Exhibit List

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A	Excerpts from Hearings before the Select Committee on Indian Affairs, S. 2829, July 1 & 2, 1980
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April 14, 2022

Hon. Teresa Leger Fernández, Chair
Subcommittee for Indigenous Peoples of the United States
Committee on Natural Resources
U.S. House of Representatives

Re: H.R. 6707, *Advancing Equality for Wabanaki Nations Act*

Dear Chair Leger Fernández:

We are a coalition of municipalities and quasi-municipal entities in Maine opposed to H.R. 6707, *Advancing Equality for Wabanaki Nations Act*. The bill would create major confusion and disagreement – and ultimately more litigation and expense for Maine citizens and municipalities – because it would effectively displace the State's and municipalities' authority to enforce their own laws, and would create compliance burdens and regulatory uncertainty throughout the State.

Our coalition – comprised of Baileyville, Calais, Carrabassett Valley, Dover-Foxcroft, East Millinocket, Guilford-Sangerville Sanitary District, Howland, Lincoln Sanitary District, Lincoln, Mattawamkeag, Millinocket, and Veazie Sewer District – supports the State of Maine's jurisdiction over all of the State's lands and waters, as set forth in the federal Maine Indian Claims Settlement Act of 1980 ("MICSA"), 25 U.S.C. §§ 1721, *et seq.*, and the Maine Implementing Act ("MIA"), 30 M.R.S. §§ 6201, *et seq.*, collectively referred to as the "Settlement Acts." We have been working together for more than 20 years to ensure clarity and consistency in jurisdiction and enforcement of our laws, particularly in relation to legal challenges to the clear jurisdictional framework set forth in the Settlement Acts.

Background

As you are certainly aware, when the Maine Wabanaki Nations settled with the State in 1980, those tribes achieved federal recognition, 300,000 acres of land spread across the State, and over $81 million (over $250 million in today's dollars) in settlement funds. The Settlement Acts also recognized the State's interest in having its laws apply uniformly throughout Maine. It was particularly important that the State would encounter no jurisdictional difficulties when the tribes acquired lands far removed from their reservations. This jurisdictional compromise is a fundamental underpinning of the Settlement Acts, and is all the more important in practice, because the Indian Territory holdings of the Penobscot and Passamaquoddy tribes, and to some extent the Houlton Band of Maliseet Indians, are in fact widely dispersed over a large swath of central and northern Maine.

The Settlement Acts accordingly adopted a clear, albeit unique, jurisdictional framework, in which there was no interference with the tribes' self-governance but regulatory authority over the environment and land use remained with the State and its political subdivisions, allowing uniformity and consistency in the application of State and municipal law. We attach to this letter an article that concisely summarizes the genesis of the Settlement Acts and some of the tribes' efforts over the years to displace State regulation of natural resources. H.R. 6707 is the latest effort to upset this clear jurisdictional framework – which has been in place for more than 40 years – in contravention of the fundamental and

comprehensively negotiated guarantee pursuant to the Settlement Acts that the laws of the State and Maine municipalities would be applied uniformly therein.

H.R. 6707 Reverses Decades of Established Authority and Delivers Regulatory Uncertainty

H.R. 6707 would effectively eliminate two provisions in MICSA that make it possible for the State and municipalities to apply a uniform set of environmental and land use laws on all land within the state, including tribal land:

1. H.R. 6707 would effectively gut MICSA Section 6(h) (25 U.S.C. § 1725(h)), which bars the application of federal law that would "affect or preempt" the jurisdiction of the State of Maine, and would instead provide that any newly enacted "laws and regulations of the United States" which are generally applicable—or enacted for the benefit of—Indians or Indian tribes would apply in Maine and would override any Maine laws to the contrary.
2. H.R. 6707 would repeal MICSA Section 16(b) (25 U.S.C. § 1735(b)), which was enacted to preserve MIA's jurisdictional framework and provides that, if Congress enacts legislation that would affect Maine's jurisdiction under MIA, that new law would not apply in Maine unless Congress specifically so provides.

MICSA Sections 6(h) and 16(b) as enacted make it possible for the State of Maine to apply a uniform set of environmental and land use laws on all land within the state, including tribal land. Adoption of these two amendments would fundamentally alter the established and painstakingly negotiated relationship between Maine tribes, Maine municipalities, and the State.

The effect of this change cannot be understated – the uniformity in application of State and municipal law across all regions of Maine that has been in effect for decades would be lost, as laws affecting or preempting existing State authority in Maine would now apply in Maine. For example, removing the bar on application of federal law that would "affect or preempt" the jurisdiction of the State of Maine would allow tribes obtain Treatment as a State ("TAS") authority under the Clean Water Act, even though TAS status would allow the tribes to displace Maine's environmental laws and would require the Maine Department of Environmental Protection ("DEP") to incorporate downstream tribal standards into licenses DEP issues. Thus, a patchwork of laws would exist across the state and within municipal boundaries, in areas never intended to be removed from municipal jurisdiction, creating a dual system of regulation in those areas that would allow Maine's tribes to regulate Maine municipalities, companies, and citizens. The H.R. 6707 amendments would, sooner or later, make clear that Maine law does not apply to Maine tribal lands and waters, and that Maine no longer has jurisdiction over those lands and waters. Any activity that could impact tribal lands or waters, such as removing a dam, doing bridge work, or building a road, would be subject to this dual regulatory system dispersed widely across the State, creating a compliance burden on Maine municipalities, companies, and citizens who since 1980 have relied on the certainty of uniform laws and standards. Importantly, H.R. 6707 would substantially amend the jurisdictional compromise reached during the MICSA negotiations at the request of one party without the consent of the counter-party to the Settlement Acts – the State of Maine – setting a troubling precedent that disincentivizes such settlement negotiations.

Precisely what laws and standards would apply in the wake of enactment of H.R. 6707 would take years to resolve, creating great uncertainty where none currently exists (and at great cost). The sweeping changes to MICSA disregard the unique manner in which federal law presently applies in Maine, and disregard the reality that tribal powers, both in Maine and nationally, are subject to a complex body of

case law. It is unclear whether existing provisions that benefit Indian tribes in existing federal laws that do not presently apply in Maine – such as in the Clean Air Act and the Clean Water Act – would apply in Maine when those acts are amended or reauthorized by Congress, given the prospective applicability language of H.R. 6707. It appears that upon amendment or reauthorization, any federal law providing tribes generally with civil, criminal, or regulatory jurisdiction would immediately apply in Maine, allowing tribes to adopt stricter laws than those imposed by the State, at great cost. That is what occurred in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), in which the court upheld the Isleta Pueblo tribe's water quality standards that were in some respects 1,000 times greater than those of the State of New Mexico, at a compliance cost to the City of over $10 million (in 1996 dollars). Maine, by contrast, has some of the most stringent environmental laws in the nation, and those laws are fully protective of tribal lands and natural resources.

And what about established case law, which falls under the Section 6(h) term "laws and regulations of the United States"? Because tribal powers are governed largely by court decisions, many of which date back nearly 200 years, the impact of H.R. 6707 on this complex body of law would be significant, and likely only resolved through additional Congressional action or, more likely, litigation in the federal courts.

We urge you and the members of the Subcommittee for Indigenous Peoples of the United States to carefully review the potential implications of H.R. 6707. This bill would profoundly change the relationship between the tribes, the State, Maine municipalities, and Maine citizens. H.R. 6707 disregards the State's and municipalities' legitimate interests in having a uniform system of environmental and land use laws that applies throughout the State and would result in decades of contentious and costly litigation to resolve new disputes about the scope of tribal authority to displace Maine's authority. As noted in the attached article, the tribes' litigation efforts are funded by federal dollars. Municipal coffers are not nearly as deep.

Thank you for your consideration of these comments.

Sincerely,

Matthew D. Manahan
On behalf of:
Town of Baileyville, Maine
City of Calais, Maine
Town of Carrabassett Valley, Maine
Town of Dover-Foxcroft, Maine
Town of East Millinocket, Maine
Guilford-Sangerville Sanitary
District Town of Howland, Maine
Lincoln Sanitary District
Town of Lincoln, Maine
Town of Mattawamkeag, Maine
Town of Millinocket, Maine
Veazie Sewer District

Water, Tribal Claims, and Maine's Not-So-Settled Settlement Acts

Matthew D. Manahan and Catherine R. Connors

In most regions of the United States, control over natural resources vis-à-vis American Indian (hereinafter Indian) tribes is addressed at the federal level. Maine, however, is not like other states. The history of federal-state-tribal control over Maine waters tells a unique and at times tortured tale still being written in the courts. The moral of the story so far is that, with sufficient financing and fading memories, even the clearest settlement language will be challenged, over and over and over again.

In examining the period when colonists from England, and later Massachusetts, settled throughout the area that eventually became Maine, historians differ as to how many Indians lived in the area, whether they were nomadic or riverine, organized or conquered, where they could be found, and when. As of 1820, however, when Maine became a state, it was clear that few Indians remained, and they were regulated by state, not federal, authorities. As Congress stated, since 1820, the state of Maine "provided special services to the Indians residing within its borders," while the United States "provided few special services to the . . . [tribes] . . . and repeatedly denied that it had jurisdiction over or responsibility" for them." 25 U.S.C. § 1721(a)(7).

After 150 years of such state oversight, however, Maine was hit with a legal lightning bolt. In 1972, the Passamaquoddy Tribe and the Penobscot Nation filed suit in federal court in Maine, asking the court to require the U.S. Department of the Interior (DOI) to file suit against the state for the return of the tribes' aboriginal lands. The tribes argued that certain treaties between the tribes and Maine and Massachusetts were invalid because they were not approved by Congress, as required by the Indian Nonintercourse Act of 1790, 25 U.S.C. § 177.

This theory about the Nonintercourse Act, combined with a U.S. Supreme Court ruling in 1974 finding federal subject matter jurisdiction for tribal land claims, led to a cascade of similar lawsuits by other tribes in other states.

In the Maine litigation, the trial court agreed with the theory, and the First Circuit Court of Appeals upheld that decision. *See Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). After *Morton* gave the Indians' position traction, the first settlement of a tribal land claim in this wave of litigation came in 1978. Congress, which must approve all such settlements, agreed to a settlement in Rhode Island with the Narragansett Tribe, which had claimed a few thousand acres of land.

Mr. Manahan and Ms. Connors represent the coalition of municipalities and businesses supporting the position of the state of Maine in Penobscot Nation v. Mills. *Mr. Manahan may be reached at mmanahan@pierceatwood.com, and Ms. Connors may be reached at cconnors@pierceatwood.com.*

In Maine, however, the stakes were far higher—the tribes were claiming two-thirds of the land mass of the state. As Congress put it: "Substantial economic and social hardship to a large number of landowners, citizens, and communities in the State of Maine, and therefore to the economy of the State of Maine as a whole, will result if the aforementioned claims are not resolved promptly." 25 U.S.C. § 1721(a)(6). The law firm of Ropes & Gray issued an opinion that a state municipal bond issue could not go forward using property within the claimed territory as collateral. Title companies refused to write title insurance for any land claimed by the tribes in Maine, causing residential and commercial transactions in these areas to come to a halt.

Much negotiation ensued. At one point, Archibald Cox of Watergate fame was on the tribes' side, with famed defense attorney Edward Bennett Williams representing the state. There were multiple task forces appointed by President Carter; the tribes' main ally in Congress was defeated in his Senate re-election bid; and Senators Edmund Muskie and George Mitchell, among others, played roles. Eventually a final deal was struck in 1980, when the possibility of Ronald Reagan's election as the next president raised the specter that he might veto a settlement favorable to the tribes were he elected.

The resulting, comprehensive settlement, agreed upon by the United States, the state of Maine, the Penobscot Nation, and the Passamaquoddy Tribe, is embodied in the federal Maine Indian Land Claims Settlement Act and its state law counterpart, the Maine Implementing Act (collectively, the Settlement Acts). Under the terms of the Settlement Acts, the Maine tribes agreed to extinguishment of their claims in exchange for the establishment of Indian Reservation and Territory lands, and to payment to the tribes of over $81 million (about $230 million in 2016 dollars). As the Settlement Acts recite, the purpose of the settlement was to remove the cloud on titles, settle all the tribes' claims, and clarify the status of the other land and natural resources in the state. 25 U.S.C. § 1721(b).

The Settlement Acts were unique in establishing a new type of relationship between the federal, state, and tribal governments unlike the relationship of any tribes to any other state, with the Indians "subject to all laws of the State of Maine." *Id.* § 1721(b)(4). The Settlement Acts gave the state of Maine civil and criminal—including environmental—jurisdiction over Maine Indian lands:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by

any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S. § 6204.

Thus, this settlement among the federal, state, and tribal governments created a jurisdictional arrangement unlike what exists in western states, where state laws are generally not applicable to tribes or tribal lands. Except as to "internal tribal matters," under the Settlement Acts, Maine tribes are subject to Maine law, and have the same governmental authority as a Maine municipality. Tribal members may catch fish for their individual sustenance and not be subjected to state fishing license requirements and bag limits, but with limits to prevent overfishing. The Settlement Acts explicitly provide that no federal laws or regulations intended to accord any special right or status to any Indians or Indian lands and affect or preempt the regulatory jurisdiction of the state of Maine—including environmental regulatory jurisdiction—apply to the Maine tribes.

In sum, the Settlement Acts were designed to be just that: a comprehensive and global settlement of all tribal claims in Maine. The legal framework adopted was clear, incorporating a unique state-tribal relationship, in which there was no interference with the tribes' self-governance, but regulatory authority remained with the state.

End of story? Oh no. This was just the beginning.

Tribal Opposition to Maine NPDES Delegation

Time passed, and the Maine tribes no longer wanted to be unique. They are federally recognized, and would like the same federal sovereign-to-sovereign relationship as their western counterparts. Federal administrative bodies, comfortable with the general federal-tribal regulatory template, have no stake in maintaining the state of Maine's interests. Hence, after a short lull to let memories fade, the tribes' pushback began in the early 1990s. As a part of this federal-tribal cooperative effort, the U.S. Environmental Protection Agency (EPA) even entered into "Tribal Environmental Agreements," requiring EPA to do everything in its power to prevent disclosure under the Freedom of Information Act of its communications with the Maine tribes, leaving the state of Maine in the dark about their discussions.

The first avenue pressed to expand tribal regulatory authority focused on "internal tribal matters"—the area of self-control not subject to state regulation under the terms of the Settlement Acts. The argument was launched that this self-governance exemption was far broader than it appears on its face, embracing water quality and its regulation.

The Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program requires a permit for the discharge of any pollutant into navigable waters. 33 U.S.C. § 1342(a). The CWA assigns permitting responsibilities first to EPA, but a state may apply to EPA to administer the NPDES program for discharges into navigable waters within its jurisdiction. 33 U.S.C. § 1342(b). The EPA administrator "shall approve each submitted program unless he determines that adequate authority does not exist." *Id.*

In November 1999, the state of Maine submitted an application to EPA seeking NPDES delegation for the entire state, including areas that may fall within or near "Indian Territory," for authority to issue wastewater discharge permits under the CWA. (Indian Territory is a defined term under the Settlement Acts, including reservations and some additional property acquired by DOI for the tribes.)

The legal framework adopted for the Settlement Acts was clear, incorporating a unique state-tribal relationship, in which there was no interference with the tribes' self-governance, but regulatory authority remained with the state.

The tribes in Maine objected, saying they thought the federal government should retain oversight in tribal territories because, they alleged, the state does not have authority over tribal waters. In January 2001, EPA approved Maine's application to implement the NPDES program, but only in areas of the state "outside Indian Country." That partial approval took no action on the state's program obligation as it applied to the territories and lands of the four federally recognized Indian tribes in Maine. EPA said it needed to study further what to do in Indian Territory.

On October 31, 2003, EPA authorized the state to implement the NPDES program as it applies to the territories of the Penobscots and the Passamaquoddies. EPA did not, however, delegate permitting authority for "disputed" Indian Territory, including tribal facilities located on tribal reservations that discharge into Maine's navigable waters, characterizing such discharges as "internal tribal matters." EPA said it would apply a balancing test to determine whether the state or the tribes have jurisdiction over specific discharges, and expressed its intent to protect fish that the tribes may catch for sustenance purposes by imposing conditions in Maine-issued NPDES permits to non-Indian dischargers not in Indian Territory and by taking over Maine's water quality standards.

The state of Maine appealed EPA's decision to the First Circuit Court of Appeals. The court agreed with the state and rejected EPA's and the tribes' position. In so ruling, the court noted that it had no need to wade into any dispute about Indian Territory, because Maine has jurisdiction over *all* discharges in the state, including those within Indian Territory and over tribal discharges themselves. *See Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

Did that end the discussion? Guess again.

Penobscot Efforts to Regulate the Penobscot River: Application for TAS

The Passamaquoddy Tribe and the Penobscot Nation have applied several times over the past 15 years for treatment as a state (TAS) under section 518 of the CWA, 33 U.S.C. § 1377(e). EPA has granted TAS to the tribes, but only for the limited purpose of obtaining federal funds to develop water quality standards. Notwithstanding that the First Circuit ruled in 2007 that the state, not Maine tribes, regulates water quality under the Settlement Acts, in 2012, the Penobscot Nation applied again for TAS status, this time accompanied by water quality standards funded by the EPA, which the Nation had developed and for which it seeks EPA approval. EPA has not yet acted on the 2012 TAS application.

If EPA grants TAS authority to the Penobscot Nation, the state of Maine will be required to ensure that all nontribal discharges licensed by the state and that may affect Penobscot Nation waters meet the Penobscot Nation's water quality standards.

If EPA grants TAS authority to the Penobscot Nation, then the state of Maine will be required to ensure that all nontribal discharges licensed by the state and that may affect Penobscot Nation waters—wherever these waters may be—meet the Penobscot Nation's water quality standards, regardless of however stringent and inconsistent the Nation's standards may be in comparison with state standards. The Penobscot Nation is not required to consider nontribal members' comments in adopting their standards, or to consider impacts to economic interests. So, for example, if the Penobscot River—the longest river located entirely in Maine, running through the middle of the state—were deemed to affect Penobscot Nation waters, then Maine towns and companies along its banks, already meeting some of the most stringent water quality standards in the country, could potentially be required to spend millions of dollars they do not have to meet these additional tribal standards.

Penobscot Efforts to Regulate the Penobscot River: Penobscot Nation v. Mills

The next assault on the Settlement Acts arrived in the form of a tribal-federal lawsuit against the state of Maine to define the Penobscot Nation's reservation to include much of the Penobscot River.

In August 2012, Maine Attorney General William Schneider learned that Penobscot Nation officials had stopped nontribal duck hunters on the Penobscot River and told them a tribal permit was required to hunt anywhere on the river. The state later discovered that the tribe had summoned nontribal hunters to tribal court, even though the Settlement Acts do not subject nontribal members to the jurisdiction of tribal courts.

In the wake of the tribe's actions, Schneider issued an opinion regarding jurisdiction on the Penobscot River and invited the tribe to meet with him. With respect to control of the Penobscot River, Schneider wrote:

> [T]he River itself is not part of the Penobscot Nation's Reservation, and therefore is not subject to its regulatory authority or proprietary control. The Penobscot River is held in trust by the State for all Maine citizens, and State law, including statutes and regulations governing hunting, are fully applicable there. Accordingly, members of the public engaged in hunting, fishing or other recreational activities on the waters of the Penobscot River are subject to Maine law as they would be elsewhere in the State, and are not subject to any additional restrictions from the Penobscot Nation.

Letter from Maine Attorney General William J. Schneider to Chandler Woodcock, commissioner of the Maine Department of Inland Fisheries and Wildlife, and Colonel Joel T. Wilkinson, Maine Warden Service, Aug. 8, 2012, at 2.

The Penobscot Nation responded by filing suit against the attorney general in the United States District Court for the District of Maine, claiming that its reservation includes the entire 60-mile stretch of the main stem of the Penobscot River north from its primary reservation island (the Main Stem), including the submerged lands, and that it has exclusive jurisdiction over that portion of the river. The Penobscot Nation asserted that it has retained aboriginal title to the waters and riverbed of the Main Stem. As a result, it claimed that the boundaries of the Penobscot Reservation are actually the river banks found on either side of the Main Stem. According to the Penobscot Nation, these boundaries result in the Penobscot Nation having exclusive authority within its Main Stem reservation to regulate hunting, trapping, and other taking of wildlife for the sustenance of the individual members of the Penobscot Nation.

Although the allegations in the Penobscot Nation's lawsuit focused on whether hunting and fishing by members of the Penobscot Nation are subject to regulation by the state of Maine, the legal bases for that position, if accepted by the court, would support the Penobscot Nation's efforts to regulate all activities on the Penobscot River.

The Maine attorney general is elected by the Maine legislature, so after the Democrats regained control of legislature, Schneider was replaced by Janet Mills. Mills continued to defend Maine's position in the Penobscot Nation's lawsuit, arguing that the Penobscot Nation does not have the right to regulate use of the Penobscot River, and that the Penobscot Nation reservation does not include any portion of the river.

DOI intervened in the Penobscot Nation's lawsuit in support of the Penobscot Nation. Even if the entire Main Stem does not fall within the bounds of the Nation's reservation,

DOI additionally argued that the boundaries of the Penobscot reservation would extend to the threads of the channels surrounding the Penobscot Nation's reservation islands. According to DOI, these "riparian rights" around the islands of the Main Stem create "halos" of water into which the reservation extends.

Because the Penobscot Nation's litigation efforts are funded by federal dollars, taxpayers are paying the bill for all sides in this litigation—the tribe's lawyers and experts, the DOI's lawyers and experts, and lawyers and experts representing the state.

A coalition of towns and businesses that hold NPDES waste discharge licenses authorizing wastewater discharges into the Penobscot River or its branches and tributaries also intervened to support of the state's position. This coalition was motivated by concern that if the court agreed with the Penobscot Nation that its reservation includes any portion of the Penobscot River, and if EPA then grants TAS to the Penobscot Nation, then all discharges into the Main Stem will be subject to Penobscot Nation water quality standards. The tribal-DOI suit also could also rewrite the territorial borders for some municipalities.

In December 2015, after three years and voluminous discovery, including testimony from history professors purporting to identify what tribal members were thinking when they entered into treaties in 1796 and 1818, district court Judge Singal issued his decision in the *Penobscot Nation v. Mills* lawsuit, holding that the Penobscot Nation reservation does not include any portion of the Penobscot River, only the islands themselves. *Penobscot Nation v. Mills*, 1:12-CV-254-GZS, 2015 WL 9165881 (D. Me. Dec. 16, 2015). The basis for this ruling was the plain language of the Settlement Acts, although the court also found that legislative history supports this reading.

The relevant language in the Settlement Acts defines the "Penobscot Indian Reservation" as certain "lands," and, more specifically, "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the states of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818." 30 M.R.S. § 6203(8). This language, the court held, "plainly defines the Penobscot Indian Reservation as the islands in the Main Stem," and "is explicitly silent on the issue of any waters being included within the boundaries of the Penobscot Indian Reservation." *Mills*, 2015 WL 9165881, at *28. The court stated:

> In short, the Court concludes that the plain language of the Settlement Acts is not ambiguous. The Settlement Acts clearly define the Penobscot Indian Reservation to include the delineated islands of the Main Stem, but do not suggest that any of the waters of the Main Stem fall within the Penobscot Indian Reservation. That clear statutory language provides no opportunity to suggest that any of the waters of the Main Stem are also included within the boundaries of the Penobscot Indian Reservation.

Id. at *29. In other words, "islands" means islands.

Judge Singal then turned to the question of whether Penobscot Nation members have a right to sustenance fish in the river, given the Settlement Acts' limitation of the tribal sustenance fishing right to "within the boundaries of their respective Indian reservations." While the state had never restricted the tribe's sustenance fishing activities anywhere on the Penobscot River, the plaintiffs had sought a declaratory judgment on the issue. Noting that the long-standing and accepted practice by all parties was that Penobscot Nation members have the right of sustenance fishing on the river, the court concluded that language limiting the sustenance fishing right to the reservation was ambiguous, given the introductory language in the Settlement Acts' definitions section, which states that those definitions apply "unless the context indicates otherwise." 30 M.R.S. § 6203.

In December 2015, after three years and voluminous discovery, district court Judge Singal issued his decision in the *Penobscot Nation v. Mills* lawsuit, holding that the Penobscot Nation reservation does not include any portion of the Penobscot River, only the islands themselves.

In sum, the court ruled that the reservation itself consists of the islands alone, but tribal members may sustenance fish in the river waters (which the state never contested). With respect to the Penobscot Nation's efforts to regulate water quality, while Judge Singal wrote that he was "not resolving the right to regulate water sampling or the right to regulate discharges by towns or non-tribal entities that currently discharge into the Penobscot River," as a practical matter, his decision effectively resolves that issue by ruling that the Penobscot reservation does not include any portion of the river. *Mills*, 2015 WL 9165881, at *26. The Penobscot Nation cannot regulate nontribal discharges to the river, or other activities in and on the river, because, in the wake of the *Penobscot Nation v. Mills* decision, the Penobscot Nation does not have any waters within its jurisdiction where its water quality standards might apply.

DOI and the Penobscot Nation filed post-judgment motions to amend the court's order, pursuing the DOI's "halo argument." These motions were summarily denied the day after DOI and the Penobscot Nation filed their reply briefs. All parties have since filed appeals to the United States Court of Appeals for the First Circuit in Boston.

Given that EPA has supported the Penobscot Nation's efforts to expand the scope of its environmental regulatory authority, it seems likely EPA will continue to hold in abeyance the Penobscot Nation's pending TAS application until a final, unappealable resolution is reached in *Penobscot Nation v. Mills*.

EPA Disapproval of Certain State Water Quality Standards

While the ruling in *Maine v. Johnson* would appear definitive, EPA nevertheless refused to approve Maine's water quality standards for any waters within Indian Territory, instead simply refusing to take any action on those standards.

Finally, seven years after the decision in *Maine v. Johnson*, the state brought suit against EPA in 2014 to force EPA's hand. *See Maine v. McCarthy*, Civ. No. 1:14-cv-00264 (D. Me. filed July 7, 2014). In letters issued in February, March, and June 2015, EPA conceded that Maine has authority to establish water quality standards for tribal lands. EPA nevertheless disapproved some of Maine's human health criteria (HHC), now asserting that they are not sufficiently protective of tribal sustenance fishing. EPA told Maine that the state must rewrite those water quality standards, dating from 2004 to 2013, for "waters in Indian lands," to ensure that those waters are clean enough to allow tribal members to continue sustenance fishing. *See* 81 Fed. Reg. 23239, 23241–2 (Apr. 20, 2016). In its 2015 disapproval letters, "EPA requested that the state revise its water quality standards to address the issues identified in the disapprovals. . . . EPA disapproved Maine's HHC for toxic pollutants based on EPA's conclusion that they do not adequately protect the health of tribal sustenance fishers in waters in Indian lands." *Id.*

> The two categories of Maine waters to which EPA's April 20 proposed rule would apply would extend the geographic scope of the Indian sustenance fishing right well beyond the "within their reservations" limitation contained in the Settlement Acts.

"Indian lands" is not a term used in the Settlement Acts, and EPA did not define "Indian lands" in its decision. Also, interestingly, and without explanation, EPA applied its decision to all four Maine tribes (the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs), even though the Settlement Acts extend sustenance fishing rights only to the Penobscot Nation and the Passamaquoddy Tribe.

The EPA decision set up two sets of standards, one for waters "in Indian lands" (wherever this may be) and another for the rest of the state. Contrast this position with the language of the Settlement Acts themselves, which provide that "all Indians . . . and any lands or other natural resources owned by them [or] held in trust for them . . . shall be subject to the laws of the State . . . to the same extent as any other person or lands or other natural resources therein." 30 M.R.S. § 6204. "Land or other natural resources" means "any real property or other natural resources . . . , including, but without limitation . . . water and water rights and hunting and fishing rights." 30 M.R.S. § 6203(3).

Notably, EPA had already approved Maine's human HHC for all non-Indians, concluding that they are sufficiently protective of human health. In fact, Maine's criteria are at least as stringent as HHC in other states, and when the Maine Department of Environmental Protection adopted its HHC, it made those criteria more stringent in recognition of the fact that some Indians may engage in sustenance fishing. For that reason, Maine increased its assumed fish consumption rate to 32.4 grams per day (gpd), which is a higher fish consumption rate than most states use (17.5 gpd), and Maine uses a risk level of 10^{-6}, which is ten times more protective than the risk level used in many states (10^{-5}). These two considerations mean that Maine's waste discharge limits are among the most stringent in the country.

In the wake of EPA's decision, Maine amended its pending *Maine v. McCarthy* lawsuit against EPA, asking the court to set aside EPA's disapproval of Maine's water quality standards and to declare that all of Maine's water quality standards that EPA approved for non-Indian waters are also required to be approved for Indian waters. That case is still pending.

On April 20, EPA went further, proposing federal HHC that would apply to certain waters in Maine in place of the Maine standards EPA disapproved in February 2015. 81 Fed. Reg. 23239 (Apr. 20, 2016). Aside from proposing the most conservative risk assessment factors possible, EPA did not clearly define the geographic scope of its rule. Support documents accompanying the proposed rule noted that the rule would apply to (1) "waters in Indian lands," which include waters within or adjacent to the boundaries of Indian reservations or Indian trust lands, and (2) waters outside Indian lands where the designated use of sustenance fishing may apply, based on Judge Singal's *Penobscot Nation v. Mills* ruling. Taken together, these two categories would extend the geographic scope of the Indian sustenance fishing right well beyond the "within their reservations" limitation contained in the Settlement Acts.

No End in Sight?

It may be appropriate to amend the Settlement Acts if that is what elected officials want, understanding the ramifications relating to Maine's economy, and if they do so clearly in legislation. But costly, continual, federally funded litigation is not the appropriate forum for this debate. Similarly, unless or until the Settlement Acts are amended, federal agencies should follow the terms of the settlement, should not enter into secret agreements to thwart transparency, and should not fund efforts to undermine a state's sovereign rights as established by Congress.

Hope springs eternal. Perhaps the court's decision in *Penobscot Nation v. Mills* will at least help to bring finality and closure. This matter was settled 35 years ago. At some point litigation should cease, and the federal executive branch should comply.