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

MOTION TO EXCLUDE THE TESTIMONY OF PLAINTIFFS' EXPERTS AND INCORPORATED MEMORANDUM OF LAW

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INTRODUCTION

State Intervenors[1] move to exclude the testimony of Plaintiffs' three experts, two historians and a surveyor, because their testimony is irrelevant, unreliable and improperly asserts legal opinions.

BACKGROUND

The question presented in this suit is whether the Penobscot River lies within the boundaries of the Reservation of the Penobscot Nation ("PN" or "Tribe"). These boundaries are established in the Maine Implementing Act ("MIA"), 30 M.R.S. §§ 6201 *et seq*., ratified by the Maine Indian Claims Settlement Act of 1980 ("MICSA"), 25 U.S.C. §§ 1721 *et seq*. (collectively the "Settlement Acts"). *See* 25 M.R.S. § 1722(i) ('"Penobscot Indian Reservation' means those lands as defined in the Maine Implementing Act"); MIA, 30 M.R.S. § 6208 (defining PN Reservation).[2]

Focusing on the1980 Settlement Acts, the defense posits that the Reservation consists, as recited in MIA, "solely" of the islands listed in section 6208. (*See supra* n.2.) As other pleadings discuss, the remainder of the text of the Settlement Acts support this plain language

[1] The "State Intervenors" are Intervenors and Counterclaim Plaintiffs 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.

[2] MIA, Section 6203(8), states in relevant part:

> "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 . . . .

reading, as does the context in which the Settlement Acts were passed in 1980, after 160 years of control over the River by the State of Maine.

Plaintiffs disagree, claiming that not just the islands, but also the River, its bed and waters, are included within the Reservation. They offer the testimony of three experts to support their position. Two are historians, who opine regarding treaties entered into between the Commonwealth of Massachusetts and the Tribe in 1796 and 1818.[3] The third is a surveyor, tasked with discussing land surveys and related documents during the period 1796-1820 and shortly thereafter.[4]

As discussed below, this testimony should be excluded for multiple reasons, including:

- The issue before the Court is the meaning of Settlement Acts enacted in 1980, not any treaty entered 160+ years before that date;

[3] The first historian, Pauleena MacDougall, "address[es] the importance of the Penobscot River to the Penobscot Nation and the events in the aftermath of the 1796 and 1818 treaties with the State of Massachusetts[.]" *MacDougall Report*, Jt. Ex. 737, ECF No. 110-37 at 6392. By "aftermath," she appears to mean shortly after these treaties were entered, because aside from one reference to 1919, her report focuses primarily on that time period. *Id.* at 6425-32. The second historian, Harald L. Prins, similarly opines on "the understandings of (a) the Penobscot Indian Nation and (b) the Commonwealth of Massachusetts of what was reserved to the Penobscot Indian Nation when the parties agreed that the Nation reserved 'the islands in the Penobscot River' in the Treaties of 1796 and 1818." *Prins Report*, Joint Ex. 288, ECF No. 105-88 at 3707. In addition, he was asked to address

> what the parties understood with respect to the Penobscot Indian Nation's continued occupancy and use of the Penobscot River attending the reservation of the islands in the main stem of the River . . . [and] to provide an opinion about whether the Penobscot Nation or Maine varied from those understandings when, pursuant to the 1820 Treaty, Maine acceded to the rights of Massachusetts in its prior Treaty of 1818.

Id.

[4] Kenneth Roy was asked by the United States to provide an opinion regarding:

> whether land surveys executed by surveyors authorized by Massachusetts and Maine and the language they used on their plats, in their field notes, and subsequently in deeds and conveyances from the Commonwealth of Massachusetts and Maine, provide evidence that the 1796, 1818, and 1820 Treaties with the Penobscot Indian Nation ceded to the State the bed of the Penobscot River, or alternatively an understanding that the Penobscot Indian Nation never conveyed title to the bed of the Penobscot River.

Roy Report, Joint Exhibit 757, ECF No. 110-57 at 6583.

- The opinions are not supported by the material upon which the experts rely; and

- The testimony seeks to usurp the Court's role and provide improper legal opinion.

LEGAL STANDARD

I. Expert testimony must be relevant, supported and reliable.

Federal Rule of Evidence 702 requires that "the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; the testimony be "based on sufficient facts or data" and "the product of reliable principles and methods"; and the expert have "reliably applied the principles and methods to the facts of the case."

Thus, first, the testimony must be relevant, not only meeting the standard set forth for all evidence in Federal Rule of Evidence 402, but also "in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact [here, the Court] to understand or determine a fact in issue." *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co*., 161 F.3d 77, 81 (1st Cir. 1998); *see id*. ("Along with the reliability requirement, the *Daubert* Court imposed a special relevancy requirement" for admission of expert testimony); *see Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 591-92 (1993).

If relevant, the expert's opinion should be supported in order to be helpful to the trier of fact. *See Brown v. Wal-Mart Stores, Inc*., 402 F. Supp. 2d 303, 309 (D. Me. 2005). In determining the reliability of the methods used and the conclusions reached, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). A "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id*.

In sum, the testimony must say something relevant to the issue presented, with the expert's conclusions logically flowing from and supported by the material on which the expert relies.

II. An expert's legal conclusions are inadmissible.

Rule 702 allows expert testimony if specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. "Expert testimony that consists of legal conclusions cannot properly assist the trier of fact in either respect." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997) (citation omitted). Thus, here, with the Court as fact-finder, the expert's role is not to provide legal opinion about any subject, or to usurp the Court's role in applying the law and interpreting relevant legal documents. *See Pelletier v. Main Street Textiles, LP*, 470 F.3d 48, 55-56 (1st Cir. 2006) (attempt to submit expert testimony concerning the interpretation of legal regulations rejected based on concern such testimony was merely a vehicle to provide legal opinions).

DISCUSSION[5]

I. None of the experts' testimony is relevant because there is no indication that the Settlement Acts in 1980 were intended to incorporate the Tribe's understanding of the meaning of the words "islands in the River" in the 1796 and 1818 treaties, whatever that understanding in 1796, 1818 and shortly thereafter might have been.

Upon occasion, courts have accepted expert testimony to explain the historical and cultural context in which ambiguous treaty provisions were entered, based on the reasoning that such treaties are interpreted as the Indians understood them, and based on the Indians' unequal bargaining positions long ago at the time the treaties were entered. *See, e.g., Menominee Indian*

[5] In addition to the flaws noted here, in its motion for summary judgment, the United States repeatedly cites directly to these experts' reports, rather than citing to its Statement of Material Facts. *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.") This citation failure makes it difficult to discern and address the particular portions of these experts' testimony relied upon by the United States.

Tribe of Wisconsin v. Thompson, 922 F. Supp. 184, 198-99 (W.D. Wis. 1996), *aff'd*, 161 F.3d 449 (7th Cir. 1998).[6]

Here, however, the Court is not interpreting an ancient treaty, ambiguous or not, subject to these rules. Instead, the Court is interpreting language contained in MIA, a state statute, ratified by MICSA, a federal statute, both enacted in 1980. What any party to a treaty in 1796 or 1818 or 1820 was thinking, or the historical context at that time, is irrelevant. If there is any need to go beyond the clear text of these statutes, the relevant context would be 1980, when these statutes established and defined the Reservation's boundaries.

This perspective is not just that of State Intervenors, but that of the Tribe itself, well represented by counsel when the Settlement Acts were enacted. *See Akins v. Penobscot Nation*, 130 F.3d 482, 487 (1st Cir. 1997) (summarizing PN's position that in interpreting the Settlement Acts, the Tribe "is not a museum piece . . . . Narrow historical analysis, the Nation says, should play almost no role.").

Plaintiffs' theory appears to be that because MIA, § 6208(3) references the islands in the River reserved to PN "by agreement with the States of Massachusetts and Maine" (*see supra* n.2), that this orienting reference reflects an intent to ratify the Treaties of 1796 and 1818, subsuming in 1980 whatever was meant by references to islands in the River in those treaties.[7] They posit that if those treaties in 1796 and 1818 provide that "islands" were retained by PN, and that reference meant both islands and the River, then it follows that the reference to "solely" islands in section 6203(8) must also mean both islands and River.

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[6] Even then, such treaties "cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. U.S.*, 318 U.S 423, 432 (1943).

[7] *See Treaty of 1796*, Public Document List (hereinafter "PD") Ex. 5 and 6 (referring to "the Islands in said River"); *Treaty of 1818*, PD Ex. 7 and 8 ("all the islands in the Penobscot river").

Setting aside, as explained *infra*, that there is no support for the conclusion that these treaties' references to islands meant the River, too, the premise of Plaintiffs' argument lacks support. It is clear that the Settlement Acts were not intended to ratify the earlier treaties. Nowhere do they say they were, but rather, the contrary. *See* MICSA, 25 U.S.C. § 1731. As a matter of both logic and context, the reference to the earlier agreements in section 6203(8) was to identify which islands *qua* islands were included in the Reservation.[8]

Most pertinently for the purposes of this motion, nowhere do Plaintiffs provide any support for their premise. Nowhere do they cite any evidence that the intent in 1980 was to incorporate the meaning of text in earlier treaties as understood by the Tribe when entered, whatever that understanding might have been. Had there been any such intent in 1980, one would expect language in the MIA and MICSA somewhere so indicating, and so defining the word "island." This conclusion is particularly self-evident given that the presumption was firmly established by 1980 that a reservation does not include a state's navigable waters absent clear language so stating.[9] Instead, however, the text of the Settlement Acts is replete with language expressing an intent recognizing the 1980 context of longstanding State control over natural resources.

In sum, as the Tribe itself has previously publicly acknowledged and argued to the Court, the historical context of any treaty it entered into in the 18th or 19th century sheds no light on what the parties to the Settlement Act intended in 1980. In the absence of any reason to believe that section 6203(8) was incorporating any special definition of "island" that Plaintiffs argue was

[8] For further discussion, *see State Intervenors' Opp'n to Pls.' Mots. for Summ. J.* at 5-12; *State Defs.' Opp'n to Pls.' Mots. for Summ. J.* at 7-10.

[9] *See State Defs.' Mot. for Summ. J.*, ECF No. 117, at 12-13.

being used in 1796 and 1818, whether or not such a special definition was being used at that time is irrelevant to the dispute now before the Court.[10]

We need go no further. None of the proffered experts seeks to testify as to the 1980 context, but rather as to what they believe representatives of the Tribe, the Commonwealth of Massachusetts, and/or the State of Maine were thinking in 1796-1820 and shortly thereafter – while ignoring the long history of State dominion, control and regulation of the River that animates the contents of the 1980 Settlement Acts.

II. MacDougall's testimony suffers from additional flaws of further irrelevancy and unreliability.

MacDougall has a Ph.D. in history and is the director of the Maine Folklife Center at the University of Maine as well as a faculty associate with the anthropology department.[11] She is currently working on a "Penobscot Dictionary," funded by a $340,000 grant.[12] While she claimed to have no recollection of approximately how much she was paid to produce her report, at the time of her deposition she had received over $71,000.[13]

Her report "states an opinion about what the parties to the [treaties of 1796 and 1818] subjectively understood when they signed the treaties . . . as [she understands] it from the

[10] Additionally, if the word "island" as used in section 6203(8) did include the River, this would also not result in the River falling within Reservation boundaries because the term "island" is used in section 6203(8) not just in reference to the 1796 and 1818 agreements, but also to exclude from the Reservation any "islands" "transferred" after 1818. (*See supra* n. 2.) Plaintiffs argue that the Reservation includes the River because the River was not conveyed by the Tribe in the Treaties of 1796 or 1818. "Transfer" has a broad meaning under the Settlement Acts, and occurs through exercise of dominion and control. 25 U.S.C. § 1722(n); 30 M.R.S. § 6203(13). There can be little doubt that the State exercised such control over the River after 1818. Hence, even under Plaintiffs' theory, it would follow that the River was "transferred" by such control after 1818, and thus not within the Reservation, because the River would be an "island transferred" after 1818 as Plaintiffs seek to define the term "island" in section 6203(8).

[11] *MacDougall Deposition Transcript* ("MacDougall Depo."), Joint Exhibit 738, ECF No. 110-38 at 6434 (Page 5:23-6:1).

[12] *Id.* at 6435 (Pages 11:10-12:23).

[13] *Id.* at 6433 and 6467 (Pages 98:8-25,134:8-10).

historical record."[14] She concludes that the "strong cultural and historical ties the Penobscot have to the river, as demonstrated in the historical documents cited in [her] report, makes it unlikely the Penobscots would negotiate to retain their islands in the river but cede the river itself with all its cultural significance and centrality."[15]

A. MacDougall's testimony is additionally irrelevant because she opines only that the River remained important to Tribe in 1796 and 1818.

Even if what anyone was thinking in 1796 or 1818 were relevant – which it is not – the gist of MacDougall's opinion is only that the River was important to the Tribe at that time.[16] It does not follow that because the River was important to PN then, however, that the Tribe thought at that time that it retained exclusive sovereign use and control over it.

For example, when probed as to what she meant in the conclusion in her report that PN understood that it had reserved the River as a "tribal possession," she explained that what she actually meant was that PN understood they reserved the right to access the River to engage in certain traditional activities.[17] Similarly, while in her report, MacDougall notes that PN, in requests for help from the State, stated "that the islands in the [Penobscot] river as far as Moosehead Lake belonged to them," she did not assert that the Tribe made any corresponding statements as to ownership regarding the River itself.[18]

Indeed, MacDougall admits that the River has historically been important to **both** tribal and non-Tribal users, with both Tribal and non-Tribal members fishing there at the time the

[14] *Id*. at 6437 (Page 18:7-11).

[15] *MacDougall Report* at 6425.

[16] *MacDougall Report* at 6392 ("I have been retained . . . to address the importance of the Penobscot River to the Penobscot Nation . . . .").

[17] *MacDougall Depo.* at 6456 (Page 94:4-8).

[18] *MacDougall Report* at 6415.

treaties were entered.[19] Long before 1796, moreover, the Tribe had recognized ultimate sovereignty over it by England, and Massachusetts was regulating fishing throughout the River. MacDougall does not explain why, given this historical context of importance of the River to PN – along with everyone else in the area – the 1796 and 1818 treaties reserving islands in the River to the Tribe should be read as reflecting an understanding of sovereign possession by the Tribe over the River's waters.

B. MacDougall's testimony is unreliable because the evidence she relies upon does not support her conclusions nor provide assistance to the Court.

With regard to her opinions concerning the 1796 Treaty, MacDougall admits that she based her conclusions solely on the language of the treaty.[20] Nothing in that language says anything as to treatment of the River itself,[21] and this Court is in as good a position (or better) to read and understand the meaning of that treaty language, were it relevant. Similarly, the extent of MacDougall's opinion regarding what the Commonwealth of Massachusetts and the State of Maine "understood" with regard to the 1796 and 1818 treaties is that she "saw no discussion of it one way or the other."[22]

When probed, it also became clear that her reasoning as to why the Tribe thought they were retaining an interest of any type in the River was unfounded. For example, that "both the Penobscots' concepts of land stewardship and their place names show the strong cultural and economic ties the Penobscot people have always had to the Penobscot River" is relevant to MacDougall's ultimate conclusion, because, she reasoned, those ties show the River as "central

[19] *MacDougall Depo.* at 6499 (Pages 65:22-66:21). *See also Bourque Report*, Joint Exhibit 697, ECF No. 109-97 at 6055 ("The historical record shows . . . that the Indians regarded the River as a public resource open and accessible to all for navigation, fishing, hunting, trapping and other uses.")

[20] *MacDougall Depo.* at 6444-45 (Pages 48:24-50:6).

[21] *Treaty of 1796*, PD Ex. 5 and 6.

[22] *MacDougall Depo.* at 6438 (Page 22:23-23:1).

to [PN's] lives and lifestyle."[23] But MacDougall admits that despite the fact that the Tribe had equally "close cultural and economic ties to the land on the sides of the river . . . notwithstanding those . . . ties, [the Tribe] ceded that land in the treaties . . . ."[24] Similarly, she bases her ultimate conclusion in part on the significance of the Tribe's "place names" for the River,[25] but again admits that the Penobscot language has place names for "features of the landscape" along the River banks and inland, and the Penobscot ceded those lands in the treaties.[26]

MacDougall references a number of instances in which PN requested assistance from Massachusetts and Maine with regard the River and the surrounding lands, including access to fishing, game, and transportation on the river, stating that such requests

> illustrate the constant concern the Penobscot Tribe has held with their fishing rights and with the maintenance of healthy fish stocks. These actions all suggest the Penobscots have a long-standing tradition of stewardship over the Penobscot River and that they did not believe they had surrendered their rights to the river in signing the 1818 treaty.[27]

But non-Tribal members also petitioned to protect fish stocks,[28] and she acknowledges that both Tribal and non-Tribal residents were actively fishing on the Penobscot River throughout the early 19th century.[29]

Her opinions are also based on factual errors as fundamental as geography. For example, she stated in her report that "the Penobscots continued to exercise their rights to fish throughout

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[23] *Id.* at 6443 (Page 43:8-18).

[24] *Id.* at 6443 (Page 44:7-14).

[25] *Id.* at 6443 (Page 43:8-18)

[26] *Id.* at 6444 (Page 46:8-21).

[27] *MacDougall Report* at 6429.

[28] *MacDougall Depo.* at 6449 (Pages 65:22-66:21).

[29] *Id.*

the river,"[30] citing to the Tribe's request to the State concerning fishing access near the islands off of the town of Sedgwick. But Sedgwick, she admits, is "a location that is nowhere near [the main stem of the Penobscot] river."[31] Her report also incorrectly states that Moosehead Lake is the head waters of the West Branch of the Penobscot River.[32]

MacDougall also acknowledged that her report was not peer reviewed and, in her opinion, the only means of testing her conclusions would be "in the courtroom."[33]

In sum, MacDougall's testimony triggers each of the "[r]ed flags that caution against certifying an expert includ[ing] reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity." *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012). The United States is asking this Court simply to take MacDougall's word for conclusions that are irrelevant and unreliable. The Court's gate-keeping function requires more.

III. Prins's testimony is unsupported and improperly asserts legal opinion.

Prins acknowledges that pursuant to the Treaty of 1796, PN relinquished any right to the lands on both sides of the Penobscot River as described, while certain specified islands were reserved to the Tribe.[34] He then concludes that by "expressly reserving the islands, the parties understood that the Penobscot tribe retained its traditional use and occupation of the river."[35]

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[30] *MacDougall Report* at 6414 n.43.

[31] *MacDougall Depo.* at 6449 (Page 68:3-19).

[32] *MacDougall Report* at 6415 n.45; *MacDougall Depo.* at 6450 (Page 70:4-20).

[33] *MacDougall Depo.* at 6466 (Page 134:14-20).

[34] *Prins Report* at 3778.

[35] *Id*. at 3780.

The argument appears to be that the Tribe's continued use of the River after the Treaty of 1796 reflects an intent to retain aboriginal title over the River.[36]

As a threshold matter, as even the United States tacitly acknowledges, the Settlement Acts clearly extinguished all claims to aboriginal title by Maine Indians.[37] Hence, once again, the point of this research and opinion testimony is unclear, except to the extent that the Tribe, not the United States, may be arguing that the Settlement Acts were not in fact intended to extinguish the Tribe's claim to aboriginal title to the River.[38]

In any event, however irrelevant and for whatever purpose Prins's testimony is being cited, the evidence upon which Prins's opinion is based does not support his conclusions, and Prins improperly attempts to offer legal opinion.

A. The evidence on which Prins's conclusions are based – evidence which the Court can assess as well as Prins – does not support his conclusions.

Prins asserts that the Tribe thought the reference to islands in the 1796 and 1818 treaties "and by reference, in the 1820 treaty" meant the River, too.[39] The explanation as to how he arrived at this conclusion shows its lack of support.

His conclusion that "the parties to the Treaty of 1796 well-understood that the Penobscot tribe retained its aboriginal title to the river surrounding the islands referred to in the 1796 treaty" is "best exemplified by the tribe's long struggle to defend its fishery at Old Town Falls against

[36] *See id*. at 3812 ("the parties agreed that with the reserved islands, the Penobscot tribe retained its ancestral Indian title (its use and occupation) of the river surrounding those islands, which was essential to their survival and wellbeing").

[37] *See State Intervenors' Mot. for J. on the Pleadings*, ECF No. 116, at 6-8, 11-13; *State Intervenors' Opp'n to Pls.' Mots. for Summ. J.* at 21-23.

[38] As noted in State Intervenors' opposition to the Plaintiffs' summary judgment motions (at § VII), under PN's reasoning, such aboriginal title would logically extend to the entirety of the River – a position that even the Tribe does not explicitly assert.

[39] *Prins Report* at 3811-12.

white rivals."[40] He dedicates a substantial portion of his report describing PN lobbying efforts regarding access and use of certain land areas near Old Town Falls during a 15-year period following the signing of the 1796 Treaty.[41]

This fishery issue came to a head when certain rocks, ledges, and islands were used by non-Tribal members for fishing.[42] The issue was further inflamed when certain land near Old Town Falls was sold by the state-appointed land agent for the Tribe for the construction of a mill.[43] Prins highlights the fact that following the treaty, the Tribe's superintendent stated that "[the tribe] say they never ceded those Islands to Govt. . . . ." [44] Delegations from the Tribe sought to protect access to the fishery and argued that they were the "proprietors of all the Islands both great and small on [the] Penobscot River."[45] PN explained that they wished to protect the "excellent privileges for taking fish on the Islands . . . ."[46] The delegates also claimed that they "were driven from the rocks and small Islands making the said Old Town falls, their nets destroyed & themselves greatly abused," and that it was possible that the rock areas used for fishing were "possibly lost sight of in the 1796 treaty."[47]

The culmination of these supplications, Prins testifies, was a resolve issued by the Massachusetts Legislature in 1812, which states that the land in question in and around Old Town Falls should not have been sold, and authorizes the Massachusetts Attorney or Solicitor General to take action to recover possession of those areas by settling the disputes between the

[40] *Id.* at 3782.

[41] *Id.* at 3782-90.

[42] *Id.* at 3782.

[43] *Id.* at 3783.

[44] *Id.* at 3784.

[45] *Id.* at 3785.

[46] *Id.* at 3787.

[47] *Id.*

Commonwealth and anyone in possession upon such terms and conditions as they consider just and reasonable, noting that trespasses have occurred upon "the lands of the Commonwealth situated upon each side of said Penobscot river, and upon the islands in said river situated above said Old Town, which are claimed by said Penobscot Indians."[48]

There are multiple problems with Prins's conclusion from this material that the Tribe retained aboriginal title to the River.

Focusing on the 1812 Resolve, first, as Prins admits, no action was taken after its issuance to suggest that it showed an understanding that the River remained in the possession of the Tribes. To the contrary, as its result, the Commonwealth simply gave permission to the Tribe to fish from one of the islands in dispute.[49]

Nor does Prins cite to any claim of ownership by the Tribe over the Penobscot River during the time period following the signing of the 1796 Treaty, either as reflected in this resolve or elsewhere. The actual statements that Prins cites with regard to the fishery at Old Town Falls, as noted above, do not support his conclusion, as the speakers only address the land at issue, not ownership of the River: "[the Tribe] say they never ceded those Islands to Govt. . . . ."; PN was the "proprietor[ ] of all the Islands both great and small on [the] Penobscot River"; PN wished to protect the "excellent privileges for taking fish on the Islands . . . ."; and PN claimed to have been "driven from the rocks and small Islands making the said Old Town falls, their nets destroyed & themselves greatly abused."

In sum, Prins's opinion that PN retained aboriginal title to the River is based on a history of supplication by the Tribe to the Commonwealth of Massachusetts for access to the fishery in places in the River. While he makes much of the fact that PN lobbied for years in an effort to

[48] *Id.* at 3788-89.

[49] *Id.* at 3790.

regain certain fishing access, Prins provides no explanation as to why PN would silently withhold what would be its strongest argument: that the Tribe claimed to own the Penobscot River and wished to exclude others from using it. Why, if this history reflected retention of title, would not the Tribe ever once have mentioned its belief that the River belonged to it?

Aside from lacking actual evidence to support his conclusion, he ignores the facts that undermine it, including (1) the Penobscot River has historically been important to both Tribal and non-Tribal users of the river – both Tribal and non-tribal members fished in the River in the early 19th century; (2) PN made efforts to protect important areas **outside** the main stem of the Penobscot River, such as islands off of Sedgwick that were historically used for fishing; (3) non-Tribal members petitioned to protect fish stocks; and (4) the Tribe had close cultural and economic ties to the land along the banks of the Penobscot River, but there is no dispute those lands were ceded by treaty. Setting aside that all these facts have all been conceded by MacDougall,[50] the *Bourque Report* further undercuts the idea of exclusive control or ownership over the River by PN at the time of the 1796 and 1818 treaties.[51]

Prins's reading of treaty language, aside from lacking evidentiary support, is also counterintuitive. For example, he reads language in the 1818 Treaty that provides that non-Tribal members "shall have a right to pass and repass any of the rivers, streams and ponds, which run through any of the lands hereby reserved" as supporting the view that the Tribe

[50] *MacDougall Depo.* at 6443 (Pages 43:8-44:14); 6444 (page 46:8-22); 6449 (Pages 65:22-66:21, 68:3-19).

[51] *Bourque Report* at 6052 ("The Penobscot Tribe never exercised or attempted to exercise any rights of ownership or sovereign control over the Penobscot River because the Tribe did not have such an intent or understanding and the reality was the Tribe was politically and militarily unable to do so. There is strong evidence supporting this conclusion, and undermining the contrary opinions of Dr. Prins and Dr. MacDougall. They failed to consider, or perhaps were not aware, of key historical documents.").

retained the River.[52] The reasoning appears to be that if non-Tribal members only have a right to pass in the River, it follows that underlying title remains with the Tribe. But logically, were this referencing the River, the language would include waters flowing by land, not only "through" it.[53]

In short, while Prins, like MacDougall, as an historian can establish that the River was important to PN in 1796 and 1818, it does not follow that the Tribe held and retained title to that River. Theoretically, they can summarize what they conclude are salient statements and activities occurring at that time – assuming it were relevant to what was happening in 1796 or 1818, instead of who was using, possessing and regulating the River in 1980. But even if one searches through Prins's report to identify what he deems the salient statements and activities from 1796 and 1818, they do not support his conclusion. Rather, they reflect Tribal unhappiness about the growing white population competing for resources. They do not indicate that PN thought the River belonged to it and that the Tribe believed that it had the sovereign right to exclude that population from the River.

B. Prins's Report conflicts with his prior research and conclusions.

In his prior work, Prins challenged the sources he now relies on and refuted the conclusions he now asserts. For example, PN and USDOJ cite to Prins in support of one of their primary contentions:

> The Penobscot People have never distinguished between the islands in the Penobscot River that they have inhabited since aboriginal times and the waters and bed of the Penobscot River surrounding those islands, everywhere between the islands and bank to bank, upon which they have relied for fishing, trapping, and hunting for their sustenance.[54]

[52] *Prins Report* at 3711, 3800-01; *see Treaty of 1818*, PD Ex. 7 and 8.

[53] *See also State Defs.' Opp'n to Pls. Mots. for Summ. J.* at 40-42.

[54] PN SMF ¶ 4, *citing* Prins at 3716-46; 3750, n.117.

This concept of a discrete community living along the Penobscot River for centuries, known generally as the "riverine theory," has been widely discredited by historians, including by Prins himself:

> [T]he 'river drainage model' . . . holds that the northeastern Algonquian groups from the Hudson River to Nova Scotia 'form a series of tribes centered on the large river valleys each varying only slightly from its neighbors' . . . . Taking the empirical ground from under this widely accepted model of tribal territoriality . . . I presented ample information contradicting this popular theory.[55]

Moreover, in specific reference to the 1980 Maine land claims case, Prins attacked the use of the riverine theory:

> Contrary to the "river drainage theory" . . . which had served as the operating model of the Maine Indian Claims case . . . new research demonstrated that the Wabanaki tribes did not form closed corporate groups, each exclusively occupying a stable territory precisely coterminous with a major river drainage.[56]

Furthermore, Prins's primary support for his application of the riverine theory in this matter is the work of anthropologist Frank G. Speck, which he references and/or cites more than seventy times over thirty pages.[57] This reliance is surprising given Prins's prior criticism of Speck's findings and research:

> [R]eviewing documented information pertaining to Wabanaki history, I encountered unambiguous evidence which contradicts Speck's findings. For instance, although Speck allowed for some 'changes wrought by Christian conversion,' he discounted most other evidence of Euro-American contact. Clearly, an ahistorical ethnographic perspective coupled with an inadequate use of historical records and a neglect of a wider field of force, fails to do justice to the dynamic reality of tribal culture. *As such, Speck's creative ethnographical adventure is badly flawed, and one wonders to what extent his conclusions deserve to be renamed Speck-ulations.*[58]

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[55] Harald Prins, *Tribulations of a Border Tribe, A Discourse on the Political Ecology of the Aroostook Band of Micmacs* (16th - 20th Centuries) 330 (1988) (citations omitted).

[56] Harald Prins, *The Mi'kmaq, Resistance, Accommodation and Cultural Survival* 213 (Harcourt Brace 1996). *See also Bourque Report*, 6058-86 (discussion and rebuttal of riverine theory).

[57] Prins Report at 3716-46

[58] Prins, *Tribulations of a Border Tribe* 105 (emphasis added).

In sum, even if the subject of Prins's present opinions were relevant to the task at hand, and even if the material he cited could support his conclusions – which predicates are both incorrect – Prins has previously undercut his current sources and undermined his newfound conclusions, rendering his report unreliable and unsupported.

C. Prins offers legal opinions.

Prins does not simply seek to explain the historical and cultural context in which these treaties were entered. Instead, as with the "pass and repass" language noted above, he offers his legal opinions as to the meaning of the treaties. The "understanding" of the parties to the treaties he reviewed is simply his spin on what those legal documents mean. Likewise, his interpretation of extrinsic evidence, such as the Massachusetts Legislature's Resolve of February 27, 1812, is nothing more than his legal analysis of that legislative document. His opinions go well beyond historical background and context and instead constitute legal conclusions.

IV. Roy's testimony should be excluded additionally because, lacking any probative evidence on the (irrelevant) issue upon which he was asked to testify, he instead offers improper legal opinion.

Roy works for Federal Bureau of Land Management and is the Indian Land Surveyor for the United States' Bureau of Indian Affairs in the Midwest Regional Office.[59] He conducted his research at the Massachusetts and Maine State Archives,[60] with no site fieldwork in support of his report.[61] He is not a lawyer and admits that he is not qualified to make legal conclusions regarding the ownership of land.[62] As noted, *supra* n.4, his task was to determine whether

[59] *Roy Report*, Joint Exhibit 757, ECF No. 110-57 at 6584.

[60] *Id.* at 6583.

[61] *Roy Deposition Transcript* ("Roy Depo."), Joint Exhibit 758, ECF No. 110-58 at 6607 (Page 9:11-15).

[62] *Roy Depo.* at 6614 (Page 40:8-18).

contemporary land surveys shed light as to conveyance of the bed of the River in the treaties of 1796, 1818 and 1820.

A. Roy's testimony confirms that contemporaneous surveys do not shed light on the conveyance of the Riverbed in 1796 and 1818.

Again setting aside the irrelevance of whether contemporary land surveys reflected conveyance or non-conveyance of the bed of the River in the treaties of 1796, 1818 and 1820, Roy's testimony sheds no light on this subject matter except to indicate that there is no cogent survey material addressing this topic.

Roy states that the records he reviewed are "difficult to trace," with the "records of surveyor instructions, plats and field notes found in the state archive's collections . . . fragmented and in many cases incomplete."[63] With respect to a "Park Holland" survey and plans that followed the 1796 Treaty, he notes that they do not shed any light on "the intentions of the parties in regards to the ownership of the bed of the Penobscot River"[64] and that the plan in question "depicts no islands and makes no mention in regards to the ownership of the river."[65] He similarly concludes from his examination of surveys, plats, field notes and deeds related to townships along the River that the evidence from this research was "ambiguous" and that "[i]t seems clear to me that the surveyors had no opinion one way or the other with regard to whether the Penobscot River was included in the cession."[66] His examination of Town incorporations and proclamations in which the State legislature proclaimed the existence of a town, including the town's boundaries, reveals that boundary descriptions on various rivers in Maine were not

[63] *Roy Report* at 6583.

[64] *Id.* at 6592.

[65] *Id.* at 6588.

[66] *Id.* at 6595.

consistent, and, with regard to the Penobscot River, it is "unclear whether the riverbed was intended to be separated from the uplands."[67]

B. Roy nevertheless improperly offers legal opinions as to how the treaties should be interpreted, based on his understanding and inconsistent application of modern legal presumptions.

Not letting this lack of probative evidence stop him, and despite asserting that it "is not the purpose of [his] report to offer any legal opinion on whether the treaty descriptions and language indicates ownership of the bed itself,"[68] Roy nevertheless proceeds to offer just such legal opinion, asserting that the "segregation of uplands and lowlands are presumed to be the high water mark which closely equates to the bank thereof."[69] He did not provide a citation for his opinion, but subsequently explained that his conclusion is based on a legal presumption taken from "knowledge of Maine case law."[70]

Similarly, he opines that "the wording of 'lands on both sides of the Penobscot River' [from the 1818 treaty] was not intended to include the bed of the Penobscot River itself," based on his understanding of number of legal presumptions, culled from his limited research of Maine case law.[71]

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[67] *Id.* at 6603.

[68] *Id.* at 6583.

[69] *Id.* at 6592.

[70] *Roy Depo.* at 6620 (Page 61:8-19).

[71] *Roy Report* at 6604. Presumably, Plaintiffs believe that such a legal conclusion would be helpful to support their argument that the Tribe intended not to convey the River under these treaties. Such an argument not only requires the assumption that whatever was conveyed in these treaties is relevant to construing the Settlement Acts, but that the Tribe thought in 1796 and 1818 that it held title to the River so as to be able to convey or not convey it. As noted *supra*, no evidence supports either assumption.

His conclusions about the "ambiguous" information as to townships along the River are, similarly, based on his understanding of legal presumptions taken from his "case laws [*sic*] interpretation in regards to the ownership of the [ ] river."[72]

The legal presumptions he applies to arrive at his opinions are listed in his deposition.[73] His knowledge of these presumptions is, as noted, based on his legal research concerning the common law as discussed in Maine court decisions.[74] Roy repeatedly references and relies upon his legal research in Maine common law as the foundation for his conclusions: "that is a presumption based on case law in Maine, yes"[75]; "case law has had that presumption that, yes, land on either side would have title to the bed of that river"[76]; "there is case law that says that typically . . . ."[77]; "I have sort of a wealth of cases that I have accumulated during my tenure as a land surveyor."[78]

Notably, Roy was asked about whether the surveyors in the late 18th and early 19th century would have applied these same legal presumptions. He admitted: "I can't speak to their knowledge. I don't know what they might have known during that time."[79] Likewise, Roy

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[72] *Id.* at 6595.

[73] *Roy Depo.* at 6612-13 (Pages 32:12-36:12).

[74] *Id.* at 6620 (Page 61:14-19). Roy initially claimed he was not sure if the cases he reviewed and relied upon in reaching his conclusions were included in the material he produced for the deposition. *Roy Depo.* at 6625 (Pages 83:10-84:14). Eventually he acknowledged that he reviewed cases in forming his opinions and, in fact, he had withheld his folder of cases from production. *Id.* at 6636 (Pages 126:4-6, 128:8-11). Eventually, Mr. Roy produced a list of the cases he relied on in forming his opinions and conclusions. *Id.* at 6637 (Page 131:6-11).

[75] *Id.* at 6613 (Page 33:8-9).

[76] *Id.* at 6613 (Page 35:17-19).

[77] *Id.* at 6626 (Page 85:11-12).

[78] *Id.* at 6628 (Page 94:16-17).

[79] *Id.* (Pages 93:23-94-4).

stated that the presumption he applied in his conclusions was not "existent at that time frame. Again, I can't speak to what their knowledge base was at that time."[80]

Further, when the legal presumption he applies to reach his conclusions does not advance his ultimate opinion, he simply ignores it. For example, based on the application of the legal presumption he relies on elsewhere, his review of town boundaries would show that those boundaries extended to the center of the Penobscot River[81] – contrary to his position that the River was excluded from any transfer from the Tribe.

In brief, Roy is opining that the River bed was not conveyed from the Tribe because he, as a non-lawyer, is applying, inconsistently, a legal presumption that he has no idea whether was applicable at the time.[82] State Intervenors respectfully submit that if any Maine rule of common law is relevant to interpreting language in a document that has some bearing on this case, this Court is in a better position to apply that rule and interpret the document than is non-lawyer Roy.

C. Roy's reasoning is unsupported by the materials he cites.

Setting aside that Roy's conclusions are legal opinions based on inconsistent application of presumptions with no known applicability to the 1796-1820 time frame, they also do not appear to make much sense.

For example, Roy identifies the key language in the 1818 Treaty as the conveyance of "all the lands" claimed by the Tribe "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 . . . ."[83] He interprets the phrase "and the branches thereof" to indicate that the Tribe ceded the beds of the branches of

[80] *Id.* (Pages 94:5-17).

[81] *Id.* at 6634 (Pages 118:19-120:24).

[82] *Roy Report* at 6585; *Roy Depo.* at 6628 (Pages 93:23-94:4).

[83] *Roy Report* at 6585.

the Penobscot River but not the bed of the river itself.[84] This is not a self-evident reading of that language.

Roy provides no explanation as to what basis, if any, outside the language itself, upon which he is relying, and there appears to be none. Focusing, therefore, on that language, the more logical reading of this text is that all lands on both sides of the River and on both sides of the branches thereof was transferred along with the related River bed. Notably, this conclusion fits squarely within the types of presumptions that Roy applies throughout his report, namely, that the conveyance of land bounded by a river presumptively conveys title to the thread of the river, and the owner of land on both sides of a river owns the river bed as well.[85]

Roy similarly states the "first significant survey of the Islands of the Penobscot River" was approved in 1835.[86] He states that the purpose of the survey was focused on the islands in the River, and notes that an Indian Agent reserved certain portions of the islands for "Mills, Booms, and Fisheries" by marking those areas in red on the plans.[87] He then concludes that the statement by the Indian Agent regarding the areas reserved in red provides "evidence of the State's understanding of the tribe's inherent right of ownership beyond the shoreline, commonly referenced as 'water privileges,' including the bed of the Penobscot River that would normally be a part or attached to the islands as a result of the treaties."[88]

But when asked, Roy acknowledged that the areas marked in red on the plans are in fact within the confines of the islands, not beyond the shoreline.[89] And when asked what "water

[84] *Roy Depo.* at 6630 (Pages 103:8-104:2).

[85] *Roy Depo.* at 6612-13 (Pages 32:12-36:12).

[86] *Roy Report* at 6592.

[87] *Id.*

[88] *Id.* at 6594.

[89] *Roy Depo.* at 6624 (Pages 78:23-79:6).

privileges" means, he stated that "I'm not a lawyer so I can't . . . water privileges is . . . not necessarily a title issue that surveyors address so that would be a question for a lawyer."[90]

In sum, as a surveyor, and focusing on the task assigned him, Roy's conclusion should have been that he found surveys and related documents ambiguous and could speak no further. *See* 11 *C.J.S. Boundaries* § 207 (updated June 2015) (A "surveyor is confined to statements of fact and cannot give as testimony conclusions of fact or of law which are for the determination of the jury or the court."). It is neither appropriate nor admissible for him to extrapolate legal conclusions, particularly when, as noted, there is no factual support for his extrapolations and there is no evidence that any party in 1796-1820 was applying any of the legal presumptions he applies now.

CONCLUSION

Expert evidence in disputes interpreting Indian treaties may be admitted to explain the historical and cultural context at the time the treaties were entered, when the text of such treaties are ambiguous and entered long ago. But here, the Court is not interpreting an ancient treaty, but plain language contained in statutes enacted in 1980, and none of the expert testimony offered by Plaintiffs provides any potentially useful historical and cultural context, because the relevant context is 1980, not 1796 or 1818.

In any event, the offered testimony does not even shed light on the context in which those early treaties, however irrelevant, were entered. At most, the testimony establishes that the Penobscot River was important to the Tribe approximately 150 years ago. This may be true, but the River was also important to non-Tribal members at that time, and that the River was important to PN then says nothing about what the parties to the Settlement Acts intended in

[90] *Id.* at 6623 (Pages 73:5-10).

1980, after centuries of the River being of importance to many constituencies, and long controlled and regulated in its entirety by the State of Maine.

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 Motion to Exclude the Testimony of Plaintiffs' Experts and Incorporated Memorandum of Law 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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