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VIA ELECTRONIC PORTAL
https://www.mainelegislature.org/testimony/

Senator Anne Carney, Chair
Representative Matt Moonen, Chair
Committee on Judiciary
100 State House Station, Room 438
Augusta, ME 04333

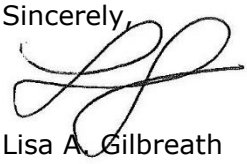
Re: LD 2007, An Act to Advance Self-determination for Wabanaki Nations

Dear Senator Carney, Representative Moonen, and honorable members of the Committee on Judiciary:

On behalf of a coalition of municipalities and sanitary and sewer districts that have a strong interest in ensuring that the State maintains jurisdiction over Maine's natural resources, please find attached a Law Review article titled *The Maine Indian Claims Settlement Acts: Ensuring Consistent Application of Environmental Laws.*

Thank you for your consideration.

Sincerely,



Lisa A. Gilbreath

Enclosure

The Maine Indian Claims Settlement Acts: Ensuring Consistent Application of Environmental Laws

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Introduction

In most regions of the United States, control over natural resources vis-a-vis American Indian tribes is addressed at the federal level. Maine, however, is not like other states, due to the geographic dispersion of tribal lands within the State. This unique patchwork of lands resulted in a unique state-tribal jurisdictional relationship embodied in the comprehensive and global 1980 Settlement Acts, in which there was no interference with the tribes' self-governance but in which the State retained the regulatory authority to apply environmental laws uniformly across Maine.

This article examines the history and intent of the jurisdictional provisions of the Maine Implementing Act ("MIA"), 30 M.R.S. §§ 6201, *et seq.*, and the Maine Indian Claims Settlement Act of 1980 ("MICSA"), 25 U.S.C. §§ 1721, *et seq.* (collectively, the "Settlement Acts"), and presents two case studies in which the State's uniform application of environmental laws within its boundaries was challenged but nevertheless withstood judicial scrutiny. Further challenges that would jeopardize the delicate jurisdictional balance required for such consistent application of environmental laws not only are unnecessary, because the Settlement Acts have achieved that result for over fifty years, but would risk further disruptive litigation and a loss of the benefits of the current system. At risk is not only a future of patchwork environmental regulation, but a loss of municipal territory and sovereignty. Accordingly, while targeted amendments to address specific concerns may be appropriate, they must be carefully considered and crafted so as to maintain the negotiated framework unique to Maine, which the Native American Rights Fund called "far and away the greatest Indian victory of its kind in the history of the United States." *Penobscot Nation v. Frey*, 3 F.4th 484, 500 (1st Cir. 2021), *cert. denied sub nom. United States v. Frey*, 142 S. Ct. 1668, 212 L. Ed. 2d 578 (2022), and cert. denied, 142 S. Ct. 1669, 212 L. Ed. 2d 578 (2022).

The Settlement Acts

More than fifty years ago, the Passamaquoddy Tribe and Penobscot Nation brought claims against the U.S. Department of the Interior ("DOI") challenging tribal land transfers that had occurred after 1790 and asked the court to require DOI to file suit against the State of Maine for the return of the tribes' aboriginal lands. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1972), *aff'd sub nom. Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). The tribes argued that certain treaties between the tribes and the states of 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. The trial court found in favor of the tribes, holding that the Nonintercourse Act created a trust relationship between the federal government and the tribes, although the court did not

address the jurisdictional implications of its decision. The First Circuit Court of Appeals upheld that decision. *Id.*

While the *Morton* decision was limited, holding that the Nonintercourse Act applied to Maine transfers and created a trust relationship between the United States and the tribes without addressing the jurisdictional implications of this holding, those implications were troubling for the State of Maine because the tribes were claiming ownership of two-thirds of the land in 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. The State was poised to settle. S. Rept. 96-957, 12-14; H. Rept. 96-1353, 12-14.

The Penobscot Nation, Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians appointed a Joint Tribal Negotiating Committee, chaired by Andrew Atkins and supported by attorney Thomas Tureen of the Native American Rights Fund, to lead the negotiations. Also assisting the tribes in their negotiations with the State were former Solicitor General of the United States Archibald Cox (then a professor at Harvard Law School) and the Washington, D.C. law firm of Hogan & Hartson. Maine was represented in the negotiations by the Attorney General's Office, attorney James St. Clair, and the law firm of Ropes & Gray.

During the course of these negotiations, the issue of state-tribal jurisdiction came to a head in two cases, *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061 (1st Cir. 1979) and *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 444 U.S. 1098 (1980), forcing the State to pursue clarity in its ability to enforce state laws over the widely dispersed lands to which the tribes were laying claims.

In 1980, these claims were resolved in the complementary Settlement Acts, which gave the Maine tribes federal recognition, 300,000 acres of land, and over $81 million (over $250 million in today's dollars) in exchange for settling the tribes' land claims against the State. At the core of the settlement, as Mr. Tureen of the Native American Rights Fund explained, was each party's understanding of the other's priorities.

> Both sides began to attempt to understand and to the greatest extent possible, accommodate the needs of the other. For the State, this meant, among other things, understanding the Tribes' legitimate interest in managing their internal tribal affairs, in exercising tribal powers in certain areas of particular importance such as hunting and fishing, and securing basic Federal protection against future alienation for lands to be returned to the Settlement. For the Indians it meant, among other things, understanding the legitimate interests of the State in having basic laws such as those dealing with the environment apply uniformly throughout Maine. [Transcript of Joint Select Committee on Indian Land Claims of the Maine Legislature ("Joint Legislative Committee Hearing") at 25 (Mar. 28,

1980).]

Lauded by the Native American Rights Fund as "far and away the greatest Indian victory of its kind in the history of the United States," the principal terms of the settlement included both the elimination of the State's claim of the right to interfere in tribal government (30 M.R.S. § 6206(1); Section 7(a) (25 U.S.C. § 1726(a)) and congressional approval of the MIA's state-tribal jurisdictional framework (Section 2(b)(1)-(4); 25 U.S.C. § 1721(b)(1)-(4); Section 4(a)-(d); 25 U.S.C. § 1725(a)-(d)). *See Penobscot Nation v. Frey*, 3 F.4th 484, 500 (1st Cir. 2021), *cert. denied sub nom. United States v. Frey*, 142 S. Ct. 1668, 212 L. Ed. 2d 578 (2022), *and cert. denied*, 142 S. Ct. 1669, 212 L. Ed. 2d 578 (2022). As the First Circuit noted, "Each party benefitted from the settlement. The [Penobscot] Nation in many respects gained the powers of a municipality under Maine law. '[T]he Settlement Act confirmed [the Nation's] title to designated reservation lands, memorialized federal recognition of its tribal status, and opened the floodgates for the influx of millions of dollars in federal subsidies.'" *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997), quoting *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996).

Indeed, the Settlement Acts enabled the tribes to secure, in the aggregate, the greatest tribal land holdings east of the Mississippi River. As Andrew Akins, Chairman of the Joint Tribal Negotiating Committee and member of the Penobscot Nation, explained to the Joint Select Committee of the Maine Legislature on Indian Lands ("Joint Select Committee"),

> The Settlement Agreement is the product of many years of work between the State and Indian leaders. The general members of the two tribes have in good faith passed and approved the agreements and we will, I might add, uphold our parts of it. [Transcript of Joint Select Committee at 27 (Mar. 28, 1980).]

In his testimony supporting Senate passage of H.R. 7919, Maine Senator George J. Mitchell observed, "I was not involved in the development of the compromise embodied in the legislation before us. But I know that the State of Maine, the landowners in Maine and the Indian tribes were all represented ably and vigorously, and I am confident that the proposal before us represents their best and honest judgment regarding the resolution of this difficult matter." Congressional Record, p. 26888 (Sept. 22, 1980).

Noting that this "complex scheme required very careful consideration and some redrafting to assure a comfortable fit with ongoing Federal Indian programs and existing Federal laws in the many areas involved in the settlement scheme," Senator Mitchell concluded,

> Some may take issue with some parts, or even all of the settlement package embodied in this bill. Anyone who does has had full opportunity to raise questions and challenge any provision. No one can argue that all interests were not heard and considered, and no one has come forward with a practical alternative. [*Id.*]

In fact, it was the tribes' intent upon reaching settlement that the Settlement Acts should not be upset by later changes in the law, as reflected in Attorney Tureen's responses to Senator William

S. Cohen, Ranking Minority Member of the Senate Select Committee on Indian Affairs,

> SENATOR COHEN: This committee has received a letter, which I mentioned earlier today, from Robert Coulter of the Indian Law Resource Center, advising that the Penobscot and Passamaquoddy Tribes should be allowed to reassess the settlement package in light of the United States [Supreme Court] June 10, [1980] decision in *Washington v. Confederated Tribes of the Colville Indian Reservation* [, 447 U.S. 134 (1980)] and a decision that came down last Friday, *White Mountain Apache* [*Tribe*] v. *Bracker* [, 448 U.S. 136 (1980)].
>
> Do you agree with that suggestion made by Mr. Coulter?
>
> MR. TUREEN: No. I read both of those opinions, but, aside from whatever they say, I do not know how one could enter into negotiations with another party who took the position that every time the Supreme Court handed down another case, the matter should be reopened. That is what negotiation is. At a particular point in time you reach an agreement, and if you are bargaining in good faith, that is what you do.
>
> SENATOR COHEN: Then if you have reached your settlement with the State which you feel is fair and reasonable, even though other cases might be cascading down that would make your case appear to be stronger, you do not feel it would be responsible or appropriate to reconsider it at this point?
>
> MR. TUREEN: We have negotiated in good faith. We assume the other side has, and it would preclude that type of behavior.

[Hearing on S. 2829, Senate Select Committee on Indian Affairs ("Senate Indian Affairs Hearing") at 183 (July 1, 1980).]

The resulting, comprehensive settlement, agreed to by the United States, the State of Maine, the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians, was enacted by the Maine Legislature on April 3, 1980 (MIA) and signed into law on October 10, 1980 (MICSA) by President Jimmy Carter at a ceremony attended by representatives of the State, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, among others. 25 U.S.C. §§ 1721*, et seq*.

Unique Settlement to Address Unique Maine Tribal Lands

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 up to that point, with the tribes "subject to all laws of the State of Maine." *Id.* § 1721(b)(4). 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). To do so, the Settlement Acts gave the State of Maine criminal and civil – including environmental – jurisdiction over Maine tribal 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.

This unique state-tribal jurisdictional framework established an arrangement unlike what exists in western states, where state laws are generally not applicable to tribes or tribal lands. That is because Maine tribal lands are unlike what exists in western states.

The MIA granted the Passamaquoddy and Penobscot tribes the right to acquire in trust up to 150,000 acres of non-contiguous lands scattered over central and northern Maine. 30 M.R.S. § 6205(1) (Passamaquoddy Indian Territory); 30 M.R.S. § 6205(2) (Penobscot Indian Territory). Because of the unique land acquisition authority that no other tribes in the nation enjoy, which has resulted in the scattered nature of these settlement lands, the State made clear during negotiations its "legitimate interests of the State in having basic laws such as those dealing with the environment apply uniformly throughout Maine," as acknowledged by Mr. Tureen of the Native American Rights Fund. Tureen, Transcript of Joint Select Committee at 25 (Mar. 28, 1980). Anything to the contrary would result in a patchwork of different and potentially competing, adjacent jurisdictions (which are not fixed and continue to evolve) spread across the State.

Accordingly, except as to "internal tribal matters," under the Settlement Acts Maine's tribes are subject to Maine law and have the same governmental authority as a Maine municipality. Recently, however, this central element of the Settlement Acts – the state-tribal jurisdictional framework – has been challenged by proposed state and federal legislation.

Rights Reserved to Maine's Southern Tribes

The Settlement Acts reserved expansive rights to Maine's tribes that are identical or similar to those available to Indians across the country. These rights include, without limitation, the powers of Maine municipalities, that is, the ability to exercise, by the adoption, amendment or repeal of ordinances or bylaws, any power or function which the Maine Legislature has not denied either expressly or by clear implication, and the right to issue bonds to promote economic development. The State may not interfere in, or otherwise restrict, any internal tribal matters or the regulation thereof.

Expressly guaranteed in MICSA Section 6(i) is the eligibility of "the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians . . . to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians." 25 U.S.C. § 1725(i). That section goes on to mandate that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians "shall be treated in the same manner as other federally recognized tribes." *Id.*

The only exception to the general applicability of the laws and regulations of the United States are those that affect or preempt the civil, criminal, or regulatory jurisdiction of the State of Maine, "including, without limitation, laws of the State relating to land use or environmental matters," which laws "shall apply within the State." 25 U.S.C. § 1725(h). If a federal Indian law would not "affect or preempt" the state-tribal jurisdictional agreement it applies in Maine. This is the sole limitation on the application of federal Indian laws in Maine.

MICSA Section 6(b) marries these two concepts – the mandate that the Maine tribes must be treated the same as other federally recognized tribes and the retention of state authority to apply environmental laws in tribal lands – stating as follows:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed . . . .
>
> Nothing in this section shall be construed to supersede any Federal laws or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine unless expressly provided by this subchapter.

[25 U.S.C. § 1725(b)(1), (3).]

What's more, the construction provisions of MICSA make clear that any federal law enacted for the benefit of Indians, Indian nations, or tribes or bands of Indians, may be made specifically applicable within the State of Maine, even if they affect or preempt Maine's jurisdiction. Accordingly, Congress retained the authority to ensure that federal laws enacted post-MICSA would apply to the Maine tribes simply by expressly providing that such law applies in Maine as well as elsewhere. 25 U.S.C. § 1723(b).

In other words, along with other federally recognized tribes, Maine's tribes are eligible for benefits under pre- and post-Settlement Act federal laws and programs relating to Indian housing, Indian health, tribal law enforcement, housing, environmental management, Indian education, tribal governmental administration, and other such programs as long as they do not affect state jurisdiction.

Furthermore, and unlike other federally recognized tribes, Maine' tribes were afforded the powers of (and funding that flows to) a municipality. As expressly recognized in the reports that the House Interior and Insular Affairs Committee and Senate Indian Affairs Committee issued when they reported MICSA to the Senate and House of Representatives, MIA Section 6206(1) granted the Passamaquoddy Tribe and the Penobscot Nation the expansive powers and immunities of Maine municipalities which, under Article VIII of the Maine Constitution, have the right of "home rule." S. Rept. 96-957 at 15; H. Rept. 96-1353 at 15. Maine statute authorizes municipalities to "exercise any function or power which the Legislature has the power

to confer upon it, which is not denied expressly or by clear implication, and exercise any power or function granted to the municipality by Constitution of Maine, general law or charter." 30-A M.R.S. § 3001(1). Unlike tribes outside of the State, this position ensures that the Maine tribes are eligible to receive all forms of state funding that flow to municipal governments. S. Rept. 96-957 at 40-54.

Where Congress fails to expressly provide that a law intended to benefit American Indians applies in Maine – such as in the Violence Against Women Act ("VAWA"), the Indian Gaming Regulatory Act ("IGRA"), and the Stafford Act (allowing tribes to apply directly for disaster relief monies from the Federal Emergency Management Agency) – targeted legislative fixes are available. *See, e.g*., Subcommittee Hearing, Testimony of Claire Sabattis, Chief, Houlton Band of Maliseet Indians (Mar. 31, 2022); Subcommittee Hearing, Testimony of Kirk E. Francis, Chief, Penobscot Nation, on H.R. 6707 (Mar. 31, 2022).

Indeed, targeted lawmaking is working. On March 18, 2020 Governor Mills signed into law L.D. 766, *An Act Regarding the Penobscot Nation's and Passamaquoddy Tribe's Authority To Exercise Jurisdiction under the Federal Tribal Law and Order Act of 2010 and the Federal Violence Against Women Reauthorization Act of 2013*, to transfer from the State to the tribes jurisdiction over violation of a tribal ordinance by a person who is not a tribal member and to clarify the concurrent jurisdiction of the Penobscot Nation over criminal offenses as authorized by VAWA. On May 2, 2022, Governor Mills signed into law L.D. 585, *An Act To Enhance Tribal-State Collaboration, To Revise the Tax Laws Regarding the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and To Authorize Casinos, Off-track Betting Facilities, Federally Recognized Indian Tribes and Certain Commercial Tracks To Conduct Sports Wagering*. This unprecedented tribal legislation, intended to address economic and financial issues while also making institutional changes in how state government interacts with Maine tribes, makes Maine one of only a few states to put into law a formal state-tribal collaboration process for policy making.

With respect to VAWA, the State has clarified through legislation that there is concurrent jurisdiction with the State over criminal offenses as authorized by VAWA, and Congress added the Maine tribes to VAWA with no objection from the State of Maine. *See* 30 M.R.S. § 6206 (2023); *see also* Violence Against Women Act Reauthorization Act of 2022, S. 3623 117th Congress.

Creation of a State Within a State and Impact on Environmental Law

While it may be appropriate to amend the Settlement Acts to streamline the application of federal laws intended to benefit all American Indians, doing so must be in a targeted fashion so as not to upset the heavily negotiated state-tribal jurisdictional framework that supports consistent application of environmental laws across the State.

Under the Settlement Acts, Maine tribal lands and natural resources – defined to include water and water rights – are fully subject to the laws of the State to the same extent as any other land and natural resources. 25 U.S.C. § 1725(b)(1); 25 U.S.C. § 1722(b); 30 M.R.S. § 6203(3); 30 M.R.S. § 6204; 30 M.R.S. § 6206(1); *see also Great Northern Paper, Inc. v. Penobscot Nation*,

2001 ME 68, ¶ 54-55. In exchange for agreeing to these unique jurisdictional provisions of the MICSA and the MIA, the tribes achieved not only authority similar to Maine municipalities but, in addition, confirmation that the State cannot regulate "internal tribal matters." 25 U.S.C. § 1725(b)(1); 30 M.R.S. § 6204.

The jurisdictional provisions of the Settlement Acts are intended to prevent a patchwork of varying environmental and land use laws across the State. In other words, the negotiating parties set up the state-tribal jurisdictional framework to avoid creating a "state within a state" by making state environmental laws applicable to Maine tribal lands.

Without this framework, if Maine tribes were to be treated as a state for purposes of creating standards and administering licensing, the regulated community would be forced to comply with different sets of environmental laws and standards in a patchwork of locations across the State. Indeed, the Penobscot Nation and Passamaquoddy Tribe have already sought "treatment as a state" ("TAS") status pursuant to Section 518 of the Clean Water Act ("CWA"), which generally authorizes Indian tribes to be treated as states for certain purposes, including for purposes of administering their own waste discharge licensing programs. Federal Water Pollution Control Act, 33 U.S.C. § 1377(e) (2023). This is despite the legislative history of Section 518, which expressly states Congress's intention that the Maine tribes "are not eligible to be treated as States for regulatory purposes." 133 Cong. Rec. H131 (daily ed. Jan. 7, 1987), *reprinted in* 1987 U.S.C.C.A.N. 5, 43. Nor is the regulation of water resources that would be authorized by TAS authority "internal tribal matters" – the area of self-control not subject to state regulation under the terms of the Settlement Acts – as determined by the First Circuit Court of Appeals. *Maine v. Johnson,* 498 F.3d 37, 46 (1st Cir. 2007).

The creation of such states within a state is plainly contrary to the delicate state-tribal jurisdictional framework negotiated in the Settlement Acts, the repeal of which would have a devastating effect on the consistent application of environmental law. A few case studies demonstrate that, despite clear language in the Settlement Acts, the tribes have attempted, unsuccessfully, to challenge the State's ability to consistently apply such law on several occasions. Amending this delicate framework would upset this well-settled and effective legal construct and go against the intent of the Settlement Acts.

A. Case Study: NPDES Applications and First Circuit Cases

In November 1999, the State of Maine submitted an application to EPA seeking National Pollutant Discharge Elimination System ("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 property acquired by DOI in trust for the tribes.)

The CWA 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(6). The EPA administrator "shall approve each submitted program unless he determines that adequate authority does not exist." *Id.*

The tribes in Maine objected to Maine's application, saying they thought the federal government should retain oversight in tribal lands because 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 NPDES 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 Passamaquoddy Tribe and Penobscot Nation, but EPA inserted a gaping hole in that authorization – discharges that EPA determined were disputed would not be subject to state permitting because those facilities qualified 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 disapproving of Maine's water quality standards if they are not adequately protective of tribal uses.

The State of Maine, the Passamaquoddy Tribe, and the Penobscot Nation all 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 under the Settlement Acts 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). In its decision, the First Circuit focused on the plain language and legislative history of the Settlement Acts, to find that in exchange for the benefits the tribes received under the Settlement Acts, the tribes agreed to be subject to Maine law, with limited exceptions that do not include environmental regulation. *Id.* at 41-42.

Years later, in *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Me. 2015), the TAS issue – and the corollary ability of the State to regulate without tribal interference – arose again when the Penobscot Nation brought suit arguing that its reservation includes much of the Penobscot River and thus that it has governmental authority over those portions of the River. *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Me. 2015), *aff'd in part, vacated in part,* 861 F.3d 324 (1st Cir. 2017), *reh'g en banc granted, opinion withdrawn sub nom. Penobscot Nation v. Frey*, 954 F.3d 453 (1st Cir. 2020), and *on reh'g en banc sub nom. aff'd in part, vacated in part sub nom. Penobscot Nation v. Frey*, 3 F.4th 484 (1st Cir. 2021).

The impetus for the case dates to August 2012, when 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 jurisdiction over that portion of the river. The Penobscot Nation asserted that it retained aboriginal title to the waters and riverbed of the Main Stem. As a result, it claimed that the boundaries of the Penobscot Nation reservation are actually the riverbanks 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 basis for that position was that the Penobscot Nation has authority to regulate all activities on the Penobscot River.

A coalition of towns and businesses that hold NPDES waste discharge licenses authorizing wastewater discharges into the Penobscot River or its branches and tributaries intervened to support 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, then all discharges into the Main Stem would be subject to Penobscot Nation water quality standards, which could be different from those of the State. The tribal-DOI suit could have also redrawn the territorial borders for riparian municipalities.

In December 2015, after three years and voluminous discovery, the District Court held that the Penobscot Nation reservation does not include any portion of the Penobscot River, only the islands themselves, but found that the Penobscot Nation had sustenance fishing rights in the Main Stem of the Penobscot River. In July 2021, the First Circuit Court of Appeals affirmed the District Court's holding that the Penobscot Nation's reservation does not include any portion of the Penobscot River but vacated the District Court's holding that the Penobscot Nation has

sustenance fishing rights in the Main Stem of the Penobscot River, finding that the sustenance fishing claim was not ripe. The First Circuit affirmed the District Court's holding regarding the Penobscot Nation reservation boundaries on the basis of the plain language of the Settlement Acts, although the court also found that legislative history supports this reading. *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Me. 2015), *aff'd in part, vacated in part,* 861 F.3d 324 (1st Cir. 2017), *reh'g en banc granted, opinion withdrawn sub nom. Penobscot Nation v. Frey*, 954 F.3d 453 (1st Cir. 2020), and *on reh'g en banc sub nom. aff'd in part, vacated in part sub nom. Penobscot Nation v. Frey*, 3 F.4th 484 (1st Cir. 2021).

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). Under this language, the court held

> Because the Reservation's definition excludes any definition that is not stated . . . because it does not say that it includes the River or its submerged lands, and because the Supreme Court has said that "'[s]olely' means 'alone,'" . . . and that "'[s]olely' leaves no leeway" for anything more . . . the Reservation includes only the specified islands and not the Main Stem of the River or its submerged lands. *Frey,* 3 F.4th at 492.

In other words, "islands" means islands. In the wake of the *Mills* decision, the Penobscot Nation cannot regulate nontribal discharges to the river, or other activities in and on the river, because it does not have Penobscot River waters within its jurisdiction where its water quality standards might apply.

Taken together, *Mills* and *Frey* are a testament of the longevity of the state-tribal jurisdictional relationship set forth in the Settlement Acts. In both *Mills* and *Frey*, the First Circuit upheld and affirmed the state-tribal jurisdictional relationship, relying on the plain language and intent of the Settlement Acts to do so.

B. Case Study: The Long, Tortured History of Maine's Water Quality Standards

Notwithstanding the First Circuit's ruling in *Johnson* that the State, not Maine tribes, regulates water quality under the Settlement Acts, and in light of multiple tribal applications for TAS authority, for nearly a decade EPA refused to approve Maine's water quality standards for any waters within Indian Territory. EPA simply refused to take any action on those standards. To force EPA's hand, the State brought suit against EPA in 2014. *Maine v. McCarthy,* Civ. No. l:14-cv-00264 (D. Me. filed July 7, 2014). This case, like *Johnson* and *Mills*, involved a challenge to the state-tribal jurisdictional framework of the Settlement Acts, but this time by a federal agency.

Over the course of that suit, EPA conceded that Maine has authority to establish water quality standards for tribal lands, but nevertheless disapproved some of Maine's human health criteria ("HHC"), asserting that they are not sufficiently protective of tribal sustenance fishing. In its

2015 disapproval letters regarding Maine's water quality standards, EPA explained that it wanted Maine to rewrite its 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. 81 Fed. Reg. 23239, 23241-2 (Apr. 20, 2016). EPA disapproved Maine's HHC for toxic pollutants based on its conclusion that they do not adequately protect the health of tribal sustenance fishers in waters in Indian lands. *Id.* This was despite the fact that EPA had already approved Maine's HHC for all non-Indians, concluding that they are sufficiently protective of human health. In fact, when the Maine Department of Environmental Protection ("DEP") adopted its HHC, it made those criteria more stringent in recognition of the fact that some tribal members 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.

This EPA decision set up two sets of standards, one for waters "in Indian lands" (an undefined term) and another for the rest of the State. This is precisely what the Settlement Acts intended to avoid, providing 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).

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. In January 2017, while the case was still pending, EPA adopted a 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. Supporting 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 U.S. District Court Judge George 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.

After extensive negotiation with the State of Maine, in July 2018 EPA reversed its position, requesting that *Maine v. McCarthy* be remanded back to EPA so that it could revise its disapproval of Maine's water quality standards. The District Court granted EPA's remand request, without objection, in December 2018.

In 2019, Governor Mills signed into law L.D. 1775, *An Act to Protect Sustenance Fishing*, P.L.

2019, ch. 463 (effective Sept. 19, 2019). The Act created a new, expressly defined "sustenance fishing designated use" within Maine's water classification program and required DEP to adopt rules no later than March 1, 2020, that calculated and established water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use. 38 M.R.S. §§ 466(10-A), 466-A. On November 6, 2019, EPA approved Maine's sustenance fishing designated use subcategory and the waters to which it applies and issued a notice announcing its intention to withdraw its 2015 decisions under the CWA.

In its 2019 notice, EPA found that it lacked statutory authority to recharacterize the State's general fishing designated use to mean sustenance fishing. 38 M.R.S. §§ 466(10-A), 466-A. The EPA also noted that it was inappropriate and unnecessary to reinterpret Maine's fishing use to mean sustenance fishing in an effort to harmonize the Settlement Acts and the CWA. EPA also indicated that it would not treat the MIA provision of certain sustenance fishing rights as a "water quality use goal" that EPA must review under the CWA, and that it had previously erred by interpreting the MIA to represent a sustenance fishing designated use for reservation waters. Finally, the notice also indicated that EPA would approve Maine's "fishing" designated use without interpreting it to mean "sustenance fishing," and that it would withdraw its 2015 disapprovals of human health criteria for waters in Indian lands because the disapprovals were based on the sustenance fishing designated use decisions that EPA was seeking to withdraw.

Conclusion

These case studies demonstrate that, while the state-tribal jurisdictional framework that has been in place for almost half a century has been challenged by both Maine's tribes and the federal government, it has withstood judicial scrutiny. That is because – at least in the context of consistent application of environmental law – it is an effective arrangement that works for Maine's tribes, the State, and Maine citizens. Efforts to upset the delicate jurisdictional balance would have a direct effect not only on the tribes' relationships with the State, but also on nontribal members of the public outside the borders of tribal lands. As the Maine Law Court has noted, the relationship between the State and the Maine tribes ensuring such uniform regulation "is a matter of the legitimate interest of the citizens of this state." *Great Northern Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 55, 770 A.2d 574, 590. Accordingly, while targeted amendments to address specific concerns may be appropriate, they must be carefully considered and crafted so as to not upset the framework that has ensured uniform and effective environmental regulation in Maine since 1980.