all other portions of the Penobscot River since Maine became a state in 1820. 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

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[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.

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.

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,

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[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).

unless 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

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[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).

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.)

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

[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.

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

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[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.

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.

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]

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[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

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

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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.

cannot adopt an interpretation of section 6207(4) that diminishes or extinguishes the Penobscot 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 Main, 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

[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.

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

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

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

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

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 16th day of December, 2015.

United States 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.

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.

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

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 (1st 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.
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Pratik A. Shah
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Kaitlyn E. Klass
Gerald Donohue Reid

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.

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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

Subchapter II. Maine Indian Claims Settlement

§ 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

Subchapter II. Maine Indian Claims Settlement

§ 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

***

(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.

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 &	Wm. Shepani
delivered	Nathan Dane

in the presence of us and of the Tribe.	Daniel Davis
Jonathan Dowder	Joseph Orono
W. Synmes	Squire Ossang his mark
Seth Catlin	Nectum Bewit his mark
Robt. Treat	Joseph Peace his mark
Nicolas	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.

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 files, 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.)
his
John ⋈ Etien, Governor. (Seal.)
mark.
his
John ⋈ Neptune, Lt. Governor. (Seal.)
mark.
his
Francis ⋈ Lolon. (Seal.)
mark.
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 our said tribe, whether the same arise from any writing of indenture, treaty or otherwise at present existing ; and *whereas* said state of Maine has obtained our consent and that of our said tribe to said assumption and arrangement—now know all people to whom these presents shall come, that we whose hands and seals are hereunto affixed, for and in behalf of ourselves and the Penobscot tribe of Indians, so called, to which we belong and which we represent, in consideration of the premises, do hereby release to said commonwealth of Massachusetts all claims and stipulations of what name or nature soever, which we or all or any of us or our said tribe have on or against said commonwealth, arising under any writing of indenture, treaty, or otherwise, existing between said commonwealth of Massachusetts, and said Penobscot tribe of Indians.

In witness whereof, we the undersigned chiefs, captains and men of said tribe, representing the whole thereof, have hereunto set our hands and seals this seventeenth day of August, in the year of our Lord one thousand eight hundred and twenty.

Governor John his ⋊ mark Etien. (L.S.)

Lieut. Governor John his ⋊ mark Neptune. (L.S.)

mark.

his
Francis ⋈ Lolon, Captain. (L.S.)
mark.

his
Captain Etien ⋈ Mithell. (L.S.)
mark.

his
Piel ⋈ Mitchel, Capt. (L.S.)
mark.

his
Sock ⋈ Sosep, Capt. (L.S.)
mark.

his
Piel ⋈ Marie, Capt. (L.S.)
mark.

his
Susian ⋈ Neptune, Capt. (L.S.)
mark.

his
Awasoos ⋈ Mitchell, Capt. (L.S.)
mark,

his.
John ⋈ Ossou, Capt. (L.S.)
mark.

his
Joseph ⋈ Marie Neptune, Esq. (L.S.)
mark.

his
Joseph ⋈ Lion. (L.S.)
mark.

his

Glocian his mark Awasoos. (L.S.)

Captain Nicholas his mark Tomah. (L.S.)

Sabattis his mark Tomah. (L.S.)

Signed, sealed and delivered in presence of us:

William D. Williamson,
Joseph Treat,
Ebenezer Webster,
William Emerson,
Stephen L. Lewis,
John Blake,
Eben Webster.

PENOBSCOT, ss.—August 17, 1820. Personally appeared the aforenamed John Etien, John Neptune, Francis Lolon, Etien Mitchell, Piel Mitchell, Sock Joseph, Peil Marie, Suassin Neptune, Awasoos Mitchell, John Ossou, Joseph Marie Neptune, Joseph Lion, Glocian Awasoos, Nicholas Tomah and Sabattis Tomah, subscribers to the foregoing instrument, and severally acknowledged the same to be their free act and deed.

BEFORE ME,

WM. D. WILLIAMSON, Justice Peace.

COMMONWEALTH OF MASSACHUSETTS,
Secretary's Office, May 19, 1823.

I hereby certify that the original instrument of release from the chiefs, captains and others of the Penobscot tribe of Indians, for and in behalf of themselves and of the said tribe, of which the above and foregoing is a true copy, has been this day received and filed in this office.

ALDEN BRADFORD,
Secretary of the Commonwealth.

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

This writing, indented and made this seventeenth day of August in the year of our Lord one thousand eight hundred and twenty, by and between Lothrop Lewis of Gorham in the county of Cumberland and state of Maine, esquire, commissioner, appointed by William King, Esquire, governor of said state, by and with the advice and consent of the council, in conformity to a resolve of the legislature of said state passed the twentieth day of June, in the year of our Lord one thousand eight hundred and twenty, to treat with the Penobscot tribe of Indians in said state, 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 covenants and agreements, hereinafter mentioned, on the part of said commissioner, in behalf of said state, to be performed, kept and fulfilled, do hereby grant, sell, convey, release and quitclaim, to said state, all their, the said

tribe's right, title, interest and estate, in and to all the lands and possessions, granted, sold and conveyed by us, to the commonwealth of Massachusetts, by our writing of indenture, made with said commonwealth by their commissioners, the honorable Edward H. Robbins, Daniel Davis and Mark L. Hill, Esquires, June the twenty ninth, in the year of our Lord one thousand eight hundred and eighteen, saving and excepting, the reservations, in said indenture made and expressed. Meaning and intending hereby, to substitute and place, the said state of Maine, in the stead and place, of the said commonwealth of Massachusetts, to all intents and purposes whatsoever, as it regards said indenture last mentioned, with the said tribe of Indians, so that all and singular, the lands, rights, immunities or privileges, whatsoever, which said commonwealth of Massachusetts did, might, or could hold, possess, exercise and enjoy, under or by virtue of said indenture, or treaty, or by any other indenture, treaty or agreement whatsoever, shall be held, possessed, exercised and enjoyed in as full and ample a manner by said state of Maine.

And the undersigned commissioner, on his part, in behalf of said state of Maine, in consideration of the premises, and of the foregoing covenants and engagements of said tribe, does hereby covenant with said tribe, that they shall have and enjoy, all the reservations made to them, by virtue of said treaty of the twenty ninth of June, eighteen hundred and eighteen. And the undersigned commissioner, in behalf of said state of Maine, does hereby further covenant and agree with said tribe, that, as soon as the commonwealth of Massachusetts, shall have made

and fulfilled the stipulations on her part to be done and performed, under and by virtue of the fifth article of an act, "relating to the separation of the district of Maine from Massachusetts proper, and forming the same into an independent state," passed June the nineteenth, eighteen hundred and nineteen, then the said state of Maine, shall and will, annually, and every year, in the month of October, so long as they shall remain a nation, and reside within the said state of Maine, deliver for the use of the said Penobscot tribe of Indians, at Oldtown, the following articles ; to wit: 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 broadcloth, 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.

It being meant and intended, to assume and perform, all the duties and obligations of the commonwealth of Massachusetts, toward the said indians, whether the same arise from treaties or otherwise, and to substitute and place, the said state of Maine in this respect, to all intents and purposes whatever, in the stead and place of the commonwealth of Massachusetts, so that said tribe may have continued to them, all the payments, and enjoy all the immunities and privileges, in as full and ample a manner, under this indenture or treaty, as they could have received or enjoyed, under the said treaty, of the twenty ninth of June, eighteen hundred and eighteen, if this present treaty had not been made. Saving and excepting the two acres of land, which were by the

treaty of June twenty ninth, eighteen hundred and eighteen, to be purchased for the use of said tribe, in the town of Brewer, the performance of which, has been relinquished by the said tribe to the commonwealth of Massachusetts.

Reserving however to the government of this state, the power and right to ratify and confirm, at pleasure, the doings of said commissioner in the premises.

In witness whereof, the parties aforesaid, have hereunto set our hands and seals, the day and year first within written.

Lothrop Lewis. (Seal.)

his
John Etien, ⋊ Governor. (Seal.)
mark.

his
John ⋊ Neptune, Lt. Governor (Seal.)
mark.

his
Captain Francis ⋊ Lolon. (Seal.)
mark.

his
Captain Etien ⋊ Mitchel. (Seal.)
mark.

his
Captain Piell ⋊ Mitchel. (Seal.)
mark.

his
Sock ⋊ Sosep, Captain. (Seal.)
mark.

his

Piel ⋊ mark. Marie, Captain (Seal.)

Suasin his ⋊ mark. Neptune, Capt. (Seal.)

Awasoos his ⋊ mark. Mitchel, Capt. (Seal.)

John his. ⋊ mark. Ossou, Capt. (Seal.)

Joseph Maria his ⋊ mark. Neptune, Esq. (Seal.)

Joseph his ⋊ mark. Lion. (Seal.)

Glocian his ⋊ mark. Awasoos. (Seal.)

Capt. Nicholas his ⋊ mark. Tomah. (Seal.)

Sabattis his ⋊ mark. Tomah. (Seal.)

Signed, sealed and delivered in presence of us: }

Wm. D. Williamson,
William Emerson,

Joseph Treat,
Stephen L. Lewis,
Jno. Blake,
Eben Webster.

PENOBSCOT, ss.—August 17, 1820. Personally appeared Lothrop Lewis, John Etien, John Neptune, Francis Lolon, Etien Mitchel, Piel Mitchel, Sock Joseph, Piel Maria, Suassin Neptune, Awassos Mitchell, John Ossou, Joseph Marie Neptune, Joseph Lion, Glocian Awassos, Nicholas Tomah, and Sabattis Tomah, subscribers to the foregoing instrument, and acknowledged the same to be their free act and deed.

BEFORE ME,

WILLIAM D. WILLIAMSON, Justice Peace.