United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

APR 2 7 2018

Honorable Matthew Z. Leopold
General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Maine's WQS and Tribal Fishing Rights of Maine's Tribes

Dear Mr. Leopold:

In 2014, the Environmental Protection Agency ("EPA") requested the views of the Department of the Interior (the "Department") regarding tribal fishing rights in Maine and the relationship between tribal fishing rights and water quality. The request was prompted by EPA's review of proposals from the State of Maine to implement Water Quality Standards ("WQS") within waters set aside for federally recognized tribes under State and Federal laws for uses that EPA characterized as sustenance fishing.

By letter dated January 30, 2015 (the "2015 Letter"), the Department's Solicitor responded with the Department's views on the fishing rights of the four federally recognized tribes in Maine: the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs (collectively the "Maine Tribes").[1] These views were limited to the unique history and circumstances of the Maine Tribes. The Solicitor there noted that issues relating to at least some Indian lands and territories in the State of Maine were also the subject of ongoing litigation in the U.S. District Court for the District of Maine (the "District Court").[2] This litigation is still ongoing.[3]

Since 2015, EPA has referenced the 2015 Letter in other contexts, in particular in the promulgation of federal WQS for the State of Washington.[4] The Department, however, has not undertaken a similar legal and historical analysis of other tribes or states; and as a result, cannot speak to fishing rights outside the State of Maine. The conclusions of the 2015 Letter were the

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[1] Letter from Hilary C. Tompkins, Solicitor, U.S. Dept. of the Interior, to Avi S. Garbow, General Counsel, U.S. Environmental Protection Agency (Jan. 30, 2015) (the "2015 Letter").
[2] 2015 Letter at 1, n. 1, citing Order on Pending Motions, *Penobscot Nation v. Mills*, 1:12-cv-0254-GZS (D. Maine Feb. 4, 2014).
[3] *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Me.), *aff'd in part and vacated in part*, 861 F.3d 324 (1st Cir. 2017), *petition for rehearing en banc filed* (1st Cir. Sept. 14, 2017) (Nos. 16-1424, 16-1435, 16-1474, 16-1482).
[4] U.S. Environmental Protection Agency, Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417 (Nov. 28, 2016).

result of thoughtful consideration of the unique and complicated interplay among agreements between Massachusetts or Maine and the tribes,[5] the Indian Nonintercourse Acts,[6] the Constitution of the State of Maine,[7] Federal and State court decisions, and settlement acts that acknowledge by statute certain rights of the Maine Tribes.

In connection with this clarification, the Department has undertaken further analysis of the issues discussed in the Solicitor's 2015 Letter, including subsidiary rights to water quality based on the nature of statutorily-acknowledged treaty rights, and the scope of "sustenance" fishing.

After a thorough review of the materials referenced in the 2015 Letter, we affirm the conclusion that the Penobscot Nation and the Passamaquoddy Tribe (the "Southern Tribes") enjoy federally-protected tribal fishing rights. We further affirm our previous position that to be rendered meaningful, these fishing rights by necessity include some subsidiary rights to water quality,[8] and that EPA could take into account such rights when evaluating the adequacy of WQS in Maine.[9]

As described in the 2015 Letter, the Southern Tribes enjoy expressly reserved fishing rights that are based on aboriginal riparian or littoral rights acknowledged or reflected in agreements with the Commonwealth of Massachusetts and the State of Maine or by operation of State law,[10] and ultimately acknowledged and protected by federal statute. These rights were later confirmed in the Constitution of the State of Maine,[11] of which Congress took notice when the State was admitted to the Union.[12]

As you are aware, the Southern Tribes' long-recognized aboriginal fishing rights[13] were incorporated into legislation known as the Maine Implementing Act (the "MIA"), which was subsequently ratified by Congress through the Maine Indian Claims Settlement Act of 1980 ("MICSA" and together with the MIA, the "Settlement Acts"):[14]

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[5] These agreements were negotiated not with the United States but with the Commonwealth of Massachusetts and the State of Maine. The text of each agreement is available at http://www.wabanaki.com.
[6] As described in *Joint Tribal Coun. of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 652 n. 1 (D. Me. 1975), the Nonintercourse Act passed in 1793 "provided that (...) "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." 1 Stat. 329, 330. This version was carried forward, without major change, in the 1796 Act, 1 State. 469, 472; the 1799 Act, 1 Stat. 743, 746; the 1802 Act, 2 Stat. 139, 143; [and] the 1834 Act (...)."
[7] Me. Const. art. X, § 5.
[8] 2015 Letter at 7.
[9] 2015 Letter at 1.
[10] 2015 Letter at 2, referencing the Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.
[11] "The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, toward the Indians within said District of Maine, whether the same arise from treaties, or otherwise." Me. Const. art. X, § 5.
[12] 16 Stat. 1 544 (March 3, 1820).
[13] 2015 Letter at 2, n. 9 (defining the Southern Tribes' reserved rights as rights retained since aboriginal times).
[14] 25 U.S.C. § 1721(b)(2).

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6 [providing a process by which the State can limit tribal sustenance fishing if necessary to protect fish stocks].[15]

Whereas our review of the record affirms the analysis by which the Solicitor's 2015 Letter recognized the Southern Tribes' extant right to sustenance fishing,[16] we find ourselves unable to identify with similar clarity federally-protected tribal fishing rights for the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs (the "Northern Tribes"). And while we affirm the proposition contained in the 2015 Letter that express language in a treaty is not necessary to establish the existence of a tribal fishing right,[17] we note that such rights *only* arise from treaty, statute, the federal set aside and supervision of lands that include bodies of water inhabited by fish, or the retention of aboriginal rights. Despite concerns about whether the Northern Tribes' retained their fishing rights, we continue to recognize the centrality of sustenance fishing to the culture of the Northern Tribes.[18]

We now turn to the Department's interpretation of the term "sustenance," which the Settlement Acts do not define.[19] In the 2015 Letter, the Solicitor concluded that "sustenance" encompasses "at least the right of tribal members to take sufficient fish to nourish and sustain them, with no specific quantitative limits other than the conservation necessity limit (...)."[20] Rather than relying on this broad definition, we believe that the wiser course is to rely on language previously adopted by the United States in its brief before the Maine Supreme Court in *Atlantic Salmon Federation v. Maine Board of Env'tl Protection*:

> [T]he right to take fish is not limited by time or the other needs of society (other than preservation of the fish resource itself). In contrast, some other reserved hunting and fishing rights in federal Indian treaties limit the exercise of those rights to the period during which land is unclaimed or the area unsettled. In short, the Penobscot Nation

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[15] 30 M.R.S. § 6207(4). The Maine Implementing Act additionally provides for a statutorily-acknowledged right for the Southern Tribes to enact ordinances that allow for tribal sustenance fishing on certain ponds on trust lands located outside the Southern Tribes' reservations. 30 M.R.S. § 6207(1).

[16] Notwithstanding the holding in *Penobscot Nation v. Mills*, 861 F.3d 324, 336 (1st Cir. 2017) that the Tribe lacked standing to litigate sustenance fishing rights claims, the Department takes the position that the Tribe's sustenance fishing rights in the Penobscot River also include some subsidiary rights to water quality sufficient to render those fishing rights meaningful.

[17] 2015 Letter at 4-5.

[18] U.S. Environmental Protection Agency, *Promulgation of Certain Federal Water Quality Standards Applicable to Maine*, 81 Fed. Reg. 92,466, 92,472 (Dec. 19, 2016). It is our view that consultation with the Northern Tribes would demonstrate a reliance on sustenance fishing that could influence WQS in the waters of the Northern Tribes such that they may not be dissimilar from the WQS established for the Southern Tribes, pursuant to statutorily-acknowledged agreements.

[19] 2015 Letter at 4. Though the District Court in *Penobscot Nation v. Mills* distinguished between sustenance, commercial, and recreational fishing, 151 F. Supp. 3d 181, 198 (D. Me. 2015), the First Circuit concluded that the district court lacked jurisdiction to consider the Penobscot Nation's "sustenance" fishing rights. *Penobscot Nation v. Mills*, 861 F.3d 324, 336 (1st Cir. 2017).

[20] *Id.*

> reserved fishing right is one to "take," i.e. obtain, fish in perpetuity. It is limited to the reservation, and it is limited to sustenance, rather than commercial, purposes (...).[21]

The fishing rights at issue, aboriginal in nature, are reflected in various agreements entered into with the Southern Tribes, and ultimately reaffirmed through federal statute. The understanding and exercise of those rights by the Southern Tribes at the time the agreements were negotiated provide evidence of the scope of these rights.[22] This is consistent with the Department's long-standing approach to treaty interpretation and is supported by the analysis of federal courts similarly engaged: "[Treaties] must therefore be constructed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[23]

The Supreme Court counsels that the interpretation of treaties should go "beyond the written words to the larger context that frames the treaty, including the history of the treaty, negotiations, and the practical construction adopted by the parties."[24]

The Department has reviewed the *Wabanaki Traditional Cultural Lifeways Exposure Scenario* (the "Wabanaki Study"), a study funded by EPA in collaboration with the Maine Tribes and published in 2009.[25] While the Wabanaki Study's conclusions as to dietary habits and resource utilization patterns are generally helpful in understanding the ecology and nutritional landscape of pre-industrial Maine, we find that its definition of "subsistence"[26] and its reliance on evidence from so broad a historical period likely does not adequately reflect fish consumption in the period between 1794 and 1822, when the relevant agreements were negotiated.[27] Relying as it does on dietary estimates from the 16th through 19th centuries, the Department additionally notes that the Wabanaki Study was not intended to identify contemporary tribal fish consumption patterns.

The Department affirms the position that the statutorily-acknowledged sustenance fishing rights codified under MIA § 6207(4) derive from aboriginal rights, which in part are reflected in practices dating back to the aforementioned agreements, but which were ultimately acknowledged by federal statute. We further affirm that sustenance fishing rights guaranteed to the Southern Tribes includes some subsidiary rights to water quality sufficient to enable sustenance fishing.

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[21] Brief for the United States as Amicus Curiae at 14, *Atlantic Salmon Federation v. Maine Board of Env'tl Protection*, 662 A.2d 206 (Me. 1995).
[22] The Department takes no position on EPA's determinations or methodologies regarding fish consumption rates and WQS standards in other states and expressly limits our analysis to tribal fishing rights in the state of Maine.
[23] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 442 U.S. 658, 675-676 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).
[24] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).
[25] 81 Fed. Reg. at 92,473, citing Barbara Harper and Darren Ranco, *Wabanaki Traditional Cultural Lifeways Exposure Scenario* (Jul. 9, 2009).
[26] The Wabanaki Study used the term "subsistence" to refer to "hunting, fishing, and gathering activities that are fundamental to the way of life and health" of indigenous peoples. Wabanaki Study at 16.
[27] *Id.* at 9.

Subject to the clarifications described above, we therefore affirm the Department's view expressed in the 2015 Letter that tribal fishing rights encompass subsidiary rights that may not be expressly stated in the language of a treaty or statute but that are necessary to render those rights meaningful.[28] In so doing, we expressly constrain this analysis to the Southern Tribes of Maine.

Sincerely,

Daniel H. Jorjani
Principal Deputy Solicitor

[28] 2015 Letter at 7.