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PUBLIC COMMENTS OF THE PENOBSCOT NATION

ON THE APPLICATION OF THE STATE OF MAINE TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR THE AUTHORIZATION TO ADMINISTER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

February 29, 2000

Submitted to:
United States Environmental Protection Agency, Region I
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The Penobscot Nation (the "Nation" or the "Tribe"), through counsel, hereby submits its written Public Comments to the United States Environmental Protection Agency (the "EPA") on the application of the State of Maine (the "State" or "Maine") to the EPA for authority to administer the permitting of pollution discharges into the Penobscot River and other rivers and tributaries in Maine under the National Pollutant Discharge Elimination System ("NPDES") pursuant to §402 of the Clean Water Act, 33 U.S.C. §1342(b).[1]

INTRODUCTION

As part of its application, the State has submitted a statement, issued by its Attorney General, asserting that the State of Maine has jurisdiction over water quality matters within the Penobscot Indian Reservation to the exclusion of (a) any tribal authority over such matters and (b) any federal authority over such matters pursuant to the federal government's trust responsibility to the Penobscot Nation. *See State of Maine: Program Submission for Authorization to Administer the National Pollutant Discharge Elimination System*, Section IV, "Statement of Attorney General," ("Attorney General's Statement") at 34-37. The Attorney General's Statement is contrary to federal law, including the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-35 (the "Settlement Act"), which recognizes and protects the right of the Penobscot Nation (or the federal government on behalf of the Nation) to protect the health, safety and welfare of the Penobscot Indian people and their reservation. That reservation includes the

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[1]This submission is made pursuant to Resolution Number 02-22-00-06 of the Penobscot Nation Tribal Council, submitted herewith as Exhibit 1 and fully incorporated by reference herein. The Nation's exhibits to these written comments are separately bound and filed as part of the record.

islands, waters, and related resources (including the right of tribal members to take fish for sustenance) within the Penobscot River from Indian Island, northward.

As set forth below, the EPA may not, consistent with the Settlement Act, the EPA's federal trust obligation to the Penobscot Nation, and the goals of the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("CWA"), grant Maine's application to take over the NPDES program for discharges that affect water quality and resources within the Penobscot Indian Reservation. Since the Settlement Act preserves and protects tribal and federal authority over the integrity of the Penobscot Indian Reservation for the health and welfare of the Nation's tribal members, the State of Maine does not have adequate jurisdiction to run the NPDES program for those pollution sources.

FACTS

Initially, the Penobscot Nation sets forth the factual background for its interest in this proceeding:

1. The Penobscot Nation is a federally recognized Indian tribe, which, since aboriginal times, has occupied the Penobscot River watershed and relied upon its water and resources for physical, cultural, and spiritual sustenance. *See* Exhibit 1; *Affidavit of John Banks, Director of Natural Resources, Penobscot Nation* (Exhibit 2); 25 U.S.C. § 1721(a)(3); S.Rep.No. 96-957 1980 ("Senate Report") (Exhibit 3) at 11 ("the aboriginal territory of the Penobscot Nation is centered on the Penobscot River"); Frank G. Speck, *Penobscot Man: The Life History of a Forest Tribe in Maine* (University of Maine Press, 2nd Ed., 1998) ("Speck 1998") at 24-26, 82-91; Frank G. Speck, "Penobscot Tales and Religious and Religious

Beliefs," *The Journal of American Folk-Lore*, Vol. 48, No. 187, Jan.-March, 1935 ("Speck 1935"). (Excerpts from Speck 1998 and Speck 1935 are contained in Exhibit 4); *Letter from Maine Attorney General, James E. Tierney to William J. Vail, Chairman, Atlantic Sea Run Salmon Commission*, Dated Feb. 16, 1988 (Exhibit 5) (tribal gill net fishing for salmon within river is beyond jurisdiction of State); Decision and Memorandum, *Penobscot Nation v. Daigle*, Criminal Docket No. 95-143 & 144 (Penobscot Nation Tribal Court, Oct. 16, 1995) (Exhibit 6) (jurisdiction of Penobscot Nation tribal court extends to Penobscot River surrounding islands in the river, from Indian Island, northward).

2. The Penobscot Indian Reservation includes the islands, waters, and resources (including the right of tribal members to take fish for sustenance) within the Penobscot River from Indian Island, near Old Town, northward. 25 U.S.C. § 1722(i), *ratifying* 30 M.R.S.A. §6203(8); Senate Report (Exhibit 3) at 15 (the Nation's sustenance fishing right is an "expressly retained sovereign activit[y]" under the Settlement Act).

3. As the EPA knows, paper companies and municipalities have discharged pollution into the Penobscot River and its tributaries to the harm and detriment of the river's water quality and its fish. Lincoln Pulp & Paper ("LP&P") is one example. LP&P, a bleached kraft paper mill, has dumped waste from its mill, including dioxin and other dioxin-like organochlorines, directly into the Penobscot River within the Penobscot Indian Reservation near Lincoln, Maine.

4. As the EPA knows, dioxin has accumulated in fish in the Penobscot River (at levels unfit for human consumption) within the Penobscot Indian Reservation, between the site of pollution dumping by LP&P, southward in the river, including the principle reservation island of the Penobscot Nation, Indian Island. As a result, the State of Maine has, since 1987, issued a fish consumption advisory, warning against the consumption of fish caught in that area. Exhibit 7 contains a map showing the location of the fish consumption advisory within the Penobscot Indian Reservation together with copies of the advisories.

5. "[D]ue to the point source discharge from LP&P (a bleached kraft mill) and the concern over the presence in the discharge of 2,3,7,8 tetrachlordibenzo-p-dioxin (dioxin)," the Penobscot River is required, pursuant to the CWA, to be listed as a river that fails to meet state water quality standards and the goals of the CWA. *Fact Sheet: Draft NPDES Permit to Discharge to Waters of the United States, NPDES Permit No.: ME0002003* ("EPA Draft LP&P NPDES Permit") (Exhibit 8) at 6; *Letter from EPA, Stephen J. Silva, to Maine Department of Environmental Protection, David Courtemanch*, Dated June 10, 1998 (Exhibit 9).

6. Dioxin is "the most powerful carcinogen evaluated to date by the [EPA]." Office of Pesticides and Toxic Substances, U.S.E.P.A., *Integrated Risk Assessment for Dioxins and Furans From Chlorine Bleaching in Pulp and Paper Mills* (July 1990). It accumulates in fish and other river organisms in extremely high concentrations. Office of Water, U.S.E.P.A., Pub. No. EPA-823-F99-015,

Polychlorinated Dibenzo-P-Dioxins and Related Compounds Update: Impact on Fish Advisories at 1 (1999).

7. The Penobscot River watershed is of unique cultural, religious, and historic significance to the Penobscot Nation. Exhibit 1; Exhibit 4; Resolution Number 02-00-07 of the Penobscot Nation Tribal Council (Exhibit 10). One such site of historic significance to the Tribe is Matna'gak (now known as "Lincoln Island"). Matna'gak is the site of the one of the Tribe's original fishing villages and a place of unique cultural importance. Exhibit 4 (Speck 1998 at 25; Speck 1935 at 13). This island is adjacent to the area were LP&P dumps its mill waste into the river. *See* Speck at 25; *Maps of the Penobscot River Watershed and Discharge Sites Affecting Penobscot Indian Reservation*, (Exhibits 11A and 11B).

8. Exhibits 11A and 11B show the location and names of entities that discharge pollutants into the Penobscot River watershed as well as the location of the Penobscot Indian Reservation, Penobscot Nation trust lands, and Penobscot Nation fee lands, some of which are proposed for the United States to take into trust. Exhibit 12 is a complete list of all such pollutant dischargers known to the Penobscot Nation Department of Natural Resources, not all of which appear on Exhibits 11A and 11B.

9. The EPA has not approved Maine's water quality standards, under section 303 of the Clean Water Act, 33 U.S.C. §1313, for application within the Penobscot Indian

Reservation. *Letter from John P. Devillars (EPA) to Hon. Richard Hamilton*, Dated Dec. 21, 1999.[2]

10. The Penobscot Nation has twice requested the EPA to promulgate federal water quality standards for the Penobscot River, but the EPA has not acted on those requests. *See* Correspondence between the Penobscot Nation and the EPA (Exhibit 13).

11. In 1989, LP&P applied to the EPA for a 5 year NPDES permit to discharge its mill waste into the Penobscot Indian Reservation. During the course of EPA's proceedings to address this application, the United States Department of the Interior ("DOI"), through its Assistant Secretary, Indian Affairs, Ada E. Deer, wrote to the EPA, through its Administrator, Carol M. Browner, explaining that the Nation had a federally protected "right to take fish for individual sustenance within the boundaries of the reservation [and that] [t]his right demands that there be sufficient fish to take and that such fish be safe to eat." *Letter from United States Department of the Interior to Carol M. Browner*, Dated April 8, 1994 (citations omitted) (Exhibit 14) at 1. Assistant Secretary Deer also stated that "[f]ederal agencies must ensure that environmental degradation, such as exists on the Penobscot River, not be allowed to impair the Nation's fishing rights." *Id.* at 2 (citation omitted). She further stated:

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[2]If not already part of the record, the Penobscot Nation asks that this letter be made part of the record.

> President Clinton's recent Executive Order regarding environmental justice should be applied to this permit process. As you know, one purpose of the Order and the federal government's increased emphasis on environmental justice is to ensure that minorities in our society live in healthy communities. As you [Carol Browner] have noted, minority communities have borne a disproportionate burden of modern industrial life. Far too often, this burden has fallen upon Native Americans. *Due to the island location of its reservation, the Penobscot Indian Nation is subject to a disproportionate burden of the risks and the harms occasioned by industrial plants, such as Lincoln.* I feel very strongly that our Native American communities should no longer bear this burden.
> Thus, I urge the EPA to give the concerns of the Nation special attention as your agency processes this permit, and to respond to those concerns in keeping with the federal trust responsibility.

Exhibit 14 at 3-4 - (emphasis added).

12. The EPA issued a five year NPDES permit to LP&P on January 23, 1997 (the "LP&P NPDES Permit"). In the course of its proceedings for the issuance of that permit, the EPA acknowledged its federal trust obligation to protect the Penobscot Nation's sustenance fishing rights. *Response to Comments- NPDES ME 0002003, Lincoln Pulp and Paper Company, Inc., Lincoln, Maine*, ("EPA Response to Comments") (Exhibit 15) at 19.

13. In the course of the EPA's proceedings for the LP&P NPDES permit, the EPA referred to Maine quality standards only as a reference point, and took into consideration additional factors, such as the dioxin levels in fish tissue below LP&P's discharge site, fish consumption rates of the members of the Penobscot Nation, and a biological opinion of the DOI's Fish and Wildlife Service concerning LP&P pollutant affects on bald eagles resident in the Penobscot River watershed. *See* Exhibit 8 (EPA Draft LP&P NPDES Permit) at 5, 11-14; Exhibit

15 (EPA Response to Comments) at 11, 15-19, 21, 24. Bald eagles are important to the culture of the Penobscot Nation. Exhibit 4 at 10, 74; Exhibit 15 at 15; Exhibit 16 at 15-17.

14. The Penobscot Nation has appealed EPA's 1997 NPDES permit to LP&P, and a copy of the *Penobscot Nation Indian Nation's Appeal of the National Pollutant Discharge Elimination System Permit for Discharges from the Lincoln Pulp & Paper Company in Lincoln, Maine* (including Exhibits A-L) is separately bound and filed herewith as Exhibit 16.

15. In the context of the Nation's appeal of the LP&P NPDES permit, the Attorney General of the State of Maine wrote a letter, dated June 3, 1997, to the EPA, through John DeVillars, Regional Administrator for EPA , asserting that the EPA had no federal trust obligation to account for the interests of the Penobscot Nation within the Penobscot River and that the Settlement Act extinguished the Nation's sovereignty. A copy of that letter (the "Attorney General Letter of 6/3/97") appears at Tab 3 to the January 28, 20000 comments of Great Northern Paper, Inc. in this proceeding.

16. By letter dated September 2, 1997, the DOI, through its Deputy Solicitor, Edward B. Cohen, wrote to the EPA, through John P. DeVillars, in response to the Attorney General Letter of 6/3/97. *Letter from Deputy Solicitor Edward B. Cohen to John P. DeVillars*, Dated Sept. 2, 1997 (Exhibit 17). In that letter, Deputy Solicitor Cohen wrote: "EPA's consideration of federal law to determine its [trust] obligations to the PIN [Penobscot Indian Nation] in making the NPDES permit

decision . . . is required in this case. . . . Since there exists a trust relationship between the Maine Tribes and the United States, EPA must act as a trustee when taking federal actions which affect tribal resources. When taking such actions, EPA's fiduciary obligation requires it to first protect Indian rights and resources." *Id.* at 3(citations omitted). He further stated that pursuant to the Settlement Act, Congress confirmed the Penobscot Nation's right to sustenance fishing as "an expressly retained sovereign activit[y], . . . not a grant from the state of Maine; it is a reservation from the aboriginal rights given up by the Penobscot Nation . . .. *Id.* at 5 (citations omitted). He further clarified that the Penobscot Nation's reservation included "the bed and banks of the river"; that the "Reservation encompasses the area into which Lincoln discharges its outfall"; and that the Nation has "the right to take fish and the right that others not unreasonably pollute the waters overlying those lands." *Id.* at 6-7.

17. On March 3, 1997, the Penobscot Nation requested the Secretary of the Interior to act on its behalf to assess and address damages to the natural resources of the Penobscot Indian Reservation pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675. *Letter from DOI, through Terrance Virden, Director, Office of Trust Responsibilities to Senator Olympia Snowe*, dated Dec. 29, 1999 (Exhibit 18). The Secretary of the Interior has thereby acted as trustee, on behalf of the Tribe, to address damages to natural resources within the Penobscot Indian Reservation, including dioxin and other toxic contamination to fish and river sediments. *Id.*

18. The Penobscot Nation, through its Department of Natural Resources, manages and monitors water quality and aquatic resources in the Penobscot River pursuant to funding provided by the United States pursuant to the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et. seq.* ("ISDA"). Exhibit 2. The Nation's tribal members use the river within the Penobscot Indian Reservation to catch fish for ceremonial purposes and for sustenance. *Id.*; Exhibit 2; Exhibit 5; Exhibit 6.

19. The water quality standards that Maine deems applicable within the Penobscot Indian Reservation, as well as its management and enforcement practices, do not protect the Penobscot Nation's cultural and sustenance fishing uses of the Penobscot Indian Reservation. Affidavit of Daniel Kusnierz (Exhibit 19).

20. The Penobscot Nation specifically incorporates by reference herein the factual statements and expert opinions set forth in Exhibits 1, 2, 4, 10, 14, 16 (including exhibits thereto), and 19, to wit: The waters and critical habitats of the Penobscot River within the Penobscot Indian Reservation are protected by the CWA and used by members of the Penobscot Nation for ceremonial and subsistence purposes, such that impairment of those waters by the activities of non-members has had (and would have) serious and substantial effects on the health and welfare of the Tribe.

LAW

A. Foundational Principles of Law:

Indian tribes have the "inherent powers of a limited sovereignty which has never extinguished." *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (citation, quotations, and emphasis omitted). While subject to divestiture by Congress, Indian tribes have "inherent sovereignty authority over their members and territory," *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Indian tribes also have inherent "authority over the activities of non-Indians" within their reservations. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333. "A tribe's power to exclude non-members entirely or to condition their presence on the reservation is . . . well established." *Id.* "Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. . .." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 141 (emphasis original). The conduct of non-Indians on their privately-owned land within the boundaries of an Indian tribe's reservation is also subject to regulation by the tribe if their activity directly affects "the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). This tribal sovereignty is not conditioned upon the assent of a non-member; rather, a nonmember's presence and conduct within an Indian reservation "are

conditioned by the limitations the tribe may choose to impose." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 148.

The foregoing attributes of tribal sovereignty are "inherent" and "retained" in the sense that they "predate[] federal recognition," -- indeed, they "predate[] the birth of the Republic," *State of RI v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).[3] They exist in full force unless expressly divested by Congress. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 18. *See State of RI v. Narragansett Indian Tribe*, 19 F.3d at 701-02 (attributes of tribal sovereignty cannot be lost "through implicit divestiture") (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)); *Bottomly*, 599 F.2d at 1064 (quoting *Wheeler*, 435 U.S. at 322-23). Since tribal sovereignty is subject only to the plenary authority of Congress, a state's exercise of authority over a tribe's affairs or its territory cannot operate to divest a tribe of its these attributes of inherent sovereignty. *State of RI*, 19 F.3d at 694, n.7; *Bottomly*, 599 F.2d at 1066. *See Indian Country U.S.A. v. Oklahoma Tax Com'n*, 829 F.2d 967, 974 (10th Cir. 1987)

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[3]As the authoritative treatise of Ninth Circuit Judge, William C. Canby, Jr., states:

> One consequence of the view of tribes as sovereign is that, when a dispute arises over the exercise of tribal powers of self-government, the decision-maker must begin with the assumption that the power exists. In other words, a tribe is quite unlike a city or other subdivision of a state. When a question arises as to the power of a city to enact a particular regulation, there must be some showing that the state has conferred such power on the city; the state, not the city, is the sovereign body from which the power must flow. A tribe, on the other hand, is it own source of power.

William C. Canby, Jr., *American Indian Law* (West 1998) 72.

(citing *United States v. John*, 437 U.S. 634, 652-53 (1978)). Tribal sovereignty carries with it "a historic immunity from state and local control." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)). Similarly, "[t]he mere passage of time with its erosion of the full exercise of the sovereign powers of a tribal organization cannot constitute such an implicit divestiture." *Bottomly*, 599 F.2d at 1066. *Accord Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999), *cert. denied*, 119 S.Ct. 2367 ("Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self governing entity.") (citing and quoting F. Cohen, *Handbook of Federal Indian Law* 231 (1982 ed.)). *See also Segundo v. City of Rancho Mirage*, 513 F.2d 1387, 1393 (9th Cir. 1987) (failure of a tribe to legislate in an area of inherent sovereignty, such as land use regulation, "does not constitute a relinquishment of its authority to do so.").

These principles form the backdrop against which federal statutes or treaties addressing Indian tribes must be read. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1972); *State of RI*, 19 F.3d at 701. *See Fellencer*, 164 F.3d at 709 (court must apply "special cannons of construction . . . in order to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence") (quoting *Bracker*, 448 U.S. at 143-44); *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997) (when the "inherent self-governing authority of a tribe" is at stake, court will not infer diminishment of that authority from Congressional silence). "The unique trust relationship between the United States and the Indians," requires that "acts diminishing

the sovereign rights of Indian tribes" be strictly construed "with ambiguous provisions interpreted to the Indians' benefit." *Fellencer*, 164 F.3d at 709 (citations and quotations omitted).

This backdrop is especially significant in the context of an assertion of state jurisdiction over an Indian tribe or its reservation. *See id.* at 709 (applying backdrop principles in context of assertion of state jurisdiction), 713 ("Congress signaled its intent that federal Indian common law give meaning to the terms of the settlement."); *Akins*, 130 F.3d at 489 (Congress "explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act."); *State of RI*, 19 F.3d at 701. Early in this country's history, the Supreme Court established the federal trust doctrine in recognition of Congress' duty to protect tribes' inherent authority against state encroachment. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832); *State of Washington Dept. of Ecology v. U.S.E.P.A.*, 752 F.2d 1465, 1470 (9th Cir. 1985). *See generally* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) (hereinafter "Cohen") at 234-35 (The trust "relationship not only preserved tribal government, but insulated it from state interference."). Since only Congress has the power to limit the inherent authority of Indian tribes, state jurisdiction over tribal territory and affairs has been conditioned on the express provisions of Congress. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71 (1973); *Williams v. Lee*, 358 U.S. 217, 223 (1959). *See also Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 914 (1st Cir. 1996) (a state "presumptively lacks jurisdiction" to enforce

its laws and regulations within an Indian reservation). In short, "the Indian sovereignty doctrine, which historically gave state law no role to play within a tribe's territorial boundaries . . . provide[s] a backdrop against which applicable treaties and federal statutes must be read." *Oklahoma Tax Com'n v. Sax and Fox Nation*, 508 U.S. 114, 123-24 (1993). And it must be presumed that Congress acts in a manner consistent with "the federal role as guarantor of Indian rights against state encroachment." *State of Washington Dept. of Ecology*, 752 F.2d at 1470.

B. Historical Context and the Maine Indian Claims Settlement Act of 1980:

It was precisely this federal protection against state interference with Indian rights that gave rise to *United States v. Maine*, in which the United States, as trustee for the Penobscot Nation and the Passamaquoddy Tribe, sued the State of Maine to restore aboriginal lands taken by the State without federal approval in violation of the Indian Nonintercourse Act of 1790, *codified at* 25 U.S.C. § 177. *See Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 388 F.Supp. 649, 655-663 (D.Me.), *aff'd.* 528 F.2d 370 (1st Cir. 1975). *See generally* H. Rep. No. 96-1353, 96th Cong., 2d Sess. at 11-14 (1980) *reprinted in* 1980 U.S. Code Cong. & Admin. News ("USCCAN") at 3786-90 (discussing history of case). In the course of that litigation, the State fought against the very identity of the Penobscot Nation and the Passamaquoddy Tribe as federal Indian tribes, claiming that limited contact between the tribes and the federal government meant that (a) there was no federal trust obligation to them and (b) they lacked the inherent sovereignty of other federal Indian tribes.

The First Circuit, however, rejected both of those arguments. In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the court held that the United States had such a trust obligation. And in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1066, the court soundly rejected the State's continuing assertion that the tribes had no inherent sovereignty. It said:

> In effect, their approach would condition the exercise of an aspect of sovereignty on a showing that it had been granted to the tribe by the federal government, either by explicit recognition or implicitly through a course of dealing. As the Supreme Court recently explained, however, the proper analysis is just the reverse:
>
> > "The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty, which has never been extinguished*,' F. Cohen, Handbook of Federal Indian Law 122 (1945)(emphasis in original) . . . .
> >
> > "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers."

Bottomly at 1066 (citation omitted).[4] The Maine Supreme Judicial Court followed *Morton* and *Bottomly* in *State v. Dana,* 404 A.2d 551 (Me. 1979), *cert. denied* 444 U.S. 1098 (1980), holding that federal Indian law protecting the Passamaquoddy Tribe's inherent sovereignty and "dependent status" rendered federal jurisdiction over an alleged crime by a tribal member on the Passamaquoddy Reservation exclusive, precluding the application of state law. *Id.*

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[4]Since an essential aspect of the Passamaquoddy Tribe's inherent sovereignty, its immunity from suit, had not been taken away by Congress, the court held that it remained fully intact. *Id.* Recognizing that the law left no doubt "that a state cannot . . . divest a tribe of its immunity," the First Circuit made clear that Maine's historical involvement with the Passamaquoddy Tribe simply could not deprive it of its inherent immunity from suit. *Id.*

In 1980, Congress enacted the Maine Indian Claims Settlement Act, ending the lands claim litigation and confirming federal recognition of the Penobscot Nation and the Passamaquoddy Tribe. *See* 25 U.S.C. §§1722(h),1722(k), 1725(i). Federal recognition confirmed the inherent sovereignty of the Penobscot Nation and the Passamaquoddy Tribe, "predat[ing] the birth of the Republic." *State of RI*, 19 F.3d at 694. *See Talton v. Mayes*, 163 U.S. 376 (1896). Thus, unless expressly divested by Congress, their attributes of inherent sovereignty remain intact. *See Iowa Mutual*, 480 U.S. at 18; *Akins*, 130 F.3d at 489 (court will not infer interference with "inherent self-governing authority of a tribe" in face of Congressional silence); *State of RI*, 19 F.3d at 701-02; *Bottomly*, 599 F.2d at 1064.

Pursuant to the Settlement Act, Congress expressly divested these two tribes of certain aspects of their sovereignty -- most notably, their sovereign immunity from suit and federal authority (exclusive of states) over major crimes committed by Indians on their reservations. *See* 25 U.S.C. §§ 1725(c); 1725(d)(1). In addressing the power of Maine with respect to these two tribes and their territories, however, Congress did not speak with express clarity about the extent to which it divested these tribes of their inherent sovereignty. *See, e.g., Akins*, 130 F.3d at 486 (the examples of "internal tribal matters" that are not subject to state jurisdiction provide "limited guidance" for understanding the term). *Accord Fellencer*, 164 F.3d at 709.

Pursuant to 25 U.S.C. § 1725(a), with limited exceptions, Congress granted the State of Maine blanket authority over all Maine tribes and their territories, "*other than the Passamaquoddy Tribe and the Penobscot Nation*." 25 U.S.C. §1725(a) (emphasis added).

For these latter two tribes, Congress expressly recognized (and did not divest) numerous aspects of their inherent sovereignty. Five salient examples are as follows:

First, by ratifying the Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214, Congress provided that "internal tribal matters, including tribal organization [and] tribal government . . . *shall not be subject to regulation by the State*." 25 U.S.C. § 1725(b)(1), *ratifying* 30 M.R.S.A. § 6206(1) (emphasis added).[5] Second, Congress recognized the "separate and distinct" jurisdiction of these two tribes over criminal and civil matters. 25 U.S.C. § 1725(f). Third, Congress provided that these two tribes and the State of Maine could, by agreement, amend the Maine Implementing Act to clarify (a) "the enforcement or application of civil, criminal, or regulatory laws of" these two tribes and the State

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[5]The Settlement Act provides, in pertinent part, that "The Passamaquoddy Tribe, the Penobscot Nation, and their members . . . shall be subject to the civil and criminal jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act . . .." 25 U.S.C. §1725(b)(1). The Maine Implementing Act provides that the Passamaquoddy Tribe and the Penobscot Nation "shall be subject to . . . the laws of the State [including the laws applicable to municipalities], *provided, however, that internal tribal matters*, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income *shall not be subject to regulation by the State*." 30 M.R.S.A. §6206(1) (emphasis added). The Maine Implementing Act recognized the right of these tribes to enact laws and ordinances, *id.* §§6206(1), 6206(3), to regulate hunting and fishing within Indian territory, *id.* §6207(1), to engage in and regulate sustenance fishing within their reservations, *id.* §6207(4); to exercise law enforcement through tribal officers over tribal laws and applicable state laws within Indian territory, *id.* §6210; and to exercise civil and criminal jurisdiction within their respective tribal courts, *id.* §§6209-A, 6209-B. While numerous matters are allocated to the exclusive jurisdiction of tribal courts and law enforcement officials, *e.g.* 30 M.R.S.A. §6207(1) (hunting and fishing regulation), §§6209-A(1), 6209-B(1) (certain criminal and domestic matters arising on the reservations), §6210(1) (law enforcement of specific hunting, fishing, criminal, and domestic matters), State jurisdiction is "exclusive" only "over violations of tribal ordinances by persons not members of either tribe or nation." 30 M.R.S.A. §6206(3).

"within their respective jurisdictions"; (b) "the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation"; or (c) "the allocation of jurisdiction between tribal courts and State courts." *Id.* §1725(e)(1). Fourth, Congress acknowledged the right of these tribes and the Houlton Band of Maliseets to bring suit in the federal courts pursuant to 28 U.S.C. §1362 to protect their unique rights and interests as Indian tribes. 25 U.S.C. §1725(d)(1). Fifth, Congress provided that the trust lands and natural resources of these tribes "shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 450f of this title [the ISDA] or other existing law." 25 U.S.C. §1724(h).[6]

Addressing all Maine tribes, in a separate provision, Congress provided:

> *Except as otherwise provided* in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian

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[6]"Natural resources" includes "water and water rights, and . . . fishing rights." 25 U.S.C. § 1722(b). Section 450f is the provision of the ISDA that provides for tribes to contract with the federal government to administer regulatory and other governmental programs affecting their reservations and membership. *See* 25 U.S.C. §§ 450 *et. seq.* Congress declared that the Indian Self-Determination Act is "crucial to the realization of [tribal] self-government." 25 U.S.C. §§ 450(1)(2). It is designed to respond "to the true needs of Indian communities," in recognition that "the Indian people will never surrender their desire to control their relationship both among themselves and with non-Indian governments, organizations, and persons." *Id.* Overall, the Act articulates "a policy of Indian control and self-determination consistent with the maintenance of the federal trust responsibility and the unique Federal-Indian relationship." H. Rep. No. 1600, 93rd Cong., 2nd Session (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7781.

> lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. §1725(h) (emphasis added).

On the eve of Congress' enactment of these laws, the Penobscot Nation and the Passamaquoddy Tribe voiced concerns that the Settlement Act would amount to a "'destruction' of the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation." Senate Report (Exhibit 3) at 14; H.R.Rep. No. 96-1353 ("House Report") at 14, *reprinted in* 1980 USCCAN at 3790. The final Committee Reports of both the House and the Senate promised the tribes that this was "unfounded." Senate Report at 14; House Report at 14. In identical language, the reports responded to this concern as a "Special Issue," as follows:

> Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that *the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States*. The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied,* 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory . . . , *in keeping with these decisions the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs*. Thus, rather than destroying the sovereignty of the tribes, *by recognizing their power to control their internal affairs* and by withdrawing the power which Maine previously claimed to interfere in such matters, *the settlement strengthens the sovereignty of the Maine Tribes*.

Senate Report at 14; House Report at 14-15 (emphasis added).

These tribes also expressed the fear that "Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement." Senate Report at 16; House Report at 17. Again, in identical language in these reports, Congress promised the tribes that this was unfounded. Referring to the provision that was to be enacted as §1725(e)(1), the reports stated:

> Prior to the settlement, Maine law recognized the Passamaquoddy Tribe's and the Penobscot Nation's right to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time. Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their respective reservations but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well. The power of the State of Maine to alter such rights without the consent of the affected tribe or nation is ended by Section 6(e)(1) . . . [1725(e)(1)]. The State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse affect on stocks in or on adjacent lands or waters. . . .

Senate Report at 16-17; House Report at 17. Both reports likewise described the tribes' fishing rights as an "expressly retained sovereign activit[y]." Senate Report at 15; House Report at 15.[7]

These tribes further expressed the fear that "The Settlement will lead to acculturation of the Maine Indians." Senate Report at 17; House Report at 17. And, in identical language in each report, Congress promised the tribes that this was unfounded:

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[7]Consistent with this Congressional assurance, the State's Assistant Attorney General, John Patterson, testified to Maine' own legislative committee on the Settlement Act that this fishing right was for the "particularized cultural interests" of the Nation, consistent with the preservation of "particular kinds of . . . fishing rights" in "agreements" with the Nation "negotiated back in the 1700's and 1800's." Testimony of John Patterson, *Hearing on the Maine Indian Claims Settlement, before the Joint Select Committee of the Maine Legislature* at 157 (March 28, 1980) (Exhibit 20). One such "agreement" is the so-called Shad Island agreement of 1834 (Exhibit 21).

> Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters.

Senate Report at 17; House Report at 17.

In discussing §1724(f) (the "separate and distinct" civil and criminal jurisdiction of the Penobscot Nation and the Passamaquoddy Tribe), the Senate Report explained that the Settlement Act recognized "the independent source of tribal authority, that is, the *inherent authority of a tribe to be self-governing. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)." Senate Report at 29 (emphasis added). It further explained that these tribes' qualified agreement to adopt certain State laws (*see* 30 M.R.S.A. §6206(1)), would "*not violate the principles of separate sovereignty*." Senate Report at 29 (emphasis added). The report continued, "Though identical in form and subject to redefinition by the State of its laws, the laws are those of the tribes. *Wauneka v. Campbell*, 22 Ariz. App. 287, 526 P.2d 1085 (C.A. 1974)." *Id.*[8] Finally, the Senate report clarified that the tribal

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[8]In *Wauneka v. Campbell*, 526 P.2d 1085 (Ariz. Ct. App. 1974), the Arizona Court of Appeals held that the State of Arizona could not enforce its Motor Vehicle Safety Responsibility Laws against Indians on the Navajo reservation, notwithstanding the fact that the Navajo Tribal Code required all Navajo Indians residing on the Navajo Reservation in Arizona to obtain an Arizona Driver's license. Noting that the Navajo Tribe, within its reservation, had police power authority to govern the activities of tribal members, the court held that imposition of Arizona's Motor Vehicle Safety Responsibility Laws would interfere with the Tribe's right to self-government. The Tribe's adoption of the Arizona Driver's licensing requirements as its own did not prevent it from enacting laws more suitable to its territory and members, nor did it constitute consent to allow state jurisdiction over the reservation. *See id.* at 1088-89. As the court explained:

> The Tribe in requiring its members who drive on the Reservation to be licensed by

(continued...)

courts of the Penobscot Nation and Passamaquoddy Tribe would function like the tribal courts of other federal Indian tribes under federal law and that "principles of double jeopardy and collateral estoppel shall not apply as between the tribal and State courts . . . in keeping with the principles enunciated in *U.S. v. Wheeler*, 435 U.S. 313 (1978)." *Id.* This section of the report concluded, "It is this *separate and independent status* which this subsection recognizes." *Id.* (emphasis added). *Accord State v. Mitchell*, 712 A.2d 1033, 1035 (Me. 1998).

Congress' intent, and its assurances to the Penobscot Nation and Passamaquoddy Tribe, upon enacting the Settlement Act and ratifying the Maine Implementing Act are paramount. Indeed, given Congress' constitutional plenary authority over Indian affairs, the Maine Implementing Act would have no force of law without congressional consent. *See Fellencer*, 164 F.3d at 709 ("Congress' authority to legislate over Indian affairs is plenary and only Congress can abrogate or limit an Indian tribe's sovereignty"); *State of RI*, 19 F.3d at 689 ("[b]ecause Congress possesses plenary power over Indian matters," state and tribe attained congressional approval of Rhode Island Indian Claims Settlement Act).[9] Thus, the scope of the State of Maine's authority to interfere with the self-

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[8](...continued)

> the state in which they live insures that those driving on the Reservation have demonstrated certain minimal skill and knowledge relative to the operation of motor vehicles. The tribal driver's license statute has not ceded either civil or criminal jurisdiction over Reservation events to Arizona courts or administrative agencies.

Id. at 1089.

[9]Senator Samuel W. Collins, Jr., Chairman of Maine's Joint Select Committee on (continued...)

governing authority of the Penobscot Nation over its territory and members is a federal question. *See Fellencer*, 164 F.3d at 708 (the meaning of the phrase "internal tribal matters" is a federal question) (citing *Akins*, 130 F.3d at 485 and *Bottomly*, 599 F.2d at 1066). In making this determination, it must be presumed that "Congress intended to exercise its power in a manner consistent with the federal trust obligation" to the Indians, including its obligation to protect the tribes from state interference with their inherent sovereignty. *State of Washington Dept. of Ecology v. USEPA*, 752 F.2d 1465, 1470 (9th Cir. 1985). *Accord Fellencer*, 164 F.3d at 709 (the "unique trust relationship between the United States and the Indians" requires that the Settlement Act be construed "to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence") (citations and quotations omitted). Ambiguities must be resolved to preserve tribal sovereignty and the Penobscot Nation's understanding of its rights. *Id.* at 709; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 52; *McClanahan v. Arizona*, 411 U.S.

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[9](...continued)
Indian Land Claims, delivered his Committee's report to the Maine Senate, stating,

> To acquire a proper perspective about Indian affairs and the relationship of our own land to Indian rights, we must start with the realization that it is Federal Law which is supreme in this area, not English American Common Law, nor State Statutes . . . the premise of this bill and the entire settlement agreement is, that the Indians are Federal Indians. This means that the Indians and their lands are within the exclusive jurisdiction of the Federal Government and its Indian Laws. Under this premise, the State has no jurisdiction at all, but the Federal Government has that authority and can presumably delegate it to the State, or, in this instance, ratify and incorporate into Federal Law an agreement between the State and the Indians.

Maine Legislative Record -- Maine Senate, April 2, 1980 at 717-18.

at 174; *Choate v. Trapp*, 224 U.S. 665, 675 (1912). *See generally* Cohen, *supra* at 221-24, 283.

C. The Issue in Context:

The Attorney General's Statement asserts jurisdiction to the exclusion of tribal or federal Indian trust authority over water quality matters within the Penobscot River watershed. *See* Attorney General's Statement at 34-37.

The State of Maine has no such exclusive authority. Indeed, the very federal program that it seeks to control, the NPDES program of the CWA, is managed throughout Maine by the EPA. The EPA holds federal NPDES authority over the entire Penobscot River watershed and exercises that authority in accordance with its trust obligations to the Penobscot Nation. *See supra* Facts ¶¶ 9, 11-13, 16. In this setting, the EPA has not approved the application of Maine's water quality standards for application within the Penobscot Indian Reservation. *See supra* Facts ¶ 9. Instead, it "borrows upon" those standards and enhances them with special considerations to account for tribal interests, including sustenance fish considerations, and the biological opinions of its sister agency, DOI's Fish and Wildlife Agency. *See supra* Facts ¶ 13. Moreover, the Secretary of the Interior, acting as trustee on behalf of the Penobscot Nation, is actively engaged in assessing damages to the tribe's natural resources, including river sediment and fish, within the Penobscot Indian Reservation. *See supra* Facts ¶ 17. Finally, the Penobscot Nation manages and monitors water quality and aquatic resources in the river through its Department of Natural Resources with funding from the United States under the ISDA,

specially earmarked to further tribal self-government. *See supra* Facts ¶ 18. *See supra* note 6.

Further, Congress never granted the State of Maine exclusive jurisdiction over the core governmental function of environmental regulation within the Penobscot Indian Reservation. That function is preserved for the Penobscot Nation, or the federal government, acting on its behalf, as an "internal tribal matter."

Were the EPA, pursuant to its own "informal rulemaking," to provide the State of Maine with authority over water quality matters affecting the Penobscot Indian Reservation and trust lands to the exclusion of tribal authority or federal trust authority over those issues, the EPA would violate federal law, including its trust responsibilities to the Penobscot Nation and the Settlement Act. Such a rule would be tantamount to an amendment of the Settlement Act without the consent of the Penobscot Nation. *See* 25 U.S.C. §1725(e). It would jettison Congress' promise that the Settlement Act protects the Penobscot Nation's inherent right to attend to the territory and the welfare of its people without interference by the state. It would jettison Congress' promise that the Settlement Act protects the Penobscot Nation's aboriginal right to sustenance fishing without state interference. And it would jettison Congress' promise that the Settlement Act protects the Nation's cultural practices without external interference. All of this, in turn, would violate the CWA, which prohibits the EPA from "affecting or impairing the provisions of any treaty of the United States." 33 U.S.C. §1371(a)(3).

The remainder of this public comment discusses why the State of Maine does not (and cannot) have jurisdiction over the Penobscot River to the exclusion of tribal

authority or federal Indian trust authority to protect the Penobscot Nation. As a result, the EPA must retain jurisdiction over the NPDES program for discharges affecting the water quality and resources of the Penobscot Indian Reservation.

D. The State May not Interfere with the Penobscot Nation's Inherent Authority to Protect the Health and Welfare of the Penobscot Indian Reservation.[10]

Indian tribes have inherent governmental authority to regulate the activities of members and non-members within their reservations. *E.g. Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. at 18; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 141. This includes the right to regulate the polluting activities of non-Indians within the reservation. *E.g.*, *State of Montana v. U.S.E.P.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 275; *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 410; *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982). That authority can only be divested by Congress, not by states. *Fellencer*, 164 F.3d at 709; *State of RI*, 19 F.3d at 689, 694, n.7; *Bottomly*, 599 F.2d at 1066. And if Congress is to eliminate that tribal authority, it must do so in unequivocal terms. *Merrion*, 455 U.S. at 152; *State of*

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[10]The Penobscot Nation relies on past representations by the EPA that it agrees with the DOI's legal positions that (a) the Penobscot Indian Reservation encompasses the islands and waters of the Penobscot River, from Indian Island, northward, including the site of pollution dumping by LP&P and (b) the Penobscot Nation retains an aboriginal right to take fish for sustenance from these waters, and the attendant right that the waters support sufficient fish to take and that they be safe for human consumption. The DOI has informed the EPA of these reservation rights, and the EPA's trust responsibility to protect them for the benefit of the Tribe. *See* Exhibits 14 & 17.

R.I. v. Narragansett Indian Tribe, 19 F.3d at 701-02. Moreover, if Congress does not act to eliminate that authority, there remains, in the federal government, a fiduciary duty (of the highest order) to protect it. *HRI, Inc. v. Environmental Protection Agency*, 2000 WL 14443, *15 (10th Cir. 2000); *State of Wash. Dept. of Ecology v. USEPA*, 782 F.2d at 1470.

Nothing in the Settlement Act unequivocally eliminates the authority of the Penobscot Nation to protect the integrity and welfare of its very reservation: the islands, waters, and aquatic resources of the Penobscot River, which it has occupied since time immemorial. To the contrary, Congress *affirmatively* protected the Nation's right to exercise its inherent sovereignty "in keeping" with principles of federal Indian law by ratifying the "internal tribal matters" provision of the Maine Implementing Act, *Fellencer*, 164 F.3d at 712. In so doing, Congress promised the Nation that its cultural practices and its sustenance fishing rights would be free from interference by the State or other outside entities. Senate Report at No. 96-957 at 16-17; House Report at 17. Moreover, Congress *affirmatively* provided for the Nation to govern its natural resources, including water rights and fishing rights, in accordance with terms agreed to by the Secretary of the Interior pursuant to the ISDA. 25 U.S.C. §1724(h); *see supra* note 6. Finally, Congress clearly understood that the Penobscot Nation had authority to enforce and apply its "civil, criminal, and regulatory laws" within its "jurisdiction[]," and anticipated that it might share its "governmental responsibility" with the State of Maine through "concurrent jurisdiction." 25 U.S.C. §1725(e)(1).

Likewise, nothing in the Settlement Act unequivocally grants the State of Maine jurisdiction over pollution within the Penobscot Indian Reservation to the exclusion of

either the inherent governmental authority of the Penobscot Nation or the trust authority of the United States to protect the health and welfare of Nation's very reservation. *See Akins*, 130 F.3d at 487, 489 (court should preserve the "inherent self-governing authority" of a tribe over the "the very land that defines" it when Congress is silent as to the withdrawal of that authority). And the State has made no such showing in its application to the EPA. Indeed, the State fails to consider whether the protection of tribal interests in the Penobscot Indian Reservation from harmful pollution is an "internal tribal matter," *expressly recognized* by Congress to be free from interference by state authority. *See id.*

Instead, the Attorney General's Statement improperly asserts that Congress simply gave the State unqualified, exclusive jurisdiction over water quality matters within the Penobscot Indian Reservation. Referring to sections 1725(h) and 1735(b) of the Settlement Act, the State asserts that "general Federal Indian law existing in 1980 or enacted thereafter does not benefit the Indian tribes of the State of Maine if its affects or preempts State law." Attorney General's Statement at 35. This is a misstatement of the law.

The State ignores the fact that pursuant to the Settlement Act's "internal tribal matters" provision, Congress recognized the right of the Penobscot Nation and the Passamaquoddy Tribe to be free from state interference "in keeping with" federal Indian law protective of tribal sovereignty. *Fellencer*, 164 F.3d at 712 (citing Senate Report (Exhibit 3) at 14); Senate Report at 14; House Report at 14-15. The State ignores the fact that this assurance by Congress was at the heart of the Settlement Act, treated as a "Special Issue" by both the House and the Senate, and coupled with assurances that the

Nation's unique cultural practices and right to engage in sustenance fishing would be protected from state encroachment and interference by outside entities. Senate Report at 16-17; House Report at 17. The State further ignores the fact that insofar as the Nation adopted state law applicable to municipalities as its own, it did not do so at the exclusion of tribal laws that could be more protective of tribal interests than state law, nor in acquiescence to state regulation over reservation affairs. Senate Report at 30 (citing *Wauneka v. Campbell*, 526 P.2d 1085 (Ariz. Ct. App. 1974)); *see supra* note 8. Finally, the State ignores the fact that if sections 1725(h) or 1735(b) were to operate as it suggests, section 1724(h), expressly providing for the Tribe's governance of natural resources in accordance with a plan under the ISDA, would be rendered ineffective. In short, sections 1725(h) and 1735(b) say nothing whatsoever about the nature and scope of the jurisdiction that Congress granted to the State of Maine under the Settlement Act. One must look elsewhere.

The Settlement Act provision, which *affirmatively protects* tribal interests from state authority is the "internal tribal matters" provision. The First Circuit has decided two cases involving the "internal tribal matters" of the Penobscot Nation, one, *Fellencer v. Penobscot Nation*, 164 F.3d 706, involving the activities of a non-member within the reservation, and the other, *Akins v. Penobscot Nation*, 130 F.3d 482, involving the affirmative regulation of the Penobscot Nation over reservation resources. Both involved an individual's attempt to challenge the actions of tribal government pursuant to state law. *Fellencer* involved a state law challenge to a tribal employment decision to discharge a non-member community health care nurse. *Akins* involved, *inter alia*, a state law

challenge to a tribal timber harvesting regulation. While clarifying that it would not set forth a definitive test for application in every case, the court considered whether federal Indian law treated the matter in question as one involving inherent tribal sovereignty, and balanced the interests of the tribe (focusing especially upon its interest in the integrity of its human or natural resources), on the one hand, against the interests of the State and any non-member interests, on the other. *Fellencer*, 164 F.3d at 710-13; *Akins*, 130 F.3d at 488-90.[11]

The State's application for NPDES authority from the EPA generates the "internal tribal matters" provision in a unique way. Unlike *Fellencer* and *Akins*, there is no direct state law challenge to tribal governmental action. Rather, in this case, the State, through a statement of its Attorney General, seeks federal action (a rule from this Agency) to change the jurisdictional framework under which water pollution affecting the Penobscot Indian Reservation is managed. In so doing, the State seeks to sweep aside any authority

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[11]Ignoring these recent First Circuit cases, the Attorney General's Statement relies, instead, upon a 1983 decision of the Maine Supreme Judicial Court, *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983). *See* Attorney General Statement at 34-36. *Stilphen*, however, is largely undermined by the First Circuit's decisions in *Akins* and *Fellencer*. First, in *Stilphen*, the Maine Supreme Judicial Court held that the "internal tribal matters" provision was to be treated, and construed as, a statute without consideration of principles of federal Indian law. *See Stilphen* at 487. *Accord Penobscot Nation v. Fellencer*, 999 F.Supp. 120, 125 n.4 (D.Me. 1998), *rev'd*, 164 F.3d 706 (1st Cir. 1999). *Akins* and *Fellencer* made clear that this is wrong. Construction of the provision is a federal question, involving considerations of federal Indian law. *Fellencer*, 164 F.3d at 708, 711-12; *Akins*, 130 F.3d at 485, 489-90. Second, the *Stilphen* Court reduced the concept to a cultural stereotype, stating that it addressed only matters of unique cultural or historic importance to the Tribe. *See Stilphen* at 488. In *Akins*, the First Circuit made clear that while protection of the Tribe's history and culture may be relevant in some contexts, *Akins* at 488, it was wrong to so-reduce the concept. *See Akins* at 487 ("such broad themes do not help to define the rules of decision in these cases").

of the Tribe in such matters and any authority of the United States, as trustee for the Tribe, in such matters. Following delegation, it appears that the State likely would achieve this objective. *See, e.g., American Forest and Paper Ass'n v. USEPA*, 137 F.3d 291 (5th Cir. 1998) (after delegation of NPDES program to state, EPA without authority to impose particularized review of pollution permit under Endangered Species Act); *Southern Ohio Coal v. Office of Surface Mining Reclamation and Enforcement*, 831 F.Supp. 1324 (S.D. Ohio 1993) (after delegation of NPDES program to state, EPA without authority to prevent dumping of untreated, contaminated mine waste water into tributaries of Ohio river under a state-approved emergency bypass plan), *rev'd on other grounds*, 20 F.3d 1418 (6th Cir. 1994).[12] The Tribe reviews the *Akins/Fellencer* factors in this setting.

Federal Indian Law and the Integrity of Tribal Resources

As repeatedly made clear above, the Tribe has inherent self-governing authority to protect the integrity of its reservation and the welfare of its members, and this includes the right to regulate the dumping of pollution by non-members within the reservation. *Montana v. U.S.E.P.A.*, 137 F.3d at 1141; *Albuquerque v. Browner*, 97 F.3d at 423; *Segundo*, 813 F.2d at 1393; *Namen*, 665 F.2d at 964. "Water quality management serves the purpose of protecting public health and safety, which is a *core governmental function*,

[12]It therefore appears (and the EPA has failed to ensure the Penobscot Nation otherwise) that delegation would end not only tribal authority, but federal trust authority as well. For instance, the direct implication of *American Forest*, *supra*, is that EPA would have no leverage to enforce particular Endangered Species Act protections of benefit to the Bald Eagle and the Atlantic Salmon, both of which are important to the welfare of the Tribe.

whose exercise is *critical to self-government*." EPA, 56 Fed. Reg. at 64,879 (emphasis added). Second, the most significant interests of the Penobscot Nation are at stake: the environmental integrity of its reservation and source of the physical, cultural, and spiritual sustenance of its people, the Penobscot River. *Accord* EPA, *Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* (July, 1991) ("Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others."); 56 Fed. Reg.64,876, 64,878 (Dec. 12, 1991) (The EPA recognizes that "clean water, including critical habitat (i.e. wetlands, bottom sediment spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations.").

As the *Fellencer* Court recognized, an Indian tribe "may retain inherent power to exercise civil regulatory authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect upon the health or welfare of the tribe." *Fellencer*, 164 F.3d 710 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)). Here, the conduct at issue, at least in the case of LP&P, is the discharge of pollution *directly within* the Penobscot Indian Reservation. As in *Fellencer*, where the Court held that the Nation had inherent authority (free from state jurisdiction) to terminate the employment of a non-member community health nurse, given her direct affect upon the welfare of the tribal community, the Penobscot Nation, likewise, has authority to protect its reservation and members from the pollution activities of non-

members within its reservation. *Accord Montana v. EPA*, 137 F.3d at 1141; *Albuquerque v. Browner*, 97 F.3d at 423; *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d at 964. The Tribe's interest is particularly heightened because the water quality laws that the State purports to apply within its reservation do not protect tribal interests in the river. *See* Facts ¶ 19. To the contrary, the river is in a marked state of pollution. The fish have been contaminated with dioxin, and the river fails to meet the federal goals of the CWA. *See* Facts ¶¶ 3-6.

State Interests

Any interest of the State of Maine must be placed in context. Does the State have an interest in controlling water quality within the Penobscot Indian Reservation in a manner that would exclude the right of the Tribe, or the United States on behalf of the Tribe, to impose environmental standards protective of tribal interests? Currently, the State of Maine has no such authority. It seeks to achieve it through a delegation of the NPDES program from the EPA. In context, the State's interest is to change the current jurisdictional framework in a manner that would avoid imposition of tribal or federal standards more protective of water quality within the Penobscot Indian Reservation than those of the State. Given the goals of the Clean Water Act -- "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. §1251 (a)(1) -- the State's interests cannot outweigh those of the Penobscot Nation. Never has a state or local government been given primacy over tribal interests to condone more environmental pollution, rather than less. *See City of Albuquerque v. Browner*, 97 F.3d at 423-24; *Administrator, State of Arizona v. U.S.E.P.A.*, 151 F.3d 1205, 1212 (9th Cir.

1998); *Pinoleville Indian Community v. Mendocino County*, 684 F.Supp. 1042, 1045 (N.D.Cal. 1988).

Non-Member Interests

Finally, and again, in context, the interests of non-members cannot outweigh the paramount interests of the Tribe, the concomitant federal trust interest, and the federal goals of the Clean Water Act. The best example is LP&P, which has literally poisoned the Penobscot Indian Reservation by dumping "one of the most powerful carcinogen[s]" known to the EPA directly into the reservation. LP&P has no legally protected "interest" to engage in that form of trespass. The Penobscot Nation recognizes the economic interests of LP&P, and the Nation's interest is not to close that business. However, LP&P's use of the reservation to dispose of its waste is subject to the overriding sovereign interest of the Tribe in protecting the integrity of its resources and the welfare of its members, who depend upon the river for their well-being. *See Albuquerque v. Browner*, 97 F.3d at 423 & n.12; *Namen*, 665 F.2d at 964; *United States v. Gila Valley Irrigation Dist.*, 920 F.Supp. 1444 (D.Ariz. 1996).

In sum, under the *Fellencer/Akins* considerations, the Nation's inherent authority to protect the health and welfare of its reservation, including the water quality of the river in which it is situated, is an "internal tribal matter," which cannot be interfered with by the State of Maine. Thus, the State of Maine cannot establish sufficient jurisdiction over

the Penobscot River to allow the EPA to delegate to it NPDES authority under the CWA.[13]

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[13]The Attorney General places much emphasis on an assertion that the Penobscot Nation could not attain "treatment as a state" under §518 of the Clean Water Act, 33 U.S.C. §1377. That issue is not presented by the State's application for NPDES authorization. In reference to the Penobscot Nation, the only issue is whether the State has adequate jurisdiction over pollution discharges affecting the integrity of the reservation. Maine's obsession about whether the Penobscot Nation could qualify for "treatment as state" under §518 is misplaced. Where, as here, the state cannot show that Congress expressly gave it jurisdiction to control water pollution within the Penobscot Indian Reservation, the EPA simply retains its management responsibility for pollution dischargers affecting the reservation. Whether the Tribe has achieved §518 status or not is of no moment. *EPA Policy for Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1994).

In any event, Maine's assertion that the Nation cannot attain "treatment as a state" under §518 is flawed. That section codifies the pre-existing inherent authority of tribes for expression through the CWA. *See City of Albuquerque v. Browner*, 97 F.3d at 418 (section "preserves the right of tribes to govern their water resources), 423 ("Indian tribes have residual sovereign powers that already guarantee the powers enumerated in 33 U.S.C. §1370); 56 Fed.Reg. 64,876, 64,880-81. *See also Namen*, 665 F.2d at 964 & n.31 (tribal power to enact ordinance regulating non-Indian use of tribal land is "an inherent component of the limited sovereignty enjoyed by the Tribes"); *Water Quality Standards for the Colville Indian Reservation in the State of Washington*, 54 Fed. Reg. 28,622, 28,623-24 (July 6, 1989) (EPA may promulgate federal water quality standards at request of tribe prior to enactment of section 518 to give effect to tribe's inherent sovereignty); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10th Cir. 1986) (EPA may promulgate rules for underground injection control program for Osage Reservation, separate from state-run program, under Safe Drinking Water Act of 1974 ("SDWA"), prior to enactment of SDWA's "treatment as a state" provision for tribes). Congress protected the Nation's inherent authority through the Settlement Act's "internal tribal matters" provision and elsewhere. Treatment of the Penobscot Nation "as a state" under §518 is manifestly consistent with that protection and Congress' specific assurances to the Tribe that its unique fishing and cultural interests in the river would be protected from external interference. It is also consistent with 25 U.S.C. §1724(h), which affirmatively recognizes the right of the Tribe to govern its resources with the federal support. *See supra* note 5. This renders ambiguous any suggestion in the legislative history cited by the State, *see* Attorney General Statement at 37 (citing Senate Report at 31) that the Nation would be constrained from achieving §518 status. Any ambiguity generated by the legislative history relied upon by the State must be resolved in favor of the Tribe, and

(continued...)

E. The State May not Interfere with the Federal Government's Trust Authority to Protect the Health and Welfare of the Penobscot Indian Reservation.

The Penobscot Nation's "internal tribal matters" are as much protected from state interference *by federal authority* as they are by the Nation's inherent tribal authority. Congress, in the exercise of its constitutional plenary authority, assured the Penobscot Nation that its aboriginal right to sustenance fishing would be free from external interference. Senate Report at 15; House Report at 15. It expressly confirmed that "[n]otwithstanding any rule or regulation . . . the members of . . . the Penobscot Nation may take fish, within the boundaries of their . . . reservation, for their individual sustenance." 30 M.R.S.A. §6207(4), *ratified by* 25 U.S.C. §1721(b).[14] Likewise, Congress assured the Tribe that its cultural practices would be free from external interference. Senate Report at 14; House Report at 15. Pursuant to section 1724(h), Congress further made clear that the Nation could regulate and manage its natural resources, including its water and fishing rights, in concert with the United States Department of the Interior. *See supra* note 6 and accompanying text.

These assurances are necessarily coupled with federally protected water rights for the benefit of the Tribe, without state interference. *See Adair*, 723 F.2d at 1410-11;

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[13](...continued)
the *specific* assurances provided to it by Congress under the Settlement Act. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

[14]The right of the Penobscot Nation tribal members to take fish for sustenance, as an expressly reserved "aboriginal right,"*see* Senate Report at 15; House Report at 15, pre-dates, and existed independently of, state sovereignty. *See United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), *cert. denied*, *Oregon v. United States*, 467 U.S. 1252 (1984). *See generally Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-671 (1974). *See supra* notes 7.

Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). Indeed, under the Settlement, Congress directly retained federal restrictions against the alienation of the Penobscot Indian Reservation. 25 U.S.C. § 1724(g)(2). The Senate and House Committee Reports described this as "one of the most important federal protections." House Report at 15; Senate Report at 15. *See also Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 376, n.6 (1st Cir. 1975) (right to extinguish Indian title is an attribute of sovereignty, which rests solely with the United States and not with any state).[15]

These federal protections are in place to benefit the Tribe's control of its internal tribal matters *without state interference*. Indeed, the United States, through the EPA and DOI, carry out these obligations in practice. While subject to concern on the part of the Nation - as reflected in the Nation's appeal of the LP&P NPDES permit - the EPA has recognized its trust obligation (immune from state interference), in managing the NPDES program within the Penobscot Indian Reservation. *See* Facts ¶ 12. The Secretary of the Interior is directly engaged in assessing natural resources damages within the reservation under CERCLA as trustee for the Nation. *See* Facts ¶ 17.[16]

In summary, the State of Maine is powerless to affect the federal trust authority over the Nation's "internal tribal matters." That federal authority is in place to protect the

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[15]The DOI has previously addressed the EPA with regard to its trust responsibility to the Penobscot Nation. Exhibit 14 at 2-3; Exhibit 17 at 2.

[16]The EPA may take notice of the activities of DOI, as trustee for the Penobscot Nation, to protect the Nation's reservation interests in the context of hydro-electric licencing proceedings within the Penobscot Indian Reservation. *E.g. In re: Milford Hydroelectric Project*, FERC No. 2534.

integrity of the Penobscot Indian Reservation, for tribal benefits (both retained and promised) in the Settlement Act, including the Nation's sustenance fishing rights and cultural practices and its right to regulate its natural resources without submission to state authority. The State of Maine, in the face of that federal authority, lacks adequate jurisdiction over water quality within the Penobscot Indian Reservation.

Were the EPA to relinquish federal control over the protection of these tribal interests, it would subject the Nation to state standards and enforcement practices that fail to protect the Tribe. Indeed, the regime that the state purports to apply within the reservation has left the river contaminated, unable to attain the goals of the Clean Water Act, and with fish that are unfit for human consumption. As a result, the Nation's rights are exploited, not realized. The EPA's relinquishment of federal control would be a violation of the Settlement Act and the EPA's fiduciary duty to the Penobscot Nation.

F. Since the State of Maine Lacks Adequate Jurisdiction over Pollution Discharges into the Penobscot River Watershed Affecting the Health and Welfare of the Penobscot Nation, the EPA Must Retain NPDES Jurisdiction over those Pollution Sources.

Never, to the Penobscot Nation's knowledge, has the EPA granted a state jurisdictional primacy over an Indian reservation under a federal environmental program. To the contrary, in every instance where a state has applied for authority to run a federal environmental program, the EPA, in the exercise of its "core federal trust responsibilities," has scrupulously retained federal authority over environmental pollution affecting the reservation. *E.g.*, *HRI, Inc. v. EPA*, 2000 W.L. 14443 (10th Cir. 2000); *Phillips Petroleum Co. v. United States EPA*, 803 F.2d 545 (10th Cir. 1986); *State of*

Washington v. USEPA, 752 F.2d 1465 (9th Cir. 1985). *See also* 60 Fed. Reg. 25,718, 25,721 (1995) (delegation of NPDES program to State of Florida would not violate trust doctrine because Agency would retain "full jurisdiction" with respect to Miccosukee reservation). Indeed, where there is any uncertainty about the scope of state jurisdiction or the legal status of the affected territory, these "core federal trust responsibilities" warrant retention of federal authority to protect Indian tribes. *HRI, Inc. v. EPA*, 2000 W.L. 14443, *15 (10th Cir. 2000). *See also* 59 Fed. Reg. 1353, 1542 (1994) (EPA retains control over Yankton waters, deferring decision on "complicated issue" of state's jurisdiction over Indian country); EPA, *Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* (July 10, 1991) at 3-4 (EPA will retain enforcement primacy for reservation pollution when tribe cannot demonstrate jurisdiction over certain sources).

These same responsibilities are triggered by Maine's application to take over the NPDES program within the Penobscot River watershed. Since, for the reasons set forth above, the State's jurisdiction over pollution discharges affecting the Penobscot Indian Reservation is inadequate for the EPA's transfer of the NPDES program to Maine, the EPA must retain federal NPDES jurisdiction over those discharges. Indeed, in this setting, it is the EPA's declared policy -- in accordance with its proclaimed "trust responsibility . . . to protect the environmental interests of Indian tribes" -- to retain responsibility for managing the NPDES program." *EPA Policy for Administration for*

Environmental Programs on Indian Reservations (Nov. 8, 1984).[17] Were the EPA to act otherwise in this proceeding, it would violate not only its own policies, but the essence of the Settlement Act for the Penobscot Nation: a loss of control over the means to realize (and conserve) a meaningful sustenance fishing right, exposure to acculturation, and, most importantly, the undermining of the Tribe's authority to manage the integrity of its reservation.

G. Since all Pollutant Discharges within the Penobscot River Watershed Have the Potential to Adversely Affect the Water Quality and Aquatic Resources of the Penobscot Indian Reservation, the EPA Should Retain the NPDES Program for all Such Sources.

Consistent with its own policies and its trust responsibility to the Penobscot Nation, the EPA must retain federal authority over those pollutant discharges into the Penobscot River watershed that may adversely affect water quality and aquatic resources within the Penobscot Indian Reservation. Clearly, these include discharges by LP&P and the industrial and municipal waste dischargers within the Penobscot River's west branch. These must also include the pollution discharge of Holtrachem at Orrington, Maine (downstream from the Penobscot Indian Reservation), since migrant aquatic species, such as Atlantic salmon and eel, which tribal members rely upon for sustenance fishing and

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[17]The fact that the Penobscot Nation has not yet fully developed its own water quality standards for the Penobscot Indian Reservation is immaterial. "Consistent with the EPA's long-standing policy for EPA to directly implement federal environmental programs in Indian country where tribes have not sought and obtained authority to do so," the EPA is drafting uniform, minimum water quality standards for tribal waters. *EPA Draft Core Water Quality Standards for Indian Country Waters Without EPA-Approved Tribal Standards* (Oct. 4, 1999).

cultural practices, are affected by that pollution source. *See* Exhibit 2.[18] These are the most obvious sources of pollution that could impair the waters and resources within the reservation, causing serious and substantial harm to the health and welfare of the Tribe.

As the EPA recognizes, however, "water pollution is by nature highly mobile, freely migrating from one local jurisdiction to another." 56 Fed.Reg. at 64,878. *Accord Colville Confederated Tribes v. Walton*, 647 F.2d at 52 ("A water system is a unitary resource. The actions of one user have an immediate and direct affect on other users."). Thus, there is no principled way to conclude that any particular pollution discharger into the Penobscot River watershed will not adversely affect water quality or aquatic resources within the Penobscot Indian Reservation. The EPA, in fulfillment of its fiduciary obligation to the Penobscot Nation, must therefore retain NPDES authority over all pollution sources into the Penobscot River watershed.

Likewise, for the reasons set forth in the letter dated February 25, 2000 from the Nation's Natural Resources Director, John Banks, to John DeVillars, the EPA must retain NPDES jurisdiction over pollution sources affecting the Penobscot River watershed in order to comply with the requirements of the National Historic Preservation Act.

The Penobscot Nation submits herewith as Exhibit 12 the list of the pollution discharges into the Penobscot River watershed that could impair the water quality and aquatic resources of the Penobscot Indian Reservation and thereby have a serious and

[18]The Nation asks the EPA to take notice of the extreme mercury contamination of the Penobscot River caused by Holtrachem.

substantial effect on the health and welfare of the Tribe. Most of these are set forth as well in the maps of the watershed submitted herewith as Exhibits 11A and 11B.

CONCLUSION

For all of the above reasons, in accordance with federal law, including the requirements of the Maine Indian Claims Settlement Act of 1980, the EPA's trust responsibility to the Penobscot Nation, and the goals of the Clean Water Act, the EPA must reject the State's application to take over the federal NPDES program for pollution discharges into the Penobscot River watershed.

Dated: 2/29/00

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