**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

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| PENOBSCOT NATION | ) | |
| | ) | |
| Plaintiff, | ) | Civil Action No. 1:12-cv-00254-GZS |
| | ) | |
| v. | ) | |
| | ) | |
| JANET T. MILLS, *et als*., | ) | |
| | ) | |
| Defendants. | ) | |

**PLAINTIFF'S OPPOSITION TO INTERVENOR NPDES PERMITTEES' MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Penobscot Nation (the "Tribe" or the "Nation") hereby submits its memorandum in opposition to Intervenor NPDES Permittees' Motion for Judgment on the Pleadings.[1] Although the NPDES Permittees have tried to recast their interest by calling themselves "State Intervenors," the reality is that the only issue raised in any of their pleadings relates to the claimed threat of possible regulation by the Tribe of the NPDES Permittees' discharges into the Penobscot River. That fear is misplaced and the NPDES Permittees' Motion should be denied and judgment entered against them both for the reasons set out in the Nation's motion for summary judgment and its opposition to the State Defendants' motion for summary judgment, as well as in the motion for summary judgment of the United States and its oppositions, and because: (1) there is no private cause of action under the Settlement Acts allowing these Intervenors to pursue any claims against the Nation; and (2) to the extent that the NPDES

[1] The Intervenors are 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. Previous Intervenor Town of Orono voluntarily dismissed its case.

Permittees' counterclaim seeking to define the boundaries of the Tribe's reservation turns on the alleged threat of tribal regulation of their discharges, those concerns have no place in this case.[2]

**BACKGROUND**

The NPDES Permittees, like the State, hinge their entire argument on a total distortion of the original litigation resulting in the land claims settlement acts. The claim in that litigation did not involve the River at all, which the Penobscot have always believed was part of their Reservation, but rather the lands on both sides of the River unlawfully ceded to Massachusetts and subsequently Maine in violation of the Non-Intercourse Act. As the Maine Implementing Act itself recognizes, "the Penobscot Nation . . . [is] asserting claims for possession of *large areas of land in the state* and for damages alleging that *the lands in question originally were transferred in violation of the Indian Trade and Intercourse Act of 1790* . . . ." 30 M.R.S.A. § 6202 (emphasis added). "The lands in question originally transferred" were, as amply demonstrated in the Tribe's motion for summary judgment, lands "on both sides" of the Penobscot River, not the River itself. Thus, contrary to the fundamental assumption in both the NPDES Permittees' motion and the State's motion, no claims to the Penobscot River were asserted in the original litigation since there was no dispute as to any cession of the River itself under the Treaties. Nor could any claim to the River have been "extinguished" since only the claims *asserted* were extinguished. *See, e.g.*, *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 45 (1st Cir. 2007) ("MICSA extinguished *the land claims* of *all* Indian tribes in Maine . . .") (first emphasis added)).

In evaluating the NPDES Permittees' Motion, furthermore, it is important to keep in mind their purported interest in the case. In their Motion to Intervene, the NPDES Permittees

[2] The Tribe employs the same abbreviations here as it did in its Motion for Summary Judgment on its Second Amended Complaint, *see* ECF No. 128-1, at 7562 n.3, and in its Opposition to the State Defendants' Motion for Summary Judgment filed this day.

asserted that they were municipalities and companies with authorized discharges into the Penobscot River or its tributaries. Their stated purpose in intervening was to assure that their operations would not be subject to regulation by the Tribe and they called themselves the NPDES Permittees. *See, e.g.*, *Mot. to Intervene*, ECF No. 12, at 113, 114. Specifically, they asserted that if the Court were to determine that the Penobscot Nation's reservation includes the River "and its tributaries," the Nation could seek to regulate or otherwise impose restrictions on their operations. *Id*. at 117. In support of these claimed interests, they submitted an identical affidavit from each entity asserting the threat of potential regulation as their interest. *Mot. to Intervene*, ECF Nos. 12-1–12-18 (Exhs. A-R). Indeed, in their reply to the Tribe's opposition to their Motion to Intervene, they acknowledged that they would not have any interest in being a party if the Tribe agreed not to seek to regulate their discharges. ECF No. 19, at 209. Finally, almost as an aside, they noted that there might be a conflict with municipal boundaries if the reservation were determined to include the entire Main Stem bank to bank. *Id*. at 211.

Originally, there were eighteen Intervenors. Significantly, Old Town, the municipality closest to and most connected with the Tribe, was not one of them. Recently, the Town of Orono, the next closest major town, voluntarily withdrew from the case. Of the remaining seventeen Intervenors, eleven have no operations in, and many are not anywhere near, the Main Stem:

1. Bucksport is more than 30 miles south of Indian Island, the beginning of the Main Stem.

2. Brewer is more than 13 miles south of the Main Stem.

3. Millinocket is in the West Branch of the Penobscot River many miles from the Main Stem.

4. East Millinocket is also in the West Branch of the Penobscot River many miles from the Main Stem.

5. Great Northern Paper Company, LLC owns mills in Millinocket and East Millinocket, which, as noted, are in the West Branch, far from the Main Stem.

6. Guilford-Sangerville Sanitary District is in Guilford in the Piscataquis River, more than 45 miles east of the Penobscot River.

7 Krugar Energy, Inc. owns three dams, none of which is on the Main Stem or even the Penobscot River, but rather in Dover-Foxcroft (40 miles northeast of Indian Island on the Piscataquis River); Milo, 30 miles northeast of Indian Island on the Sebec River; and Lowell, more than 35 miles north of Indian Island on the Passadumkeag River.

8. True Textiles, Inc. is in Guilford on the Piscataquis River, again, 45 miles east of the Main Stem.

9. Veazie Sewer District is in Veazie, more than 8 miles south of Indian Island.

10. Verso Paper Corp. is in Bucksport more than 30 miles south of the Main Stem.

11. Expera Old Town, LLC is in Old Town, also south of Indian Island.

Thus, the only Intervenors with even any marginal connection to the Main Stem are Covanta Energy Corporation in West Enfield, the Town of Howland, the Town of Lincoln, the Town of Mattawamkeag, Lincoln Paper and Tissue, and Lincoln Sanitary District.

Nothing in the papers filed by the NPDES Permittees, from their initial Motion to Intervene to their Motion for Judgment on the Pleadings, mentions any of the claims asserted by either the Tribe or the State. Those claims all involve hunting, fishing and trapping rights, navigation, and the jurisdiction of the Nation's Tribal Court. None of those controversies affects the NPDES Permittees in any way or their claimed concern over regulation of their discharge, and they make no attempt even to argue as to how resolution of any of those issues could affect any of their interests.

## ARGUMENT

Although it is not entirely clear what the NPDES Permittees are seeking judgment on, because their motion presumably addresses both the Tribe's claim in its Second Amended Complaint and their counterclaim, we address each in turn below.

A. The NPDES Permittees' Motion for Judgment on the Tribe's Second Amended Complaint Should be Denied.

With minor exceptions, the NPDES Permittees raise no argument with respect to the Tribe's complaint not already made by the State Defendants (the "SDs"). The one point worth mentioning about their argument is that its logic leads to the conclusion that there can be no actual Reservation. They argue that, because the State has exercised "dominion and control" over the Penobscot River and its islands, the Tribe's claim to both the River and its islands were "extinguished" by the settlement acts. *Mot. for J.*, at 6-7, ECF No. 116, at 6840-41. They base this contention principally on the transfer provisions of the Settlement Acts. But reading the transfer provisions to include all land and natural resources over which the State previously had allegedly exercise dominion and control prior to the Settlement Acts, including the Penobscot River and its islands, would mean that the historic Reservation of the Tribe confirmed by the Acts—the islands "reserved to the Tribe by agreement with the States of Massachusetts and Maine"—would have been transferred and thus could not be part of the Tribe's Reservation. That argument, in short, would render the Reservation a nullity.

One astonishing example of historical inaccuracy in their motion highlights the absurdity of their argument—the citation to the 1713 Treaty of Portsmouth as an "exercise of control over all PN territory and the extinguishment of any aboriginal title." *Mot. for J.*, at n.4, ECF No. 116, at 6838 n.4. First, although a Penobscot appears to have signed it, it is a treaty that expressly involves only "Delegates for the several Tribes of Indians belonging to the River of [Kennebec],

[Amerascoggin], St. John's, Saco, Mer[r]imack and the parts adjacent," P.D. 1, at 5-6, with no mention of the Penobscots, and, accordingly, cannot be considered as binding on the Penobscots. Moreover, it expressly saves "unto the Indians their own Ground, and free liberty of Hunting, Fishing, Fowling and all other Lawful Liberties and Priv[ileges] . . . ." *Id.* at 4. Second, and more important than this failure actually to examine the historical text, the State's own expert, the Tribe's expert, and the relevant historical documents all confirm that the Penobscots had secured their aboriginal domain above the head of the tide – the limit of English expansion – until the Treaty of 1796. *See SMFs* ¶¶11-22, ECF No. 119, at 7198-7200; Prins Report, ECF No. 105-88, at 3746-75; Bourque Dep., ECF No. 106-69, at 4030-31 (agreeing with Governor Pownall's statement that he took possession of captured territory as far as the head of the tide, quoted in Bourque's *Twelve Thousand Years, American Indians in Maine*); *id*., at 4042-43 (agreeing that the line at the falls at the head of tide demarcated Indian territory above which English Settlers were not to go).

B. The NPDES Permittees' Counterclaim Must be Dismissed Because There is No Private Cause of Action under MICSA.

With respect to their counterclaim, the NPDES Permittees' Motion for Judgment must be dismissed because there is no private cause of action under the settlement acts.

Federal courts have a long history of examining implied rights of action under statutes, specifically federal statutes and constitutional provisions. In *Cort v. Ash*, the Supreme Court set forth a four-prong test for finding an implied cause of action. The test asks whether 1) the plaintiff is in the class for whose special benefit the statute was enacted; 2) there is any indication of legislative intent, explicit or implicit, either to deny or to create a private right to enforce; 3) a private right to enforce would be consistent with the underlying purpose of the

statute; and 4) the cause of action is traditionally in the purview of state law, such that a federal right to enforce would be inappropriate. 422 U.S. 66, 78 (1975).

Since *Cort*, the Court has increasingly narrowed the test for finding implied rights of action, holding that "implied causes of action are disfavored." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). *See also Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377 (1982) (federal courts require "more careful scrutiny of legislative intent" to imply a private right of action); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person") (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979)). By the early 2000s, there were numerous federal court cases holding that there was no implied private right of action to enforce federal statutes, with the exception of Title IX and VI of the Civil Rights Act and the Rehabilitation Act. *See Alexander v. Sandoval*, 532 U.S. 275, 286-89 (2001) (discussing the genesis of the law surrounding implied rights of action under federal statutes and reaffirming the rule that no private cause of action can be found absent clear Congressional intent to create one).[3]

[3] As for implicit rights under state statutes, the Maine Law Court has adopted a similar approach to that outlined in *Cort*, holding that in order to determine whether a cause of action may be implied, the court is to examine

> (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one; (3) whether it is consistent with the underlying legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to one jurisdiction rather than another.

*Goodwin v. Sch. Admin. Dist. No. 35*, 1998 ME 263, ¶ 12, 721 A.2d 642 (citing *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 101 (Me. 1984)). In *Charlton v. Town of Oxford*, the Law Court held that absent an express right of action, courts should look to legislative intent "either in the statute or the legislative history" to determine whether an implicit right of action exists. 2001 ME 104, ¶ 15, 774 A.2d 366. In short, the Law Court's examination of whether an implied right of action exists appears equally as strict of that of federal courts, with the court going on to state that it is "hesitant to imply a private right of action where the legislature has not expressly stated that a cause of action exists." *Id.*

Given this authority, it is not surprising that the First Circuit has stated that "nothing in the Settlement Act explicitly creates a federal right . . . to sue to enforce what is at most an implicitly-adopted federal limitation on state power that could easily be asserted as a defense in a state proceeding." *Penobscot Nation v. Georgia-Pac. Corp.*, 254 F.3d 317, 322 (1st Cir. 2001); *see Wiener v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 223 F. Supp. 2d 346, 351, n.8 (D. Mass. 2002) (stating that "the First Circuit observed . . . that the federal Maine Claims Settlement Act lacked an explicit private right of action to sue to 'enforce what is at most an implicitly-adopted federal limitation on state power' and that, similarly, no private right of action existed under the Federal Wampanoag Settlement Act (internal citations omitted)); *see also Shobar v. California*, 134 F. App'x 184, at *1 (9th Cir. 2005) ("no private cause of action exists to enforce the state-tribal compact under either IGRA or the terms of the compact itself").[4]

This limitation on private causes of action applies particularly where, as here, treaties are involved.[5] "To determine whether a treaty creates a cause of action, [the court is to] look to its text." *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008) (citing *United States v. Alvarez–Machain*, 504 U.S. 655, 663 (1992)). "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Id.* at 489 (internal quotation marks and citations omitted); *see In re Request from United Kingdom Pursuant to*

[4] Of course, the Declaratory Judgment Act itself is procedural only and does not establish a cause of action. *See Akins v. Penobscot Nation*, 130 F.3d 482, 490 n.9 (1st Cir. 1997).

[5] As the Tribe pointed out in its Motion for Summary Judgment, after the end of treaty-making in 1871, Congress's dealings with Indian tribes have been by means of statutes, like the Settlement Acts, which the Supreme Court characterizes as "treaty substitutes," meaning that, for all intents and purposes, they function in precisely the same manner as treaties, particularly where, as here, they confirm an underlying agreement involving an Indian tribe. *See Mot. of Penobscot Nation for Summ. J. on 2d Amend. Compl.*, ECF No. 128-1, at 7593 (citing, *inter alia*, *United States v. Dion*, 476 U.S. 734 (1986),) and *Antoine v. Washington*, 420 U.S. 194 (1975)). State legislators themselves referred to the settlement act as "this treaty." *See, e.g.*, P.D. 271, at 4017 (statement of Senator Redman).

*Treaty Between Gov't of U.S. & Gov't of United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 685 F.3d 1, 11 (1st Cir. 2012) ("The First Circuit and other courts of appeals have held that treaties do not generally create rights that are privately enforceable in the federal courts." (internal citations omitted)); *see also Medellin v. Texas*, 552 U.S. 491, 505-06 (2008) ("A treaty is, of course, primarily a compact between independent nations. It ordinarily depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these interests fail, its infraction becomes the subject of international negotiations and reclamations. It is obvious that with all this the judicial courts have nothing to do and can give no redress"); *McKesson Corp.*, 539 F.3d at 488-91 ("inferring a treaty-based cause of action embroils the judiciary in matters outside its competence and authority"). Since the Settlement Acts are in essence a form of treaty, *see United States v. Dion*, 476 U.S. 734 (1986), the NPDES Permittees' attempt to assert a claim against the Tribe under those Acts must fail.

Even if the Acts were considered only as an ordinary contract, rather than a treaty, moreover, in order for there to be a right of action by a third-party, the law requires "special clarity" that the parties to the contract intended to confer such a benefit upon third parties. *InterGen N.V. v. Grina*, 344 F.3d 134, 146 (1st Cir. 2003). The First Circuit, in interpreting Maine law, has adopted the Restatement's position that "a person who is not a party to a contract is entitled to sue on the contract only if such person is a donee beneficiary or a creditor beneficiary" and that "[an] incidental beneficiary has no cause of action on the contract." *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 F.2d 49, 52-53 (1st Cir. 1979). "Unless the performance required by the contract will *directly* benefit the would-be intended beneficiary, he is at best an incidental beneficiary." *Elmet Technologies, Inc. v. Advanced Technologies Sys.*,

*Inc.*, No. 05-200 PS, 2007 WL 30276, at *5 (D. Me. Jan. 3, 2007) (emphasis in original). Nowhere in either of the acts can "special clarity" be found that Congress, the State, and the Tribe intended to confer a right of action on any third-party. The absence of such clarity also requires dismissal of the NPDES Permittees' counterclaim.

Finally, even if the settlement acts were somehow viewed as government contracts, claimed third-parties like the NPDES Permittees face equally high barriers as those seeking to assert a private right of action under an otherwise silent statute. *See Astra USA, Inc. v. Santa Clara Cnty., Cal.*, 131 S. Ct. 1342, 1348 (2011) (holding that there is no private right to sue for breach of contract as a third party beneficiary of a government contract when the statute mandating the contract contains no express or implied right of action); *New York City Health & Hospitals Corp. v. WellCare of New York, Inc.*, 801 F. Supp. 2d 126, 134 (S.D.N.Y. 2011) ("Although whether the plaintiff has a private right of action under [a] statute is conceptually distinct from whether the plaintiff may sue as a third-party beneficiary of the contract mandated by the statute, the same considerations largely determine both issues. When a government contract confirms a statutory obligation, a third-party private contract action to enforce that obligation would be inconsistent with the legislative scheme to the same extent as would a cause of action directly under the statute." (internal quotation marks and citations omitted)).

Courts have been reluctant to allow third-party suits in contract to proceed, finding such action no more than a creative way around the fact that no private right of action otherwise exists. *See New York City Health & Hospitals Corp.*, 801 F. Supp. 2d at 140 ("In the absence of any evidence, either in the contract itself, the background statutes, legislative history, or implementing regulations, that Congress intended to confer third-party beneficiary rights to" private parties, no action in contract raises by a purported third-party beneficiary may proceed);

*Bobo v. Christus Health*, 227 F.R.D. 479, 482 (E.D. Tex. 2005) (non-profit hospital's federal tax-exempt status did not create binding contract between hospital and government to provide free or discounted treatment to needy patients; in turn, uninsured patient had no private right of action to enforce, as third-party beneficiary, her purported right to free or discounted care at hospital); *see also Grochowski v. Phoenix Construction*, 318 F.3d 80, 85 (2d Cir. 2003) (holding that a plaintiff may not get around the lack of a private right of action under a federal statute by artfully pleading a third-party breach of contract claim or quasi-contract claim based on a violation of the statute).

The absence of a private cause of action under the settlement acts dooms the NPDES Permittees' counterclaim and, accordingly, it should be dismissed.

C. The NPDES Permittees Have No Interest Implicated by Any Claim in This Case in Any Event.

As pointed out in numerous filings, the Tribe here seeks to vindicate its sustenance fishing, trapping and hunting rights and related authorities in the Penobscot River. Neither the exercise of those sustenance rights and authorities nor resolution of any of the SDs' counterclaims affects any of the asserted interests of the NPDES Permittees for two reasons:

First, state and federal regulations have routinely regulated fishing, hunting and trapping rights throughout the State, irrespective of municipal or other boundaries or property ownership. *See, e.g.*, P.D.133- 207. Indeed, the SDs themselves have recognized that the taking of fish and game in the Penobscot River is subject to sovereign authority. *See SDs' Mot. for Summ. J.*, ECF No. 117, at 6880 ("[t]he fish in the waters of the state, and the game in its forests, belong to the people of the state, in their sovereign capacity, who, through their representative, the legislature, have sole control thereof, and may permit or prohibit their taking." (quoting *State v. Snowman*, 46 A.815, 818 (Me. 1900)). Thus, regardless of a municipality's boundaries or a permittee's

discharge, the sovereign has regulatory authority over these resources, not the property owner or a governmental subdivision. The sovereign here – the United States – has guaranteed that there will be no State interference with the Tribe's sustenance fishing, hunting and trapping rights, which can only be exercised in the River itself, and that guarantee trumps any boundary interest that might be asserted by a municipality.

Second, as with the Tribe's claims, nothing in the SDs' counterclaims implicates any interest of the NPDES Permittees. Those counterclaims involve asserted disputes about the regulation of boating, fishing, hunting, trapping, and the like. *See SD's Amend. Answer & Counterclaims*, ECF No. 59, at 682-83. None of those activities affect the NPDES Permittees' operations.

Thus, and consistent with their pleadings, the only conceivable interest the NPDES Permittees have in the waters of the Main Stem relates to their discharges. The First Circuit in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), held that, by the terms of the settlement acts, the State governs the NPDES Permittees' discharges and the Tribe makes no claim to regulate their discharges in any way. There can be, accordingly, no issue in this case of tribal authority over the NPDES Permittees' discharges.[6]

**CONCLUSION**

For the foregoing reasons, the NPDES Permittees' Motion for Judgment on the Nation's Second Amended Complaint should be denied and their Motion for Judgment on their counterclaim dismissed.

[6] If that were not in and of itself sufficient to put to rest the NPDES Permittees' claimed concern, EPA recently, in considering the State's water quality standards, has again determined that water quality standards are a matter to be determined by the State. ECF No. 105-99. In that proceeding, EPA also determined that the State has an obligation to protect the sustenance fishing rights of the Tribe in the Penobscot River. In the course of developing those standards, the State may or may not adopt water quality standards that affect the NPDES Permittees. Thus, the appropriate place for the NPDES Permittees to raise any concerns about any proposed standards is with the State and EPA, not here.

Respectfully submitted,

Dated: June 22, 2015

*/s/ James T. Kilbreth*
Kaighn Smith Jr., Esq.
James T. Kilbreth, Esq.
Adrianne E. Fouts, Esq.
David M. Kallin, Esq.
Attorneys for Plaintiff Penobscot Nation

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
207-772-1941
jkilbreth@dwmlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 2015 I electronically filed Plaintiff's Opposition to Intervenor NPDES Permittees' Motion for Judgment on the Pleadings with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

*/s/ James T. Kilbreth*
James T. Kilbreth

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, Maine 04101
Tel: (207) 772-1941
Fax: (207) 772-3627
jkilbreth@dwmlaw.com