UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION,

Plaintiff and Counterclaim Defendant,

and

UNITED STATES,

Intervenor,

v.

MAINE ATTORNEY GENERAL, *et al*.,

Defendants,

and

CITY OF BREWER, *et al*.,

Intervenors and Counterclaim Plaintiffs.

Docket # 1:12-cv-00254-GZS

STATE INTERVENORS'[1] OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

[1] The State Intervenors are: 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.

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INTRODUCTION

Plaintiffs Penobscot Nation ("PN" or the "Tribe") and the United States make two primary arguments in support of their claim that the Tribe's Reservation includes the Penobscot River. (ECF Nos. 120, 128-1.) First, they assert that PN members did not think they were giving up any rights they had to the River when they entered into treaties with Massachusetts in 1796 and 1818. Second, Plaintiffs contend that the Reservation must include the 60-mile Main Stem in order to enable the Tribe to engage in sustenance fishing.

These arguments are discussed below, at §§ III and IV, respectively. Before that discussion, however, State Intervenors identify the applicable standard of review (§ I), followed by a discussion of the dispositive point that Plaintiffs never seriously address: the text of the statutes before the Court. (§ II.)[2] The last three sections of this memorandum discuss the material outside the statutory text that Plaintiffs say support their position (§ V); the United States' argument that if the Reservation does not contain the entire Main Stem, PN should still be deemed to hold rights in the halo of water around the Reservation islands (§ VI); and PN's argument that it retains aboriginal title to the River (§ VII).

Put simply, Plaintiffs seek to re-write the statutory text and ignore the modern context in which the Settlement Acts were enacted. Setting aside that nothing suggests that PN ever retained the Penobscot River under any treaty, this Court is not construing treaties from 1796 and 1818. Rather, the Court is interpreting the Settlement Acts, enacted over 160 years later. The relevant context, if extrinsic evidence is deemed relevant, is that which existed in 1980, after

[2] The state statute containing the terms of the settlement agreement, including the definition of PN's Reservation, is set forth at 30 M.R.S. §§ 6201 *et seq*. and is known as the Maine Implementing Act, or MIA. The federal statute ratifying MIA is set forth at 25 U.S.C. §§ 1721-1735 and is known as the Maine Indian Claims Settlement Act of 1980, or MICSA. Collectively, they are referred to as the Settlement Acts.

hundreds of years of control by Commonwealth of Massachusetts and State of Maine over the Tribe and the River. The text of the Settlement Acts is replete with language recognizing that contemporaneous context. Applying this proper perspective, it is clear, as a matter of law, that the Reservation consists, as MIA provides, "solely" of a specifically identified set of islands, and no portion of the Penobscot River.

I. Standard of review: The Court "strongly presumes" that the Reservation does not include State navigable waters and recognizes the long, unique history of State control over Maine tribes.

The core issue presented is whether any portion of the Penobscot River falls within the boundaries of the PN Reservation. State Intervenors believe that resolution of this issue does not require resort to material outside the text of the Settlement Acts themselves, and so filed a motion for judgment on the pleadings. (ECF No. 116.) The lack of relevance of much of the materials submitted and referenced by Plaintiffs is further addressed in a *Daubert* motion that State Intervenors file contemporaneously with this memorandum.

Additionally, in its motion, the United States repeatedly cites directly to such materials, rather than citing to its Statement of Material Facts. Under Local Rule 56, State Intervenors anticipate that the Court will not consider these assertions of fact for this reason also. *See* D. Me. Local R. 56(f) ("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.").

To the extent that the Court believes it is appropriate to go beyond the pleadings, State Intervenors agree with the other parties that this dispute should be resolved on summary judgment, and rely on the State Defendants' statements of material fact – both supporting (ECF No. 118) and opposing – as if the State Intervenors had filed those statements themselves, to support summary judgment declaring that the Reservation does not include any portion of the

Penobscot River, and that the Tribe has no authority to regulate non-Tribal members' activity in or on those waters.

Regarding applicable rules of statutory construction, Plaintiffs devote many pages to arguing that treaties and statutes must be liberally construed to the benefit of Indians. But, first, the Settlement Acts expressly provide that any special law favoring Indians does not apply to Maine tribes, including PN. MICSA, 25 U.S.C § 1722(d)(h); MIA, 30 M.R.S. § 6204; *see infra* n.10. Second, a more specific principle attaches when addressing whether an Indian reservation includes a state's navigable waters. As to this question, the Court strongly presumes against inclusion of such waters. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283-84 (1997); *Montana v. U.S.*, 450 U.S. 544, 552 (1981). As the State Defendants explain, to include the River, the Settlement Acts would have to expressly make such intent clear. (ECF No. 117 at 12-13; *see Montana*, 450 U.S. at 552.[3])

Plaintiffs also suggest that the exclusive focus of the Court's attention should be on MICSA and federal articulations. (*See, e.g.*, ECF No. 120 at 19-20.) But MICSA ratifies MIA. 25 U.S.C. § 1721(a)(8), (b)(3); § 1725(b). Hence, the contents of MIA matter, too. Indeed, the language defining PN's Reservation is contained not in MICSA, but in MIA, 30 M.R.S. § 6203(8). *See* 25 M.R.S. § 1722(i) ('"Penobscot Indian Reservation' means those lands as defined in the Maine Implementing Act."). *See generally* 25 U.S.C. § 1735(a) (MICSA

[3] In *Montana*, the Supreme Court stated:

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

450 U.S. at 552 (citations and footnote omitted).

overrides MIA only to extent there is a conflict between the two); *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 696 (1st Cir. 1994) (when a federal statute is ratifying a settlement agreement, the statute should be read to implement the agreement embodying the settlement); *see also Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 54 (1st Cir. 2006) (looking to MIA to inform reading of MICSA); *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997) ("Congress was explicit that the purpose of [MICSA] was 'to ratify [MIA]'" and MIA is "incorporated into" MICSA); *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007) (rejecting U.S. and PN interpretations of Settlement Acts, citing MIA repeatedly).

Finally, the citation by the United States (ECF No. 120 at 20 n.7) to *Hagen v. U.S.*, 510 U.S. 399 (1994) is inapposite. That decision states that a federal statute must reflect the express congressional purpose when the United States is diminishing a reservation established by an enforceable US-Indian treaty. In contrast, the Settlement Acts extinguish Maine tribal land claims and bestow federal recognition of those tribes, identifying jurisdiction over and the compromise boundaries of the resulting Indian territories and reservations. *See* MICSA, 25 U.S.C. § 1721; MIA, 30 M.R.S. §§ 6203(8), (9), 6205(2)(A).

In sum, when interpreting the Settlement Acts, contrary to Plaintiffs' position, the State's existence and concerns are highly relevant. The State was a party to the settlement agreement ratified in MICSA. For many years prior to that agreement, both the State and United States viewed the State, not the United States, as sovereign over and responsible for the care of the Tribe. *See* 25 U.S.C § 1721(a)(9) ("Since 1820 . . . the United States . . . repeatedly denied that it had jurisdiction over or responsibility for the said tribe, nation, and band."); *Johnson*, 498 F.3d at 41 ("Until the 1970s, Maine and its courts considered the tribes to be 'as completely subject to the state as any other inhabitants can be.'") (citation omitted); *Akins*, 130 F.3d at 489 ("Before

the settlement, the federal government had not formally recognized the Penobscot Nation as an Indian tribe and the State of Maine had long assumed that the Maine tribes had no inherent sovereignty.") It is within this context – hundreds of years of federal rejection of jurisdiction and exercise of State authority over Maine tribes – that the Settlement Acts were enacted.[4]

II. The Settlement Acts define the Reservation as only specifically identified islands, and not any portion of the Penobscot River.

The entirety of the definition of the PN Reservation is set forth at footnote 5.[5] As that language reflects, the Reservation consists of specifically identified land parcels including:

> 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

[4] It is for these reasons that the amici brief filed in support of Plaintiffs' position (ECF No. 131-1) goes astray. In that brief, five members – none from Maine – of the 83-member Native American congressional caucus argue that Maine tribes should be treated like other federally recognized tribes. It is beyond peradventure, however, that due to this long history of State control, the Settlement Acts do not treat Maine tribes like other federally recognized tribes. Any change in this relationship would require legislative changes by the Maine Legislature and/or Congress.

[5] 30 M.R.S. § 6203(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.

> 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. § 3203(8) (emphasis supplied).

Thus, the Reservation consists of "solely" the identified islands. No portion of the Penobscot River, whether the Main Stem or otherwise, is included in this text.

To be succinct, the Settlement Acts mean what they say. MIA is very precise about Reservation and Indian Territory boundaries, mapping parcels with pinpoint precision. (*See e.g.*, *supra*, n.5; 30 M.R.S. §§ 6505(1), (2), 6208(5).) This is wholly logical. Nowhere in their memoranda does either the Tribe or the United States explain why in 1980 the State and Congress would want to include *sub silentio* an amorphous and imprecise boundary, and, if so, why that imprecise boundary would include 60 miles of the Main Stem, rendering that portion of the River under PN regulatory control for the first time in hundreds of years. Indeed, the United States still remains vague as to where it believes this boundary is (*see* ECF No. 120 at 2 "all the parties understood the Nation's Reservation as encompassing **some or all of the Penobscot River in the area of** the islands") (emphasis supplied); *id*. at 14 (referencing unidentified "portions" of the River), while under the Tribe's reasoning, PN logically would retain aboriginal title to the entire River. (*See infra*, § VII.) Such formless and unworkable results do not arise under a plain reading of the statutory language.

In response, Plaintiffs argue that the Court should not focus on statutory text. The United States, for example, exhorts the Court (ECF No. 120 at 15-16) not to take an "antiseptic" view, and contends that the Settlement Acts are ambiguous as to whether the Main Stem is included in the Reservation because these statutes contain no express statement that "the waters surrounding

th[e] islands" (*id*. at 16) are not included in PN's Reservation. In support of this position, both Plaintiffs cite *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78 (1918). This reliance is misplaced.

In *Alaska Pacific*, the Supreme Court construed an 1891 federal treaty, enacted long before Alaska became a state. That treaty referenced a federally established reservation as the Annette Islands, which were located within a named archipelago "separated from other islands by well-known bodies of water," and the question was whether this reference incorporated archipelago waters. *Id*. at 87-88. The Court concluded, given the context, that the answer was yes. Additional contextual factors included that the United States had encouraged the tribe to emigrate to the area in 1887 to establish a self-sustaining community; "the entire dominion and sovereignty" in the area "rested in the United States"; and the fishery was to be the tribe's source of livelihood. *Id*. at 88-90.

The instant case deviates from that in *Alaska Pacific* in two important ways: text and context. First, the text of the Settlement Acts differs from the 1891 federal treaty, *e.g.*, the PN Reservation definition references "solely" the islands. The context also starkly differs, which, in turn, also affects much of the rest of the text of the Settlement Acts. *Alaska Pacific* involved construction of a pre-statehood treaty between the United States and a tribe. The instant case involves construction of a federal statute that ratifies and incorporates a state-tribal settlement. In 1891, there was no state of Alaska, and so no presumption of an exclusion of state navigable waters. As the case law cited *supra* at 3 indicates, courts presume navigable waters are not included in a reservation definition because such waters are an important incident of a state's sovereignty. *See Idaho v. U.S.*, 533 U.S. at 273, citing *Montana*, 450 U.S. at 552, and *Coeur d'Alene*, 521 U.S. at 284. Recognition of Maine's sovereignty was a particular and paramount driver of the contents of the Settlement Acts, as reflected throughout their text, which bestow

upon Maine tribes far less authority vis-à-vis the State than do ordinary treaties such as that interpreted in *Alaska Pacific*.

The question here is not what federal territory and rights were being agreed upon by the United States pre-statehood, but rather what portion of territory and what rights would be carved out of what was previously considered a state's complete sovereignty over a tribe, to be included in a reservation crafted for a tribe first federally recognized in 1979. The unlikelihood that in 1980 the State of Maine would agree, and Congress would intend, to include within a reservation a crucial thoroughfare of navigable waters that the general public had been using and over which the State and its predecessors had exercised authority since before the State's admission into the Union only heightens the strength of the already applicable presumption that no such waters are included. The many provisions in the Settlement Acts preserving State regulatory control over natural resources underscores this statutory reading, and the stark difference from the situation presented in *Alaska Pacific*.

The only other Settlement Act text cited by Plaintiffs regarding the Reservation's boundaries is MIA, § 6205(3)(A), but this statutory provision undermines Plaintiffs' argument. The provision, relating to utility property takings, states: "**For purposes of this section**, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation." *Id*. (emphasis supplied). First, if the Reservation as defined in MIA, 30 M.R.S. § 6203(8), included the River, then this provision in section 6205(3)(A) would not be needed – such land would, by virtue of that inclusion, already be contiguous to the Reservation. As both the United States and PN concede, the Court should not construe a statute in a way that renders words or phrases superfluous. (ECF No. 128-1 at 43; ECF No. 120 at 24.) Second, section 6205(3)(A) references the entire River, further underscoring that the Settlement Acts, if

only for practical reasons, did not parcel off sub-sets of the River for any reason, and were they going to, they would have been specific about identifying which parts.

In sum, focusing on statutory text, "solely" "islands" means . . . solely islands. The text is not ambiguous, and Plaintiffs cannot create ambiguity where none exists. While resort to rules of statutory construction is not needed, the applicable rules only confirm this conclusion.

III. The Treaties of 1796 and 1818 do not support the argument that the Settlement Acts include the Penobscot River within the boundaries of the Reservation.

Plaintiffs spend copious pages, including testimony from multiple professors, expounding on what they believe members of the Tribe were thinking when they entered into treaties in 1796 and 1818 with the Commonwealth of Massachusetts. (*See, e.g.*, ECF No. 120 at 31, arguing that PN "*understood the Treaty [of 1796] as* …") (emphasis in original). Much less space, however, is devoted to explaining why understandings of anyone in 1796 and 1818 would be relevant to interpreting the definition of Reservation contained in the settlement agreement among the Penobscot Nation, Passamaquoddy Tribe, and the State of Maine ratified by Congress in 1980.

Plaintiffs' argument appears to be that Congress intended MICSA to ratify the treaties of 1796 and 1818. For example, the United States argues that the purpose of the Settlement Acts was to confirm that PN "retained" the Main Stem (ECF No. 120 at 20-21), *i.e.*, to preserve boundaries as reflected in these treaties, which the United States then argues included the River because the Tribe did not specifically state that it was transferring those waters to Massachusetts.

There are at least four problems with this argument.

First, nothing in these treaties provides that any waters of the River were being retained by the Tribe. *See Treaty of 1796*, Public Document List (hereinafter "PD") Ex. 5 and 6; *Treaty of 1818*, PD Ex. 7 and 8.

Second, and relatedly, Plaintiffs' argument presumes that the parties to the treaties in 1796 and 1818 thought at that time that the River belonged to PN, and intended that the Tribe retain the River within its exclusive sovereign control. But control over the River had passed from the Indians long before those treaties were signed, and the Tribe did not consider that the River belonged to it. (*See* ECF No. 116 at 5 & n.5; ECF No. 117 at 36, 37, 40-41; ECF No. 118 at ¶¶ 128-135, 186-205; *see also State Intervenors' Mot. to Exclude Pls.' Expert Testimony* at 8-9.)

Third, under Plaintiffs' reasoning, there would be no logical basis for limiting the Reservation's boundaries to the Main Stem – yet even the Tribe appears to be conceding that its Reservation does not extend beyond that portion of the River. If the theory is that under the Settlement Acts the Reservation includes any waters that PN did not expressly transfer in a treaty, at one point the Tribe purportedly resided all along the River,[6] and no treaty ever expressly transferred the River itself to Great Britain, Massachusetts, or Maine.[7] Neither the United States nor PN explains why, if the Reservation includes any waters not expressly conveyed by the Tribe in a treaty, the Reservation would then not include the entire River.

[6] Putting aside the problematic nature of PN's expert opinions as outlined in the State Intervenors' *Daubert* motion, both historians assert that PN once occupied much more than the islands in the Main Stem of the Penobscot River: *Prins Report*, Joint Ex. 288, ECF No. 105-88 at 3716-17 ("Historically, the ancestral homeland of the Penobscot Indian Nation is more or less coterminous with the drainage area of the Penobscot River on which its families have resided since time out of mind."); *MacDougall Report*, Jt. Ex. 737, ECF No. 110-37 at 6395 ("Historically, the geography central home and seat of government of the Penobscots is the Penobscot River – 240 miles (West Branch to Bucksport). The river's drainage basin (including all tributaries) is 8,610 square miles.").

[7] Both historians proffered by Plaintiffs seek to opine, consistent with this argument, that PN thought it was retaining waters under these Treaties. Setting aside the deficiencies of these opinions under Fed. R. Evid. 702 as explained in State Intervenors' *Daubert* motion, nowhere in either historians' report do they explain why, under their theory, PN would only have retained the Main Stem as opposed to the entire River. MacDougall, for example, stated that even in 1830 the Tribe agitated for fishing access near islands off the town of Sedgwick, which is nowhere near the Main Stem. (*MacDougall Deposition Transcript* ("MacDougall Depo."), Joint Exhibit 738, ECF No. 110-38 at 6449 (Page 68:3-19).)

Finally, and most importantly, whatever the intent or import of these treaties, nothing **in the Settlement Acts** supports Plaintiffs' position. Nothing in those statutes states that their purpose is to preserve boundaries of a reservation previously established by treaties, whatever those boundaries might be. To the contrary, MICSA expressly makes clear that there was no intent to ratify earlier treaties, instead discharging any obligations of the State under them. 25 U.S.C. § 1731. Further, MIA, § 6203(8) defines the contours of the Reservation as **not** mirroring those treaties, by, *e.g.*, removing any island transferred post-1818, adding a few specified parcels (*see supra* n.5), and describing the areas transferred from the tribes as not based only on treaty, but change in possession, also, *inter alia*, dominion, or control. *See* 25 U.S.C. § 1722(n); 30 M.R.S. § 6203(13).

In defining the Maine tribes' reservations, the Settlement Acts focused on the islands identified in these two treaties and not subsequently transferred. (*See* ECF No. 117 at 14-15.) Hence, MIA, 30 M.R.S. § 6203(8) references the "islands in the Penobscot River reserved to the Penobscot nation by the agreement with the States of Massachusetts and Maine," and, equally unsurprisingly, House and Senate Reports, repeatedly cited by Plaintiffs (*e.g.*, ECF No. 128-1 at 3, 36, ECF No. 120 at 20, 55), summarize that Maine tribes will retain as their reservations those lands and natural resources reserved to them in their treaties and not subsequently transferred. *See also Johnson*, 498 F.3d at 47 n.11 ("[*s*]*ee* 30 M.R.S.A. § 6203(5), (8) (defining reservation lands as those reserved to the tribes by agreement with Massachusetts and Maine and not subsequently transferred")).[8] *See* MIA, 30 M.R.S. § 6202 (noting MIA's purpose to resolve

[8] MIA, 30 M.R.S. § 6203(8), alludes to agreements with Maine as well as Massachusetts (*see supra* n.5) because when Maine became a state, the substance of Massachusetts' relationship with the Maine tribes passed to Maine, as reflected in, among other documents, a PN treaty of 1820. *Treaty of 1820*, PD 9 and 10. The State of Maine also entered into agreement with PN after 1820, further reducing the area where PN lived. In 1833, PN reduced the area where its members lived from that limned in 1796 and 1818 when it sold four townships bordering the River to the State. (*See* ECF No. 118, ¶ 202.) Hence, as

claims and jurisdictional questions over "the **present** Passamaquoddy and Penobscot Indian reservations and in the claimed areas.") (emphasis supplied). The Tribe was living on Indian Island in 1980, and the language in section 6203(8) uses the reference to the treaties as a logical identifier, followed by more specific language not found in any of the treaties noting that "solely" the listed islands fell within the Reservation boundaries.

Dispositively, whatever PN members thought in 1818, it should be beyond dispute that no part of the Penobscot River was deemed to be under the authority of the Tribe by 1979-80.[9] In those many intervening years, Maine became a state; PN was never federally recognized, but rather deemed under the State's jurisdiction; and the State wholly controlled the River, regulating its use by everyone, including the Tribe. Plaintiffs' position ignores this indisputable post-treaty history up to the Settlement Acts, which history is reflected throughout their text.

So, for example, as noted, the Settlement Acts extinguish all tribal land claims, untethered to any treaty conveyance, but rather based on any kind of "transfer," defined as including, without limitation, "any act, event or circumstance that resulted in a change . . . dominion over, or control of land or other natural resources." 25 U.S.C. § 1722(n); 30 M.R.S. § 6203(13). Whatever any treaty provided, the Settlement Acts focus on the historical State "control" or "dominion over" the tribes. Given this history of State control, the Settlement Acts craft a State-tribal relationship unlike any other outside Maine. The Settlement Acts were not designed to invigorate any ancient treaty, or to create a tribal-state relationship similar to other

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previously noted, the area identified as forming the Reservation in 1980 is not the same as where PN members lived in 1818, and, accordingly, the Reservation definition includes only islands, not land bordering the River – and even then, the definition excludes islands transferred after 1818. So, for example, in 1828, the State authorized the Governor of the Tribe to sell Nicatow Island to the State. The definition of Reservation in the Settlement Acts thus recognizes that this island does not fall within the Reservation unless it is reacquired. (*See supra* n.5).

[9] *See State Defs.' Opp'n to Pls.' Mots. for Summ. J.* at 38-46; ECF No. 117 at 35-44; SD SMF, ECF No. 118, ¶¶ 9-10, 61-80,101-122, 127-155, 160-62, 165-85, 186-222.

federally recognized tribes. *See Johnson*, 498 F.3d at 43 ("the Settlement Acts were a compromise by which land claims were limited, federal funds paid over, and the authority of the tribes and the State redefined on a new basis, **closer to Maine's historic treatment rather than the full sovereignty asserted by the tribes**") (emphasis supplied).

The State Intervenors will leave to the State Defendants any further discussion of this history, but briefly note that even a cursory review shows that Plaintiffs' argument that PN retained sovereign control over the River after 1818 is undermined even by the materials they cite. For example, the United States cites as support for this proposition an 1835 Maine statute. (ECF No. 120 at 39.) In this statute, **the State** decided how to allocate water privileges, with Indians subjugated to whatever the State determined. Similarly, in *Stevens v. Thatcher,* also cited by the United States (ECF No. 120 at 41-42), the Court affirmed that **the State** had the authority to set territorial boundaries wherever it wanted. 91 Me. 70, 39 A. 282, 282 (1897). It is simply fruitless to claim the maintenance of any Tribal self-governing authority over any portion of the River in the teeth of cases like *Murch v. Tomer*, 21 Me. 535, 537 (1842) ("We have in express terms extended our legislation over [the tribes]; and over their territory[.]") and *State v. Newall*, 84 Me. 465, 24 A. 945 (1892) (holding that a member of Passamaquoddy Tribe was subject to state hunting and fishing laws). *See generally Great Northern Paper v. Penobscot Nation*, 2001 ME 68, ¶¶ 20-22, 770 A.2d. 574, 581; and ECF No. 116 at 3-5.

Given this longstanding state-tribal relationship of State control, in the 1980 settlement the State insisted on, among other things, retention of regulation of natural resources, including the Penobscot River. PN cites various materials that it says show intent that the Reservation be governed by federal Indian common law, and argues that the Tribes' rights within the Reservation are those of any other federally recognized tribes. (ECF No. 128-1 at 17.) Were this

true, it would only underscore why the Settlement Acts would not include any part of the River in the Reservation. It defies credulity to think that the State in 1980 was going to agree to give away regulatory control over 60+ miles of a crucial state resource used by the general public, towns, multiple paper mills, and other industries that the State had governed for 160 years. In any event, the premise of the PN's argument is wholly unsupported.

Under the Settlement Acts, the State retains control over natural resources even within Indian Territory, and the Settlement Acts do not incorporate federal common law. *See Akins*, 130 F.3d at 489 (invocation of federal Indian common law in Maine "would be inconsistent with the unique nature of the Maine settlement and the specific provisions of the Act limiting the application of federal Indian law"); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983) ("We, therefore, look not to federal common law . . . but to the statute itself and its legislative history.").[10]

[10] The Settlement Acts provide that Maine Indians and Maine Indian lands shall be subject to the laws of the State "to the same extent as any other person or lands." MIA, 30 M.R.S. § 6204. "Laws" include not only statutes but also common law. MICSA, 25 U.S.C § 1722(d). General federal Indian law applies only if such law does not (1) accord or relate to a special status or right of or to any Indian, Indian nations, tribe, or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory, or land held in trust for Indians, and (2) affect or preempt 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. MICSA, 25 U.S.C. § 1725(h). The federal trust responsibility that is part of federal Indian common law which accords a special status to Indians and would affect the jurisdiction of the State of Maine does not apply in Maine.

Thus, the only time Indian common law theoretically may be instructive is when, unlike here, the question is what constitutes an "internal tribal matter" as referenced but not defined in the Settlement Acts – and even then, the Court has been clear that Indian common law does not control. *See Micmacs*, 484 F.3d at 49 ("internal tribal matters" exception in Settlement Acts "does not invoke all of Indian common law" and finding that MICSA and the Aroostook Band of Micmacs Settlement Act "displaced any federal common law that might otherwise bear on this dispute"); *Fellencer*, 164 F.3d at 709-13 (treating Indian common law as but one factor in determining whether something is an "internal tribal matter"). *See generally State Defs.' Opp'n to Pls.' Mots. for Summ. J.* at 16-27.

In sum, the Settlement Acts create a unique state-tribe relationship unlike ordinary federal-Indian treaties, recognizing a history of longstanding State control.[11] *See generally Johnson*, 498 F.3d at 46 ("The basic jurisdictional allocation in the federal Settlement Act is contained in section 1725, which makes Maine law generally applicable to all of the Maine tribes and tribal lands save that, in the case of the southern tribes, the Maine Implementing Act controls by cross-references; and it, as already described, does no more than give those tribes municipal powers and reserves tribal authority over internal tribal matters. 25 U.S.C. § 1725(b)(1).").[12]

Thus, whatever the import of the Treaties of 1796 and 1818 when they were signed, this Court is construing the Settlement Acts of 1980, which reflect no intent to strip the State of the control it exercised over the Penobscot River for 160 years prior.

IV. That PN historically engaged in sustenance fishing is not a basis to read the Settlement Acts as including the 60-mile Main Stem within the boundaries of its Reservation.

Plaintiffs argue that the Settlement Acts must include the River within the Reservation because sustenance fishing was historically important to PN. (*See, e.g.*, ECF No. 120 at 20-25.)

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[11] Indeed, the relationship among the tribes, the State, and the federal government set forth in the Settlement Acts is so removed from an ordinary federal-state-tribal relationship that MICSA expressly bars the federal government from asserting claims on behalf of the tribes, 25 U.S.C. §1723(a)(2), (3).

[12] Contrary to PN's representation (ECF No. 128-1 at 36), the First Circuit did not state in *Johnson* that the Reservation "including any related waters in the Penobscot River claimed by the Tribe" was retained by PN in the Settlement Act. Rather, in *Johnson*, the Tribe argued that the State lacked power to regulate discharges by facilities into the Penobscot River, citing MICSA, 25 U.S.C. § 1724(h). Section 1724(h) provides that the tribes shall manage and administer the land or natural resources acquired by the secretary in trust for them under the Settlement Acts. *Johnson*, 498 F.3d at 45. Such land is identified in Section 1724(h) as land purchased for the Maine tribes by the United States with a federal fund, which land then forms a part of PN's "Indian Territory." *See* 30 M.R.S. § 6205(2)(B). Rejecting PN's argument, the Court in *Johnson* noted that the facilities at issue were not located on such federal trust land acquired with this fund, but other tribal land "**assuming the tribes' boundary claims**[.]" 498 F.3d at 47 (emphasis supplied); *see also id*. at 44 (referencing two facilities on tribal lands [that] . . . drain into navigable waters within what we **assume** to be tribal land.") (emphasis supplied). The Court held in *Johnson* that under the Settlement Acts, the State regulated discharges wherever they occurred, inside the Reservation or out, so the Court never had to address these boundary claims. *See Johnson*, 498 F.3d at 44 ("In our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected").

They note that anadromous fish are included in the definition of fish contained in MIA, 30 M.R.S. § 6207(9), and argue that the consideration Maine tribes gave under the Settlement Acts is "illusory" absent inclusion of the 60-mile Main Stem within PN's Reservation, because otherwise the Tribe's right to sustenance fishing as provided in MIA, 30 M.R.S. § 6207(4), is rendered meaningless. (*See, e.g.*, ECF No. 120 at 52.) This argument is misdirected for multiple reasons.

First, however unsatisfactory Plaintiffs in hindsight feel the bargain made in the settlement, this does not allow them to change it now in a lawsuit.

Second, MIA, 30 M.R.S. § 6207(4), has content without including the Main Stem within the Reservation. Subsection 6207(4) provides that both PN and Passamaquoddy members may "take fish, within the boundaries" of their reservations, "for their individual sustenance" subject to certain State regulatory limits.[13] The Passamaquoddy reservation includes waters, including those where anadromous fish travel. This text also provides PN with the right to take fish on their islands, which would include not just fish in ponds, but also anadromous fish from the River, as long as the Tribal member fishes from the islands themselves. So understood, this provision not only provides a substantial right, but a clear boundary for the Reservation, consistent with logic and the language of MIA, 30 M.R.S. § 6203(8).

Third, by 1980, sustenance fishing was of lesser importance than when needed to survive centuries before, both due to changes in the fishery and modern Tribal interests. As to the fishery, as of 1980, a sustenance fishery for Atlantic salmon had not existed on the River for

[13] Section 6207(4) provides:

> 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.

close to 100 years. (ECF No. 118, ¶ 124.) As to the need to look to modern Tribal interests, these are the sentiments of the Tribe itself. *Akins*, 130 F.3d at 487 (summarizing PN's position that in interpreting the Settlement Acts, the Tribe "is not a museum piece and may not be relegated to historic roles. If the Nation is truly to exercise its residual sovereignty, it must be free to act within the present marketplace and not be stereotypically restricted to ancient forms of economic support. **Narrow historical analysis, the Nation says, should play almost no role**.") (emphasis supplied).

In short, the fishery in the River is limited as a matter of modern fact, and any sustenance fishing within the Reservation has to be circumscribed by the State for environmental reasons, as expressly provided for in MIA. 30 M.R.S. § 6207(6). Any Tribal member not only has whatever rights the general public has to fish in the River, but the State historically, both before and after passage of the Settlement Acts, has regulated in a manner that gives all Maine tribes broad sustenance fishing privileges throughout the State. Thus, PN gave up no substantial right by accepting a right to sustenance fish only within its Reservation boundaries, understood not to include the Main Stem. Both Plaintiffs argue (ECF No. 120 at 31; ECF No. 128-1 at 8) that the Court should reason that PN in 1818 would not give up rights to the Penobscot River because the River was the "central artery" of PN life. But as of 1980 – the relevant timeframe – the River was the "central artery" for the State – for the general public, towns, and businesses in Central Maine and beyond, for many different uses, such as transportation, effluent discharge, mills, dams, and tourism – all long controlled and regulated by the State, and the State was not going to give that up.

There is nothing suspect about the benefit of the bargain made by the Maine tribes in the Settlement Acts in the absence of extending the boundaries of the Reservation to the 60-mile

Main Stem. They made a very good deal, obtaining, among other things, $80+ million, many acres of land, and federal recognition with a concomitant flood of federal subsidies. *See Akins*, 130 F.3d at 484 ("Each party benefitted from the settlement."); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996) ("the Settlement Act 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.") (brackets in original). And while the judicial land claim proceedings had been going well for the tribes up to the date of the Settlement Act, Congress has the last word in this area, and the tribes were facing the prospects of a new President (Reagan instead of Carter) and a Republican Congress generally viewed as more hostile to the tribes' claims. (*See* State Defendants' Opposing Statement of Material Facts ("SDOSMF") ¶ 75.)[14]

In sum, there is nothing in either the text of the Settlement Acts or the context in which they were passed to indicate that the scope of sustenance fishing rights for the PN was so lacking absent extending the Reservation boundaries throughout the Main Stem that PN never would agree to such a deal in 1980.

V. To the extent the Court deems it necessary to go beyond text and context, statements made during negotiation and after entry of the Settlement Acts do not reflect an understanding that PN's Reservation includes the Main Stem of the Penobscot River.

Plaintiffs argue that throughout the negotiation of the Settlement Acts and thereafter, State representatives clearly and consistently articulated an understanding that the Main Stem fell within the Reservation boundary, while the Tribe consistently and clearly articulated the same,

[14] This looming election perhaps explains why the amici supporting the Tribes' position describe the pace to enact the settlement in the last half of 1980 as "hurried." (ECF No. 131-1 at 9.)

and that it is only recently that the State suddenly took a different view. (*E.g.*, ECF No. 120 at 2-3, 14.)

First, because the Settlement Act language is unambiguous, particularly in light of the context in which it was entered in 1980, there is no need to go beyond that text. The text says "solely" islands; the River was long controlled by the State; and the State retained control over natural resources as reflected throughout the text of the Settlement Acts.

Second, as the State Defendants note, the scenario painted by Plaintiffs is not supported by the record. (*See, e.g.*, ECF No. 118 at ¶¶ 8, 11B, 52, 54, 60, 73-76, 107-116, 157-59, 161B, 163, 181, 183; ECF No. 117 at 9 n.6, 10 n.8, 11 n.9, 15-18, 21-22, 30, 31-33.)[15] To the contrary, the record shows a general understanding that the Reservation did not include the Penobscot River, and it is only in recent years that the Tribe has taken the position that it does. To the extent there are any stray statements from Tribal, State, or federal representatives to the contrary, they are outliers that do not undermine this general understanding as reflected in the parties' actual conduct and regulations until recently, when the Tribe sought and obtained federal funding to launch this suit. (*See* ECF No. 118, ¶¶ 12, 47.)

VI. That the Tribe benefits from riparian rights from the State's ownership of the Reservation does not mean that any part of the River lies within the Reservation, or that the Tribe has any regulatory authority over any part of the River.

The United States (not PN) argues that if the Court does not conclude that the Main Stem falls within the boundaries of the Reservation, it should rule that the Tribe holds rights in the halo around their islands, like any other owner of an island under Maine law. (*See* ECF No. 120

[15] As generally, State Intervenors further rely on the State Defendants' submissions in opposition to Plaintiffs' motions for summary judgment on this issue. *See State Defs.' Opp'n to Pls.' Mots. for Summ. J.* at 38-49.

at 12, 14, 54.) The United States then argues that ownership of this halo would "be subject to the Nation's sustenance fishing right" because it falls within the Reservation boundaries. (*Id*. at 57.)

Among other things, this argument confuses three different concepts: private ownership rights, Reservation boundaries, and governmental regulatory authority.

The Settlement Acts established land over which PN and the Passamaquoddy Tribe could exercise certain governmental authority, primarily akin to that of a municipality, although with less state interference as to "internal tribal matters." One portion of such land is discussed *supra*, n.12 – Indian Territory acquired through a federal fund. That land is not "owned" by PN. Rather, it is held in trust by the United States for the benefit of the Tribe. 25 U.S.C. § 1724(d)(3). In parallel, reservation land is not "owned" by the tribes, either, but held in trust for them by the State. The United States has admitted this in this action. (*See* ECF No. 46 at 7 ("Maine holds the underlying fee to Indian lands in the State") and *id*., n.7 ("no one disputes that Maine possesses the underlying fee to Indian lands within the State").[16] With PN's aboriginal claims extinguished under the Settlement Acts (*see infra*, § VII), any rights that the Tribe holds are only those as expressly provided in those statutes. Nowhere do these statutes confer any fee ownership on any Maine tribe as to any reservation land.

It is true that throughout the years, both before and after the Settlement Acts were enacted, various parties at times referred to the relationship between PN and its reservation land loosely as "ownership." This is unsurprising, because the State holds the fee for the benefit of the Tribe, and thus the Tribe enjoys beneficial "ownership" in that respect, including certain

[16] This is consistent with earlier statements by the United States. (*See, e.g*., May 17, 1983 letter to FERC from Lawrence Jensen, the Associate Solicitor for DOI's Division of Indian Affairs, SDOSMF ¶ 123, in which Jensen states that "title in fee simple to the subject islands and affected lands is held by the State of Maine in trust for the benefit of the Penobscot Nation which possesses the right of perpetual occupancy and use.").

riparian rights. But the understanding that this beneficial ownership relationship only extends to that trust benefit has been consistently understood, not just by the United States, but by the State.[17]

In sum, PN enjoys the benefit of riparian rights from the islands to which the State holds title, but this does not mean that any part of the River lies within the boundaries of the Reservation as established under the Settlement Acts. Because the Settlement Acts provide that only the islands fall within the Reservation, only the islands are so located, and the governmental rights that PN can exercise are limited solely to those islands, not to the water held by the State or to the land beneath that water.

VII. PN retained no aboriginal title to any portion of the River.

Finally, PN, but not the United States, argues that it retains aboriginal title to the River. (ECF No. 128-1 at 47.)

There is good reason why the United States does not join in this argument. The primary purpose of the Settlement Acts was to extinguish all aboriginal title claims by Maine tribes. *See* 25 U.S.C. § 1721(a)(3) (noting that PN claimed aboriginal title to certain lands); § 1721 (a)(6) (noting hardship to a large number of landowners, citizens and communities in Maine and to the economy of the State as a whole will result "if the aforementioned claims are not resolved promptly"); § 1721 (a)(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

[17] As Assistant Maine Attorney General James Frost explained in a 1951 Attorney General opinion:

> Though the land would appear to be vested in the Indians, legislation has so encompassed his ability to transfer such land, that ultimately the conclusion must be that the land on a reservation is state land, but held for the use of the Indians, at least so long as they remain a tribe, on that reservation.

(SDOSMF ¶ 68). *See also* Statement of Assistant Maine Attorney General John Kendrick, made in 1972: "The actual control of tribal lands has long been in the State. The reservation, held for the use of the Indians, is State land." SDOSMF ¶ 68.

Maliseet Indians with a fair and just settlement of their land claims."); § 1721(b)(1) (purpose is "to remove cloud on the title to land in the State of Maine resulting from Indian claims").

This point is further discussed in State Intervenors' motion for judgment on the pleadings. (ECF No. 116 at 6-8; *see also* ECF No. 117 at 5, 7, 8, 33-34, 35.) *See also Micmacs*, 484 F.3d at 45 ("MICSA extinguished the land claims of *all* Indian tribes in Maine") (emphasis in original); *Johnson*, 498 F.3d at 42 ("the Settlement Acts extinguished the tribes' remaining claims to vast tracts of Maine land").

Under PN's reading, "land claims" would have to mean that the settlement intended only to extinguish claims to solid land – to resolve PN's pending claims by acknowledging, for the first time, PN's aboriginal title in the River; and then consciously to exclude any extinguishment of that particular aboriginal title in the Settlement Acts. Not only does nothing in the statutes support this reading, it does not make sense, either as a matter of logic or history. The term "transfer" was broadly defined in the Settlement Acts to underscore that these statutes were not eliminating only aboriginal title addressed in a specific treaty conveyance, but also by means of a loss of dominion or control. There can be no question that PN had lost dominion and control over the River.

As noted, moreover, under PN's interpretation, logically, it would retain title to the entire River. The Tribe energetically attempts to hide the implications of its argument by using language that could be mis-read to suggest that it only claims hunting and fishing rights and only within the Main Stem. (*See, e.g.*, ECF No. 128-1 at 48-49 ("Thus, the Penobscot Nation retained full aboriginal title (exclusive occupancy as well as use) of the entire bed of the Main Stem, bank to bank, including the islands referenced in the Treaties, at least for the purpose of sustenance fishing, hunting, and trapping, which are the issues presented by the Second Amended

Complaint.")). The Tribe's argument, however, is that it retains aboriginal title to any area not expressly conveyed in a treaty. This would mean the entire River, and this would be title, not a limited hunting or fishing right.

The purpose for attempting to bury the consequences of accepting PN's argument is self-evident – because it is beyond peradventure that the Settlement Act did not recognize and leave aboriginal title to the whole of the River to the Tribe.

CONCLUSION

The Court should declare that the boundaries of the Penobscot Reservation are as the Settlement Acts provide: solely the islands identified in the Maine Implementing Act. No portion of the Penobscot River falls within those boundaries, and the Penobscot Nation holds no regulatory rights over any of the waters of the River.

DATED: June 22, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2015, I electronically filed the foregoing document entitled State Intervenors' Opposition to Plaintiffs' Motions for Summary Judgment with the Clerk of Court using the CM/ECF system which will send the notification to all counsel of record.

DATED: June 22, 2015

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