

**TESTIMONY OF KAIGHN SMITH JR., ESQ.,
COUNSEL FOR THE PENOBSCOT NATION
ON AN ACT TO IMPLEMENT THE RECOMMENDATIONS OF THE
TASK FORCE ON CHANGES TO THE MAINE INDIAN CLAIMS
SETTLEMENT IMPLEMENTING ACT
(L.D. 2094)**

**FISH AND GAME AND LAND USE AND NATURAL RESOURCES
(TASK FORCE CONSENSUS RECOMMENDATIONS 7-10)**

Public Hearing, February 14, 2020

Good afternoon, my name is Kaighn Smith Jr. I am a shareholder at Drummond Woodsum & MacMahon, and I have served as litigation counsel for the Penobscot Nation for over 25 years. I teach *Federal Indian Law* at the University of Maine School of Law, and I serve as an Associate Reporter for drafting the American Law Institute's *Restatement of the Law of American Indians*.

I have been asked by Penobscot Nation Chief, Kirk Francis, to speak to you today in support the implementation of Task Force Recommendations 7-10 through L.D. 2094. I provide this testimony solely on behalf of the Penobscot Nation.

The Penobscot Nation believes that in order to place this opportunity to improve tribal-state relations in context, it is very important to look at some painful history. The Nation appreciates the Committee's consideration of this context and looks forward to better relations with the State of Maine through L.D. 2094.¹

¹ Consensus Recommendations 7-10 are to amend the Maine Implementing Act to:

[R]ecognize federal law regarding the exclusive jurisdiction of Tribes to regulate fishing and hunting by Tribal citizens of all federally recognized Tribes on Tribal lands. . .

[R]estore and affirm the exclusive jurisdiction of Tribes to regulate fishing and hunting by non-Tribal citizens on Tribal lands, but . . . not cede any of the Maine Indian Tribal-State Commission's authority to regulate hunting and fishing under current law to the State.

[R]elinquish the State of Maine's jurisdiction with respect to the regulation of fishing and hunting by both Tribal and non-Tribal citizens on Tribal lands, except that, solely for conservation purposes, the State of Maine . . . under general principles of federal Indian law and in a manner consistent with reserved Tribal treaty rights.

[R]estore and affirm the Tribes' rights to exercise regulation of natural resources and land use on Tribal land to the fullest extent under federal Indian law.

The Restoration Of Inherent Sovereignty And What That Means In Historical Context

At the time of the Maine Indian Land Claims Settlement, Congress explained that “[t]he aboriginal territory of the Penobscot Nation is centered on the Penobscot River.” H. R. REP. No. 96-1353 at 11, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787 (“H.R. REP.”); S. REP. NO. 96-957 (“S. REP”) at 14 REP. at 11. Congress further explained:

When the Revolutionary War broke out, General George Washington requested assistance of [the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians] and, on June 23, 1777, Colonel John Allan, of the Massachusetts militia . . . negotiated a treaty with these Indians, pursuant to which the Indians were to assist the Revolutionary War in return for protection of their lands by the United States Allan’s journals indicate that the Indians played a crucial role in the Revolutionary War.

Despite requests from the Maine Indians, the federal government did not protect the tribes following the Revolutionary War. In 1794, the Passamaquoddy Tribe . . . relinquished all but 23,000 acres of its aboriginal territory. Subsequent sales and leases by the State of Maine reduced this territory to approximately 17,000 acres. The Penobscot Nation lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818. A sale to the State of Maine in 1833 resulted in the loss of four townships by the Penobscot Nation.

H.R.REP. at 11-12; S.REP. at 12.

These lands cessions failed to comply with one of the first acts of Congress, the Indian Nonintercourse Act. H.R.REP. at 12; S.REP. at 12. Enacted in 1790, and presently codified at 25 U.S.C. § 177, this Act renders void any land transaction with an Indian tribe that lacks federal approval. *See* 25 U.S.C. § 177.

In the landmark decision of 1975, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me.), Judge Edward T. Gignoux, held that the United States had a trust responsibility to the Passamaquoddy Tribe (and concomitantly to the Penobscot Nation) to investigate claims against Maine for violations of the Nonintercourse Act. The First Circuit affirmed his decision, *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), and the United States commenced federal court actions against Maine on

behalf of the Penobscot Nation and the Passamaquoddy Tribe to recover the ceded lands. *See* 25 U.S.C. § 1731 (referring to Civil Action Nos. 1966-ND and 1969-ND, hereinafter “*U.S. v. Maine*” or the “land claims”). Together, these claims covered “12.5 million acres, or 60 percent of the State.” H.R.REP. at 14; S.REP. at 13.²

In 1979, the United States, through the U.S. Department of the Interior (“DOI” or “Interior Department”), Bureau of Indian Affairs formally recognized the Penobscot Nation and the Passamaquoddy Tribe as Tribal Nations with government-to-government relationships with the United States. 44 Fed.Reg. 7,235-7,236 (Jan. 31, 1979). The U.S. Court of Appeals for the First Circuit has explained what this means:

Federal recognition is just that: recognition of a previously existing status. The purpose of the procedure is to “acknowledg[e] that certain American Indian tribes exist.” 25 C.F.R. § 83.2 (1993). *The Tribe[s]’ retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978)—and it may be altered only by an act of Congress, see Morton, 417 U.S. at 551–52, 94 S.Ct. at 2483.7*

² Contrary to certain testimony presented at the Public Hearings on L.D. 2094, the Tribes never sued Maine; the United States sued Maine as the Tribes’ trustee. Also contrary to certain testimony presented at the Public Hearings, the United States carefully assessed the merits of the claims and was fully prepared to proceed with these actions; these were very serious claims. For example, the United States reported to Judge Gignoux in 1977:

We have concluded that a valid cause of action on behalf of the Penobscot Tribe encompasses all those lands lying in the Penobscot River watershed above the ancient head of the tide, a point north of Eddington, Maine, to the head of the river. Based on the outcome of further study this cause of action may also include those portions, if any, of the eastern shore of Moosehead Lake and the St. John River watershed west of Houlton, Presque Isle and Caribou which the tribe actually used and occupied in 1790, excluding, however, those lands in the St. John River watershed under treaty deeds confirmed pursuant to- Article 4 of the Webster-Ashburton Act of 1842.

Memorandum in Support of [United States’] Motion for Further Time to Report to the Court, *United States v. Maine* (Civil Nos. 1966-ND and 1969-ND) (D. Me.) at 4, copy attached hereto as **Exhibit A**.

State of R.I. v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994) (emphasis added).³

That same year, the United States Court of Appeals for First Circuit held “in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (Coffin, J.) that the Maine Tribes still possess[ed] inherent sovereign authority to the same extent as other tribes in the United States [and] [t]he Maine Supreme Judicial Court . . . adopted the same view in *State v. Dana*, 404 A.2d 551 (Me. 1979).” H.R.REP. at 14; S.REP. at 14. See *Bottomly*, 599 F.2d at 1066; *Dana*, 404 A.2d at 560-563. The final Senate Committee Report on MISCAs refers to *Bottomly* as “holding that Maine Tribes are entitled to *protection under federal Indian common law doctrines*.” S.REP. at 13 (emphasis added). See *Bottomly*, 599 F.2d at 1066; *Dana*, 404 A.2d at 560-563.⁴

³ Contrary to testimony presented at the Public Hearings, the Penobscot Nation and the Passamaquoddy Tribe did not attain federal recognition in 1980; they attained formal recognition in 1979. Further, they were never “granted” governmental authority by the federal government or by Maine. The sovereign authorities that Tribal Nations possess are inherent, not “granted” by the United States or any state government, and they are “retained” absent express abrogation by Congress. See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979). Because tribal sovereignty is subject to the exclusive authority of Congress, a state’s assertion of authority over a tribe’s affairs or its territory cannot operate to divest the tribe of its inherent sovereign powers. See *State of R.I.*, 19 F.3d. at 694 n.7; *Bottomly*, 599 F.2d at 1066.

⁴ All parties to the land claims settlement in 1980 understood this. The following are just a few examples:

- On April 2, 1980, in his opening remarks to introduce what became Maine Act to Implement the Indian Land Claims Settlement, 30 M.R.S.A. §§ 6206-6212 (“MIA”) to the Maine Legislature, Maine Senator Samuel W. Collins, Jr., Chairman of Maine’s Joint Select Committee on Indian Land Claims, stated that “the premise of this bill and the entire settlement agreement is that the Indians are Federal Indians.” He continued:
This means that the Indians and their lands are within the exclusive jurisdiction of the Federal Government, and its Indian Laws. Under this premise, the State has no jurisdiction at all, but the Federal Government has that authority and can presumably delegate it to the State, or, in this instance, ratify and incorporate into Federal Law an agreement between the State and the Indians.
Maine Legislative Record -- Maine Senate, April 2, 1980 at 717-18.
- On March 28, 1980 at the public hearings held on MIA, Maine’s Deputy Attorney General, John Paterson, testified that in the absence of attaining Congress’s ratification of MIA, “State laws would generally have no applicability [to the Tribes] as exists in most states.” *Transcript of March 28, 1980 Public Hearing before the Joint Select Committee of the Maine Legislature on Indian Land Claims* (1980) (“Public Hearing”) at 42.

Thus, going into the land claims settlement, the Penobscot Nation and the Passamaquoddy Tribe retained and exercised the same inherent sovereign authorities over their existing reservations (those lands and related natural resources that they did not cede in the suspect treaties with Massachusetts and Maine) that other Tribal Nations exercised across the country in accord with established “federal Indian common law doctrines.” Further, they were poised to exercise those authorities over their aboriginal lands and resources that United States would recover for them in the land claims actions brought on their behalf in the federal court.

In 1980, Congress settled *U.S. v. Maine* with the enactment of the Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (1980) (“MICSA”) and thereby ratified and rendered effective MIA (collectively the “Settlement Acts”). See 25 U.S.C. § 1721(b)(3); 30 M.R.S.A. § 6201 (Historical and Statutory Notes, referencing Sec. 31, “Effective date” as that of MICSA).⁵

-
- At the same hearings, Thomas N. Tureen, counsel for the Penobscot Nation and the Passamaquoddy Tribe testified that as a result of *Dana*, “the lands of the Maine Indian Tribes constitute Indian Country as the term is used in Federal Law. As such, Indians residing on Tribal Land in Maine are not subject to the civil or criminal jurisdiction of the Courts of Maine.” *Public Hearing* at 24.
 - On July 1, 1980, Senator Collins confirmed, under questioning from Senator George Mitchell before the Senate Committee on Indian Affairs, that the Penobscot Nation and the Passamaquoddy Tribe “were not now subject to the jurisdiction of the State of Maine,” but that the Tribes could agree “to return that jurisdiction to the State” if confirmed by Congress. *Maine Indian Land Claims: Hearings on S. 2829 Before the S. Select Comm. on Indian Affairs*, 96th Cong. 38 (1980) (“*Senate Hearings*”) at 343-44. See also *id.* at 337 (testimony of Maine Representative, Bonnie Post, co-chair of the Maine’s Joint Select Committee, (the proposed settlement “accepts the concept that the Penobscot Nation and the Passamaquoddy Tribe are Federal Indians”).
 - At the same hearings, Andrew Akins, Chairman of the Penobscot Negotiating Committee, testified that the *Dana* and *Bottomly* decisions “confirm[ed] . . . the existence of our inherent tribal sovereignty, and ‘Indian country’ status of our lands” pursuant to principles of federal Indian law. *Senate Hearings* at 175-176. See also *Settlement of Indian Land Claims in the State of Maine: Hearing Before the Committee on Interior and Insular Affairs, House of Representatives*, 96th Congress Second Session (Aug. 25, 1980) (same, testimony of Penobscot Negotiating Representative, Rubin (“Butch”) Phillips); *id.* at 235-236 (same, testimony of Andrew Akins).

⁵ MICSA was formerly codified at 25 U.S.C. §§ 1721-1735, but it was removed from Title 25 in 2016. This testimony cites MICSA using the former Title 25 section numbers.

The MIA generally subjects the Penobscot Nation, the Passamaquoddy Tribe, their members, and their lands and natural resources to state law, but it prohibits state jurisdiction over “internal tribal matters,” which are not defined. 30 M.R.S.A. §§ 6204, 6206(1). Since the passage of the Settlement Acts, Maine and the Tribes have engaged in protracted litigation over the nature and scope of “internal tribal matters.” (Some of the cases are listed in footnote 10, below.) Restoration of the Tribes’ inherent sovereign authority over the exploitation of natural resources within their Tribal Lands in accord with the “federal Indian common law doctrines” that “protected” them in 1979 will clarify the law and thereby end the acrimonious litigation that has marked tribal-state relations since 1980. In so doing, it will also properly “protect” the dignitary interests of the Tribes as sovereign tribal governments.

These “federal Indian common law doctrines” are not complicated. They establish the following with respect to the authority of Tribal nations over natural resources exploitation and environmental protection within their reservations and trust lands (what is referred to as “Tribal lands” in the L.D. 2094):

Unless limited by Congress . . . , Indian tribes have the power to enact and enforce laws governing . . . natural-resources exploitation, and environmental protection [within Tribal lands].

AMERICAN LAW INSTITUTE, COUNCIL DRAFT NO. 6, RESTATEMENT OF THE LAW OF AMERICAN INDIANS (Dec. 2, 2019) (Black Letter § 52). *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (Tribes retain inherent regulatory authority over hunting, trapping, fishing, and other taking of wildlife within their tribal lands); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (Tribes retain “undisputed power” to exclude persons from tribal lands and with that power comes the power to regulate their activities while they remain on tribal lands). *Accord Plains Commerce Bank v. Long Family & Cattle Co., Inc.*, 554 U.S. 316, 335 (2008) (“[r]egulatory authority goes hand in hand with the power to exclude”); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808-809, 811-812 (9th Cir. 2011) (citing cases).

The Importance Of Penobscot Sovereign Authority Over The Exploitation Of The Tribe’s Sustenance Resources

The preservation of this governmental authority is critical for the physical and cultural survival of Indigenous peoples. As the Supreme Court has said, hunting

and fishing practices are “not much less necessary to the existence of the Indians than the atmosphere they breathe.”⁶ The Penobscot People are no different.

At the hearings on the land claims settlement, the U.S. Senate Committee overseeing the settlement heard testimony from Penobscot tribal member, Lorraine Dana (a/k/a Lorraine Nelson), a single mother, who fed her family with fish her son, Barry Dana, caught from the reservation waters of the Penobscot River. Concerned that Maine would be granted full authority over the Penobscot Nation’s fishing rights, she testified:

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

Senate Hearings at 419. In stating “my son . . . fishes my islands,” she used a Penobscot locution, meaning he fished in the Penobscot River in the waters surrounding her family’s allotted islands in the River near Lincoln, Maine. Supporting sworn testimony of Penobscot citizens, Lorraine Dana and Barry Dana, is attached hereto as **Exhibit B**.

From time immemorial and continuing into the 1990s, when they learned that water pollution was poisoning their sustenance resources, Penobscot families relied upon fish, eel, and other food sources from the River for up to four meals per week to the tune of two to three pounds per meal. Additional supporting sworn testimony of Penobscot citizens, Chris Francis, Timothy Gould, and Kirk Loring, is attached hereto as part of **Exhibit B**.

Professor Harald Prins testified to you about the central importance of Penobscot sustenance practices to Penobscot culture. Relevant excerpts from the Dr. Prins’s Report, referenced in his testimony, are attached hereto as **Exhibit C**.

Given the critical importance of hunting and fishing for tribal existence, one of the most fundamental principles of federal Indian law is that Tribes generally retain

⁶ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 680 (1979).

inherent authority, exclusive of states, to regulate the exploitation of natural resources within their lands and waters by their own members and by non-members.⁷

Were this not so, tribal resources could be exploited by local interests supported by state governments. The United States Supreme Court has consistently observed that, for reasons bound up in the history of the colonization of America's Indigenous Peoples, state governments are often hostile to tribal interests. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983) (state and local decision making may be “based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation.”); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (recognizing that “[b]ecause of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies”).⁸

Article I, section 8 of the United States Constitution allocates plenary authority over Indian affairs to Congress, and implicitly deprives states of any authority over Tribal Nations and their resources. As one of the most respected commentators in the field of federal Indian law explains: “[o]ne of the basic premises underlying the constitutional allocation of Indian affairs to the federal government was that the states could not be relied upon to deal fairly with the Indians.” WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 138 (4th ed. 2004).

States are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it. *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170–71 (1973). This rule derives in part from respect for the plenary authority of Congress in the area of Indian affairs. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43

⁷ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 342.

⁸ *See also Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 566–67 (1983) (there is “a good deal of force” to the view that “[s]tate courts may be inhospitable to Indian rights.”); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 678 (1974) (“state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians.”). *See also Idaho v. Coeur d’Alene Tribe of Idaho*, 117 S.Ct. 2028, 2056 n.11 (1997) (“the readiness of the state courts to vindicate the federal right[s] of Indian tribes] has been less than perfect”) (Souter, J., with Stevens, Ginsburg, and Breyer, JJ., dissenting).

(1980). Accompanying the broad congressional power is the concomitant federal trust responsibility toward the Indian tribes. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir.1975), *cert. denied*, 429 U.S. 1038 (1977); *see Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). That responsibility arose largely from the federal role as a guarantor of Indian rights against state encroachment. *See United States v. Kagama*, 118 U.S. 375, 383–84 (1886).

Washington v. EPA, 752 F.2d 1465, 1469-70 (1985).

Given this context and the on the ground experience of the Penobscot People, it is no wonder that litigation over the control of the exploitation of their sustenance resources by outsiders has led to protracted litigation and attendant animosity.

The Experience Of The Penobscot People

It is worth repeated Congress’s announcement upon settling the land claims in 1980: “The aboriginal territory of the Penobscot Nation is centered on the Penobscot River.” S. REP. at 11; H.R. REP. at 11, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787. Until 1950, when a bridge was constructed from their principal community (and the seat of their government) at Indian Island (*Panawamskeag* or *Pem ta guaiusk took*, meaning “great or long River”) to the mainland, the Penobscots were an entirely river bound people.

But the Penobscot River, and therefore, the Penobscot People suffered greatly from exploitation at the hands of Maine and its paper industry.⁹

As of 1968, “the Penobscot [River] . . . received the untreated industrial wastes discharged non-stop from seven pulp and paper mills,” five of which flowed

⁹ A fuller history of the Penobscot Nation’s relationship to the Penobscot River and its struggle to protect its sustenance resources than that set out here can be found in the dockets of two cases in the United States District Court for the District of Maine: *Penobscot Nation and United States of America v. State of Maine, Janet T. Mills, et. al.*, Civil Action No. 1:12-cv-0025-GZS, Documents 102-110, as summarized in Document 119 (Statement of Material Facts in Support of the United States’ and Penobscot Nation’s Motions for Summary Judgement) and Document 140 (Opposing Statement of Material Facts of the United States and the Penobscot Nation) and *State of Maine v. Andrew Wheeler, Acting Administrator United States Environmental Protection Agency, et. al.* (Civil Action No. 1:14-cv-264 JDL), Document 155-1 and Exhibits 1 and 2 attached thereto. These documents are available through the Public Access to Court Electronic Records website (PACER): <https://www.pacer.gov/>.

directly into the Main Stem of the River (from Indian Island to Medway) – the home of the Tribe’s aboriginal villages occupied from time immemorial. In 1964, this was equivalent to “untreated domestic sewage load produced in one day by about 5,000,000 people,” thereby depressing “dissolved oxygen levels . . . as low as zero.”¹⁰

Maine’s support for industrial interests over those of the Penobscot People has marred tribal-state relations for a very long time. Since the land claims settlement in 1980, the Maine Attorney General’s office consistently sided with corporations to fight the Maine tribes on water quality issues.¹¹

One such corporation, Lincoln Pulp & Paper (“LP&P”) (now bankrupt), discharged dioxin into the Penobscot River, leading to warnings that the fish in the River have been, and continue to be, dangerously contaminated.¹² Siding with

¹⁰ U.S.E.P.A., *A Water Quality Success Story: Penobscot River, Maine*, December, 1980 at 4-5, accessible at <https://nepis.epa.gov/Exe/ZyNET.exe> or via Google search with key words from title.

¹¹ The cases include *Penobscot Nation and United States v. Mills*, 861 F.3d 324 (1st Cir. 2017) (petitions for rehearing en banc, filed by the United States and the Penobscot Nation pending) (Maine Attorney General, siding with pollutant discharging corporations, asserting that the Penobscot Indian Reservation is confined to island surfaces and excludes the River, the source of the Tribe’s sustenance resources); *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007) (Maine Attorney General siding with pollutant discharging corporations, arguing that Maine, not the EPA should hold authority to permit pollution discharges into the Penobscot River affecting tribal sustenance resources); *Penobscot Nation v. Georgia-Pac. Corp.*, 254 F.3d 317, 318 (1st Cir. 2001) (whether paper corporations can invoke Maine Freedom of Access Law to obtain governmental documents of the Penobscot Nation regarding efforts of the Nation to protect its reservation from environmental pollution); *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574 (Me. 2001) (same); *State of Maine v. McCarthy, et. als.* (1:14-cv-00264-JDL), currently pending in the U.S. District Court for the District of Maine (involving whether EPA must approve Maine’s water quality standards in tribal waters); and numerous proceedings before the Federal Energy Regulatory Commission in which the Maine AG’s office has sided with dam owners against the U.S. Department of the Interior and the Penobscot Nation on environmental protection measures.

¹² In the late 1990s, the United States Department of the Interior, as trustee for the Penobscot Nation, commenced a natural resources damages proceeding against potentially responsible parties, in particular, LP&P. In July, 1999, the Bureau of Indian Affairs commissioned a report entitled “*Final Report: The Economic Value of Foregone Cultural Use: A Case Study of the Penobscot Nation.*” **Exhibit D.** In explaining this work to then Senator Olympia Snowe, DOI described its field observations of the Penobscot River by its Natural Resources Damages Assessment Coordinator: “it stinks, it makes you sick, you can’t eat the fish, and it’s killing

LP&P and other pollutant dischargers, Maine has long maintained that the Maine Tribes' rights to sustenance fishing do not include any right to water quality to support healthy fish.

The Maine AG's office first took this position in the late 1990s when LP&P applied to the EPA for a discharge permit into the Penobscot River in the heart of the Penobscot Nation's fishing territory (indeed, the very fishing grounds of Lorraine and Barry Dana.) The Maine AG wrote to EPA, stating that the Nation's sustenance fishing right afforded tribal members nothing more than the opportunity to catch "whatever fish were available" and did not afford the Nation any right to a quality or quantity of fish to nourish tribal members in accord with principles of federal Indian law. *See* STATE OF MAINE, DEPARTMENT OF ATTORNEY GENERAL, LETTER TO JOHN DEVILLARS, REGIONAL ADMINISTRATOR, REGION I, RE: LINCOLN PULP & PAPER NPDES NO. ME0002003 APPEAL (June 3, 1997), attached hereto as **Exhibit G** at 6. Maine further asserted that there was no federal trust responsibility on the part of the EPA to protect the Nation's sustenance fishing right in any manner. *Id.* at 10-14.

The Interior Department responded, "the United States has a trust responsibility to protect the lands and resources of federally recognized Indian tribes," including those of the Penobscot Nation:

Since there exists a trust relationship between the Maine Tribes and the United States, EPA must act as a trustee when taking federal actions which affect tribal resources. When taking such actions, EPA's fiduciary obligation requires it to first protect Indian rights and resources. . . . Thus, fulfillment of EPA's trust responsibility must entail considerations beyond the minimum requirements in the Clean Water Act (CWA) and in MICA to fully protect the PIN's rights and resources.

birds." **Exhibit E** at 3. The Final Report states that "the Penobscot Nation has been deprived of its rightful use of the Penobscot River" and estimates that the value of the Tribe's foregone use of the Penobscot River between \$34.9 and \$62.7 million. *Id.* at 11. In 2001, LP&P filed for Chapter 11 bankruptcy to discharge its obligations, including any claims for natural resources damages. The United States, as trustee for the Penobscot Nation, filed a proof of claim in that proceeding, to recover "damages suffered by the Penobscot Indian Nation . . . for the loss of its sustenance fishing right and cultural use due to the contamination of the waters and sediments of the Penobscot River, which includes areas of the Nation's reservation." **Exhibit F** at 2-3.

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SOLICITOR, LETTER TO JOHN DEVILLARS, REGIONAL ADMINISTRATOR, REGION I, RE: LINCOLN PULP & PAPER NPDES No. ME0002003 (Sept. 2, 1997), attached hereto as **Exhibit H** at 2-4.

More recently, in 2015 the U.S. Environmental Protection Agency and the Interior Department concluded that

[F]undamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. . . . The [federal] trust relationship counsels protection of tribal fishing rights in Maine.

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SOLICITOR, LETTER TO AVI S. GARBOW, GENERAL COUNSEL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RE: MAINE'S WQS AND TRIBAL FISHING RIGHTS OF MAINE TRIBES (Jan. 30, 2015) at 10. DOI's 2015 Opinion is attached hereto as **Exhibit I**.

Then Maine Attorney Janet Mills fought back in the federal courts, even going so far as to file briefs in the U.S. Supreme Court to overturn a decision of the U.S. Court of Appeals for the Ninth Circuit, holding that a treaty sustenance fishing right carried with it a right to fish habitat protection. The State of Maine petitioned Donald Trump's EPA Administer at the time, Scott Pruitt, to overturn EPA water quality standards promulgated to protect tribal fishing rights in Maine. Tribal leaders and environmental, religious, and civic organizations called then Attorney General Janet Mills to task for her actions. A copy of their letter is attached hereto as **Exhibit J**. (More recently, the Legislature amended Maine's water quality standards to provide more protection to the Penobscot Nation's sustenance resources in the Penobscot River. This has generated a measure of cautious optimism for the future of tribal-state relations.)

Conclusion

The implementation of consensus recommendations 7-10 through L.D. 2094 will put an end to ambiguities that have led to unrelenting wasteful, protracted litigation between the Maine Tribes and the State of Maine over environmental matters, not to mention 40 years of unfortunate animosity. It will restore the dignity of the Tribes to exercise stewardship over the resources that define them as a unique Peoples. In so doing, it will protect the environment for all Mainers.

* * *

Postscript: The Clarity of Federal Indian Law

This Committee heard testimony that if the doctrines of federal Indian law operate in Maine, there will be confusion (and protracted litigation) because federal Indian law is uncertain. This is incorrect. Indeed, the best way for the Legislature to ensure clarity would be to simply enact a law announcing that federal Indian law applies to the Maine Tribes, their members, their lands and natural resources.

Since the 1980s, Congress has restored many tribes to federal recognition by using language in the simplest terms such as “*all Federal laws of general application to Indians and Indian tribes . . . shall apply with respect to the [Tribe] and its members*” and the Tribe “*shall have jurisdiction to the full extent allowed by law*” over its reservation or lands taken into trust on its behalf by the United States. *E.g.*, 25 U.S.C. §§ 1300j-1, 1300j-7 (Pokagon Band of Potawatomi Indians Restoration Act) (emphasis added); §§ 1300k-2(a), 1300k-3 (Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Restoration Act); §1300l(a) (Auburn Indian Restoration), § 1300m-1(a)-(b) (Paskenta Band of Nomlaki Indians of California Restoration Act), § 1300n-2(a)-(b) (Graton Rancheria Restoration).

Federal Indian Law is a body of common law, which can be readily discerned and applied. The American Law Institute will soon publish the RESTATEMENT OF THE LAW OF AMERICAN INDIANS to set forth this common law.

Further, the Office of Legal and Policy Analysis can readily confirm that, pursuant to the above-referenced Restoration Acts, as well as land claims settlement acts outside of Maine, *e.g.*, 25 U.S.C. §§ 1747(a) (Florida (Miccosukee)); 1752(3) and 1754(b)(7) (Connecticut); 1771c(a)(1)(A) and 1771d(a) (Massachusetts); 1772d(a) and (c) (Florida) (Seminole)); and 1775c (Mohegan (Connecticut)), where civil jurisdiction within Tribal Lands is governed by established principles of federal Indian law, there is very little litigation between tribes and states compared to the protracted litigation besetting tribal-state relations in Maine.¹³

¹³ Indeed, when the contours of tribal-state jurisdiction within Tribal Lands are governed by the established principles of federal Indian law, most differences are ironed out by intergovernmental agreements between tribes and states. Such agreements are commonplace across the country, but not yet in Maine.

EXHIBIT A

DISTRICT OF MAINE

NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff)	
)	
v.	)	CIVIL NO. 1966-ND
)	
THE STATE OF MAINE,)	
Defendant)	
)	
UNITED STATES OF AMERICA,)	
Plaintiff)	
)	
v.	)	CIVIL NO. 1969-ND
)	
THE STATE OF MAINE,)	
Defendant)	

PLAINTIFF'S MOTION FOR
ENLARGEMENT OF TIME

The plaintiff moves for an enlargement of time until June 1, 1977, within which to report to the Court on the status of its preparations with respect to the pending actions filed in this Court by the United States on behalf of the Passamaquoddy Tribe and Penobscot Nation against the State of Maine. The reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,



PETER R. TAFT
Assistant Attorney General

PETER MILLS
United States Attorney

DISTRICT OF MAINE
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL NO. 1966-ND
)	
THE STATE OF MAINE,)	
)	
Defendant.)	
)	
)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL NO. 1969-ND
)	
THE STATE OF MAINE,)	
)	
Defendant.)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR FURTHER EXTENSION OF TIME TO REPORT
TO THE COURT

I

INTRODUCTION

Pursuant to the court's order of January 17, 1977, plaintiff seeks a further extension of time until June 1, 1977, within which to report to the court regarding particular steps to be taken in the further prosecution of the above-entitled actions. There are two basic reasons for the extension. First, an extension is necessary to enable plaintiff to adequately prepare proposed claims discussed herein and to coordinate them with other claims against major landholders in the affected areas. While substantial work has been completed, additional work is required.

Second, the President has announced that in response to the request of the Maine Congressional delegation he is appointing a special representative to help the parties reach an amicable settlement for submission to Congress. The extension of time is necessary to allow all parties to engage in meaningful settlement talks and to permit Congress sufficient time to adopt any agreement reached. As stated in our memorandum of January 14, 1977, only Congress can correct past injustice to the tribes without causing new hardship to other citizens of Maine. We therefore fully support and endorse the settlement process. On the other hand, if it proves unsuccessful, we have no choice but to proceed with the litigative course outlined herein.

II

SUMMARY OF NEW STATUS

In final draft litigation reports forwarded to the Department of Justice on January 11, 1977, the Department of the Interior requested the initiation of litigation on behalf of the Penobscot and Passamaquoddy Tribes for possession and trespass damages for lands in certain defined watersheds in Maine. These lands included areas used and occupied by the tribes as of 1790; they also included other areas mostly along the coast where lands were settled by, or land granted to, non-Indians as of 1790. These coastal areas remain the most heavily populated at the current time.

In the interim since January 11, 1977, certain agreements have been arrived at with the Penobscot and Passamaquoddy Tribes. In accord with these agreements, the Department of the Interior has modified its request to the Department of Justice for the initiation of litigation in its final litigation reports. Subject to conditions hereinafter set forth, the Interior Department limits its request for litigation to a possession and trespass damage claim for those lands actually used and occupied by the Penobscot and Passamaquoddy Tribes as of 1790. This omits the coastal areas settled and land granted as of 1790.

In the interim since January 11, 1977, the Department of Justice has conducted an independent review of the laws and facts submitted and made an independent judgment as to the scope and content of any causes of action. We have reviewed all materials previously submitted and have conducted independent research of documentary evidence in the Archives of the United States and elsewhere. Additionally, we met with anthropologists and ethnohistorians knowledgeable with the tribes and their traditional use and occupancy of land in the latter half of the Eighteenth Century.

Based on this review and the modified litigation request from the Department of the Interior, the Department of Justice has concluded that a valid cause of action exists for possession and trespass damages for those lands actually used and occupied by the Penobscot and Passamaquoddy Tribes as of 1790, and thereafter taken from them in violation of the Trade and Intercourse Act of 1790, as amended.

The modified request from Interior and the cause of action Justice has agreed to pursue modifies the claim areas. As to certain portions of that area, we have fully satisfied ourselves as to actual use and occupancy by the tribes in question as of 1790. As to other portions, we have concluded that additional evidence is necessary to assure ourselves of the tribes' claim and the necessary studies are commencing forthwith. The modified claim area is as follows.

Modified Claim Area

We have concluded that a valid cause of action on behalf of the Penobscot Tribe encompasses all those lands lying in the Penobscot River watershed above the ancient head of the tide, a point north of Eddington, Maine, to the head of the river. Based on the outcome of further study this cause of action may also include those portions, if any, of the eastern shore of Moosehead Lake and the St. John River watershed west of Houlton, Presque Isle and Caribou which the tribe actually used and occupied in 1790, excluding, however, those lands in the St. John River watershed under treaty deeds confirmed pursuant to Article 4 of the Webster-Ashburton Act of 1842.

We have concluded that a valid cause of action on behalf of the Passamaquoddy Tribe encompasses all those lands lying within the upper St. Croix River watershed beginning north of Baring Plantation. Based on the outcome of further study this cause of action may also include those portions, if any, of the upper watersheds of the Machias and Dennys Rivers which the tribe actually used and occupied as of 1790.

Tribes offer to exclude
Homeowners and Small Property
Owners Within the Modified Claim Area

The Penobscot and Passamaquoddy Tribes had indicated their intention not to pursue, and to request Justice not to pursue, any remedy for land or damages against any homeowner or other small property owner in the modified claim area if they can substitute a satisfactory monetary claim against an appropriate sovereign body for the full value of such claims. The Department of the Interior intends to assist them in developing a legislative package substituting such a monetary claim and to support them in obtaining passage of appropriate legislation. We will honor that offer.

Coastal Areas Excluded

The Department of the Interior, in its litigation report, has specifically requested that the Department of Justice omit all claims for possession of land or damages for the coastal areas which had been substantially settled by non-Indians and land which had been granted prior to 1790, the date of passage of the first Trade and Intercourse Act. As a result, coastal areas which are presently the most densely populated portions of the original claim area will not be involved in any litigation to be initiated by the United States. In lieu thereof, the tribes and the Department of the Interior have agreed to seek an alternative legislative solution with respect to these coastal areas.

Appointment of a Special
Representative of the President

The White House has announced that the President will shortly name a special representative to assist the parties in reaching a settlement to these claims. When that person is designated, it is contemplated that efforts will be underway immediately to open discussions which hopefully will lead to an out-of-court solution. The Department of Justice fully supports these efforts. As a consequence, and if approved by the court, we propose to take no further steps in this or related litigation before June 1, 1977, so as not to interfere with the settlement process. We suggest to the court that it would be appropriate to continue the stay against further activities in the above-captioned actions through June 1, 1977, for this same purpose.

Basis of Claim

The claim on behalf of the Penobscot and Passamaquoddy Tribes discussed in the previous section is predicated on the tribes' aboriginal use and occupancy of the lands in the claim area as of 1790.

Aboriginal title, the basis of the claims proposed by Interior, is a factual matter to be proved at trial. United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941). Proof of aboriginal title is established by a showing of actual, exclusive, and continuous use and occupancy of lands for a long period of time. Sac and Fox Tribe v. United States, 315 F.2d 896, 903 (Ct.Cl. 1963), cert. denied, 375 U.S. 921 (1963). Use and occupancy is determined by reference to the way of life,

habits, customs, and usages of the Indians. Sac and Fox Tribe v. United States, 383 F.2d 992, 998 (Ct.Cl. 1967). And it has been held that "the 'use and occupancy' essential to the recognition of Indian title does not demand actual possession of the land, but may derive through intermittent contacts [citations] which define some general boundaries of the occupied land. . ." United States v. Seminole Indians, 180 Ct.Cl. 375, 385 (1967) [emphasis in original].

The Nature of Tribal
Usage of Claimed Area

Penobscot Indians were riverine oriented so that the territorial boundaries used and occupied by them were generally defined by the watersheds (or parts thereof) of the rivers so used. This, also, dictated how they would live, hunt, fish, and gather berries for subsistence.

Briefly, their traditional mode of land use was that they had a series of core villages near and above the head of the tide. From these core villages they would conduct their hunting, fishing, trapping and berry picking expeditions. Dividing their time somewhat regularly, they spent the summer months in the lower coast or salt-water region, then ascended the river to hunting territories for the fall hunting and finally returned to their core villages for the dead of winter. The early spring months were spent drifting down toward the ocean and hunting and fishing through the Penobscot River and neighboring streams. As non-Indians settled in the coastal regions, Indian reliance on the coast for subsistence was diminished. On the other hand, their use of the upper watershed intensified both for subsistence and development of the fur trade with non-Indians.

The Passamaquoddy Tribe's use and occupancy of land was essentially the same as the Penobscot's. They were also riverine oriented, and they used and occupied lands in the St. Croix, Dennys and Machias watersheds. The Passamaquoddies had their core villages along the coast. Their use pattern was to spend the spring and summer along the coast berrying and fishing. In the fall and winter they went inland to hunt and trap, returning to their core villages in the spring. Settlement by non-Indians tended to interfere more with their core villages than with the Penobscots, but their use of the upper watersheds was the same.

This was essentially the state of affairs as of 1790, with Indian use and occupancy extant in the modified claim area. In 1790, the first Non-Intercourse Act was passed with respect to Indian land which provided in relevant part:

No purchase, grant, lease or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The First Circuit Court of Appeals held in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (C.A. 1, 1975) that this statute created a trust responsibility on the part of the United States to protect Indian rights under this statute and specifically described the duty as follows:

The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy . . . and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted by the circumstances. 528 F.2d at 379.

The Department of Interior has interpreted this responsibility to require a suit for possession and trespass damages and we agree.

It has been asserted that the Trade and Intercourse Acts did not apply to land transactions entered in between tribes and states if those actions occurred east of a line defining the boundaries of Indian country or if the state involved was one of the original colonies. Such contentions are inconsistent with the plain language of the Non-Intercourse Acts and contrary to well-settled law.

Dealings in tribal lands must be placed in a constitutional context. As pointed out infra, the right to extinguish Indian occupancy rights resides only with the sovereign. The traditional mode for such transactions at that time was by treaty, recognizing the limited sovereign rights of the tribes. In accord therewith, the Commerce Clause of the Constitution relegated the right to deal with Indian tribes to the United States, and Article I, § 10 abolished the right of States to enter into treaties. In this context, the statutory provisions dealing with land transactions must necessarily be viewed in a geographically unlimited context which the actual language of the relevant statutes and judicial opinions indeed reflect.

The provisions of the Trade and Intercourse Acts dealing with the transfer of Indian land have changed little since 1790.^{1/} The words contained in each act with respect

^{1/} See Act of July 22, 1790, 1 Stat. 137, 138; Act of March 1, 1793, 1 Stat. 329, 330; Act of May 19, 1796, 1 Stat. 469, 472; Act of March 3, 1799, 1 Stat. 743, 746; Act of March 30, 1802, 2 Stat. 139, 143; Act of June 30, 1834, 4 Stat. 729, now 25 U.S.C. 177.

to land transfers were unambiguous. The provisions in each section prohibited all purchases or grants of land from Indian tribes without federal approval. Each act specifically set forth the geographical area in which the land transfer section was to be applied. In 1790 that area was defined as "in the United States." In the 1793, 1796, 1799 and 1802 acts that area was defined as "within the bounds of the United States." The constitutional demand for unlimited geographical applicability of these sections is reflected in the statutory requirement that valid transactions had to be entered into "by treaty or convention entered into pursuant to the Constitution" or under direct federal auspices. To this day, the provision remains unlimited. See 25 U.S.C. 177.

The fact that the land transfer provisions were intended to have broad and unlimited application is supported by reference to other sections of the statutes. For example, in contrast to the unlimited language of the land transfer provision of the 1802 act is the section of the act which relates to trading. The later section explicitly provided that it was to have application in "Indian country" only. That limitation, and similar limitations with respect to trading in the later acts, was never appended to the provisions in those acts prohibiting land transfers.

In the landmark case of Worcester v. Georgia, 6 Pet. 515 (1832), Justice Marshall was confronted with the question of whether the State of Georgia had complete governmental jurisdiction over the portion of the Cherokee Reservation

within that state. Justice Marshall rejected the State's assertion of jurisdiction, finding it inconsistent with the constitution, treaties and laws of the United States. One basis for his conclusion was that the Trade and Intercourse Act of 1802 which contained language identical to that found in the 1790 Act granted exclusive jurisdiction to the federal government and prohibited state jurisdiction. This case is direct authority for the proposition that the Trade and Intercourse Act did apply to the original thirteen colonies and thus would apply to Massachusetts.

Later rulings have held that the land transfer provisions of those acts did apply in the eastern United States in the original thirteen colonies. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Joint Tribal Council of the Passamaquoddy Tribes v. Morton, 528 F.2d at 380 (1st Cir. 1975); Narragansett Tribe of Indians v. Murphy, C.A. No. 750005, U.S.D.C. Rhode Island (unpublished opinion of June 23, 1976). See also, United States v. Boylan, 265 F.2d 165 (C.A. 2, 1920).

It has been asserted that the tribes' rights to the use and occupancy of the lands in the modified claim area have been extinguished by various transactions which occurred either before or after the passage of the Trade and Intercourse Act in 1790. There is no question that the sovereign may extinguish aboriginal title. Johnson v. McIntosh, 21 U.S. 543 (1823). The sovereign may extinguish title by purchase, conquest followed by dispossession, or by the exercise of complete dominion over the property adverse to the continued use or occupancy of the tribe. United States v. Santa Fe

Pacific R. Co., 314 U.S. 339 (1941), rehearing denied, 314 U.S. 716 (1942). When the transactions discussed hereinafter are viewed in the light of this law, it is clear that the tribes' title was not extinguished.

It is asserted, first, that the tribes' title was extinguished by Pownall, the Royal Governor of Massachusetts, in 1759. At the outset of the French and Indian War in 1754 and 1755, Pownall declared war on all the tribes in eastern Maine, including the Penobscots. Pownall never engaged the Indians in battle or invaded and occupied the areas encompassed within the modified claim area. In 1759 Pownall issued a Proclamation which provided:

May 23, 1759, Province of Massachusetts Bay -
Penobscot Dominions of Great Britian.
Possession Confirm'd by Thos. Pownall, Govr.

Immediately after issuing the proclamation, Pownall buried a leaden plate at the head of the tide on the Penobscot River on which the Proclamation was inscribed. That was the limit of settlement in 1759 and still was in 1790. It also is the southern limit to the modified claim on behalf of the Penobscots. It is argued that by these actions Pownall extinguished the tribes' claims. We disagree.

It is a well-settled principle of law that more is required to extinguish aboriginal title than a mere declaration of dominion over a tribe. Johnson v. McIntosh, 21 U.S. 514 (1823). Circumstances surrounding the issuance of the Proclamation show that the purpose of proclaiming dominion over the Penobscots' lands was an attempt to establish English jurisdiction over them and thereby discourage allegiance with the French. Pownall made no attempt to remove them from their

lands. Thus all Pownall did was to establish the relationship necessary for the sovereign to treat the tribal occupancy rights. The action did not impair in fact the tribes' use and occupancy of the land. Johnson v. McIntosh, 21 U.S. at 572.

Pownall's actions followed the well-settled principle of adjusting rights in the New World among competing European sovereigns rather than rights of actual occupancy. Local occupancy rights would only be affected if the conquest were established by actual expulsion of the natives. As the Supreme Court stated in Worcester v. Georgia, 6 Pet. 515, 543 (1832):

This principle, suggested by the actual state of things, was, 'that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.'

This dominion set up the right to deal with the occupants for actual possession:

It regulated the right given by discovery among European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right of purchase, but did not found that right on a denial of the right of the possessor to sell.

Except for the fact that the French and the English were at war over their rights to Maine, the situation is no different than the original discovery of the New World, or the Louisiana Purchase or the Purchase of Alaska. In each case, the sovereign dominion obtained merely set the stage for dealing with the actual occupancy of the natives.

Here the tribes actively continued to use and occupy the lands contained in the modified claim area without interruption after the issuance of the Proclamation. That use and occupancy was only ended after the tribes had entered into treaties with the State of Massachusetts after 1790 which were invalid under the terms of the Trade and Intercourse Acts. The fact that the State of Massachusetts dealt with the tribes, is itself proof that the State considered these groups as tribes and recognized the extent of their land use rights. All these factors lead to the conclusion the tribes' use and occupancy had not been extinguished by conquest.

Finally, it has been asserted that the approval by Congress of the 1819 Articles of Separation of Maine from Massachusetts ratified the land transactions with the tribes. Nothing in the Articles of Separation mention Indian lands or the previous land transactions of Massachusetts with the tribes. The case law is specific that where Indian property rights are involved and congressional acts are passed affecting them, all such rights not expressly dealt with survive. Menominee v. United States, 391 U.S. 404 (1968).

How does this square with Webster-Ashburnton theory?

Proposed Form of Action

As can be seen from the foregoing, the areas subject to the Department of the Interior recommendation, though reduced in size from the original litigation report, are substantial and will include numerous parties. A suit naming every potential party would be incredibly cumbersome, if not impossible to manage. Because of its size, the procedural aspects of the litigation could take over a year to resolve.

If litigation is found to be the only method for resolving these claims, it will be necessary to devise a lawsuit which can be effectively managed so that a final decision on all major issues can be obtained as rapidly as possible. In order to reach that objective, the United States at this time contemplates a lawsuit against a limited number of major landowners holding lands in the Penobscot and St. Croix watersheds and in those portions of the St. John, Dennys and Machias watersheds which are found to be included in the claim area. As proposed, the litigation would permit the adjudication of all the major issues, factual and legal, with only a few parties with the resources to properly defend the case. The limited number of defendants would enable the case to proceed expeditiously. If the court denied a claim to a particular watershed, there might be no need to proceed against any other landholders in the same watershed.

Such a litigation program will require an extension of the current statute of limitations which expires on July 18, 1977. See 28 U.S.C. 2415. For if a claim against major landowners in a given watershed is upheld, we would thereafter proceed against the remaining landholders within the claim area in that watershed. Moreover, even if we wished to move against all landholders in the original suit, it would be virtually impossible to determine the names of all potential defendants and initiate an action prior to July 18, 1977. Therefore, the United States proposes to seek legislation to extend the statute with respect to the claims on behalf of the Passamaquoddy and Penobscot Tribes.

CONCLUSION

Plaintiff submits that the foregoing description of the status of the cases makes it readily apparent that an extension of time until June 1, 1977, is necessary.


Since the last report to the court, there has been a complete review of the legal basis for this litigation. Although the validity of causes of action on behalf of the Penobscot and Passamaquoddy Tribes as to some areas is certain, additional research is yet necessary to establish the outer perimeters of the claims area. In addition, there is substantial work to be undertaken to identify possible defendants in the claim area. An extension of time until June 1, 1977, is necessary to permit this work.

It is impossible to overemphasize, however, the fact that litigation is not the best method to resolve the issues presented in these claims. Litigation, while resolving past injustices imposed on the tribes, would place substantial hardships on innocent parties, who acted largely in good faith in purchasing real estate, investing their funds and improving their property. Only a congressional resolution of the Indian claims can correct the past injustices to the tribes without creating new hardships for others.

As stated previously, steps are now being taken to provide a method for getting a legislative solution underway. A presidential representative is to be appointed.

The extension requested is equally necessary to permit this representative the time necessary to work with the parties to effect a settlement and to permit Congress to adopt a just and equitable legislative solution to the claims of the Passamaquoddy and Penobscot Tribes.

Respectfully submitted,



PETER R. TAFT
Assistant Attorney General

PETER MILLS
United States Attorney

EXHIBIT B

DECLARATION OF LORRAINE DANA

I, Lorraine Dana, state as follows:

1. My name is Lorraine Dana. My full name is Dorothy Lorraine Dana, but I have never used my first name. My married name is Lorraine Nelson.
2. I am a member of the Penobscot Nation and have resided on Indian Island in the Penobscot River since I was 12 years old. My date of birth is xxxxxxxxxx, 1937.
3. The mainland town closest to Indian Island is Old Town, Maine.
4. Prior to residing on Indian Island, I resided on Mattanawcook Island in the Penobscot River with my father, Chester Dana, his wife, Liza Winchester Heigh, and my brother, Chester Dana, Jr. My father held Mattanawcook Island by assignment from the Penobscot Nation. After he passed away in 1975, I inherited my father's assignment to Mattanawcook Island and other islands near it, including Choquecherry Island. Until his death, my father resided on Mattanawcook Island for most of the year.
5. The mainland town closest to Mattanawcook Island is Lincoln, Maine.
6. My father was born and raised on Mattanawcook Island until he came of age and joined the United States Marine Corps. When he was a child, there was a village of Penobscot families on the island, but most of the residents eventually moved to either Indian Island or to Old Lemon Island further down the Penobscot River. My father was the last Penobscot tribal member to live year round on Mattanawcook Island. His main diet, and the diet of the other Penobscot families who lived there, consisted of fish and muskrat from the Penobscot River and other animals that they hunted or trapped.
7. My brother and I were adopted by Liza Heigh in 1942. We lived a short time in Enfield, Maine, but then moved to Mattanawcook Island. My father never wavered from his tradition of hunting, fishing, and trapping in the Penobscot River because he depended on this tradition to put food on the table. My brother and I fished in the River and across to the main land where there was a special cove where pickerel were plentiful. We ate what we caught. My father fished just about every day to feed our family and also provided muskrat and wildlife for us. We went to school in Lincoln, crossing the river every day.
8. When my father took fish and other water-dwelling animals from the Penobscot River, he never sought or carried a permit or license from the State of Maine. My brother and I likewise never sought or carried a permit or license from the State of Maine when taking fish from the River. It never occurred to us that one would be necessary because we considered the River to be our home.
9. My brother and I never encountered state wardens or other state officials while fishing on the River and I never heard of my father ever encountering a state warden or other official while fishing, hunting, or trapping on the River.

10. When I was 12 years of age, I moved back to Indian Island where I resided with my mother, Beatrice Phillips; my half-brothers, Neil, Reuben (“Butch”), Clifford, and Guy Phillips; and my half-sisters, Donna and Cheryl Phillips. Because of hardship raising a family on her own, my mother relied heavily upon the Penobscot River for food. My brothers fished and hunted for food. Clifford was an avid fisherman. He caught perch, pickerel, and bass to feed our family. My mother also bought muskrat to feed our family from tribal members who trapped muskrat in the Penobscot River.
11. I raised my own children on Indian Island as a single parent and continued to rely upon the River for food because I had little means. I had two sons, Barry and Robert, two daughters, Lori and Kelly. In the 1970s, Barry, being the older son of the two, spent much of his spare time hunting and fishing to help provide food for our family. Barry also provided fiddleheads that he picked on the banks alongside of the Penobscot River and flagroot, which we used for medicine. Flagroot grows on the River bottom up and down the Penobscot River.
12. While my father was alive, I regularly took my sons and my daughters to visit him at Mattanawcook Island during the spring and summer. While there, we relied upon the fish and muskrat that he caught from the River as our primary food source.
13. I recall the events surrounding the settlement of the Penobscot Nation’s land claims against the State of Maine, including the proposal for the settlement presented to Penobscot tribal members in March of 1980. I voted against the settlement. I thought it was rushed and complicated. I also feared that the State of Maine would end up controlling our ability to fish, hunt, and trap for our food from the Penobscot River.
14. I recall testifying before the United States Senate Committee on the land claims in July, 1980. At that time, I was identified as “Lorraine Nelson.” I have reviewed the following passage of that testimony at page 419 of Volume 1 of *Proposed Settlement of Maine Indian Land Claims, Hearings Before the Select Committee on Indian Affairs United States Senate*:

My son hunts and fishes my islands to help provide for our family, and if we are to abide by State laws, as this bill intends us to, my family will endure hardship because of the control of the taking of deer and fish. You know as well as I, inflation has taken its toll, and at the present time I am unemployed and have a family of five to support. Two of these children are going to college. I have brought them up by myself.
15. In giving this testimony and stating that “my son hunts and fishes my islands,” I was referring to the fact that my son, Barry, hunted deer at Mattanawcook, Chokecherry, other islands assigned to me, and that he fished the River from his canoe all around those islands and between them, including near the mainland shores, in order to provide food for my family. Although I referred to “my islands,” I was referring to the fact that he also fished all around Indian Island and other islands near Indian Island, including Orson and Marsh islands, and the waters between those islands, as well as the waters between those islands and the mainland shores, in order to provide food for my family.

16. I have never distinguished between the islands in the Penobscot River, where I and other members of the Penobscot Nation reside, and the River. The River is as much a part of our daily lives as the islands where we maintain our homes. So when I testified to the Senate Committee on the settlement of the land claims that “my son . . . fishes my islands,” I was referring to his fishing in the River as described above.
17. My father, my brother, and I would commonly say we would “fish” an island when referring to fishing in the River in waters in the vicinity of an island. This simply meant that we were fishing in the waters of the Penobscot River in areas where we knew there were fish, and this was anywhere in the River, including in coves of the mainland shores.
18. I am familiar with the islands in the so-called “main stem” of the Penobscot River, from Indian Island, north up to Medway. There are no waters (such as ponds or streams) to support fish on those islands. Fish exist only in the Penobscot River, not on the islands.
19. I have personal knowledge of the foregoing facts.

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

Dated: 03/25/15

/s/ Lorraine Dana
Lorraine Dana

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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

DECLARATION OF CHRISTOPHER B. FRANCIS

Christopher B. Francis hereby declares and states as follows:

1. My name is Christopher B. Francis.
2. I am an enrolled member of the Penobscot Nation.
3. My date of birth is xxxxxxxxxxxx, 1971, and have resided at Indian Island in the Penobscot River all of my life.
4. I have personal knowledge of the facts stated herein.
5. During my childhood, throughout the 1970s and into the early 1980s, my family relied upon fish, fresh water claims, and muskrat caught, gathered, and trapped from the waters and bed of the Penobscot River (the “River”) surrounding Indian Island and northward for a substantial portion of our diet.
6. We relied upon all portions of the River, bank to bank, for these food sources.
7. From the spring (April) until the late fall (November), we relied upon these food sources from the River for three or four meals per week.
8. At each such meal, we caught, gathered, or trapped enough of these food sources from the River to feed my mother, my father, and me, which was between two and three pounds per meal.
9. The River species we ate during these meals included, but were not limited to, small mouth bass, perch, pickerel, catfish, fresh water clams, eel, and muskrat.

10. During this same period of time (throughout the 1970s and into the early 1980s), other families of Penobscot members at Indian Island similarly relied upon these same food sources for their diet as regularly as my family did.
11. Until the mid-1990s, I was often asked by elder members of the Tribe for fish from the River for their meals, and I often provided them with fish that I caught from the River near Indian Island, which they ate.
12. As my family became more aware of the contamination of fish and other River resources in the 1980s and 1990s, we refrained from relying as heavily upon the River for food. Other Penobscot families did the same.

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

Dated: 03/25/15

/s/ Christopher B. Francis
Christopher B. Francis

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

DECLARATION OF KIRK LORING

I, Kirk Loring, hereby state as follows:

1. My name is Kirk Loring. I am an enrolled member of the Penobscot Nation (the “Tribe” or the “Nation”). I grew up on Indian Island, and I served as Chief Game Warden for the Tribe from 1976 until 2001.
2. When I was a born, on xxxxx, 1948, the only means of accessing Indian Island and the other islands in the Penobscot River where Penobscot tribal members lived was by canoe or other boat.
3. In 1950, a bridge was built between the mainland shore and Indian Island. Attached hereto as Exhibit A are three photographs of the Penobscot River and Indian Island, looking out from the mainland, where the bridge now exits.
4. While growing up on Indian Island, my family always relied upon the Penobscot River as a source for food. We regularly ate fish and muskrat from the River. It was common for many tribal members to rely upon the River as a source of food, particularly fish, turtles, eels, and muskrat.
5. I spent much of my youth on the Penobscot River, canoeing, fishing, trapping and engaging in other activities. I never saw law enforcement officers from the State of Maine while engaging in these activities on the River, and I rarely saw anyone other than Penobscot tribal members on the River from Indian Island, northward.
6. While growing up on Indian Island and fishing and trapping in the Penobscot River to put food on the table, I never sought, or applied for, a permit or license from the State of Maine; it never occurred to me that one would be necessary, and I never heard of or observed any tribal member carrying a license or permit from the State of Maine while taking fish or other water-dwelling animals from the Penobscot River for food.

7. While growing up, I always considered the River, from Indian Island northward, to be the Tribe's Reservation. I never distinguished between the islands and the River when I thought about our Reservation. It was inconceivable to me that the River upon which my family relied for food, upon which my family travelled to visit other Penobscot island communities, and upon which I spent almost all of my free time as a youth was not as much my rightful home as Indian Island. My views in this regard have never changed.
8. On January 12, 1976, I became a game warden for the Penobscot Nation. That year, the Tribe was able to hire three other wardens, my brother Chip, John Mitchell, and David Hamilton, all enrolled members of the Tribe. Later in 1976, I was given the title of Chief Game Warden for the Nation, and I served in that position until my retirement in April, 2001.
9. Throughout my tenure as Chief of the Penobscot Nation's Warden Service, the Tribe's wardens patrolled the River from sun up to sun down, from Indian Island to Medway, every day from mid-April, after the break-up of the winter ice, until November, when the River again became ice bound.
10. I am very familiar with the islands in the River from Indian Island northward to the confluence of the east and west branches at Medway. There are no ponds or streams on the surfaces of Indian Island or other islands in the River northward thereof up to confluence of the west and east branches of the River to support fish, eel, muskrat, beaver, or waterfowl, and their taking involves fishing, hunting, or trapping in the River.
11. In the first year of my service as Chief Game Warden, I encountered a non-tribal member engaged in muskrat trapping in the River in waters off of the so-called Brown Islands, which are situated in the River to the southwest of the mainland town of Winn. This individual had no permit. I warned him that he was trespassing on the Penobscot Indian Reservation, and I confiscated his trap.
12. In 1990, I was involved in a Penobscot Tribal Court case, *Penobscot Nation v. Kirk Fields* (Criminal Action Docket Nos. 90-36 and 90-37) in which the State of Maine turned over the prosecution of a tribal member to the Penobscot Nation for hunting a deer in the Penobscot River with a motor boat between the mainland Town of Greenbush and Jackson Island. True copies of the Penobscot Nation Tribal Court Criminal Complaints issued against Mr. Fields are attached hereto as Exhibits B and C and a true copy of my Complaint and Investigation Report in the matter is attached hereto as Exhibit D.
13. I have personal knowledge of the foregoing facts.

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

Dated: April 10, 2015

/s/ Kirk Loring
Kirk Loring

DECLARATION OF BARRY DANA

I, Barry Dana, state as follows:

1. My name is Barry Dana. I am a member of the Penobscot Nation. My date of birth is xxxxxxxxx, 1958.
2. My mother is Lorraine Dana. In the past, she was also known as "Lorraine Nelson."
3. I was raised by my mother with my brother, Rob, and my sisters, Lori and Kelly, on Indian Island in the Penobscot River.
4. The mainland town closest to Indian Island is Old Town, Maine, where I attended high school until I graduated in 1977. I attended the University of Maine at Orono from 1977 to 1981.
5. From the time I was a teenager and throughout high school and college, I fished and hunted in the Penobscot River to provide food for my family. When I was a high school freshman, I built my own canoe for traveling, hunting and fishing on the River. Before that, I borrowed canoes from other Penobscot tribal members.
6. Starting my freshman year of high school in 1973, when I had my own canoe, I fished in the Penobscot River after school almost every day, from early spring until late fall, in order to provide food for our family. I fished all around Indian Island and other islands near Indian Island, including Orson and Marsh islands, and in the waters between those islands, as well as the waters between those islands and the mainland shores. I caught perch, pickerel, bass, chub, catfish, and eel, and my family ate what I caught two to three times per week, sometimes more. I used the entire river, bank to bank, to catch fish and eel because I always understood the River to belong to the Penobscot Nation, as our reservation.
7. During this time, I also collected flagroot plants, from the same areas of the River, and my family used flag root for medicinal purposes. Flagroot grows on the bottom of the River near shores. I collected it from the waters near the mainland shores as readily as from the waters near island shores.
8. During my childhood and adolescence, my mother's father, Chester Dana, resided at Mattanawcook Island (near the mainland town of Lincoln, Maine) most of the year, and my mother, my siblings, and I visited him on a regular basis. During those visits, my grandfather fished and trapped in the River. My family ate fish and muskrat that he harvested from the River. We also ate the deer meat and waterfowl that he secured by hunting.
9. During high school and thereafter, including while I attended the University of Maine at Orono between 1977 and 1981, I hunted deer at Mattanawcook Island and fished the waters surrounding it and Chokecherry Island as well as in the waters between those islands up to the mainland shores on the west and east sides of the River. I did this to provide food for myself and for my family members.

10. In growing up on Indian Island and at Mattanawcook, I never distinguished between the islands in the Penobscot River, where I and other members of the Penobscot Nation lived, and the River. We were always on the River to gather food and flagroot and to travel and play. It was integral to our way of life.
11. Following stories and the traditions of my grandfather and other elders of the Penobscot Nation, I first journeyed up the Penobscot River to Katahdin, a mountain of great spiritual significance to Penobscot people, while in high school. Starting in 1981, as a tribute to our ancient connection to the River, I began annual journeys in the form of a run from Indian Island up along the River ending at Katahdin. Other Penobscot tribal members have joined me in this annual tribute ever since. Our members not only run to Katahdin, but some of us canoe 90 miles up the River from Indian Island to the west branch of the Penobscot at Pockwockamus falls, and then run and walk the last 7 miles to Katahdin.
12. I am familiar with the islands in the so-called “main stem” of the Penobscot River, from Indian Island, north up to Medway. There are no waters of any sort (such as ponds or streams) to support fish, eel, muskrat, or other water dwelling animals on those islands. They live only in the Penobscot River, not on the islands.
13. I have personal knowledge of the foregoing facts.

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

Dated: 07/03/14

/s/ Barry Dana
Barry Dana

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

DECLARATION OF TIMOTHY GOULD

I, Timothy Gould, depose and state as follows:

1. My name is Timothy Gould. I am an enrolled member of the Penobscot Nation, a federally recognized Indian tribe (the “Tribe” or the “Nation”).
2. I was born in 1960 and grew up on the Penobscot Indian Reservation on Indian Island on the Penobscot River.
3. During my childhood, my family relied on the River, from Indian Island northward for food. We regularly ate fish and muskrat caught and trapped in the River. We also regularly ate fiddleheads gathered from the shores of islands as well as from the mainland shores of the River.
4. When thinking about the Penobscot Reservation, we never distinguished between the islands and the bed and waters of the River where we gathered our food, and that was everywhere on the River, bank to bank and between the Islands from Indian Island and northward. I have always considered the bed and waters of the River, from Indian Island at least as far north to Medway (the “Main Stem”) to be as much our reservation as the islands.
5. I spent much of my youth (from age 12 into my 20s) on the Main Stem canoeing, fishing, and engaging in other activities. While on the Main Stem during those years, I cannot recall ever seeing State of Maine law enforcement officers. The only law enforcement officers I saw were Penobscot game wardens. It was extremely rare to see anyone other than other Penobscot tribal members on the

Main Stem. During those years, I can recall seeing non-tribal individuals on the Main Stem only once, and I recall being very surprised to see them. They were in a canoe near Orson Island.

6. I commenced work as a game warden for the Penobscot Nation in 2001 and assumed the position of Chief Warden that same year. The Penobscot Nation Warden Service enforces the laws of the Penobscot Nation governing hunting, trapping and other taking of wildlife on the Main Stem as well as tribal laws governing sustenance fishing by members of the Tribe.
7. As a matter of course, the Tribe's wardens patrol the Main Stem every day.
8. Our patrolling on the River was enhanced by our procurement of "jet boats" in 2001, which are powered by jets just below the water surface, unencumbered by most sunken logs, rocks, and ledges in the River.
9. Maine game wardens have, on occasion, patrolled the Main Stem in the company of Penobscot wardens in Penobscot boats. This happened about two or three times per summer until approximately 2007.
10. I have seen Maine game wardens on the Main Stem in boats, other than Penobscot boats, no more than six times in the fourteen years I have served as Chief Game Warden for the Penobscot Nation, and I have not known or heard of State wardens issuing a summons from their own boats, other than one issued to Penobscot tribal member, Miles Francis in the 1990s.
11. I have read the Affidavit of Jennifer Davis Dykstra, "ECF No. 52-2" in this matter, in which Ms. Dykstra attributes a number of statements to me and one "Richard Allen" and refers to us as "Tribal Wardens." There is no Penobscot game warden by the name of Richard Allen. (She may have meant Richard Adams.) I recall the day in question, but I was not involved in any conversation with Ms. Dykstra. I was inspecting individuals in a separate boat.
12. I have never told anyone that the Penobscot Nation requires individuals on the River to have an "access permit" "for access for any reason onto the river." By practice, the only discussions I have with non-tribal individuals about Penobscot permits on the Main Stem have to do with hunting and trapping permits.
13. I have never told anyone that they should "call the Tribe if [they] see State of Maine Wardens on the river."
14. As Chief of the Penobscot warden service, I closely monitor the enforcement and other operations of our warden service on the Main Stem.

- a. Penobscot wardens have never told non-tribal members that they need a \$40.00 access permit to fish or engage in boating on the Main Stem. They have, however, explained that non-tribal members need the Penobscot hunting permit, which we refer to as a “duck hunting access permit” to engage in duck hunting on the Main Stem. They have also explained that the Tribe prohibits non-sustenance trapping of fur-bearing animals on the Main Stem, but will, on occasion, issue "nuisance" trapping permits to deal with animals that are harming resources.
 - b. Penobscot wardens have never sought to exclude non-tribal members from the Main Stem; nor have they ever claimed authority to prevent any non-Tribal member from boating on the River.
15. I have read the Affidavit of Steven Morin, “ECF No. 52-4” in this matter, in which Mr. Morin states that I came up to him and Jerrod Hughes and informed them that they “needed a tribal permit to trap anywhere in the Penobscot River because the Tribe owned the bed of the river from bank-to-bank.” I never had such a conversation with Mr. Morin, and I have never told anyone that “the Tribe owns the bed of the river.” I have informed individuals who hunt or trap on the waters or bed of the Main Stem that Penobscot permits are required for those activities, but never in a provocative or demanding manner.
16. I do recall encountering Jerrod Hughes in the spring of 2013 with trapping equipment. This was when the ice was just out on the River and trappers tend to be active. Mr. Hughes told me that he was in the company of two others, but that he was the only one trapping. He said that his friends were watching. I never spoke with anyone other than Mr. Hughes.
17. Mr. Hughes said that he was beaver trapping on the Main Stem, and when I asked, he said he did not have a trapping permit from the Tribe. I explained that he would need a permit from the Tribe, and he could apply for a nuisance permit through John Banks, the Natural Resources Director for the Tribe. The conversation was very cordial.
18. I later had a discussion with Mr. Banks about prospects for providing Mr. Hughes with a nuisance permit, given the damage that beavers were doing to trees on the islands.
19. Within about 5-7 days later, I learned that Mr. Banks had a nuisance permit for Mr. Hughes. I retrieved it and gave it to another Penobscot game warden, Troy Francis, to deliver it to Mr. Hughes.

20. I later saw Mr. Hughes near a tributary of the Main Stem and he told me that someone was springing his traps. I told him I would keep an eye out for any such activity. As in our first meeting, the conversation was cordial and friendly.
21. On July 20, 2012 I learned from PN Police Chief Robert Bryant that there had been an incident on the River in the area of the eddy near Sandy Beach on Indian Island in which State wardens had stopped three tribal members.
22. Shortly thereafter I received a call on my cell phone from State warden David Georgia saying that someone wished to speak with me. Warden Georgia then handed the telephone to State warden Lieutenant Daniel Scott.
23. Lt. Scott asked me to meet him at the Old Town boat launch to discuss the incident that had occurred earlier that day on the River. I agreed and we met there, together with State warden Sargent Gillis, a short time later.
24. I have read the affidavit of Lt. Scott (ECF No. 118-5) filed in this matter. I did not, as Lt. Scott asserts in paragraphs 9 and 12 of his affidavit, ever say anything about whether State wardens should or should not be patrolling the River.
25. As I recall, Lt. Scott did not say he was concerned "that officials from PN were on the River telling MDIFW Wardens to leave."
26. Lt. Scott and I did discuss our concerns about the incident. I told him that PN considers the river to be part of the Reservation and that as tribal wardens we patrol in the area we consider to be the Reservation.
27. He expressed concern that there could be a conflict on the River given the dispute about jurisdiction, a concern which I told him I shared.
28. Our conversation was at all times cordial and non-confrontational. I told Lt. Scott that we are all professionals and we agreed that the jurisdictional dispute would not be decided at our level but rather in some other forum. I recall telling Lt. Scott that as a tribal member and a tribal warden, I hoped that the Tribe would not lose any more ground when the issue was finally resolved.
29. Lt. Scott asked me if I intended to have my wardens order state wardens off the River and I told him I had no such intention.
30. I explained to Lt. Scott that Warden Georgia frequently called tribal wardens asking them to take him out on the Main Stem to patrol. I explained that tribal wardens declined these requests because the Tribe stopped doing joint patrols on the River because of the dispute about who has jurisdiction. I told Lt. Scott that

Warden Georgia kept calling asking to do joint patrols and appeared unhappy that tribal wardens declined his requests.

31. The Tribe incorporates the laws of Maine as the law of the Tribe by providing that: "State of Maine Law Title 12 shall govern (but not be limited to) the taking of fish and wildlife in all instances where there are no applicable tribal ordinances." Thus, pursuant to that section, Penobscot game wardens routinely check boaters on the Main Stem for compliance with Title 12's provisions, such as requisite boat registrations and personal flotation devices.
32. I have never heard any non-tribal member complain about the Penobscot warden service other than what State wardens have presented by means of affidavits in this case.
33. Our wardens regularly meet with compliments from non-tribal members in their interactions with non-tribal members on the Main Stem. (The letter dated May 30, 2005 attached hereto is an example.) Just last week, I checked a boat on the Main Stem operated by individuals from Massachusetts. Although I did not recognize them, they said that they recognized me because I checked in on them exactly one year ago. They expressed their enjoyment of the River and their gratitude for the Penobscot warden service in its concern for their safety. I expressed my mutual enjoyment of the River and said I was glad they were having a good time.

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

Executed on:

06/19/15

/s/ Timothy Gould

Timothy Gould

EXHIBIT C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

STATE OF MAINE, and PAUL MERCER, in
his official capacity as Commissioner of the
Maine Department of Environmental
Protection,

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator,
United States Environmental Protection
Agency, *et al.*

Defendants and

PENOBSCOT NATION and
HOULTON BAND OF MALISEET
INDIANS,

Defendants-Intervenors.

Civil Action No. 1:14-cv-264 JDL

DECLARATION OF HARALD PRINS

Pursuant to 28 U.S.C. § 1746, I, Harald Prins, declare and state as follows:

1. I am a cultural anthropologist, ethnohistorian, and scholar. A copy of my curriculum vitae is attached hereto as Exhibit 1.
2. As a scholar, I have studied and published peer-reviewed articles on the Penobscot Indians (the Penobscot Nation) and am deeply familiar with their history and their subsistence and cultural practices in relation to the Penobscot River from the seventeenth century to the present.
3. In December, 2013, I provided expert opinions set out in a report filed in the matter of *Penobscot Nation v. Mills*, Civil Action No. 1:12-cv-254 at ECF 105-88 PageID# 3707-3812. A copy of the Summary of Opinions from that report is attached hereto as Exhibit 2.

4. From my anthropological work and historical research on the Penobscot Nation, I have learned the following, all of which I previously provided as part of my above-referenced expert opinions in the matter of *Penobscot Nation v. Mills*:

- (a) Penobscot cultural practices are inextricably intertwined with the taking of fish for sustenance from the Penobscot River.
- (b) Penobscot family names, *ntútem* (or “totems” in English), reflect the fish in the River: for example, *Neptune* (eel); *Sockalexix* (sturgeon), *Penewit* (yellow perch).
- (c) The Tribe’s principal island village variously called *Panawamskeag* or *Pem ta guaiusk took*, translated as “great or long River,” but known by non-Indians as “Indian Old Town” or “Indian Island,” is located just above a series of ledges and falls, historically the Tribe’s most prized fishing site.
- (d) Nichol’s rock, identified by the Penobscots as *Sobscook* (translated “Sea Rock”), marked the head of the tides, the place below which the Penobscot River was affected by the ebb and flood of the tides.
- (e) The Penobscots’ relinquishment of the uplands on both sides of the Penobscot River in their 1796 and 1818 treaties with Massachusetts did not change their subsistence way of life on the Penobscot River: they continued to use and occupy the River to take fish and other water-dwelling creatures in order to survive. The Penobscots would not have entered into these treaties if they had provided otherwise.

5. The statements set forth in the Summary of Opinions attached hereto as Exhibit 2 and in subparagraphs 4(a)-(e), above, are true and accurate, based upon established sources and methodologies in the fields of anthropology and ethnohistory.

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

Dated: 07/27/18

/s/ Harald Prins
Harald Prins

Exhibit 1

CURRICULUM VITAE
Dr. HARALD E. L. PRINS

07/26/18

Wisbee Creek Point, 295 North Bath Road, Bath, Maine 04530, U.S.A.
Phone/fax 207-386-0544 e-mail: prins@ksu.edu <http://www.ksu.edu/sasw/anthro/prins.htm>

CURRENT POSITIONS

University Distinguished Professor of Anthropology (Emeritus), *Kansas State University*

RESEARCH INTERESTS

Cultural Anthropology; Visual Anthropology, Ethnohistory; Political Ecology; Military History; Indigenous Peoples; North America (Northeast & Plains), South America (Pampa & Chaco).

PREVIOUS POSITIONS

University Distinguished Professor, Anthropology, *Kansas State University* ('05-'17).
Graduate Faculty, KSU ('90-'17); Professor, American Ethnic Studies ('96-'17)
University Distinguished Teaching Scholar, *Kansas State University* ('04-'17)
Research Associate, National Museum of Natural History, *Smithsonian Institution* ('08-'11)
Guest Professor of Social Anthropology, *Lund University*, Sweden (Spring '10)
Principal Investigator, Indigenous History, Acadia National Park/National Park Service, ('03-'07)
Co-Guest Curator, National Museum for Natural History, *Smithsonian*, Washington DC ('03-'07)
President, *Society for Visual Anthropology* ('99-'01)
Visual Anthropology Editor, *American Anthropologist* ('98-'02)
Faculty Advisor, *Native American Student Body*, KSU ('95-'00)
Faculty Advisor, American Indian Science & Engineering Society, KSU ('92-'95)
Acting Director, American Ethnic Studies Program, KSU (Summer '95)
Full Professor ('96-'05), Assoc. tenured Prof. ('94-'96); Ass't Prof. Anthropology, KSU ('90-'94)
Visiting Lecturer in Anthropology, *Bowdoin College*, Maine ('86-'88, '90)
Visiting Ass't Prof. of Anthropology, *Colby College*, ME ('88-'89)
Adjunct Prof. of Anthropology, *University of Maine-Orono* (Fall '89)
Visiting Prof., *Salt Institute for Documentary Field Studies*, Maine College of Art, Portland, Me (Summer '90)
Film Project Director, Micmac Indian Artisans in Maine ('83-'85)
Staff Anthropologist, *Aroostook Band of Micmac Indians* ('82-'90)
Director of Research and Development, *Association of Aroostook Indians*, Maine ('81-'82)
Assistant Professor of Comparative History, *Radboud University* (U Nijmegen), Netherlands ('76-'78)

ACADEMIC DEGREES

Ph.D., The Grad. Faculty of Pol. & Soc. Science, New School for Social Research, NY ('88).
[thesis committee: Michael Harner, Rayna Rapp, Eric Wolf, Arthur Vidich]
Doctorandus, University of Nijmegen, The Netherlands ('76); Doctoraal Scriptie: *Feodalisme: Een Begripsanalyse* ('76).

ACADEMIC EDUCATION

Graduate Training: The Graduate Faculty for Social and Political Science, The New School for Social Research, New York ('78-'80); University of Nijmegen, The Netherlands ('73-'76).
with courses at: Columbia University ('78-'79); CUNY ('79-'80); Ctr. for Latin American Studies (CEDLA), U Amsterdam ('75); U Utrecht, Netherlands ('74)

Undergraduate Training:

U Nijmegen, Netherlands ('70-'72), with courses at: U Groningen, Netherlands ('70-'72)

FILM TRAINING

Advanced 16mm. Film Production, New School/Parsons School of Design, New York ('79-'80)

RESEARCH:

Ethnographic Fieldwork:

Mi'kmaq Indian Nation, Canadian Maritimes/Newfoundland/Maine, '81-'01.
Maliseet Tribe, Maine/New Brunswick, '81-'90.
Plains Apache Tribe of Oklahoma, '93-'95.
Gran Chaco & Mato Grosso tribes, South America; Ethnographic survey, '97, '07
Mapuche (Ranqueles), La Pampa, Argentina, '73, '80-81

Ethnohistorical:

Wabanaki (Mi'kmaq, Maliseet, Penobscot, Passamaquoddy, Abenaki), '81-today

Archaeological Excavations:

Tel Gezer, Canaanite Bronze Age City; Tel Anafa, Hellenistic Town, Israel, '70
Bergumermeer, Mesolithic site, northern Netherlands, '72.
Norridgewock, Proto-Historical Abenaki Indian village (site discoverer/surface surveyor), '83-'85

EXPERT WITNESS:

U.S. District Court of Maine, (Penobscot Indian Nation vs. State of Maine et als.)
(riverine fishing & hunting rights, sovereignty & reservation boundaries)
Penobscot Indian Nation/U.S. Department of Justice, May '13-Dec. '15
Supreme Court of Newfoundland, St. John's (Mi'kmaq Aboriginal Land Claims
Her Majesty vs. Dren), Sept./Dec, 2000 (legal decision pending)
Provincial Court, Gander, Nwfld (Mi'kmaq Aboriginal Fishing Rights), Feb. '99
U.S. Senate: Congressional Hearings re. Aroostook Band of Micmac Indians Native Rights
Bill (S.1413 & H.R.3049), Washington DC 28-29 March, 1990
Native rights awarded Micmac Indians in Maine, 1991:
- Federal recognition of tribal status
- \$900,000 settlement to buy back tribal lands (5,000 acres)

AWARDS & HONORS

Harald Prins & Bunny McBride Student Travel Scholarship, KSU ('16) (colleague-founded at retirement)
Kansas State University Academy of Fellows, Founding member ('13)
Leadership in History Award, American Association for State and Local History (Abbe Museum
exhibit "Indians & Rusticators" (co-curator). ('12).
Outstanding Faculty Honoree, Mortar Board National College Senior Honor Society, XIX Chapter
Kansas State University ('12)
Oxford University Press Award for Excellence in Undergraduate Teaching of Anthropology,
American Anthropological Association ('10)
Maine Writers & Publishers Association, Literary Award (Honorable Mention) for *Indians in Eden* ('10)
Professorial Performance Award, KSU ('08)
Carnegie Foundation for the Advancement of Teaching, Kansas Professor of the Year ('06)
New York Academy of Sciences, Associate (complimentary membership '06-'07)
Coffman Chair of Distinguished University Teaching Scholars, KSU ('04-'05)
John Culkin Award for Outstanding Praxis in the Field of Media Ecology ('04),
Media Ecology Association (for *Oh, What a Blow that Phantom Game Me*)
President, Society for Visual Anthropology ('99-'01)
Presidential Award for Outstanding Undergraduate Teaching, KSU '99
Margaret Mead Award Finalist, Society for Applied Anthropology/AAA ('92, '97)
Honorable Mention, Society for Visual Anthropology '96 (for *Wabanaki: A New Dawn*)
History Book Club, *American Beginnings* designated Alternate Selection of the Month, '95
Conoco Award (renamed "Presidential Award") for Outstanding Undergraduate Teaching, KSU '93
Indian Service Award, Aroostook Micmac Council, Presque Isle, Maine, '82
Fulbright-Hays Travel Grant '78-'79 (declined due to visa restrictions)
Vera List Fellow, Graduate Faculty for Political & Social Science, New School for Social Research,
New York City, '78-'79 (selected through Fulbright Center, Amsterdam)

OTHER DISTINCTIONS

President, University Distinguished Professor Group, Kansas State U ('10-'11)

Outstanding Mentor, McNair Scholars Program, Kansas State U ('08).
 K-State Basketball Professor of the Week, Dec 30 ('08)
 International Review Committee member, *Nijmegen Institute for Social Cultural Research* (NISCO),
 Radboud University Nijmegen, Netherlands ('06)
 New York Academy of Sciences, Invited Lecture (UNESCO and Human Rights; 12/04/06)
 Pi Beta Phi (K-State women's fraternity), "Outstanding Teacher" ('06).
 Commencement Address, College of Arts & Sciences, KSU (12/09/05).
 University Distinguished Teaching Scholar, Kansas State U (lifetime appointment since '04)
 Dept of House & Dining Services, K-State, Recognition of "leadership in the classroom and
 commitment to student success." May '03
 Executive Board, *Society for Visual Anthropology* ('99-'02)
 Distinguished Lecturer, 55th Anniversary Anthropology Institute, U Nijmegen, Netherlands ('03)
 Keynote Speaker, Northeastern Anthropological Association Annual Mtngs, Burlington VT, ('03)
 Keynote Speaker, High Plains Society for Applied Anthropology Conference ('02).
 Distinguished Lecturer, U Maine-Presque Isle, ME ('02).
 Football Professor of the Week, KSU/Wildcats, Manhattan, Fall ('02)
 Chair in American Civilization, École des hautes études en sciences sociales, Paris (nominee, '01)
 Jury: SVA Ethnographic Film & Video Festival, Santa Fe, NM ('98)
 Program Organizer/Editor, Society for Visual Anthropology, San Francisco ('96)
 International Observer, Presidential Elections in Paraguay, LASA, May ('93)
 Jury: Baxter Award (annual), Maine Historical Society, Portland (Me) ('91-present)

Biographical Inclusions:

Who's Who in America. (64th edition [since '99])
Wikipedia, the Free Encyclopedia (since '07)
Who's Who in Science and Engineering (10th Anniversary Edition, since '07)
Who's Who in American Education. (since '06)
Who's Who in Social Sciences Higher Education. (since '04)
Who's Who Among America's Teachers. (since '96)
Who's Who in the Midwest. (since '98)
Contemporary Authors. (since '98)
Directory of American Scholars.
Reference Encyclopedia of the American Indian. (since '93)

FELLOWSHIPS, RESEARCH FUNDING & TRAVEL GRANTS

The Metropolitan Museum of Art '17; University of Mississippi '17; Penobscot Indian Nation [U.S. Dept. of Interior/Dept. of Justice: '13-'15; Wenner-Gren Foundation for Anthropological Research '14, '15, '16; Smithsonian Institution '02-'06; U.S. National Park Service '03-'07, '09, '14; Canada's Social Sciences and Humanities Research Council (SSHRC) '08; U Toronto '11; University of Lund, Sweden '10; McCormick Tribune Foundation/First Division Museum '07; UNESCO '05; Swiss Development Corporation '04; New York State Dept. of Education '88; US Bureau of Indian Affairs '97; National Endowment for the Humanities ('89); Vera G. List Fellowship ('78-'79); Fulbright-Hays ('78, declined); New School for Social Research ('79-'80, '85); Parsons School of Design ('79); Criterion Foundation ('80), National Indian Lutheran Board ('82); U.S. Dept. of Health & Human Services (Admin. for Native Americans) ('82-'90); Vera List Foundation, NYC ('83), Maine Humanities Council ('84, '85, '07); Maine Arts Commission ('85); National Endowment for the Humanities Summer Fellow ('89); Bowdoin College ('87); Colby College ('89); Penobscot Indian Nation ('97); Rock Foundation, NYC ('01, '08-'11); Miawpukek Heritage Fund (Newfoundland, Canada) ('98, '99); Kansas Humanities Council ('93); Kansas State University (Summer Fellow '91, Inst. for Social and Behavioral Research, 6 USRG & President's Faculty Development Awards -'92-'09); &c

COURSES TAUGHT

Introduction to Cultural Anthropology; Anthropological Theory; Research Methods;

Comparative History Fourth World; Indigenous Peoples of Latin America;
South American Indians; North American Indians (Ethnohistory); Visual Anthropology
(Ethnographic Film); Anthropology of Religion/Shamanism; Maine Material Culture

PUBLICATIONS

BOOKS/EDITED VOLUMES

- Cultural Anthropology: The Human Challenge.*** (multiple revised editions- most recent 15th ; leading co-author with W. Haviland et al). Belmont, CA: Wadsworth Publishers/Cengage, '17
- The Essence of Anthropology*** (multiple revised editions – most recent 4th; 2nd author with W. Haviland et al). Belmont, CA: Wadsworth Publishers, '15.
- Evolution and Prehistory: The Human Challenge,*** (10th edition; 3rd author, with W. Haviland et al), Belmont, CA: Wadsworth Publishers, '13.
- Anthropology: The Human Challenge,*** (multiple revised editions – most recent 15th; leading co-author with W. Haviland et al . Belmont, CA: Wadsworth Publishers, '17.
- Princípios de Antropologia.*** (Portuguese translation by E Paes e Lima). Sao Paulo, Brazil: Cengage Learning Learning Edições, Ltda '(11) (co-authored with Haviland et al)
- Indians in Eden: Wabanakis and Rusticators on Maine's Mount Desert Island: 1840s-1920s.*** Camden: Down East Books. (co-author, with B. McBride, '09)
- Asticou's Island Domain: Wabanaki Peoples at Mount Desert Island: 1500-2000,*** (2 vols.). Washington, D.C.: National Park Service, US Dept. of Interior, '07. (with B. McBride.)
Electronic version on NPS website: www.nps.gov/acad/historyculture/ethnography.htm
https://www.nps.gov/parkhistory/online_books/acad/wabanaki_peoples_vol1.pdf
https://www.nps.gov/parkhistory/online_books/acad/wabanaki_peoples_vol2.pdf
- Cultural Anthropology.*** India Edition. New Delhi, India: Cengage Learning India (1st edition, '09 2nd author with W. Haviland et al).
- Introduction to Anthropology.*** India Edition. New Delhi, India: Cengage Learning India. (1st edition, '08 2nd author with W. Haviland et al)
- Kültürel Antropoloji*** (2nd author, with W. Haviland et. al.) Istanbul, Turkey: Hermes Kaknus Publications, '08. (Turkish translated edition of the Cultural Anthropology textbook)
- Cultural Anthropology: The Human Challenge.*** (12th edition; 2nd author with W. Haviland et al). Belmont, CA: Wadsworth Publishers, '07.
- Evolution and Prehistory: The Human Challenge,*** (8th edition; 3rd author, with W. Haviland et al), Belmont, CA: Wadsworth Publishers, '07.
- Anthropology: The Human Challenge,*** (11th edition; 2nd author, with W. Haviland et al). Belmont, CA: Wadsworth Publishers, '07.
- The Origins of Visual Anthropology: North American Contributions.*** *Visual Anthropology Review* (17 (2) 2001. Special Guest-Edited Issue (with Jay Ruby).
- Maine History*** 37 (3), '98. Issue in Honor of Frank Siebert, Guest edited with Willard Walker).
- The Mi'kmaq: Resistance, Accommodation, and Cultural Survival,*** Fort Worth (&c.): Harcourt Brace, '96. (*Case Studies in Anthropology* series)
- American Beginnings: Exploration, Culture, and Cartography in the Land of Norumbega.*** Co-editor with E. Baker et. al., Lincoln: University of Nebraska Press, '94.
- Tribulations of a Border Tribe: A Discourse on the Political Ecology of the Aroostook Band of Micmacs (16th-20th Centuries).*** Ann Arbor: UMI '89. [Doct. Dissertation].

IN PREPARATION:

From Indian Island to Omaha Beach: The Story of Charles Shay, Penobscot Indian War Hero. Lincoln: U Nebraska Press (1st author, with B. McBride, expected publication 2019.)

MUSEUM EXHIBITIONS

Irving Penn Centennial, Metropolitan Museum of Art, New York 2017; Grand Palais, Paris; C/O Berlin, Germany; Instituto Moreira Salle, Sao Paulo, Brazil '18 [catalog contributor]

- Indians & Rusticators: Wabanakis and Summer Visitors at Mount Desert Island 1840s-1920s.** Abbe Museum for Stone Age Antiquities, Bar Harbor, Maine
(Guest curator with B. McBride; national award-winning “blockbuster” exhibit ‘11-‘13)
<http://mdi.mainememory.net/page/3708/display.html>
<http://www.ellsworthamerican.com/living/living-entertainment/exhibit-evokes-gilded-age-dichotomy>
- Alfred Métraux, *From Fieldwork to Human Rights: Itinerary of a 20th-Century Ethnographer.*** Washington DC: National Museum for Natural History, Smithsonian Institution [co-curator, ’03-’07 – canceled due to budget crisis and funding problems].

DOCUMENTARY FILMS

- A Day to Remember***, Maine Experience, MPBS (’08) (camera, concluding footage in Normandy). New England Emmy for Historical/Cultural Program/Special, 2008.
- Among Xavante Friends: A Tribute to David Maybury-Lewis*** (’08) (with A. Bohannon & J. Stone). (Video/DVD, 22 mins., first screened at Pitt-Rivers Museum, Oxford U, June 19, 2008. Annual Meetings of the AAA, San Francisco, Nov.29, ’09.
- Oh, What a Blow that Phantom Gave Me! Edmund Carpenter*** (’03). (John Culkins Award for Outstanding Media Practice, Media Ecology Association; with J. Bishop) 55-mins. (VHS Video & DVD Formats). Produced by Media Generation, West Hills, CA., Distributor: D.E.R. (Watertown, MA).
- Wabanaki: A New Dawn*** (’95) (Project initiator & key scholar). Dirs. D. Westphal & D. Kostyk, Produced by the Maine Indian Tribe-State Committee. Distributor: Northeast Historic Film (Bucksport, ME) (SVA 1996 Honorable Mention).
- Kickapoo Dreamer***. (28 min). video Project Dir. Harald Prins [with Bruce Broce] (Kansas Humanities Council ’94 (project aborted and \$14,533 returned)
- Ka-ta-ka: Plains Apaches of Oklahoma*** (’94) (Director & cameraman, with Chad Buehler)
- Our Lives in Our Hands*** (’85). (Co-prod. with K. Carter). A 50-minute, 16 mm. color film on Micmac Indian artisans & farm workers in Maine (Also in VHS & DVD formats). Distributors: D.E.R. (Watertown, MA), Northeast Historical Film (Bucksport, ME). Videostreaming on Folkstreams website: <http://www.folkstreams.net/film,94>

JOURNAL ARTICLES & BOOK CHAPTERS

- “Guerrieri indiani d'America nella liberazione dell'Europa, *Rivista Teepee, Soconas Incomindios*, ’19 (invited article, in prep.)
- “Wolf, Eric.” *International Encyclopedia of Anthropology*. Ed. by Hilary Callan (1500-word entry, solicited by the editors). Hoboken, N.J.: Wiley-Blackwell. ’18.
- “Ethnographic Portraits, 1967-71.” Pp. 212-219, 366-367. *Irving Penn: Centennial*. Edited by Maria. M. Hambourg. New York: Metropolitan Museum of Art/Yale U Press. ’17
- “Portraits ethnographiques, 1967-1971.” Pp.211-17, 366-367. *Irving Penn : Le centenaire*. Paris: Les éditions Rmn-Grand Palais. ’17
- “Ethnographische Portraits, 1967-1971. Pp. 211-17, 365-66. Munich: Schirmer/Mosel Verlag ’18.
- “Retratos Etnográficos, 1967-1971. Pp. Xxx-xyz. Sao Paulo, Brazil ’18.
- “The Turtle Honors Extraordinary Sacrifice of Indian Warriors on D-Day,” Digital Magazine *Indian Country Today*. 12 July ’17. (1st author, with B. McBride).
<https://indiancountrymedianetwork.com/news/veterans/turtle-honors-extraordinary-sacrifice-indian-warriors-d-day/>
- “Trumpets at a Kansas Parade.” *Hot Spots, Cultural Anthropology website*, January 18, 2017.
<https://culanth.org/fieldsights/1041-trumpets-at-a-kansas-parade>
- “A Co-Existence of Contraries: Carpenter & McLuhan as Totemic Twins. In *McLuhan 100: Then | Now | Next*. Ed. Dominique Scheffel-Dunand. U Toronto Press (submitted)
- Trumpets at a Kansas Parade.” *Hot Spots, Cultural Anthropology website*, January 18, 2017.
<https://culanth.org/fieldsights/1041-trumpets-at-a-kansas-parade>
- “Upside Down: Arctic Realities & Indigenous Art.” Review Essay. *American Anthropologist* Vol. 114 (2):359-64. (1st author, with B. McBride).

- “From Reservation to Globalization: 20th-Century Native Americans in the Military.”
Webinar. Cengage Learning, Belmont, CA., April 26, 2012.
<https://cengage.webex.com/cengage/ldr.php?AT=pb&SP=MC&rID=58885032&rKey=426661690fe56622>
- “Edmund Carpenter. *Tribal Art Magazine*, Winter Issue. 2011.
- “Edmund Carpenter. Obituary. *Anthropology News*, Vol.52 (9), p.24. Dec. 2011.
- “Comment: Krech, S. “The Nature and Culture of Birds,” *On the Human: A Project of the National Humanities Center* (April 2011). G. Comstock, P. Barron, P. Shipton, S. Haslanger (eds.)
URL=<http://onthehuman.org/2011/03/nature-and-culture-of-birds/comment-page-1/#comment-5599>
- “Asticou’s Fjord or Somes Sound?: Mythistory of Wabanaki Dispossession.” In *Chebacco: The Magazine of Mount Desert Island Historical Society* Vol.XII: 41-61. [1st author, with B. McBride]
http://mdihistory.org/wp-content/uploads/2011-Asticou-Fjord-or-Somes-Sound_ocr.pdf
- “Foreword.” C.N. Shay, *Diary of an Omaha Beach Veteran*. Solon (Me): Polar Bear Press ‘11 pp.1-2. (with B. McBride.)
- “Eric R. Wolf.” Pp.260-66. In *Fifty Key Anthropologists*, eds. R. Gordon, H. Lyons, A. Lyons. London: Routledge, ‘10.
- “Cherokee Chief Opens Highland Games in Scotland.” News feature in: *Indian Country Today*. Oct 6, 2010 (front page)
<http://www.indiancountrytoday.com/global/Cherokee-chief-opens-Highland-Games-in-Scotland-104162228.html>
- “The Atlatl as Combat Weapon in 17th-Century Amazonia: Tapuya Indian Warriors in Dutch Colonial Brazil.” *The Atlatl* Vol.23(2):1-3 (June 2010)
<http://waa.basketmakeratlatl.com/wp-content/uploads/2013/02/Tapuya-Atlatl-Article-by-Harald-Prins-25-May-2010.pdf>
- “Beyond Wolf: Structural Power in the Globalscape.” In: “Ten years after: the legacy of Eric R. Wolf.” Presidential Session/AAA Executive Program Committee. 108th Annual Meetings of the American Anthropological Association. AAA Blog
<http://blog.aaanet.org/2010/06/23/annual-meeting-video-the-legacy-of-eric-r-wolf/>
- “The Indian Encampment.” Feature article in *Down East: The Magazine of Maine*. Vol.56(10): 100-102 (May 2010) [with B. McBride; edited excerpt from book *Indians in Eden*]
- “Tribal Tourism.” *Portland Monthly*, July/August 2010, pp.57-59. [with B. McBride]
- “Charles Norman Shay.” Bio sketch on Penobscot Indian Nation Website *Penobscot: Culture & History of the Nation*. (with B. McBride).
http://www.penobscotculture.com/index.php?option=com_content&view=article&id=201&Itemid=72
- “Messamouet.” Mi’kmaw Biography Project. Social Sciences & Humanities Research Council, Canada (in prep)
- “Willard Walker.” Obituary. *Anthropology News* Vol. 51 (4), p.31. (April 2010). (with J. Sarbaugh)
- “Discussion: Lévi-Strauss aujourd’hui.” *Journal de la société des américanistes* Vol.94 (’08), No.2, Pp.21-22. (& others in ‘Tribute to Claude Lévi-Strauss’ at Quai Branly museum.)
<<http://jsa.revues.org/index10554.html>>
- “Donald Sanipass.” Mi’kmaw Biography Project. Social Sciences & Humanities Research Council, Canada (2nd author, with B. McBride)
- “Pioneer in Brazilian Ethnography & Indigenous Rights Advocacy: David Maybury-Lewis (1929-2007).” *Tipiti: Journal of the Society for the Anthropology of Lowland South America*. Vol.6 (2008), No.1-2, pp.115-22. Invited Essay. 1st author, with L. Graham.
<http://digitalcommons.trinity.edu/cgi/viewcontent.cgi?article=1087&context=tipiti>
- “Alfred Métraux, Richard Wright and the History of the Civil Rights Movement: A Multi-Platform Education Project. (2 p. brochure). Washington DC: NMNH, Smithsonian, ’08.
- “Edmund Carpenter.” Biography for *The Media Ecologists* (Media Ecology Association website)
- “Acadia National Park: Asticou’s Island Domain.” Pp.31-33. In *American Indian Place Names: A Historic Guidebook*. (F. H. Kennedy, ed.) Boston: Houghton Mifflin (’08) (2nd author, with B. McBride)
- “From Indian Island to Omaha Beach: A Penobscot Combat Veteran’s Pilgrimage.”
Indian Country Today, Vol. 27, No.22, pp.1, 5. (7 Nov ‘07) (1st author, with B. McBride)
- “On Enthusiastically Teaching the Relevance of Cross-Cultural Literacy.” *Anthropology News*,

- Vol.48, No. 2 (February, '07), p.5.
<http://onlinelibrary.wiley.com/doi/10.1525/an.2007.48.2.26/abstract>
- “Vers un Monde sans Mal: Alfred Métraux, un anthropologue à l’Unesco (1948-1962),” Pp.115-125. In “60 Ans d’histoire de l’Unesco. Actes de conference internationale, Paris, 16-18 novembre, 2005.” Paris: Unesco, ‘07. (1st author, with E. Krebs.)
- “Toward a Land without Evil: Alfred Métraux as UNESCO Anthropologist 1948-1962.” Pp.1-18. In 60 Years of UNESCO History. Proceedings of the International Symposium in Paris, 16-18 November 2005. Paris: UNESCO, ‘07.
- “Edmund Carpenter: A Trickster’s Explorations in Culture & Media.” Pp.207-246. In Memories of the Origins of Ethnographic Film. B. Engelbrecht, ed. Bern, Berlin, Oxford: Peter Lang Publishers, ‘07. (with J. Bishop)
- “Pragmatic Idealism in Challenging Structural Power: Reflections on Advocacy Anthropology in the American Indian Rights Struggle.” Pp. 183-200. In Ethik, Ethos, Ethnos: Aspekte und Probleme Interkultureller Ethik, Ed.A. Hornbacher. Bielefeld, Germany: Transcript Verlag, 06
- “Children of Gluskap: Wabanaki Indians on the Eve of the European Invasion.” In: Viewpoints: Readings in Canadian History, pp. 4-23 (Chapter 1). R. Douglas Francis & Donald B. Smith, eds., Toronto: Nelson/Thomson, 2007. (republishing of 1994 article in other book)
- “Alfred Métraux, From Fieldwork to Human Rights: Itinerary of a 20th-Century Ethnographer.” A Smithsonian Institution exhibition brochure, 6 pages. (with E. Krebs & S. Fee)
- “Toward a World without Evil: Alfred Métraux as UNESCO Anthropologist (1946-1962).” Symposium ‘60 Years of UNESCO’. Paris: UNESCO.
http://portal.unesco.org/en/ev.php-URL_ID=30431&URL_DO=DO_TOPIC&URL_SECTION=201.html
- “Kennewick Man,” Original Study in William Haviland et al, In Anthropology: The Human Challenge (11th edition), Wadsworth, ‘05, p.102.
- “Storm Clouds over Wabanakiak: Confederacy Diplomacy until Dummer’s Treaty (1727). In From Lake Champlain to the Penobscot: The Abenaki and their Neighbors, edited by J.B. Petersen and C.A. Roy. Hanover: University Press of New England, 2006. (in press). [Electronic version published by the Treaty Education Initiative of the Atlantic Policy Congress of First Nations Chiefs (APC), <www.apcfn.ca> This article also appeared on Passamaquoddy Tribal Education and Museum Project, Pleasant Point, Maine, 2004. http://www.wabanaki.com/Harald_Prins.htm
- “From Tropical Africa to Arctic Scandinavia: A.H.J. Prins as Maritime Anthropologist.” In: “Het Topje van de IJsborg. 35 Jaar Arctisch Centrum (1970-2005). N. Boschman, L. Hacquebord, J. W. Veluwenkamp, eds. Circumpolar Studies, Vol.2 [2005], pp. 20-29. (with H.H. T. Prins)
- “Visual Anthropology.”Pp. 506-25 (Ch.26) In Companion to the Anthropology of North American Indians. Edited by T. Biolsi, Oxford: Blackwell Publishers, 2004: 506-525.
- “Antropologia Visual ou Virtual?: Na Vastidão de um Gênero Conturbado.” Cadernos de Antropologia e Imagem 14 (17-34) (Rio de Janeiro, Brazil; translated republication of Prins 1997)
- “Media visivi e imbroglia primitivista: fantasia coloniali, immaginazione indigena e sostegno della causa in Nord America pp.155-74. In VISIONI del Mondo: Rappresentazioni dell’altro, autodocumentazione di minoranze, produzioni collaborative. C. Balma Tivola, ed., Trieste (Italy): Edizioni Goliardiche, 2004.
 Publisher Endorsement, Visual Anthropology: Innovations in Ethnography, Method & Theory (Fadwa El Guindi). Walnut Creek, CA: Altamira Press, ‘04.
- “The Wabanaki Confederacy: A Powerful Idea that Endures.” Mi’gmawei Gespi’siq, Issue 2, Fall 2003. pp. This article also appeared on Passamaquoddy Tribal Education and Museum Project, ‘04 (Sipayik/Pleasant Point, Maine)
- “Edmund Carpenter: Explorations in Media & Anthropology.” Visual Anthropology Review 17 (2) [2001]:110-140 (with John Bishop). <http://media-generation.com/Articles/VAR.pdf>
- “North American Contributions to the History of Visual Anthropology: Introduction” Visual

- Anthropology Review 17 (2):3-4 (with Jay Ruby).
- "Visuality in Indian Country: From Salvage Ethnography to Action Anthropology"
High Plains Applied Anthropologist 23 (1): 42-52. (Spring 2003)
- "A Long Road Home: Maine Indian Land Claims." Portland Magazine ('03) Vol.18, No.4:
pp.126-127.
- "Making 'Oh, What a Blow that Phantom Gave Me!' Oceania Newsletter Nos.30-31:12-14.
- "Indian, Red Man or Native American: What's in a Name?" In Pequot Times, Vol.11 (2002), p.4.
[Magazine published by the Mashantucket Pequot Tribal Nation, Ledyard, Ct.]
- "Visual Media and the Primitivist Perplex: Colonial Fantasies and Indigenous Imagination in
North America." In Media Worlds: Anthropology on New Terrain F. Ginsburg, L. Abu-
Lughod, and B.Larkin, eds. Berkeley: University of California Press. 2002.:58-74.
- "Historical Background Information: AAA Guidelines for the Professional Evaluation of
Ethnographic Visual Media." American Anthropologist 104 (1): 303-305.
- "The Crooked Path of Dummer's Treaty: Anglo-Wabanaki Diplomacy & the Quest for
Aboriginal Rights." Papers of the Algonquian Conference/Actes des Congres des
Algonquinistes. Ed. by H.C. Wolfart. Winnipeg: U Manitoba Press, 2002:84-106.
Publisher Endorsement, The Anthropology of Media: A Reader (K. Askew & R. Wilk, eds.)
Oxford: Blackwell Publishers, '02.
- Instructor's Manual to accompany the 10th edition of the textbook Cultural Anthropology
by William Haviland, Fort Worth: Harcourt College Publishers, '02. (with B.McBride)
- "Indian, Red Man, or Native American: What's In a Name?" Pequot Times (Dec.. '02),
Vol.12, No.11, p.4.
- "Manhattan Should Honor its Real Indians" (Opinion article with J. McGowan and B. Lynn-
Sherow). The Manhattan Mercury, Sept.28, '01, p.A8.
- "Guidelines for the Evaluation of Ethnographic Visual Media." American Anthropological
Association. Produced by the Society for Visual Anthropology. 11/28, 2001.
(with P. Biella, J. Himpele, and others) http://www.aaanet.org/about/Policies/Guide_Visual.cfm
- "A Handful of Ashes: Reflections on Tristes Tropiques." Pp.94-99. In Contemporary Cultures
and Societies of Latin America: A Reader in the Social Anthropology of Middle and
South America. Dwight R. Heath, editor, Prospect Heights: Waveland Press, 2001.
- "Digital Revolution: Indigenous Peoples in Cyberia." Pp. 306-08. In W. Haviland, Cultural
Anthropology. (10th.ed.). Ft. Worth: Harcourt College Publishers, 2001.
[Also translated in Chinese and Turkish]
- "Resolving a Native American Tribal Membership Dispute." Pp.283-85. In W. Haviland,
Cultural Anthropology (10th.ed.). Ft. Worth: Harcourt, 2001.
[Also translated in Chinese and Turkish]
- "Achter Indiaanse Maskers" [Behind Indian Masks] In: Miniature Ethnografiche. H. Driessen &
H. de Jonge, eds.): Nijmegen: SUN Press, 2000, pp. 58-61.
- "Cradleboard Cultural Rights," In The People's Voice. 11/2, 2000.
- A.H.J. Prins. Obituary Anthropology Today 16(3):25-26.
- A.H.J. Prins. Obituary Anthropology News 41(4): 42.
- In Memoriam: A.H.J. Prins (1921-2000). Focaal: Tijdschrift voor Antropologie 35 (2000):193
- Eric Wolf. Obituary Mitteilungen der Arbeitsgruppe Geschichte der Ethnologie. Deutsche
Gesellschaft für Völkerkunde. Universität Tübingen, '99:13-15.
- "Sobre la Vida de Eric Wolf." In Ichan Tecolothl. Casa Chata. Año 9. No.104 (Abril), Mexico
- "On the Life of Eric Wolf." Obituary H-World Listserve, February 1999 (reproduced on half a
dozen other electronic lists
- "Antropologische Zwerftochten." in Cultus Vol. 10 (35) (March, 1999), pp. 4-5.
- "Eine Handvoll Asche: Überlegungen zu 'Traurige Tropen.'" [A Handful of Ashes: Reflections
on Tristes Tropiques]. In Wegmarken: Eine Bibliothek der Ethnologischen Imagination.
Edited by R. Kapfer, et. al. Wuppertal (Germany): Peter Hammer Verlag, 1998: 113-123.
- "Anthropology Applied: Federal Recognition for Native Americans." in Haviland, William A.,

- Cultural Anthropology. Ft. Worth, New York, London: Harcourt Brace College Publishers (9th edition), 1998:301-302.
- "*We Fight With Dignity: The Miawpukek Mi'kmaq Quest for Aboriginal Rights in Newfoundland.*" Papers of the 28th Algonquian Conference, ed. D.H. Pentland, Winnipeg: U Manitoba Press 1998: 283-305.
- "From the Visual Anthropology Editor: Visual Anthropology Section," American Anthropologist, Vol.100 (3), 1998: 770-771
- "Indigenous Media and the Articulation of Native Identity: Two Mi'kmaq Videos." Visual Anthropology, Vol. 11 (1998), No.3: 253-255.
- "Report from the AA Visual Anthropology Editor." Anthropology Newsletter 39 ('98) 4:16-17.
- "Frank T. Siebert, Jr., Obituary Anthropology Newsletter 39 (1998) 3, p.31.
- "Tribal Network and Migrant Labor: Mi'kmaq Indians as Seasonal Workers in Aroostook's Potato Fields (1870-1980)." *In* After King Philip's War: Presence and Persistence in Indian New England, pp. 231-255. Colin Calloway, ed. Hanover: University Press of New England, 1997. (Edited reprint)
- "Chief Big Thunder (1827-1906): The Life of a Penobscot Trickster." Maine History 37 (3), 1998: 140-158.
- "Preface: Frank T. Siebert, Jr.: 1912-1998. (with W. Walker). Maine History 37 (3), 1998: 70.
- "Visual or Virtual Anthropology: In the Wilderness of a Troubled Genre." Reviews in Anthropology 26 (4), 1997: 279-294.
- "The Paradox of Primitivism: Native Rights and the Problem of Imagery in Cultural Survival Films. Visual Anthropology 9 (1997): 243-66.
- "Chief Rawadagon Alias Robin Hood: Native 'Lord of Misrule' in the Maine Wilderness." *In* Northeastern Indian Lives, 1632-1816, pp. 93-115. Robert Grumet, ed. Amherst: University of Massachusetts Press, 1996.
- "Tribal Network and Migrant Labor: Mi'kmaq Indians as Seasonal Workers in Aroostook's Potato Fields (1870-1980)." *In* Native Americans and Wage Labor: Ethnohistorical Perspectives, pp. 45-65, 274-76. Alice Littlefield and Martha Knack, eds. Norman: U. of Oklahoma Press, 1996.
- "Walking The Medicine Line: Molly Ockett, A Pigwacket Doctor" (with B. McBride). *In* Northeastern Indian Lives, 1632-1816, pp. 321-347. Robert Grumet, ed. Amherst: University of Massachusetts Press, 1996.
- "Discovering Europe, 1493" (with B. McBride). *In* World History, 1500 to the Present, Vol. II, pp. 95-98. D. McComb, ed. (Annual Editions) Guilford, Ct.:Brown & Benchmark, 1996. (Reprint from World Monitor, 5 (11) 1992): 56-62.
- "The Fighting Family" (Letter to the Editor). London Review of Books, 18 (12), '96:2
- "Visual Anthropology on the Cutting Edge?" Anthropology Newsletter, 37 (7), 1996: 39-40.
- "The Four Maine Tribes in Brief." The Dissident: Maine's Journal of Political and Cultural Analysis, 1 (9), 1996: 6-7. (ed. reprint of various encyclopedia articles).
- "The Four Maine Tribes." Rural Connections: Maine State Rural Development Council Bulletin 2 (5) 1995: 1-3. (edited reprint of my various encyclopedia articles).
- "Turmoil on the Wabanaki Frontier 1524-1678." *In* Maine: The Pine Tree State from Prehistory to Present, pp. 97-119 (Ch 5). R. Judd, et. al., eds. Orono: U Press of Maine, 1995.
- "Abenaki." *In* Ready Reference: American Indians. Pasadena, CA: Salem Press, 1995: 1-2.
- "Penobscot." *In* Native America in the Twentieth Century: An Encyclopedia, edited by M. Davis. New York & London: Garland Publishing, 1994: 441-42.
- "Passamaquoddy." *In* Native America in the Twentieth Century: An Encyclopedia, edited by M. Davis. New York & London: Garland Publishing, 1994: 435-436.
- "Maliseet." *In* Native America in the Twentieth Century: An Encyclopedia, edited by M. Davis. New York & London: Garland Publishing, 1994: 328.
- "Micmac." *In* Native America in the Twentieth Century: An Encyclopedia, edited by M. Davis. New York & London: Garland Publishing, 1994: 339-40.

- "Neo-Traditions in Native Communities: Sweat Lodge & Sun Dance Among the Micmac Today," *In Proceedings of the 25th Algonquian Conference*, pp. 383-394. W. Cowan, ed. Ottawa: Carleton University Press, 1994.
- "Itapua," in *Negogacion de Corredores Democraticos en el Paraguay*. M.A. Riquelme (autor principal), pp.127-31. Asuncion: Ctro de Informacion y Recursos para el Desarrollo, '94
- "Itapua," in *Negotiating Democratic Corridors in Paraguay*. M.A. Riquelme (principal author), pp. 73-75. Pittsburg: Latin American Studies Association, 1994.
- "Children of Gluskap: Wabanaki Indians on the Eve of the European Invasion." In *American Beginnings: Exploration, Culture and Cartography in the Land of Norumbega*, ed. by Emerson W.Baker, et.al., pp. 165-211. Lincoln: U. Nebraska Press, '94.
- "'Wenooch,' or Who Are These Strangers: Native Americans and the European Encounter" (Prefatory Remarks). In *American Beginnings: Exploration, Culture and Cartography in the Land of Norumbega*, edited by E. Baker, et al., pp. 152-155. Lincoln: U Nebraska Press, '94.
- "To the Land of the Mistigoches: American Indians Traveling to Europe in the Age of Exploration," in *American Indian Culture and Research Journal*, 17(1), 1993: 175-195.
- "White Pete: Tribute to a Maliseet Culture Hero" (with Louis Paul, former Maliseet Chief & Elder) *In In Memoriam: Peter Lewis Paul, 1902-1989*, edited by K. Teeter, 19-21. Hull: Canadian Museum of Civilization, Canadian Ethnology Service. Mercury Series Paper 26, 1993.
- "Cornfields at Meductic: Ethnic and Territorial Reconfigurations in Colonial Acadia." In *Man In The Northeast* (now: *Northeast Anthropology*), No.44, (1992), pp.55-72.
- "Discovering Europe, 1493" (with B. McBride). *World Monitor*, 5 (11) 1992: 56-62.
- "Notes on The Corlaer" (unpubl. ms. April, 1992; in circulation).
- "Elitist Exclusionism." *The Maine Times* (1992).
- "A Trickster in American Popular Culture? -- Reflections on Columbus and the Quincentennial" (invited essay). In *Central States Anthropological Society Bulletin*, vol.26(1), '91: 3,7-8.
- "A Social History of Maine Indian Basketry" (with B. McBride). *The Kennebec Proprietor* 6 (2): pp. 18-21
- "New England's Algonquian Cultures." *American Indian Quarterly, Journal of American Indian Studies*, 14(1), 1990:289-291 (review essay).
- "De Antropoloog als 'Trickster'; Kritische Beschouwing en Politieke Actie Binnen de Antropologie." In *Natuur en Cultuur; Beschouwingen op het Raakvlak van Antropologie En Filosofie*, pp. 174-187. R. Corbey and P.v.d.Grijp, eds. Baarn, The Netherlands: Ambo, '90.
- "Hiawatha: Did Longfellow Know Indians?" *Kennebec: a Portfolio of Maine Writing*, vol. 14 (1990): p. 5. Augusta: University of Maine.
- "Aroostook Micmac and Splint Basketry: Tradition, Adaptation and Survival" (with B. McBride). In *Our Lives in Our Hands: Micmac Indian Basketmakers*, by B. McBride, Pp. 1-23. Gardiner, Me.: Tilbury House, 1990.
- "The Spirit in the Land: The Native People of Aroostook" (with A. Bear Nicholas). In *The County: Land of Promise*, A. McGrath, ed. pp. 18-37. Norfolk, Va.: Donning Publishing Company, 1989.
- "A Social History of Maine Indian Basketry" (with B. McBride). In *Maine Basketry: Past to Present* (catalog), pp. 5-14. Waterville: Colby College Museum of Art, 1989.
- "American Indians and the Ethnocinematic Complex: From Native Participation to Production Control." In *Eyes Across the Water: the Amsterdam Conference on Visual Anthropology & Sociology*, pp. 80-90. R. Boonzajer Flaes, ed. Amsterdam: Het Spinhof, 1989.
- Ibid. *In Visual Studies* 4 (2), 1989:80-90.
- "Natives and Newcomers, Mount Desert Island in the Age of Exploration." In *An Island in Time Three Thousand Years of Cultural Exchange on Mount Desert Island*, The Abbe Museum for Stone Age Antiquities Bulletin XII (1989): pp. 21-36.

- Ibid., (Revised edition), Second printing, 1994.
- "Two George Washington Medals in the Chain of Friendship between the United States and the Wabanaki Confederacy." Maine Historical Society Quarterly 28 (4), 1989: 226-234.
- "Native Rights Issues on Film." American Anthropologist, 90 (3), 1988: 774-778
(Film review article, eight documentaries).
- "Indian Artifacts and Lost Identity." Salt Magazine, vol.10 (3) 1990: 10-16.
- "The Aroostook Band of Micmacs: an Historical Anthropological Review," Report in Support of S.1413 and H.D. 3049, "The Aroostook Band of Micmacs Settlement Act," submitted to the U.S. Senate Select Committee on Indian Affairs and the U.S. House Committee on Interior and Insular Affairs, Washington, D.C.: U.S. Congress, '90 (66 pages).
- "Statement -- Regarding S. 1413 To Settle All Claims of the Aroostook Band of Micmacs..." In Hearings Before the Select Committee on Indian Affairs United States Senate, 101st Congress, 2nd Session. Washington DC: U.S.Gov't Publications, 1990: 51-53, 96-104.
- "A Romantic Poet Touring 19th-Century Maine: William Cullen Bryant's Trip on the Kennebec River in 1847." The Kennebec Proprietor: Magazine of Fort Western Museum, vol. 5 (1), 1988: 18-21.
- "Wabanaki Legends," and "Penobscot Tribal Governor Joseph Nicolar (1827-1894)." In The Land of Norumbega: Maine in the Age of Exploration and Settlement. Freeport: The Village Press, 1988
- "Norridgewock: Village Translocation on the New England Acadian Frontier" (with B.Bourque) The Kennebec Proprietor: Magazine of Fort Western Museum, vol. 4(4), 1987: 4-12.
- "The Search for Cushnoc: A 17th-century Pilgrim Trading Post in the Kennebec Valley of Maine." The Kennebec Proprietor: Magazine of the Fort Western Museum, vol. 4 (1), 1987: 8-13.
- "Paisanos en La Pampa: Supervivencia en el Interior de Argentina. (18 p's). Archivo Histórico Provincial, Santa Rosa, Argentina. 1987.
- "Cartooning," Editorial, Christian Science Monitor, 1987 [?], p. 17
- "Norridgewock: Village Translocation on the New England Acadian Frontier" (with B.Bourque) Man in the Northeast (now Northeast Anthropology) No. 33, 1987:137-58.
- "Micmacs and Maliseets in the St. Lawrence River Valley." In Papers of the Seventeenth Algonquian Conference, W.Cowan, ed. Pp. 263-78. Ottawa: Carleton University, 1986.
- "The Most Convenientest Place for Trade; a Discussion of the Kenibec/Cushnoc Controversy." The Kennebec Proprietor: Magazine of the Fort Western Museum, vol. 3 (1), 1986: 4-9.
- Proceedings, Conference on Reburial Issues (Newberry Library, June 14-15, 1985), P. Quick, ed.. Washington, D.C.: Society for American Archaeology, 1986.
- "Two George Washington Medals: Missing Links in the Chain of Friendship Between the United States and the Wabanaki Confederacy." In The Medal, no. 7, 1985: 9-11. London: The British Museum.
- "Een Wabanaki Renaissance?: Een Kritisch Overzicht van de Politieke Beweging bij Micmacs en Maliseets in Noordoostelijk Noord America." In Terugkeer van een Verdwijnd Volk (Sociaal Anthropologische Cahiers XVI. T. Lemaire and F. Wojciechowski, eds. Pp. 108-44. Nijmegen, The Netherlands: University of Nijmegen Press, '85.
- "Foul Play on the Kennebec: The Historical Background of Fort Western and the Demise of the Abenaki Nation." The Kennebec Proprietor: Magazine of the Fort Western Museum, vol. 1 (3), 1984: 4-14.
- "Micmacs Rally to the Cry of Recognition" (with B. McBride). Wabanaki Alliance, July 1982: 1.
- "U.S. Micmacs: United for Federal Recognition" (with B. McBride). Micmac News, Sydney, N.S., September 1982.
- "Algemene Geschiedwetenschap: een Verkennend Onderzoek." Foundational study to establish doctoraal program in Theoretical & Comparative History. Department

of History, University of Nijmegen, The Netherlands, 1977.
"Feodalisme: Een Conceptuele Analyse." Doctoraal Scriptie. Instituut voor Culturele en
Sociale Antropologie. Nijmegen: Katholieke Universiteit, 1976.

BOOK & DOCUMENTARY FILM REVIEWS

- The North American Journals of Prince Maximilian of Wied. (3 vols), Edited by
Stephen S. Witte and Marsha V. Gallagher. Joslyn Art Museum/University of
Oklahoma Press, 2008, 2010, 2012. Ethnohistory, Vol.64 (2): 329-33.
- In Search of First Contact: The Vikings of Vinland, the Peoples of the Dawnland, and the
Anglo-American Anxiety of Discovery. [Annette Kolodny] Studies in American Indian
Literatures Vol. 26 (2): 81-85.
- Upside Down: Arctic Realities & Indigenous Art. Review Essay in American Anthropologist
Vol.114 (2): 359-64 (1st author, with B McBride)
- The Adventure of the Real: Jean Rouch and the Craft of Ethnographic Cinema [P. Henley, 2009].
Book Review in American Anthropologist Vol. 113 (4): 676-678.
- Blackfoot War Art: Pictographs of the Reservation Period, 1880-2000." [L. James
Dempsey, U Oklahoma Press, '07]. Visual Anthropology Review 26 (1): 37-39.
<http://onlinelibrary.wiley.com/doi/10.1111/j.1548-7458.2010.01048.x/full>
- Transatlantic Encounters: American Indians in Britain, 1500-1776.[Alden T. Vaughan,
Cambridge U Press, 2006.] Canadian Journal of History/Annales canadiennes d'histoire,
Vol. 43, No.1 (2008): 201-03.
- Alanis Obomsawin: The Vision of a Native Filmmaker." [R. Lewis, U Nebraska Press, '06]
in Visual Anthropology Review. (in prep.)
- The Indians of the Paraguayan Chaco: Identity and Economy [J. Renshaw] Tipiti: Journal
of the Society for the Anthropology of Lowland South America (in prep.)
- Tracking Doctor Lonecloud: Showman to Legend Keeper [R. Whitehead]. Maine History
(in prep.)
- Twelve Thousand Years: American Indians in Maine [B.Bourque] American Anthropologist
104 (2): 670-72.
- Envisioning Power: Ideologies of Dominance and Crisis [E. Wolf] American Anthropologist
103(1): 263-64.
- Edward S. Curtis and North American Indian Inc. [Mick Gidley]. American Anthropologist
102 (4): 891-95
- Coming to Light: Edward S. Curtis and the North American Indians, 2000. Documentary Film
[A. Makepeace]. American Anthropologist 102 (4): 891-95
<http://www.makepeaceproductions.com/reviews/Coming-to-Light/harald-prins.pdf>
- In Search of New England's Native Past: Selected Essays by Gordon Day [M.K.Foster & W
Cowan, eds.]. The Journal of American History (December), 2000:
- Spirit Capture: Photographs from the National Museum of the American Indian [T. Johnson,
ed.] American Anthropologist 102 (1):156-158 (with B. McBride)
- Lawrence of Arabia: A Film's Anthropology [S.C. Caton]. Choice Vol.37 (3) (1999);37-1630.
- Patterns that Connect: Social Symbolism in Ancient & Tribal Art [C. Schuster & E. Carpenter].
American Anthropologist, Vol.100 (3), 1998: 841.
- Eastern Shore Indians of Virginia and Maryland [H. Rountree & T. Davidson]. Choice
Vol.35 (10), June 1998, 35-5742.
- Mi'kmaq Family/Migmaoei Otjiosog ('94), [C. Martin]. Visual Anthropology 11(2), '98:253-55.
- Kwa'nu'te': Micmac and Maliseet Artists (1993), [C. Martin & K. McTaggart] Visual
Anthropology 11 (2), 1998: 253-55.
- Indigenous Rights and Development: Self-Determination in an Amazonian Community
[A.Gray]. Choice Vol.35, No. 6 (Feb, 1998), 35-3389.
- People of the Peyote: Huichol Indian History, Religion, & Survival [S.B. Schaeffer and
P.T. Furst, eds.]. Choice, Vol.34, No.7 (March, 1997), 34-3952.

- A History and Ethnography of the Beothuk [I. Marshall]. American Anthropologist. 99 (3), 1997: 657-58.
- Becoming and Remaining a People: Native American Religions on the Northern Plains [H. L. Harrod]. Choice 33 (8), 1996: 33-4588.
- The Voyages of Jacques Cartier [R. Cook, ed.], American Indian Quarterly 18 (4), '94: 587-89.
- The 'Nations Within': Aboriginal-State Relations in Canada, United States, and New Zealand [A. Fleras and J.L. Elliott]. Social Forces 72 (4), 1994: 1272.
- Games of the North American Indians (2 vols.) [Stewart Culin]. Explorations in Sights and Sounds: A Journal of Reviews of the National Association for Ethnic Studies, No. 14 (Summer 1994): 16-18.
- Dawnland Encounters: Indians and Europeans in Northern New England [C. G. Calloway] American Indian Quarterly 18 (2), 1994: 293-94.
- Wapapi Akonutomakol. The Wampum Records: Wabanaki Traditional Laws [R.M. Leavitt & D.A. Francis, eds.]. American Indian Quarterly 18 (1), 1994: 107-108.
- The Welsh in Patagonia: The State and the Ethnic Community [G. Williams]. The Latin American Anthropology Review 5 (1), 1993: 29-30.
- The Pequots of Southern New England: The Fall and Rise of an American Indian Nation, [L. Hauptman and J.D. Wherry, eds.]. American Indian Quarterly, vol. 17 (2), 1993: 271-273.
- The Western Abenakis of Vermont, 1600-1800: War, Migration, and the Survival of an Indian People [Colin Calloway]. Maine Historical Society Quarterly, Vol. 32 (1), 1992: 59-61.
- Runa: Guardians of the Forest, dir. E. Speiser and D. Irvine. American Anthropologist, Vol. 93 (4), 1991: 1035-36.
- The Embattled Northeast--The Elusive Ideal of Alliance in Abenaki-Euramerican Relations, [by K.M. Morrison]. Maine Historical Society Quarterly, vol. 30 (1), 1991: 18-20.
- Native Americans on Film and Video, vol. II [E. Weatherford and E. Seubert]. Visual Anthropology Review, vol. 3. (1990): 96-97.
- And Here the World Ends--The Life of an Argentine Village [by K. Hoffman Ruggiero]. The Latin American Anthropology Review, vol. 1 (1989): 10.
- Native Participation in Visual Studies--a Review. In Eyes Across the Water: the Amsterdam Conference on Visual Anthropology and Sociology [R. Boonzajer Flaes, ed.]. Amsterdam: Het Spinhof, 1989:151-52; Visual Sociology Review, vol.4 (2), '89:151-52.
- Abnaki: The Native People of Maine, [J. Kent]. American Anthropologist 90 (3), '88: 774-75.
- Our Sacred Land, [C. Spotted Eagle.] American Anthropologist 90 (3), 1988: 775-776
- Incident at Restigouche, [A. Obomsawin] American Anthropologist 90 (3), 1988: 776
- Nations within a Nation: Sovereignty and Native American Communities, dir. D.N. Brown & M. Ringwald, American Anthropologist 90 (3), 1988: 776-777.
- Home of the Brave, dir. H. Solberg Ladd, American Anthropologist 90 (3), 1988: 777.
- Contrary Warriors, A Film of the Crow Tribe, dir. C. Poten, et al., American Anthropologist 90 (3), 1988: 777-778.
- "The Indian as Dream and Anxiety," [T.Lemaire]. European Review of Native American Studies, Issue 2:1 (1988): 59-61.
- A Key into the Language of Woodsplint Baskets edited by A. McMullen & R. Handsman]. Pennsylvania Archaeologist, vol. 58 (2), 1988: 70-72.

CONFERENCE PAPERS, INVITED LECTURES & FILM SHOWINGS

2018

- "The Ardennes as 'Indian Country': Native American warriors in the Battle of the Bulge 1944-45." Paper presented at the 39th Annual American Indian Workshop, University of Ghent, Belgium, 13 April.

2017

- “Wabanaki Tribesmen in the Liberation of France.” Keynote Speaker. 3rd Annual Bastille Day Lecture Series, Castine Historical Society, Maine, 14 July.
- “Perspectives on Ephemerality and Preservation: From Language to Digital Media, Communities to Institutions.” 116th Annual Meeting of the AAA, Washington DC. (Discussant)

2016

- “A Native American Contribution to the Formation of the Atlantic Hemisphere.” Session: Early Atlantic Cultures. 15th Annual Transatlantic Conference, Plymouth University, United Kingdom, 4 July.

2014

- “Marketing Tribal Crafts & Refashioning Indigenous Identity: Wabanaki Adaptation to the Early Tourist Economy of Seacoast Maine. Paper in special session “Native North America and Tourism”. 35th AIW, National Museum of Ethnology. Leiden, Netherlands, 21-25 May.

2013

- “Wenken naar Winnetou: Paradox van het Primitivisme in Visuele Media.” Invited Lecture. Museum Exhibit *Indianen. Kunst en Cultuur tussen Mythe en Realiteit*. De Nieuwe Kerk, Amsterdam, The Netherlands, 5 January 2013.

2012

- “From Omaha Beach to Pacific Atoll: A Penobscot Tribesman in the Global Theater.” Crossing borders ». Séminaire de centre de recherche. Laboratoire d’anthropologie sociale/Centre d’études nord-américaines. L’École des hautes études en sciences sociales (EHESS), Paris, France, 21 March.
- “The Right Format – The Carpenter Memorial Round Table,” Invited panelist at the “Arctic/ Inuit/Connections - Learning from the Top of the World.” 18th Inuit Studies Conference, Smithsonian National Museum of Natural History, Washington DC, Oct. 24-28, 2012.
- “Media Studies & Arctic Anthropology in the Cold War: Edmund Carpenter in the Toronto School of Communication.” Paper to be presented at Canadian Communication Association annual conference. Waterloo, Ontario, Canada, 30 May - 1 June.
- “The Mysterious Penobscot Belle: Early Photography and a Forgotten Wabanaki Encampment in Portland (1830s-1860s). Invited Lecture (with B McBride). Maine Historical Society, Portland, May 24.
- “Remembering Two Astronauts of the Human Soul: Steve Rubenstein and Neil Whitehead.” 111th Annual Meeting of the AAA, San Francisco, November 18, 2012. (Discussant)

2011

- “Carpenter & McLuhan: A Co-Existence of contraries.” Invited paper presented at the Plenary Session “Explorations 1951-1957: Reflections Upon the Explorations Seminar and Journal.” International conference *McLuban 100: Then|Now|Next*. U Toronto, Canada, Nov. 7-10.
- ”Reflections on *Ob, What a Blow that Phantom gave Me!* Presented at Memorial & Celebration: Edmund S. Carpenter (1922-2011). American Museum of Natural History, New York City, 29 October, 2011.
- “Oh, What a Blow that Phantom Gave Me!” Public screening at New Guinea exhibit “Ancestors of the Lake,” The Menil Museum, Houston, Texas, 19 April.

2010

- “Passamaquoddy Indian Code Talkers in the World War: Historic Fact or Echo of an Imaginary Past? Paper presented at the 109th Annual Meetings of the American Anthropological Association, New Orleans, 21 Nov.
- “Warriors from Turtle Island Invade German-Occupied Normandy.” Paper presented at the 31st American Indian Workshop: “Transformation, Translation, Transgression: Native American Culture in Contact and Context.” Charles University. Prague, 26 March.
- “Exploring Structural Power.” Research Seminar, Institute for Sociology, Social-Anthropology, and Pedagogy, University of Lund, Sweden, 16 March.

- “The Court of Law as Political Arena in the Human Rights Struggle of American Indians.”
Invited Lecture, Historical Studies Research Seminar, Malmö University, Sweden, 17 March
- 2009**
- “Indigenous Art as Political Capital.” Invited Lecture. “Indigenous Art as Political Capital : The Mi'kmaq as Case Study.” Invited Lecture, Histoire et anthropologie des sociétés nord-américaines (États-Unis et Canada). Les arts visuels amérindiens en question. l'École Pratique des Hautes Études/Sorbonne. Paris, 18 March.
- “Beyond Wolf: Structural Power in the Globalscape.” In: “Ten years after: the legacy of Eric R. Wolf.” Presidential Session/AAA Executive Program Committee. 108th Annual Meetings of the American Anthropological Association, Philadelphia, 3 Dec.
<http://blog.aaanet.org/2010/06/23/annual-meeting-video-the-legacy-of-eric-r-wolf/>
- “Consciousness, Agency and Authenticity in Shamanic Identity and Ritual in South America: Expanding the Range of the Sound of Rushing Water.” Invited Session. Discussant. 108th Annual Meetings, American Anthropological Association, Philadelphia, 5 Dec.
- 2008**
- “Anthropologists and Unesco’s Hylea Amazon Project, 1946-1952. SALSA Conference, Maison Française, Oxford University, 18 June.
- “Among Xavante Friends: A Tribute to David Maybury-Lewis.” Film premiere at Pitt-Rivers Museum, Oxford University, UK, June 19, '08. (1st Author, with A. Bohannon & J. Stone). Also at 107th Annual Mtng, American Anthropological Association, San Francisco, 21 Nov.
- "The 60th Anniversary of the Universal Declaration of Human Rights: Anthropology, Politics, History." Session discussant. 107th Annual Mtng, American Anthropological Association, San Francisco, 23 Nov.
- 2006**
- “Human Rights Anthropology in the Cold War,” Invited Lecture, New York Academy of Sciences, New York City, Dec. 4
- 2005**
- “Early Cameras in Salvage Ethnography and Cultural Revitalization.” Paper presented in SVA invited session. American Anthropological Association, 104th Annual Meeting, Washington DC, Dec.1`
- “The Anthropology of Visual Communication Now: Studies in Honor of Jay Ruby.” Chair, SVA Invited session. American Anthropological Association, 104th Annual Meeting, Washington DC., Dec. 1
- “Toward a Land without Evil: Alfred Métraux as UNESCO Anthropologist 1948-1962.” Panel: “The Vision: Fostering Humanism and Peace.” UNESCO 60th Anniversary symposium. Paris. 11/16/2005. (Co-organized by U of Paris & Cambridge U)
http://portal.unesco.org/en/ev.php-URL_ID=30431&URL_DO=DO_TOPIC&URL_SECTION=201.html
- “Edmund Carpenter Symposium,” 6th Annual Convention of the Media Ecology Association, Lincoln Center, Fordham U, New York, June 25.
- “Anthropology of the Global Mediascape.” Provost Lecture, Kansas State U, April 25
- "Oh, What a Blow that Phantom Gave Me!" was selected for screening at Le Festival Interuniversitaire de Films Ethnographiques de Montréal, January 30, 2005.
Documentary Film and Edmund Carpenter; screening/discussion “Oh, What a Blow that Phantom Gave Me.” Cultural Studies Visual Culture: Image, Icon, Ideology. Fourth Annual KSU Cultural Studies Conference, Plenary Session, March 11, 2005 (with Michael Wesch). Film also featured on University of California Television, The Educational Channel, Feb. 4
- 2004**
- “From Fieldwork to Human Rights.” Powerpoint presentation (with A. Krebs & S. Fee)
National Museum of Natural History, Washington DC, June 29, 2004
- “Edmund Carpenter: Maverick Anthropologist and Media Ecology Pioneer.” The 5th Annual Convention of the Media Ecology Association. Rochester Institute of Technology, Rochester, N.Y., June 12.

- “Oh, What a Blow that Phantom Gave Me!” (Film with John Bishop), Competitive Screening at IWF International Festival of Ethnographic Film, Göttingen, Germany, May 20.
- “Josefa and the Omelet: Challenges in Cross-Cultural Communication.” Paper presented at the Mid-American Chapter of American Translators Association (MICATA) Symposium on Translation and Interpretation, Manhattan, April.

2003

- “In Search of Winnetou: Karl May’s Adventure Stories and the Dialectics of Primitivist Nostalgia,” Field Museum, Chicago, Nov. 21
- “Committed Anthropology,” Distinguished Lecture, U. Nijmegen, Netherlands, Oct.4
- “Oh, What a Blow that Phantom Gave Me! (Film with John Bishop), Competitive Screening at 8th Royal Anthropological Institute’s International Festival of Ethnographic Film. University of Durham, UK, July 5.
- Ibid. Film Screening at 14th Beeld voor Beeld Ethnographic Film Festival, Royal Institute for the Tropics, Amsterdam, The Netherlands. June 6
- Ibid. Special Featured Screening, 4th Media Ecology Association Annual Conference, Hofstra U, USA, June 6.
- Ibid. Special Featured Screening, Taipei, Taiwan / [影展] 2003年02屆台灣國際民族誌影展 (10/03-10/07) 那幻像賞了我一拳! (美//紀錄) 約翰比索普, 哈洛普林斯
- Ibid. Special Featured Screening, Radboud U, Nijmegen, Netherlands
- Ibid. Selected Screening, American Anthropological Association, 102nd Annual Meeting, Chicago. Nov.22
- Ibid. Selected screening, 7th Documentary and Ethnographic Film Festival of Belo Horizonte, Nov. 28.
- Invited panelist, “Visual Culture: A Future for the Anthropology of Visual Communication Conference,” Dept. of Film and Video, Columbia College, Chicago, Nov. 22.
- “Wabanaki Confederacy: A Historical Perspective,” Seventh District Congress Meeting, 10th Annual Wabanaki Confederacy Conference, Listuguj First Nation, Restigouche, Quebec, July 29-30.
- “Phantom Anthropology: Structural Power and Visual Media.” Keynote Lecture, Northeastern Anthropological Ass’n annual meetings, U Vermont, Burlington, 03/21

2002

- “The Ethnographer’s Discipline: Alfred Métraux (1902-1963).” Discussant, AAA Presidential Session, AAA, New Orleans, Nov. 20, 2002.
- “Tarzan was an Ecotourist...and Other Reflections on the Anthropology of Adventure.” Discussant, AAA, New Orleans, LA. Nov. 22, 2002
- “Visuality in Indian Country: From Salvage Ethnography to Action Anthropology.” Keynote Lecture, High Plains Society for Applied Anthropology Annual Conference, Estes, Colorado, April 20.
- “Borderline Reflections: American Patriotism & the Quest for Maine Indian Rights.” Distinguished Lecture, University of Maine, Presque Isle, ME, January 25.

2001

- “Other Media/Other Histories: Extending the Rafters in Visual Anthropology.” Organizer Invited Session (with J. Himpele), AAA, Washington DC
- “Visual Performatives in Cyberia: Traditional Iconography and Tribal Identity Politics on the Internet.” Invited Paper presented at the AAA Presidential Session “The Work of Anthropology in a Century of Media,” Washington DC, Nov.
- “On the Problem of Interpreting Anglo-Wabanaki Diplomatic History: Native Rights & the Dummer Treaty (1725). 33rd Algonquian Conference. U California-Berkeley, Oct.28.
- “Edmund Carpenter on the Culture of Illusion: The Tribal Terror of Self-Awareness” (with John Bishop), Film/Paper. 17th Annual Visual Research Conference, Smithsonian Institution, Washington DC, Nov.
- “Edmund Carpenter: Explorer & Witness in the History of Visual Anthropology.” Invited

- Paper, IWF Visual Anthropology Conference, Max Planck Institute, Goettingen, Germany, June 21
- “Let Me Tell You A Story: Edmund Carpenter as Visual Anthropology Pioneer.” Presentation & Discussion of Documentary Film. Premiere IWF Visual Anthropology Conference, Max Planck Institute, Goettingen, Germany, June 21.
- “Development of Methods: Looking for an Indigenous View.” Invited Panel Discussant at the IWF Visual Anthropology Conference, Max Planck Institute, Goettingen, Germany, June 23,
- 2000**
- “Reflecting and Remembering Visual Anthropology: The East Hampton Jamboree,” 16th Visual Research Conference. San Francisco, Nov.16
- "Anthropology & History: International Symposium_(in honor of Anton Blok," Invited Participant, University of Amsterdam, The Netherlands, June 8-9, 2000.
- “The Politics of Archaeology.” Colloquium Presentation, University of Massachusetts -Amherst, Sept. 18, 2000.
- 1999**
- “Apaches, Anthropologists, and the Repatriation of Anthropological Knowledge,” Paper read the 98th Annual Meetings of the American Anthropological Ass’n. Chicago, Nov. 17.
- “A Diamond In His Shoulder: Remembering Eric Wolf (1923-1999). Special Session sponsored by the American Ethnological Society. AAA Annual Meetings, Chicago, 19 Nov.
- “In the Trickster’s Web: American Indians and the Politics of Visual Representation.” Public Lecture, Fleming Museum, Burlington, Nov.4.
- “On the Origins of the Wabanaki Confederacy.” Abenaki Conference, Burlington: University of Vermont, October 3-5.
- “Stormclouds over Wabanakiak: The Wabanaki Confederacy until Dummer’s Treaty (1727).” Invited Paper, the Atlantic Policy Congress of First Nations Chiefs, Halifax, NS., March
- 1998**
- “Visual Anthropology at Temple.” Invited Session Discussant. 97th Annual Meeting of the American Anthropological Association. Philadelphia, Dec.2
- "Sympathetic Reflections on 'Tristes Tropiques': With/out Levi-Strauss back to the Bororo and Nambikwara of southern Brazil." 75th Annual Meeting of the Central States Anthropological Society, Kansas City, April 4
- 1997**
- "Morality, Justice, and the politics of Mi'kmaq History," Mi'kmawey: An International-Intertribal Conference. University College of Cape Breton. Sidney (NS), Canada, Oct.1
- 1996**
- “Beyond Representation: Visual Anthropology in the Fourth World.” SVA Invited Double Session, 95th Annual Meetings of the American Anthropological Association, San Francisco, 11/20-24 (Chair & Co-Organizer with Faye Ginsburg).
- "*We Fight With Dignity*: Miawpukek's Quest for Netuklemk, Newfoundland." 28th Algonquian Conference, University of Toronto, Toronto, Canada, October 25.
- "Cross-Border Tribes on the Justice Frontier." American Ethnological Society Annual Meeting. San Juan, Puerto Rico, April 20, 1996.
- "Nations Across Borders." Chair, American Ethnological Society Annual Meeting. San Juan, Puerto Rico, April 20.
- 1995**
- "Cultural Resistance: The Paradox of Saint Anne." 94th Annual Meeting of the American Anthropological Association. Washington DC, November 16.
- 1994**
- "Indigenous Advocacy in the Electronic Domain: Documentary Film and Human Rights." 93rd Annual Meeting of the American Anthropological Association. Atlanta, December 1.
- "Tradition Against Law: Neotraditionalism as Cultural Resistance in Indian Country."

Central States Anthropological Association, Kansas City, MO, March 19.

1993

- "Sweat lodge and Sundance among the Micmac Today. A Case Study in Neotraditionalism." 25e Congres des Algonquinistes. Montreal (Quebec), Canada, October 30.
- "Ethnocinematic Self-Fashioning as Cultural Process." Invited paper, 92nd Annual Meeting of the American Anthropological Association, Washington, D.C., 19 Nov.
- "Chief Rawandagon alias Robin Hood." Annual Meeting of the Northeastern Anthropological Association. Danbury CT, 27 March.

1992

- "Another Look at Ethnography and Ethnology on the Plains." Discussant. 67th Annual Meeting of the Central States Anthropological Society, Iowa State University, Ames, 22 March.
- "The Ranqueles of the Pampas: A Frontier Tribe in 19th-Century Argentina." Annual Meeting of the American Society for Ethnohistory. Salt Lake City, NV., 13 Nov.
- "Bwana Piccer: Martin Johnson as Ethnographic Film Pioneer." Invited Paper, 91st Annual Meeting of the American Anthropological Association. San Francisco, Ca., 3 Dec.

1991

- "Micmac Indians in Maine: Stoop Labor in Potato Paradise." Invited paper, 90th Annual Meeting of the American Anthropological Association. Chicago, Ill., 21 Nov.
- "Indians of the Plains." Panel Discussant. Annual Meeting of the American Society for Ethnohistory. Tulsa, OK., 9 Nov.
- "Public Performance and Ethnic Identity: Chief Big Thunder and the Peddling of Native American Culture." Annual Meeting of the American Society for Ethnohistory. Tulsa.
- "Another look at the Ethnography of the Plains." Panel Discussant. 67th Annual Meetings of the Central States Anthropological Society. Iowa State University. Ames, 22 March.

1990

- "Destinging the WASP: Alleviating Cultural Dominance through Anthropological Discourse." I
Invited paper for session organized by the National Endowment for the Humanities, 89th Annual Meeting of the American Anthropological Association, New Orleans, La.

1989

- "Wabanaki Algonquian Ethnohistory since Eckstorm: Dawnland Dialectics." (& A Morrison) 8th Annual Meeting of the American Anthropological Association, Washington, DC.
- "Enigmatic Tribes in Wabanakia: Ethnic Identity in the Struggle for Cultural Survival," Annual Conference of the American Society for Ethnohistory, Newberry Library, Chicago, Ill., 3 Nov.
- "Natives and Newcomers -- Mount Desert Island in the Age of Exploration. Abbe Museum of Stone Age Antiquities. Bar Harbor, Me., 21 May.
- "Documentary Film as Ethnographic Record and Advocacy." Eyes Across the Water--Joint International Conference on Visual Studies of Society, U. of Amsterdam, The Netherlands, 21-24 June.
- "Popular Image and Self Articulation in Traditional Crafts: The Case of Maine Indians." Salt Conference on the Interaction of Folk Culture and Popular Culture: From Folk to Pop and Back Again, University of Southern Maine, Portland, 20 June.
- "Defusing the Canons: Theory as Political Issue in Action Anthropology," Faculty Colloquium, Dept. of Anthropology and Native American Studies Program, Dartmouth College, Hanover, NH, 2 Feb.

Northern Plains Indians & Northeastern & Maritime Indians, Lecture & Discussion, with Senator William Yellowtail (Crow Nation), 10/11, 10/17, 10/18, 10/25 [1989] ITV Channel 2. .

1988

- "Amesokanti: Abortive Tribe Formation on the Colonial Frontier." Annual Conference of the American Society for Ethnohistory, Williamsburg, Va., 11 Nov.
- "Encounters: Script-centrism in Ethnohistory," lecture/panel discussion. International

Conference on The Land of Norumbega--Maine in the Age of Exploration and Settlement, sponsored by the National Endowment for the Humanities/Maine Humanities Council, Portland, 3 Dec.

1987

- "Damned People in a Promised Land." Maine Humanities Council Conference: "AIDS: Plague, Panic, and the Test of Human Values," Augusta, 8 May.
- "Cornfields at Meductic; A Case Study in the Dynamics of Ethnohistory." 19th Algonquian Conference, Smithsonian Institution, Washington, D.C., 23-25 Oct.
- "Our Lives in Our Hands: Making A Documentary." Native North American Indian Film Series. Hudson Museum. Orono, Me., 19 Nov.
- "Maliseet Ethnohistory in Southern Quebec: A Comment," Quebec Ethnohistory Colloquium, Universite de Montreal, 21-22 Nov. (see: Recherches Amerindiennes au Quebec, vol. 18 (1), 1988: 85.

1986

- "Our Lives in Our Hands." Introduction and follow-up discussion of Prins/Carter ethnographic film. 85th Annual Meeting of the American Anthropological Association, Philadelphia, 5 Dec.
- "A Forgotten Mission on the Micmac-Maliseet Frontier: Father Morain at 'Le Bon Pasteur,' in the late 17th Century." Annual Conference of the American Society for Ethnohistory, Charleston, S.C., 6-9 Nov.
- "Robin Hood of Kennebec: What's in an Indian Name in 17th Century Colonial America?" Symposium Peoples in Contact: Indians and Europeans in the Seventeenth Century, Haffenreffer Museum of Anthropology, Brown U., Providence, R.I., 26-27 Sept.
- "Visual Expressions in Wabanaki Culture: From Past to Present." Native Arts Symposium. Hudson Museum, Orono, Me., April.
- "Mohock the Tories: Political Symbolism at the Boston Tea Party in 1773." First Interdisciplinary Conference on New England Culture and History (1699-1830), University of Massachusetts, Boston, Ma., 12 April.

1985

- "A New Perspective on Tribal Territoriality: The Case of Micmacs and Maliseets on the Lower St. Lawrence River." 17th Algonquian Conference, Redpath Museum, McGill University, Montreal, PQ, Canada, 24-27 Oct.
- "Norridgewock: Village Translocation on the Acadian Frontier" (co-authored by B. Bourque). Conference of New England Archaeology, Sturbridge, Ct., 23 March.
- International Conference on Reburial Issues. Invited discussant. Organized by the Society of American Archaeologists & the Society of Professional Archaeologists, D'Arcy McNickle Center for the History of the American Indian, Chicago, 14-15 June
- Media Makers Symposium, Invited discussant. Organized by the Museum of the American Indian/Heye Foundation. New York, 13 Dec.

1983

- "The Anthropologist as Trickster; the Case of Micmacs in Maine and Wabanaki Tribal Territoriality." 15th Algonquian Conference, Harvard University, Cambridge, Ma., 28-31 Oct.

1982

- "A Political Ecology of Machismo." 22nd Annual Conference of the Northeastern Anthropological Association, Princeton University, Princeton, NJ, 18-21 March.
- "Micmacs and the Quest for Micmac Recognition." First International Micmac Congress, Boston Indian Council. Boston, April.

1978

- "Violence in History." Introductory remarks. International Symposium on Political Violence: From the Right of Resistance to Crime. University of Nijmegen, The Netherlands. April 1978. (Symposium organizer)

CONSULTANCY REPORTS:

- “The Penobscot Nation’s Reservation of the Penobscot River Accompanying its Reservation Islands in the Penobscot River in the 1796 and 1818 Treaties with Massachusetts and in the 1820 Treaty with Maine.” Prepared for the Penobscot Nation in *Penobscot Nation v. Mills, et als.*, Civil Action No.1:12-cv-00254-GZS. (120 pages plus appendices), Dec. 2013.
- “158 Maine Wabanaki Indian Men & Women Enlisted in WWII [in support of L.D. 30, H.P. 25 [An Act To Establish Native American Veterans Day], Maine Legislature [volunteered], ‘09.
- “Asticou’s Island Domain: A Historical Ecology of Acadia National Park.” (500-pages) Report for National Parks Service (co-PI with B Mc.Bride), July ’07. (see Publications)
- “Nijmegen Institute for Social Cultural Research: Research Assessment 2006. Nijmegen: Radboud University, December 2006 (44 p’s; co-authored with J. Billet et. al.)
- “The Mi’kmaq of Ktaqamkuk: A Political Ecological Perspective on the Colonial History of Newfoundland, 1500-1750” (157 pages, plus bibliography). Report submitted to the Miawpukek First Nation and the Supreme Court of Newfoundland, September 2000.
- “The Ordeal of Disorder: The Aroostook Micmac Tribal Membership Problem.” Bureau of Indian Affairs funded project report submitted to the Aroostook Band of Micmacs, Presque Isle, June 1999 (45 p’s, plus appendices).
- “Miawpukek: Historical Anthropological Profile of a Newfoundland Indian Band.” Aboriginal Rights Report Submitted to Provincial Court, Gander, Newfoundland, June 1988 (26 p’s)
- “The Economic Value of Foregone Cultural Use: A Case Study of the Penobscot Nation” Co-authored with John Duffield, et.al. Washington DC, Bureau of Indian Affairs, US Dept. of the Interior/Penobscot Nation, 1999 (129 p’s, plus appendices).
<http://www.indecon.com/iecwweb/documents/Duffield,%20John,%20et.%20al.%20The%20Economic%20Value%20of%20Foregone%20Cultural%20Use-%20A%20Case%20Study%20of%20the%20Penobscot%20Nation.%20June%201999.pdf>
- "The Penobscot: A River and its Native People--An Ethnohistorical Perspective." Dioxin Contamination: Natural Resource Damage Assessment Report (22 p's). Deloitte & Touche/ Penobscot Nation, January '97.
- "Introduction to the Miawpukek Band of Mi'kmaq, Conne River, Newfoundland" (20 p's). *In* Miawpukek Mi'kamawey Mawi'omi Land Claims & Self-Government Submission. Conne River, Newfoundland, '96.
- "Mi'kmaq Territorial Claims in Newfoundland: Critical Review of Supporting Documents." Report for Miawpukek First Nation, Newfoundland, '96 (87 p's).
- "Micmac Kith and Kin: Ties that Bind in Maine & Notes based on Aroostook County's Criminal Dockets," for Aroostook Micmac Council/Pine Tree Legal Assistance, '89
- "Wabanaki Tribal Territoriality, A Review of Joint Use in the St. John River Valley," (38 pp) For Pine Tree Legal & Hobbs, Strauss, etc., Law Firm, Washington, D.C.
- "The Aroostook Micmac Band in Maine: An Ethnohistorical View," 225 pp. Document prepared for the Federal Acknowledgement Petition to U.S. Department of the Interior, by the Aroostook Micmac Council, for Pine Tree Legal Assistance, Inc., '86.
- "Notes on the Ethnohistory of the Saint George River Area." Report for the Maine Historic Preservation Commission, August '85.
- "Analysis of F.A.P. Criteria and the Aroostook Band of Micmacs," (with E. Nelson), Report for Pine Tree Legal Assistance, June '84 (49 p's).
- "A Chronology of Facts, for Ibid. (74 p's).
- "Micmac Aboriginal Title in Maine," (with E. Nelson), Report for Pine Tree Legal Assistance, February '85 (85 p's).
- "Genesis of the Micmac Community in Maine, and its Intricate Relationship to the Micmac Reserves in the Maritimes," (with B. McBride), Report for the Aroostook Micmac Council, Fall '83 (111 p's).
- "Micmac Redbook: A Resource Manual for Federal Recognition," (with B. McBride), Report for the Aroostook Micmac Council/Administration for Native Americans. US Dept. of

Health & Human Services, Washington, D.C., '82/'83.

Consulting:

- American Indian War Memorial, Omaha Beach, Normandy ('16-'17)
- Maine Public Broadcasting Network, Television documentary *A Day to Remember* ('08). (Camera of segment & adviser). (7 minutes) Directed & produced by C. Sweet. first aired on Maine Public Television, 01/08/08. Won Emmy Award from New England Chapter of the National Television Academy, 31st New England Emmy Awards ceremony, Boston, May '08.
<http://video.google.com/videoplay?docid=8145200814982449090>
- Co-Guest curator, Smithsonian Exhibit Project *Alfred Métraux: From Fieldwork to Human Rights*. National Museum of Natural History, Washington DC. ['03-'07; project canceled]
- National Park Service, Principal Investigator, Indigenous Natural Resources and Cultural History of Acadia National Park region, Mount Desert Island, Maine, '03-'07.
- Environmental Protection Agency, US Dept. of Interior (Natural resources & clean water, Indian tribal lands in Maine, '04-'07)
- Aroostook Band of Micmacs, Presque Isle, Maine (Heading Tribal Membership Review Task Force, '98-'99)
- Listuguj First Nation, Restigouche, Quebec (Wabanaki Confederacy history) ('03)
- Miawpukek First Nation, Conne River, Newfoundland, Canada (land claims research ('96-'01); aboriginal land, hunting & fishing rights ('99-'01).
- Penobscot Indian Nation, Oldtown, Maine (cultural resources project/court case against big paper companies for river contamination ('96-'98)
- Wabanaki Confederacy, Restigouche First Nation, Quebec, Canada (political history ('03).
- Plains Apache Tribe. Anadarko (OK), Culture Preservation Project ('93-'95).
- Aroostook Band of Micmacs, Presque Isle, Maine (federal recognition and land claims, successfully completed and settled ('81-'91).
- Houlton Band of Maliseet Indians, Houlton, Me. Community development project advisor ('83).
- Maine Indian Tribe-State Commission, Documentary film project ('89-'95)
- New England Foundation for the Humanities, Boston, Ma. Advisor for Columbus Quincentennial programs ('89-'91).
- Indian Law Project, Pine Tree Legal Assistance, Augusta, Me. Research scholar for the Micmac Federal Recognition Effort. '82-'91.
- Department of Education, New York State, Albany. Project evaluator in development of a social studies resource guide: "Haudenosaunee: Past - Present - Future." '88.
- Maine Arts Commission, Augusta, Me. Evaluated traditional arts projects '86-'90.
- Administration for Native Americans, U.S. Dept. of Health and Human Services, Washington, D.C. Panel Chair and Reviewer of American Indian and Native Hawaiian Social and Economic Development Projects. '83-'89.
- Maine Crafts Association & the Colby College Museum of Art, Waterville, Me. Exhibit consultant. "Maine Basketry Past and Present." '88-'90.
- University of Maine, Augusta. Project consultant for Forum A Presentation, "Crow Indian Art in Transition." '89.
- The Robert Abbe Museum of Stone Age Antiquities, Bar Harbor, Me. Exhibit consultant "An Island in Time: 3,000 years Culture History at Mt. Desert." '88-'89.
- Maine Humanities Council. Project scholar and Steering Committee member. "The Land of Norumbega" conference, exhibit, and book. '87-'90.
- American Friends Service Committee, Freeport, Me. Project scholar and consultant. Maine Indian Education Project, which developed "The Wabanaki Curriculum Guide" for schools and American Indian communities in Maine. '85-'88.
- Fort Western Museum, Augusta, Me. Historical research, various projects. '82-'85.

b: DOCUMENTARY FILMS/CD-ROM

Peopling of Atlantic Canada (CD-ROM). Graham Reynolds & R. MacKinnen, '97
Naishan Dene: A Plains Apache Portrait (in co-production with Alonzo Chalepah, Apache
Tribe of Oklahoma, Anadarko, Ok. '93-present)
On the Barrens: Micmacs Blueberrying in Maine. ('87) (Research consultant/adviser).
Directed by Linda Ende, Produced by Maine Public Television, Lewiston, ME.
Prehistoric Petroglyphs in Northern New England (provisional title). Research consultant.
Produced by Mark Hedden for the Maine Historic Preservation Commission.
Mystic Images: Edward Curtis and Native Americans. Research consultant. Independent
production by Nicholas Rosza, New York (in production).

PROFESSIONAL SERVICE

Board Member for:

Maine History Online, National Board of Advisory Scholars, Maine Historical Society, '06-'09
Explorations in Media Ecology, Editorial Board, '05-present
Visual Anthropology Review, Editorial Board, '99-'04
Maine History, Editorial Board, '92- present
American Anthropologist, Editorial Board, '97-'02
Society for Visual Anthropology, Board of Directors, '95-'02
American Ethnic Studies, KSU, Governance Board, '91-'98
Latin American Studies, KSU, Governance Board, '91-'95
SALT Center for Documentary Field Studies, Portland, Me. Advisory Council, '92-
Abbe Museum for Stone Age Antiquities, Bar Harbor, Me., Advisory Committee, '98-
Dushkin Publ. Group, Advisory Board *Anthropology: The Annual Editions Series*, '92-

Manuscript & Grant Reviewer for:

Oxford U Press
Blackwell Press,
School of American Research Press;
Smithsonian Institution Press
Queen's-McGill University Press
University of Oklahoma Press
Berghahn Publishers
University of Massachusetts Press
Prentice Hall
Edinburgh University Press
University of Toronto Press

[22 academic presses; 23 academic journals &c]
Duke University Press
De Gruyter
University of Nebraska Press
Harcourt Brace College Publishing
Altamira Press
Wadsworth
West Educational Publishing
Dushkin Publishers
Maine Historical Society Occasional Publications
Northern Illinois University Press
Mayfield Publishing Society

[American Anthropologist](#)
[Ethnohistory](#)
[American Antiquity](#)
[Cultural Anthropology](#)
[American Indian Quarterly](#)
[Law and Society Review](#)
[Visual Anthropology](#)
[Explorations in Ethnic Studies](#)
[Acadiensis: Journal of the History of the Atlantic Region](#)
[Northeast Anthropology](#)
[Anthropologie et Sociétés](#)
[Anthropological Quarterly](#)
National Science Foundation
National Park Service

[Current Anthropology](#)
[American Ethnologist](#)
[Ethnos: Journal of Anthropology](#)
[American Historical Review](#)
[American Indian Culture and Research Journal](#)
[Journal of the Canadian Historical Association](#)
[Visual Anthropology Review](#)
[Maine Historical Society Quarterly](#)
[Native Studies Review](#)
[The Journal of Material Culture](#)
[Australian Journal of Human Rights](#)

National Humanities Center
U.S. Dept. of the Interior;

US Dept. of Health & Human Services (Administration for Native Americans)
US Department of Justice (Environment & Natural Resources Division)
New York State Department of Education
Social Sciences and Humanities Research Council of Canada
The Wenner-Gren Foundation

PROFESSIONAL MEMBERSHIPS

American Anthropological Association, '89- ; American Society for Ethnohistory, '88-' ; Society for Visual Anthropology, '90- ; Society for Latin American Anthropology, '93- Northeast Historical Film, '89- ; Current Anthropology, Associate, '02- ; Native American Rights Fund, '97- ; Northeastern Anthropological Association, '82- '90; National Museum of the American Indian (Charter Member), '97; The Society for the Anthropology of Lowland South America (SALSA), '03- ; Maine Historical Society, '02- ; Media Ecology Association, '04- ; New York Academy of Sciences, '06- .

ACADEMIC SERVICE

Wenner-Gren Foundation, Review Panel for Paul Fejos Post-Doctoral Fellowship in Ethnographic Film '14-'15; '15-'16; '16-'17.
President, University Distinguished Professor Group, K-State '10-'11 (Vice-Pres, '09-'10; Secretary, '08-'09). Promotion International academic evaluation team, Graduate Research School for Social and Cultural Studies (NISCO), Radboud University, Nijmegen, Netherlands ('06); Outside Reviewer Ethnography Curator National Museum of Natural History, Smithsonian ('04)
Outside Adviser New Archaeology Professorship at U Massachusetts-Amherst ('00),
Tenure & Promotion Outside Reference New York University ('06), U California-Los Angeles ('02), Vassar College ('03), U Lund (Sweden, '08), U Florida ('08), San Francisco State U ('03), Temple U ('96), U Vermont ('99, '04, '08), U-Maine ('09, '10); Expert Full Professorship Promotion, Faculty of Social Sciences, Lund U, Sweden, '08; History Dept, York U ('14); African Studies & Anthropology, U Michigan ('14); Anthropology, Indiana U ('14)..
SVA Program Director AAA annual mtgs, San Francisco ('96), SVA Nominations C'ttee ('09-'02); K-State : Marshall Committee ('97-'00); SASW Faculty Evaluation Committees (regularly), SASW Head Search Committee ('02-'03); KSU Anthropology Program Coordinator ('08-'09); Chair Anthropology Search Committees KSU ('03-'04; '05-'06, '09), University Distinguished Professor Selection Committee ('06-'07); Presidential Award for Outstanding Teaching selection committee ('06), Coffman Chair for University Distinguished Teaching Scholars review committee ('06); Member, Dean of College of Arts & Sciences Search Committee ('10-'11); Member, UDP Focus Group for K-State 2025, appointed by Pres. Schulz (July 2010); Member, Dept Head Review Advisory Committee, Dean's Office Arts & Sciences; Member, K-State's Honorary Degree committee ('11); External Referee, Full Professor Promotions at U Michigan-Ann Arbor, Indiana U-Bloomington, York U, Canada, etc.

Doctoral Committee Memberships (K-State & Other Universities):

U Sidney, Australia (1); Temple U (2), KSU History (9); KSU Sociology (2); KSU Human Ecology (2), KSU Education (1), KSU Agr. Economics (1), etc..

LANGUAGE SKILLS

Dutch, English, German, Spanish, French, and a reading & speaking smattering of others

MAJOR NEWSMEDIA-PROFILES

“Trieste indianenverhalen: Nederlandse antropoloog verdedigt de belangen van ontheemde stam.”
By Stéphane Alonso Casale. *NRC-Handelsblad*, The Netherlands 08/14/1999, p.27. &c.

ON-CAMERA EXPERT DOCUMENTARY FILM INTERVIEWS

- Characteristics of Culture* (30 mins); *Social Identity* (30 mins); *Religion and Spirituality* (30 mins).
Telecourse: "Cultural Anthropology: Our Diverse World." Produced by Coast Learning Systems, California, '08.
- The Future of Visual Anthropology*. Dir. Martin Gruber. Hamburg, Germany: Gruberfilm.'07
premiered at 27th Annual Conference in Visual Anthropology, Trondheim, Norway), &c
"Conquest of the Northeast: "Mutiny! Henry Hudson's Voyages of Discovery." (Lone Wolf Documentary Group). The History Channel '05.
- The History of Fort Western on the Kennebec*." Augusta: Ft. Western Museum, '86.

FILM REVIEWS AND SCREENINGS

Our Lives in Our Hands ('85). Reviewed (very favorably) in American Anthropologist vol. 90, no. 1 (March '88), pp. 234-5; Journal of American Folklore vol.107 (1994), pp.320-21; The Maine Times ('86); Maine in Print, Vol. IX, no.9 (Oct. '94): 8. Premiered at the American Indian Film Festival, American Museum of Natural History, New York, NY, Dec. '85. Other showings include: Film Festival of the Society for Visual Anthropology in Santa Fe ('86) Ethnographic Film Series of the Smithsonian Festival of American Folklife ('87); WCBB Public Television ('86); Maine Public Broadcasting Network ('87); Annual Meeting of the American Anthropological Association in Philadelphia ('86); Barbara Meyerhoff Film Festival in Los Angeles ('87); Twelfth Annual American Indian Film Festival in San Francisco ('87); International Conference on Visual Studies of Society, Amsterdam ('89); "Film, Food & the Future," a series co-sponsored by Cultural Survival, Earthwatch and Documentary Educational Resources, Watertown, Ma. ('90); American Anthropological Association Annual Meeting, San Francisco ('92); University of Pennsylvania Museum ('93), &c.

Oh, What a Blow that Phantom Gave Me! ('03). Premiered at the Northeastern Anthropological Association (Fleming Museum, U Vermont). Reviewed favorably in Visual Anthropology Review Vol.22, No.2 (2006), pp.77-78. Selected screenings at the Taiwan International Ethnographic Film Festival, Institute of Ethnology, Academia Sinica, Taipei ('03); 8th Royal Anthropological Institute International Ethnographic Film Festival, UK ('03); 14th Beeld voor Beeld Film Festival, Royal Institute for the Tropics Museum, Amsterdam, Netherlands ('03); 4th Media Ecology Association Conference, U Hofstra, NY ('03); Annual Meetings of the American Anthropological Association, Chicago ('03); 7th Documentary and Ethnographic Film Festival of Belo Horizonte, Brazil ('03); Institut für den Wissenschaftliche Film, Göttingen, Germany ('04), Ethnographic Film Festival of Montréal ('05), School of Oriental and African Studies, University of London ('05), Bauhaus-Universität, Weimar, Germany ('10), The Menil Museum, Houston ('11), &c.

MISCELLANEOUS

Interviews: Print Media

National Geographic; Frankfurter Allgemeine [Germany]; The Christian Science Monitor; La Opinion de Trenque Lauquen [Argentina]; NRC-Handelsblad [Netherlands]; Appalachia; Ultima Hora [Paraguay]; New York Sun; Maine Times; ABC Color [Paraguay]; Portland Press Herald; FACTA: Tijdschrift voor Sociale Wetenschappen [Netherlands]; Kennebec Journal; Algemeen Dagblad [Netherlands]; Kansas City Star; The Maine Progressive; Presque Isle Herald; Micmac-Maliseet Nation News [Canada]; Manhattan Mercury; Kansas State Collegian; St. Joseph's News-Express; Topeka-Capital Journal; Down East Magazine; Nieuwsblad van het Noorden [Netherlands]; Credits: Kwartaalblad reclame, design, fotografie en nieuwsmedia [Netherlands]; Maine Sunday Telegram, Bangor Daily News; The Big Issue [Namibia], &c.

Interviews: Broadcast Media

CBC [Canada]; NBC [Kansas]; Maine Public Television; Kansas Public Radio; Maine Public Radio; KKSU, etc., etc.

Photographs & Drawings

Boston Globe Sunday Magazine; Indian Country Today; Hot Spots, Cultural Anthropology; Christian Science Monitor; Detroit Free Press; Dallas Morning News; Houston Chronicle; Kansas City Star; Down East Magazine; Kennebec Proprietor (Fort Western Museum magazine); Portland Magazine, etc.

Book Publisher & Film Distributor Blurbs

SUNY Press '12 (*Conversations with Remarkable Native Americans*);
Bullfrog Films '10 (*We Still Live Here; Ás Nutayuneân*); '00 (*Coming to Light*);
Cambridge U Press '08 (*Transatlantic Encounters*);
Duke U Press '08 (*Global Indigenous Media*);
U Oklahoma Press '09 (*Native People of Southern New England*);
Blackwell Publishers '04 (*The Anthropology of Media*);
Altamira Press '04 (*Visual Anthropology*);

Exhibit 2

SUMMARY OF OPINIONS

Below is a summary of the opinions I am prepared to give in the matter of *Penobscot Nation v. Mills*. The facts and data supporting them are set forth in the body of the Report and in the footnotes. This is meant only as a synopsis with some non-exhaustive examples of the supporting material and reasoning more fully delineated in the Report.

1. As of the 1796, 1818, and 1820 Treaties, the Penobscot Indians did not distinguish between their occupation and use of their islands in the Penobscot River and their occupation and use of the River surrounding those islands.

In the 1700s and 1800s, the Penobscot tribe consisted of about two dozen related indigenous families, linked together by ties of kinship. They shifted periodically between several main villages and numerous small temporary encampments widely scattered on islands and on both banks of their river, as well as beyond. Collectively, the Penobscot formed a large social network consisting of three core settlements and dozens of small camp sites situated on the east and west river banks and on a number of islands strung like wampum beads in a necklace along the main stem of the Penobscot River that provided them with almost everything they needed to survive. Penobscot Indian villages and smaller camps were almost always situated at a site with easy access to the river and its resources, in particular fish. Because the Penobscot River provided an abundance of fish, which was not only easily caught, but also easy to smoke and preserve, fish was a staple food. Having developed a predominantly river-based culture, as detailed in Part I of this Report, Penobscot Indian communities occupied seasonal encampments or established more permanent settlements with nearby canoe-landings on river islands or river banks. For instance, their major village, established on Indian Island (Panawamskeag), is located immediately above the Old Town Falls where they used to spear or net fish (salmon, shad, and alewives) during spring and early summer. Another village, Passadumkeag (also known as New Town), used to exist upriver on Thorofare Island near a major fish weir where they trapped fish (especially eel) primarily in the late summer and fall. Their northernmost village, Matawamkeag, sat on the Penobscot River's east bank at the confluence with the Matawamkeag, a major tributary. Nearby, Penobscots maintained a very large fish weir, primarily to catch eel. These strategically selected sites provided them easy access to fishing grounds at river falls, rapids, gravel bars, rocks, ledges, and other favored places where they speared, netted, or trapped eel, sturgeon, salmon, trout, shad, alewives, and other fish. Dependent on their canoes as a means of transport, they also hunted moose, deer, and other game animals swimming or wading in the water or walking or grazing or browsing near the river shore. In addition, they used bark canoes to shoot or trap muskrat, beaver, and otter, primarily valued for their thick fur. Moreover, they paddled or poled their canoes when hunting water birds, primarily duck and geese. Last but not least, they used canoes in search of edible plants, nuts, berries, as well as herbal medicines. In short, their traditional way of life before, during, and after the treaty period in question, depended on the

waters of the Penobscot River surrounding their string of islands, from bank to bank. In addition to traveling to their fishing sites, trap lines, and other locations in search of food and other vitally-important natural resources, they fished and hunted from their canoes, both by day and by night (using burning torches to attract fish). They also built fish weirs, some of which were very large, some nearly spanning the river from bank to bank. Primarily dependent on fishing, hunting, and food gathering (as well as some food gardening, fertilizing the soil with fish), they pursued a highly mobile way of life, with communities periodically splitting into family groups, each to its own district known as *nzibum*, meaning “my river.” During the winter, when their rivers and lakes were frozen, Penobscots traveled on ice, up or down river, to and between islands, pulling their belongings (as well as fish, meat, furs and hides) on toboggans (sleds). While on the ice, Penobscots engaged in ice fishing as well as hunting game. Last but not least, as extensively described in this report, the Penobscot river has great spiritual significance as it features in their creation myths and is linked to many water-based family totem animals, including fish. Canoeing up or down the Penobscot River, whether for purposes of fishing, hunting, and trapping, or visiting relatives between Old Town Falls and the Forks (and beyond), Penobscots passed a sanctuary, a spiritually-powerful site in the form of a large granite rock situated in the river just south of Mattawamkeag. This peculiar rock with a deep cavity near the top was used as a deposit for ritual gifts to appease a powerful storm spirit dwelling in Mount Katahdin and in hope for an abundance of fish and game, but also plenty of hides and pelts. Confronted with white surveyors entering their domain above the head of the tide before the 1796 treaty, Penobscots explicitly claimed the river had always belonged to them and that they had it from the Creator. In short, culturally-adapted to the seasonal rhythm of their riverine ecological system, the Penobscot tribe has historically survived on the basis of an inextricable linkage between land and water in their island domain. Without the water surrounding their islands, Penobscot survival was in peril, as also articulated in their creation myth about Anglebému (“Guards the water”), the giant frog who had gulped up all the water in the Penobscot River. This monster was killed by Gluskábe, their ‘culture hero’ who thus released the water and rescued his “grandchildren” settled “up the river.” In conclusion, the idea that Penobscots could survive by isolating the islands from the water surrounding each of them makes no sense from a cultural ecological, historical and ethnographic perspective.

2. The Commonwealth of Massachusetts entered into the 1796 or 1818 treaties understanding that it was extinguishing the Penobscot Nation’s “Indian title” (also known as “aboriginal title”).

As explained in Parts II-IV of this Report, at the time of the 1796 and 1818 treaties, the Penobscot Tribe had exclusive occupation and use the Penobscot River above the head of the tides (about 5 miles north of Bangor), including the River itself, bank to bank, all islands in it, and the uplands on both sides of the River extending at least six miles back from the River on each side, and Massachusetts recognized this as the exclusive domain of the Tribe, held as “Indian title” (or “aboriginal title”) which could only be extinguished through treaty-making. This is well documented by the

early surveyors, Captain Joseph Chadwick (in 1764) and Captain Park Holland (in 1793), who separately recorded the tribe's firm stance (and their respect for it) that they were in the tribe's domain. While two Commonwealth attorneys, James Sullivan and Thomas Dawes, entertained the notion that the tribe's aboriginal title had been extinguished as a consequence of military confrontations between the British and the Tribe (and they with instructed a treaty agent, Daniel Little, to try to assert such a position to tribal leaders), this "conquest" theory was not based in historic fact and, ultimately, was dropped as an argument, in favor of extinguishing Indian title by means of a purchase by mutual agreement in a treaty. Asserting that they held their lands from the Creator since time out of mind, Penobscot tribal chiefs walked away from treaty discussions when the notion of having been conquered was suggested, and ultimately, General Knox, one of the largest proprietors in Maine (owner of the Waldo Patent), and a land speculator, as the US Secretary of War in charge of Indian Affairs, as well as other influential Commonwealth officials involved in the drive to consummate the 1796, rejected the conquest theory in favor of title extinguishment by treaty. Land speculators such as Knox, but also foreign bankers like Alexander Baring (the future Lord Ashburton) were interested in extinguishing Indian title from a legal and financial point of view, rather than from a human rights perspective. Familiar with the speculative value of lands increasing once Penobscot Indian title was extinguished in 1796 Treaty, Baring wrote: "the Penobscot Indians and it was finally agreed that this strip of valuable land should not be encroached upon but remain their hunting ground. The tribe resided at Indian Town, about 200 families, became Roman Catholics, lived quietly and crept insensibly into a state of civilization from the vicinity of European settlements. This is sure ruin to the Indians. They fell off, decreased in numbers.... The state has consequently appointed commissioners to treat with them, the result of which is not yet known, but they will certainly agree. The lands will afterwards be sold by the state in townships and we shall pick out some that will be of great service to our lands behind them. The attention of all New England speculators is fixed on these lands and they will sell very high. We can afford to give more than any body and the remainder selling high must give additional value to our lands. I reckon our back tract [northeastern Maine] worth twice as much when the Indians are removed than before..." Regarding the fundamentals, nothing changed in this regard when it came to the 1818 treaty.

3. The Penobscot Nation entered into the 1796 or 1818 treaties with the understanding that it was giving up its rights of occupancy and use to the lands, not with the understanding that it was being given lands or rights by Massachusetts.

As explained in Part IV, Penobscot leaders engaged in the treaties of 1796 and 1818 did not speak English, and translations were not always accurate, but they clearly did not make their marks upon those treaties with an understanding that they were being given lands or rights from Massachusetts. On the contrary, they zealously claimed dominion over the subject matter of the treaties and understood that they were relinquishing their rights only with respect to the lands above the shores. There was nothing in the area under consideration to be granted from Massachusetts to the

Penobscots. Tribal leaders would never have thought otherwise, and as described in the Report, the most influential Massachusetts representatives never thought otherwise.

4. Upon entering into the treaties of 1796 and 1818, Massachusetts did not intend to extinguish the Penobscot Nation's occupation and use of the waters of the Penobscot River surrounding islands in the River from Indian Island northward.

As explained in Parts IV and V, the Commonwealth's treaty efforts focused upon securing the land on either side of the Penobscot River for settlement (and eventually timber extraction), not the River itself. The River was left to the Penobscot tribe to occupy and use to sustain itself in its way of life attending its settlements on the islands from Old Town falls, northward. James Sullivan, at the time of the 1796 Treaty was Massachusetts Attorney General. He was quite familiar with the Penobscot Indian "way of life" at the time, and explicitly referred to their dependence on the fisheries on their river, observing: "what those people acquire by the labour of their women in the summer [growing crops], and by the hunting done by the men, lays up but very scanty provision for their long and cold winters. The sturgeon, the salmon, and the great fish, the men will condescend to take, but they feel themselves above the taking of small fish: the catching of shad and alewives they make the business of their women and children. The alewives taken, and some of the salmon, they preserve by hanging them in the smoke." This understanding on the Commonwealth's part is well-confirmed by the February 27, 1812 Resolve of the Commonwealth to re-secure the Tribe's fishing grounds attending its village at Indian island and Old Town falls. This shows that the Commonwealth understood that, as a result of the 1796 Treaty, the Tribe retained these fishing grounds, made up of bars, rocks, ledges and "small islands" even though they were not the identified "islands" in that Treaty. Nothing changed from Commonwealth's perspective with its consummation of the 1818 Treaty. In fact, the Commonwealth saw fit in that Treaty to establish the right of its citizens to pass and repass the River to ensure that the Tribe would allow them to use it as a public highway for floating logs and boats that could navigate the shallows. The Commonwealth knew that the Penobscot Tribe depended upon its continuing occupation and use of the River to sustain its village establishments on the islands and, in fact, protected the Tribe's continued right to occupy and use the River fishery.

5. Upon entering into the treaties of 1796 and 1818, the Penobscot Nation did not intend to give up its rights of occupancy and use of waters surrounding islands in the Penobscot River from Indian Island northward.

Given the Penobscots' way of life described in Part I of the Report, it is inconceivable that the Tribe would ever intend to give up its occupancy and use of the waters surrounding its island villages and family camps from Old Town falls northward in the treaties 1796 and 1818. Indeed, after having failed to convince the old Penobscot Chief Joseph Orono to sign a treaty in 1784, General Knox reported

that Orono's response had been: "The Almighty placed us on the land and it is ours. . . . Orono continued his speech asking Massachusetts [government] to fix the bounds of the Penobscots' land to prevent the new inhabitants from interfering 'with us.' He declared that his people did not sell any land 'to our knowledge, and never will while we live.'" In 1788, in another failed effort to convince the Penobscots to agree to a treaty based on unacceptable terms, the Penobscot chief spokesman, a war chief identified as Colonel Orsong Neptune (the father of Lt. Governor John Neptune), informed the Massachusetts Commissioner, through an interpreter: "Brother, God put us here. It was not King of France or King George. We mean to stay on this Island. The great God put us here; and we have been on this Island 500 years. . . . From this land we make our living." A year later, one of the most powerful and influential political figures in the USA in the post-revolutionary period, Knox reconsidered the concepts of "Indian title" and claims of possession based on the "right of conquest." In his capacity as U.S. Secretary of War (and in charge of Indian Affairs) in 1789, Knox wrote: "The Indians, being the prior occupants, possess the right to the soil. It cannot be taken from them except by their consent, or by rights of conquest in case of a just war. To dispossess them on any other principle would be a great violation of the fundamental laws of nature." In 1793, three years before the 1796 treaty, Captain Park Holland ventured upriver into Penobscot Indian territory above Old Town Falls for a survey. He was met with hostility as an intruder. Obviously, in defense of their homeland, Penobscots were willing to expel or even kill uninvited American whites. He reported in his field journal: "They gave us to understand. . . that the river was their river, and that they did not wish any white man to go up." Proceeding upriver, he arrived in Mattawamkeag, where "found another large Indian town, full of inhabitants, who forbade our proceeding any further. They came out to us, and gave us to understand they wished to make a strong talk, the amount of which was, that the river was their own river, and they did not want any whites to go up, for bye and bye the white man would come and buy a little of their land, then a little more, and the further the white men go up, the further the beaver and moose would go, and bye and bye the poor Indian would have no land and no moose meat. Many of these old men, I found to be afterwards, men of sound sense, strict integrity, and good judgement. We satisfied them that we did not come to buy their land, or to injure them, and proceeded on our way. . . ." Captain Holland's 1793 account depicts not only the Penobscot's vigorous defense of their ancestral domain, but the ready acceptance of that tribe's claim of exclusive use and possession by these prominent agents of a foreign government. The five arduous trips made to Boston by Penobscot delegates between 1797 and 1812, described in Part V of the Report, aptly show, for example, that the Tribe considered its ancient connection to the River attending its island village of "Old Town" to be left entirely intact by the 1796 Treaty. In the early 19th century, soon after James Sullivan took office as governor of Massachusetts, Penobscot Chief Attian Elmut headed to Boston with a tribal delegation to request protection of their fishing privileges near their head village at Indian Island. The language used by the Chief, even as roughly translated, reveals the Penobscots' understanding of their retained fishery in the Penobscot River. (Indeed, years later, Neptune recounted that he "went to Boston and saw Governor Sullivan and told him about *our fishing ground*.")) The Penobscot Chief referred to his own people as the

“proprietors of all the Islands both great and small on [the] Penobscot River,” and explained that “our Islands and especially Shad Island . . . has been the greatest support to our Ancestors.” Echoing those of past Penobscot leaders describing the Tribe’s understanding of its relationship to the River, a note taker at the time wrote that Chief Attian proclaimed in 1807 that “the God of Nature gave them their fishery, and no man without their consent has a right to take it from them.” The old chief became utterly desperate by his own inability to obtain recourse: “Oppressed with anxiety and care for his people, and perplexed with the business on hand, he fell into a state of derangement, and stabbed himself, in Boston, so badly that he soon died. . . . an event much lamented.”

Nothing changed with the 1818 Treaty. The Tribe continued to occupy and use the River to support its way of life unquestioned.

6. Massachusetts and the Penobscot Nation understood that by reserving the islands in the Penobscot River from Indian Island northward in the 1796 and 1818 Treaties, the Penobscot Nation reserved its occupancy and use of the waters of the Penobscot River surrounding those islands.

This is established by the synopses above and in Parts I-VI of the Report. It was understood by the Tribe and by Massachusetts that with the islands, the Tribe retained its continued occupancy and use of the Penobscot River between the islands and from shore to shore to sustain the Penobscot way of life described in Part I of the Report. Because of this symbiosis in their riverine habitat, a severance between their use and occupation of the islands and their use and occupation of the River was inconceivable and would have reduced them to starvation, dooming their chances for survival. Their mode of subsistence and material culture, their social organization and family totems, as well as mythological worldview, all continued through the treaty period in question. When those treaties were finally executed in 1796 and 1818, all parties were well aware of how and why the Penobscot people were culturally and historically embedded in their river habitat. As the nineteenth century progressed past 1818, non-Indians would encroach upon the River from their developments on the shores, including their sawmills and timber drives, but tribal members would continue to occupy and use the River in all of the ways described in Part I; and there was no assumption that the Treaties would deprive them of doing so in accordance with their ancient traditions.

7. In entering into the 1820 Treaty with the Penobscot Nation Maine and the Penobscot Nation understood that Maine was acceding to the 1818 Treaty, with the exception of the Tribe’s retention of land and services of an agent in Brewer.

As fully described in Part VII, when Maine separated from Massachusetts in 1820, it took over the 1818 Treaty between the Commonwealth and the Tribe. Nothing changed other than the elimination of a small parcel of tribal land and related agent services in Brewer. The intent and understanding on the part of Maine and the Tribe

was that everything agreed to in the 1818 treaty carried over and was confirmed in the 1820 treaty with Maine.

8. Maine and the Penobscot Nation understood that following the 1820 treaty, the Penobscot Nation reserved its occupancy and use of the waters of the Penobscot River surrounding those islands.

As described in Parts VII and VIII of the Report, Maine officials understood and accepted that the Penobscot tribe retained its occupation and use of the Penobscot River. There are numerous reports describing the importance of the fisheries at Old Town Falls, a few hundred yards below their head village at Panawamskeag (“Indian Island”), but also upriver. In addition to dependence of the fisheries, they also continued to hunt and trap, and canoed up and down the river where they established seasonal encampments on the river banks and islands. In the summer of 1820, when Penobscot tribal chief, Lt. Governor John Neptune visited the Governor of the newly-established State of Maine in Portland, he complains that “the white people take the fish in the river so they do not get up to us. They take them with weirs; they take them with dip-net. They are all gone before they get to us. The Indians get none. If you can stop them so that we can get fish, too, we shall be very glad. There is another thing — our hunting privilege. The white men come and spoil all the game. They catch all the young ones and the old ones. We take the old ones and leave the young ones till they grow bigger and are worth more. We wish the white men to be stopped from hunting. . . . We wish your Government to stop the white men from hunting — put their traps in their chests. Let white men have the timber and the Indians have the game weirs had been set up in their river which had obstructed the fish and injured their means of support.”

The linkage between the river and the nearly 150 islands reserved by the Penobscots is so self-evident that the 1820 treaty, confirming that the State of Maine simply stepped into the shoes of Massachusetts with respect to the 1818 treaty terms, does not even mention the islands. During the treaty ceremony in Bangor, prior to the actual signing of the document, Captain Francis Lolar spoke on behalf of the Penobscot tribal council. Addressing Colonel Lewis, the treaty commissioner representing the State of Maine, he said: *Brother*.—The Good Spirit who made and placed the red men here, before white men came, gave us all the land from whence the waters run into the Penobscot. He caused the forests to abound with game, and the rivers with fish, for our use and subsistence- we then were contented and happy. When the white men came over the great waters to our country, we received them as friends and brothers: we then were many and strong: they few and weak: we gave them land, and permitted them to live peaceably among us, and have remained their friends. The white men are now very strong; we are weak, and now want them to be our friends. *Brother*.—We place the greatest confidence in the Governor, Chiefs, and people of the State of Maine, and are willing to put ourselves under their care and protection, helping, and expecting they will perform all their promises to us as faithfully as our good friends the governor, Chiefs, and People of Massachusetts have done.” In his response, Colonel Lewis confirmed the state’s intent to stand in shoes of Massachusetts concerning the specific understandings provided by the Treaty of

1818: “It being meant and intended, to assume and perform, all the duties and obligations of the commonwealth of Massachusetts, toward the said Indians, whether the same arises from treaties or otherwise.... So that said tribe may have continued to them, all the payments and enjoy all the immunities and privileges....” After the 1820 treaty, a Penobscot chief guided two surveyors, one of whom was Major Treat. Having witnessed the treaty ceremony in Bangor, Treat was personally familiar with the importance of the Penobscot Indian fisheries on the Shad Islands at Old Town Falls. Traveling by canoe upriver, with Neptune (one of the signers of the 1818 and 1820 treaties), Treat kept a journal and sketched maps of the river, marking numerous wigwam sites, place names, as well as several large fish weirs in the river. There are numerous Indian agent reports, newspaper accounts, and early ethnographic descriptions underscoring the continued importance of the river in the Penobscot way of life, well into the 20th century. In his 1822 *Report to the Secretary of War on Indian Affairs*, published two years later, Dr. Morse observed: “The Penobscots, in government and internal regulations, are independent- The legislative and executive authorities are vested in the sachems; though the heads of all the families are invited to be present at their public meetings, which are held in their house of worship, and conducted with order and decorum.... The tribe has the right to hunt and fish along the banks of the river, to the mouth of Penobscot Bay.” Among his major sources of information regarding the Penobscots was the Bangor-based attorney and politician Williamson, the second Governor of the State of Maine and its major 19th-century historian.

Three years after the 1820 treaty, Maine government officials traveled to the Penobscot reservation, reporting Penobscot families encamped on ten islands in the main stem of the river above the falls. A generation later, in 1842, two decades after the final treaty, the Indian agent reported 31 Penobscot families encamped on nine islands. Notwithstanding complaints about diminishing fish supplies due to fisheries below the falls, and dams, or ongoing disputes with local whites, Penobscots continued to spear and net fish at the Old Town Falls just downriver from their head village. Although more remote and less reported on, the same is true for Penobscots residing at Mattanawcook Island and other upriver island communities. They also continued to hunt and muskrat, beaver, and other fur-bearing animals along their river. In various degrees, families continued to depend for their food on fish and game harvest on their islands upriver. Penobscot families retained much of their indigenous way of life as described in the first section of this report until well into the 19th century. Whether the water on their river was low, high, or frozen, they camped on--or traveled between-- the many dozens of islands on their tribal reservation above Old Town Falls. Even in recent decades, several Penobscot families still frequent islands upriver for purposes of fishing, hunting, and trapping.

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

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

**Harald E.L. Prins, PhD
University Distinguished Professor of Anthropology
Kansas State University
11 December 2013**

SCOPE OF OPINION

*** * ***

REPORT SUPPORTING OPINIONS

I. Penobscot Indian Way of Life on the Penobscot River

A. Brief Description of the Penobscot River & Homeland

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

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

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

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

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

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

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

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

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

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

⁵ Snow 1978, Speck 1940.

⁶ Speck 1940, p.2.

⁷ Eckstorm, Fannie H. 1978. *Indian Place Names of the Penobscot Valley and the Maine Coast*. Orono: University of Maine Press (4th printing), p.192. Eckstorm offers the following etymology for Pentagoët, or *Pen-tag-wet* – *-pen*, ‘descending’; *-tegwe*, ‘river’; *-t*, locative).

⁸ Ibid.

⁹ Godfrey 1876, p. 7. See Godfrey, John E. 1876. The Ancient Penobscot, or Panawanskek. Pp. 1-22. *Collections of the Maine Historical Society*, Vol. VII. Bath: Maine Historical Society.

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

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

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

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

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

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

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

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

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

14 See also Joseph Chadwick 1764, Park Holland 1794.

15 Chadwick, Joseph. 1764

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

B. Penobscot Seasonal Residence Pattern

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

¹⁶ Although the Penobscot were involved in treaty-making ceremonies prior to the American Revolutionary War, the term “treaty period” as used in this report refers to the treaty-making activities from 1784 to 1820.

¹⁷ Vetromile 1866, pp. 78-79.

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

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

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

¹⁸ Vetromile 1866, pp.79-80.

¹⁹ Godfrey 1876, p.4.

²⁰ Discussing family hunting districts among the Maliseet, eastern neighbors of the Penobscots, Frank Speck and Wendell Hadlock (1946, p. 361, 364, 365, 372) offer several examples why a tribesman would refer to his family hunting district as “my river.”

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

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

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

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

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

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

²³ Cited in Bingham, p.212.

²⁴ Joseph Treat 1820, in Pawling 2007, p.72.

²⁵ Joseph Treat 1820, in Pawling 2007, p. 76.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁴ Speck 1940, p.25.

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

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

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

C. Traditional Mode of Subsistence on the River

The Penobscot River has been the central artery of an ecosystem supporting Penobscot culture-- their traditional “shared and socially transmitted ideas, values, emotions, and perceptions, which are used to make sense of experience and generate behavior and are reflected in that behavior,’ or, in short, their way of life.”³⁷

To further understand the tribe’s way of life in the period leading up to the 1796, 1818 and 1820 treaties, the following sketch offers a basic outline of its relevant historical features in reference to their river. Illustrations that accurately depict activities carried out by the Penobscots are provided in Addendum 3.

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

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

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

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

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

³⁸ Penobscot and neighboring Indian communities were often named “according to the various residences in which a tribe, or a part of it, had encamped for some war, hunting, or fishing party. These names were generally taken from some river, pond, etc., in whose vicinity they had pitched their camps.” (See Vetromile, E. 1866. *The Abnakis and their History*, New York: J. B. Kirker, p.22).

³⁹ Sugar Island “was so named because, from the maple trees on it, the Indians made quantities of maple sugar” (Eckstorm 1978, p.41). Considering there were maple-tree stands elsewhere, too, it is not surprising that this island was also known by other names, including *Pimimwamkikatook*, as noted by Eugene Vetromile (Eckstorm 1978, p.41). Pawling (2007, p.33, n.19) offer an interpretation for this place name as “the water-town on the gravel.”

⁴⁰ Speck 1940, p.36.

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

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

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

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

41 Speck 1940, p.35.

42 Rasle (1833:409), in his *Abenaki Dictionary* offers the indigenous term *N8ran'k8a*: “I am going beaver hunting by canoe in short while.”

43 Chadwick, Joseph 1764. *Journal of a Survey*, Massachusetts State Archives, p.89; See also Butler and Hadlock 1962, p. 18. Butler, Eva L., and Hadlock, Wendell S. 1962. *A Preliminary Survey of the Munsungan-Allagash Waterways*. Bulletin VIII. Bar Harbor: The Robert Abbe Museum.

44 Chadwick, cited in Butler and Hadlock, p.10.

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

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

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

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

⁴⁵ Speck 1918, p.218, note.

⁴⁶ Treat 1820, in Pawling 2009, p.151

⁴⁷ Speck 1940, pp.82-83.

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

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

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

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

48 Speck(1940:85) noted: “Just below Indian Island, above the falls, there is in the middle of the river a rocky ledge where the men used to get their stock of salmon. Unheard-of quantities were taken here until the dam was built [in 1833].”

49 Speck 1940, p.85.

50 Speck 1940, p.83.

51 Speck 1940, p.87. It is likely that Penobscots also hunted fish with bow and arrows, as reported from the western regions: “. . . they embark in a canoe with bows and arrows; they hold themselves erect the better to discover the fish, and as soon as they have caught sight of one they pierce it with an arrow” (Rasle 1723. p.279 In: *Collections of the Maine Historical Society* 2nd Series, Vol. IV:265-301.

52 Speck 1940, pp.86-87.

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

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

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

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

⁵³ Several museums, including the Penobscot tribal museum at Indian Island and the Maine State Museum in Augusta, have a leister in their collections (see also Bourque 2001, p.299).

⁵⁴ Speck 1940, p.83. Penobscot Indian fishing by fire light continued until the 1930s, and perhaps later. For instance, Charles Shay, a tribal elder at Indian Island, now 89 years old, remembers how he and other Penobscot boys used to go night fishing for eel in the late 1930s." (p.c. 08/18/2013).

⁵⁵ Thoreau, p.294-296.

⁵⁶ Speck 1940, pp 82-83, 85. The anthropologist took a photograph, which he included as an illustration of a Penobscot demonstrating use of the fishing spear.

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

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

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

⁵⁷ Ibid., p.90.

⁵⁸ Speck 1940, p.90, p.?.

⁵⁹ A review of the historic record shows that Penobscots depended very heavily on eel.

⁶⁰ Petersen, James B., Brian S. Robinson, Daniel F. Belknap, James Stark and Lawrence K. Kaplan. 1994 An Archaic and Woodland Period Fish Weir Complex in Central Maine. *Archaeology of Eastern North America* 22:197-222.

⁶¹ Speck 1918, pp.193-194.

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

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

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

62 Wallis and Wallis 1955, p.22. See Wallis, Wilson D., and Wallis, Ruth S. 1955. The Micmac Indians of eastern Canada. Minneapolis: U Minnesota Press. Mi'kmaq weir-construction is fundamentally similar to that of their various neighbors, including the Penobscot.

63 Eckstorm 1978:204-205.

64 Speck 1940, p. 90.

65 Sullivan, 1804, p.228.

66 According to Eckstorm (1978, pp.15-16), these "eel-weirs were on the rapids from State to Franklin Streets" in what is now the city of Bangor. Neighboring tribes of the Penobscot also established villages near fish weir sites.

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

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

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

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

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

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

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

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

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

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

⁷⁰ Reverend Daniel Little, 3 September 1786, cited in Deane p.85.

⁷¹ Speck 1940, p. 89. As Speck described it: “When the water was so strongly impregnated, . . . [the] torpid eels began to appear on the surface, and before an hour had passed the top of the water was spotted with the bodies of dead or dying fish, which floated belly up, unable to escape. The children of the party... were then forced to enter the water and bring the fish ashore, where they were skinned and salted by the women. After this the eels were placed upon dead limbs and laid in the sun to dry for two days. Then they were hung up in a tent and smoked until there was drip from the suspended bodies.”

⁷² Speck 1940, p.91.

⁷³ Speck 1940, pp.85-86, p.88.

⁷⁴ Sullivan 1804, p.145.

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

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

D. Penobscot Worldview in a Riverine Habitat

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

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

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

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

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

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

⁷⁷ Speck 1935, p.10.

⁷⁸ Speck 1935 p.7.

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

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

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

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

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

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

⁸⁰ Speck 1918, p.219.

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

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

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

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

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

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

⁸² Speck 1918, pp.193-194. See Speck, Frank G. 1918. Penobscot Transformer Tales. *International Journal of American Linguistics*, Vol. 1, No. 3, pp. 187-244.

⁸³ “She was just as fond of swimming. Once as she waded ashore, after swimming...”; “All of a sudden, looking across the river, they saw some women coming down to the shore to go in bathing” (Speck 1918, p.218).

⁸⁴ Especially in the late summer and fall, river levels above Old Town Falls could drop low. The Jesuit missionary Eugene Vetromile (1866, p.48), who visited the Penobscot on their river islands in the mid-1800s, noted: “In dry seasons I have known the waters of that river to be so low that I could hardly go from Mattanacook to Oldtown in a canoe.”

⁸⁵ Speck 1915, p.191; Speck 1918, p.200, note 4

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

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

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

⁸⁶ Speck 1940, pp.216-217

⁸⁷ Speck 1915, pp.191-192.

⁸⁸ See also Speck 1940, p.210, where he spells the word as *ndó'dem*, translated as “my co-relative.”

⁸⁹ It is not clear what the “water nymph” exactly is, but Speck 1918, p.235, footnote 2) states that it is a “supernatural creature believed to live beneath the water.” Elsewhere, he offers its Penobscot name as Wanagamesu, describes it as an “addle-headed creature,” and notes it is the totem of the Nicola/Coley family whose family hunting territory was located on “Russell Stream and Pond” (Speck 1940,p. 215). Frank Siebert identified this totem as Dragonfly. See: Siebert, Frank T. 1982. "Frank G. Speck, Personal Reminiscences." Pp. 91-142. In *Papers of the Thirteenth Algonquian Conference*, edited by William Cowan. Ottawa: Carleton University.

⁹⁰ Speck 1928:170, n.3; Speck 1940:209, n.6.

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

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

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

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

91 Speck 1915, p.192. “Like the other eastern and northern Algonkian, the Penobscot families each possessed inherited hunting-territories which were designated by the totemic animal names. So we find those families located near the ocean bearing marine-animal names, while the territories of the land-animal families are situated in the interior. The latter trace their origins to independent causes. The family hunting-territory is called *nzi'-bum* (‘my river’)” (Speck 1918, pp.201-202).

92 Nicolai 1893, p. ; Speck 1918, p.200. Penobscots point to a large rock lying on the shore at the mouth of the Penobscot River, near Castine, as Gluskábe’s canoe (Ibid., footnote).

93 Treat 1820, in Pawling 2007, pp.94, 995.

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

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

94 Speck (1935, p.4) explained that “*kthán.dowit*’ may be translated “great spiritual being.”

95 Speck (1935, p.4) explained: “The term *manitu* itself is not found in Penobscot, its cognate appearing as *wahán.do*, the suffix *-han.do* denoting beings possessed of supernatural power. The ordinary generic term for an evil spirit is *wahán.do*,” Penobscot shamans were known as *mæde’olənuwak* (variously spelled). *Medé-oulin*, also spelled *M’té-oul-in* or *Motewolon*, is a Wabanaki shamanic concept referring to a non-ordinary power, or magic, historically also translated as “witchery.” See also Eckstorm 1945, pp.5, 97-99, 181-189; Leland 1884, p.260; Speck 1919, p.252. Speck, Frank G. 1919. *Penobscot Shamanism*. Memoirs of the American Anthropological Association Vol. VI (4), pp. 239-289; 1935: Penobscot Tales and Religious Beliefs. “Journal of American Folklore.Vol.48 (187), pp.1-107.

96 Treat 1820, in Pawling 2007, p.95

97 Leland 1884, p.255-257. See Leland, Charles G. 1884. *The Algonquin Legends of New England; or, Myths and Folk Lore of the Micmac, Passamaquoddy, and Penobscot Tribes*. Boston: Houghton, Mifflin and Company. .

98 Speck 1935, p.17.

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

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

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

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

⁹⁹ Speck 1935, p.13.

¹⁰⁰ Speck 1935, pp.13-17.

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

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

¹⁰¹ Speck 1935,p.27.

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

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

II. Penobscot Territory That Became Object of the Treaties

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

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

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

EXHIBIT D

FINAL REPORT

**The Economic Value of Foregone Cultural Use:
A Case Study of the Penobscot Nation**

**John Duffield
Chris Neher
David Patterson
Harald Prins**

July 1999

**Report submitted to:
Bureau of Indian Affairs
U.S. Department of the Interior**

Contact: Dr. John Duffield, 3699 Larch Camp Road, Missoula, MT 59803 406-728-9510.

ACKNOWLEDGMENTS

This study was funded by the U.S. Department of Interior, Bureau of Indian Affairs, Division of Environmental Quality and through and in cooperation with the Penobscot Nation. We would like to acknowledge the participation of Michael Hanemann and Victor Adamowicz at the critical stage of study and survey design. John Banks, Daniel Kuznierz, and Linda Socoby of the Penobscot Department of Natural Resources and other members of the tribal staff provided crucial day to day assistance with focus groups, mailings, and provided information important for the study design. We would also like to acknowledge the critical role Keith Eastin played in getting this study organized and underway. Robert Mitchell helped conduct focus groups and provided useful comments on the survey design. Kira Young and Mark Duda and the staff at Responsive Management, Inc. provided a careful and conscientious review, programming and implementation of the phone survey instrument. We are indebted to the members of the Penobscot Nation who had the interest and patience to participate in our numerous survey efforts. Any remaining errors and limitations to the study are, of course, the responsibility of the authors.

TABLE OF CONTENTS

ACKNOWLEDGMENTS	ii
TABLE OF CONTENTS	iii
LIST OF FIGURES	v
LIST OF TABLES	vi
SUMMARY	1
1.0 INTRODUCTION/SCOPE OF THE ANALYSIS	12
1.1 OVERVIEW	12
1.2 SCOPE OF THIS STUDY	13
1.3 TYPES OF FOREGONE USE AND SERVICES	18
1.4 PENOBSCOT RIVER USER'S SURVEY	19
1.5 NATURAL RESOURCES LINKED TO CULTURAL USE	19
1.6 ETHNOHISTORICAL REVIEW	20
1.6.1 <u>The Concept of Culture:</u>	20
1.6.2 <u>Material and Nonmaterial Culture:</u>	21
1.6.3 <u>Penobscot Indian Fishing: 1900-1940</u>	22
1.6.4 <u>Paper Mills Contaminating Rivers:</u>	24
1.7 THE MAINE SETTLEMENT ACT	25
2.0 THEORY AND METHODS	27
2.1 OVERVIEW	27
2.2 CONTINGENT VALUATION METHODS	27
2.2.1 <u>Introduction.</u>	27
2.2.2 <u>NOAA Panel Guidelines</u>	30
2.2.3 <u>Interpreting Temporal Scope Designs</u>	35
2.3 CULTURAL USE	37
2.4 SURVEY DESIGN	38
3.0 DATA COLLECTION	41
3.1 OVERVIEW	41
3.2 INITIAL MAIL SURVEY	41
3.3 PHONE SURVEY	43
3.3.1 <u>Overall response.</u>	43
3.3.2 <u>Item nonresponse</u>	43
3.4 NONRESPONDENT MAIL SURVEY	45
3.5 SUMMARY	45

4.0 ANALYSIS AND RESULTS	49
4.1 OVERVIEW	49
4.2 CONTINGENT VALUATION RESPONSES	49
4.2.1 <u>Response to bid and scaling factors</u>	49
4.2.2 <u>Explanation of bid response.</u>	58
4.2.3 <u>Cross-tabulation of bid response and key variables.</u>	62
4.3 OTHER PHONE SURVEY FINDINGS	84
4.3.1 <u>Respondent's assessment of understanding</u>	84
4.3.2 <u>Survey agent assessment of respondent understanding.</u>	84
4.4 MAIL SURVEY OF NONRESPONDENTS	86
4.5 WEIGHTED SAMPLE	89
4.6 MULTIVARIATE MODEL.	93
4.7 VALUATION OF FOREGONE USE.	97
4.7.1 <u>Median Value of Cleanup.</u>	97
4.7.2 <u>Present Value and Annual Value</u>	100
4.7.3 <u>Aggregate Value for Penobscot Nation</u>	100
4.8 CULTURAL USE SHARE	104
 5.0 CONCLUSIONS	 108
 6.0 REFERENCES	 109
 APPENDIX 1. ETHNOHISTORICAL PERSPECTIVE: PREHISTORY TO 1940	
 APPENDIX 2. METHODS FOR ESTIMATING CULTURAL USE SHARE	
 APPENDIX 3. INITIAL MAIL SURVEY INSTRUMENTS	
 APPENDIX 4. PHONE SURVEY INSTRUMENT	
 APPENDIX 5. MAIL SURVEY OF NONRESPONDENTS INSTRUMENTS	
 APPENDIX 6. MULTIVARIATE LOGIT MODELS	
 APPENDIX 7. CORRELATION MATRIX	
 APPENDIX 8. GOODNESS OF FIT TESTS	
 APPENDIX 9. COMPUTATION OF SHARE PARAMETERS	

LIST OF FIGURES

Summary Figure 1. Proportion of Respondents willing to accept cash at alternative bid levels.	6
Summary Figure 2. Summary of Scale Effect on Valuation Response.	8
Summary Figure 3. Plot of IFCLEAN vs. CV Response	9
Figure 1-1. Map of Penobscot River and Fish Consumption Advisory Area.	15
Figure 1-2. Notice of Penobscot River Contamination	16
Figure 4-1. Proportion of Respondents Willing to Accept Cash at Alternative Bid Levels.	53
Figure 4-2. Summary of Scale Effect on Valuation Response: 1) Time to Cleanup, 2) Belief about Effectiveness of Cleanup, 3) Belief about Time to Natural Recovery.	59

LIST OF TABLES

Summary Table 1. Summary of Data Collection.	5
Table 1-1. Scope of this Study	17
Table 2-1. Model for Interpreting Temporal Scope Tests.	36
Table 2-2. Geographic distribution of Penobscot Tribe voters	40
Table 3-1. Penobscot Survey Timeline	42
Table 3-2. Completion and Response Rate Statistics: Phone survey.	44
Table 3-3. Response Rate Statistics: Mail Survey.	46
Table 3-4. Summary of Survey Participation	47
Table 3-5. Summary of Data Collection.	48
Table 4.1. Contingent Value Response Proportions: Frequency and Percent Choosing Cash Distribution: Final Unweighted Data Set*.	51
Table 4-2. Contingent Value Response Proportions: Frequency and Percent Choosing Cash Distribution: Final Unweighted Data Set*.	52
Table 4-3. Simultaneous Comparison of Scenarios and Bid Levels (Logit Models)	55
Table 4-4. Effect of Beliefs on Effectiveness of Cleanup on Valuation Response	56
Table 4-5. Effect of Beliefs about Natural Recovery on Valuation Response	57
Table 4-6. Distribution of Reasons Given for being Unsure of a Response to the Initial Valuation Question.	60
Table 4-7. Distribution of Reasons Given for Voting for Cash Distribution over Cleanup.	61
Table 4-8. Distribution of Reasons Given for Voting for Cleanup of the Penobscot River.	63
Table 4-9. Penobscot Survey Variable Names and Survey Questions/Descriptions	64
Table 4-10. Crosstabulation of Maine Residency and Valuation Response Proportions - 2 Year Cleanup Scenario	66
Table 4-11. Crosstabulation of Maine Residency and Valuation Response Proportions - 20 Year Cleanup Scenario	66
Table 4-12. Crosstabulation of Local Area ¹ Residency and Valuation Response Proportions - 2 Year Cleanup Scenario	67
Table 4-13. Crosstabulation of Local Area Residency and Valuation Response Proportions - 20 Year Cleanup Scenario	67
Table 4-14. Crosstab of KNOWRIV with Response to Valuation Question, 2-Year Cleanup Scenario.	69
Table 4-15. Crosstab of KNOWRIV with Response to Valuation Question, 20-Year Cleanup Scenario.	69
Table 4-16. Crosstab of HOWOFT with Response to Valuation Question, 2-Year Cleanup Scenario.	70
Table 4-17. Crosstab of HOWOFT with Response to Valuation Question, 20-Year Cleanup Scenario.	70

Table 4-18. Crosstab of YOUFISH with Response to Valuation Question, 2-Year Cleanup Scenario.	71
Table 4-19. Crosstab of YOUFISH with Response to Valuation Question, 20-Year Cleanup Scenario.	71
Table 4-20. Crosstab of ENDPROT with Response to Valuation Question, 2-Year Cleanup Scenario.	72
Table 4-21. Crosstab of ENDPROT with Response to Valuation Question, 20-Year Cleanup Scenario.	72
Table 4-22. Crosstab of IFCLEAN with Response to Valuation Question, 2-Year Cleanup Scenario.	73
Table 4-23. Crosstab of IFCLEAN with Response to Valuation Question, 20-Year Cleanup Scenario.	73
Table 4-24. Crosstab Summary of Attitude Variables with Valuation Question Response, 2-Year Cleanup Scenario.	74
Table 4-25. Crosstab Summary of Attitude Variables with Valuation Question Response, 20-Year Cleanup Scenario	75
Table 4-26. Crosstab of INCOME with Valuation Question Response, 2 Year Cleanup Scenario.	77
Table 4-27. Crosstab of INCOME with Valuation Question Response, 20Year Cleanup Scenario.	78
Table 4-28. Crosstab of EDUCATE with Valuation Question Response, 2 Year Cleanup Scenario.	79
Table 4-29. Crosstab of EDUCATE with Valuation Question Response, 20 Year Cleanup Scenario.	80
Table 4-30. Crosstab of Gender by Valuation Question Response, 2 Year Cleanup Scenario.	81
Table 4-31. Crosstab of Gender by Valuation Question Response, 20 Year Cleanup Scenario.	81
Table 4-32. Crosstab of Presence of Minor Children in the Household by Valuation Question Response.	82
Table 4-33. Crosstab of Age Class by Valuation Question Response, 20 Year Cleanup Scenario.	82
Table 4-34. Crosstab of VOTEREF by Valuation Question Response, 2 Year Cleanup Scenario.	83
Table 4-35. Crosstab of VOTEREF by Valuation Question Response, 20 Year Cleanup Scenario.	83
Table 4-36. Comparison of Referendum Question Percent Voting for Cleanup Considering the Exclusion of Selected Responses. Final unweighted data set.	86
Table 4-37. Survey Agent Ratings of Respondent Understanding of Valuation Question . .	87
Table 4-38. Survey Agent Ratings of Respondent Attentiveness, Understanding, and Seriousness.	87
Table 4-39. Phone and Mail Survey Means and Sample Sizes	88
Table 4-40. Penobscot Tribe (18 and older) Demographics by Subsample	90

Table 4-41. Penobscot Tribe (18 and older) Comparison of Demographics between Phone Samples and Total Tribe Voters	91
Table 4-42. Contingent Value Response Proportions: Frequency and Percent Choosing Cash Distribution: Final Weighted Data Set	92
Table 4-43. Contingent Value Response Proportions: Frequency and Percent Choosing Cash Distribution: Final Weighted Data Set*.	92
Table 4-44. Estimated Penobscot River Use Valuation Model - Linear Specification	94
Table 4-45. Estimated Penobscot River Use Valuation Model - Log-log Specification	95
Table 4-46. Penobscot Survey Variable Definitions and Coding used in final reduced models	96
Table 4-47. Estimated Median Values per Member for Cleanup of Penobscot River (1997 dollars)	99
Table 4-48. Estimated Implicit Discount Rate, Annual Use Value, and Present Value of Complete Use on Penobscot River per Tribal Member (1997 dollars)*	101
Table 4-49. Computation of Present Value of Foregone Use of Penobscot River. Implicit Discount Rate (1997 dollars).	102
Table 4-50. Estimated Value of Foregone Use of Penobscot River (1987-future). Implicit Discount Rate (1997 dollars).	103
Table 4-51. Computation of Present Value of Foregone Use of Penobscot River - OMB 7.0% Discount Rate (1997 dollars)	105
Table 4-52. Estimated Value of Foregone Use of Penobscot River (1987-future) - OMB 7.0% Discount Rate (1997 dollars).	106
Table 4-53. Estimated Relative Share of Valuation of Penobscot River Use due to Cultural Motives	107

SUMMARY

Introduction. This report develops methods for determining the economic value of foregone cultural use. An application of these methods is presented for valuing foregone cultural use of the Penobscot River caused by the presence of dioxin. The general approach is to first provide an estimate of the total economic value of all foregone use by the Penobscot Nation of the Penobscot River below Lincoln for the period 1987 until such time as the river can be restored to full use. Secondly, it is of interest to identify what share of this total economic value represents foregone cultural use.

The Penobscot Indian Nation is headquartered on Indian Island, near Old Town, Maine and takes its name from the river which runs through their ancestral domains in Central Maine. The Penobscot River is central to the identity and culture of this Tribe. Among other traditional practices the river and the more than 200 islands within the reservation have been a source of a number of important natural resources such as fish, eels, frogs, muskrats and plants such as fiddleheads, raspberry and flagroot. These resources provide direct use such as fishing, hunting, gathering and eating as well as use for medicine and ritual purposes.

In July 1987, the State of Maine posted a fish consumption advisory for the Penobscot River below Lincoln for a 60 mile section through the Penobscot Reservation. The advisory stated that fish caught below Lincoln may contain traces of dioxin and that consumption of fish in this area should be limited. A paper mill has operated in Lincoln since the late 1960's, and is believed to have released dioxin into the river waters as part of its paper bleaching process. The direct affect of the presence of dioxin is that it is unsafe to catch fish to eat - both for humans, and for bald eagles that live along the river. These affected direct uses make the river unusable for significant cultural purposes related to fishing.

Methods. The existing economic literature provides little guidance on how one would estimate the value of foregone cultural use per se. However, there is a very extensive economics literature on how one would place a total value on foregone use of natural resources. Total value is the value associated with all affected purposes or uses of a given resource, including cultural use. In addition to the economics literature, reports and regulations developed by the U.S. Department of Interior and the National Oceanic and Atmospheric Administration provide guidance on methods for estimating the total economic value of foregone use of a given natural resource. Based on these sources, the methodology applied in this report is contingent valuation. In this approach, individuals are asked in a survey how much value they place on a given resource. The general guidance from the literature is that it is best to ask for this value in the context of a vote on a referendum. The contingent valuation referendum designed for this study asked tribal members to vote on whether they would accept a one-time per capita dollar compensation in lieu of a cleanup of the Penobscot River by a given date. An important consideration in this decision is the amount of time it would take the river to clean up on its own. Tribal members were told that natural recovery (in the absence of cleanup) would occur in 30 years time, once dioxin emissions ceased. Other general guidance from the

literature is that the referendum results will be more reliable if respondents find the referendum plausible and realistic and if respondents are familiar with the resource at issue.

The case at hand provided an unusually good opportunity to use the referendum approach both because tribal members know the river and realize the prominence it has in their culture and because the Penobscot Nation uses referenda to make important natural resource policy decisions, often with a tradeoff of per capita compensation. In the late 1970's and early 1980's the Tribe used a referendum to decide a cash settlement offer concerning land claims made by themselves and associated tribes against the State of Maine. The offer to the Penobscot Nation was \$40.3 million compensation, of which a large share (\$26.8 million) was to be used to purchase lands and \$12.5 million to be used for per capita payments in perpetuity (seniors would receive an additional fund of \$1 million). The \$12.5 million on a per capita lump sum basis was about \$8,600 per member in 1980 dollars or the equivalent purchasing power of \$16,800 in 1997 dollars. The per capita lump sum value for the entire settlement package is about \$54,000 per member (again, in 1997 dollars). The Tribe voted to accept this offer and the out-of-court settlement was eventually finalized in the Maine Indian Claims Settlement Act passed by Congress in 1980. A more recent example involving per capita distributions is a vote in February 1996 to distribute \$1.5 million (about \$750 per capita lump sum) to tribal members from accruals to a Land Acquisition Fund.

In the current study, a vote in the contingent valuation referendum is interpreted in the following way. If you assume a contaminated river, it is clear that the Penobscot Nation has the right to a cleanup and full fishing-related use of the Penobscot River. If a tribal member votes to refuse a given cash offer in lieu of a cleanup by a given date, this indicates that having use of the river after the date of the cleanup is worth more than the cash offer. Accordingly, identifying a cash offer that would be refused by half or more of the Tribe (or accepted by just half or less in a referendum vote) provides a conservative estimate of the median value of use of the river for the period after cleanup occurs. An aspect of the referendum method is that one would expect that a given vote tally will vary with when the cleanup would occur. One would expect that the percentage voting to accept a given cash offer for a cleanup in the near future (for example completed two years from now) would be lower than the percentage voting to accept the cash offer against a cleanup further in the future (for example, in 20 years). If cleanup is sooner rather than later, then full use of the river is obtained sooner and accordingly, early cleanup is more valuable to the Tribe. For the case at hand, approximately one-half of tribal members contacted were asked to vote on a two year cleanup and the other half contacted were asked to vote on a twenty year cleanup. One way to interpret this data is that the dollar difference between the two year and twenty year median values is an estimate of the value of 18 years of full use of the river by the Tribe. These results can be used to also compute the value of the foregone use of the river from 1987 to 1997 and for foregone use in the future depending on when the cleanup (or natural recovery) will actually occur.

This study focuses on the adult members of the Penobscot Nation. The services being valued are uses made of the Penobscot River by the Penobscot Nation that are affected by the

presence of dioxin. This includes catching fish to eat and the viability of bald eagle populations that also rely on the river for food sources. It should be noted that these direct uses of the Penobscot River provide important associated indirect services. These include transmission of culture to future generations through directly experiencing cultural practices. As is well-demonstrated in the economics literature, indirect use is important for some kinds of natural resources and may include the desire that other individuals or future generations can have full use of the resource (so-called bequest value). Or it may include just knowing that the river and its associated plant and animal life is in a clean, healthy and viable state (so-called existence value).

Once one has identified the total value associated with the foregone uses of the Penobscot River by the Tribe, previously developed methods (Duffield, 1991; Duffield, Brown, and Allen, 1994) can be used to identify the share of this total value that is due to cultural use or culturally-related motives. These methods have been applied in previous natural resource economics studies to classify the share of total value to various motives, but not specifically to identifying a share to cultural motives. The method requires developing a statistical model that shows how the dollar value revealed by each individual through the contingent valuation referendum depends on measures of the individual's motives for valuing use of the Penobscot River. These motives may include a desire to have the river available for future fishing themselves or by other members of the Tribe. Some of these motives may be similar to motives held by other residents of Maine such as the desire to have healthy populations of bald eagles. However, some of the motives may be largely a manifestation of the Penobscot culture, such as the desire to be able to teach and practice traditional cultural uses related to fishing on the Penobscot River. Accordingly, the survey implemented for this study needed to include questions to measure the attitudes, motives and other characteristics of tribal members. Because of the necessary length of the survey and for flexibility and efficiency during the survey itself, the study team chose to design a computer-assisted phone survey. The goal of the survey was to sample as high a share of the entire tribal membership 18 years of age or older as possible.

An important feature of the survey design was whether the cash offer amount in the contingent valuation referendum was a lump sum (one time) per capita offer or an annual per capita amount. Previous studies have shown that the lump sum version provides more conservative results. This was the approach taken in this study.

Data collection. The design of a survey instrument for this study began with a meeting of several members of the study team with a small group of tribal members in August 1996. The purpose of this initial meeting was to identify specific uses made of the Penobscot River by tribal members and to begin to explore motives for valuing a cleanup of the river. Elements of a draft survey instrument were further developed through focus groups held on Indian Island with tribal members in January-March 1997. The Tribe maintains a mailing list for all members, but not a phone list. In March a national directory search was undertaken and a mail survey was conducted of all tribal members to obtain phone numbers to use in the phone

survey. Of the initial complete list of 1,543 members provided by the Tribe, telephone numbers were obtained for 1,120 or about 72.6 percent of the initial list (Summary Table 1).

A professional survey research firm in Harrisonburg, Virginia (Responsive Management, Inc.) was contracted to conduct the phone survey. The phone survey instrument was pretested April 14-17, 1997. One purpose of the pretest was to identify a range of specific cash offer amounts that would roughly bracket a median amount for cleanups at different points in the future. The final range of bids indicated by the pretest was \$500, \$3000, \$8,000, \$14,000 and \$22,000. Each phone survey respondent was asked to vote on accepting a cash offer to the Tribe in lieu of a cleanup. The cash offer was presented in terms of the per capita value to each member of the Tribe. A given respondent was faced with only one cash offer amount and the offer amount varied randomly between the five specific dollar values across respondents. The survey was implemented April 21 to June 2, 1997. The eligible population for the phone survey excluded about 70 tribal members on the original list who were since deceased or too ill, had participated in the focus groups, were tribal leaders, or for whom there was no address. Additionally, during the course of the phone survey, 121 of the initial set of phone numbers were found to be disconnected or wrong numbers. A high response rate (78.9%) was obtained to the phone survey with a total of 782 completed surveys (Summary Table 1). This comprises over half of the entire adult membership of the Tribe. In order to identify whether the unsampled (nonrespondent) portion of the Tribe was significantly different from the sampled members, a follow-up mail survey to 687 members that included many of the questions on the phone survey was implemented June 30 to August 27, 1997. The response rate to the mail survey was 48.2 percent. Combining the phone and mail data, detailed information was developed on a total of 1,113 tribal members - or 72.1% of the entire adult population. Some information is also available on the 28% of adult tribal members who did not respond to either survey. Census lists indicate age, gender, place of residence, and mean blood quantum.

Item nonresponse to the phone survey was very low, on the order of less than 1.0 percent for most questions. As is typical in these types of surveys, a question with one of the highest item nonresponse was household income (a private matter to most people). But even for this question, nonresponse was less than 10 percent. The item nonresponse for the referendum question was only 4.0 percent. This indicates an interested and motivated sample population.

A basic finding of the surveys was that the phone and mail survey respondents were similar with regard to many, but not all, specific characteristics and attitudes. The census list characteristics are similar across survey subgroups. The main conclusion is that the phone survey sample is generally representative of the Tribe as a whole.

Summary Table 1. Summary of Data Collection.			
Statistic	Initial mail survey	Phone survey	Mail survey of nonrespondents
Initial sample frame	1,543 ¹	1,120 ⁹	687
Eligible population	1,536 ²	991 ⁵	
Completed responses	986 ³	782	331
Response rate	64.2 ⁴	78.9 ⁶	48.2
Number of attempts to contact	2 ⁸	6	3 ¹⁰
Type of information collected	phone numbers	referendum vote + 99 variables	21 variables
Date of survey	March-April	April-June	June-August
Completes as a percent of Tribal members 18 years and older	63.9	50.7	21.5

¹ Entire listing of Tribal members 18 years and older as of January 1997.

² Excludes deceased (1) as of March 7, and no address (6).

³ Excludes phone numbers obtained through directories.

⁴ Excludes numbers obtained through directories.

⁵ Excludes ill, dead, or handicapped (8), disconnected numbers (56), and wrong numbers (65).

⁶ Cooperation rate was 95.1% (completed / (completed + refusals))

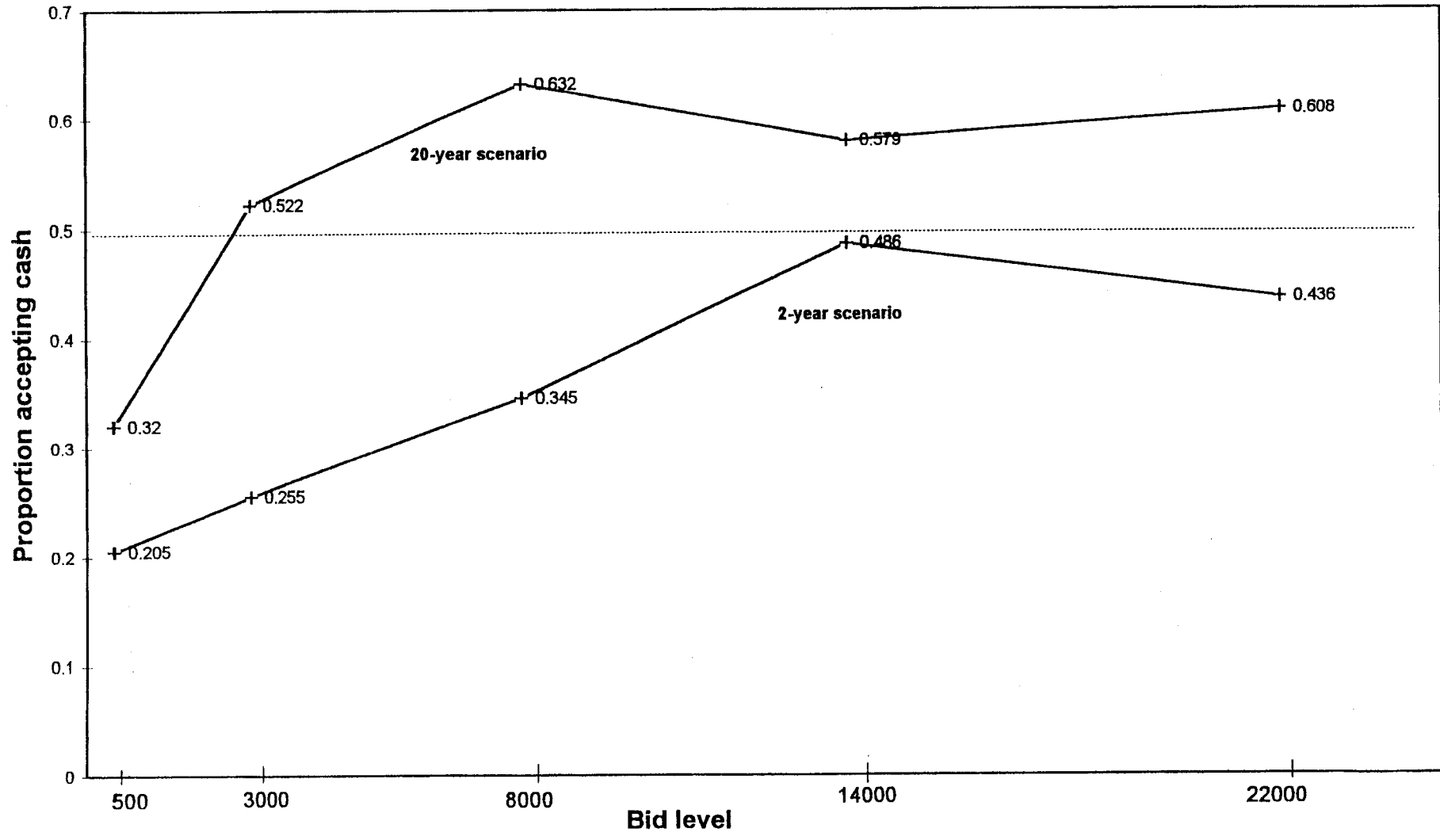
⁷ measures of respondent attitudes, beliefs, use of the Penobscot River, and socio-economic characteristics such as income, age, education, gender, place of residence, etc.

⁸ Two mailings were sent.

⁹ Includes 1,120 members for which phone numbers were obtained (986 from initial survey plus about 134 from directory searches) and excludes 62 known ineligible prior to survey (Tribal leaders, focus group participants, deceased, etc.)

¹⁰ Includes two mailings and a follow-up postcard.

Summary Figure 1. Proportion of Respondents willing to accept cash at alternative bid levels



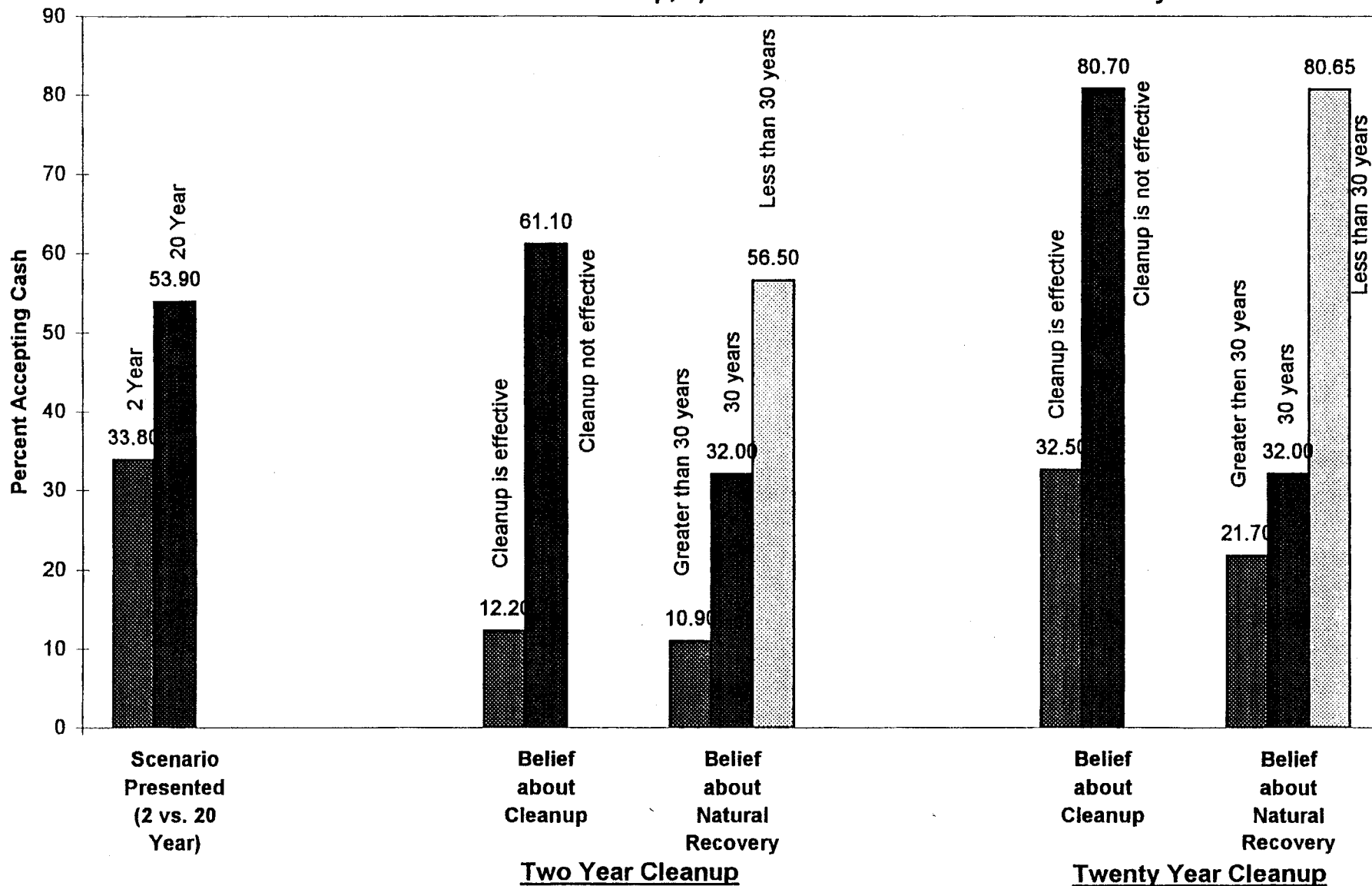
Results. The survey results indicated that tribal members took the questions seriously and answered them thoughtfully. The response to the contingent valuation referendum on the part of a given tribal member was found to be predictable and consistent with the specific services at issue and with the respondents' attitudes and characteristics. For example, as one would expect, for a given cleanup, individuals were less likely to accept a low cash offer (e.g. \$500) than a high offer (\$8,000 to \$22,000). The vote response proportions are shown as a function of the cash offer amount and for each cleanup scenario in Summary Figure 1. As one would expect, respondents were less likely to accept a given cash offer to forego a cleanup in the near future (two years), compared to a cleanup in twenty years (Summary Figure 1). This indicates, as one would expect, that a cleanup in the near term is valued more highly.

The response also varied in a way consistent with the individual respondent's beliefs about the length of time for natural recovery (greater, equal or less than 30 years). For example, individuals who believed that natural recovery could occur in less or much less than 30 years were more likely to accept a cash offer, other things equal. Response also varied with how effective respondents personally believed the cleanup program for the Penobscot River described to them at the time of the survey would be. Individuals who thought the cleanup program could be effective were reluctant to accept a cash offer. The relationships of the vote response to scope and beliefs about the effectiveness of cleanup and the natural recovery period are shown in Summary Figure 2.

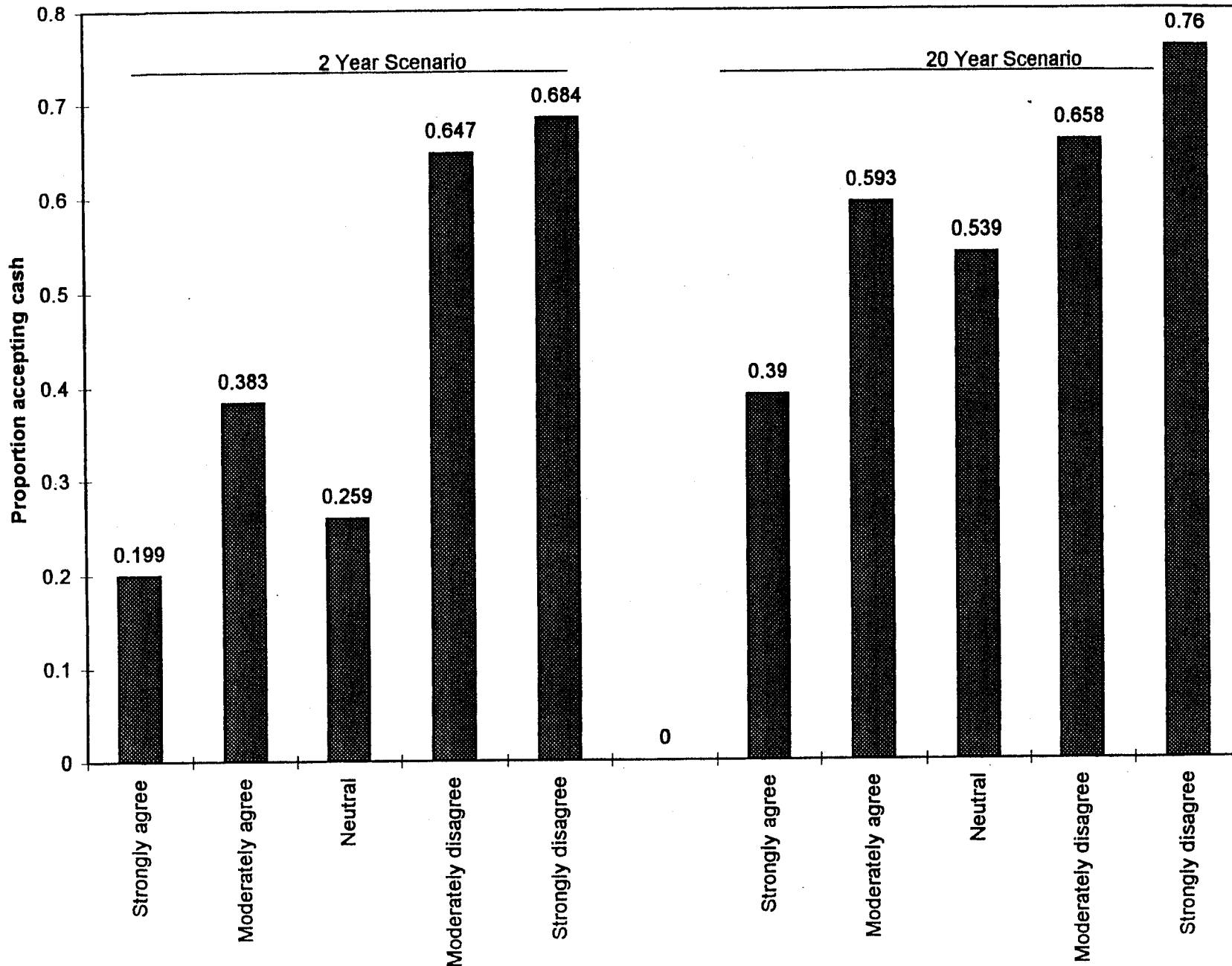
Responses were also very consistent with the motives that specific individuals reported for valuing use of the river. After the referendum vote question, respondents were asked whether they agreed or disagreed with each of a set of statements designed to measure their attitudes and preferences. One finding was that individuals who strongly agreed with the statements "If the Penobscot River were clean, I expect that my children or grandchildren would directly benefit by catching fish to eat there" and "It is important to clean up the Penobscot River for cultural use by future generations," were much less likely to accept a cash offer in lieu of cleanup. (For example, Summary Figure 3 shows the data for the first of these statements.) On the other hand, individuals who strongly agreed that "The decision to clean up natural resources should be based mostly on economics," were more likely to accept a cash offer, other things equal. The consistency between the referendum response percentage and the attitudinal measures is impressive and indicates that respondents were serious and thoughtful.

It is interesting to note that while many of the measures of attitudes and preferences were correlated with the referendum response, most personal characteristics were not. For example, income, age, gender, and education did not significantly affect the vote decision. A concern expressed in the focus groups was that tribal members living outside of Maine would gladly accept any per capita cash offer and not place much importance on cleanup of the river. This did not prove to be the case. The average percentage voting to accept the cash offers was similar across this measure of place of residence. For the two year cleanup, 34 percent of Maine respondents chose to accept the cash offer compared to 33 percent for those living in other states.

Summary Figure 2. Summary of Scale Effect on Valuation Response: 1) Time to Cleanup, 2) Belief about Effectiveness of Cleanup, 3) Belief about Time to Natural Recovery



Summary Figure 3. Plot of IFCLEAN vs. CV Response



IFCLEAN = " If the Penobscot River were clean, I expect my children or grandchildren would directly benefit by catching fish to eat there."

For twenty year cleanup, the proportions were 50 percent and 57 percent respectively, which is also not a statistically significant difference. This is similar to the result of the actual Maine Settlement Act referendum held in 1980 where the proportion voting to accept the settlement offer was not significantly different between in-state and out-of-state voters (71 percent and 67 percent respectively). A general finding is that voting in the contingent valuation referendum was based more on the respondent's view of how important a clean Penobscot River is for the future of the Penobscot Nation than on the respondent's proximity to the river or personal socio-economic status.

A multivariate statistical model was estimated that used the survey measures of attitudes, motives and personal characteristics to explain the individual valuation for the Penobscot River revealed by the referendum vote response. Two different functional forms of the model were estimated (linear and log) and both provided a good fit to the data with a total of 15 independent variables statistically significant at the 90 percent level. In every case the sign (plus or minus) of the estimated coefficient was consistent with a priori expectations. When the model was used to predict the contingent valuation referendum vote (accept cash offer or not), the predicted vote was the same as the observed vote for 90 percent of the individuals in the sample. This indicates that the models fit the data well. The statistically significant variables included the cash offer amount (significant at the 99 percent level) and several scaling factors that affected the scope of the resource being valued: the date of the cleanup (two year or twenty year), the respondent's belief about the effectiveness of cleanup, and the respondent's belief about the length of time for natural recovery to occur. The remaining statistically significant variables were all measures of motives or attitudes concerning reasons for valuing the use of the Penobscot River. These included seven statistically significant variables that were measures of motives that were closely tied to the protection or practices of the Penobscot culture. This included the following: the desire to personally utilize the river for subsistence fishing, to have the river available to one's own children or grandchildren or other future tribal members for cultural activities, concern about the well-being of tribal members and the well-being of wildlife species dependent on the river (including eagles), and one's personal knowledge of specific sites along the Penobscot River for spiritual experiences such as offerings for blessings, vision quests and sweats. The other four motives were not specifically related to the Penobscot culture.

A general conclusion is that the responses to the referendum questions are consistent with respondent characteristics and the situation presented for consideration, including time to cleanup.

The discussion to this point focuses on the results for the 782 respondents to the phone sample. There were also 331 respondents to a follow-up mail survey to the remaining members of the Penobscot Nation who could not be reached or did not respond to the phone survey. Only the phone sample respondents were asked the referendum question. Comparing questions that were asked on both surveys, the results for the mail survey are generally similar to the phone survey results. In order to ensure that the final estimates from the phone sample were

representative of the entire Penobscot Nation, the sample was weighted to reflect the actual proportion of all tribal members on the basis of gender, age, blood quantum, and place of residence.

Based on the weighted sample and the response to the contingent valuation referendum, the median value per member for full use of the Penobscot River after a cleanup in two years is \$14,000. The median value per member for full use in twenty years is \$3,000. These values are conservative interpretations of the empirical distribution shown in Summary Figure 1 (which is essentially unchanged by the weighting). The NOAA guidelines suggest using the difference of these two estimates to value 18 years of foregone future use. Following this concept, the values taken together indicate an annual foregone use value per member of \$1,484, an implicit real discount rate for comparing present and future foregone use of 8.94%, and a present value of future foregone use of the river of \$16,600. The estimated implicit real discount rate is consistent with rates reported in other economic studies.

The discount rate required for use in natural resource damage assessments under the U.S. Department of the Interior regulations is a 7.0 percent real rate based on the U.S. Office of Management and Budget (OMB) Circular A-94. A more conservative approach to estimating annual and present value is to use the OMB 7.0 percent discount rate and the two year cleanup median value. This leads to an annual foregone use value per member of \$1,049 and a present value of foregone use of \$14,980. Based on the more conservative approach and the OMB 7.0 percent discount rate, these per capita values can be used to estimate the total dollar loss suffered by the Penobscot Nation from not having full use of the Penobscot River since the time fish advisory was posted in 1987. The magnitude of this total dollar loss depends on when cleanup is expected to occur in the future. If the cleanup actually occurs in two years (by the year 1999), the total value of foregone use is \$34.9 million. If cleanup occurs in 20 years (by the year 2017) the total loss is \$56.1 million and if there is never a cleanup the loss is \$62.7 million. Estimated aggregate values based on the implicit discount rate of 8.94 percent are approximately \$15 million to \$20 million higher, depending on the date of cleanup. These estimates are, as noted, conservative for a variety of reasons. The welfare measure chosen is the median, which is more conservative than the mean. In principle the valuation estimate should be based on response from those who accepted the referendum scenario posed and believed that cleanup would be effective. However, the estimated median values reported here are conservative in that they represent the average of the range of beliefs about the effectiveness of cleanup. The median values indicated by the sub-sample who believed the cleanup program would be completely effective are much higher than those reported above. Similarly, other potential corrections to the estimate to derive the pure economic tradeoff values, for example for beliefs about the extent of the injury, consistently lead to higher estimates of the foregone value. The general approach here is pragmatic and recognizes that in a real referendum on this issue there would also be a diversity of opinion and beliefs about the effectiveness of the proposed programs.

The statistical model that explained the individual vote decisions can be used to estimate the share of total values derived from respondent motives having to do with protection or practices of the Penobscot Culture. The finding is that approximately 70 percent of the total valuation associated with use of the Penobscot River was due to cultural motives. This share was quite similar across two different functional forms. The remaining 30 percent of total value is associated with other motives for wanting the Penobscot River to be clean. The other motives are not as clearly tied to a concern about the practice or continuance of the Penobscot culture.

1.0 INTRODUCTION/SCOPE OF THE ANALYSIS

1.1 OVERVIEW

This report develops methods for estimating the economic value of foregone cultural use. An application is presented of foregone use of the Penobscot River by the members of the Penobscot Nation.

Headquartered on Indian Island near Old Town, Maine, the Penobscot Indian Nation takes its name from the river which slices through their ancestral domains in central Maine. The word Penobscot is derived from *panawahpskek*, their name for a place "where the rocks spread out." With a tribal membership of about 2,000, only 600 people live in their Indian Island settlement. In addition to this 315-acre island, the tribe owns almost 200 other islands in the Penobscot River, between Old Town and Medway and up both the east and west branches of the river to Chesunkook and Mattagamom lakes. Collectively measuring about 4,800 acres, these islands comprise the Penobscot Indian Reservation. Since 1980, as part of the Land Claims Settlement, the tribe has also acquired "large tracts of trust land (55,000 acres) in Penobscot County, and at Alder Stream in western Maine, plus fee-simple lands (38,000 acres), including part of Carrabasset Valley near Sugarloaf ski resort" (Prins 1994:441).

Although very few people on Indian Island still speak the native tongue, Penobscot Indians are considered Algonquian speakers. Together with neighboring ethnic groups in the Northeast-- Abenaki, Passamaquoddy, Maliseet, and Mi'kmaq--, they form part of a group collectively known as the Wabanaki ("People of the Dawn").

Among other traditional practices the river and the more than 200 islands within the reservation have been a source of a number of important natural resources such as fish, eels, frogs, muskrats and plants such as fiddleheads, raspberry and flagroot. These resources provide direct use such as fishing, hunting, gathering and eating as well as medicine and ritual. The Penobscot River features prominently in the traditional culture of the local tribal community

The Penobscot Nation has a long history of river use. The sophisticated technology for crafting birch-bark canoes was developed by this tribe (there is a long and continuous history

of Penobscot river guides). The first mold used for making Old Town Canoes was crafted by a Penobscot. In his book The Maine Woods, Henry David Thoreau described how he chose a Penobscot to guide him, by canoe, into headwaters in his search for remaining virgin stands of white pine. The tribe annually hosts the Katahdin 100, an event in which teams canoe up-river and travel overland from Indian Island to the 100 mile distant summit of Mt. Katahdin. In 1995, a dozen or so members of the Penobscot Nation paddled a war canoe up the Yukon River in Alaska as part of a sacred run celebration. This voyage was taken during the Summer Solstice, when the river was flooding.

In July 1987, the State of Maine posted a fish consumption advisory for the Penobscot River below Lincoln for a 60 mile section through the Penobscot Reservation (see Figure 1-1). The advisory stated that fish caught below Lincoln may contain traces of dioxin and that consumption of fish in this area should be limited (Figure 1-2). A paper mill has operated in Lincoln since the late 1960's and is believed to have released dioxin into the river waters as part of its paper bleaching process. The conditions leading to the fish advisory have caused the river to be unusable for many significant cultural purposes.

The remainder of this introduction describes the general scope of the study, the types of use foregone, previous research, and an ethnohistorical perspective on the Penobscot Nation.

1.2 SCOPE OF THIS STUDY

The objective of this report is to develop methods for estimating the economic value of foregone cultural use. First estimates are developed of the economic value of the foregone use by the Penobscot Nation of the Penobscot River below Lincoln for the period 1987 until such time as the river can be restored to full use. Secondly, estimates are developed of the share of this total economic value represented by foregone cultural use.

Table 1-1 summarizes the types of foregone use, the time period and the user populations for this study. Both direct use (such as fishing) and passive use (values not necessarily associated with one's own on-site use, such as the desire to preserve a resource for future generations) are estimated. The potential users sampled are limited to members of the Penobscot Nation. For other purposes, such as a social benefit-cost analysis of the total value of cleaning up the Penobscot River (for example as a guide to pollution regulations for upstream mills), it would be appropriate to also investigate the value of a clean Penobscot River to local residents. Local or other Maine or U.S. residents may also place a value on knowing the Penobscot River is clean or that the Penobscot Nation is able to follow its traditional cultural practices. These questions are beyond the scope of this study.

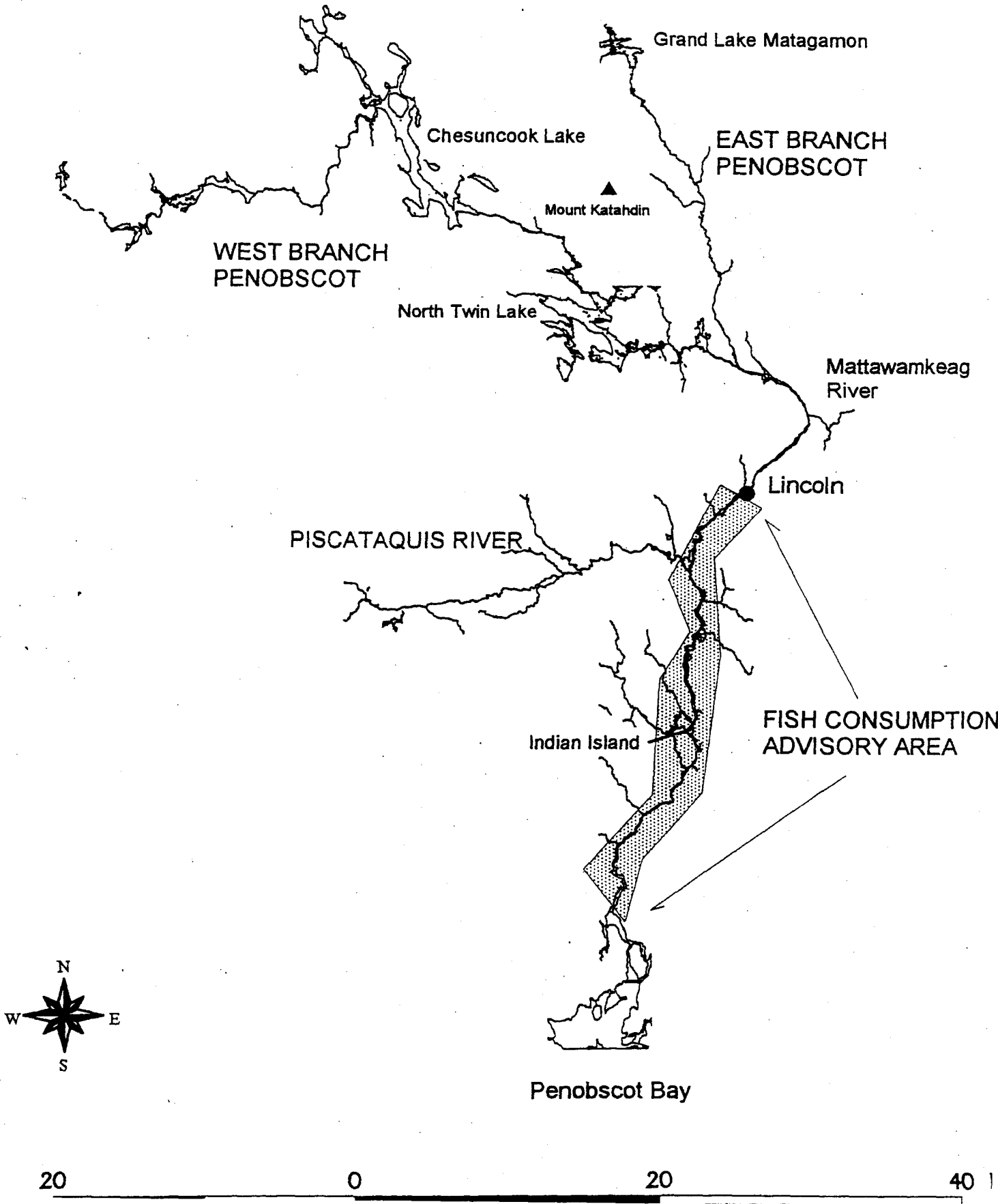
Additionally, the study is focused on the period from 1987 forward, though the estimates developed for foregone use could be extrapolated further back in time.

The basic motivation for this study is essentially twofold. It is apparent that the Penobscot Nation has been deprived of its rightful use of the Penobscot River. It is of interest to know the magnitude of appropriate compensation for this deprivation. The second motivation is primarily methodological. It is of interest to know what share of the foregone use value is cultural lost use. With regard to the first motivation, the economic estimates developed here could provide a starting point for the "compensable value" (the value of foregone use) element of a natural resource damage assessment. The other usual economic element of these types of assessments (Ward and Duffield 1994) is a restoration cost analysis. Restoration costs associated with cleanup of the Penobscot River are not examined in this study.

The compensable value element is essentially efficiency-based and places a value on the river from the standpoint of the opportunity cost to the Tribe of its foregone use. In the context of the federal regulations for natural resource damage assessments, the plausible level of restoration cost is in turn limited by the identifiable compensable values. An alternative perspective is to consider the opportunity cost of the clean river from the standpoint of the polluter. This entirely different perspective is the approach taken in identifying appropriate compensation when tribally-owned river resources are taken for hydroelectric purposes. This approach amounts to identifying a "fair share" for the Tribe of the "net benefits" of the given project. The underlying principle of this approach is essentially equity. Aside from the potential legal relevance of an equity-based approach in any given context, this information would provide a valuable perspective on the issue. Again, such an investigation is beyond the scope of this analysis.

The usual approach to estimating compensable value for lost use (e.g. U.S. Department of Interior CERCLA regulations at 43 C.F.R. § 11) is to: 1) identify the physical and biological injury to natural resources, 2) quantify the resulting change to affected human services or uses, and 3) to estimate the dollar value of this change in services (the economic damages). For purposes of this study, the fish advisory shown in Figure 1-2 provides sufficient characterization of injury. The Penobscot River downstream of Lincoln is unusable for significant Native American purposes.

PENOBSCOT RIVER



ATTENTION FISHERMEN

Figure 1-2.

Fish caught in the Penobscot River below Lincoln—
may contain traces of dioxin, a chemical suspected of causing
cancer in humans.

For your health and safety when eating fish taken from these
waters, the following advisory should be observed:

1. No more than two meals (eight ounces per meal) of fish taken from this section should be eaten each month.
2. Pregnant women and nursing mothers should avoid eating any fish taken from this stretch of the river. Dioxin may affect the pregnancy or be passed to infants through breast milk.
3. When preparing fish, areas with the highest potential dioxin content should be trimmed away. These include the skin, fat, belly meat, and dark fat along the backbone and lateral line. Broil, bake or barbecue fish on a rack so juices, which may contain dioxin-rich fats, will drip off. Don't fry the fish.

For further information contact:

Andrew Smith, Maine Department of Human Services, Tel. (207) 289-5378

Barry Mower, Maine Department of Environmental Protection, Tel. (207) 289-3901

Dan Kusnierz, Penobscot Nation DNR, Tel. 827-7776 ext. 361

Clem Fay, Penobscot Nation DNR, Tel. 827-7776 ext. 361

**Commissioner of Inland
Fisheries and Wildlife**

Table 1-1. Scope of this Study		
(1) Foregone use 1987 to future		
Use Type	User Population	
	Penobscot Tribe	Other Maine & US residents
Cultural use	Estimated	Not estimated
Other direct or passive use	Estimated	Not estimated
(2) Foregone use prior to 1987 - not estimated		
(3) Restoration costs - Not estimated		

1.3 TYPES OF FOREGONE USE AND SERVICES

To begin to identify the types of human services and uses that were affected by this injury, several members of the study team met with eleven Penobscot tribal members in Old Town on August 27, 1996. With regard to the issue of cultural resources injured by contamination, one participant summarized the impact to the tribe from the injured river and riparian resources by saying "the river was our sustenance, our highway, we gathered everything on it we could find".."we ate everything that came out of the river," but now "we are on the sewage pipe and the ocean is the septic tank."

The impact on fishing particularly was emphasized, another participant stated: "My family, we were always on the river...I'm a fish eater; we're a fish eating tribe... I used to do a lot of river fishing for food, bass, ate them all the time. I don't fish anymore, I don't see any sense in it." This individual noted that after the sign went up (the 1987 fish warning) he quit eating fish: "I won't eat even one. I can remember when the sign went up." Another participant commented "...can't eat them, just poisoning yourself...it's safer to eat your nightcrawlers." This individual also made it clear that catch and release fishing had no relevance to sustenance uses "how in hell could we afford catch and release."

There was a major concern expressed about the impact of the river on human health. One person said, "In my father's family it has been cancer." Another commented, "A lot of people I used to work with have died of cancer." Another participant noted, "We don't have any elders here"... "they're killing us all off."

Besides the effect on direct use services from the impacted natural resources, it is clear from the August 27 discussion that the tribe also perceives an impact on passive uses, specifically the bequest and existence services associated with culture as a stock of human knowledge or human capital. One tribal member commented, "What has been devastated is our lives, as a tribe, it has been going on so long." Many individuals commented on the absence of traditional meals that were based on now contaminated sustenance resources. It was noted that "There used to be a big feed of muskrat," and "... At celebrations we used to eat salmon; we don't do that." Another commented, "We don't have traditional meals anymore." There was clearly a concern that the Penobscot cultural heritage is being diminished. One person pointed out that people used to show their children where, when, and how to gather, fish and hunt but now "that reflects on a break in our tradition...my father used to tell me where, but I can't do that with my children." From a discussion of federal discharge permitting at the mill in Lincoln and the issue of dioxin standards related to bald eagles, it was clear that the group was offended that there was a greater concern for wild species than human health and well-being. One person asked "Aren't Penobscot an endangered species?"

1.4 PENOBSCOT RIVER USER'S SURVEY

Another source of information on the types of resource services is a survey undertaken by the Penobscot Department of Natural Resources in January 1991. This mail survey was sent to all adult tribal members and resulted in 210 completed surveys. Among other findings, this study reports that the most commonly consumed fish species from the Penobscot River were smallmouth bass, brook trout, Atlantic salmon, pickerel, perch and landlocked salmon. A total of 67% of respondents said yes to the question "Do you have any concerns about eating fish from the Penobscot River?" The specific concerns listed were all related to pollution and specific contamination problems as well as the Consumption Advisory (fish warning). Over 72% of respondents said they did not eat fish from the Penobscot. Estimates are reported in this study of fish consumption by tribal members. Responses are categorical and are not easily averaged.

A total of 61.9% of respondents had used the Penobscot River for recreation in the last two years. Respondents were asked if they did not use the Penobscot River for recreation, why not. A total of 16.5% said because of pollution. Eighteen percent of respondents said they would use the river more often if "the river was cleaner." Response to a question on total days of use of the river is categorical and does not allow exact estimates of total use. However, for the sample, total use appears to be around 850 user days on the Penobscot River. One should be cautious in extrapolating these estimates to the entire tribal population because of the potential

for nonresponse bias. The distribution of the respondent use by contaminated and non-contaminated areas is not reported.

The survey reported the specific recreational activities in which tribal members participated. The main uses were: canoeing, fiddleheading, fishing, hunting, swimming, boating, camping, picnicking, birdwatching, and rafting.

Qualitative survey responses indicated that the survey respondents view the Penobscot River as a "valuable natural resource" and that more should be done by the state, federal government and the Tribe to protect the river.

1.5 NATURAL RESOURCES LINKED TO CULTURAL USE

The preceding discussion suggests that natural resources traditionally utilized by the Penobscot Tribe from the Penobscot River and associated islands and other riparian area include several species of fish, eels, frogs, muskrats and plants such as fiddleheads, raspberry, and flagroot. The direct use services of these resources (fishing, hunting, gathering, eating) appear to have been impacted by the contamination in the 60 miles of river upstream of Indian Island. Specific fish species used for sustenance include at least bass, perch and salmon. In addition the water resource itself is linked to diminished use for swimming and ceremonial uses. Turbidity and the presence of foam negatively affect the aesthetic use of the river. Waterfowl

and deer may be less likely to be hunted by some individuals. It is not clear whether canoeing, rafting, picnicking, and birdwatching have been impacted.

In addition to the specific cultural uses made of these river, riparian and biological resources, there has been an impact on the transmission and teaching of culture related to these uses. Since some activities are no longer participated in due to the contamination of the resources which are the basis of the activity, it is difficult for parents and elders to teach children how, where and when to utilize the resources. Certain ceremonial uses, such as the sweat lodge and traditional meals have been diminished. This is an impact on the stock of traditional knowledge held collectively by the tribe and a diminished passive use of the natural resources previously listed. This traditional knowledge is valued for reasons of the continued existence of the tribal culture (existence use) and the desire for elders and other adult tribal members to pass on this knowledge to the next generations (bequest use).

The human population most directly impacted by the injury to Penobscot River natural resources as described above is all Penobscot tribal members. Impacts are clearly not limited to the tribal members living on Indian Island. The river user survey shows that off-reservation tribal members also use the river. In addition passive use losses related to the viability of the tribal culture are potentially a concern for all tribal members, independent of their place of residence. It is likely that members of other tribes, in Maine and perhaps throughout North America, may also place a value on knowing that the Penobscot culture is viable and being perpetuated. This may also be true of other residents of Maine and the New England region who are not Native Americans. However, as noted, it is not feasible for this study to investigate these passive use values held by non-tribal members.

1.6 ETHNOHISTORICAL REVIEW

1.6.1 The Concept of Culture:

The focus of this ethnohistorical review is on the relationship between the Penobscot culture and its natural environment. In this context, culture is understood as a dynamic system of adaptation. Briefly, the concept is defined in terms of "the total socially acquired life-style of a group of people including patterned, repetitive ways of thinking, feeling, and acting" (Harris 1991:9). In other words, culture not only refers to behavior but also to ideas, values, beliefs, and emotions.

The two most basic components in culture are material and nonmaterial: "Material culture consists of the physical products of human society ... whereas nonmaterial culture refers to the intangible products of human society (values, beliefs, norms). . ." (Scupin:36). The nonmaterial pertains to a people's world view: "how they perceive the world around them, how they feel, what they desire, what they fear, and so forth" (Peoples and Bailey: 17).

Analytically, the cultural system is organized in three structural levels, with the material basis (mode of production) forming the infrastructure, followed by social structure, and the superstructure which concerns the nonmaterial realm of ideas, representations, beliefs, and values. This superstructure contains the "cultural knowledge" which guides a people's collective and individual behavior (Ibid.).

Not everyone in the community, however, possesses exactly the same set of cultural knowledge. Depending on one's particular status within the community, individual members inherit or otherwise acquire distinctive (but overlapping) bundles of knowledge. For instance, a Penobscot tribesman skilled in trapping beaver or spearing salmon has a knowledge not necessarily shared with other members of the community. Obviously, the same is true for others who acquire and manage their own specialized bundles of knowledge. In other words, individual members acquire and manage their own particular "stocks" of culture.

Whereas some culture stocks are considered very valuable by all, others are considered important by just a select few. This means that each member in a community develops a particular cultural portfolio. These portfolios typically change in response to variable demands and opportunities. In the process, people re-evaluate these culture stocks, adding some and discarding others. Earlier defined in terms of a dynamic system of adaptation, a culture functions as a composite of individual portfolios within a collectively managed mutual fund. Obviously, this conceptual framework gives new meaning to the idea of "taking stock" of a particular culture.

1.6.2 Material and Nonmaterial Culture:

The relationship between the Penobscot Indian Nation and its natural environment can be examined in terms of the distinction between material and nonmaterial culture. In this context, material use refers to subsistence practices in which tribes people productively utilize local natural resources for survival and support.

With respect to the Penobscot River, such natural resources include several species of fish, as well as eels. They also include muskrats, beavers, otters, ducks and eagles, as well as plants such as fiddleheads, lilly-root, and flagroot. Their use value is not only for food, but also medicine, ritual, and, last but not least, protection against cold weather. Obviously, the Penobscot River has also tremendous material use value as a convenient travel route for a people who depend on seasonal hunting, fishing, and gathering activities.

The Penobscot River also has nonmaterial use value for its indigenous occupants. Indeed, their tribal identity and traditional world view are deeply embedded in their natural habitat. The river contains many cultural "signposts" in the form of myths, totem animals, legendary events, and meaningful places. This nonmaterial component is of importance because their traditional world view provides the organizational framework for their norms and beliefs, and offers moral guidance.

The Penobscot River has a number of distinctive nonmaterial use values for its indigenous occupants. These include ideas about the river as a locus of traditional myth and legend. For instance, one important tribal legend tells how their culture hero Gluskap "saved the plants and animals that were dying of thirst because all the earth's water was held in the belly of [the Great Bull Frog]." Gluskap "slew the monster and released the water, which formed streams and rivers. In their relief, many animals leaped into the water and turned into fish and water creatures" (Calloway 1989:24-25; cf. Leland 1884:114-19; Speck 1940:82). The river is also a site where important historical events have taken place. Moreover, it is a place of collective memory about ancestors passing up and down the river in their age-old quest for survival. But there are other nonmaterial uses of the Penobscot River. For instance, on its banks people enjoy certain spiritual experiences and engage in religious devotions, offerings for blessings, vision quests, and purification rituals (sweatlodges, fasting). Of course, representing natural harmony, the river has also nonmaterial significance as an inspiring source of aesthetic satisfaction and spiritual well-being. In this respect, the river with its plants and animals is a moral habitat as well.

Finally, the Penobscot River also features in their social organization. Most of their kin-groups (or clans), are symbolically identified by "totem" animals (*n'tutem* signifies my "relative of another kind"). Historically, the following Penobscot families have a (tidal) riverine totem animal:

Neptune: eel; Sockalexis: sturgeon; Penewit: yellow perch
Francis: sculpin; Orson: frog; Glossian: toad; Nelson: insect;
Nicola: otter; Tama'hkwe: beaver; Stanislaus: whale
Susup: crab; Mitchell: lobster; Coley (Nicola): waternymph.

In short, the material and nonmaterial components of Penobscot culture have always been dependent on the integrity of the river as a natural resource.

1.6.3 Penobscot Indian Fishing: 1900-1940.

Whereas they have confronted an array of dramatic challenges to their river-based culture over the centuries, the Penobscots have always turned to their river for material and nonmaterial support. Well into the 20th century, they used its water for drinking, cooking, bathing, and washing, combed its banks for muskrats and edible plants, and especially relied on its storehouse of fish (Speck 1940:98).

In his monograph *Penobscot Man: The Life History of a Forest Tribe in Maine* (1940), anthropologist Frank Speck offered a detailed description of their material life in the early twentieth century. According to him, fishing was still important: "The Penobscot at all times depended to a large extent upon the many fish of their lakes, river, and bay for a food supply. Some of the old capturing devices are at times still employed."

"To these Indians, practically all of whom lived near the Penobscot River, the spearing of salmon in their annual run upstream in June, July, or August, was one of the great seasonal

events." "During the run, just above the falls or rapids, the men would occupy some ledge, and spear the fish as they came by. Camps were established in such vicinities. At other times they went in canoes, the bow man with a spear watching for fish. At night a [burning] torch . . . was fastened in the bow of the canoe. These methods of catching salmon were practiced until about 1912, when spearing was prohibited by the makers of [Maine state] game laws" (Speck: 82-83).

"Just below Indian Island, above the falls, there is in the middle of the river a rocky ledge where the men used to get their stock of salmon. Unheard-of quantities were taken here by the tribe each year until the dam was built. In those days they feasted on the fresh fish and smoked a large amount of it for winter upon pole racks over a fire" (Speck 1940:85).

"The fish spear (leister) was, and is yet [1940], in general use also for getting pollock and eels. The usual method of spearing from a canoe is followed" (85).

To catch eels, they also used the fish-trap, or "pot," which they made of rough wood splints (88). "In the winter time, when hibernating eels have buried themselves in the mud of a cove, some families will repair thither and make camp. The men will go out on the ice, make holes through it and prod in the mud with their spears, drawing out eels in quantities. During times of scarcity of other game in the past, whole communities have had to subsist for months upon eels obtained in this manner. When they are down the [Penobscot] bay or river and want flounders, the Indians find some cove where they can see the fish. Then they go ashore, cut and trim a few long spruce poles. The ends are next sharpened and a notch cut in. From the canoes they stick these crude spears into the flounders and pull them up. Turtles are obtained in the same way. The old way of taking fish, like mackerel, pollock, and others swimming in schools, was to jig them with a fairly large-sized hook [and line]" (85-86).

"A scap-net . . . used for scopping fish in shallow places consists of a hoop netted with basswood cord on a handle of about ten feet long. A fisherman standing on a rock over the water may net many fish as they swim by. Salmon and shad were regularly caught in this way." "They used to go down to salt water for porpoises occasionally in large canoes manned by two and carrying a sail" (87). "For not only large bay fish, but also river fish--salmon, shad, and others-- the harpoon . . . was used" (87).

Finally, they used weirs. Speck describes the "one most commonly seen on the banks of the Penobscot," which "is a fence of brush or sticks projecting obliquely down stream, or a corral with an entrance on one side. Smaller rivers were fenced across leaving a narrow opening near the middle, where fishermen armed with spears, harpoons, and nets gathered in canoes . . . to capture the fish as they passed through" (90).

Speck also described an eel weir on Passadumkeag stream, a tributary to the Penobscot: "In the fall, about a dozen Penobscot families assembled at a point some miles upstream, where an island and abundance of good birch bark for shelters furnished an inviting camp site. The

Indians began by constructing fences of willow rods filled in with brush, one running obliquely down stream from each shore." "In places where weirs are set for eels [earth] pits are dug along the shore some three or four feet wide and about three deep, the number of the pits depending upon the quantity of eels caught" (90-91).

1.6.4 Paper Mills Contaminating Rivers:

"The Millinocket plant produced nearly a thousand tons of paper a day, and almost as much came out of a newer facility built at East Millinocket in 1954. Great Northern lived up to its name by owning well over two million acres of the state - about 11 percent of its total land area" (Condon 1995: 535).

"The transformation of watersheds with dams and reservoirs, the construction of new cities, roads, and railroads, and the acquisition of vast timberland estates all demonstrated the power of these big firms and the tremendous capital resources at their disposal. Maine's rivers became transport systems for their pulpwood, sources of hydroelectric energy for their mills, and conveyers of their mill wastes" (Ibid.: 429).

In 1976, five years after the last river drive took place on the Penobscot, the Maine State Legislature outlawed this centuries-old tradition altogether. What continued, however, was the dumping of paper mill waste into the Penobscot and other rivers. This practice has had a negative impact on the region's fish and wildlife.

Since the late 1960s, like the six other bleach kraft paper mills elsewhere in Maine, the paper mill in Lincoln has used chlorine compounds to bleach its wood pulp (NRCM 1996: 3). Dioxin is a chemical byproduct of this bleaching process. Released in the river water, dioxin (and furan, another toxic chemical) accumulates in the sediments. As fish feed and live down river, they bioaccumulate these toxic chemicals in their fatty tissues. The tomalley of lobsters becomes another repository.

The effects of these chemical emissions led the State of Maine to officially issue a "Fish Warning" in 1987, declaring a total of 250 miles of Maine rivers off-limits for eating fish and lobster. This warning also affected the Penobscot river downstream from Lincoln. Because of serious health hazards, especially pregnant women are advised not to eat fish (NRCM 1996:3). Dioxin discharges have also been linked to the reproductive failure in bald eagles nesting along the Penobscot River (Ibid.:4).

Additional ethnohistorical findings concerning the Penobscot Nation, including the period of prehistory to the present century are summarized in Appendix 1.

EXHIBIT E



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240



IN REPLY REFER TO:

DEC 29 1999

Environmental & Cultural
Resources Management
BCCO 00378

The Honorable Olympia Snowe
United States Senate
Washington D.C. 20510-1903

Dear Senator Snowe:

Thank you for your letter of October 13, 1999, on behalf of Lincoln Pulp & Paper Company, and their representative Mr. Dennis McComb. From your letter and the enclosed copies of correspondence provided by Mr. McComb, we understand the reason for his stated frustration in obtaining information. Mr. McComb has requested a Quality Assurance/Quality Control (QA/QC) plan for the study on the Penobscot River currently being conducted by the U.S. Geological Survey with the assistance of the U.S. Environmental Protection Agency. Unfortunately, Mr. McComb believed that the Bureau of Indian Affairs was attempting to prevent the company's representatives from obtaining this information. We want to assure you and Mr. McComb that this is not the case; when the Plan is completed, which we expect to occur in March 2000, we will provide it to your office and Mr. McComb. In anticipation of that release, we want you and Lincoln Pulp & Paper Company representatives to fully understand the Bureau of Indian Affairs responsibilities with respect to this matter and therefore are providing a comprehensive explanation of our activities.

On March 3, 1997, the Penobscot Indian Nation requested the United States, as trustee, to initiate a natural resources damages action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§9601-9675. The CERCLA, 42 U.S.C. 9601 *et seq.*, and the Clean Water Act (CWA) 33 U.S.C. 1251-1376, provide that natural resource trustees may assess damages to natural resources and may seek to recover those damages and reasonable costs to assess the damage. The reason for the Penobscot Indian Nation request rests primarily with the fact that since 1987 and continuing to the present, the State of Maine, through the Bureau of Health of the Maine Department of Human Services, issued a fish consumption advisory. This advisory is in effect because concentrations of dioxin found in fish caught in the Penobscot River below Lincoln, Maine, exceed health guidelines. The dioxin and other hazardous substances may have been released by Lincoln Pulp & Paper Company. The level of dioxin in the fish has prevented the Penobscot Indians (the Wabanaki), who have historically subsisted on fish, fiddlehead ferns, and wildlife along the River, from exercising their statutorily recognized right to safely fish in the Penobscot River for individual sustenance and critically important nutritional, cultural, and spiritual needs. The Penobscot Indian Nation currently extends from Indian Island at Old Town, Maine, north along a series of islands in the middle of the Penobscot River, near the high country

PN-003022

around Mount Katahdin. The awe-inspiring Mount Katahdin and the Penobscot River are critical elements in Wabanaki culture; one must understand the relationship of the Wabanaki to the mountain and the River in order to understand the public health problems resulting from contamination of the River.

We have taken the Penobscot Indian Nations request very seriously while at the same time are fully cognizant of the implications of moving forward to conduct a damage assessment and prepare any subsequent claim. We have very carefully considered any expenditure of public funds as we proceeded to evaluate the merits of the Penobscot Indian Nation request.

As a first step, we enlisted assistance from a host of highly qualified scientists, health professionals, and others to fully examine available information with respect to the pollution problems associated with past and ongoing discharges of hazardous substances to the River which may be from Lincoln Pulp & Paper and other industrial dischargers. We petitioned the U.S. Environmental Protection Agency (EPA) to conduct an assessment of release for the Penobscot River. On June 1, 1999, EPA added the Lincoln Pulp & Paper Company to EPA's inventory of known, suspected, or potentially hazardous waste sites. The inventory, called the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) is used to store information on all properties evaluated under the Superfund process. EPA is also conducting an investigation at the Great Northern Paper Mill in Millinocket. The EPA identification number for the Penobscot River is MESFN0102987. Additionally, as a result of our request, the EPA is conducting a Preliminary Assessment/Site Investigation (PA/SI) of the River. We also have requested the EPA to conduct a multi-media environmental compliance inspection of the Lincoln Mill. It is my understanding that this activity is ongoing.

At our request, representatives from the Agency for Toxic Substances and Disease Registry (ATSDR) met with the Penobscot Indian Nation to discuss concerns about cancers and other adverse health impacts from exposure to dioxin and other hazardous substances which may have been released by the aforementioned industries into the Penobscot River. During this consultation, ATSDR reviewed a Cancer Registry for the Penobscot Indian Nation managed by a health professional with experience in hospital-based disease registries. ATSDR determined that health statistics surveys completed by the Center for Disease Control (CDC), Harvard and the Penobscot Indian Nation Health Department reflect increased rates of cancers (primarily lung and cervical; with some qualified increases in colorectal, prostate, and breast cancers); partly attributable to environmental and lifestyle factors such as smoking, alcohol consumption, and diets low in fiber and high in saturated fats. However, Harvard found lung cancers increases in excess of those previously found in populations with high smoking rates. More recent reports by the Penobscot Indian Nation Health Department reflect increases in cancers of the prostate, brain, and kidney. High rates of lung cancers persist. Although CDC found in May 1994 that rates of cancers associated with dioxin exposure were not elevated, the increased rates of all cancers, the strong positive respiratory cancer trend among smokers, and high rates of cancer among females are consistent with findings in epidemiological studies included in ATSDR's updated toxicological profile on dioxin. The high rate of cervical cancers in Penobscots may also be consistent with recent findings in ATSDR's dioxin subregistry.

In addition, ATSDR determined that dioxin contamination may indirectly impact the high rates of Penobscot Indian cancers related to diets high in saturated fats and low in fiber. Fish and fiddlehead ferns, traditional foods low in saturated fats and high in fiber, are no longer available to the Wabanaki due to dioxin contamination. This is an example of where CERCLA's public health and natural resources damage assessment and restoration mandates intersect.

On July 28, 1999, Mr. Jeffery Loman, our Natural Resources Damage Assessment and Restoration Program Coordinator, had the occasion visit the Penobscot Indian Reservation and travel by small boat along the River between Mattanawcook Island and the Lincoln Pulp & Paper Mill. Mr. Loman put the boat in at the first bridge located down river from Lincoln, Maine, and observed a sign (copy attached) warning fisherman of the dioxin. While traveling upriver Mr. Loman reported that he aware of an acute odor, ever increasing as we approached the outfall where Lincoln Pulp & Paper discharges into the River. At the actual discharge, a large amount of foam was being released to the surface of the River (see attached photographs) and upon clearing the foam at the discharge itself, Mr. Loman observed a dark brown substance that appeared to be much like rotting grapefruit spewing out in great quantities. According to Mr. Loman, this dark brown pulp substance appeared heavier than water. Mr. Loman also observed three areas where surface water flowed from the Lincoln Pulp & Paper Company property and obtained a pH by paper of each of these streams, one of which had a pH greater than 10 S.U. Along the bank of this small stream (see attached photograph) Mr. Loman observed a dead bird, possibly a woodcock. My general overall impression of the Penobscot River, based on the observations Mr. Loman reported during this trip are simple; it stinks, it makes you sick, you can't eat the fish, and it's killing the birds. Clearly, it's not the way it should be and the Bureau of Indian Affairs is studying the environmental health of the Penobscot River pursuant to its trust responsibility to the Penobscot Indian people.

After a careful review of available information concerning the contamination of the Penobscot River, we concluded that it would be prudent to learn the risks and contribution of dioxin and other contaminants in river-bed sediments. One important reason to determine the occurrence and distribution of dioxin in river-bed sediment in the Penobscot River would be to evaluate the significance of this phenomenon as it may relate to the requirement for the fish consumption advisory. It is possible that contamination in the sediment is responsible for the fact that, despite a significant reduction in the release of dioxin by Lincoln Pulp & Paper Company, the levels found in fish tissue by the State of Maine are not thus far declining at a rate that would eliminate the need for the fish advisory. With the assistance of the U.S. Geological Survey, Maine District, and personnel from the U.S. Environmental Protection Agency, Region 1, a study is underway to determine the occurrence and distribution of dioxin and furans in river-bed sediments and fish tissue. As my staff explained to Mr. McComb, after a review and analysis of historical data and determining the study area, the study has three components. The first part involved a geophysical survey of the Penobscot River to determine the location of fine-grained, organic-rich sediments. The second part was the preparation and implementation of a field sampling plan in which fine-grained, organic rich sediments and fish were collected for analysis. The third part is the analysis. The geophysical survey plan and the field sampling plan and the activities for which they were prepared are complete. These two plans will be part of a Quality Assurance Project Plan (QAPP) which is currently being completed and will be subject to approval by the U.S. Environmental Protection Agency Regional Quality Assurance Manager. Once the QAPP is approved, the laboratory analysis results will be validated by experts from the U.S. Environmental Protection Agency.

When the Quality Assurance Project Plan is complete, we will be happy to provide the document to Mr. McComb. Mr. Loman recently contacted Dennis to let him know that we will arrange to have representatives from the U.S. Geological Survey, U.S. Environmental Protection Agency, Penobscot Indian Nation and the Bureau of Indian Affairs meet with him and other representatives of Lincoln Pulp & Paper Company explain all of the aspects of the Quality Assurance Project Plan, the project itself and any human health and ecological risk assessment activities that will commence once the data validation is complete. I would also extend an invitation to any member of your staff that would be interested in participating in this meeting. If a member of your staff is interested in attending, please have them contact me prior to March 1, 2000, the date we anticipate completion of the QAPP.

We are encouraged by the statement in the letter from Mr. McComb to Franklin Keel, Bureau of Indian Affairs, Eastern Regional Director, that Lincoln Pulp & Paper Company is interested in participating in the project. This is the first indication that we have had that Mr. McComb was interested in more than simply receiving a copy of the plan. We certainly welcome any meaningful assistance in solving this pollution problem. We are hopeful that the meeting that we will participate in to provide the information that Mr. McComb is requesting will serve to commence a future relationship between Lincoln Pulp & Paper Company and all involved government agencies working to address this important matter in full measure.

When the Quality Assurance Project Plan is complete and approved, I will forward a copy to your office. In the meantime, should you have any questions about this matter, please contact Jeffery Loman at (202) 208-5474.

Sincerely,



Director, Office of Trust Responsibilities

EXHIBIT F

UNITED STATES BANKRUPTCY COURT		DISTRICT OF MAINE	PROOF OF CLAIM
Name of Debtor Lincoln Pulp & Paper Co., Inc.		Case Number 00-11614 (JBH)	
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.			
Name of Creditor (The person or other entity to whom the debtor owes money or property): United States of America		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.	
Name and address where notices should be sent: Jeffrey K. Sands U.S. Department of Justice P.O. Box 7611, Ben Franklin Station Washington, DC 20044 Telephone number: 202-514-3908		THIS SPACE IS FOR COURT USE ONLY	
Account or other number by which creditor identifies debtor:		Check here if this claim <input type="checkbox"/> replaces a previously filed claim, dated: _____ <input type="checkbox"/> amends	
1. Basis for Claim <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes See Attached <input checked="" type="checkbox"/> Other _____		<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Your SS #: _____ Unpaid compensation for services performed from _____ to _____ (date) (date)	
2. Date debt was incurred:		3. If court judgment, date obtained:	
4. Total Amount of Claim at Time Case Filed: \$ <u>See Attached</u> If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below. Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.			
5. Secured Claim. Check this box if your claim is secured by collateral (including a right of setoff) Brief Description of Collateral: Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral: \$ _____ Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____		6. Unsecured Priority Claim. <input checked="" type="checkbox"/> Check this box if you have an unsecured priority claim. Amount entitled to priority \$ <u>See Attached</u> Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,650),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input checked="" type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a): <u>1</u> *Amounts are subject to adjustment on 4-1-04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.	
7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.		THIS SPACE IS FOR COURT USE ONLY	
8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.			
9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.			
Date May 01 2001	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any): Jeffrey K. Sands Toal Attorney		
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.			

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In Re:)	
	)	Chapter 11
EASTERN PULP & PAPER,	)	Case No. 00-11613(JBH)
)	
Debtor)	
In Re:)	
	)	Chapter 11
EASTERN FINE PAPER, INC.,	)	Case No. 00-11612(JBH)
)	
Debtor)	
In Re:)	
	)	Chapter 11
LINCOLN PULP & PAPER CO., INC.	)	Case No. 00-11614(JBH)
)	
Debtor)	
	)	<i>[Jointly Administered]</i>

PROOF OF CLAIM OF THE UNITED STATES ON BEHALF OF
THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY AND THE DEPARTMENT OF THE INTERIOR

1. This Proof of Claim is filed by the Attorney General of the United States at the request of the United States Environmental Protection Agency ("EPA"), and the United States Department of the Interior ("DOI"), in its own capacity and on behalf of the Penobscot Indian Nation. This Proof of Claim relates to environmental liabilities of the Debtor to the United States under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601 et seq., as well as damages for injury to, destruction of, or loss of natural resources under the trusteeship of the United States, including the reasonable costs of assessing such injury, destruction or loss under Section 107 of CERCLA, 42 U.S.C. § 9607. This Proof of Claim also relates to the recovery of damages

suffered by the Penobscot Indian Nation ("Nation") for the loss of its sustenance fishing right and cultural use due to the contamination of the waters and sediments of the Penobscot River, which includes areas of the Nation's reservation, caused by the discharges of dioxin and/or other hazardous substances into the Penobscot River by the Debtor, Lincoln Pulp and Paper Company, Inc. ("Lincoln" or "Debtor").

The Site

2. Lincoln manufactures kraft pulp, fine paper, and tissue at its 385-acre kraft manufacturing facility located at 50 Katahdin Avenue, Lincoln, Penobscot County, Maine. On-site industrial operations began in approximately 1827. The Debtor has been operating on the Site since approximately 1969.

3. Lincoln maintains approximately fifteen structures, the majority of which are located in the southwestern section of the property. The most prominent of these structures include the paper mill, pulp mill, tissue mill, lime kiln, wastewater treatment facility ("WWTF"), boiler houses, sawdust gallery, storage and maintenance buildings, and several aboveground storage tanks ("ASTs"). In addition, the property contains fifteen solid waste disposal areas which cover approximately fifty-six acres of the facility. The property is bordered by the Penobscot River to the north, an active railroad right-of-way to the east, private residences and commercial properties to the south, and a junkyard and undeveloped property to the west. Two perennial streams transect the property - the Mattanawcook and an unnamed stream.

4. During operation of its kraft pulp and paper manufacturing facility, the Debtor has discharged dioxin and furan containing compounds into the Penobscot River, contaminating the fish, sediments, and other natural resources of the River. Dioxin is a chemical

suspected of causing cancer in humans. Sampling done at the Lincoln Pulp & Paper Site ("Lincoln Site") also revealed elevated levels of several hazardous substances under CERCLA.

CERCLA

5. The Debtor is liable to the United States with respect to releases and threatened releases of hazardous substances at the Lincoln Site in the State of Maine. The EPA is currently evaluating the Site in order to determine whether it should be listed on the National Priorities List, 40 C.F.R. Part 300, Appendix B ("NPL"), which is a list of hazardous waste sites nationwide that pose the greatest threat to public health, public welfare, and the environment. See 42 U.S.C. § 9605(a).

6. The Debtor is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), which provides that four separate categories of persons are liable to the United States with respect to releases and threatened releases of hazardous substances, including the following:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

...

42 U.S.C. § 9607(a)(1), (2). The Debtor has owned the Lincoln Pulp & Paper mill since approximately 1968 and is therefore liable as the owner and operator under CERCLA. There has been a release or threat of release of hazardous substances at the Lincoln Site. The Debtor's liability is joint and several with other liable parties, if any.

7. Past Costs. In response to the releases and threats of releases of hazardous substances at the Lincoln Site, the United States has incurred "response costs" within the

meaning of Sections 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a). The EPA has conducted and/or overseen various response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, including, but not limited to, conducting a Site assessment, performing a Site investigation, and testing soil, sediment, and water samples. To date, EPA has incurred costs of approximately \$307,000 related to such response actions. The United States files a claim for such costs in the amount of \$307,000, plus interest.

8. Future Response Obligations. The EPA has not yet determined whether the Lincoln Site will be listed on the NPL. If the Site is listed, the United States may determine that a remedial action is necessary to address an imminent and substantial endangerment to the public health, welfare, or the environment resulting from the release or threatened release of hazardous substances from the Site. It is the position of the United States that any injunction compelling Debtor to comply with an order issued pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, or under any other statutory or regulatory provision, would not be a "claim" within the meaning of Section 101(5) of the Bankruptcy Code and therefore not dischargeable in bankruptcy. This Proof of Claim is filed to protect the United States' rights with respect to such obligation of the Debtor. To the extent that this Court determines that such an injunctive obligation constitutes a "claim" dischargeable in bankruptcy, the United States hereby asserts that "claim" for protective purposes only and estimates that it may cost the Debtor between \$400,000 to in excess of \$60 million. The United States reserves the right to take further actions in the future to enforce the obligations of the Debtor, debtor-in-possession, and any reorganized debtor. Nothing in this Proof of Claim constitutes a waiver of any rights of the United States or an election of remedies.

Natural Resource Damages

9. The United States also hereby asserts a claim on behalf of DOI—in its own capacity and on behalf of the Penobscot Indian Nation—for injury to, destruction of, or loss of natural resources under the trusteeship of DOI and/or the Nation at the Lincoln Site. As no remedial action has been completed, the eventual amount of natural resource injury, destruction or loss, including the reasonable costs of assessing the existence and extent of such injury, destruction or loss, is unknown. To date, the United States has incurred between \$680,000 and \$1.1 million in costs associated with assessment of the natural resource damages at the Lincoln Site.

10. The Debtor is liable for all past and future costs relating to injury to, destruction of, or loss of natural resources associated with the Lincoln Site, including the reasonable costs of assessing such injury, destruction, or loss. Lincoln's liability to the United States is joint and several with other liable parties, if any.

11. The EPA has not yet determined whether the Lincoln Site will be listed on the NPL. DOI may exercise its authority to initiate a CERCLA response action, in the absence of EPA's decision to list the Site on the NPL, pursuant to Executive Order Number 12580 (as amended by Executive Order Number 13016). DOI may determine that a remedial action is necessary to address an imminent and substantial endangerment to the public health, welfare, or the environment resulting from the release or threatened release of hazardous substances from the Site. It is the position of the United States that any injunction compelling Debtor to comply with an order issued pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, or under any other statutory or regulatory provision, would not be a "claim" within the meaning of Section 101(5)

of the Bankruptcy Code and therefore not dischargeable in bankruptcy. This Proof of Claim is filed to protect the United States' rights with respect to such obligation of the Debtor. To the extent that this Court determines that such an injunction constitutes a "claim" dischargeable in bankruptcy, the United States hereby asserts that "claim" for protective purposes only and estimates that it may cost the Debtor between \$400,000 to in excess of \$60 million. The United States reserves the right to take further actions in the future to enforce the obligations of the Debtor, debtor-in-possession, and any reorganized debtor. Nothing in this Proof of Claim constitutes a waiver of any rights of the United States or an election of remedies. This portion of the Proof of Claim for natural resource damages may overlap with the United States' protective claim on behalf of EPA for CERCLA future response obligations. *See Paragraph 8, supra.*

Claims under Federal Common Law, Maine Statutory Law, and Maine Common Law

12. Since 1987, the State of Maine has issued a fish consumption advisory for the Penobscot River downstream of the Debtor's manufacturing facility due to the presence of dioxin in bass and suckers.

13. The Debtor is liable to the Penobscot Indian Nation under federal common law, Maine statutory law, and Maine common law for damages caused by the Debtor's acts of nuisance, trespass and strict liability.

14. Pursuant to 17 M.R.S.A. § 2701, "[a]ny person injured in his comfort, property or enjoyment of his estate by a common and public or a private nuisance may maintain against the offender a civil action for his damages, unless otherwise specially provided."

15. Pursuant to 17 M.R.S.A. § 2702, the Court may order the Debtor to abate or remove the nuisance at the Debtor's expense.

16. Pursuant to 17 M.R.S.A. § 2802, "[t]he use of any building or place for the exercise of trade, employment or manufacture that, by noxious exhalations, offensive smells or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals or the public; . . . corrupting or rendering unwholesome or impure the water of a river, stream, pond or aquifer; . . . are nuisances . . ."

17. The Debtor's actions have injured the health, comfort or property of the Nation by rendering the water of the Penobscot River unwholesome or impure for fishing and other cultural enjoyment. The Maine legislature has established that such action constitutes a nuisance. 17 M.R.S.A. § 2802; see also. 17 M.R.S.A. § 2701.

18. The Debtor is also liable under the State of Maine's common law claims of continuing nuisance and continuing trespass because the dioxin contamination caused by the Debtor's manufacturing facility discharges continues to remain unabated on the Nation's reservation and continues to harm the fish, sediments, and other natural resources of the Penobscot River. See, Jacques v. Pioneer Plastic, Inc., 676 A.2d 504 (Me, 1996); Hanlin Group, Inc. v. Intern'l Minerals and Chem. Corp., 759 F. Supp. 925 (D. Me. 1990).

19. The dioxin and/or other hazardous substances discharged by the Debtor into the Penobscot River have contaminated, and continue to contaminate, the fish and sediments of the River, rendering the fish unsafe to eat.

20. Maine law provides that one who disposes of hazardous waste be held strictly liable for the damage that disposal causes to others. See, 38 M.R.S.A. § 1319-U(5). The Debtor is liable under the State of Maine's statutory and common law for strict liability because the Debtor has discharged dioxin and/or other hazardous substances from its manufacturing

facility into the Penobscot River causing damages to the Nation's sustenance fishing right and cultural use. See, Murray v. Bath Iron Works, 867 F. Supp. 33 (D. Me. 1994)(finding Maine Law Court would recognize common law strict liability action for disposal of hazardous waste); Saco Steel Co. v. Saco Defense, Inc., 910 F.Supp. 803 (D. Me. 1995).

21. The Debtor is liable to the United States for damages suffered by the Penobscot Indian Nation for the loss of its sustenance fishing right and cultural use of the fish and waters.

22. The Debtor's actions giving rise to these claims have caused the United States, as trustee of the Penobscot Indian Nation, to incur damages representing the loss of the Penobscot Indian Nation's sustenance fishing right and cultural use of fish and other resources.

23. The claims made by the United States, on behalf of the Nation, under federal common law, Maine statutory law, and Maine common law for damages caused by the Debtor's acts of nuisance, trespass and strict liability may overlap with the Proof of Claim for natural resource damages asserted in Paragraph 10, *supra*.

24. In accordance with 17 M.R.S.A. § 2702, the Debtor should be ordered to abate or remove the nuisance at the Debtor's expense.

25. This Proof of Claim also asserts a protective claim regarding any Order issued by the Court pursuant to 17 M.R.S.A. § 2702, or under any other statutory or regulatory provision, requiring the Debtor to abate or remove the nuisance. Any such Order requiring abatement or removal of the nuisance is a mandatory obligation of the Debtor that does not constitute a claim within the meaning of Section 101(5) of the Bankruptcy Code. This Proof of Claim is filed to protect the Nation's rights with respect to such obligation of the Debtor,

including the obligation to abate and remove the nuisance. The United States, on behalf of the Nation reserves the right to take further actions in the future to enforce the obligations of the Debtor, debtor-in-possession, and any reorganized debtor. Nothing in this Proof of Claim constitutes a waiver of any rights of the United States, on behalf of the Nation, or an election of remedies.

26. This protective Proof of Claim asserted by the United States on behalf of the Nation may overlap with the United States' Proof of Claim set forth in Paragraphs 8 and 11.

Priority of Claims

27. The United States' claims for natural resource damages occurring post-petition, and all post-petition CERCLA liabilities with respect to the property of the estate, are entitled to administrative priority under 11 U.S.C. §§ 503(b) and 507(a)(1).

28. The protective claims asserted by the United States with respect to injunctive obligations of the Debtor are not dischargeable claims; but if they are found to be dischargeable claims, they would be administrative expense obligations of the Debtor.

29. All claims or rights asserted in this Proof of Claim, other than those referred to in Paragraphs 27 and 28, are filed as general unsecured claims, except to the extent that such claims are secured by insurance proceeds recovered by the Debtor.

30. To the extent that the United States' position with respect to Paragraph 27 or 28 is denied, such claim or right is asserted as a general unsecured claim.

Miscellaneous Provisions

31. No judgments against the Debtor have been rendered with respect to this Proof of Claim.

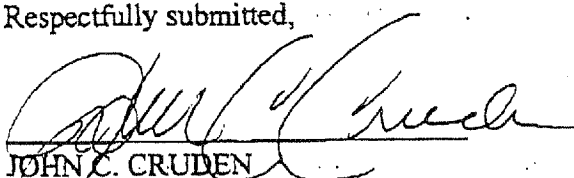
32. No payments to the United States have been made by the Debtor with respect to this Proof of Claim.

33. This Proof of Claim reflects the known liability of the Debtor to the United States. The United States reserves the right to amend this Proof of Claim to assert subsequently discovered liabilities, and to update its estimates as to its future response costs and natural resource damages.

34. This Proof of Claim is without prejudice to any right under 11 U.S.C. § 553 to set off, against this claim, debts owed (if any) to the Debtor or the Debtor's estate by this or any other federal agency.

35. No perfected security interests are held for these claims in property of the Debtor.

Respectfully submitted,

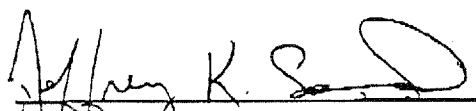


JOHN C. CRUDEN
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources
Division



ROGER R. MARTELLA, JR.
Assistant Section Chief
FRANCES M. ZIZILA
Trial Attorney
U.S. Department of Justice
Indian Resources Section
Environmental and Natural Resources
Division

P.O. Box 44378, L'Enfant Plaza Station
Washington, D.C. 20026-4378
PH: (202) 514-5406
Fax: (202) 305-0271



MYLES E. FLINT II
JEFFREY K. SANDS
Trial Attorneys
Environmental Enforcement Section
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
PH: (202) 307-1859
Fax: (202) 616-2427

JAY P. MCCLOSKEY
United States Attorney
District of Maine

FREDERICK EMERY
Assistant United States Attorney
District of Maine
100 Middle Street Plaza
East Tower, 6th Floor
Portland, Maine 04101

OF COUNSEL

ROBERT J. PHOCAS
U.S. Environmental Protection Agency
Region 1
1 Congress Street, Suite 1100
Boston, Massachusetts 02114

MARK BARASH
JANET WONG
JEAN RICE
U.S. Department of the Interior
Office of the Solicitor
1849 C Street, N.W., M.S. 6456
Washington, D.C. 20240

EXHIBIT G

ANDREW KETTERER
ATTORNEY GENERAL



REGIONAL OFFICES:

84 HARLOW ST., 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260
FAX: (207) 822-0259

Telephone: (207) 626-8800
FAX: (207) 287-3145
TDD: (207) 626-8865

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

June 3, 1997

John DeVillars
Regional Administrator
Region I
U.S. Environmental Protection Agency
J.F.K. Federal Building
Boston, MA 02203

Re: Lincoln Pulp & Paper NPDES No. ME0002003 Appeal

Dear Mr. DeVillars:

On April 3, 1997, we submitted a short letter to you relating our concern over the positions taken by the Penobscot Indian Nation in its petition for appeal dated February 28, 1997, of the NPDES permit for the Lincoln Pulp & Paper plant in Lincoln, Maine. By letter dated May 1, 1997, the Penobscot Indian Nation clarified its position in response to a request by the EPA. This May 1 letter made clear that the Penobscot Indian Nation sought to have an evidentiary hearing regarding, *inter alia*, the true "nature and extent of the [Nation's] fishing rights," arguing that such "rights" were somehow violated by the EPA's actions.

Because the Nation proffers arguments and theories that, if accepted, would do serious damage to the legal relationship between the Penobscot Nation and the State of Maine, we are compelled to address them in detail. This letter will not address all issues raised in the appeal but, rather, will focus on the Penobscot Nation's contention that their members' fishing rights allow them to effectively regulate a large portion of the State of Maine outside the Penobscot reservation – a result at odds with the Federal Maine Indian Claim Settlement Act, 25 U.S.C. §§ 1721-35, the Maine legislation implementing the Indian Claim Settlement Act, 30 M.R.S.A. §§ 6201-14, and the Clean Water Act.

DISCUSSION

As noted above, this filing will not attempt to counter all of the arguments presented by the Penobscot Indian Nation. Rather, we will limit our discussion to assertions of the Penobscot Indian Nation that they possess "sustenance" fishing

rights requiring the State and EPA to guarantee a particular type of fishery in the Penobscot River, and that general Indian common law provides the Penobscots with some special status with respect to the EPA. As discussed in more detail below, the Settlement Acts do not guarantee a particular quality or quantity of fish, and do not delegate to the Nation the jurisdiction to control the resources of the State of Maine; and whatever general relationship EPA may have with other Indian tribes, the Settlement Acts define its relationship with the tribes in Maine. For these reasons, the EPA should reject the Penobscot Indian Nation's legal assertions and should deny their request to have an evidentiary hearing. Applicable legislation already prescribes the relationship between the Penobscot Nation, the federal government and the State of Maine – an evidentiary hearing on that relationship is wholly irrelevant.

We wish to make clear that the members of the Penobscot Indian Nation have the same rights and standing as all other citizens of Maine to challenge the actions of the EPA and the State of Maine regarding water quality. The members, however, have no greater rights because of their status as Penobscots – i.e., the Penobscots have no additional or different claims based solely upon their being members of the Nation.

BACKGROUND

To correctly evaluate the issues raised, it is critical to understand the nature, purpose and effect of the Settlement Acts – the Federal Maine Indian Land Claim Settlement Act, 25 U.S.C. §§ 1721-35, and the Maine Indian Claim Settlement Act, 30 M.R.S.A. §§ 6201-14. It is well established that tribal rights are subject to the plenary authority of Congress to delimit the sovereignty and rights of a tribe. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1676 (1978). The tribe no longer possesses the full attributes of sovereignty, and tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance.” *Id.*; *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1074, 1086 (1978). Tribal sovereignty may be eliminated by treaty, statute or necessary implication. *Id.* Moreover, a tribe's attributes of sovereignty, to the extent they exist, do not negate the fact that its reservation is part of a state. *Chemehuevi Indian Tribe v. California State Board*, 800 F.2d 1446, 1450 (9th Cir. 1986).

In the 1970's, the Secretary of the Interior on behalf of the Passamaquoddy Tribe and Penobscot Indian Nation pursued claims in court to nearly two-thirds of Maine's land mass. See *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996). The Federal government, the Penobscot Indian Nation and the State negotiated a settlement of the land claims and the jurisdictional issues. This settlement and the legislation memorializing it were designed “to create a unique relationship between State and Tribal authority.” *Id.* This settlement was

specifically agreed to and approved by the Penobscot Indian Nation. 25 U.S.C. §1721(a)(8); 30 M.R.S.A. §6202; S. Rep. No. 96-957, 96th Cong., 2d Sess. 13 (1980).

The Settlement Acts "rid the State of all Indian land claims and submitted . . . the Penobscots[] and their tribal lands to the State's jurisdiction[, and] . . . gave the State a measure of security against future federal incursions upon these hard-won gains." *Passamaquoddy Tribe v. State of Maine*, 75 F.3d at 787. According to the Penobscot Indian Nation's own counsel, the relationship established by the Federal and State Acts is "unlike that which exists anywhere else in the United States."¹

The Federal and State Acts set the framework that would "govern matters of common political concern to the State and" the Penobscot Indian Nation. *Id.*

It was generally agreed that the acts set up a relationship between the tribes, the state, and the federal government different from the relationship of Indians in other states to the state and the federal governments. . . .

We, therefore, look not to federal common law . . . but to the statute itself and its legislative history.

Penobscot Nation v. Stilphen, 461 A.2d 478, 489 (Me. 1983)(emphasis added). The settlement acts prescribe that the members of the Penobscot Nation are to be treated exactly the same as any other person, except as otherwise prescribed in the State Act. 30 M.R.S.A. § 6204. There is nothing in the State or Federal Act that supports the far-reaching rights the Penobscots now appear to claim.

THE PENOBSCOT INDIAN NATION DOES NOT HAVE UNLIMITED FISHING RIGHTS AND DOES NOT OWN THE PENOBSCOT RIVER

Perhaps the most troubling aspect of the theories tendered by the Penobscot Indian Nation in its present petition is the notion that the claimed right to "sustenance" fishing within its reservation, under the Settlement Acts, should be read to dictate the environmental standards, laws and regulations for the State. The Penobscot Indian Nation's present claim demands a guarantee to a quantity of fish beyond that which currently exists and of a quality that the Penobscots have special rights to choose, and a requirement that the EPA and the State of Maine do whatever the Penobscot Indian Nation believes is appropriate to create "their"

¹ Transcript of March 28, 1980 Public Hearing before the Joint Select Committee on Indian Land Claims, 25, quoted in *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 (Me. 1983). Said counsel further noted that the settlement expanded the State's jurisdiction over the tribe from what he conceived it previously to be. *Id.* at 23-24, quoted in *Penobscot Nation v. Stilphen*, 461 A.2d at 488 n. 7.

fish — regardless of the impact on the rest of the State.² This argument runs counter to the language of and the history behind the Settlement Acts, and does damage to the relationship carefully crafted therein between the Penobscot Indian Nation and the Federal and State governments. The Penobscot Indian Nation tenders two bases for their theory: that members of the Penobscot Indian Nation have unlimited fishing rights; and the Penobscot Indian Nation somehow reserved the Penobscot River.

The Penobscot Indian Nation's Fishing Rights Are Not Unlimited.

The cornerstone of the Penobscot Indian Nation's argument is that it reserved or was granted "sustenance" fishing rights which constitute a guarantee of a special quality and quantity of fish for them as Penobscots. No such guarantee appears in the Settlement Acts, prior treaties, or history of the Penobscot Indian Nation.

At the time of the Settlement Acts in 1980, the type of "sustenance" fishing the Nation now lays claim to did not exist. Indeed, they do not and cannot suggest that the fishery in 1980 — or for any appreciable time prior thereto — was sufficient to allow the members of the Penobscot Tribe to live off their catch.³ Further, the EPA can — and should — take administrative notice that, in 1980, when the settlement was negotiated and confirmed, clearly the Penobscot River and the fish therein were less "clean" — i.e., more polluted — than today. In 1980, obviously the fish were fewer and more "contaminated."

In the face of this, the notion that in 1980 Congress and the State of Maine specifically guaranteed to each member of the Penobscot Nation a sufficient quantity and quality of fish to live upon is untenable. In 1980, the members of the Nation did not live off of — did not sustain themselves from — the fish. There is nothing in the treaties, laws or history that supports a conclusion that in 1980 the State and Congress intended to create a fish resource in the Penobscot River that did not exist.

The Penobscot Nation relies upon the following provision in the State Act

Notwithstanding any rule or regulation promulgated by the commission or any other law of the States, the members of . . . the Penobscot Nation may take fish

² To reiterate, the Penobscots may tender any argument regarding quantity or quality that any Maine citizen can proffer.

³ In 1980, only 810 salmon were caught by anyone on the Penobscot River. Baum, Atlantic Salmon Restoration Program, Progress Report 1969-1985, App. D (1988). In 1980, the total salmon run for that river was 3,277. *Id.* at App. C.

within the boundaries of their . . . reservation[], for their individual sustenance subject to the limitations of [30 M.R.S.A. § 6207(6)].

30 M.R.S.A. § 6207(4). Section 6207(6) empowers the Commissioner of Inland Fisheries and Wildlife to limit the Nation's fishing if, in his opinion, tribal fishing is harming the resource. The Nation would have EPA construe this provision to constitute a guarantee of unlimited, virgin fish — unaffected by modern industrial society — to "sustain" each and every member of the tribe. However, there is nothing in the Acts wherein the State or Congress promised to enhance dramatically or even marginally the fishery, nor give the Penobscot Indian Nation a right to higher quality fish than any other Maine citizen.

The first portion of section 6207(4) makes clear that the members of the Nation may take fish regardless of the normally applicable State restrictions on quantity, size and season:

Notwithstanding any rule . . . of the state, the members of . . . the Penobscot Nation may take fish within the boundaries of their reservation[] . . .

In other words, if the otherwise applicable State laws allow fishing only in January, the Penobscots may fish within their reservation in Maine from February through December as well. **There is no guarantee of a special quantity or quality of fish for the Penobscots.**

During legislative hearings, a question arose over whether this exemption was intended to apply to commercial as well as personal fishing. The second portion of section 6207(4) clarifies the issue by limiting the exception from State law only

. . . for their individual sustenance . . .

to make clear the exemption was not for "commercial" purposes.⁴ The word "sustenance," thus, was a limitation on the exemption from State fishing

⁴ As noted at the State legislative hearings on the proposed Settlement Act

We didn't just use the word sustenance, we used sustenance for the individual which we construe as not covering commercial fishing operations. We believe that means consumption by the individual.

regulations for tribal members fishing within the reservation – with no indication, implication, or intent that it constituted a guarantee of numbers or quality of fish.

This conclusion is fully supported by applicable case law. Even where “sustenance” fishing rights are recognized, the courts have rejected the notion that tribes have some sort of special right to require the protection of fishing habitats from environmental degradation. *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184, 215-16 (W.D. Wis. 1996). Thus, not only do the history and language of the Settlement Acts fail to support the guarantee the Penobscot Indian Nation now proclaims, but such a guarantee finds no place in federal case law.

The contrary conclusion is both unworkable and unenforceable. What would that special fishery be? What types of fish? How many? What size? What special quality? None of these issues are alluded to in the Settlement Acts, and the answer to each raises matters beyond the authority or discretion of the EPA. But that is exactly what the Penobscot Nation appears to seek: an evidentiary hearing to create a fishery that has not existed for generations. There is nothing in the law supporting such a right.

To accept the Penobscot Nation’s argument is to conjure up an affirmative obligation on the part of the EPA and the State to enhance and create a fishery for the Penobscots that did not exist in 1980, and for that matter generations theretofore. Discharge of untreated and municipal waste into the Penobscot River and use of the river for log drives caused severe deterioration in water quality – and therefore the fishery – from at least the start of the century until the 1970’s. Draft EIS, Milford Dam, 3-7 (FERC 1994). The extensive damming of the river in the 1800’s and early 1900’s effectively altered the river environment and fishery. *Id.*, at 3-1, 3-19. In the face of this, there is nothing in the Settlement Acts which even hints at the notion that “sustenance” fishing contemplated anything more than allowing members of the Penobscot Nation to fish for whatever fish were available for their personal – not commercial – purposes. There is no obligation found in the Settlement Acts requiring the federal government or the State to create a new fishery.

The Penobscot Nation Does Not “Own” The River.

The Penobscot Nation also suggests it “owns” the River. The stated purpose of the Federal Act is

- (1) to remove the cloud on the titles to land in the State of Maine resulting from Indian claims;

(2) to clarify the status of other land and natural resources in the State of Maine;

(3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the . . . Penobscot Nation

25 U.S.C. § 1721(B)). Congress defined "land and natural resources" to include not only real property but also "water and water rights, and hunting and fishing rights." 25 U.S.C. §1722(b). Congress ratified and approved all prior "transfers" of land and natural resources, which by definition included any fishing rights, including, without limitation, transfers pursuant "to any treaty, compact or statute of any State." 25 U.S.C. §1723(1). "Transfer" was broadly defined to encompass *all* forms of "voluntary or involuntary sale, grant, lease, allotment, partition or other conveyance," including "any transaction the purpose of which was to effect" a conveyance as well as "any act, event, or circumstance the resulted in a change to title to, possession of, dominion over, or control of land or natural resources." 25 U.S.C. §1722(n). Congress specifically extinguished any aboriginal claims in or to such natural resources (25 U.S.C. §1723(b)), and made clear that

The . . . Penobscot Indian Nation and [its] 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 the same manner provided in the Maine Implementing Act and that Act is hereby approved, ratified and confirmed.

25 U.S.C. § 1725(b)(1). The Maine Act rendered the Nation fully subject to Maine regulation and law. 30 M.R.S.A. § 6204. Thus, Congress specifically validated all prior acts which had the effect of placing any ownership of or control over the river out of the hands of the Penobscot Indian Nation, as well as made the resources the Nation did own fully subject to Maine law.

The Penobscot Indian Nation suggests that the 1796 and 1818 treaties between the Commonwealth of Massachusetts and the Penobscot Indian Nation somehow resulted in the latter owning the Penobscot River and, apparently, everything therein. First, we note that such an assertion is largely irrelevant. There is little doubt under the present state of the law, the Federal government and the State can and do regulate "resources" whatever they may be – land, water, trees, crops – regardless of ownership and sometimes at odds with the preferences of owners. Certainly, the "owners" may complain that the regulation is inappropriate but may not dictate the outcome by merely claiming ownership. (If the contrary were true,

there would be no EPA.) In any case, there is nothing in the treaties reserving or granting such broad rights to the Penobscot Indian Nation.

In the 1796 treaty [a typewritten version is attached hereto as Exhibit A], the Penobscot Indian Nation relinquished title to all lands along both sides of the Penobscot River for a 30 mile stretch north of Old town, specifically reserving only "all the Islands" therein. There is no reservation of the River or any of its resources. In Massachusetts, and thereafter Maine, the owner of the land along a navigable river owned the land *beneath* the river but not the river itself. *Bradley v. Rice*, 13 Me. 198, 201 (1836). The "State represents all public rights and privileges in our fresh water rivers and streams, and may dispose of the same as it sees fit." *Mullen v. Penobscot Log Driving Co.*, 90 Me. 555, 567 (1897). The right of the public to regulate interior fisheries was well-established in Massachusetts, and subsequently in Maine. *Cottrill v. Myrick*, 12 Me. 441, 459-60 (1835). There is nothing in the 1796 Treaty in any way suggesting otherwise.

Reliance on the 1818 Treaty is also misplaced. The Penobscot Indian Nation suggests that a particular phrase in the Treaty somehow implies the Nation reserved broad fishing rights. Penobscot Indian Nation Br., at 4. In this treaty, the Nation conveyed

the tribe's rights, title, interest and estate in and to all the lands they claims, occupy and possess by any means whatever on both sides of the Penobscot River, and the branches thereof . . . excepting and reserving from this sale and conveyance . . . four townships of land of six miles square each . . .

(A copy is attached as Exhibit B.) Thus, the Nation conveyed all its interest, except four specific townships which bordered the river or its branches. At the end of the Treaty, it reads:

And it is further agreed by and on the part of said tribe, . . . that the said commonwealth shall have a right at all times hereafter to make and keep open all necessary roads, through any lands hereby reserved for the future use of said tribe. *And that the citizens of said Commonwealth shall have a right to pass and repass any of the rivers, streams, and ponds, which runs through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same.*

(Emphasis added.) The Nation suggests that the specific reference to the "passing and repassing" on waterways implies that the Penobscot Indian Nation retained

ownership of the river, the water and the fish. First, at most it speaks to only the four reserved townships. It does not purport to effect the entire Penobscot River or its watershed. Moreover, in 1833, the Penobscot Nation did

cede, grant, bargain, sell and convey to said State, all the right, title and interest of said Tribe in and to their four townships . . .

To have and to hold to said State the above granted premises with all the privileges and appurtenances there unto belonging forever.

...
[A]nd that we for ourselves and in behalf of said Tribe will forever covenant and defend the premises against the claims of all the members of said tribe.

Deed of June 10, 1833 (Exhibit C hereto). Thus, the Nation conveyed away all lands and any privileges relating thereto upon which any claim could be based. To the extent the Penobscot Nation suggests the 1818 Treaty reserved some sort of rights in or to the Penobscot River, the 1833 deed conveyed those to the State. These transfers were ratified and approved by Congress. 25 U.S.C. § 1722(n) & 1723(i).⁵

The Penobscot Indian Nation's ownership of islands in the main stem of the Penobscot River does not change the result. Prior to the final adoption of the settlement in 1980, it was made clear that:

The tribes will not own the bed of any Great Pond or any waters of a Great Pond or river or stream, all of which are owned by the State of Maine in trust for all citizens.

Memorandum dated April 1, 1980, from Richard S. Cohen, Attorney General, to Joint Select Committee on Indian Land Claims, at 3. Moreover, as noted by the Joint Select Committee on Indian Land Claims:

⁵ As an aside, the Commonwealth was seeking to make clear to the Nation in 1818 that ownership along waterways would not allow it to impede traffic thereon, and to ensure use of smaller waterways not normally open to the public. In Maine and Massachusetts, there is a distinction between navigable and "nonnavigable" rivers and streams. The former may be used by the public "to pass and repass," while the latter normally cannot. *Pearson v. Rolfe*, 76 Me. 380 (1884). In addition, great ponds [being ponds greater than 10 acres in size] are generally open to public use, but smaller ponds are not. Thus, put in context, it becomes clear that in the 1818 Treaty, the Commonwealth was ensuring transportation – not only over all potential roads but also all waterways – whether or not the public normally might have such a right. This language, thus, does not imply a reservation of broad rights to the Penobscots but rather preserves the public's ability to pass and repass over "nonnavigable" waterways and non-great ponds where the Nation might otherwise block them.

The jurisdictional provisions relating to fish and wildlife use the term "side of a river or stream" which means the mainland shore and not the shoreline of an island.

Report of Maine Joint Select Committee on Indian Land Claims, at 2. Finally, the definition of the Penobscot Indian Reservation does not include the river — only the islands in the main stem. 30 M.R.S.A. § 6203(8). Although there may be a certain portion of the river bed that goes along with the ownership of an island in the river, as noted above ownership of a portion of the bed does not constitute ownership of the "river" and certainly does not amount to a guarantee of a special quality or quantity of fish therein.

THE PENOBSCOT INDIAN NATION HAS NO SPECIAL
STANDING IN THESE PROCEEDINGS.

Throughout their filings, the Penobscot Indian Nation suggests it possesses some special status, requiring EPA to abide by its wishes because of a "trust" relationship. Neither the Settlement Acts nor the Clean Water Act support such an assertion.

The EPA Has No Special Relationship With the Penobscot Indian Nation.

The structure of the settlement, as set out in the Federal and State Acts, clearly argues against the claim to a "special" right to have EPA do the Nation's bidding. The Penobscot Indian Nation relies heavily upon notions of general Indian common law for the proposition that EPA is the trustee of the Penobscot Indian Nation's asserted fishing rights to the exclusion of the State's regulatory authority. However, the settlement dealt with the Maine Indians in a manner "unlike that which exists anywhere else in the United States." Comments of the Nation's Counsel, quoted in *Penobscot Nation v. Stipphen*, 461 A.2d at 488. Thus, in dealing with the Penobscot Indian Nation, we look not to federal common law but to the statutes themselves. *Id.* at 489. The caselaw referred to by the Penobscot Indian Nation regarding EPA's responsibilities elsewhere is, therefore, irrelevant.⁶

⁶ We note further that the caselaw relied upon by Penobscot Indian Nation is mischaracterized. For example, in the unreported case of *Klamath Tribes v. United States*, No. 96-381-HA (D. Ore. Oct. 2, 1996), referred to at page 25 of the Nation's brief, the U.S. Forest Service acknowledged its trust obligations in view of the clear and unambiguous language in the treaty with that tribe. The lesson from *Klamath Tribes* is that we must look closely at the exact relationship created by Congress — and not blindly apply caselaw based upon different treaties and different statutes relating to different tribes.

It is the Federal and State Acts that establish the relationship between the Penobscot Indian Nation, the federal government and the State of Maine.⁷ Congress made clear that federal regulations and statutes generally applicable to Indians would not apply in Maine:

[N]o law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians and also (2) which affects or preempts 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, shall apply within the State.*

25 U.S.C. § 1725(h) (emphasis added). Further, Congress went on to provide that

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

Thus, general Federal Indian law existing in 1980 or enacted thereafter does not benefit the Penobscot Indian Nation.

These provisions were designed to implement a crucial premise of the settlement from the State's point of view – the principle that, except as specifically provided in the Act, Maine Indians and Indian lands shall be subject to the laws of the State “to the same extent as any other person or lands . . .” 30 M.R.S.A. § 6204. This principle was specifically “approved, ratified, and confirmed” by Congress.

⁷ Transcript of March 28, 1980 Public Hearing before the Joint Select Committee on Indian Land Claims, 25, quoted in *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 (Me. 1983).

25 U.S.C. § 1725(b)(1).⁸ These provisions are consistent with the statement by the attorney for the tribes at the time of settlement that federal Indian law was excluded in Maine "in part because that was the position the State held to in the negotiations . . . [and] it is also true to say that the tribes are concerned about the problems that existed in the West because of the pervasive interference and involvement of the federal government in internal tribal matters." Hearings before the Senate Committee on Indian Affairs on S.2829, 96th Cong. 2d Sess. 181-82 (1980).

These statutes are designed to protect against any incursion upon Maine's law by federal law which might otherwise give a special status to either Indians or Indian lands. "Laws" include not only statutes but "common law." See *Penobscot Nation v. Stilphen*, 461 A.2d 489; 25 U.S.C. §1722(d)(defining "laws" of the State to include common law).

A "complex statutory and regulatory scheme . . . governs our Nation's waters, a scheme which implicates both federal and state administrative responsibilities." *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 704 (1994). Generally, the states and EPA share duties in achieving the goals of the Clean Water Act but the primary responsibility for establishing water quality standards is left to the states. 33 U.S.C. § 1251(b); *NRDC v. U.S.E.P.A.*, 16 F.3d 1395, 1399 (4th Cir. 1993). EPA reviews the state-implemented standards, with approval and rejection power. 33 U.S.C. § 1313(c). The States must establish narrative or numerical criteria for various pollutants, including dioxin. *Id.* Permits to individual facilities under the NPDES program must be protective of these standards. 33 U.S.C. § 1311(b) & (c). These permits are issued by the EPA or by states that have been delegated NPDES permitting authority. 33 U.S.C. § 1342. In Maine, this authority has not been delegated to the State. However, the EPA's action still must be approved by Maine certifying pursuant to section 401, that the discharge will comply with Maine water standards. *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. at 1907.

Nothing in these provisions specifically provides a role for Maine tribes. Indeed, EPA itself has noted:

[The provisions of the 1980 Federal Act] seem to invalidate federal laws that might give the Penobscots special status . . . if it would "affect or preempt" the state's authority, including the state's jurisdiction over environmental and land use matters.

⁸ As the Maine Supreme Judicial Court noted in *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488-89 n.7 (Me. 1983), *appeal dismissed for want of a substantial federal question*, 464 U.S. 923 (1983), the attorney for the tribes at the time of settlement acknowledged that the subjection of the tribes to state jurisdiction was the essential *quid pro quo* which the tribes had to offer to obtain the State's agreement to a settlement.

...
[A]ny post-1980 special federal legislative provisions that might give Indians special jurisdictional authority . . . could not provide the Penobscots with such jurisdictional authority unless the federal legislation specifically addressed Maine and made the legislation applicable within Maine.

USEPA Memorandum: Penobscots Treatment as a State under CWA § 518(e) for Purposes of Receiving CWA § 106 Grant, at 8 (July 20, 1993).⁹

In 1980, the Senate Committee Report listed the Clean Air Act, 42 U.S.C. § 7474, as an example of a federal statute which accords special rights to Indian tribes and Indian lands but which would not be applicable in Maine because it would interfere with the State air quality laws. S.Rep.No. 96-957, 96th Cong., 2d Sess. 31 (1980). The specific section of the Clean Air Act which the Senate Committee Report cites as being inapplicable in Maine, 42 U.S.C. § 7474, is a provision that permits tribes to supplant state air quality standards by designating their own air quality standards for tribal lands. The Clean Water Act now has a similar provision.

The Water Quality Act of 1987 authorized the EPA to treat an Indian Tribe as a state when dealing with water quality standards, limitations, permitting and enforcement. 33 U.S.C. §1377(e). However, Congress clearly intended that

This section does not override the provisions of the Maine Indian Claims Settlement Act (25 U.S.C. §1725). Consistent with subsection (h) of the Settlement Act, the tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes . . .

Section-by-Section Analysis Prepared by the Hon. James J. Howard, Chairman of the House Committee on Public Works and Transportation, 2 1987 U.S.C.C.A.N. at 43. Obviously, Congress understood that in Maine the tribes receive no special status.¹⁰

⁹ Despite identifying this issue, the memorandum went on to conclude that the Penobscots could obtain § 106 grants, without addressing the "preempt or affect" bar.

¹⁰ More recently, the United States Department of the Interior recognized that the intent of these statutes is "to limit the applicability of provisions of the . . . Clean Water Act (CWA) provisions (Federal Water Pollution Control Act, 33 U.S.C. § 1377) . . . which accord Indian tribes the opportunity to assume state status or otherwise affect the exercise of state authority . . ." United States Department of the Interior's Response to Comments, Bangor Hydro-Electric Co., FERC Project No. 2534, at 20 (April 9, 1997).

In addition, a State waste discharge license pursuant to 38 M.R.S.A. §§ 414-A, *et seq*, is required. The Clean Water Act specifically recognizes and validates the role of such permits in the regulatory scheme. 33 U.S.C. § 1370; *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. at 707-08. In this matter, the State issued that permit on January 23, 1997.

The Penobscot Indian Nation has no special status to directly or indirectly affect or preempt the role of the State in regulating the Penobscot River. Congress could not have been more clear that the Maine tribes have no special status to establish water standards nor circumvent the State's role in the § 401 process or its State licensing authority. Likewise, the Penobscot Nation cannot be allowed to attain a special status not recognized in the Clean Water Act or the Settlement Acts which affects the State's jurisdiction to regulate its water resources. The Settlement Acts direct that the Penobscot Nation and their land "or other natural resources" [including any alleged fishing rights] are to be treated "to the same extent as any other person or lands or other natural resources." 30 M.R.S.A. § 6204. To the extent the Penobscot Nation seeks a special status for its members under the Clean Water Act to affect the regulatory role of the State of Maine, both the Federal and State Settlement Acts specifically bar such a result.


Obviously, the State's regulatory jurisdiction is affected if the State's water quality actions and decisions can be rendered irrelevant by new conditions imposed specially on behalf of the Penobscot Nation. State regulatory jurisdiction is "affected" whenever the federal government changes the State's licenses or certification specially on behalf of an Indian tribe.

CONCLUSION

The Penobscot Indian Nation seeks a special status not provided in the Settlement Acts, and in fact specifically barred therein. The Nation has no guarantee of an quantity and quality of fish other than that of every other citizen of the State. Neither the Settlement Acts nor the Clean Water Act contemplate allowing the Penobscot Nation to specially dictate the environmental regulation of the Penobscot River. Certainly, the Settlement Acts do not require the EPA to amend, vacate or nullify the State's § 401 certification or waste discharge license to ensure special "unlimited" fishing rights.

Respectfully submitted,

ANDREW KETTERER
Attorney General



PAUL STERN
Assistant Attorney General
Attorney for State of Maine

PS:jwp

Attachments

cc Patti A. Goldman, Esq.
Kate L. Geoffroy, Esq. ✓
Timothy L. Williamson, Esq.
Mary Ann Gavin, Hearing Officer

EXHIBIT H

6

39-2
Control
OBC-Tw...
L...
L...
L...



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

John P. DeVillars
Regional Administrator
Environmental Protection Agency
Region 1
J.F.K. Federal Building
Boston, MA 02203-0001

SEP 2 1997
RECEIVED: OFFICE OF THE REGIONAL ADMINISTRATOR

Date: 9/19/97

01-9700711

Re: Penobscot Indian Nation Request for Evidentiary Hearing
Lincoln Pulp & Paper NPDES permit No. ME0002003

Dear Mr. DeVillars:

The Department of the Interior (Department) has reviewed the correspondence filed with you by the Penobscot Indian Nation (PIN), Lincoln Pulp and Paper Company (Lincoln), and the State of Maine, Department of the Attorney General (State), in the above-referenced Request for Evidentiary Hearing concerning NPDES Permit No. ME0002003. Certain of the positions set forth in those filings cause concern to this Department, in its role as primary agency within the Federal Government charged to act on behalf of Indian Tribes. Consequently, my intent in this letter is to ensure that your agency is fully aware of the positions of this Department, and of the United States, concerning certain issues relevant to the Maine Indian Claims Settlement Act, the Federal Trust responsibility to Maine Indians, and the fishing rights of the Penobscot Indian Nation.¹

I address three major points, as follows:

1. The Nature of the Federal Government's trust responsibility to the PIN;
2. Interpretation of PIN's fishing rights;
3. PIN's right to appeal the NPDES permit

¹ The First Circuit has recognized the Secretary of the Interior as the administrator of the Maine Indian Claims Settlement Act (MICSA). Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 794 (1st Circuit, 1996). Moreover, the Department of the Interior is recognized to have reasonable power to discharge effectively its broad responsibilities in the area of Indian affairs, and its actions in interpreting tribal rights are accorded substantial deference. Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996).

1. The Nature of the Federal Government's trust responsibility to the PIN

As you know, the United States has a trust responsibility to protect the lands and resources of federally recognized Indian Tribes. In the exercise of this trust responsibility, the United States is held to the most exacting fiduciary standards. Seminole Nation v. United States, 316 U.S. 286 (1942). This fiduciary responsibility extends to all agencies of the Federal Government, including the Environmental Protection Agency (EPA). Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981).

The Department acknowledges that the Maine Tribes came late to federal recognition and protection. However, as of 1975, when the First Circuit recognized that the protections of the federal Trade and Intercourse Act (1 Stat. 137 (1790), now codified at 25 U.S.C. § 177) did apply to the Maine Tribes (See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379-380 (1st Circuit, 1975)), the United States has recognized and acted in furtherance of its trust responsibility to protect the lands and natural resources of the Maine Indians, beginning with the United States advocacy on the Tribes' behalf in the Maine land claims litigation. This litigation, which alleged that Massachusetts and Maine illegally took lands of the Maine Indians without federal involvement or consent in violation of the Trade and Intercourse Act, was settled through the enactment by Congress in 1980 of the Maine Indian Claims Settlement Act (MICSA), 25 U.S.C. § 1721, et seq., which ratified Maine's Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. § 6201, et seq. (Implementing Act).

Contrary to the assertions made in several of the filings before you, the United States did not through MICSA limit its trust responsibility. While the MICSA did create a unique relationship between the State of Maine and the Maine Tribes, the federal trust obligation to protect the lands and natural resources of the Maine Tribes continues. The Penobscot Nation is a federally recognized Indian Tribe (61 Fed. Reg. 58211, 58213 (1996)) and, as such, is entitled to those rights and benefits which the United States provides to Indians based upon their status as Indians. See 25 U.S.C. § 479a-1(a); H. Rep. No. 96-1353, p. 18, reprinted in 1980 U.S.C.C.A.N. 3786, p. 3794. The Penobscot Reservation is a federal reservation under the jurisdiction of the United States. 25 U.S.C. §§ 2 and 9.

The Department thus finds erroneous the views expressed which suggest that EPA has no special relationship with the Penobscot Indian Nation. In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. §§ 1722, 1721, 1725(i). (Subsequent Congressional action extended this federal recognition to the Aroostook Band of Micmacs. Pub. L. No. 102-171, 105 Stat. 1143 (1991).) Congress has declared that this

recognition requires that the United States protect tribal resources through the trust responsibility. Pub. L. No. 103-454, 108 Stat. 4791 (1994).

The Department further finds no merit in the claim that MICSA extinguished PIN's sovereignty. Federal recognition connotes recognition of a Tribe's inherent sovereignty. Pub. L. No. 103-454, 108 Stat. 4791 (1994). See also Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994). Passage of MICSA did not terminate the Maine Tribes and thus did not extinguish PIN's sovereignty. Instead, as noted in the legislative history, the "settlement strengthens the sovereignty of the Maine Tribes." H. Rep. No. 96-1353 at 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3790. See also Senate Rep. No. 96-957, pp. 14-15 (1980).

It has been asserted that section 1725(h) of the MICSA, a section of the Act which reflects the unique relationship between the Maine Tribes and the State, prevents the application of the trust responsibility and federal case law interpreting its requirements in Maine (25 U.S.C. § 1725(h)). Through this section, Congress provided that the application of federal Indian law (including case law) in Maine can be precluded, but **only** if such law would affect or preempt the civil, criminal, or regulatory jurisdiction of the State. If Maine's jurisdiction is unaffected, federal law does apply. See H.R. Rep. No. 96-1353 at 19-20 (1980), *reprinted in* 1980 U.S.C.C.A.N., 3786, pp. 3794-5; Senate Report No. 96-957 at 30 (1980).

In the Department's view, section 1725(h) has no applicability to this situation.² The NPDES program has not been delegated by the United States to the State of Maine; it thus remains a federal program for which EPA is the permitting authority. EPA's consideration of federal law to determine its obligations to the PIN in making the NPDES permit decision, therefore, is required in this case.³

² While the State does have authority under section 401 of the Clean Water Act to certify that a proposed discharge meets its water quality standards, this does not mean that EPA cannot impose a more stringent standard in its permit. 40 C.F.R. § 124.55(c) provides that a state may not condition or deny a certification on the grounds that State law allows a less stringent permit condition.

³ There is also no merit to the claim that, because MICSA is an Act of Congress rather than a treaty, EPA cannot consider federal case law in determining tribal rights and federal obligations. As with a treaty, MICSA is similarly the "supreme law of the Land," and creates rights and liabilities which are virtually identical to those established by treaties. See Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), cert.

Since there exists a trust relationship between the Maine Tribes and the United States, EPA must act as a trustee when taking federal actions which affect tribal resources. When taking such actions, EPA's fiduciary obligation requires it to first protect Indian rights and resources. See Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972), rev'd. in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975) (holding that for the Secretary of Interior to fulfill his fiduciary duty to Tribe while determining amount of water to be diverted from dam for benefit of irrigation district and to detriment of tribal fishery in downstream Pyramid Lake, the "Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake"); Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065 (D. Mont. May 28, 1985) (Rejecting Secretary's argument that national interest in developing coal resources outweighed trust duty and stating that "identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.") Thus, fulfillment of EPA's trust responsibility must entail considerations beyond the minimum requirements in the Clean Water Act (CWA) and in MICSA to fully protect the PIN's rights and resources.

2. Interpretation of PIN's fishing rights

The historic treaties between PIN and Massachusetts (Maine then being part of the Massachusetts territory) provide the basis for rights expressly confirmed to the PIN through the Implementing Act and MICSA. As a result, PIN's fishing right has two components - the aboriginal right retained through treaty and confirmed by MICSA, and a statutory right included within the Implementing Act.

a. PIN's confirmed aboriginal fishing rights

Through a series of treaties which culminated in the 1818 Treaty with Massachusetts, the PIN retained the islands and natural resources, including fishing rights, within the Penobscot River, beginning at Indian Island and extending upriver. Congress, through its ratification in MICSA of the Maine Implementing Act which defined the retained Penobscot Reservation, confirmed this reservation of lands and resources, including fishing rights, to the PIN. See 30 M.R.S.A. § 6203(8); 25 U.S.C. §§ 1722(i); 1725(b)(1). While Section 1723(b) of MICSA did extinguish

denied, 116 S. Ct. 2546 (1996); Felix Cohen, Handbook of Federal Indian Law, p. 127 (1982 ed.).

aboriginal title to lands or natural resources given up by the PIN through transactions illegal under the Trade and Intercourse Act, MICSA did **not** extinguish aboriginal title to lands or natural resources retained by the PIN. Rather, Congress confirmed those retained aboriginal rights to the PIN. According to the legislative history of MICSA, fishing rights are an example of natural resources considered "**expressly retained sovereign activities.**" H.R. Rep. No. 96-1353 at p. 15 (1980), reprinted in 1980 U.S.C.C.A.N. 3786, p. 3791 (emphasis added).

I attach the brief filed by the United States in Maine's Supreme Judicial Court in Atlantic Salmon Federation v. Maine Board of Environmental Protection, 662 A.2d 206 (Me. 1995), in which the United States position regarding the PIN's fishing right is set out. In short, the brief states that:

The Penobscot Nation's right is a reserved right, meaning it was reserved from the greater aboriginal rights of the Nation to the use and occupancy of its territory which had not been validly extinguished under 25 U.S.C. 177, prior to the enactment of the Maine Implementing Act and the federal Settlement Act ratifying its terms. The fishing right, therefore, is not a grant from the state of Maine in the exercise of its sovereign authority over fish and wildlife within its borders; it is a reservation from the aboriginal rights given up by the Penobscot Nation in the settlement which finally extinguished its aboriginal rights.

Brief for the United States as Amicus Curiae, filed before the Supreme Judicial Court of Maine in Atlantic Salmon Federation, et al., v. Maine Board of Environmental Protection, Law Docket No. Ken-94-779, January 27, 1995, (p. 15).

b. PIN's statutory fishing right under the Maine Implementing Act

In addition to PIN's retained aboriginal fishing rights within its Reservation, the Maine Implementing Act expressly confirmed to PIN a fishing right, providing that

the members of the . . . Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance . . .

30 M.R.S.A. § 6207(4). The State of Maine has only a residual right to prevent the PIN from exercising its fishing right in a manner which has a substantial adverse impact on fish stocks in or on adjacent waters - the legislative history compares this residual power to that which other states retain with respect to federal Indian treaty fishing rights. See H.R. Rep. No. 96-1353 at p. 17 (1980), reprinted in 1980 U.S.C.C.A.N. 3786, p. 3793. Indeed, the State of Maine has acknowledged that, in recognition of "traditional Indian activities" such as fishing, preferential

treatment is to be provided to Maine Indians. See letter from Attorney General Richard Cohen to Senator John Melcher (August 12, 1980), reprinted in U.S. Senate, Select Committee on Indian Affairs, Hearings on S. 2829, Proposed Settlement of Maine Indian Land Claims. See also Letter from Maine Attorney General James Tierney to Atlantic Sea Run Salmon Commission Chair William Vail (Feb. 16, 1988), in which the State recognized that the Penobscot Nation possesses a right to take fish from the Penobscot River for consumption in a manner otherwise prohibited by state law, due to the provisions in the Maine Implementing Act. (Copies attached.)

As provided in the Implementing Act, the PIN fishing right applies within the boundaries of the Penobscot Reservation, as it is defined in the Implementing Act. The Reservation is defined to expressly include the islands in the Penobscot River, beginning at Indian Island and continuing upriver, which were reserved by the PIN in its historic treaties. 30 M.R.S.A. § 6203(8). In those treaties, the PIN ceded lands beginning at the river's edge and extending upland, thereby retaining its rights to the beds and banks of the Penobscot River. See Wilson & Son v. Harrisburg, 107 Me. 207, 210 (1910). Pursuant to the 1818 Treaty, PIN's riparian ownership to the bed and banks of the river is limited only by the commonly recognized right of the public to use the river for navigation. See Pearson v. Rolfe, 76 Me. 380, 386 (1884). In confirming the PIN Reservation, the Implementing Act recognized the retention of PIN's riparian rights to the Penobscot River, including the beds and banks of the river.⁴

As a riparian owner, PIN possesses certain rights under state law which relate to the interpretation of its statutorily-based fishing right. Maine law recognizes that a riparian proprietor, such as the PIN, has a legal right:

to take fish from the water over his own land, to the exclusion of the public. Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec., 333. He does not own the water itself, but he has the right to the natural flow of the stream, and the right to the use and benefit of it, as it passes through his land, for all the domestic and agricultural purposes to which it can be reasonably applied, and **no proprietor above or below can unreasonably divert, obstruct or pollute it.** Waluppa Reservoir Co. v. Fall River, 147 Mass., 548, 554, 18 N.E. 465, 1 L.R.A., 466; Auburn v. Water Power Co., 90 Maine 576-585, 38 Atl. 561, 38 L.R.A., 188.

⁴ Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory," included within Appendix, Senate Select Committee on Indian Affairs, hearing July 1-2, 1980.

The only limitation upon the absolute rights of riparian proprietors in non-tidal rivers and streams is the public right of passage for fish, and also for passage of boats and logs. ... All these rights which the riparian proprietor has in the running streams are as certain, as absolute, and as inviolable as any other species of property, ...

Opinion of the Justices of the Supreme Judicial Court, 118 Me. 503, 507 (1919) (emphasis added).

The PIN Reservation encompasses the area into which Lincoln discharges its outfall. As such and as a riparian proprietor, PIN possesses certain rights under Maine law, including the right to take fish and the right that others not unreasonably pollute the waters overlying those lands.

3. PIN's right to appeal

The Department finds particularly questionable the attempt to have EPA deny the PIN's right of appeal. We have examined the NPDES regulations which define standing to request a hearing in this matter. In the Department's view, PIN is an "interested person" as provided in 40 C.F.R. §124.74, which is the sole indicated criterion for filing a request for hearing. Moreover, the PIN meets the criteria under the definitions for "Indian Tribe" and of "person" under 40 C.F.R. § 124.2 as well. The definition for "Indian Tribe" specifically states that "[f]or the NPDES program, the term 'Indian Tribe' means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 C.F.R. § 124.2. PIN meets these requirements. There would appear, thus, no grounds on which to contest PIN's status to request an evidentiary hearing in this proceeding.

Thank you for this opportunity to provide the views of the Department. Please contact me if you have any further questions.

Sincerely,



Edward B. Cohen
Deputy Solicitor

Enclosures

cc: The Honorable Francis Mitchell, Chief, PIN
Patty Goldman, Sierra Club Legal Defense Fund
Paul Stern, State of Maine, Office of the Attorney General
Kate Geoffroy, Pierce Atwood

EPA, Office of General Counsel, Washington, D.C.
EPA, Office of Regional Counsel, EPA, Boston
EPA, Indian Desk, Washington, D.C.
Department of Justice, Indian Resources Section
Department of Justice, Office of Tribal Justice
Office of the Regional Solicitor, Boston
Bureau of Indian Affairs, Office of Trust Responsibilities
Bureau of Indian Affairs, Eastern Area Office
Fish and Wildlife Service, Maine Field Office

EXHIBIT I



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 30 2015

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

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

Dear Mr. Garbow:

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

1. Overview of Tribal Fishing Rights in Maine Indian Waters

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

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

² 30 M.R.S. §§ 6201 *et seq.*

³ 30 M.R.S. §§ 7201 *et seq.*

⁴ 25 U.S.C. §§ 1721 *et seq.*

federal Aroostook Band of Micmacs Settlement Act⁵ (collectively the “Settlement Acts”).⁶

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

The fishing rights of the Passamaquoddy Tribe and Penobscot Indian Nation in their Reservation waters⁸ are expressly reserved⁹ fishing rights: the Maine Implementing Act

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

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

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

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

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

State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 “An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory,” at p. 3, para. 14.

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

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

These statutorily-acknowledged fishing rights are rooted in treaty guarantees¹¹ that were upheld through the Settlement Acts. The Passamaquoddy Tribe’s 1794 treaty with the State of Massachusetts explicitly reserves a Passamaquoddy fishing right in the St. Croix River (then known as the Schoodic River): the treaty guarantees “to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation.”¹² The Penobscot treaties of 1818 (with Massachusetts) and 1820 (with Maine) do not expressly mention fishing rights because they did not cede the Penobscot River, explicitly retaining islands and granting to non-members only the right to “pass and repass” the River. The Penobscot Nation had historically relied on fishing, and the islands mentioned in the Treaty would have been of little value if they were not accompanied by fishing grounds.¹³

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

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

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

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

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

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

The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise.

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

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

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

¹⁴ 30 M.R.S. § 6207(1).

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

Although the term "sustenance" is not defined in the Settlement Acts, it is reasonable to conclude that the term encompasses, at a minimum, the notion of tribal members taking fish to nourish and sustain themselves. Moreover, the Indian law canons of construction require that ambiguous terms in statutes must be construed "most favorably towards tribal interests."¹⁶ Where fishing rights of traditional fishing tribes are concerned, this rule of liberal construction applies with special force: one court has held that treaties must be construed "in the sense in which they would naturally be understood by the Indians . . . especially the reference to the right of taking fish."¹⁷ The term "sustenance" in section 6207(4) of the Maine Implementing Act should thus be construed broadly¹⁸ to incorporate at least the right of tribal members to take sufficient fish to nourish and sustain them,¹⁹ with no specific quantitative limits other than the conservation necessity limit that the statutory language specifically places on the tribal fishing right.²⁰ When interpreting the scope of the Maine tribes' fishing right as the tribes would understand them, EPA should consider that the tribes' ability to fish was, and continues to be, essential to their livelihood and culture.

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

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

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

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

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

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

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

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

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

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

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

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

²² State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 “An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory,” at p. 3, para. 14.

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

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

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

Even more importantly, however, the Northern Tribes²⁶ have more than the right of a Maine citizen to fish – they have the right to do so on lands set aside and held in trust for them. The establishment of trust land is one of the most important functions the United States performs for tribes. Trust lands provide a permanent land base, protecting these lands against loss,²⁷ and providing territory over which tribes may exercise governmental authority, albeit subject to the constraints imposed by the Settlement Acts.²⁸ Trust lands also protect and sustain tribal culture and ways of life, including tribal sustenance fishing

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ Sen. Rep. No. 96-957, at 17 (“Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine.”). Several of the Maine tribes submitted comments to the EPA about Maine’s WQS describing the centrality of fishing to their cultures.

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

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

³³ See *supra* note 30 and accompanying text.

³⁴ 198 U.S. 371, 384 (1905).

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

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

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

³⁵ 763 F.2d 1032, 1034-35 (9th Cir. 1985).

³⁶ 141 F.3d 635, 639-40 (6th Cir. 1989).

³⁷ 443 U.S. 658, 679 (1979).

³⁸ *Minnesota v. Clark*, 282 N.W.2d 902, 909 (Minn. 1979).

³⁹ 723 F.2d 1394, 1409-10 (9th Cir. 1983). See also *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598-601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).

⁴⁰ The leading federal Indian law treatise explains:

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

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

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

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

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

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

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

⁴⁴ *Id.* at 78-79.

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

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

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

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

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

In its decision, EPA announced that when reviewing proposed permits under the Clean Water Act⁴⁹ it would "require the state to address the tribes' uses [for sustenance fishing] consistent with the requirements of the CWA."⁵⁰ EPA's 2003 analysis of tribal fishing rights and federal review authority under the Clean Water Act was cogent and the agency should follow through on this policy in reviewing Maine's WQS.⁵¹

⁴⁶ See *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."); *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (upholding tribal water quality standards that were more stringent than federal standards and observing that the authority to establish such high standards "is in accord with powers inherent in Indian tribal sovereignty").

⁴⁷ 68 Fed. Reg. 65052, 65068 (Nov. 18, 2003).

⁴⁸ *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (internal quotation marks omitted).

⁴⁹ The EPA specifically cited the provision codified at 33 U.S.C. § 1342(d).

⁵⁰ 68 Fed. Reg. at 65,068.

⁵¹ The First Circuit, reviewing this EPA decision in *Maine v. Johnson*, found that EPA's analysis of the relationship between fishing rights and water quality was not ripe for consideration. 498 F.3d 37, 48 (1st Cir. 2007) ("The current relationship of the United States to [Maine] tribes, and the EPA's continued authority under the Clean Water Act to review Maine's exercise of ceded powers, present quite different

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

4. Conclusion

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

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

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

Sincerely,


Hilary C. Tompkins
Solicitor

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

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

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

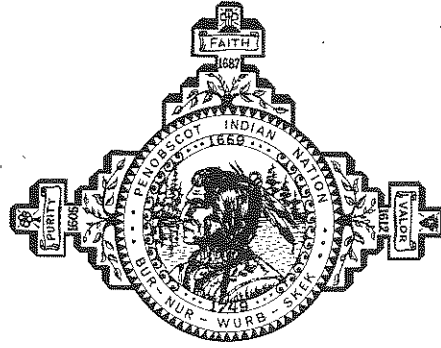
EXHIBIT J

Office of the Chief and Council

Kirk E. Francis
Chief

Mark Sockbeson
Vice-Chief

Maulian Dana
Tribal Ambassador



Penobscot Nation
12 Wabanaki Way
Indian Island, Maine 04468
(207) 817-7349

FAX (207) 827-6042

March 13, 2018

Dear Attorney General Janet Mills:

We are writing to express deep disappointment at your joining a Supreme Court effort against tribal treaty fishing rights in the State of Washington.

Let us begin at home.

The Tribes of Maine have a right to sustenance fishing. For many decades, this right was compromised because of poor water quality. Maine's rivers were so polluted that the fish themselves became poisonous to consume.

Under the Obama Administration, the Environmental Protection Agency (EPA) stepped in to promulgate new water quality standards, stating that the Tribes' right includes "the ability to safely consume fish from their waters at sustenance levels" and that "it would defeat the purpose of the [right] for the tribes in Maine to be deprived of the ability to safely consume fish from their waters at sustenance levels."

In plain language, this means that Maine Tribes can't be expected to survive on fish if they risk getting cancer from eating the fish from Maine's rivers.

Since 2015, you have been in federal court fighting these water quality standards designed to protect the fishing rights of Maine's Tribes—standards that also benefit all Mainers, since all of us depend on clean water and a healthy environment. Just last year, you supported Governor LePage in petitioning Trump's EPA Administrator, Scott Pruitt, to withdraw those standards.

Now let's turn to your efforts far from home.

Last September, you asked the U.S. Supreme Court to review a decision of the Ninth Circuit Court of Appeals that, to comply with a treaty-secured fishing right, Washington could not continue to block the migrations of millions of fish with its dilapidated road culverts. In its ruling, the Ninth Circuit said that the Tribes' treaty right to take fish "would be worthless without harvestable fish."

In plain language, this means that the Tribes of Washington can't be expected to survive on fish if there are no fish alive to catch and eat.

Thanks in part to your efforts, the Supreme Court agreed to review that decision. And just last Friday, you joined a handful of states in yet another brief to the Supreme Court. This time, you urge the Court to reverse the Ninth Circuit's decision: to, in effect, allow Washington (through its maintenance of faulty culverts) to continue harming fish migrations to the detriment of Washington Tribes. Your efforts stand in stark contrast to a state like Oregon, which is subject to the same treaty obligations that Washington is fighting against, but which felt no warrant to join in a fight against the Washington Tribes and environmental protection.

We are deeply concerned about your attacks upon tribal fishing rights at home and well beyond Maine. Your efforts at home threaten critical clean water rules, the survival of our Native American communities, and the safety of all Mainers who depend on a clean environment. Your efforts beyond Maine threaten the survival of Washington's Native American communities, and are not in the best interests of Maine citizens.

Kirk Francis, Chief, Penobscot Nation
Ralph Dana, Chief, Passamaquoddy Tribe
William J. Nicholas, Sr, Chief, Passamaquoddy Tribe
Alison Beyea, Executive Director, American Civil Liberties Union of Maine
Christine Bagliari, on behalf of Central Maine Showing up for Racial Justice (SURJ)
Nickie Sekera, Co-founder, Community Water Justice
Sean Mahoney, Director of Maine Advocacy Center, Conservation Law Foundation
Jessica Burton, Executive Director, Southern Maine Conservation Collaborative
Mike Belliveau, Executive Director, Environmental Health Strategy Center
John Dieffenbacher-Krall, Chair, Episcopal Committee on Indian Relations
Fatuma Hussein, Executive Director, Immigrant Resource Center of Maine
Kenney Miller, Executive Director, Health Equity Alliance
Jim Matlack, Clerk, Friends Committee on Maine Public Policy
Meredith Wheeler, President, Friends of Sebago Lake
Fowsia Musse, Executive Director, Maine Community Integration
Maureen Drouin, Executive Director, Maine Conservation Voters
Jesse Graham, Executive Director, Maine People's Alliance
Landis Hudson, Executive Director, Maine Rivers
Rachel Talbot Ross, Executive Director, Martin Luther King Jr. Fellows
Michael Alpert, President, NAACP Bangor Branch
Lisa Pohlmann, Executive Director, Natural Resources Council of Maine
Sass Linnekin, Director, Resources for Organizing and Social Change
Brian Altvater, Chairman, Schoodic Riverkeepers
Anthony Donovan, Chair, Sierra Club Maine
Sofia Owen, Attorney, Toxics Action Center
Genevieve Morgan and Sarah Gaba, Co-Chairs, Womens March Maine