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May 18, 2017

Via Federal Express and Email Pruitt.scott@epa.gov

Hon. Scott Pruitt
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue
Mail Code: 1101A
Washington, D.C. 20460

Dear Administrator Pruitt:

Please find enclosed the response of the Penobscot Nation to "Petition for EPA's partial withdrawal of EPA letter actions and repeal of EPA's final rule on Maine's water quality standards" dated February 27, 2017 from the Office of the Governor, State of Maine and the "Petition for Reconsideration and Repeal of EPA's Final Rule on Maine's Water Quality Standards," dated March 6, 2017 from William Taylor of Pierce Atwood.

Thank you very much for your consideration.

Sincerely,

Mark A. Chavaree

cc: Hon. Kirk Francis, Chief, Penobscot Nation and Penobscot Nation Tribal Council
Hon. Ryan Zinke, Secretary, U.S. Department of the Interior
Deborah Szaro, Acting Administrator, EPA Region I

Penobscot Nation's response to petitions for reconsideration and withdrawal of EPA's letter actions dated February 2, 2015, March 16, 2015 and June 5, 2015 and EPA's final rule Promulgating Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466:

1. submitted by the State of Maine on February 27, 2017 and
2. submitted by the Town of Baileyville, ME, Verso Corporation, and Woodland Pulp LLC on March 6, 2017

Submitted May 18, 2017, to the Administrator, U.S. Environmental Protection Agency

"Hunting, fishing, gathering, and trapping were essential to the survival and ways of life of Indian tribes throughout the United States. Such activities were not much less necessary to the existence of the Indians than the atmosphere they breathed."
Diana E. Murphy, Circuit Judge, writing for a unanimous court in *U.S. v. Brown,* 777 F.3d 1025 (8th Cir. 2015) (citations and quotations omitted)

"I and other Penobscot members of the Tribes' Negotiating Committee never would have agreed to, or recommended to the Penobscot members and Tribal Council, a settlement of our Tribe's land claims against the State of Maine that would extinguish the Tribe's reservation of the Penobscot River; for such a result would have been an unacceptable termination of our existing reservation and our longstanding reliance upon the Penobscot River for sustenance fishing, trapping and hunting and for our cultural identity."
Declaration of Reuben Phillips, Penobscot Representative to the Negotiating Committee for the Maine Indian Land Claims Settlement of 1980, filed in *Penobscot Nation v. Mills*, Case: 1:12-cv-254 (D. Me.), ECF 124.

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The Penobscot Nation, a federally recognized Indian Tribe, hereby opposes two rulemaking petitions (the "Petitions") submitted under 5 U.S.C. § 553(e) by the State of Maine on February 27, 2017, and by the Town of Baileyville, ME, Verso Corporation, and Woodland Pulp LLC (the "Coalition") requesting that EPA initiate a rulemaking process for reconsideration and withdrawal of EPA's letter actions dated February 2, 2015, March 16, 2015 and June 5, 2015 and EPA's final rule Promulgating Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 ("EPA Final Rule").

I. SUMMARY

The Petitions do little more than reiterate Maine's erroneous position, joined by the Coalition, that tribal sustenance fishing is not a recognized use of tribal waters in Maine. EPA, together with the Department of the Interior ("DOI"), have previously reviewed and rejected this position—put forth essentially *word for word* by these same commentators during the notice and comment period for EPA's previous decisions. There is no basis on which EPA could conclude that tribal sustenance fishing is *not* a designated use of tribal waters, which is the underlying premise of both Petitions. Nor is this determination an EPA rulemaking that that can be the subject of a petition submitted under 5 U.S.C. § 553(e).

The subject matter of the Petitions is at issue in ongoing litigation in federal court, *see Maine v. Pruitt*, Civil Action No. 1:14-cv-264 JDL (D. Me.). And EPA lacks discretion to conclude, contrary to the view of DOI (the federal agency that administers the Settlement Acts and Indian affairs in general), that tribal sustenance fishing is not a designated use under the Clean Water Act ("CWA"). Indeed, the United States and its agencies has a trust responsibility to recognize and protect the Congressionally-confirmed right of the Penobscot People to sustenance fish within tribal waters in Maine. This use of tribal waters in Maine for sustenance and cultural practices is guaranteed to the Penobscot Nation through the Maine Implementing Act, 30 M.R.S. §§ 6201 *et. seq.* ("MIA") and the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA") (collectively the "Settlement Acts").

On February 2, 2015, when EPA concluded for the first time that Maine, because of the Settlement Act, had jurisdiction to set water quality standards ("WQS") in tribal waters within Indian Territory in Maine, EPA established,

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through agency decision, a unique jurisdictional privilege within Indian country that no other state enjoys. EPA, in close consultation with DOI, however, rightly concluded that those WQS must recognize and protect the designated use of sustenance fishing, and it is not within EPA's discretion to now conclude otherwise.

Accordingly, this use must be treated as a designated use under the clean water act ("CWA"), and on that basis, EPA should deny the Petitions. Further, the Petitions should be denied for the simple reason that they point to no new evidence, studies, data, circumstances, or arguments upon which the agency could base a rational change in course. The EPA should deny the Petitions in their entirety and leave it to the federal court to resolve challenges to EPA's actions.

II. BACKGROUND

These Petitions are made in the context of ongoing litigation and simply rehash arguments already rejected by the Agency. The State of Maine originally sued EPA in July 2014 for failure to timely approve or disapprove state revised surface water quality standards. That claim became moot when EPA, after taking public comment, issued formal approvals and disapprovals of the standards, including disapprovals of those standards it deemed insufficiently protective of tribal members who engage in sustenance fishing. Maine, rather than revising its WQS, instead chose to challenge the EPA decisions in court, amending its complaint in October 2015. The complaint sought review under the Administrative Procedure Act ("APA") and the Federal Water Pollution Control Act's ("Clean Water Act" or "CWA") citizen suit provision. The latter claim was dismissed on November 18, 2016.

In light of the State's failure to correct its WQS, the Clean Water Act compelled EPA to promptly propose and promulgate federal replacement WQS. 81 Fed. Reg. 92,466, 92,467-69 (Dec. 19, 2016); 33 U.S.C. § 1313(c)(3), (4) (deadline). The Tribes, State, towns, industrial entities, and private citizens participated in that notice and comment rulemaking, and public comments overwhelmingly supported EPA's proposed WQS.[1] 81

[1] As EPA noted: "One striking aspect of the comments EPA received on its proposal is that every individual who commented supported EPA's proposed action, including many non-Indians. Nearly all of the comments were individualized expressions of support, ranging from a profound recognition of the need to honor commitments made to the tribes in the Indian settlement acts to an acknowledgement that everyone in Maine

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Fed. Reg. at 92,475; *see generally* EPA, Response to Public Comments (Dec. 2016) ("RTPC"). On December 8, 2016, EPA finalized the "Promulgation of Certain Federal Water Quality Standards Applicable to Maine", 81 Fed. Reg. at 92,466, along with a 10-page summary of the response to comments in the preamble and a detailed 231-page Response to Public Comments. *Id.* at 92,475-85; *see generally* RTPC.

The EPA Final Rule was published in the Federal Register on December 19, 2016, and came into effect on January 18, 2017. *Id.* at 92,466. The replacement water quality standards are designed to protect the health of those who engage in sustenance fishing and, in particular, the Penobscot Nation, and other Maine tribes. 81 Fed. Reg. at 92,468. These WQS are the first ever to apply in Indian waters in Maine. *Id.* at 92,468 (Rule fills "gap in protection"). The State of Maine has declined to challenge the Rule in Court, although it challenges the underlying basis that gave rise to EPA's non-discretionary duty to promulgate the Rule. While the Rule itself might conceivably be within the ambit of a petition under 5 U.S.C. § 553(e), the underlying basis set out in the letter rulings—the very issues that Maine is currently litigating in court—are not EPA rulemakings that can appropriately be reconsidered under 5 U.S.C. § 553(e).

On February 2, 2015, in the context of disapproving certain of Maine's proposed WQS as insufficiently protective of the human health of tribal members, the EPA made a threshold determination that Maine has authority to promulgate WQS for waters in Indian Lands.[2] Its February 2, 2015 threshold determination regarding the scope of Maine's jurisdiction put EPA in a particularly unique situation in the context of WQS: the norm elsewhere

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benefits from improved water quality. It is notable that the record for this action shows that individuals in Maine who commented did not express concern that the tribes are being accorded a special status or that this action will in any way disadvantage the rest of Maine's population." 81 Fed. Reg. at 92,476.

[2] By participating in these proceedings, the Nation does not concede the State's authority to promulgate such WQS nor waive any right to appeal or otherwise challenge the EPA's determination regarding such authority. However, the Nation's principal concern is that WQS sufficiently protective of the human health of tribal members be made applicable to all waters used by tribal members, regardless of regulatory jurisdiction over such waters. Accordingly, while the Nation supports the Federal Rule because it is adequately protective of tribal health, the Nation objects to the authority of any entity to promulgate standards that are not sufficiently protective of tribal health.

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in the country is that EPA has authority to set WQS for Indian country waters unless or until a tribe obtains treatment as a state under CWA section 518; states other than Maine have no such authority elsewhere in the country. However, the unique jurisdiction on this issue that the EPA found Maine to have under the Settlement Acts does not give Maine the authority to ignore the existence of the federally recognized Indian tribes within its borders, including the Penobscot Nation. For purposes of WQS promulgation under the CWA, the Nation must be treated as its own general population in the waters within its territories and in which it has a sustenance fishing right, regardless of which agency has authority to promulgate WQS.

Furthermore, despite EPA's determination that the Settlement Acts give Maine jurisdiction that no other State in the country has, WQS for the waters at issue in this rulemaking continue to uniquely impact the rights, resources and health and well-being of the Penobscot Nation and its members, as well as those of the other tribes in the State. In fact, when waters used by tribal members and waters that support fish and other animals consumed by tribal members are allowed to be contaminated, the Nation's interests are profoundly affected and the Nation's people are disproportionately among the most exposed and impacted. This context is significant because it constrains, in important ways, the rulemaking authority of any agency that is promulgating WQS for these waters. Among other things, the adequacy of WQS for these waters must be considered in view of legal protections for the Nation's fishing and hunting rights, including the Nation's sustenance fishing rights, which are time immemorial aboriginal rights confirmed by Congress in the Settlement Acts (and as recently held by the Federal District Court for the District of Maine). *See Penobscot Nation v. Mills,* 151 F. Supp. 3d 181, 222 (D. Me. 2015) ("the Court concludes that the Settlement Acts intended to secure the Penobscot Nation's retained right to sustenance fish in the [River], as it had done historically and continuously.").[3]

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[3] In its identical final committee reports on the Settlement Acts, Congress addressed the Penobscot Nation's culturally important sustenance fishing, hunting, and trapping rights as "Special Issues" and assured the Nation they were secure and protected under principles of federal Indian common law because they were "retained" "inherent" and "sovereign" authorities. *See* H.R.Rep. No. 96–1353, at 13-17, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3788-92; S.Rep. No. 96–957, at 13-17 (1980). (Pertinent pages of the House Report are attached hereto as Exhibit C, and pertinent pages of the Senate Report are attached hereto as Exhibit D.) This promise – that the Tribe would be secure in its sustenance practices – was central to the Tribe's willingness to surrender much of its sovereignty to Maine. *See* Proposed Settlement of Maine Indian Land Claims:

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Maine's four-page petition does nothing more than summarize arguments the State previously, and unsuccessfully, presented to EPA in administrative processes, attaching the Attorney General's 20-page comments and the Maine Department of Environmental Protection's 11-page comments on the Rule. It likewise repeats the arguments made in pending litigation and includes the 57-page Second Amended Complaint. On March 6, 2017, the Town of Baileyville, Verso Corporation, and Woodland Pulp, LLC filed a similarly redundant petition, , which merely duplicates comments submitted on June 20, 2016 during the rulemaking in Docket ID EPA-HQ-OW-2015-0804 that EPA considered and rejected.[4]

Because the underlying premise of the Petitions is that tribal sustenance fishing is not a protected use of tribal waters in Maine, a determination that EPA has no discretion to reverse, EPA should deny the petitions, or decline to address them, until the matter is resolved in the pending litigation.

III. EPA LACKS DISCRETION TO CONCLUDE THAT SUSTENANCE FISHING IS NOT A DESIGNATED USE OF TRIBAL WATERS

In its petition, the State argues that it has "never created . . . a sustenance fishing [designated] use, but actually considered and rejected a controversial 2002 proposal to create a similar 'subsistence' designated use for limited portions of the Penobscot River only." State Petition at 3. The State argued the same in its comments during the federal rulemaking. June 14, 2016 comments in EPA-HQ—OW-2015-0804 at 7 (same).

Hearings on S. 2829 Before the S. Select Comm. on Indian Affairs, 96th Cong. 148-49, 154 (1980) ("Senate Hearings") (letter from Maine Attorney General to Senator Melcher, Senate Select Committee on Indian Affairs on behalf of Maine representatives to the Settlements Acts, stating that the Nation's retained authority over hunting, trapping and fishing was "in recognition of traditional Indian activities" / "traditional Indian ways"). (Pertinent page of this letter is attached hereto as Exhibit E).

[4] Because the Petitions are identical to previously submitted comments, the Penobscot Nation also incorporates herein by reference its comments submitted in the underlying proceedings, including those submitted on June 20, 2016 in Docket ID No. EPA-HQ-OW-2015-0804, and the Public Comments of the Penobscot Nation Regarding Maine's Application for Approval of Water Quality Standards for Application Within the Penobscot Indian Reservation, submitted September 13, 2013 and Supplemental comments submitted November 25, 2013.

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However, as EPA explained in its February 2, 2015 decision, the agency's authority and duty to evaluate the tribal sustenance fishing designated use does not depend on what WQS the State submits for review and is not limited to a single section of a state code. Analysis Supporting EPA's February 2, 2015 Decision ("EPA Analysis") at 31 n.18; *see also Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1089 (11th Cir. 2004); *Natural Res. Def. Council v. McCarthy*, No. 16-CV-02184-JST, 2017 WL 491147, at *12-22 (N.D. Cal. Feb. 7, 2017).

EPA further described, in exhausting detail, why it was required to interpret the State's "fishing" use as "sustenance fishing" in Indian waters in Maine in its February 2, 2015 letter:

> The first step in establishing and reviewing WQS is to determine the uses of the waters. In tribal waters, EPA must harmonize the CWA requirement that WQS must protect uses with the fundamental purpose for which land was set aside for the Tribes under the Indian settlement acts in Maine. Those settlement acts, which include MICSA and other state and federal statutes that resolved Indian land claims in the State, provide for land to be set aside as a permanent land base for the Indian Tribes in Maine. One clear purpose of that set aside is to provide a land base on which these Tribes could continue their unique cultures. A critical element of tribal cultural survival is the ability to exercise sustenance living practices, including sustenance fishing. There are multiple provisions in the Indian settlement acts that specifically codify the Tribes' sustenance practices. Maine general law regulating fish take accommodates sustenance fishing, and in several regards also specifically codifies the Tribes' ability to sustenance fish. The legislative record supporting the Indian settlement acts in Maine makes it clear that the statutes intend to create a land base on which the Tribes in Maine may fish for their sustenance. Therefore, EPA interprets the State's "fishing" designated use, as applied in tribal waters, to mean "sustenance" fishing; and EPA is approving a specific sustenance fishing right [including that of the Penobscot Nation] reserved in one of the settlement acts as a designated use for certain tribal reservation waters[, including that of the Penobscot Nation].

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EPA Analysis at 2; *id* at 17-32 (detailed legal analysis); *see also id* at 3 (noting reliance on legal opinion from the Department of Interior's Solicitor, from whom EPA sought advice "because the Department is the federal government's expert agency on matters of Indian law and is charged with administering the settlement acts in Maine").[5]

Maine wrongly asserts that tribal sustenance fishing is not a protected use of tribal waters in Maine. The Coalition goes farther, asserting that "Due to the current commercial availability of fresh, frozen, and prepared foods in stores and restaurants, and public assistance for low income persons, this [sustenance] lifestyle is no longer necessary for survival in Maine." Coalition Petition at 10.

The Coalition's claims that the cultural sustenance practices of tribal members are not protected and no longer necessary for survival in Maine, implying a preference for the use "public assistance" to purchase "foods in stores and restaurants," exhibits its ignorance of the importance of subsistence fishing to the Penobscots and Congress's promise that the Settlement Acts secured to them a viable subsistence economy.

At the time of the Settlement Acts, Penobscot tribal member Lorraine Nelson (now Lorraine Dana), unemployed and a single mother of five testified to the Senate Committee that she was concerned that Maine might control her son's ability to take fish from the River to put food on table for her family. See Senate Hearings at 418-19, and Congress responded with the assurances that she need not worry. See supra note 3. Penobscot families at that time relied upon fish, fresh water clams, muskrat and other food source from the waters of the River for three to four meals per week, eating two to three pounds (907 to 1360 grams) of these food sources per meal. See Declaration of Christopher B. Francis, Exhibit A.[6]

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[5] DOI's opinion is attached hereto as Exhibit F for ease of reference.

[6] Lorraine Dana's Declaration, filed in Penobscot Nation v. Mills, is attached hereto as Exhibit B. Her family's sustenance reliance upon the River, like that of Christopher Francis, is exemplary. Upon testifying to the Senate Committee that "My son hunts and fishes my islands to help provide for our family," she employed the Penobscot locution "fishes my islands" to mean fishing in the waters that intervene and surround islands in the Penobscot River, bank to bank. See Exhibit B¶¶15-16; Senate Hearings (Exhibit E) at 418-19. In the 1970s and 1980s, her son, Barry Dana and her father, Chester Dana (until his death in 1975), fished and trapped for food source from the River, using all of

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Thus, quite contrary to the Coalition's claim , the Penobscots' reliance upon the River is not some romantic fantasy, but actually defines a unique way of life, economically and culturally—a way of life that Congress, as the Tribe's trustee, promised would be secure upon compromising the Tribe's land claims against Maine.[7]

Further, the Coaltion's claim was flatly rejected by the Federal District Court in *Penobscot v. Mills*, holding that the right guaranteed by 30 M.R.S. § 6207(4) for Penobscot members to sustenance fish "within the boundaries of [the Penobscot] reservation[]" applies "in the entirety of the Main Stem section of the Penobscot River." *See Mills,* 151 F. Supp. 3d at 223..

In short, EPA lacks discretion to conclude that tribal sustenance fishing is not a designated use of the Penobscot River, and it rightly concluded that it was a designated use of all waters in Indian territory.

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the waters, bank to bank. There are no waters on the islands in the River to support fish or other water-dwelling animals. See *Penobscot Nation v. Mills,* 151 F. Supp. 3d at 186.

[7] As described in note 3 above, Congress promised the Penobscot Nation that its sustenance fishing rights were secure. In the "Special Issues" sections of its committee reports, Congress further assured the Tribe that Maine and other outside entities could no longer disturb the Tribe's ability to exercise its culture, see See H.R.Rep. No. 96–1353, at 17, reprinted in 1980 U.S.C.C.A.N. 3786, 3792 (Exhibit C); S.Rep. No. 96–957, at 17 (1980), and nothing is more important to the Tribe's culture than its sustenance practices in the Penobscot River. *See, e.g.,* Senate Hearings at 148-49, 338(attached as Exhibit E).

The Tribe submits herewith the report of Dr. Harald Prins, prepared for *Penobscot Nation v. Mills*. Professor Prins points out that according to the Penobscot creation legend, the Tribe emerged from its namesake river and that Penobscot families bear the names of the fish and other Penobscot River-dwelling animals upon which the Tribe has relied from time immemorial. See Prins Report at 31-39. Prins summarizes:

> The Penobscot tribe's creation myths, animal totem stories, ritual gifting at a sacred rock in their river, river-dwelling magic creatures, and divination involving fish blood or beaver and muskrat bones, not only affirmed the cultural identity of tribal members but also reminded them of their deeply historical, ecological, and spiritual roots in their ancestral homeland and intimate connections to their river and its wildlife. Such was the case in the past, including the treaty period, and remains so today.

Prins Report at 39.

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IV. THE PETITIONS PROVIDE NO NEW EVIDENCE, STUDIES, DATA, CIRCUMSTANCES OR ARGUMENTS UPON WHICH THE AGENCY COULD BASE A RATIONAL CHANGE IN COURSE

Because the petitions lack any new evidence, studies, data, circumstances, or arguments upon which the agency could base a rational change in course from its thoroughly-reasoned decisions on this issue over the last several years.

Under the CWA, WQS must include human health criteria (HHC), wherein human health is the touchstone of any agency tasked with promulgating the WQS. Fish and water dwelling animals are the primary route of human exposure to a host of toxic chemicals that are harmful to human health. Pursuant to EPA guidance, health-based water quality standards are set to ensure that humans can safely consume fish and other organisms, without also being exposed to contaminants in harmful amounts. Quantitative risk assessment methods are employed to set standards for both threshold and non-threshold contaminants. For threshold contaminants, standards are set so that contaminants don't exceed levels that are safe for humans. For non-threshold contaminants, including carcinogens, exposure to any non-zero amount has the potential to cause cancer, so standards are set such that contaminants don't exceed a risk level determined to be "acceptable." In either case, a risk assessment equation is used to "solve" for the concentration of each chemical that will be permitted in the waters that support fish. The toxicity of each contaminant is considered together with human characteristics and practices that expose people to the contaminant in their environment: how much direct contact with water containing the toxin will people have; how much of the toxin will accumulate in the tissue of fish or other animals to be consumed; how much fish and water dwelling animals will people eat, over how long a period. Under the CWA, this analysis must take into account the particular effect on the general population of the Nation's members and be sufficiently protective of the human health of the Nation's members.

Because Maine refuses to accept that sustenance fishing is a designated use of tribal waters, Maine refuses to engage in the analysis necessary to set standards quantitative standards related to that use. Maine presents no new or different information that would change EPA's reasoned analysis.

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Similarly, in relation to the fish consumption rate (FCR), the Coalition urges EPA to employ a survey of Maine resident recreational anglers' fish consumption ("ChemRisk Study"), arguing that "the maximum rate reported by [the tribal] subpopulation (162 g/day) was lower than the maximum consumption rate of 182 g/day reported for the entire Maine population surveyed." Coalition Petition at 9-10. This is the very same argument the petitioners made during the rulemaking comment period.

EPA, both in its February 2, 2015 decision and in the Federal Register notice for the federal WQS Rule, explained in detail the reasons that the ChemRisk Study could not be used to determine the fish consumption rate. *See* 81 Fed. Reg. at 92,480-81; RTPC at 62-64, 72. EPA concluded that the ChemRisk Study does not represent tribal members' sustenance fishing use because, among other reasons, it "was not intended to be, nor was it, a survey of tribal sustenance fishers in tribal waters" and it did not "reflect unsuppressed fish consumption levels." 81 Fed. Reg. at 92,481. Instead, EPA relied on the Wabanaki Traditional Cultural Lifeways Exposure Scenario, a peer-reviewed estimate of traditional sustenance fish consumption from the Wabanaki Study, which "EPA [found] . . . used a sound methodology (peer reviewed, written by experts in risk assessment and anthropology), and contains the best currently available information for the purpose of deriving an FCR for [Human Health Criteria] adequate to protect present day sustenance fishing for such waters." 81 Fed. Reg. at 92,480; RTPC at 59-62.

The EPA's fish consumption rate reflects the reality of Penobscot sustenance fishing practices which Congress intended to protect in the Settlement Acts and the Coalition's view is far removed from that reality. Indeed, when Congress promised the Penobscot Nation that its sustenance fishing, hunting and trapping rights were secure, Penobscot families relied upon food sources from the River – e.g., fish, fresh water clams, muskrat – for three to four meals per week, to the tune of two to three pounds (907 to 1360 grams) per meal. *See* Christopher Francis Declaration (Exhibit A) ¶¶5-9. The EPA's fish consumption rate, derived from the Wabanaki Study, is far less – 286 grams (0.63 pounds) per day – reflecting an already suppressed fish consumption rate for tribal members.

Once again, nothing in the reconsideration Petitions presents a viable basis for disturbing EPA's conclusions. Neither petitioner provides, for example, some new survey or study that they argue should displace EPA's reliance on the Wabanaki Study. Having been presented with no new evidence or argument, EPA has nothing new to consider and no permissible basis for

disregarding any of its past determinations.

Likewise, the Coalition suggests, without any support, that there will be economic harm for pollutant discharges, but EPA's own review found to the contrary that given the location of tribal waters at issue that there would be very little economic impact to the State or existing dischargers based on the proposed WQS in Penobscot territory and its sustenance fishery reservation. 81 FR 92485-86.

EPA cannot simply reverse its decisions on political whim. Instead, a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *see also id.* at 537 (Kennedy, J., concurring in part and concurring in the judgment) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.").

In short, EPA has not been presented with considered petitions elucidating new circumstances or scientific evidence that could support a permissible reconsideration of prior decisions. The petitions do nothing to upset the strong analysis and administrative record that EPA amassed over the last several years. They present no warrant for administrative reconsideration and should be denied or not acted upon until the results of the pending litigation are known.

V. CONCLUSION

EPA's Final WQS are good for the people of Maine and the health of Maine waters, just as they are good for the people of the Penobscot Nation and the health of its members. These standards are necessary to comply with the CWA and protect the sustenance rights of tribal matters guaranteed by federal law. While the State and the Coalition may deny the existence of the sustenance use of tribal waters by the Penobscot people, the United States has always protected that right, which has been similarly recognized and protected by the federal judiciary. Accordingly, EPA should deny the Petitions in their entirety or decline to act on the Petitions and allow the federal courts to resolve the issue of whether tribal sustenance fishing is a designated use of tribal waters in Maine under the Clean Water Act.

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Dated: May 18, 2017

/s/ David M. Kallin, Esq.
David M. Kallin, Esq.
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Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

DECLARATION OF CHRISTOPHER B. FRANCIS

Christopher B. Francis hereby declares and states as follows:

1. My name is Christopher B. Francis.

2. I am an enrolled member of the Penobscot Nation.

3. My date of birth is xxxxxxxxxxx, 1971, and have resided at Indian Island in the Penobscot River all of my life.

4. I have personal knowledge of the facts stated herein.

5. During my childhood, throughout the 1970s and into the early 1980s, my family relied upon fish, fresh water claims, and muskrat caught, gathered, and trapped from the waters and bed of the Penobscot River (the "River") surrounding Indian Island and northward for a substantial portion of our diet.

6. We relied upon all portions of the River, bank to bank, for these food sources.

7. From the spring (April) until the late fall (November), we relied upon these food sources from the River for three or four meals per week.

8. At each such meal, we caught, gathered, or trapped enough of these food sources from the River to feed my mother, my father, and me, which was between two and three pounds per meal.

9. The River species we ate during these meals included, but were not limited to, small mouth bass, perch, pickerel, catfish, fresh water clams, eel, and muskrat.

10. During this same period of time (throughout the 1970s and into the early 1980s), other families of Penobscot members at Indian Island similarly relied upon these same food sources for their diet as regularly as my family did.

11. Until the mid-1990s, I was often asked by elder members of the Tribe for fish from the River for their meals, and I often provided them with fish that I caught from the River near Indian Island, which they ate.

12. As my family became more aware of the contamination of fish and other River resources in the 1980s and 1990s, we refrained from relying as heavily upon the River for food. Other Penobscot families did the same.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 03/25/15

/s/ Christopher B. Francis
Christopher B. Francis

Exhibit B

DECLARATION OF LORRAINE DANA

I, Lorraine Dana, state as follows:

1. My name is Lorraine Dana. My full name is Dorothy Lorraine Dana, but I have never used my first name. My married name is Lorraine Nelson.

2. I am a member of the Penobscot Nation and have resided on Indian Island in the Penobscot River since I was 12 years old. My date of birth is xxxxxxxxxx, 1937.

3. The mainland town closest to Indian Island is Old Town, Maine.

4. Prior to residing on Indian Island, I resided on Mattanawcook Island in the Penobscot River with my father, Chester Dana, his wife, Liza Winchester Heigh, and my brother, Chester Dana, Jr. My father held Mattanawcook Island by assignment from the Penobscot Nation. After he passed away in 1975, I inherited my father's assignment to Mattanawcook Island and other islands near it, including Chokecherry Island. Until his death, my father resided on Mattanawcook Island for most of the year.

5. The mainland town closest to Mattanawcook Island is Lincoln, Maine.

6. My father was born and raised on Mattanawcook Island until he came of age and joined the United States Marine Corps. When he was a child, there was a village of Penobscot families on the island, but most of the residents eventually moved to either Indian Island or to Old Lemon Island further down the Penobscot River. My father was the last Penobscot tribal member to live year round on Mattanawcook Island. His main diet, and the diet of the other Penobscot families who lived there, consisted of fish and muskrat from the Penobscot River and other animals that they hunted or trapped.

7. My brother and I were adopted by Liza Heigh in 1942. We lived a short time in Enfield, Maine, but then moved to Mattanawcook Island. My father never wavered from his tradition of hunting, fishing, and trapping in the Penobscot River because he depended on this tradition to put food on the table. My brother and I fished in the River and across to the main land where there was a special cove where pickerel were plentiful. We ate what we caught. My father fished just about every day to feed our family and also provided muskrat and wildlife for us. We went to school in Lincoln, crossing the river every day.

8. When my father took fish and other water-dwelling animals from the Penobscot River, he never sought or carried a permit or license from the State of Maine. My brother and I likewise never sought or carried a permit or license from the State of Maine when taking fish from the River. It never occurred to us that one would be necessary because we considered the River to be our home.

9. My brother and I never encountered state wardens or other state officials while fishing on the River and I never heard of my father ever encountering a state warden or other official while fishing, hunting, or trapping on the River.

10. When I was 12 years of age, I moved back to Indian Island where I resided with my mother, Beatrice Phillips; my half-brothers, Neil, Reuben ("Butch"), Clifford, and Guy Phillips; and my half-sisters, Donna and Cheryl Phillips. Because of hardship raising a family on her own, my mother relied heavily upon the Penobscot River for food. My brothers fished and hunted for food. Clifford was an avid fisherman. He caught perch, pickerel, and bass to feed our family. My mother also bought muskrat to feed our family from tribal members who trapped muskrat in the Penobscot River.

11. I raised my own children on Indian Island as a single parent and continued to rely upon the River for food because I had little means. I had two sons, Barry and Robert, two daughters, Lori and Kelly. In the 1970s, Barry, being the older son of the two, spent much of his spare time hunting and fishing to help provide food for our family. Barry also provided fiddleheads that he picked on the banks alongside of the Penobscot River and flagroot, which we used for medicine. Flagroot grows on the River bottom up and down the Penobscot River.

12. While my father was alive, I regularly took my sons and my daughters to visit him at Mattanawcook Island during the spring and summer. While there, we relied upon the fish and muskrat that he caught from the River as our primary food source.

13. I recall the events surrounding the settlement of the Penobscot Nation's land claims against the State of Maine, including the proposal for the settlement presented to Penobscot tribal members in March of 1980. I voted against the settlement. I thought it was rushed and complicated. I also feared that the State of Maine would end up controlling our ability to fish, hunt, and trap for our food from the Penobscot River.

14. I recall testifying before the United States Senate Committee on the land claims in July, 1980. At that time, I was identified as "Lorraine Nelson." I have reviewed the following passage of that testimony at page 419 of Volume 1 of *Proposed Settlement of Maine Indian Land Claims, Hearings Before the Select Committee on Indian Affairs United States Senate*:

    > My son hunts and fishes my islands to help provide for our family, and if we are to abide by State laws, as this bill intends us to, my family will endure hardship because of the control of the taking of deer and fish. You know as well as I, inflation has taken its toll, and at the present time I am unemployed and have a family of five to support. Two of these children are going to college. I have brought them up by myself.

15. In giving this testimony and stating that "my son hunts and fishes my islands," I was referring to the fact that my son, Barry, hunted deer at Mattanawcook, Chokecherry, other islands assigned to me, and that he fished the River from his canoe all around those islands and between them, including near the mainland shores, in order to provide food for my family. Although I referred to "my islands," I was referring to the fact that he also fished all around Indian Island and other islands near Indian Island, including Orson and Marsh islands, and the waters between those islands, as well as the waters between those islands and the mainland shores, in order to provide food for my family.

16. I have never distinguished between the islands in the Penobscot River, where I and other members of the Penobscot Nation reside, and the River. The River is as much a part of our daily lives as the islands where we maintain our homes. So when I testified to the Senate Committee on the settlement of the land claims that "my son . . . fishes my islands," I was referring to his fishing in the River as described above.

17. My father, my brother, and I would commonly say we would "fish" an island when referring to fishing in the River in waters in the vicinity of an island. This simply meant that we were fishing in the waters of the Penobscot River in areas where we knew there were fish, and this was anywhere in the River, including in coves of the mainland shores.

18. I am familiar with the islands in the so-called "main stem" of the Penobscot River, from Indian Island, north up to Medway. There are no waters (such as ponds or streams) to support fish on those islands. Fish exist only in the Penobscot River, not on the islands.

19. I have personal knowledge of the foregoing facts.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 03/25/15

/s/ Lorraine Dana
Lorraine Dana

Exhibit C

96TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 96–1353

PROVIDING FOR THE SETTLEMENT OF LAND CLAIMS OF INDIANS, INDIAN NATIONS AND TRIBES AND BANDS OF INDIANS IN THE STATE OF MAINE, INCLUDING THE PASSAMAQUODDY TRIBE, THE PENOBSCOT NATION, AND THE HOULTON BAND OF MALISEET INDIANS, AND FOR OTHER PURPOSES

SEPTEMBER 19, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H.R. 7919]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 7919) to provide for the settlement of land claims of Indians, Indian nations and tribes and bands of Indians in the State of Maine, including the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

That this Act may be cited as the "Maine Indian Claims Settlement Act of 1980".

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) Congress hereby finds and declares that:

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1970 (1 Stat. 137), or subsequent reenactments or versions thereof.

(2) The Indians, Indian nations, and tribes and bands of Indians, other than the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, that once may have held aboriginal title to lands within the State of Maine long ago abandoned their aboriginal holdings.

59–006 O

AUTHORIZATION

SEC. 14. There is hereby authorized to be appropriated $81,500,000 for the fiscal year beginning October 1, 1980 for transfer to the Funds established by Section 5 of this Act.

INSEPARABILITY

SEC. 15. In the event that any provision of Section 4 of this Act is held invalid, it is the intent of Congress that the entire Act be invalidated. In the event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections of this Act shall continue in full force and effect.

CONSTRUCTION

SEC. 16.(a) In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern.

(b) The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian Nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicaable within the State of Maine.

PURPOSE

The purpose of H.R. 7919 [1] is to provide Congressional ratification and implementation of a ettlement of land claims which have been raised by three Maine Indian Tribes, the Passamaquoddy Tride, the Penobscot Nation, and the Houlton Band of Maliseet Indians to as much as two-thirds of the lands comprising the State of Maine and on which more than 350,000 private citizens now reside. The settlement embodied in this Act was negotiated by the three Maine Tribes, the State of Maine, and those private landowners who are willing to transfer portions of their holdings to fulfill its purposes.

HISTORICAL BACKGROUND

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians were first contacted in the area which is the State of Maine and the Province of New Brunswick by the earliest explorers of the North American continent.

All three tribes are riverine in their land-ownership orientation. The aboriginal territory of the Penobscot Nation is centered on the Penobscot River. The aboriginal territory of the Passamaquoddy Tribe is centered on the Saint Croix River and the smaller river systems to the west. The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River.

When the Revolutionary War broke out, General George Washington requested the assistance of these tribes and, on June 23, 1777, Colonel John Allan, of the Massachusetts militia who was the director of the Federal Government's Eastern Indian Department, negotiated a treaty with these Indians, pursuant to which the Indians were to assist in the Revolutionary War in return for protection of their lands

[1] H.R. 7919 was co-sponsored by Representatives Emery and Snowe.

by the United States and provision of supplies in times of need. This treaty was never ratified by the United States, although Allan's journals indicate that the Indians played a crucial role in the Revolutionary War.

Despite requests from the Maine Indians, the Federal Government did not protect the tribes following the Revolutionary War. In 1794, the Passamaquoddy Tribe entered into an agreement with the Commonwealth of Massachusetts (which then had jurisdiction over all of what is now Maine), in which the tribe relinquished all but 23,000 acres of its aboriginal territory. Subsequent sales and leases by the State of Maine further reduced this territory to approximately 17,000 acres. The Penobscot Nation lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818. A sale to the State of Maine in 1833 resulted in the loss of four townships by the Penobscot Nation.

History of Litigation

The validity of these agreements with the Tribes was not seriously questioned until, in 1972, when the Governors of the Passamaquoddy Tribe asked the United States to bring suit on behalf of their Tribe on the ground that its agreement with Massachusetts was invalid because it had never been approved by the Federal Government as required by the Nonintercourse Act.

The Nonintercourse Act—which is also known as the Trade and Intercourse Act—was first enacted by the newly-formed Congress of the United States in 1790 and was subsequently re-enacted five times. It consisted of many provisions regulating a wide spectrum of activities between American Indians and Indian Tribes and the non-Indian citizens of the United States. Salient among these provisions was a section which prohibited the transfer of any lands from Indians or Indian tribes without the approval of the United States. As re-enacted in 1793, this section read, in pertinent part:

> . . . no purchase or grant of lands, or 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 . . .

A fine of up to one thousand dollars and imprisonment of up to one year were provided for a violation of this section. All the subsequent re-enactments of the Nonintercourse Act included this section in one form or another. In 1834, it was enacted in its present form and is currently codified at Title 25, section 177 of the United States Code. The importance of this provision to Federal Indian policy is critical and it has been described as "the linchpin of Federal Indian law."

The tribe's request was denied by the United States on grounds that the Nonintercourse Act does not apply to nonrecognized tribes and on the grounds that there was, thus, no trust relationship between the United States and the Maine Tribes. The Passamaquoddy Tribe then brought a declaratory judgment action against the Secretary of the Interior and the United States Attorney General. In 1972, the tribe won an order forcing the United States to file a protective action on

its behalf. In 1975, the United States District Court for the District of Maine held that the Indian Nonintercourse Act applies to all tribes, including those which are not federally-recognized, and that the Act creates a trust relationship between the United States and all such tribes. Later that year, the United States Court of Appeals for the First Circuit unanimously reaffirmed the *Passamaquoddy* decision, holding that the trust relationship created by the Act includes, at minimum, an obligation to investigate and take such action as may be warranted under the circumstances when an alleged violation of the Nonintercourse Act is brought to the government's attention.

The issues raised in the *Passamaquoddy* case were reaffirmed in two subsequent decisions involving Maine Indians: *Bottomly* v. *Passamaquoddy Tribe*, 599 F. 2d 1061 (1st Cir. 1979) (holding that Maine Tribes are entitled to protection under the federal Indian common law doctrines) and *State of Maine* v. *Dana*, 404 A. 2d 551 (Me. 1979), *cert.* denied 100 F. Ct. 1064 (Feb. 1980) (holding that reservation land of dependent Maine Indian Tribes constitutes Indian country as that term is used in Federal law).

History of Settlement Discussions

The settlement process began in March of 1977 when President Carter appointed retired Georgia Supreme Court Justice William Gunter to study the case. After substantial study of the merits of the claims and the defenses to them, Justice Gunter recommended that the case be settled. The White House acted on this suggestion by appointing a three-person work group to develop a settlement plan which consisted of Eliot Cutler, Associate Director of the Office of Management and Budget for Energy, Natural Resources and Science; Leo Krulitz, Solicitor of the Department of the Interior; and A. Stephens Clay, Judge Gunter's law partner. Negotiations between this work group and the tribes produced an agreement between the tribes and the administration, which was announced in February, 1978. An agreement between the administration and officials of the State of Maine was announced in November, 1978. But it was not until March, 1980, that an agreement supported by all parties was announced.

Following its March announcement, the current agreement was approved by the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. The agreement was then adopted by the Maine legislature and signed into law by the Maine Governor Joseph Brennan, on April 2, 1980. The proposal was introduced in the Senate on June 13, 1980, by Senator William Cohen and Senator George Mitchell of Maine and in the House of Representatives, on August 1, 1980, by Congressman Emery and Congresswoman Snowe.

Need

After the Court of Appeals affirmed the District Court decision, the Justice Department undertook an analysis of the Tribes' claim. In a memorandum written in 1977, the Department described the case as "potentially the most complex litigation ever brought in the Federal courts with social costs and economic impacts without precedent and

incredible litigation costs to all parties." This conclusion was based on the size of claim, the number of persons living within the disputed area, and the nature of the legal issues involved, since the Tribes claim covers up to 12.5 million acres of land (60 percent of the State of Maine) and nearly two hundred years had intervened between the time the first agreement was reached and the present day. More than 350,000 people live on the now disputed land.

If the case were to be litigated, it would involve a host of novel issues and, given the magnitude of the claim each side would be certain to appeal each ruling of the court. Moreover, the court would be required to decide questions of fact concerning events which began before this country was founded. Estimates of the time it would take to litigate such a case range from five to more than fifteen years. In the meantime, according to testimony offered to this Committee, titles to land in the entire claim area would be clouded, the sale of municipal bonds would become difficult if not impossible, and property would be difficult to alienate. Although the State of Maine estimates its chances of succeeding, if the case were to be litigated, at 60 per cent, all the parties agree that such a victory would be pyrrhic. In August of this year, the Under Secretary of the Interior in testimony before the Committee on Interior and Insular Affairs described this legislation as "critical" and urged its passage.

Special Issues

Testimony before the Committee and written materials submitted for the record reveal the following concerns about the settlement embodied in H.R. 7919 and the Maine Implementing Act, all of which the Committee believes to be unfounded:

1. *That the settlement will terminate the three Maine Tribes.*—The settlement does not terminate the three Tribes in Maine. Numerous provisions of H.R. 7919 and the Maine Implementing Act make reference to the Maine Tribes as tribes, and Sec. 6(i) specifically provides that "As Federally recognized Indian tribes the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations or tribes or bands of Indians, to same extent and subject to the same eligibility criteria as are generally applicable to other Indians, Indian nations or tribes or bands of Indians."

2. *That the settlement amounts to a "destruction" of the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation.*—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 the power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly* v. *Passamaquoddy Tribe*, 559 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 to the extent provided in the Maine Implementing Act, 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.

The settlement also protects the sovereignty of the Passamaquoddy Tribe and the Penobscot Nation in other ways. For example, Secs. 6206(1) and 6214, and 4733 of the Maine Implementing Act provide that these Tribes, as Indian tribes under the United States Constitution, may exclude non-Indians from tribal decisionmaking processes, even though non-Indians live within the jurisdiction of the tribes. Other examples of expressly retained sovereign activities include the hunting and fishing provisions discussed in paragraph 7 below, and the provisions contained in Title 30, Sec. 6209 as established by the Maine Implementing Act and Sec. 6 in H.R. 7919 which provide for the continuation and/or establishment of tribal courts by the Passamaquoddy Tribe and the Penobscot Nation with powers similar to those exercised by Indian courts in other parts of the country. Finally, Sec. 7(a) of H.R. 7919 provides that all three Tribes may organize for their common welfare and adopt an appropriate instrument to govern its affairs when acting in a governmental capacity. In addition, the Maine Implementing Act grants to the Passamaquoddy Tribe and Penobscot Nation the state constitutional status of municipalities under Maine law. In view of the "homerule" powers of municipalities in Maine, this also constitutes a significant grant of power to the Tribes.

3. *The settlement provides none of the protections that is afforded other tribes.*—One of the most important federal protections is the restriction against alienation of Indian lands without federal consent. Sections 5(d)(4) and 5(g) (2) and (3) of H.R. 7919 specifically provides for such a restriction and, as was made clear during the hearings, this provision is comparable to the Indian Non-Intercourse Act, 25 U.S.C. Section 177. Sections 6 and 8 of H.R. 7919 also specifically continue the applicability of the Indian Bill of Rights of the 1968 Civil Rights Act, the Indian Child Welfare Act, and all other federal Indian statutes to the extent they do not affect or preempt authority granted to the State of Maine under the terms of the settlement.

4. *Individual Indian property and claims by Indians who hold individual use assignments will be taken in the settlement.*—The settlement envisions four categories of Indian land in Maine: individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian territory." Only newly-acquired land within Indian territory and newly-acquired tribal land to be held in trust for the Houlton Band of Maliseet Indians will be taken in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in common by the Tribe as a whole, will not be taken by the United States in trust. These lands will simply be subject to a federal restric-

tion against alienation which will prevent their loss or transfer to a non-tribal member. Sec. 5(g)(2)(C) of H.R. 7919 provides that the Department of the Interior will have no role in transfers of individual tribal property from one tribal member to another, and Sec. 18 of the Maine Implementing Act, ends the power of the Maine Commissioner of Indian Affairs to interfere with such internal transfers.

The settlement will also have no effect on claims by individual Indian land owners or individual Indian assignment owners. Section 4 of H.R. 7919 and Title 30, Sec. 6213 as established by the Maine Implementing Act specifically protect claims which individual Indians have for causes of action arising after December 1, 1873. For these reasons, trespass actions brought by individual Indians will not be affected.

5. *The settlement will subject tribal lands to property taxation.*—Sec. 6208 of the Maine Implementing Act specifically prohibits the imposition of such a tax. The confusion over this issue apparently comes from two provisions of the settlement: Title 30, Sec. 6208(2) as established by the Maine Implementing Act, which provides for payments in lieu of taxes on lands within Indian Territory, and Sec. 6(i) of H.R. 7919 which provides that lands held in trust for the Passamaquoddy Tribe or the Penobscot Nation or subject to a restriction against alienation, shall be considered "Federal Indian reservations for purposes of federal taxation."

Title 30, Sec. 6208 as established by the Maine Implementing Act does not impose any taxes on any land within Indian territory. A tax is a charge against property which can result in a taking of that property for non-payment of the tax. Section 6208 does not provide for such a tax, and H.R. 7919 forbids such a tax. The actual workings of this provision are explained in detail in the Committee section-by-section analysis of the Maine Implementing Act which appears in this report. That analysis explains, among other things, that these payments in lieu of taxes will most likely be paid with funds provided to the tribes by the federal government.

Sec. 6(i) of H.R. 7919, which treats the Passamaquoddy and Penobscot Indian Territories as federal reservations for purposes of federal taxes is designed to insure that activities within these Territories are entitled to the same Federal tax exemptions which apply on reservations of other Federally-recognized tribes. The provision is intended only to benefit the Tribes.

6. *That the provision for eminent domain takings will lead to a rapid loss of Indian land.*—While Sec. 6205(3), (4), and (5) of the Maine Implementing Act and Sec. 5(i) and (j) of H.R. 7919 provide a mechanism for takings for public uses, these provisions impose preconditions on such takings which are more stringent than any other known to the Committee. Before a taking could ever be effectuated within the reservations, an entity proposing such a taking must demonstrate that there is no reasonably feasible alternative to the taking. No taking, whether within or without the reservation, can lead to a diminution of Indian lands, and any taken land must be replaced. The settlement provides machinery for adding such substitute lands to the reservation or Indian territory from which they are taken.

7. *Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement.*—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 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 Sec. 6(e)(1) of H.R. 7919. 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. This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in Title 30, Sec. 6207(6) as established by the Maine Implementing Act, the State will only be able to make use of this residual power where it can be demonstrated by substantial that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal land.

8. *The lands and trust funds provided in the settlement will not benefit the Indians because of the lack of adequate controls.*—In testimony before the Committee, one of the Indian opponents to the bill stated his belief that the Indians would receive no benefits from the trust fund established under the settlement, and that all income would be used by the Secretary of the Interior. This fear in unfounded. Section 5(b) of H.R. 7919 requires the Secretary to make all trust fund income available to the respective Tribe and Nation quarterly, and provides that he may make no deduction for the United States' expense in the administration of the fund.

Fears that the Tribes will not have adequate control over the management of the trust funds are equally unfounded. The legislation specifically provides that the funds shall be managed in accordance with terms put forth by the Tribes. As is explained elsewhere in this report, the Secretary must agree to reasonable terms put forth by the tribes, and through the Administrative Procedure Act, the Tribes may obtain judicial review of any refusal by the Secretary to agree to reasonable terms. While the United States will not be liable for losses which result from investments that the Tribes request which are outside the scope of the Department of the Interior's existing authority, such investments cannot be made except at the request of the Tribe or Nation which seeks such an investment.

9. *The settlement will lead to acculturation of the Maine Indians.*—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. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.

Exhibit D

Calendar No. 1050

96TH CONGRESS, 2d Session | SENATE | REPORT No. 96-957

AUTHORIZING FUNDS FOR THE SETTLEMENT OF INDIAN CLAIMS IN THE STATE OF MAINE

SEPTEMBER 17 (legislative day, JUNE 12), 1980.—Ordered to be printed

Mr. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2829]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2829) to authorize funds for the settlement of Indian claims in the State of Maine, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

AMENDMENT TO S. 2829 IN THE NATURE OF A SUBSTITUTE

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Maine Indian Claims Settlement Act of 1980".

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) Congress hereby finds and declares that:

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1790 (1 Stat. 137), or subsequent reenactments or versions thereof.

(2) The Indians, Indian nations, and tribes and bands of Indians, other than the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, that once may have held aboriginal title to lands within the State of Maine long ago abandoned their aboriginal holdings.

(3) The Penobscot Nation, as represented as of the time of passage of this Act by the Penobscot Nation's Governor and Council, is the sole successor in interest to the aboriginal entity generally known as the Penobscot Nation which years ago claimed aboriginal title to certain lands in the State of Maine.

event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections of this Act shall continue in full force and effect.

CONSTRUCTION

SEC. 16. (a) In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern.

(b) The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would materially affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian Nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

PURPOSE

The purpose of S. 2829 is to provide Congressional ratification and implementation of a settlement of land claim which have been raised by three Maine Indian Tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians to as much as two-thirds of the lands comprising the State of Maine and on which more than 250,000 private citizens now reside. The settlement embodied in this Act was negotiated by the three Main Tribes, the State of Maine, and those private landowners who are willing to transfer portions of their holdings to fulfill its purposes.

HISTORICAL BACKGROUND

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians were first contacted in the area which is the State of Maine and the Province of New Brunswick by the earliest explorers of the North American continent.

All three tribes are riverine in their land-ownership orientation. The aboriginal territory of the Penobscot Nation is centered on the Penobscot River. The aboriginal territory of the Passamaquoddy Tribe is centered on the Saint Croix River and the smaller river systems to the west. The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River.

When the Revolutionary War broke out, General George Washington requested the assistance of these tribes and, on June 23, 1777, Colonel John Allan, of the Massachusetts militia who was the director of the federal government's Eastern Indian Department, negotiated a treaty with these Indians, pursuant to which the Indians were to assist in the Revolutionary War in return for protection of their lands by the United States and provision of supplies in times of need. This treaty was never ratified by the United States, although Allan's journals indicate that the Indians played a crucial role in the Revolutionary War.

Despite requests from the Maine Indians, the federal government did not protect the tribes following the Revolutionary War. In 1794, the Passamaquoddy Tribe entered into an agreement with the Commonwealth of Massachusetts (which then had jurisdiction over all of what is now Maine), in which the tribe relinquished all but 23,000

acres of its aboriginal territory. Subsequent sales and leases by the State of Maine further reduced this territory to approximately 17,000 acres. The Penobscot Nation lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818. A sale to the State of Maine in 1833 resulted in the loss of four townships by the Penobscot Nation.

History of Litigation

The validity of these agreements with the Tribes was not seriously questioned until, in 1972, the Governors of the Passamaquoddy Tribe asked the United States to bring suit on behalf of their Tribe on the ground that its agreement with Massachusetts was invalid because it had never been approved by the federal government as required by the Nonintercourse Act.

The Nonintercourse Act—which is also known as the Trade and Intercourse Act—was first enacted by the newly-formed Congress of the United States in 1790 and was subsequently re-enacted five times. It consisted of many provisions regulating a wide spectrum of activities between American Indians and Indian Tribes and the non-Indian citizens of the United States. Salient among those provisions was a section which prohibited the transfer of any lands from Indians or Indian tribes without the approval of the United States. As reenacted in 1793, this section read, in pertinent part:

> * * * no purchase or grant of lands, or 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 * * *.

A fine of up to one thousand dollars and imprisonment for up to one year were provided for violation of this section. All the subsequent reenactments of the Nonintercourse Act included this section in one form or another. In 1834, it was enacted in its present form and is currently codified at Title 25, section 177 of the United States Code. The importance of this provision to federal Indian policy is critical and it has been described as "the linchpin of federal Indian law."

The tribe's request was denied by the United States on grounds that the Nonintercourse Act does not apply to nonrecognized tribes and on the grounds that there was, thus, no trust relationship between the United States and the Maine Tribes. The Passamaquoddy Tribe then brought a declaratory judgment action against the Secretary of the Interior and the United States Attorney General. In 1972, the tribes won an order forcing the United States to file a protective action on its behalf. In 1975, the United States District Court for the District of Maine held that the Indian Nonintercourse Act applies to all tribes, including those which are not federally-recognized, and that the Act creates a trust relationship between the United States and all such tribes. Later that year, the United States Court of Appeals for the First Circuit unanimously reaffirmed the *Passamaquoddy* decision, holding that the trust relationship created by the Act includes, at minimum, an obligation to investigate and take such action as may be warranted under the circumstances when an alleged violation of the Nonintercourse Act is brought to the government's attention.

The issues raised in the *Passamaquoddy* case were reaffirmed in two subsequent decisions involving Maine Indians: *Bottomly* v. *Passamaquoddy Tribe*, 599 F. 2d 1061 (1st Cir. 1979) (holding that Maine Tribes are entitled to protection under the federal Indian common law doctrines) and *State of Maine* v. *Dana*, 404 A. 2d 551 (Me. 1979), cert. denied 100 F. Ct. 1064 (Feb. 1980) (holding that reservation land of dependent Maine Indian Tribes constitutes Indian country as that term is used in federal law).

History of Settlement Discussions

The settlement process began in March of 1977 when President Carter appointed retired Georgia Supreme Court Justice William Gunter to study the case. After substantial study of the merits of the claims and the defenses to them, Justice Gunter recommended that the case be settled. The White House acted on this suggestion by appointing a three-person work group to develop a settlement plan which consisted of Eliot Cutler, Associate Director of the Office of Management and Budget for Energy, Natural Resources and Science; Leo Krulitz, Solicitor of the Department of the Interior; and A. Stephens Clay, Judge Gunter's law partner. Negotiations between this work group and the tribes produced an agreement between the tribes and the administration, which was announced in February, 1978. An agreement between the administration and officials of the State of Maine was announced in November, 1978. But it was not until March, 1980, that an agreement supported by all parties was announced.

Following its March announcement, the current agreement was approved by the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. The agreement was then adopted by the Maine legislature and signed into law by the Maine Governor Joseph Brennan, on April 2, 1980. The proposal was introduced in Congress on June 13, 1980, by Senator William Cohen and Senator George Mitchell of Maine.

Need

After the Court of Appeals affirmed the District Court decision the Justice Department undertook an analysis of the Tribes' claim. In a memorandum written in 1977, the Department described the case as "potentially the most complex litigation ever brought in the Federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties." This conclusion was based on the size of claim, the number of persons living within the disputed area, and the native of the legal issues involved. For, the Tribes claim up to 12.5 million acres, or 60 percent of the State of Maine and, in the nearly two hundred years that had intervened between the time the first agreement was reached and the present day, more than 350,000 people had moved onto the now disputed land.

If the case were to be litigated, it would involve a host of novel issues and, given the magnitude of the claim each side would be certain to appeal each ruling of the court. Moreover, the court would be required to decide questions of fact concerning events which began before this country was founded. Estimates of the time it would take to litigate such a case range from five to more than fifteen years. In the meantime, according to testimony offered to this Committee, titles to

land in the entire claim area would be clouded, the sale of municipal bonds would become difficult if not impossible, and property would be difficult to alienate. Although the State of Maine estimates its chances of succeeding, if the case were to be litigated, at 60 per cent, all the parties agree that such a victory would be pyrrhic. In July of this year, Secretary of the Interior Cecil Andrus, in testimony before this Committee, described this legislation as "critical" and urged its passage.

Special Issues

Testimony before the Committee and written materials submitted for the record reveal the following concerns about the settlement embodied in S. 2829 and the Maine Implementing Act, all of which the Committee believes to be unfounded:

1. *That the settlement will terminate the three Maine Tribes.*—In July 1, 1980, testimony, Interior Secretary Cecil Andrus stated that the setlement does not terminate the three Tribes in Maine. The Committee agrees with the Secretary. Numerous provisions of S. 2829 and the Maine Implementing Act make reference to the Maine Tribe as tribes, and Sec. 6(h) specifically provides

> That as Federally recognized Indian tribes the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations or tribes or bands of Indians, to same extent and subject to the same eligibility criteria as are generally applicable to other Indians, Indian nations or tribes or bands of Indians.

2. *That the settlement amounts to a "destruction" of the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation.*—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 the 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 to the extent provided in the Maine Implementing Act, 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.

The settlement also protects the sovereignty of the Passamaquoddy Tribe and the Penobscot Nation in other ways. For example, Secs.

6206(1) and 6214, and 4733 of the Maine Implementing Act provide that these Tribes, as Indian tribes under the United States Constitution, may exclude non-Indians from tribal decision-making processes, even though non-Indians live within the jurisdiction of the tribes. Other examples of expressly retained sovereign activities include the hunting and fishing provisions discussed in paragraph 7 below, and the provisions contained in Title 30, Sec. 6209 as established by the Maine Implementing Act and Sec. 6 in S. 2829 which provide for the continuation and/or establishment of tribal courts by the the Passamaquoddy Tribe and the Penobscot Nation with powers similar to those exercised by Indian courts in other parts of the country. Finally, Sec. 7(a) of S. 2829 provides that all three Tribes may organize for their common welfare and adopt an appropriate instrument to govern its affairs when acting in a governmental capacity. In addition, the Maine Implementing Act grants to the Passamaquoddy Tribe and Penobscot Nation the state constitutional status of municipalities under Maine law. In view of the "homerule" powers of municipalities in Maine, this also constitutes a significant grant of power to the Tribes.

3. *The settlement provides none of the protections that is afforded other tribes.*—One of the most important federal protections is the restriction against alienation of Indian lands without federal consent. Sections 5(d)(4) and 5(g)(2) and (3) of S. 2829 specifically provides for such a restriction and, as was made clear during the hearings, this provision is comparable to the Indian Non-Intercourse Act, 25 U.S.C. § 177. Sections 6 and 8 of S. 2829 also specifically continue the applicability of the Indian Bill of Rights of the 1968 Civil Rights Act, the Indian Child Welfare Act, and all other federal Indian statutes to the extent they do not affect or preempt authority granted to the State of Maine under the terms of the settlement.

4. *Individual Indian property and claims by Indians who hold individual use assignments will be taken in the settlement.*—The settlement envisions four categories of Indian land in Maine: individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian territory." Only newly-acquired land within Indian territory and newly-acquired tribal land to be held in trust for the Houlton Band of Maliseet Indians will be taken in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in comomn bv the Tribe as a whole, will not be taken by the United States in trust. These lands will simply be subject to a federal restriction against alienation which will prevent their loss or transfer to a non-tribal member. Sec. 5(f)(2)(C) of S. 2829 provides that the Department of the Interior will have no role in transfers of individual tribal property from one tribal member to another, and Sec. 18 of the Maine Implementing Act, ends the power of the Maine Commissioner of Indian Affairs to interfere with such internal transfers.

The settlement will also have no effect on claims by inividual Indian land owners or individual Indian assignment owners. Section 4 of S. 2829 and Title 30. Sec. 6213 as established by the Maine Implementing Act specifically protect claims which individual Indians

have for causes of action arising after December 1, 1873. For these reasons, trespass actions brought by individual Indians will not be affected.

5. *The Settlement will subject tribal lands to property taxation.*—Sec. 6208 of the Maine Implementing Act specifically prohibits the imposition of such a tax. The confusion over this issue apparently comes from two provisions of the settlement: Title 30, Sec. 6208(2) as established by the Maine Implementing Act, which provides for payments in lieu of taxes on lands within Indian Territory, and Sec. 6(h) of S. 2829 which provides that lands held in trust for the Passamaquoddy Tribe or the Penobscot Nation or subject to a restriction against alienation, shall be considered "Federal Indian reservations for purposes of federal taxation."

Title 30, Sec. 6208 as established by the Maine Implementing Act does not impose any taxes on any land within Indian territory. A tax is a charge against property which can result in a taking of that property for non-payment of the tax. Section 6208 does not provide for such a tax, and S. 2829 forbids such a tax. The actual workings of this provision are explained in detail in the Committee section-by-section analysis of the Maine Implementing Act which appears in this report. That analysis explains, among other things, that these payments in lieu of taxes will most likely be paid with funds provided to the tribes by the federal government.

Sec. 6(h) of S. 2829, which treats the Passamaquoddy and Penobscot Indian Territories as federal reservations for purposes of federal taxes is designed to insure that activities within these Territories are entitled to the same Federal tax exemptions which apply on reservations of other Federally recognized tribes. The provision is intended only to benefit the Tribes.

6. *That the provision for eminent domain takings will lead to a rapid loss of Indian land.*—While Sec. 6205(3), (4), and (5) of the Maine Implementing Act and Sec. 5 (h) and (i) of S. 2829 provide a mechanism for takings for public uses, these provisions impose preconditions on such takings which are more stringent than any other known to the Committee. Before a taking could ever be effectuated within the reservations, an entity proposing such a taking must demonstrate that there is no reasonably feasible alternative to the taking. No taking, whether within or without the reservation, can lead to a diminution of Indian lands, and any taken land must be replaced. The settlement provides machinery for adding such substitute lands to the reservation or Indian territory from which they are taken.

7. *Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement.*—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 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 Sec. 6(e)(1) of S. 2829. 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 effect on stocks in or on adjacent lands or waters. This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in Title 30, Sec. 6207(6) as established by the Maine Implementing Act, the State will only be able to make use of this residual power where it can be demonstrated by substantial that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal land.

8. *The lands and trust funds provided in the Settlement will not benefit the Indians because of the lack of adequate controls.*—In testimony before the Committee, one of the Indian opponents to the bill stated his belief that the Indians would receive no benefits from the trust fund established under the settlement, and that all income would be used by the Secretary of the Interior. This fear is unfounded. Section 6(b) of S. 2829 requires the Secretary to make all trust fund income available to the respective Tribe and Nation quarterly, and provides that he may make no deduction for the United States' expense in the administration of the fund.

Fears that the Tribes will not have adequate control over the management of the trust funds are equally unfounded. The legislation specifically provides that the funds shall be managed in accordance with terms put forth by the Tribes. As is explained elsewhere in this report, the Secretary must agree to reasonable terms put forth by the tribes, and through the Administrative Procedure Act, the Tribes may obtain judicial review of any refusal by the Secretary to agree to reasonable terms. While the United States will not be liable for losses which result from investments that the Tribes request which are outside the scope of the Department of the Interior's existing authority, such investments cannot be made except at the request of the Tribe or Nation which seeks such an investment.

9. *The Settlement will lead to acculturation of the Maine Indians.*—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. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.

Summary of Major Provisions

S. 2829 provides congressional implementation and ratification of the terms of the settlement negotiated among the parties; that is, the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, the State of Maine, the private owners of large tracts of land, and the United States.

Exhibit E

PROPOSED SETTLEMENT OF MAINE INDIAN LAND CLAIMS

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2829

TO PROVIDE FOR THE SETTLEMENT OF THE MAINE INDIAN LAND CLAIMS

JULY 1 AND 2, 1980
WASHINGTON, D.C.

Volume 1

96th 420 10/10/80
File With.....PUBLIC LAW.....approved.....

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 12, 1980

Senator John Melcher
Select Committee on Indian Affairs
U.S. Senate
Washington, D.C.

Re: S. 2829, The Maine Indian Claims Settlement Act

Dear Sir:

During the Committee's hearing on this bill on July 1 and 2, 1980, the Committee requested that Governor Brennan, Senator Collins, Representative Post and me to respond in writing to certain questions posed by the Bangor Daily News and former Governor James B. Longley concerning the bill and the State Implementing legislation. This letter constitutes a joint response to that request.

It is important to note that many of the questions posed by both the Bangor Daily News and former Governor Longley contain inaccurate assumptions about this bill and the State legislation which should be corrected to assure a clear understanding of the issues.

The following are questions from Bangor Daily News editorial of March 28, 1980, with our joint response:

1. "What are the implications for Maine if the State legislature ratifies the proposal and the U.S. Congress refuses to go along with the revised and extravagent price tag?"

This question is premised on the initial assumption that the appropriation provided for in the S. 2829 is excessive. Much of the testimony before the Senate Committee addresses this point and there is no need to repeat those points in this letter.

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It is in the nature of negotiated settlements that particular provisions meet the requirements of the interested parties. Each settlement must have unique characteristics that reflect the nature and implications of the underlying claim, the relative risks to the parties, traditions of the area involved and the desires of the parties. In this sense, the settlement provisions in the Maine Act and S. 2829 are not precedents. Every future settlement will have to reflect the unique considerations in each case to meet the parties' requirements.

5. "Have all of the intricacies of the jurisdictional language been examined by an expert without vested interest? Does the jurisdictional language bestow a preferential treatment upon the tribes which will foster an unrelenting chain of legal disputes in the years ahead?"

This question incorrectly assumes that the Governor and Attorney General, and their staffs, in accepting the settlement agreement and the Maine Implementing Act, have not carefully reviewed the jurisdictional language in that Act. The question further suggests that the Governor, Attorney General and members of the Maine Legislature somehow had a "vested interest" or personal stake in the matter and were not acting out of concern for the general welfare of Maine citizens. This suggestion is false.

Not only did we carefully review the language of the bill, we brought in outside counsel to do so as well and have encouraged any other experts to review and make corrective suggestions. At the time of enactment of the Maine Implementing Act the intricacies of the State and Indian jurisdictional relationship had been carefully scrutinized by several independent experts, by the Legislature and by many public speakers. It has been knowledgeably and thoroughly assessed and accepted.

The second part of the question contains the assumption that the Indians receive "preferential" treatment. Under the State Implementing Act, the Penobscot Nation and Passamaquoddy Tribe are given certain rights and authority within the 300,000 acres of "Indian Territory." To the extent that these rights and authority exceed that given any Maine municipality, they do so only to a limited extent and in recognition of traditional Indian activities. (The Houlton Band of Maliseets are not granted this "municipal" status). The most significant aspect of this limited expansion of authority is in the area of hunting and trapping and, to a limited extent, fishing in Indian Territory. Even in this area, the Indian Tribes must treat Indians and non-Indians alike, except for subsistence provisions, and Tribal authority can be overriden by the State if it begins to affect

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hunting, trapping or fishing outside the Indian Territory. Generally the Act does not provide Indians with preferential treatment. To the contrary, we believe the Implementing Act establishes a measure of equality between Indian and non-Indian citizens normally not existing in other States. Indeed, the Act recovers back for the State almost all of the jurisdiction over existing reservations that had been lost as a result of recent Court decisions.

Obviously no one can guarantee that there will be no litigation in the future over the meaning of certain provisions in the Maine Implementing Act or S. 2829. However, the provisions of S. 2829 and the Implementing Act have been carefully drafted and reviewed to eliminate insofar as possible any future legal disputes. Particular care was taken to insure that S. 2829 is adequate to finally extinguish the land claims, and as to those provisions we are satisfied that they have been drafted as carefully as possible. Nevertheless, litigation over this and other provisions is always possible and we cannot prevent the filing of future suits. Any contract, agreement or legislation always contains unanticipated ambiguities that sometimes can only be resolved through the courts. In our judgment, however, should questions arise in the future over the legal status of Indians and Indian lands in Maine, those questions can be answered in the context of the Maine Implementing Act and S. 2829 rather than using general principles of Indian law.

6. "If the Indians get their money and land in Maine, will the Native American Rights Fund and other foundations that have bankrolled the Indians in their legal quest dispatch an army of well-financed lawyers to Maine to chase down other historic injustices heaped upon the Native Americans by our forefathers?"

Though we cannot say what the plans of the Native American Rights Fund or similar organizations may be, the Maine Implementing Act and S. 2829 clearly and absolutely extinguish all Indian land claims in Maine. These two Acts will finally and completely settle those issues and remove any legal ground for attempting to resurrect the historical incidents that gave rise to the present claims. As to any other disputes that may arise in the future, we assume the Tribes will use available legal resources and rights just as any other citizen would.

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for its past expenditures as well as asking Congress to pay the Tribes for extinguishment of the claim. The State has, however, taken the position that the millions of dollars that it has spent on Maine Indians is its contribution to the settlement agreement. It is for this reason that we expect the Federal Government to meet the expense of purchasing land and creating a trust fund. To ask the Indians or federal government to reimburse the State would only increase the federal cost of the settlement, thus making it more difficult to have the settlement implemented by Congress. Thus, the State has simply proposed that Congress consider the State's past payments as its share of the settlement.

8. "Does the Maine Implementing Act establish 'separate and preferential laws for Indian Citizens,' or has it thus rendered favored treatment to one class of citizen, or in effect, endorsed the concept of a second class of citizen at the expense of the rest of the citizens of Maine?"

The implication in the term "preferential treatment" for Indians has already been discussed in the response to the Bangor Daily News question # 5.

There are certain provisions in the Maine Implementing Act that permit in Indian Territory different laws than apply elsewhere in the State. These provisions embody a recognition of traditional Indian ways. They are minor changes and are far less intrusive on general state jurisdiction than the generally applicable laws that govern federal "Indian Country" generally.

As was stated in testimony, the Maine Tribes now have certain rights on their reservations that other citizens do not. The State is now powerless to change that fact. Should the Tribes be successful in recovering land in a lawsuit they would enjoy these same additional rights on these other lands also. Under current general law, their rights are far more extensive than those accorded under either the Maine Implementing Act or S. 2829. As we stated above, we think the Maine Implementing Act restores equality of treatment of Indians and non-Indians which was lost under recent Court decisions. Rather than creating and continuing "preferential treatment" the Implementing Act and S. 2829 insure equality of treatment. To the extent there are some minor distinctions in the application of State law in Indian Territory and elsewhere in Maine, those differences are in our judgment minor and represent a fair compromise and balancing of Tribal, State and Federal interests.

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We wish to thank the State Committee for the opportunity to respond for the record on the series of questions raised by the Bangor Daily News and former Governor Longley. We believe that the record of your hearings on S. 2829 and the Maine Implementing Act clearly show that these questions have been adequately answered.

We hope that the Committee will shortly act favorably on this bill.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC:mfe

cc: Honorable William S. Cohen
Honorable George J. Mitchell

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STATEMENT OF HON. SAMUEL COLLINS, STATE SENATOR, ROCKLAND, MAINE AND HON. BONNIE POST, STATE REPRESENTATIVE, OWLS HEAD, MAINE, ACCOMPANIED BY JONATHAN HULL, COUNSEL TO THE JOINT SELECT COMMITTEE ON INDIAN LAND CLAIMS, MAINE STATE LEGISLATURE

Mr. COLLINS. Thank you, Mr. Chairman.

I am Senator Samuel Collins, and with me is Representative Bonnie Post. We have served as cochairmen of the Joint Select Committee on Indian Land Claims of the Maine Legislature. Our statement is a joint one. I will take the first portion and Mrs. Post the second portion.

For several years the Maine Legislature has been aware of, and involved in, the various attempts to negotiate a settlement of this case. Legislators, including myself, were members of former Governor Longley's advisory panel in 1976. In 1977, Maine legislative leadership set up an informal committee to consider options and advise the attorney general. This committee discussed the case and the ongoing negotiations with the State negotiators and other interested parties.

On several occasions, the legislature was informed of the progress of the claims, including an address to a joint session by former Senator Edmund Muskie in 1978. Thus, the legislature was well informed on the progress and developments of the claims case and the negotiations long before the Maine Act was presented to it.

Early this year our committee considered and favorably reported a bill that carried into Maine law the relevant parts of the negotiated settlement among the Penobscot Nation, Passamaquoddy Tribe, and the Houlton Band of the Maliseet Tribe and the State of Maine. The agreement had been approved by the governing body of each Maine Indian tribe and also by an advisory referendum by the Penobscot Nation prior to its submission to the Maine Committee. The committee and the legislature acted favorably on the bill, and it was signed into law by our Governor on April 3, 1980. It will become effective when this companion Federal bill is enacted.

As you all realize, the final part of that agreement in the form of S. 2829 is now before your committee for its consideration. We strongly urge you to favorably report S. 2829. The bill is vitally important to Maine and to the country as a whole.

As you know, these two acts, the Maine Act and the companion Federal bill pending before this committee form the negotiated resolution of the Maine Indian Land Claims case. That case rests on actions that occurred almost 200 years ago but have had profound consequences in the past few years.

There is no need for us to repeat the details of the legal arguments on both sides of this case, nor the difficulties in developing a negotiated settlement. It is sufficient to note that the process has been long and arduous for all concerned. Both the State and the Indians feel that their legal position is strong but that the consequences of complete court determination of the issues would be too harmful when a reasonable settlement is possible.

The Maine Joint Select Committee considered in detail the legal arguments on both sides of this issue. It considered the provisions of

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State role in the context of the Federal trust relationship to Western Indians, with the Indians' agreement, is embodied in the Indian Civil Rights Act, 25 U.S.C. 1301, 1321, and 1322.

The Maine Act seeks to continue the significant role for the State while establishing a sound and undisputed legal basis for that role. Although it is different from the typical treatment of Western Indians, it is a difference that has existed since the nation was founded. It is also a difference that both the State and the Indians have now voluntarily negotiated and agree to continue. Both parties agree that the traditional Western Indian Federal concept should not be applied. This concept, most commonly characterized in political debate in Maine as a "nation within a nation," would be divisive and destructive if applied in Maine. The resulting increased social friction and tension is unnecessary since both the State and the Indians prefer the continuation of the historical relationship.

We do not see this as establishing any basis for a redefinition of Federal policies toward other Indian tribes but rather as a continuation of a long accepted State and Indian relationship in a new legal framework.

The State act embodies the particulars of the continuing relationship. Although in most respects it continues full State jurisdiction over the Indians and their land, it also provides specific exceptions in recognition of traditional Indian practices and the Federal relationship to Indians. .

In particular, it recognizes the rights of the nation and the tribe to exclusive control of their "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 of disposition of settlement fund income."

It grants the nation and the tribe specific authority to regulate hunting and fishing within their territories and creates joint regulatory authority with the State in regulating fishing in great ponds and rivers within the territory. Under the Colonial Ordinances of this State and present statutes, a "great pond" is an inland body of water which in its natural state has a surface area in excess of 10 acres.

It exempts settlement fund income from State taxation although it continues payment in lieu of taxes on land in Indian territory.

It gives the Indians limited jurisdiction over enforcement and adjudication of criminal laws for misdemeanors but continues State jurisdiction over non-Indian and over felonies.

It gives the Indians some control over State eminent domain powers that will prevent the erosion of their territory or reservation areas.

It continues the Indians' eligibility for and receipt of all programs and services that are provided to other Maine citizens. It also makes the tribe and nation eligible for State funds and programs given to all municipalities, including revenue sharing and local road aid.

It gives the Indian territories the status of municipalities within the State; thus under Maine municipal law it authorizes the exercise of taxing, zoning, and other police powers.

I would like to depart from the written statement to elaborate on that particular subject. In Maine, article 8, part 2, sections 1 and 2 of the Maine constitution provide the basis for municipal home rule.

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When I was first introduced to this land claim thing, it was $12.5 million; then it went down to $8 million, then $5 million; and that is the last I heard of the whole thing. I never heard anything else.

Senator MITCHELL. Could you sum up very briefly, Mr. Sapiel? I know that both Ms. Coti and Ms. Nelson want to speak, and we have about 4 more minutes.

Mr. SAPIEL. So, what I would like to say is to have the Congressmen and Senators come to these reservations and see how this money is being spent, and see how the Indian people are being treated. If you do not go along with what they say, you are left out. And this money is supposed to be for all Indian people—all Indian people. They use me as a number; they get money for me, but I do not get a chance to work for it or do anything for it. That is the way it is all across the country. The United States pushes that so that they can have Indian people fighting one another. Then they just come in and say, "We are the guardians," and we have to do what the Governor and council say.

Senator MITCHELL. Yes; but you are not suggesting that the answer to that is not to give the Indians anything here?

Mr. SAPIEL. I cannot understand you.

Senator MITCHELL. You said that one of the problems is that the Government pushes money on the Indians and then tries to control their lives. Would you rather see the Penobscot and the Passamaquoddy get nothing here?

Mr. SAPIEL. I would rather see the Congress, or the Senate, or whoever is in charge of the State of Maine see that this is implemented in the right way and that everybody is getting their fair share.

Senator MITCHELL. Your objection is not that you are getting something; your objection is that you are not getting enough. Is that not true? You think you should get more land?

Mr. SAPIEL. I think we should get more land.

Senator MITCHELL. Thank you very much, Mr. Sapiel.

Ms. Coti and Ms. Nelson, would you each like to say something, briefly?

Ms. Nelson?

Ms. NELSON. Yes; I would. Thank you, Senator Mitchell, for allowing me to speak; I will be very brief.

My name is Lorraine Nelson, and I am a member of the Penobscot Nation. I came here in opposition to the proposed Indian settlement claims.

My concerns are many, as those of these people before you. But I would like to elaborate on my greatest fear that has haunted me ever since I saw the proposed settlement in March 1980. This is, prior to the beginning of the Indian land claims, I brought suit against the Bangor Hydroelectric Co. for illegally trespassing on two of my large islands, on which they erected utility poles to service the town of Chester. This happened about 40 years ago.

No easement was obtained, nor was any permission ratified by the Governor of Indian Affairs. This suit has been held up largely because of the jurisdictional issue concerning Indian lands.

If these bills pass in Congress, our lands will be owned in trust by the Federal Government and will be considered Federal Indian land for purposes of Federal taxation. This will be done without my consent. This is a violation of my rights.

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Gentlemen, if this should happen, I will lose my lands either to the Federal Government or to the tribes who are supposed to be representing me. No, gentlemen, these people are not concerned with my rights.

The majority of the Penobscot Indian Council and the negotiating committee does not own a vast amount of land, if any, and therefore cannot feel my concern.

My son hunts and fishes my islands to help provide for our family, and if we are to abide by State laws, as this bill intends us to, my family will endure hardship because of the control of the taking of deer and fish. You know as well as I, inflation has taken its toll, and at the present time I am unemployed and have a family of five to support. Two of these children are going to college. I have brought them up by myself.

If I should lose my lands because of inability to pay taxes, what will I have to offer my children and their children thereafter? It will be history repeating itself—the taking of Indian lands.

Getting back to my pending suit, if this bill should pass, my suit could be extinguished. The bill extinguishes any tribal claim by deeming any transfer as following Federal law. This will ratify any tribal transfer, including taking by the State or any of its agencies. This pertains to the Bangor Hydro, which has to have approval from a State agency, which is the Public Utilities Commission.

This bill could deny my right to recover my land and pursue my claim against the Bangor Hydro. This requires clarification.

In closing, I must express my concern for all Indian people whose individual rights will be extinguished. I fear the taking of my lands under this bill will be a violation of my constitutional and basic inherent rights.

Thank you for your time.

Senator MITCHELL. Thank you, Ms. Nelson.

Ms. Coti, do you wish to say something?

Ms. COTI. My name is Julia Coti. I am a full Penobscot off-reservation Indian residing in Bristol, Conn.

I oppose this bill very much for the mere fact that I do not think all our people were given the legal right to vote. I went to the hearings in March in Augusta, Maine, and I was very much bothered by the way it was presented. I got all the information I could, and when I went back to Bristol, I contacted as many Penobscot people that were residing in Connecticut as I could reach, and I held a meeting at my home.

I contacted, I would estimate, approximately one hundred people who reside, that I know of, in Bristol, Conn. When I had the meeting and also when I spoke to the people on the phone, I informed them of how the bill was presented in Augusta, Maine. I would say the majority of the people I spoke to said they did not even receive a package about what it was all about; they did not even know. They said that had they been informed and informed right, the ones who did vote yes, had they been properly informed, would never have given a yes vote.

I think that if the people had been properly informed, they would not have got what they called the majority of the vote. They certainly did not have the majority of the vote to approve this.

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Exhibit F

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 30 2015

Avi S. Garbow
General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

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

Dear Mr. Garbow:

The State of Maine has submitted proposals to the Environmental Protection Agency (EPA) to implement Water Quality Standards (WQS) within waters set aside for federally recognized tribes under applicable state and Federal law for uses including sustenance fishing (hereinafter described as Maine Indian Waters).[1] To assist in your review of Maine's proposals, you have asked for the Department of the Interior's views regarding tribal fishing rights in Maine and particularly the relationship between tribal fishing rights and water quality. We have reviewed applicable law and, for the reasons explained below, conclude that all four of the Maine tribes—the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs—have federally-protected tribal fishing rights. These fishing rights should be taken into account in evaluating the adequacy of WQS in Maine.

1. Overview of Tribal Fishing Rights in Maine Indian Waters

As you are well aware, the four federally recognized Indian tribes in the State of Maine are subject to a unique statutory framework established by the state-law Act to Implement the Maine Indian Claims Settlement ("Maine Implementing Act"),[2] the state-law Micmac Settlement Act,[3] the federal Maine Indian Claims Settlement Act ("MICSA"),[4] and the

[1] We note that the exact boundaries of at least some Indian lands and territories in Maine remain in dispute. For example, the United States has intervened in a lawsuit filed by the Penobscot Nation against Maine claiming that the Penobscot Reservation includes waters in the Main Stem of the Penobscot River. *See* Order on Pending Motions in *Penobscot Nation v. Mills*, 1:12-cv-00254-GZS (D. Maine Feb. 4, 2014) (granting US motion to intervene). It is beyond the scope of this letter to precisely identify all Maine Indian Waters. The location of Maine Indian Waters for each Tribe would have to be defined based on all applicable law, including statutory language, applicable property law doctrine, and lands reserved by treaty and retained by the tribes pursuant to statute. We do not elaborate here on the question of whether the Maine tribes have additional fishing rights outside of Indian lands and territories.
[2] 30 M.R.S. §§ 6201 *et seq.*
[3] 30 M.R.S. §§ 7201 *et seq.*
[4] 25 U.S.C. §§ 1721 *et seq.*

federal Aroostook Band of Micmacs Settlement Act[5] (collectively the "Settlement Acts").[6]

There is no dispute that the four Maine tribes have historically engaged in fishing in Maine waters and that fishing is an important cultural and economic activity for Maine tribal members.[7] Because of differences in their history and applicable statutory language, the fishing rights of the two Southern Tribes—the Passamaquoddy Tribe and the Penobscot Indian Nation— derive from different legal sources than the fishing rights of the Northern Tribes—the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. But all Maine tribes possess fishing rights that EPA should consider when analyzing proposed water quality standards in Maine.

The fishing rights of the Passamaquoddy Tribe and Penobscot Indian Nation in their Reservation waters[8] are expressly reserved[9] fishing rights: the Maine Implementing Act

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[5] P.L. 102-171, 105 Stat. 1143 (1991).

[6] In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. § 1725(i). Federal recognition was extended to the Aroostook Band of Micmacs eleven years later with the enactment of P.L. 102-171 (Sec. 6(a)), so now these four Maine tribes are recognized as eligible for the rights and benefits of Indian tribal status. *See generally* 25 U.S.C. § 479a-1(a) (providing for listing of federally recognized tribes that are all entitled to "services provided by the United States to Indians because of their status as Indians").

[7] Notably, several standalone provisions in Maine law recognize and arguably encourage the continuing centrality of fishing to the traditions and health of Maine tribes. First, the State of Maine recognizes and facilitates fishing as a central part of tribal culture by issuing permits to tribal members to fish in Maine waters at no cost. 12 M.R.S. § 10853(8). Second, the State has enacted legislation providing for special treatment of tribal members engaged in fishing for marine organisms, exempting them from many state permitting requirements and providing a broad exemption for many tribal sustenance and ceremonial uses. 12 M.R.S. § 6302-A. Concerns of the tribes with the process by which this language was adopted and objections to the definition of sustenance are explained in a recent report by the Maine Tribal-State Commission. Me. Indian Tribal-State Comm'n, *Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine* (June 17, 2014), *available at* http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf ("Commission Saltwater Fisheries Report").

[8] 30 M.R.S. § 6203(5) (defining Passamaquoddy Indian Reservation as "those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19, 1794" except for lands transferred by the Tribe after these treaties but before enactment of the Maine Implementing Act, and with certain additional specifications); § 6203(8) (defining Penobscot Indian Reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine" except for islands transferred by the Tribe after these treaties but before the enactment of the Maine Implementing Act and with the addition of other specifically enumerated parcels). Legislative history confirms that the Reservations include riparian and littoral rights under State law or treaties:

> The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of state law.

State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, 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.

[9] A reserved right is a right that has been retained since aboriginal times. Section 6207(4)'s sustenance fishing right applies within these Reservations retained by the Southern Tribes first under treaties and now under the Settlement Acts, see *supra* note 8, since aboriginal times. Congress used an apt phrase that

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acknowledges the right of Penobscot Nation and Passamaquoddy members to "take fish . . . for their individual sustenance" within their reservations free of state regulation.[10]

These statutorily-acknowledged fishing rights are rooted in treaty guarantees[11] that were upheld through the Settlement Acts. The Passamaquoddy Tribe's 1794 treaty with the State of Massachusetts explicitly reserves a Passamaquoddy fishing right in the St. Croix River (then known as the Schoodic River): the treaty guarantees "to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation."[12] The Penobscot treaties of 1818 (with Massachusetts) and 1820 (with Maine) do not expressly mention fishing rights because they did not cede the Penobscot River, explicitly retaining islands and granting to non-members only the right to "pass and repass" the River. The Penobscot Nation had historically relied on fishing, and the islands mentioned in the Treaty would have been of little value if they were not accompanied by fishing grounds.[13]

The Maine Implementing Act further provides for tribal sustenance fishing in certain ponds on lands located outside the Southern Tribes' reservations, but held in trust by the United States as part of the Indian territories established under the Settlement Acts. The Southern Tribes have exclusive authority to enact ordinances regulating the taking of fish on ponds of less than ten acres in their trust lands which "may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation."[14] The Maine Implementing Act also includes special provisions for

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captures the reserved right concept in the legislative history for the Federal Maine Indian Claims Settlement Act, characterizing fishing rights as an example of natural resources considered "expressly retained sovereign activities." H.R. Rep. No. 96-1353 at p 15 (1980).

[10] This reading is established by language in 30 M.R.S. § 6207(4):

> 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 for the State to limit tribal fishing if necessary to protect the stock of fish].

State regulation is allowed only in the case of conservation necessity, as laid out in the Maine Implementing Act at 30 M.R.S. § 6207(6).

[11] These treaties were State treaties, negotiated not with the United States but with the Commonwealth of Massachusetts; Maine later adopted the responsibility to implement these treaties in its state constitution. See Maine Constitution, Art. X, Sec. 5:

> 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, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise.

Available at http://www.maine.gov/legis/lawlib/const1820.pdf. (Note that per Art. X, Sec. 7, the text quoted here is omitted from printed copies of the Maine Constitution, but still remains in force and effect.). The Settlement Acts preempt any contrary language in the treaties, but the legislative history discussed in *supra* note 8 explains that expressly reserved riparian rights under the treaties were retained under the Settlement Acts.

[12] The text of the treaty is available at http://www.wabanaki.com/1794_treaty.htm.

[13] *See, e.g.*, *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 86-89 (1918) (holding that where Congress set aside lands for the Metlakahtla Indians, a fishing tribe, it impliedly reserved fishing rights in the adjacent waters).

[14] 30 M.R.S. § 6207(1).

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regulation of certain waters by the Maine Indian Tribal-State Commission.[15] Thus, through the Maine Implementing Act, the State has recognized the Southern Tribes' sustenance fishing rights within their territories, and the importance of fish to tribal members' diet.

Although the term "sustenance" is not defined in the Settlement Acts, it is reasonable to conclude that the term encompasses, at a minimum, the notion of tribal members taking fish to nourish and sustain themselves. Moreover, the Indian law canons of construction require that ambiguous terms in statutes must be construed "most favorably towards tribal interests."[16] Where fishing rights of traditional fishing tribes are concerned, this rule of liberal construction applies with special force: one court has held that treaties must be construed "in the sense in which they would naturally be understood by the Indians . . . . especially the reference to the right of taking fish."[17] The term "sustenance" in section 6207(4) of the Maine Implementing Act should thus be construed broadly[18] to incorporate at least the right of tribal members to take sufficient fish to nourish and sustain them,[19] with no specific quantitative limits other than the conservation necessity limit that the statutory language specifically places on the tribal fishing right.[20] When interpreting the scope of the Maine tribes' fishing right as the tribes would understand them, EPA should consider that the tribes' ability to fish was, and continues to be, essential to their livelihood and culture.

The sources of the fishing rights of Maine's Northern Tribes are different in that they are not discussed explicitly in the Settlement Acts. However, express language in a statute or

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[15] The Commission is an intergovernmental body made up of members appointed by the Tribes and the State. 30 M.R.S. § 6212. 30 M.R.S. § 6207(3) authorizes the Commission to promulgate fishing rules and regulations within specified waters on or adjoining the Penobscot Nation's and Passamaquoddy Tribe's territories, taking into account the "needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes."

[16] *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1032 (9th Cir. 2010). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). The Indian canons of construction have been held to apply to interpretation of the Settlement Acts. *See infra* note 48 and accompanying text.

[17] *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 678 (1979).

[18] Tribes have argued that in addition to fishing for individual consumption, the definition of sustenance traditionally incorporated two other components: barter and exchange. Commission Saltwater Fisheries Report, *supra* note 7, at p. 22-23

[19] A study prepared for EPA in collaboration with the Maine Tribes discusses what level of fish consumption is representative of sustenance fishing in Maine Indian waters. Harper, Barbara and Darren Ranco, *Wabanaki Traditional Cultural Lifeways Exposure Scenario*, prepared for EPA in collaboration with the Maine Tribes, July 9, 2009, available at http://www.epa.gov/region1/govt/tribes/pdfs/DITCA.pdf.

[20] This statutory provision establishing a right of the State to regulate in limited situations of conservation necessity is consistent with the federal common law rule. *See United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1990) (describing findings that court must make in order to uphold regulation of treaty rights to take fish, including that "States must consider the protection of the treaty right to take fish . . . as an objective co-equal with the conservation of the fish runs for other uses"); *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974) ("Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.").

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treaty is not necessary to establish the existence of a tribal fishing right.[21] Tribal fishing rights are implied through an analysis of the purpose of these land settlements—to create a permanent land base—and the trust property interests created pursuant to the Acts. As described below, these fishing rights are also rooted in state common law on the right of riparian owners to fish on their properties in addition to the Settlement Acts and federal common law on the importance and durability of tribal fishing rights.

The fundamental requirement for a fishing right is access to fishable waters, and legislative history for the Maine Implementing Act specifically addresses the issue of the tribes' access to waters in connection with their trust lands:

> Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are conveyed by the selling party or included by general principles of law.[22]

This language allows for riparian rights to attach to the tribal trust lands held by the United States for the Northern Tribes, which are acquired by purchase and then put into trust.[23] In Maine, a right to fish is a right "included by general principles of law" when riparian lands are acquired,[24] and this language thus confirms that Maine's legislature recognized the right of the Maine tribes to engage in fishing on their reservation and trust

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[21] The hunting and fishing rights that were held to survive termination of the Tribe's status as a federally recognized tribe in the seminal case *Menominee Tribe of Indians v. United States* were created by treaty language providing that tribal land would be "held as Indian lands are held." 391 U.S. 404, 405-06 (1968). *See also United States v. Dion*, 476 U.S. 734, 738 (1986) (explaining that "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress," and that these rights need not be expressly mentioned in the treaty). State regulatory jurisdiction is not incompatible with a tribal fishing right; the existence of state laws dealing with tribal fishing in Maine, *see supra* note 7, reinforces that the State acknowledges the importance of tribal fishing rights. Carole E. Goldberg et al., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 1177-78 (6th ed. 2010) ("It is important to see that jurisdictional protections supplement rather than displace tribal property rights to hunt and fish.").

[22] State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, 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.

[23] *See* 25 U.S.C. § 1724(d)(4) (providing for "land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band"); 30 M.R.S. § 6205-A (providing for acquisition of "Houlton Band Trust Land"; P.L. 102-171, 105 Stat. 1143, § 5 (providing for acquisition of "Aroostook Band Trust Lands"); 30 M.R.S. § 7202(2) (defining Aroostook Band Trust Land).

[24] The right of riparian landowners to fish is predicated on both State and federal common law. Based on the default Maine property rule, owners of riparian land also own out to the thread, or middle, of most streams. *Wilson & Son v. Harrisburg*, 107 Me. 207, 211 (1910) ("With respect to the rights of the riparian proprietor in floatable and non-tidal streams, it is the settled law of this State that he owns the bed of the river to the middle of the stream and all but the public right of passage."). Riparian property owners have the right to fish on their lands. *See* Answers to Questions Propounded to the Justices of the Supreme Judicial Court by the House of Representatives, 118 Me. 503, 507 (1919) (noting that "[t]he riparian proprietor has the right to take fish from the water over his own land").

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lands alike when these lands are riparian to fishable waters. On the Northern Tribes' trust lands, this right is subject to reasonable State regulation.[25]

Even more importantly, however, the Northern Tribes[26] have more than the right of a Maine citizen to fish – they have the right to do so on lands set aside and held in trust for them. The establishment of trust land is one of the most important functions the United States performs for tribes. Trust lands provide a permanent land base, protecting these lands against loss,[27] and providing territory over which tribes may exercise governmental authority, albeit subject to the constraints imposed by the Settlement Acts.[28] Trust lands also protect and sustain tribal culture and ways of life, including tribal sustenance fishing

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[25] The Settlement Acts provide that State law applies to the trust lands of the Northern Tribes. We describe this as a right of "reasonable regulation" because the Settlement Acts did not contemplate and should not be read to allow State law that is discriminatory against tribes or not consistent with the Settlement Acts, including the federal purpose of holding this land base in trust. In section 1725(a) of MICSA, Congress approved 30 M.R.S. § 6204 of the Maine Implementing Act regarding the application of state law to Indian lands, specifying that Maine civil and criminal law would generally apply to these lands. While conferring civil and criminal jurisdiction on the State of Maine over the Northern Tribes' trust lands, nothing in section 1725 abrogates federal authority to protect these tribal trust lands. 25 U.S.C. § 1725(a) reads:

> Except as provided in section 1727(e) [dealing with Indian Child Welfare Act definitions] and section 1724(d)(4) [regarding acquisition of land and natural resources for the Houlton Band of Maliseet Indians] of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

[26] This discussion is aimed at the Northern Tribes, but we note that some of the Southern Tribes' Territories include lands held in trust that would have fishing rights based on this same trust land focused analysis. Some, but not all, of these lands have fishing rights confirmed through other statutory language, *see supra* notes 14-15 and accompanying text.

[27] For the Houlton Band of Maliseet Indians, 30 M.R.S. § 6205-A(3) describes restraints against alienation of these trust lands. The same language applying to the trust land of the Aroostook Band of Micmacs,is found at 30 M.R.S. § 7204(3). With respect to the Micmacs, legislative history is even plainer that Congress intended the trust lands to provide a land base for subsistence purposes: "The ancestors of the Aroostook Micmac made a living as migratory hunters, trappers, fishers and gatherers until the 19th century . . . .Today, without a tribal subsistence base of their own, most Micmacs in Northern Maine occupy a niche at the lowest level of the social order." S. Rep. No. 102-136 at 5, 9 (1991) (quoting testimony of Dr. Harold E.L. Prins).

[28] Even for the Northern Tribes, the Maine Implementing Act recognizes that the tribes may retain certain aspects of governmental authority over tribal members. For example, 30 M.R.S. §6209-C(1)(a) provides:

> The Houlton Band of Maliseet Indians has the right to exercise exclusive jurisdiction, separate and distinct from the State, over . . . [c]riminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Houlton Band Jurisdiction Land by a member of the Houlton Band of Maliseet Indians, except when committed against a person who is not a member of the Houlton Band of Maliseet Indians or against the property of a person who is not a member of the Houlton Band of Maliseet Indians.

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practices, which fosters tribal self-determination.[29] The legislative history for MICSA supports the view that one of Congress's purposes in providing Maine tribes with a land base was to preserve their culture.[30] The connection between fishing rights and land ownership is particularly emphasized in the Settlement Acts: the Maine Implementing Act defines the "land or other natural resources" to be purchased with federal funds and placed into trust as "any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, minerals and mineral rights, timber and timber rights, water and water rights and hunting and *fishing rights*."[31] The exercise of these fishing rights by Tribes is fully consistent with the Settlement Acts.[32]

In sum, the Federal Government as the owner of the trust lands for the benefit of the Tribes has a substantial interest in providing all Maine tribes, including the Northern Tribes, with a functional land base that ensures the continuation of their sustenance practices and cultural activities.[33]

2. Tribal Fishing Rights Include the Subsidiary Right to Sufficient Water Quality to Render the Rights Meaningful.

In Maine, EPA must determine how tribal fishing rights intersect with EPA's authority under the Clean Water Act to approve or disapprove State WQS. We are not aware of any case law addressing an identical situation to the one raised by Maine's proposed WQS. However, Federal courts have acknowledged the importance of permanent, enforceable fishing rights for tribes and have interpreted these rights expansively.

Tribal fishing rights encompass subsidiary rights that are not explicitly included in treaty or statutory language but are nonetheless necessary to render them meaningful. For example, in the 1905 case *United States v. Winans*, the Supreme Court held that a tribe must be allowed to cross private property to access traditional fishing grounds.[34]

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[29] *See* Final Rule, Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928, 67929 (November 13, 2013) (noting in Background section that taking land into trust serves the "goals of protecting and restoring tribal homelands and promoting tribal self-determination" and "reaches the core of the Federal trust responsibility").

[30] Sen. Rep. No. 96-957, at 17 ("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."). Several of the Maine tribes submitted comments to the EPA about Maine's WQS describing the centrality of fishing to their cultures.

[31] 30 M.R.S. § 6203(3) (Emphasis added). MICSA includes this definition almost verbatim at 25 U.S.C. § 1722(b). 25 U.S.C. § 1724(d) authorizes the Secretary to "expend . . . the land acquisition fund for the purpose of acquiring land or *natural resources* for the . . . . Houlton Band of Maliseet Indians." Emphasis added. Section 5(a) of the Aroostook Band of Micmacs Settlement Act, P.L. 102-171, provides similarly that the Secretary is authorized "to expend . . . the Land Acquisition Fund for the purposes of acquiring land or natural resources for the Band" and defines natural resources to include fishing rights at section 3(4).

[32] Recognizing that Maine tribes have a tribal fishing right would not impinge upon Maine's right to regulate such a fishing right. The existence of a tribal fishing right does not affect or preempt Maine's regulatory jurisdiction as described in 25 U.S.C. § 1725(h).

[33] See *supra* note 30 and accompanying text.

[34] 198 U.S. 371, 384 (1905).

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Similarly in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, the Ninth Circuit held that a tribe's fishing right could be protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch.[35] In *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, the Sixth Circuit found that the treaty right to fish commercially in the Great Lakes includes a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially.[36] While the issues presented by diminished water quality in Maine are different from the issues presented by inadequate access to fishing places or the need to protect fish populations, the result for tribes if water quality in Maine Indian Waters is not protected is the same: Indian tribes will not be able to fish for their sustenance healthfully.

The rules in the cases identified above are all variations on the fundamental holding of *Washington v. Washington State Commercial Passenger Fishing Vessel Association* that tribes with reserved fishing rights are entitled to something more tangible then "merely the chance . . . occasionally to dip their nets into the territorial waters."[37] The holding of *Washington*, while specific to the treaty language at issue in that case, is consistent with similar holdings from other courts examining the question of whether a tribal fishing right implicitly contains within it the right to additional protections to render the fishing right meaningful. For example, in holding that a Tribe's hunting and fishing rights persisted, the Minnesota Supreme Court explained that "[c]ertainly, it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to grant them a home."[38]

In the context of water quantity, courts have recognized that tribal fishing rights include the subsidiary right to water flow sufficient to maintain fish health and reproduction in order to effectuate the fishing right. In *United States v. Adair*, the Ninth Circuit held that the tribe's fishing right implicitly reserved sufficient waters to "secure to the Tribe a continuation of its traditional . . . fishing lifestyle."[39] The logic that supports the tribe's right to water quantity adequate to support a lifestyle based on fishing in *Adair* supports a conclusion that EPA should take tribal fishing rights into account when reviewing Maine's water quality standards. If water quality diminishes to the point where the fish are no longer safe to eat or able to reproduce, tribal fishing rights will suffer a diminution just as surely as they suffer from inadequate quantity of water to support fish.[40]

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[35] 763 F.2d 1032, 1034-35 (9th Cir. 1985).
[36] 141 F.3d 635, 639-40 (6th Cir. 1989).
[37] 443 U.S. 658, 679 (1979).
[38] *Minnesota v. Clark*, 282 N.W.2d 902, 909 (Minn. 1979).
[39] 723 F.2d 1394, 1409-10 (9th Cir. 1983). *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598-601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).
[40] The leading federal Indian law treatise explains:

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Ongoing litigation in Washington State involving questions about the extent to which tribal fishing rights encompass associated rights to protection for fish habitat also informs our analysis.[41] The tribes and the United States have argued that tribal fishing rights impose a duty on the state of Washington to refrain from building or maintaining road culverts that directly block fish passage both to and from breeding areas and therefore significantly and directly kill fish, diminish fish populations, and diminish habitat.[42] In 2013, the court adopted this analysis, concluding that the tribes' treaty based fishing right had been "impermissibly infringed" through the construction and operation of culverts that "has reduced the quantity of quality of salmon habitat, prevented access to spawning grounds, reduced salmon production . . . and diminished the number of salmon available for harvest."[43] The court issued a permanent injunction forcing the State to renovate its culvert system.[44] The decision is currently on appeal, but the district court's reasoning is consistent with the view that tribal fishing rights can be protected under the Clean Water Act.

When diminished water quality has hindered tribal uses of water outside the fishing context, courts have held for tribes and found that a right to put water to use for a particular purpose must include a subsidiary right to water quality sufficient to permit the protected water use to continue. In an Arizona case, *United States v. Gila Valley Irrigation District*, farmers with a more junior right whose properties were located upstream from a reservation were required to take steps to decrease the salinity of the tribe's water so that "the Tribe receives water sufficient for cultivating moderately salt-sensitive crops."[45] Other courts have noted that in some situations protecting water

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> Fulfilling the purposes of Indian reservations depends on the tribes receiving water of adequate quality as well as sufficient quantity. . . . . [H]abitat protection is an integral component of the reserved [fishing] right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted).

[41] The United States District Court for the Western District of Washington court held that several Washington State tribes' treaty fishing rights "implicitly incorporated the right to have the fishery habitat protected from manmade despoliation." *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (Phase II). The court explained that "the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless." *Id.* at 205. That decision was vacated on procedural grounds. *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc) (requiring plaintiffs to allege specific environmental harms before any declaratory judgment could issue, noting that "[i]t serves neither the needs of the parties . . . nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension").

[42] In *United States v. Washington*, 2007 U.S. Dist. LEXIS 61850, 37-38 (W.D. Wash. Aug. 22, 2007), the district court held in favor of the federal and tribal plaintiffs.

[43] *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. 2013).

[44] *Id.* at 78-79.

[45] 920 F. Supp. 1444, 1454-56 (D. Ariz. 1996), aff'd, 117 F. 3d 425 (9th Cir. 1997).

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quality is fundamental to the protection of tribal rights to self-determination.[46] Given the importance of fishing to Maine tribes, protection of water quality sufficient to enable the tribes to continue to fish and to consume the fish they are able to catch is comparable to protecting water quality to allow the tribe in the *Gila Valley* case to continue to grow crops.

In summary, fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. Case law supports the view that water quality cannot be impaired to the point that fish have trouble reproducing without violating a tribal fishing right; similarly water quality cannot be diminished to the point that consuming fish threatens human health without violating a tribal fishing right. A tribal right to fish depends on a subsidiary right to fish populations safe for human consumption. If third parties are free to directly and significantly pollute the waters and contaminate available fish, thereby making them inedible or edible only in small quantities, the right to fish is rendered meaningless. To satisfy a tribal fishing right to continue culturally important fishing practices, fish cannot be too contaminated for consumption at sustenance levels.

3. The Trust Relationship Counsels Protection of Tribal Fishing Rights in Maine

EPA has already recognized that Maine tribes' fishing rights should be considered in regulating water quality in a 2003 decision regarding Maine's authority to issue permits under the Clean Water Act.[47] As EPA noted in that decision, the First Circuit has held that the Indian law canons of construction obliging courts to construe statutes which diminish the "the sovereign rights of Indian tribes . . . strictly" apply to the Maine tribes and that the requirement that ambiguity be interpreted in favor of tribes is "rooted in the unique trust relationship between the United States and Indians."[48]

In its decision, EPA announced that when reviewing proposed permits under the Clean Water Act[49] it would "require the state to address the tribes' uses [for sustenance fishing] consistent with the requirements of the CWA."[50] EPA's 2003 analysis of tribal fishing rights and federal review authority under the Clean Water Act was cogent and the agency should follow through on this policy in reviewing Maine's WQS.[51]

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[46] *See Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."); *City of Albuquerque v. Browner*, 97 F.3d. 415, 423 (10th Cir. 1996) (upholding tribal water quality standards that were more stringent than federal standards and observing that the authority to establish such high standards "is in accord with powers inherent in Indian tribal sovereignty").
[47] 68 Fed. Reg. 65052, 65068 (Nov. 18, 2003).
[48] *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (internal quotation marks omitted).
[49] The EPA specifically cited the provision codified at 33 U.S.C. § 1342(d).
[50] 68 Fed. Reg. at 65,068.
[51] The First Circuit, reviewing this EPA decision in *Maine v. Johnson,* found that EPA's analysis of the relationship between fishing rights and water quality was not ripe for consideration. 498 F.3d 37, 48 (1st Cir. 2007) ("The current relationship of the United States to [Maine] tribes, and the EPA's continued authority under the Clean Water Act to review Maine's exercise of ceded powers, present quite different

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Secretary Jewell has recently reaffirmed the federal trust responsibility to tribes. Consistent with the principles of Secretarial Order 3335 on Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes, federal agencies should "[e]nsure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected."[52] In addition, consultation is a critically important part of the United States' government to government relationship with tribes, and the EPA should continue to fully consult with tribes regarding decisions that have implications for trust resources, including fishing rights.[53]

4. Conclusion

The Maine tribes rely on clean water, and in particular, on water of a quality sufficient to allow the tribes to engage meaningfully in fishing in Maine Indian Waters. Maine tribes rely on fish as a dietary staple and vital component of their cultures, and a diminution in their ability to take fish at sustenance levels results in a loss of food as well as a threat to their ability to carry on their traditions.

The Maine tribes have fishing rights connected to the lands set aside for them under federal and state statutes. Further, these fishing rights would be rendered meaningless if they did not also imply a right to water quality of a sufficient level to keep the fish edible so that tribal members can safely take the fish for their sustenance. The right of all four tribes to take fish is well-founded under State as well as Federal law as discussed in this letter.

Thank you for your attention to these matters of great importance to the Maine tribes. I appreciate the opportunity to submit these views for your consideration.

Sincerely,

Hilary C. Tompkins
Solicitor

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questions [from the ones decided in the case]. . . . [W]e take no view today as to the ultimate resolution of these potential issues.").

[52] Secretarial Order 3335 (August 20, 2014), Sec. 5, Principle 2, *available at* http://www.usbr.gov/native/policy/SO-3335_trustresponsibility_August2014.pdf.

[53] *See generally,* Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000).

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Exhibit G

THE PENOBSCOT NATION'S RESERVATION OF THE PENOBSCOT RIVER ACCOMPANYING ITS RESERVATION ISLANDS IN THE PENOBSCOT RIVER IN THE 1796 AND 1818 TREATIES WITH MASSACHUSETTS AND IN THE 1820 TREATY WITH MAINE

Prepared for the Penobscot nation in Penobscot Nation v. Mills, *et als*., Civil Action No.1:12-cv-00254-GZS

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University Distinguished Professor of Anthropology
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11 December 2013

SCOPE OF OPINION

* * *

REPORT SUPPORTING OPINIONS

I. Penobscot Indian Way of Life on the Penobscot River

A. Brief Description of the Penobscot River & Homeland

"The Penobscot Indians refer to themselves as *Pa'nawampske'wiak*, 'People of the white rocks (country),' or 'People of where the river broadens out.'"[1] In his authoritative *The History of the State of Maine* (1832), William Williamson, a lawyer (and former State Senator and Governor from Bangor), personally long familiar with the Native peoples then residing in villages on several islands above the Old Town Falls, referred to the Penobscot as "a river, once wholly theirs from its sources to the ocean."[2]

Since the early 17th century, English explorers and colonists named then Penobscot tribe after their river, the *Penobscot* (variously spelled).[3] The name of this river, however, features in French colonial records from the early 1600s onwards as *Pentagoët* (also variously spelled).[4]

Historically, the ancestral homeland of the Penobscot Indian Nation is more or less coterminous with the drainage area of the Penobscot River on which its families have

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1 Speck 1940, p. 7. Dr. Frank Speck, an anthropologist who had studied anthropology under Dr. Franz Boas at Columbia University and later joined the University of Pennsylvania where he served as department head, began his ethnographic fieldwork among the Penobscot in 1907, annually returning to this tribal community for the next dozen years. He spoke and wrote their language, and was respected for his interest in their culture and his personal friendships. A number of Penobscots were his personal guests for weeks and even months. Speck's ethnography remains a major authoritative source and was recently republished by the University of Maine Press.

2 Williamson, William. 1832, *The History of the State of Maine*. Hallowell: Glazier, Masters & Co. Vol.2, p.670.

3 See Godfrey 1876, p.1 Godfrey explains: "We find it thus spelled in Strachey's account [1618] of the expedition that sailed from England, in 1606, to establish the Popham Colony. He says that, on the eighth of September, Captain Gilbert with twenty- two others departed in the shallop for the river of 'Penobscot.'" See Godfrey, John E. 1876. The Ancient Penobscot, or Panawanskek. Pp. 1-22. *Collections of the Maine Historical Society*, Vol. VII. Bath: Maine Historical Society.

4 "At the time Champlain sailed up the river, in the autumn of 1605, it was called, by the savages, 'Pentagoet.'" (Godfrey 1876, p.1).

resided since time out of mind.[5] "Their tribal hunting territory," as noted by anthropologist Frank Speck, "was the valley on the Penobscot River and its tributaries. Beginning at Penobscot Bay, it extended a short distance back from both shores and spread out, going upriver, reaching almost as far as the Upper St. John River.... Thus nearly all the Penobscot villages were on the Penobscot River, and their hunting grounds bordered it."[6]

As noted above, French colonial records referred to the Penobscot River as Pentagoët. The indigenous meaning of this place name is thought to refer to "falls of the river."[7] Maine historian Fannie H. Eckstorm, born and raised in the Penobscot valley, noted that "Pentagoet was first used of the Bagaduce region [Castine]; later the name was extended to cover the whole Penobscot.... Since the word definitely means 'the falls,' it must have been settled on the tide-falls of the Bagaduce and the tide-falls at Bangor (Pemjedgewok)."[8] Another Maine historian and native to the Penobscot valley, John Godfrey, long served as a judge in Bangor. Referring to the "Head of the Tide," he wrote in 1876: "The Indians made peculiar claim to the territory extending from that point up the river and held it, with wonderful tenacity, for years, against the efforts of the white settlers and the Government to obtain it."[9]

White fishermen and loggers had frequented the coastal shores and islands in Penobscot Bay since the early 1600s, but the Penobscot River from entrance to source remained exclusively indigenous domain until the second half of the 18th century.

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5 Snow 1978, Speck 1940.
6 Speck 1940, p.2.
7 Eckstorm, Fannie H. 1978. *Indian Place Names of the Penobscot Valley and the Maine Coast.* Orono: University of Maine Press (4th printing), p.192. Eckstorm offers the following etymology for Pentagoët, or *Pen-tag-wet' – -pen*,'descending'; *-tegwe*, 'river'; *–t*, locative).
8 Ibid.
9 Godfrey 1876, p. 7. See Godfrey, John E. 1876. The Ancient Penobscot, or Panawanskek. Pp. 1-22. *Collections of the Maine Historical Society*, Vol. VII. Bath: Maine Historical Society.

However, the interior woodlands above Old Town Falls remained largely *terra incognita* to white settlers and surveyors in New England until Penobscot chiefs, headed by the old sachem Joseph Orono signed the 1796 Treaty in Kenduskeag (Bangor). Throughout this historical period, the Penobscot Tribe maintained its exclusive use and occupancy of their river from Old Town Island northward to support their way of life, including subsistence from hunting, fishing and gathering of plants. By then, the tribe had dwindled in numbers due to foreign diseases and frontier violence.[10]

Historically, the Penobscot homeland was mostly covered by huge forests, but also includes extensive bogs, marshes, and swamps, as well as lakes and ponds. Draining the northeastern territories, the Penobscot River's East Branch rises near the headwaters of the Allagash, a tributary of the St. John River; its West Branch rises near Penobscot Lake in the northwestern highlands on the border with Quebec. The main stem of the Penobscot River, which is the focus of this report, begins at Nicatow ("the Fork") where both major branches converge, forming an ever larger river downstream, as it is joined by major tributaries such as the Mattawamkeag and Passadumkeag rising in the east, and the Piscataquis coming in from the west. About 150 islands are located in this majestic part of the river before reaching the Old Town Falls. These large falls are named after the historic Penobscot Indian village of Old Town, at Indian Island.[11] Below these falls, after

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10 The number of Penobscot warriors in 1690 was still estimated at 350 men. By 1726, there were only 90 warriors left.See Aon. 1726. "Memorandum of the Number of Indians in Each tribe from Boston in New England to Canso in Nova Scotia…." *New England Historical and Genealogical Register* Vol.XX, p. 9. The tribe's population continued to dwindle, notwithstanding an influx of indigenous refugees driven from southwestern river valleys by English colonial expansion.

11 Indian Island is historically identified by its indigenous name as Panawamskeag (variously spelled). Situated a few hundred feet above the falls, this island became an important site for a seasonal settlement. In the late 17th century, French Jesuits established a colonial mission post on this island, identified as *Paňna8aňbskek* (see Rasle 1691:542). In the course of the 18th century, this village ("Old Town") developed into the tribe's principal village and became the seat of government for the Penobscot Indian Nation.

an eight-mile stretch with rapids and, historically, about nine smaller falls in the main branch, the Penobscot River's head of tide is reached at Eddington Bend, a location identified by Penobscots as *Wee-quer-gar-wa-suk*.[12] Immediately below existed a large rock in the river, named Nicholl's Rock (after an early white settler), traditionally identified by Penobscot Indians as *Sobscook* ("Sea Rock"), indicating that from thereon, the Penobscot River is affected by the sea tides.[13]

Until signing the 1796 treaty with the Penobscot tribal chiefs, political authorities representing the Commonwealth of Massachusetts recognized the political status of the territories above the head of the tide as "Indian lands."[14] Claiming that territory as their ancestral domains, Penobscots considered uninvited strangers as intruders. When a small English colonial survey team journeyed upriver above Old Town Falls in 1764, and notwithstanding that the team had hired eight Penobscot Indian guides, the surveyors ran into problems: "The Indians are so jealous of their country being exposed to this survey," noted the team's major surveyor Joseph Chadwick, "as made it impracticable for us to perform the work with accuracy."[15]

Notwithstanding growing pressure by armed white settlers on the Penobscot tribe's southern and western frontiers, the indigenous traditional culture persisted in the tribal domains upriver in the period of the treaty-making (from 1784 to 1820) here under

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12 This translates as "the head of the tide," according to Joseph Nicolar, in his 1887 article "Some of the names that the Indian has Bestowed—Quaint and Old." *Old Town Herald*. Reprinted in Eckstorm 1978, pp.239-241.

13 Eckstorm 1978. *Indian Place-Names of the Penobscot Valley and Maine Coast*. Orono: University of Maine at Orono Press (4th printing), pp.20-21.Noting "there used to be a dangerous rock in the river, called Nichols' Rock" (just downriver from Nichols Falls, as noted on Joseph Treat's 1820 map; see Pawling 2007, p.72), Eckstorm (1978, p.21) notes that the 19th-century Penobscot Indian historian Joseph Nicolar identified Sobscook as *So-ba—quar-ps-cook*, meaning "sea rock."

14 See also Joseph Chadwick 1764, Park Holland 1794.

15 Chadwick, Joseph. 1764

consideration.[16] That is to say that from the first treaty-making attempt by the newly-constituted Commonwealth of Massachusetts in 1784, a year after the conclusion of the American Revolutionary War, to 1820, when Governor John Attean, Lt. Governor John Neptune, and the Penobscot "captains" (tribal council members) portaged around Old Town Falls and canoed downriver to Bangor to sign the 1820 treaty with the newly-formed State of Maine just separated from Massachusetts, the Penobscot Indian "way of life" -- including their mode of subsistence, technology, social organization, government structure, spiritual beliefs and moral values -- was generally as described in this report.

B. Penobscot Seasonal Residence Pattern

Adapted to the seasonal rhythms of their natural environment, Penobscots developed a cultural system primarily based on fishing, hunting, and gathering in their river habitat: "They distinguish the four seasons, the opening of the leaves of the trees and breaking of the ice; the warm weather and fishing season; the hunting season, frosts and falling of the leaves; the closing of the rivers by ice, and the deep snow season."[17] They traditionally name their months ("moons") after a characteristic feature or predominant activity in the seasonal cycle. For instance, although fishing also took place in other months, April is called *Amusswikizoos* ("moon in which we catch fish"); August is *Wikkaikizoos* ("moon in which there is a heap of eels on the sand"); October is

16 Although the Penobscot were involved in treaty-making ceremonies prior to the American Revolutionary War, the term "treaty period" as used in this report refers to the treaty-making activities from 1784 to 1820.
17 Vetromile 1866, pp. 78-79.

Assebaskwats ("there is ice on the banks"); and November they call *Abonomhsswikizoos* ("moon in which the frost fish comes").[18]

Families periodically moved to districts where they were most likely able to secure food, for immediate consumption or preservation. This mobile way of life is reflected in their pattern of residence in the Penobscot valley above the Old Town Falls in the 18th and early 19th centuries: "That they had temporary camping-grounds, at the mouths of nearly all the tributaries of the Penobscot, is evident from the fact that great numbers of arrow-heads, stone axes and other Indian implements, have been found there. But there are three localities upon the river which, it is said, were their particular places of rendezvous — Mattawamkeag, Passadumkeag, and Penobscot Falls. The latter locality, was, probably, the beginning or principal point of the ancient Panawanskek [Panawamskeag]. It may be that that name, in its several forms, was applied to the different camping-grounds; or it might have been applied to the whole territory."[19] Located on the river bank or islands with easy access to nearby fishing grounds, these settlements were periodically abandoned when families dispersed in their bark canoes for purposes of seasonal fishing, hunting, or trapping elsewhere. One or several closely-related families camped together in bark wigwams, usually erected on an island shore or river bank in their family hunting, fishing, and trapping territory known as *nzibum* ("my river").[20]

A few decades before the 1796 Treaty, the English colonial surveyor Joseph Chadwick and a few companions journeyed upriver for an exploration expedition from

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18 Vetromile 1866, pp.79-80.
19 Godfrey 1876, p.4.
20 Discussing family hunting districts among the Maliseet, eastern neighbors of the Penobscots, Frank Speck and Wendell Hadlock (1946, p. 361, 364, 365, 372) offer several examples why a tribesman would refer to his family hunting district as "my river."

Penobscot Bay to Quebec City in the summer of 1764. Paddling upriver with their Penobscot Indian guides, they passed Sobscook at the head of the tide and entered what was then well understood to be still the exclusive tribal domain of the Penobscot people, or, as Chadwick noted: "Indian Lands so called." After portaging around the Old Town Falls, he made note of the three Penobscot Indian settlements noted above. The first was "Indian Old Town," located at the "Isle of Penobskeag" (Panawamskeag), or "Penobscot," today better known as Indian Island.[21] Chadwick observed that "the chief value of this place is hunting and fishing." Next, Chadwick landed on Passadumkeag Island, where he noted "the Indians made maple sugar near equal to single refined." Here the Penobscot Tribe had its second principal village, "the Indian Town of Persadonk." There, Chadwick met with three Penobscot Chiefs, "Tomah, Odohando, and Orono, who were richly dressed sitting on three packs of Beaver." As Chadwick noted, "the whole room [was] lined with Beaver, on the other side of the room 3 packs placed for us." Continuing upriver, he came to the third principal Penobscot village at Mattawamkeag Point, today still identified as Mattawamkeag on the eastern shore of the River. Chadwick referred to this ancient settlement as "Mederwomkeeg," and described it as "an Indian town and a place of residence in time of war, but was now mostly vacated… Land high ground and stony, large tracts of old fields and as they say have raised good Indian corn."[22]

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21 As observed by Williamson (Vol.1, p.474) in 1832: "In later years, *Indian Old-town* has been their village and altogether the place of their greatest resort. Its situation is upon the southerly end of an island in Penobscot river twelve miles above the mouth of the Kenduskeag [Bangor], being partially cleared and containing about 350 acres of very rich and mellow land. At the close of the American revolution, the village contained between 40 and 50 wigwams, about equally divided by a street five rods in width, which passed east and west across the Island; quite compact on each side, and constructed after the old Gothic fashion with the gable ends towards the street."

22 Chadwick, Joseph. 1764. An Account of a Journey from Fort Pownall—Now Fort Point—Up the Penobscot River to Quebec in 1764. *Bangor Historical Magazine* Vol. 4 (1889), pp.141-148.

Primarily depending on fishing, hunting, and gathering, Penobscots continued their seasonal migrations before, during, and after the treaties of 1796, 1818, and 1820, periodically leaving their villages and dispersing for weeks, months, or even longer. Accordingly, when Chadwick traveled upriver, he found Mattawamkeag "mostly vacated," but when a Massachusetts surveyor, Captain Park Holland, reached that same village in the summer of 1793, three years before the 1796 treaty, he described it as a "large Indian town, full of inhabitants…."[23]

Just weeks after the 1820 treaty ceremony, Major Joseph Treat, a militia officer from Old Town (the name eventually adopted by white settlers for the settlement on the western mainland shore adjacent to the Penobscots' village at Old Town Island) was commissioned by Maine Governor William King to survey the Penobscot River above the head of the tide. Born and raised in the Penobscot valley, and guided by 53-year old Penobscot tribal leader John Neptune, Treat began his journey, keeping a journal and sketching a detailed map. On page 10, where his map of the Penobscot River above the head of the tide begins, Treat penned the following: "The original Indian name is *Pem ta guaiusk took* – or great or long River but lately called Penobscot from the name of their late cheifs place of residence old Town or Penobscot Island."[24] Marking this island, now better known as Indian Island, on page 14 of his map, Treat penned: '"*Pe,no,om skee,ok* or Penobscot.. i.e. Rocky or stony place from which the River is called."[25] See Addendum (unnumbered), "14" marked at the top.

For part of the year, even these more permanent settlements were largely abandoned, as village communities periodically broke up in clusters of closely-related

23 Cited in Bingham, p.212.
24 Joseph Treat 1820, in Pawling 2007, p.72.
25 Joseph Treat 1820, in Pawling 2007, p. 76.

families and scattered, each band moving to a favorite spot where resources were thought to be plenty that season.[26] Some family groups avoided the larger settlements, and retreated to seasonally-occupied small encampments on the islands and along the river banks, especially near rapids and falls, as well as entrance of tributary rivers, where the fisheries were good.[27]

Periodically dispersing along their rivers, members of the Penobscot communities communicated with each other not only by sending messengers orally transmitting information (and, for official purposes, using wampum strings or belts), but also by means of *wikhegan*, a form of pictographic writing, usually scratched in bark or sketched with charcoal. An illustration of indigenous media on river routes is offered by an 18th-century French missionary among neighboring Abenaki on the Upper Kennebec, telling of a tribesman

> going on his way to carry the news to those of his quarter [district] arrived at a river bank. There he took the bark of a tree, upon which with coal he drew [a picture]. He then put this kind of letter around a stick which he planted on the bank of the river, to give news to those passing by.... A little while after some [Indians] who were passing by in six canoes on their way to the village, took notice of this bark; 'See there a writing,' they said, 'let us find out what it says.'[28]

Treat's 1820 Journal offers another example from above Old Town Falls. After landing his canoe at Old Town on Indian Island, he noted that it is "the Present residence of the

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26."In general the family hunting group is a kinship group composed of individuals united by blood or marriage, maintaining the right to hunt, trap, or fish, in certain inherited districts bounded by rivers, lakes or other natural landmarks. The group is known by a family name and the territories are patrilineally inherited. Trespass, though rare, is punishable" (Bailey, Alfred G. 1969. *The Conflict of European and Eastern Algonkian Cultures, 1505-1800: A Study in Canadian Civilization*. Toronto: U Toronto Press. 2nd edition, p.85).

27 Indigenous occupation of sites in the Penobscot Valley above and below Old Town Falls is very ancient, with archaeological excavations pointing to evidence dated as early as 7,000 years ago. See, for example, the Gilman Fall site in Old Town, located "on the upstream side of a falls at the confluence of the Stillwater River and Pushaw Stream, [where] a 150m3 excavation produced over 600 Middle Archaic artifacts [yielding] dates ranging from roughly 7300 to 6300 BP" (Sanger 2006, p.233; In Sanger, David, and Renouf, M.A.P., eds. 2006. *The Archaic of the Far Northeast*. Orono: U Maine Press, pp.228- 236.

28 Rasle, Sebastien 1723. In *Collections of the Maine Historical Society,* 2nd Series, Vol. 4, p.301.

Penobscot Indians, [but] his has not been their chief place of residence they say more than 1 or 200 years—their Towns were formerly on Now,at, kee, mongon and Passadunkee Islands."[29]

The indigenous name for this 300-acre island situated immediately above Old Town Falls has been spelled "in not far from sixty different ways — Panouamske, Panawanskek, Pamnaouamske, Panahamsequet, Panamske, Panaomske, Panaouamsde, Panaouamske, Panouamske, Panoumsque, Panouske are some of the forms."[30]

Anthropologist Frank Speck, who began his ethnographic research in 1907, provided the following historical sketch of Penobscot Indian settlements in the 19th century, based on a combination of oral history and written records: "The bands of the northern part of the country assembled usually at the northern villages, 'where the current piles up sand,' *Madawam'kik* (Mattawamkeag), and *Tcimski'teguk* 'big dead water (Kingman). The central bands held their gatherings often at *Matna'guk*, 'Long Island' (Lincoln), where there is still a dwindling village."[31] This village, the name of which is more commonly spelled as Mattanawcook, was visited in 1846 by Henry David Thoreau, who noted several inhabited "wigwams" there.[32]

Downriver from Mattanawcook, on the southeast side of Olemon Island, stood yet another Penobscot Indian village: *Welama'nesuk*. Probably the most famous Penobscot

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29 Treat 1820, in Pawling 2007, p.77. Pawling (2007, p.77, note 7) explains that the "old Penonobscot village at 'Now,at, kee, mongon' is present-day Freese Island, the first island upriver from Indian Island. 'Passadunkee' Island, commonly referred to as Thorofare Island today, is located just upstream of the mouth of the Passadumkeag River." In 1820, 277 Penobscots resided in their tribal village Old Town on Indian Island (Morse 1822, p.68).

30 Godfrey 1876, p.1. In his "A Dictionary of the Abnaki Language" French Jesuit Sebastien Rasle spelled the name of this Abenaki Indian village on the Penobscot as *Pañna8añbskek*.

31 Speck 1940, p.212. In his book, Speck (1940, p.25) explained that Mattanawcook (or as he spells it, Matna'guk), "is the most northerly permanent settlements [and] located also on a large island about thirty-six miles above Oldtown, opposite Lincoln. There were seven families here in 1912."

32 Thoreau, pp. 294-295. According to the linguist Dyneley Prince (1910, p. 194), the meaning of *Mat'nagwuk* is "large hills."

who lived in this village in the second half of the 19th century was Frank Loring, better known as Chief Big Thunder.[33] By the late 1800s, its population had dwindled, so that only "four or five families" remained when Speck began his ethnographic fieldwork in the early 20th century: "It is so named from the fact that in the olden times they used to obtain there supplies of red ochre for paint."[34] "Other large camps, possibly villages, are known to have been situated on the Penobscot river," including Mattawamkeag and Passadumkeag (on Thorofare Island).[35] Both settlements were historically significant and still inhabited after the 1820 Treaty was signed. "All [Penobscots], however, had Indian Island (*Panawa'pskik*) for the central tribal headquarters where they held elections and ceremonies as at a capital."[36]

As the various Penobscot place names here discussed show, the indigenous toponymy reflects culturally-embedded information concerning the environment, information of practical use to native speakers of the ancestral language, not only on their seasonal migrations but also when teaching the next generation how to find their way in throughout their riverine homeland. Many of these place names reveal the tribe's traditional relationship to their river, its wildlife, and geographical features. This cultural

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33 As Big Thunder's life history well illustrates, Penobscots were often gone from their villages for many months, sometimes even years. Many continued to migrate to the sea coast, camping below the falls (such as at Brewer, opposite Kenduskeag), and on coastal islands (Deer Isle, Mount Desert Island, and so on). (See also Prins 1997).

34 Speck 1940, p.25.

35 Speck 1940, p.26. Note there are two islands on the Penobscot named Thoroughfare Island, the other just upriver from Costigan, known by the Penobscots as *Bosquenuguk* ("Burying Ground Island"), and historically named by English settlers "Broken Island" (see Treat 1820, in Pawling p.78). Eckstorm (1978, p.40) is partially correct in her critical comments about this having been a "Burying Ground for Mohawks," as this location close to Indian Island was an ancient cemetery, but not for burying Mohawk enemies.

36 Speck 1940, p.212. In his book, Speck (1940, p.25) explained that Mattanawcook (or as he spells it, Matna'gak), "is the most northerly permanent settlements [and] located also on a large island about thirty-six miles above Oldtown, opposite Lincoln. There were seven families here in 1912."

ecological relationship endured above Old Town Falls well into the 19th century, even after the 1820 treaty had been signed.

C. Traditional Mode of Subsistence on the River

The Penobscot River has been the central artery of an ecosystem supporting Penobscot culture-- their traditional "shared and socially transmitted ideas, values, emotions, and perceptions, which are used to make sense of experience and generate behavior and are reflected in that behavior,' or, in short, their way of life."[37]
To further understand the tribe's way of life in the period leading up to the 1796, 1818 and 1820 treaties, the following sketch offers a basic outline of its relevant historical features in reference to their river. Illustrations that accurately depict activities carried out by the Penobscots are provided in Addendum 3.

The natural cycle of their natural resources demanded great mobility on the part of Penobscot families depending on foraging, supplemented by small food gardens. They developed a lightweight material culture in which bark, especially birch, was of major importance, not only for their dwellings (wigwams), but also their swift canoes and food containers, skillfully constructed and water tight. As a canoe-faring migratory people, they not only hunted, gathered, and trapped, but also depended to a considerable degree on their fisheries.

Widely ranging through their vast domains, sometimes with their elder, infants, and dogs aboard their canoes, as well as carrying food, furs, rolls of bark, and other essential belongings, Penobscots paddled or poled (or sledded, in winter) up and down

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37 The concept of culture, as defined in Haviland et al 2014, *Cultural Anthropology: The Human Challenge*. Belmont: Wadsworth (14th edition), p.28.

the Penobscot River and its tributaries, ventured across lakes and saltwater bays, followed shore lines or visited islands, in a never-ending pursuit of natural resources according to the rhythm of nature and its seasonal cycle shifting from periods of easy plenty to scarcity and challenge. Adapting their mode of subsistence to the seasonal cycle, families periodically moved and set up camp at favorite sites along river shores, on islands, and other locations with close access to water.[38] In addition to fishing, hunting, and trapping, they collected bird eggs, harvested bulbs, roots, and berries, and felled trees or burned brush and meadows on fertile soil near their encampments, where they planted, weeded, and harvested their food gardens. In the spring, they tapped maple trees and collected their sweet sap in containers, later to be boiled down. One favorite location was an island eleven miles upriver from Panawamskeag they named *Suga-la-manahn* ("Sugar Island").[39] On their periodic visits to the seashore and coastal islands, canoe-faring Penobscot often camped near mudflats with clam, mussel or oyster beds.

In the late summer or early fall, Penobscot families moved to their traditional hunting districts in pursuit of fish, fowl, and game, not only moose or deer, but also caribou, as well as bear and other animals: "During this time, the moose, deer, and caribou are driven to seek refuge from the flies that molest them, by resorting to the lakes and rivers. Here the hunters in canoes sought and killed them."[40] This type of hunting

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38 Penobscot and neighboring Indian communities were often named "according to the various residences in which a tribe, or a part of it, had encamped for some war, hunting, or fishing party. These names were generally taken from some river, pond, etc., in whose vicinity they had pitched their camps." (See Vetromile, E. 1866. *The Abnakis and their History*, New York: J. B. Kirker, p.22).
39 Sugar Island "was so named because, from the maple trees on it, the Indians made quantities of maple sugar" (Eckstorm 1978, p.41). Considering there were maple-tree stands elsewhere, too, it is not surprising that this island was also known by other names, including *Pimimwamkikatook*, as noted by Eugene Vetromile (Eckstorm 1978, p.41). Pawling (2007, p.33, n.19) offer an interpretation for this place name as "the water-town on the gravel."
40 Speck 1940, p.36.

was called *wla'kwhan* ("still-hunting at night in canoe").41 Canoes were also indispensable when they trapped river-dwelling animals valued for their thick furs, such as beaver, otter, and muskrat along their river banks.42

As noted, Penobscot families referred to their own hunting district as *nzibum* ("my river"), exercising stewardship to manage its natural resources, especially harvesting wildlife. Articulating their traditional practice, Penobscot chiefs meeting Sir Francis Bernard, the British Royal Governor of Massachusetts, at Fort Pownall in 1763, told him: "That there hunting Ground & Streams were all paseled out to Certen famelys, time out of mind, That it was there rule to hunt every third year & kill 2/3 of the Bevier, Leving the other third part to breed and that their Beviers were as much their Stock for a Leving as Englishmens Cattel war his Living."43

Protesting the destruction of wildlife, these Penobscot leaders contrasted their wildlife harvesting with the indiscriminate slaughter by white settlers pushing inland from the coastal region: "English hunters kill all the bevier they find on said streams. Which had not only impoverished many Indine famelys but destroyed the bre[e]d of bevier &c."44

Of great significance in the Penobscot mode of subsistence were their fisheries on their river. Living much of their daily lives on its banks, either on the islands or mainland, Penobscots had ready access to an abundance --not only of salmon and sturgeon, but also shad, alewives, and eel. A staple food in Penobscot culture, fish was

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41 Speck 1940, p.35.
42 Rasle (1833:409), in his Abenaki Dictionary offers the indigenous term *N8ran'k8a*: "I am going beaver hunting by canoe in short while."
43 Chadwick, Joseph 1764. *Journal of a Survey*, Massachusetts State Archives, p.89; See also Butler and Hadlock 1962, p. 18. Butler, Eva L., and Hadlock, Wendell S. 1962. *A Preliminary Survey of the Munsungan-Allagash Waterways*. Bulletin VIII. Bar Harbor: The Robert Abbe Museum.
44 Chadwick, cited in Butler and Hadlock, p.10.

broiled in hot ashes and also smoked, stewed, or cooked in soup. Considerable quantities of surplus fish were sun-dried and smoked for winter food. Especially eel featured prominently in their traditional diet.

Each late spring and early summer, standing on rocky ledges at the river falls, Penobscots used fish spears or leisters to catch anadromous fish such as salmon and river herring (shad and alewives). They also fished and hunted aboard their canoes—hook-lining, spearing, shooting, or clubbing the fish, molting ducks, and other river-based animals on which they subsisted. Even at night, spear-fishers were on the river in their canoes, burning torches to attract salmon, sturgeon, and eel: "To fish at night from canoes with torches made of birch-bark which light up the depths of the river and also draw the fish so that the spearmen can see them."[45]

The great falls about 200 meters (660 ft) below the old canoe landing on Indian Island, or Panawamskeag, was a great fishing location long favored by Penobscot families.[46] Here they congregated in the later spring, after the ice had melted and large schools of anadromous fish, especially salmon and river herring (shad and alewives) began migrating upriver to spawn: "To these Indians, practically all of whom lived near the Penobscot River, the spearing of salmon in their annual run upstream in June, July, or August, was one of the great seasonal events. When the lightning bugs begin to appear late in June, they say it is the sign for salmon spearing. The Penobscot salmon sometimes attain a weight of forty pounds."[47]

From their tribal settlement on the southern tip of this island, Penobscot Indian fishers had easy access to the dozen small islands and rocky ledges downriver where they

45 Speck 1918, p.218, note.
46 Treat 1820, in Pawling 2009, p.151
47 Speck 1940, pp.82-83.

speared and netted an abundance of fish.48 Hours after setting out in their canoes, fishers residing in Old Town on Indian Island returned home with loads of fresh food and fertilizer for the food gardens before planting. They also "smoked a large amount of it for winter upon pole racks over a fire."[49]

There were numerous other great fishing spots upriver, as well: "During the run, just above the falls or rapids, the men would occupy some ledge and spear the fish as they came by. Camps were established in such vicinities. At other times they went in canoes, the bow man with a spear watching for fish."[50] .

Commenting on the importance of the fisheries in the 20th century, anthropologist Frank Speck noted: "The Penobscot at all times depended to a large extent upon the many fish of their lakes, river, and bay for a food supply. Some of the old capturing devices are at times still employed. [For] not only large bay fish, but also river fish--salmon, shad, and others-- the harpoon . . . was used."[51]

In their fisheries, Penobscots used a variety of devices, including the scap-net (*kwa'phigan*), which "consists of a hoop netted with basswood cord on a handle of about ten feet long. Equipped with such a net, they scooped "fish in shallow places….Salmon and shad were regularly caught in this way."[52] They also used the leister (*e'niga'hk*^{w}), a special three-pronged fish spear to catch salmon, trout, and bass, as well as shad (river

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48 Speck(1940:85) noted: "Just below Indian Island, above the falls, there is in the middle of the river a rocky ledge where the men used to get their stock of salmon. Unheard-of quantities were taken here until the dam was built [in 1833]."
49 Speck 1940, p.85.
50 Speck 1940, p.83.
51 Speck 1940, p.87. It is likely that Penobscots also hunted fish with bow and arrows, as reported from the western regions: "… they embark in a canoe with bows and arrows; they hold themselves erect the better to discover the fish, and as soon as they have caught sight of one they pierce it with an arrow" (Rasle 1723. p.279 In: *Collections of the Maine Historical Society* 2nd Series, Vol. IV:265-301.
52 Speck 1940, pp.86-87.

herring).[53] Taking their canoes on the water at night, they lured the fish with torches of burning birch bark: "At night a torch . . . was fastened in the bow of the canoe."[54] Torch-fishing (*noda'sə·ni.*), a tribesman could spear up to 200 fish during one trip. On his journey into the Maine woods in 1846, Henry David Thoreau later recounted that he traveled by horse and wagon on the "military road' along the east bank of the Penobscot, to the town of Lincoln:

> Learning that there were several wigwams here, on one of the islands [Mattanawcook, we] walked through the forest half a mile to the river, to procure a guide to the mountains. [A] salmon-spear, made wholly of wood, lay on the shore, such as they might have used before the white men came. It had an elastic piece of wood fastened to one side of its point, which slipped over and closed upon the fish, somewhat like the contrivance for holding a bucket at the end of a well-pole.[55]

For larger fish like sturgeon or sea mammals like porpoise, they boarded their canoes and hunted with harpoon. Speck noted that this Penobscot fish-spearing still took place when he began his ethnographic fieldwork in Maine: "The fish spear (leister) was, and is yet [1940], in general use also for getting pollock and eels. The usual method of spearing from a canoe is followed."[56]

Penobscots caught an abundance of fish in weirs set in the River, not only shad and alewives, but also eel, bass, salmon, and even sturgeon. Speck noted in the early 1900s that the "one most commonly seen on the banks of the Penobscot.... is a fence of brush or sticks projecting obliquely down stream, or a corral with an entrance on one

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53 Several museums, including the Penobscot tribal museum at Indian Island and the Maine State Museum in Augusta, have a leister in their collections (see also Bourque 2001, p.299).
54 Speck 1940, p.83. Penobscot Indian fishing by fire light continued until the 1930s, and perhaps later. For instance, Charles Shay, a tribal elder at Indian Island, now 89 years old, remembers how he and other Penobscot boys used to go night fishing for eel in the late 1930s." (p.c. 08/18/2013).
55 Thoreau, p.294-296.
56 Speck 1940, pp 82-83, 85. The anthropologist took a photograph, which he included as an illustration of a Penobscot demonstrating use of the fishing spear.

side. Smaller rivers were fenced across leaving a narrow opening near the middle, where fishermen armed with spears, harpoons, and nets gathered in canoes . . . to capture the fish as they passed through."[57] Typically, the Penobscot fish weir, called *sikmohka'gan*, was a temporary construction, as the fence made of sticks and brush wood: "The ice destroyed it in the winter, and it was rebuilt every spring, before the big run of the fish."[58]

Perhaps more important than any other fish in the Penobscot traditional diet was eel.[59] Large numbers of this snakelike fish hide in mud, sand or gravel close to shores of the banks and islands where they live together in holes, or "eel pits," about five to six feet under water. Hunting at night and feeding on a variety of insects and other small aquatic prey, eels mature to about 4 feet in length and over 15 pound in weight. Historically, eels have been abundant throughout the Penobscot river system and played a very important role in the tribe's seasonal subsistence cycle. Eels were trapped and speared during several seasons, but especially when water levels in their rivers and streams were low, in the late summer and fall.

To catch large eels, Penobscots constructed special eel weirs throughout the river. This fishing method is effective, widely practiced, and very ancient.[60] Penobscots traditionally attribute the invention of the fish weir to their culture hero Gluskabe, as recounted in the myth noted below.[61] Communities built their weirs usually on the same favorite spot in the river, year after year, usually by closely-related tribesmen working

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57 Ibid., p.90.
58 Speck 1940, p.90, p.?.
59 A review of the historic record shows that Penobsots depended very heavily on eel.
60 Petersen, James B., Brian S. Robinson, Daniel F. Belknap, James Stark and Lawrence K. Kaplan. 1994 An Archaic and Woodland Period Fish Weir Complex in Central Maine. *Archaeology of Eastern North America* 22:197-222.
61 Speck 1918, pp.193-194.

together: "It belonged to those who had cooperated in its construction, and they shared equally in the catch."[62]

Made of a series of wooden stakes driven into the mud or river bottom, and intertwined with brush or branches, some of the largest weirs measured one hundred feet in length or more. At these weirs, Penobscots trapped and speared huge quantities of these fish, not only shad and alewives, but also eel, salmon, bass, and even sturgeon. At the large weirs, large numbers of Penobscots could gather for many days, even weeks, as such places provided them with fish enough to feed multitudes, leaving enough to be smoke-dried and preserved for later consumption.[63] There were several important locations for these indigenous fish weirs on the Penobscot River or near the entrance of tributary streams, sometimes spanning the stream from bank to bank. Speck described the technique as follows: "In places where weirs are set for eels [earth] pits are dug along the shore some three or four feet wide and about three deep, the number of the pits depending upon the quantity of eels caught."[64]

Catching eels, as well as smaller fish such as "shad and alewives," noted a report on Penobscot Indians in 1804, "they make the business of their women and children."[65]. Proximity to productive fish-weir sites explains why Penobscots favored places such as Mattawamkeag, Passadumkeag and Kenduskeag (Bangor) for their major settlements.[66]

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62 Wallis and Wallis 1955, p.22. See Wallis, Wilson D., and Wallis, Ruth S. 1955. The Micmac Indians of eastern Canada. Minneapolis: U Minnesota Press. Mi'kmaq weir-construction is fundamentally similar to that of their various neighbors, including the Penobscot.
63 Eckstorm 1978:204-205.
64 Speck 1940, p. 90.
65 Sullivan, 1804, p.228.
66 According to Eckstorm (1978, pp.15-16), these "eel-weirs were on the rapids from State to Franklin Streets" in what is now the city of Bangor. Neighboring tribes of the Penobscot also established villages near fish weir sites.

Vitally important in Penobscot subsistence, a few major eel weirs in the Penobscot River above Old Town Falls have been historically documented. For instance, Major Joseph Treat of Old Town on an official survey trip for the Maine State government soon after the Penobscot Chiefs signed the 1820 Treaty in Bangor marked a few on his manuscript map. He was guided by one of the Penobscot chiefs, a great hunter named John Neptune. One of the large weirs marked on Treat's map spanned across the Penobscot River, almost from bank to bank, just down river from the Penobscot village of Passadumkeag. See Addendum 4. On the east bank of the Penobscot River bank, he noted three wigwams close to this large weir, identifying it as an "Indian Eel ware camp."[67] See Addendum 4. He also marked another eel weir adjacent to the historic Penobscot Indian village at Mattawamkeag.[68] See Addendum 5. In the seventeenth century, the French had already made note of a "great eel-fishery" at this settlement on the east bank of the Penobscot River.[69]

But this long and slippery fish served as a staple food not only for these local villages, but also for those without the benefit of a large eel weir nearby. In early September 1786, a white settler visited Panawamskeag and observed that most of its inhabitants had departed, canoeing upriver to Mattawamkeag Point "to supply themselves

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67 This large eel weir spanned the Penobscot near the entrance of Chubabacook Stream [sp?], now known as Pollard Brook. See Treat's map in Pawling 2007, p.82.

68 This eel weir was located just before the Mattawamkeag runs into the Penobscot, where later the bridge was built (see Joseph Treat's 1820 map, reproduced in Pawling 2007, p.94). Micah A. Pawling, ed. 2007. *Wabanaki Homeland and the New State of Maine: The 1820 Journal and Plans of Survey of Joseph Treat.* Amherst: University of Massachusetts Press, p.12, see also note 28, and map on p.82).

69 Published in the *Maine Hist. Soc. Collections*, Series IV, p.426; see also Eckstom 1978, p.59. The eel fishery at the tribal village on Mattawamkeag Point was already mentioned late 17th-century French document, referring to it as *Madaham-ouit*. Mattawamkeag was again mentioned in 1736, by an English captive, John Gyles, later taken to Meductic on the St. John River, and in 1764, by a surveyor named Chadwick, who briefly visited that village while scouting out a riverine route from Penobscot Bay to Quebec.

with food from their eel pots which they left set."[70] In addition to constructing eel weirs, Penobscots also made traps, or "pots," woven of rough wood splints, usually brown ash.

To catch eels, Penobscots also mixed crushed and mixed purple pokeberry and Indian turnip root, "strewing the poisoned pulp" in a stretch of river.[71] In his 1940 ethnography of the Penobscot, Speck wrote: "In several places up the [Penobscot] river are to be seen, adjoining old villages or camp sites, a series of such [eel pits] overgrown with trees or shrubs, where long ago eeling parties have camped… One prominent locality of this sort is to be seen opposite the Teguk rapids [also known as the Cook] halfway up the west side of Indian Island."[72]

Like shellfish, especially clams, near the sea shore, eels were also caught on the river in the winter season when moose, caribou, deer, or other game was scarce:

> In the winter time, when hibernating eels have buried themselves in the mud of a cove, some families will repair thither and make camp. The men will go out on the ice, make holes through it and prod in the mud with their spears, drawing out eels in quantities. During times of scarcity of other game in the past, whole communities have had to subsist for months upon eels obtained in this manner.[73]

Since the second half of the 17th century, continuing through the treaty period and thereafter, Penobscot families made forest clearings near their encampments on river islands or near the shore. Here, they grew some "Indian corn, pumpkin, squashes, which they produce by the labor of their women on light and easy land."[74] The abundance of

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70 Reverend Daniel Little, 3 September 1786, cited in Deane p.85.
71 Speck 1940, p. 89. As Speck described it: "When the water was so strongly impregnated, . . . [the] torpid eels began to appear on the surface, and before an hour had passed the top of the water was spotted with the bodies of dead or dying fish, which floated belly up, unable to escape. The children of the party… were then forced to enter the water and bring the fish ashore, where they were skinned and salted by the women. After this the eels were placed upon dead limbs and laid in the sun to dry for two days. Then they were hung up in a tent and smoked until there was drip from the suspended bodies."
72 Speck 1940, p.91.
73 Speck 1940, pp.85-86, p.88.
74 Sullivan 1804, p.145.

alewives, shad, and other fish caught at the small islands at Old Town Falls just downriver from their main village at Indian Island, also provided the Penobscot food gardens with an important organic source of nitrogen, phosphorus, and potassium, as well as sulfur--major nutrients that their cultivated food crops need the most.[75] They had no farm animals that provided them with dung and there is no evidence they used human excrement as manure.

The importance of fish in their diet as well as fertilizer for their food gardens underscores that the Penobscots' way of life before, during, and after the treaty period formed part of an eco-system, organically linking their islands and the river water within which these small tracts of land are situated. Because of this symbiosis in their riverine habitat, a severance between their use and occupation of the islands and their use and occupation of the River was inconceivable and would have reduced them to starvation, dooming their ability to survive.

D. Penobscot Worldview in a Riverine Habitat

Articulated in myths, the traditional Penobscot Indian worldview symbolically reflects their deep ecological awareness and expresses their understanding of how their daily lives are organically tied to and dependent on the river and its wildlife, both in water and on land. Once that link is broken, they cannot survive. This profound understanding of eco-systemic connectivity and interdependency is evident in their creation myths, telling of the formation of their river, their ancestors, and their close family relationship with the water and shore animals in their traditional habitat.

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75 Prins, Herbert H Th. Professor of Biology, Wageningen U, The Netherlands, p.c. June 2013.

The central figure in the Penobscot myth cycle is their traditional 'culture hero,' a mythic figure named *Gluskábe* ("the man from nothing").[76] The great adventures of this giant shaman, hunter and fisherman are recounted in an epic saga revealing the deep cultural roots of Penobscots in their river-based homeland:

> Penobscot mythology credits Gluskabe with some twenty major achievements for the benefit of man, to wit: distributing over the world the game animals, food, fish, hares and tobacco; renewing the warmth of summer; protecting the eagle above who regulates daylight and darkness; moderating the destructive force of the wind; tempering the winter; bringing the summer north; reducing giant animals to a harmless size; domesticating the dog; clearing obstructions from the portages along the routes of hunting and travel; smoothing out the most dangerous waterfalls; creating the whole Penobscot river system…"[77]

Forming part of a great narrative tradition articulating a worldview shared and enjoyed in all indigenous encampments up and down the Penobscot River, surviving fragments of this saga have been translated and penned down in short stories since the early 1800s: "Some of the incidents of Gluskabe's journey explain the physical characteristics of the Penobscot valley."[78] Other myths offer an indigenous explanation of how Penobscot ancestors originally acquired their technology, including the fish weir. Through these ancient stories, each band of related families also made sense of their own place in the

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76 According to Nicolar (1893, p.11-12), this name, variously spelled, is erroneously translated as "man of falsehood" or "liar," all of which he considered inaccurate. See Nicolar, Joseph. 1893. *The Life and Traditions of the Red Man*. Bangor: C.H. Glass & Co. Regarding his name, Speck (1935,p.6) clarified: "The translation may be Deceiver or Trickster, but the epithet is not uncomplimentary because it refers to the ability to outwit one's enemies by strategy and cunning, He is the legendary hero and transformer personage of the Wabanaki tribes. Even at the present day his performances and his personality are sources of marvel to the Indians, many of whom though they are observing Catholics, nevertheless cherish a superstitious belief in him. Not only actual transformations but unaccountable peculiarities of the whole country are attributed to his agency. He is largely responsible for the present aspect of the earth and its inhabitants."

77 Speck 1935, p.10.

78 Speck 1935 p.7.

world, and the stories gave symbolic meaning to their relationships with the river, rocks, rapids, trees, fish and other animals.[79]

On one of his many hunting and fishing adventures on the Penobscot River, Gluskábe hired "a Fish-Hawk to go spearing fish by torch-light."[80] He also killed a giant moose:

> Then Gluska'be returned and cooked his moose-meat in his kettle near the big lake. When he had eaten, he turned his kettle over, and left it there turned into stone. Now it may still be seen. It is the mountain called Kineo. Then he went back and told his people, his descendants, "Now I have killed the big beast.[81]

The following myth offers an intriguing Penobscot perspective on the invention of the fish-weir and the traditional indigenous gender division of labor:

> When [Gluskábe] returned to his wigwam, he saw his grandmother [Woodchuck] there fishing. He at last became impatient, as he saw that his grandmother was having a hard time fishing. Then he thought, 'I had better help my grandmother, so that she will not have such a hard time.' Then he made a weir across the mouth of the river, and left an opening half way in the middle, so that the fish could enter. Then he started out upon the ocean, and called everywhere to all the fish, saying to them, 'The ocean is going to dry up, the world is coming to an end, and you will all die; but I have arranged it so that you will all live if you will listen to me. All who hear me, enter into my river, and you will live, because my river will survive! Enter all ye who hear me!' All kinds of fish came, until the fish-weir was full; and then he closed it up and held them there. Then he went to his wigwam, and said to his grand-mother, 'Now, grandma, you will not have to fish so hard, you will only have to go and gather as many fish as you want.' Then Woodchuck went to examine what he had done; and when she arrived, she saw the weir brimful of all kinds of fish that were even crowding one another out. Then she went back, and said to her grandson, 'Grandson, you have not done well by annihilating all the fish. How will our descendants manage in the future, should you and I now have as many fish as we wish? Now go at once and turn them

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79 Speck (1918, p.216) notes: 'It was believed even until recently by some of the older people that Gluska'be would some day return and restore the country to the Indians; the expulsion of the Europeans to be accomplished by one sweep of the hero's foot forcing them into the sea."

80 Speck 1918, p.219.

81 Speck 1918, p. 204. In a footnote, Speck explained: 'Mount Kineo, on the eastern shore of Moosehead Lake. Folk etymology among the Indians says that the first people who saw the mountain after its transformation declared, '*ki-'i ni-'yu*!' ("oh, [see] here!").

> loose!' Accordingly he said, 'You are right, grandmother, I will go and open up [the weir]'; and he went and turned them loose.82

These segments in the Gluskabe epic point to a Penobscot division of labor historically based on age and gender, privileging adult males as hunters whereas women (as well as elders and older children) make a less spectacular (and thus under-valued) contribution to the food supplies by gathering, snaring (small animals like rabbits), shell-fishing (clams and mussels), and fishing behind weirs.

Other Penobscot myths relate to an ancient time when humans and animals were related and talked to each other, went bathing, swimming, and fishing in the river, etc.83

Long ago, Gluskabe's grandchildren, early ancestors of the Penobscot Indians who had settled 'up the river," were dying of thirst, because their river had dried up.84 The cause of this natural disaster was the Anglebému ("Guards-Water"), the giant frog-like monster at Chesuncook Lake, on the upper reaches of the West Branch of the Penobscot River: He had gulped up all the water.85 Hearing his grandchildren were in serious trouble, Gluskábe came to their rescue. With his stone axe, he cut a big birch tree which fell on Anglebému, killing the huge frog:

> That's how the Penobscot River originated. The water flowed from him. All the branches of the tree became rivers, all emptied into the main river. From this came the big river. Now all the Indians were so thirsty, nearly dying, that they all jumped into the river. Some turned into fish, some turned to frogs, some turned to

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82 Speck 1918, pp.193-194. See Speck, Frank G. 1918. Penobscot Transformer Tales. *International Journal of American Linguistics* , Vol. 1, No. 3, pp. 187-244.
83 "She was just as fond of swimming. Once as she waded ashore, after swimming…"; "All of a sudden, looking across the river, they saw some women coming down to the shore to go in bathing" (Speck 1918, p.218).
84 Especially in the late summer and fall, river levels above Old Town Falls could drop low. The Jesuit missionary Eugene Vetromile (1866, p.48), who visited the Penobscot on their river islands in the mid-1800s, noted: "In dry seasons I have known the waters of that river to be so low that I could hardly go from Mattanacook to Oldtown in a canoe."
85 Speck 1915, p.191; Speck 1918, p.200, note 4

> turtles.[86] [Those] who restrain themselves from the water escape transformation and become the ancestors of the human families. These, however, assume the names and to a certain extent the identity of the particular animal into which their nearest relatives were transformed. Furthermore, they seem to have chosen their habitat near the places inhabited by their animal relatives.... Certain physical peculiarities are also attributed to the mythical relationship between the present-day human and animal families."[87]

These "animal relatives" are identified as *ntútem*, a word also found in other Algonquian languages and now adopted in English as "totem." Literally translated as "my spouse's parents," or "my partner of a strange race," *ntútem* expresses the idea in Penobscot traditional culture that human and animal ancestors are closely related.[88]

A deep ecological awareness of human dependence on fish, fowl, and game animals in their riverine habitat is underscored by the fact that the totems of about half of the extended families (or clans) in the tribe are water- or shore-based animals: fish (eel, perch, sculpin, sturgeon); reptiles (frog, toad); crustaceans (lobster, crab); mammals (otter, beaver, fisher, whale), and the "water nymph."[89] Some specific examples of Penobscot families with fish-related totems are Neptune (eel); Sockalexis (sturgeon), Penewit (yellow perch), and Francis (sculpin). Penobscot families with a riverine mammal totem include Orono/Tama'hkwe (beaver), Nicola/Nicolar (otter), and Francis (fisher).[90] Although these and other animals are mythically related to the various Penobscot families, they could be fished, hunted, or trapped: "There were no taboos

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86 Speck 1940, pp.216-217
87 Speck 1915, pp.191-192.
88 See also Speck 1940, p.210, where he spells the word as *ndó'dem*, translated as "my co-relative."
89 It is not clear what the "water nymph" exactly is, but Speck 1918, p.235, footnote 2) states that it is a "supernatural creature believed to live beneath the water." Elsewhere, he offers its Penobscot name as Wanagamesu, describes it as an "addle-headed creature," and notes it is the totem of the Nicola/Coley family whose family hunting territory was located on "Russell Stream and Pond" (Speck 1940,p. 215). Frank Siebert identified this totem as Dragonfly. See: Siebert, Frank T. 1982. "Frank G. Speck, Personal Reminiscences." Pp. 91-142. In *Papers of the Thirteenth Algonquian Conference*, edited by William Cowan. Ottawa: Carleton University.
90 Speck 1928:170, n.3; Speck 1940:209, n.6.

against killing the associated animal, which to a certain degree was depended upon for food."[91]

After slaying Anglebému ("Guards the water") and thereby releasing the water of the rivers flowing into the main stem of the Penobscot River, Gluskábe boarded his large stone canoe and paddled down the river to the seacoast.

> "Then said Gluska'be to his grandmother, 'Now, grandmother, I am going to travel to search for and transform things, so that our descendants may not have such hard times to exist in the future. Now I am leaving, and shall inspect the rivers and lakes. I shall be gone long, but do not worry.' Then he started off paddling, and entered all the rivers emptying into the ocean. He inspected them. Wherever there were bad falls, he lessened them, so that they would not be too dangerous for his descendants. He cleared the carrying-places. Then he left his canoe upside down, where it turned into stone, and may be seen there yet."[92]

Beyond myths and legends, there once existed spiritually-important sites along the banks and even within the Penobscot River itself. One such site was a granite rock rising above the surface about 900 yards downriver from the Penobscot village at Mattawamkeag Point. Identified as Maja-Obseoose, or Pimolos Rock" by Major Joseph Treat just weeks after the 1820 treaty-signing ceremony in Bangor, it was described as a "a large Rock of granite in form of a small hay stack—and on the South side near the top is a circular hole in form of a pot 2 feet deep."[93] On this survey upriver, Treat was guided by John Neptune, who was not only a chief and formidable hunter, but also had a reputation as a mighty shaman (*medéolinu*) believed to possess great spirit power

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91 Speck 1915, p.192. "Like the other eastern and northern Algonkian, the Penobscot families each possessed inherited hunting-territories which were designated by the totemic animal names. So we find those families located near the ocean bearing marine-animal names, while the territories of the land-animal families are situated in the interior. The latter trace their origins to independent causes. The family hunting-territory is called *nzi-'bum* ('my river')" (Speck 1918, pp.201-202).
92 Nicolar 1893, p. ; Speck 1918, p.200. Penobscots point to a large rock lying on the shore at the mouth of the Penobscot River, near Castine, as Gluskábe's canoe (Ibid., footnote).
93 Treat 1820, in Pawling 2007, pp.94, 995.

(*ktáhando*).[94] With the help of his invisible totem animal-spirit, a powerful supernatural eel supporting him as his "messenger" (*boahigan*), Neptune could perform magic (*motewolon*).[95] Thus informed by this renowned Penobscot shaman chief, Treat commented on *Maja-Obseoose*: "the Indians say it has been their custom to place in this cavity when the water is low, presents for Pimola, of Tobacco, Pipes, Jackknives &c. and if they are not taken out, they have a bad season for hunting and fishing the next year—and if taken out they have a great good luck in every thing."[96] Traditionally, the Penobscots believed that Pimola, also spelled as Pamola, Bumole, or *Pemúle*, was a potentially dangerous mythic storm spirit represented as a human-like flying giant residing in Mount Katahdin to be appeased with ritual gifts to secure success in fishing, hunting, or trapping.[97]

Other than this mysterious granite rock in the Penobscot River near Mattawamkeag, there were also other spiritually-important sites within or along their river. For instance, as noted by Speck in the early 1900, "there are certain mysterious local phenomena like the series of markings on a rock by the river between Bucksport and Bangor. Here the old Indians came, to divine from the markings which were constantly changing."[98]

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94 Speck (1935. p.4) explained that "*kthán.dowit'* may be translated "great spiritual being."
95 Speck (1935, p.4) explained: "The term *manitu* itself is not found in Penobscot, its cognate appearing as *wahán.do*, the suffix *–han.do* denoting beings possessed of supernatural power. The ordinary generic term for an evil spirit is *wahán.do*," Penobscot shamans were known as *məde'olənuwak* (variously spelled). *Medé-oulin*, also spelled *M'té-oul-in* or *Motewolon*, is a Wabanaki shamanic concept referring to a non-ordinary power, or magic, historically also translated as "witchery." See also Eckstorm 1945, pp.5, 97-99, 181-189; Leland 1884, p.260; Speck 1919, p.252. Speck, Frank G. 1919. *Penobscot Shamanism*. Memoirs of the American Anthropological Association Vol. VI (4), pp. 239-289; 1935: Penobscot Tales and Religious Beliefs. "Journal of American Folklore.Vol.48 (187), pp.1-107.
96 Treat 1820, in Pawling 2007, p.95
97 Leland 1884, p.255-257. See Leland, Charles G. 1884. *The Algonquin Legends of New England; or, Myths and Folk Lore of the Micmac, Passamaquoddy, and Penobscot Tribes*. Boston: Houghton, Mifflin and Company. .
98 Speck 1935, p.17.

The Penobscot River not only sustained its indigenous occupants with its fish and other natural resources, but also posed risks such as drowning in the swift currents, as told in stories and legends but also indicated in mythic tales and folklore relating to various types of river-dwelling creatures with magic powers:

> "*Alambégwi•no'si•s*, under-water man-dwarf, is a shy man-like dwarfish being who lives in deep pools along the rivers or in lakes. Sometimes these dwarfs dwell singly, sometimes in bands carrying on the ordinary mode of life under water. They possess considerable power. [Some Penobscots] think that the person who sees one will be drowned within a year. A story is told of a water dwarf who lived in a deep pool of the Penobscot river at Milford opposite the village at Indian Island. An Indian who camped there was awakened one winter night by the dwarf who then disappeared through the ice. Within a year the man himself was drowned by falling through a hole in the ice. Another spot in the Penobscot river, about forty miles above Oldtown back of Lincoln Island in a dense growth of pines and hemlocks, is pointed out as the abode of one of these beings. The place is isolated. A deep pool lies at the foot of the ledge."[99]

Other river-dwelling magic creatures include "*Nodə'm'kenowet'*, grabbing-from-beneath-the-water, is a creature of the pools, half fish and half human;" ""*Wanagəméwak*, reckless creatures, are little people of another genus, who inhabit rivers;" "*Wi•wil•yámek*^{cw}, tickler fish, is the snail, who has special supernatural gifts and is capable of living either in the water, on land, or in the trees;" "*Maski• k*^{cw}*su*, toad creature;" *Awuskhówa*, spy, is an imaginary spirit [who] comes down the Penobscot river and returns over it. An Awuskhówa years ago was discovered leaving Indian Island ensconced in a roll of birch-bark which was moving rapidly up-stream.[100].

Finally, Penobscots also used fish and river-based animals for divination purposes. Applying a ritual technique known as scrying, they searched for messages in the flow of blood from fish or a pattern of spots on a bone, believing these could be interpreted as revealing something hidden (far away or not yet happened). For instance,

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99 Speck 1935, p.13.
100 Speck 1935, pp.13-17.

Penobscots thought that the flow of blood from a freshly-hooked fish could be a sign: "If the flow was copious the augury was good for the ensuing fishing operations. If hooked fish did not bleed much at the wound the sign was an unfavorable one."[101] Another traditional form of divination ritually practiced by Penobscots involved bones of beaver and muskrat: "The little shoulder-blade of the muskrat, the breast-bone of duck or partridge, if spotted with dark spots, presumably blood, denote good luck in the chase. The hind hip-bone with round opening is held in the right hand, both hands are dropped down on each side. Then the hunter to find out if he is going to have any trouble in finding a certain stream, or hunting place, will say as he slowly raises it above his head, 'To Birch Stream (or any stream) I am going.' By the time he says these words his finger of the left hand has either hit the opening or missed it - if he hits it right, no trouble to find the stream or hunting ground; *gwelmúgwebana*," we shall have good luck."[102]

The Penobscot tribe's creation myths, animal totem stories, ritual gifting at a sacred rock in their river, river-dwelling magic creatures, and divination involving fish blood or beaver and muskrat bones, not only affirmed the cultural identity of tribal members but also reminded them of their deeply historical, ecological, and spiritual roots in their ancestral homeland and intimate connections to their river and its wildlife. Such was the case in the past, including the treaty period, and remains so today. Their occupation and use of the Penobscot River described above, as well as their mode of subsistence and material culture, their social organization and family totems, as well as mythological worldview, all continued through the treaty period in question. When those treaties were finally executed in 1796, 1818, and 1820 all parties were well aware of how

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101 Speck 1935,p.27.
102 Correspondence Penobscot tribesman Roland Nelson (Needahbeh) to Frank Speck, April 22, 1928 and Dec. 1925, cited in Speck 1935, p.28.

and why the Penobscot people were culturally and historically embedded in their river habitat.

II. Penobscot Territory That Became Object of the Treaties

This Part briefly describes the historically documented understandings of Penobscot Indian leaders and Massachusetts government officials that the Penobscot tribe possessed rights of self-government and self-determination in their ancestral homeland, in particular the riverine territory that became the object of their 1796 and 1818 treaties with the Commonwealth of Massachusetts.

As a consequence of threats of violence and military raids up the Penobscot tidal river by white militia from New England from the late 17th century onwards, Penobscot Indians recognized the risk of maintaining settlements in the coastal region of their tribal domain. Although they still hunted, fished, and trapped in the region below the falls, their seasonal encampments downriver and in the bay area were usually small and temporary. Until the treaty period, Penobscots had successfully guarded their traditional way of life in their ancestral homeland upriver, as detailed in Part I. Penobscots regarded any strangers portaging around the great falls just below Panawamskeag (Old Town Island, or Indian Island) as potentially hostile intruders. Consequently, as far as the English on the Maine seacoast were concerned, the tribal territory above the head of the tide remained largely *terra incognita* until the late 18th century, as is also evident when reviewing historic maps of this period.

This situation changed, albeit slowly, soon after the conclusion of the so-called French and Indian War in 1763. On 23 July that year, the British royal governor of