Testimony of Matt Manahan
In Regard to L.D. 2094
An Act to Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act
February 14, 2020

Chair Carpenter, Chair Bailey, and members of the Judiciary Committee, my name is Matt Manahan. I represent a coalition of municipalities, sanitary and sewer districts, and companies that have deep concerns about the potential ramifications of this bill, especially with respect to displacing the State's jurisdiction to regulate land and natural resources. A list of our coalition members is attached to my written testimony. Unfortunately, we were excluded from participation on the Task Force that made these recommendations.

Rather than making the Maine Implementing Act (MIA) clearer, we believe L.D. 2094 will create more confusion and disagreement, resulting in more litigation and expense for all parties involved. By way of background, I am including with my written testimony a copy of an article I co-authored several years ago, summarizing the genesis of the Settlement Acts and some of the Tribes' efforts over the years to displace State regulation of natural resources. You will note that at the end of the article I wrote that it may be appropriate to amend the Settlement Acts, but that in doing so we must first understand the ramifications relating to Maine's economy and make sure that any legislation amending the Settlement Acts is clear. Our concern is that this legislation is unclear and too broad and completely guts the delicate balance the Settlement Acts have achieved over the last 40 years, including through litigation. This will result in yet more litigation and another spiral into legal uncertainty.

L.D. 2094 proposes to significantly alter the relationship between the Tribes and the State. With respect to regulation of natural resources:

- Section 4 would repeal Section 6204 of the MIA, which provides that State laws apply to tribal lands and natural resources.
- Section 5 would add a new provision to the MIA, Section 6205(6), which would allow acquisition of new trust land anywhere in the State at any time in the future, without consent from the municipality where that land is located. State environmental law would not apply to those new Tribal lands.
- Section 6 would do the same for Houlton Band lands.
- Section 7 would repeal the provision in MIA Section 6206(1) that gives the Penobscot Nation and the Passamaquoddy Tribe the powers of municipalities but also subjects them to the laws of the State.
- Section 10 would amend MIA Section 6207(4) to expand the Tribes' sustenance fishing right beyond their reservation land to include all trust lands.
- Section 11 would give the Tribes the authority to regulate natural resources and land use on their tribal lands, including newly acquired trust lands.
- Section 23 would give the Tribes civil legislative jurisdiction over non-Indians within their tribal lands, including with respect to the regulation of natural resources. The Penobscot Nation has argued that the Penobscot River and other state waters are part of their reservation, so they would seek to regulate and restrict non-Tribal uses of the river.

- Section 24 seeks to render ineffective two provisions in the federal Maine Indian Claims Settlement Act that make it possible for the State of Maine to apply a uniform set of environmental laws on all land within the State, including Tribal land. Federal laws that affect or preempt Maine's regulatory jurisdiction do not apply in Maine, but this language would allow such laws to apply in Maine. So, for example, the Tribes could 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.

Together, these provisions would allow the Tribes to create their own environmental regulations separate from the State's environmental laws and regulations, and the Tribes would not be subject to the State's laws. This dual system of environmental regulations would present a real risk that Maine municipalities, companies, and citizens could be subject to regulation by the Tribes. The Penobscot Nation has argued that its reservation includes the entire bed and banks of the Penobscot River and its tributaries and branches, including portions of the river within the municipal boundaries of upstream towns. The courts have so far rejected that argument, but the Penobscot Nation and the Department of the Interior have asked the First Circuit Court of Appeals to reconsider that ruling, so it's not yet final.

If the First Circuit decides the Penobscot Nation's reservation includes any portion of the Penobscot River, these proposed amendments would allow the Tribe to regulate uses of the entire river without State oversight. And even if the First Circuit decides (again) that the Penobscot Nation's reservation does not include any portion of the river, these proposed amendments would allow the Penobscot Nation, or any other Maine Tribe, to add land beneath the Penobscot River to its territory and then to regulate the uses of that land and water without State oversight. So it's an end run around all the court cases over the past 40 years.

In addition, if a Tribe adds land beneath a river to its territory, and EPA grants TAS status to the Tribe (as would be allowed by this bill), that Tribe could argue that towns and businesses that discharge into the river at an upstream location and have DEP permits to do so must also comply with the Tribe's water quality standards, even if it costs millions of dollars to comply with those standards. That's what happened in a 1996 federal court case involving the City Albuquerque wastewater treatment plant, which had to comply with a downstream tribal water quality standard that was 1,000 times stricter than the federal Safe Drinking Water standard. *City of Alburquerque v. Browner*, 865 F. Supp. 733 (D.N.M. 1993), *aff'd* 97 F.3d 415 (10th Cir. 1996).

The Tribes would have the authority to set water quality standards without considering nontribal members' comments or economic interests. As I noted in my article, the Penobscot Nation has previously sought TAS status and prepared water quality standards. Among the draft water quality standards was the requirement that a discharger use the "highest and best degree of wastewater treatment practicable," which the Penobscot Nation recognized may be more protective, and costly, than what is required by the State of Maine.

Dual water quality standards would also create compliance burdens and confusion. Any person who wants to conduct an activity (such as removing a dam, doing bridgework, or building a road) that could result in the discharge of sediment into Tribal waters would have to obtain a permit both from the United States and from the Tribe.

The expansion of Tribal jurisdiction and territory, in place of Maine's jurisdiction, would make it likely that the Tribe, the State, and regulated dischargers, such as the coalition of Maine towns and companies that I represent, would become embroiled in further disputes over the extent to which discharges into waterways affect Tribal waters. The fact that the bill would give the Tribes unfettered authority to acquire additional trust land creates an even greater likelihood of future conflicts over regulatory authority surrounding ever-shifting boundaries of Tribal waters.

If you amend the MIA now and later find out that the amendments have created a jurisdictional nightmare, and that the State has lost control of its environmental destiny, you cannot simply repeal or revise the amendments. Section 6(e)(1) of the federal Maine Indian Claims Settlement Act allows for amendments to the MIA, but only if both the State and the tribes agree. 25 U.S.C. § 1725(e)(1).

In closing, I want to say a few words about the historic nature of the 1980 Settlement Act and what it accomplished for both the State of Maine and for the Tribes. The Settlement Act was hotly negotiated by the State and the Tribes, and it was a compromise that established a unique relationship between the Tribes and the State unlike that between any other tribes and states in the country. The settlement gave the Tribes federal recognition, 300,000 acres of land, and over $81 million (over $250 million in today's dollars). At the same time, the settlement also recognized the State's interest in having its laws, including specifically those dealing with the environment and natural resources, apply uniformly throughout Maine. This was very important to the State and is a fundamental underpinning of the Settlement Act.

L.D. 2094 would disregard the State's legitimate interest in having a uniform system of environmental laws that apply throughout the State and result in many more decades of contentious litigation to resolve new disputes about the scope of tribal authority to displace Maine's authority. At a minimum, given the many uncertainties about the potential effect of the bill, the Attorney General's Office should be given time to thoroughly analyze its potential effects and report back to you before you move forward. Thank you, and I would be happy to answer your questions.

MAINE NATURAL RESOURCES JURISDICTION COALITION MEMBERS
February 14, 2020

Baileyville, Town of
Calais, City of
Dover-Foxcroft, Town of
Duvaltex (aka True Textiles)
East Millinocket, Town of
Guilford-Sangerville Sanitary District
Howland, Town of
Kruger Energy (USA) Inc.
Lincoln Sanitary District
Lincoln, Town of
Mattawamkeag, Town of
Millinocket, Town of
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.