Nos. 16-1424, 16-1435, 16-1474, & 16-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES, on its own behalf, and for the benefit of the Penobscot Nation,

Plaintiffs-Appellants/Cross-Appellees,

v.

AARON M. FREY, Attorney General for the State of Maine; JUDY A. CAMUSO, Commissioner for the Maine Department of Inland Fisheries and Wildlife; JOEL T. WILKINSON, Colonel for the Maine Warden Service; STATE OF MAINE; TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILFORD-SANGERVILLE SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET; KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF MATTAWAMKEAG; COVANTA MAINE LLC; LINCOLN SANITARY DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSON PAPER CORPORATION,

Defendants-Appellees/Cross-Appellants,

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,

Defendants-Appellees,

TOWN OF ORONO,

Defendant.

On Appeal from the United States District Court
for the District of Maine, No. 1:12-cv-00254-GZS (Hon. George Z. Singal)

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS AND UNITED SOUTH AND EASTERN TRIBES IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES AND REVERSRAL

[*continued on next page*]

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CORPORATE DISCLOSURE STATEMENT

The National Congress of American Indians and United South and Eastern Tribes, Inc., pursuant to Fed. R. App. P. 26.1, certify that they have no parent corporations and certify that they have no stock and, therefore, no publicly held corporation owns 10% or more of their stock.

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INTERESTS OF *AMICI CURIAE*[1]

Amicus National Congress of American Indians ("NCAI") is the Nation's oldest and largest organization of American Indian and Alaska Native Tribal governments and their citizens. NCAI works to educate the general public, and Tribal, Federal, and State officials about Tribal self-government, treaty rights, and policy issues affecting Indian Tribes, including the interpretation of Indian statutes.

Amicus United South and Eastern Tribes, Inc. ("USET"), a nonprofit organization representing 30 Federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET advocates on behalf of its Tribal Nation members by upholding, protecting, and advancing their inherent sovereign authorities and rights.

Amici Curiae share an interest in preserving tribal sovereignty, which is the foundation of the long-established Indian canons of construction implicated by this case. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[1] *Amici Curiae* submit this brief pursuant to this Court's Orders of April 8 and May 14, 2020, inviting amicus briefs. Undersigned counsel hereby certifies that: all parties have consented to *amici curiae*'s submission of this brief; no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person or entity—other than *amici*, their members, and their counsel—contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 18th and 19th centuries, the Commonwealth of Massachusetts, predecessor in interest to the State of Maine ("State"), entered into treaties with the Penobscot Nation ("Nation"), thereby implicitly recognizing the Nation's inherent sovereignty. See Worcester, 31 U.S. at 538 (Marshall, C.J.) (treaties "acknowledge the said Cherokee [N]ation to be a sovereign nation, authorised [*sic*] to govern themselves"). The second treaty explicitly affirmed the Nation's continued possession of, and sovereignty over, "all the islands in the Penobscot river above Oldtown and including said Oldtown Island," which constituted the Penobscot Indian Reservation ("Reservation"). Treaty made by the Commonwealth of Massachusetts with the Penobscot tribe of Indians, June 29, 1818 ("1818 Treaty") (Nation's Suppl. Br. Add.162, 163). Both the State and the United States have enacted statutes, the Maine Implementing Act, Me. Rev. Stat. Ann. tit. 30 (1980) ("MIA"), and the Maine Indian Claims Settlement Act of 1980, 94 Stat. 1785 (previously codified as 25 U.S.C. §§ 1721-1735) ("MICSA")[2] (together, "Settlement Acts"), affirming the Reservation as identified in the 1818 Treaty. MIA § 6203(8) (defining "Penobscot Indian Reservation" as "Old Town Island, and all islands in [the Penobscot River] northward thereof that existed on June 29, 1818"); MICSA § 1722(*i*) (defining "Penobscot Indian Reservation" by reference to MIA).

[2] This Brief identifies sections of MICSA by their former location in the U.S. Code.

Neither the 1818 Treaty nor the Settlement Acts expressly say whether the Reservation includes all or part of the Main Stem of the Penobscot River ("River"), but they offer some strong clues. The 1818 Treaty secured to the citizens of Massachusetts "a right to pass and repass any of the rivers, streams, and ponds, which run through any of the lands hereby reserved." 1818 Treaty. (Nation's Suppl. Br. Add.166). That the Nation could grant such a right to "pass and repass" the rivers that run through their lands necessarily implied that rivers traversed the Reservation and that the Nation governed those rivers. The MIA affirms the right of the Nation's members to "take fish, within the boundaries of [the Reservation], for their individual sustenance." MIA § 6207(4). The articulation of such a right necessarily implies that there are waters within the Reservation where members can fish. Nevertheless, the State now denies that any part of the River falls within the Reservation.

The State has repeatedly promised to respect the Nation's sovereign territory. This Court should "hold the government to its word." McGirt v. Oklahoma, No. 18-9526, slip op. 1 (U.S. S. Ct. July 8, 2020); see also Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great [states], like great men, should keep their word.").

In its Order granting rehearing en banc, the Court asked the Parties to address 12 questions, and also welcomed *amici* to address those questions. Herein, *Amici*

Curiae address Question 1 (the applicability of the Indian canons of construction), Question 2 (the applicability of the canon against conveying navigable waters, and its relationship with the Indian canons), the first element of Question 3 (the applicability of Alaska Pacific Fisheries v. United States, 248 US. 78 (1918)), and the first element of Question 4 (identifying ambiguities in the Settlement Acts).

Specifically, *Amici Curiae* identify three distinct Indian canons of construction that this Court must employ in interpreting the Settlement Acts in order to comport with "the unique trust relationship between the United States and the Indians." Cty. of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247 (1985). Nothing in the Settlement Acts displaces these canons, which are equally applicable when interpreting both Settlement Acts. In addition, *Amici Curiae* demonstrate why this Court must follow Alaska Pacific Fisheries in construing the Settlement Acts.

This Court should reverse the District Court and hold that the Reservation includes the River and the submerged lands beneath it.

ARGUMENT

I. The Indian canons of construction govern interpretation of the Settlement Acts.

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).[3] Thus, when interpreting Indian treaties and statutes, the U.S. Supreme Court employs three distinct canons of construction, each with origins in Worcester.

First, treaties and certain statutes must be interpreted as the Indians would have understood them. Worcester, 31 U.S. at 546-47, 552-54 (Marshall, C.J.) (construing "protection," "allotted," "hunting grounds," and "managing all their affairs" as the Cherokee would have understood them); see also id. at 582 (McLean, J., concurring) ("How the words of the treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction."). Second, ambiguities in treaties and statutes touching on Indian interests must be construed to the Indians' benefit. Id. at 582 (McClean, J., concurring) ("The language used in

[3] Even the Court's most avowed textualist acknowledged the force of the Indian canons. See, e.g. Cty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (Scalia, J.,) (quoting Blackfeet, 471 U.S. at 766).

treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."). Third, only a clear statement of Congressional intent is sufficient to diminish Tribal lands or Tribal sovereign authority. Id. at 554 (Marshall, C.J.,) (any intent to diminish Tribal sovereignty must "have been openly avowed.").

A. This Court must construe the Settlement Acts as the Nation would have understood them.

The Supreme Court has consistently held that "the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) (quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979)); Worcester, 31 U.S. at 552-54, 582. It also has extended that rule to select statutes, in particular statutes—like the Settlement Acts—that ratify an agreement between a Tribe and a State or the Federal Government. See infra Parts I.B-C.[4]

[4] In wrongly asserting that this canon applies only to ambiguous treaty language, Intervenors appear to conflate this canon with the canon construing ambiguities in the Indians' favor. Intervenors' Suppl. Br. 22-21. In Jones v. Meehan, 175 U.S. 1 (1899), the Court catalogued the structural inequalities in the treaty-making process and concluded "that the treaty must therefore be construed, *not according to the technical meaning of its words to learned lawyers,* but in the sense in which they would naturally be understood by the Indians." 175 U.S. at 11 (emphasis added). Implicit in this passage is that even treaty language that appears

This canon has its origins in the United States' trust responsibility, see Worcester, 31 U.S. at 556 (Marshall, C.J.) (noting the United States in Indian treaties "assum[es] the duty of protection, and of course pledg[es] the faith of the United States for that protection"), and accounts for the structural inequalities in Indian treaty making. For example, international treaties traditionally are recorded in the languages of both parties,[5] however Indian treaties were drafted only in English, and the formal negotiation records were kept by the non-Indian side. Kristen A. Carpenter, Interpretive Sovereignty: A Research Agenda, 33 AM. INDIAN L. REV. 111, 112, 120-21 (2008); see also Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1012 (2019) (language barrier as one justification for the canon on Indian understanding). Moreover, the Senate often amended Indian treaties after negotiations with the Tribe had been completed, see FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 435-39 (1994), and consequently "[a] number of treaties were ratified and carried into effect without any attempt to get the Indians' approval." Id. at 436.

1. This canon controls interpretation of the 1818 Treaty, and also controls interpretations of the Settlement Acts in part because those statutes reaffirm the

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unambiguous to the modern reader must be interpreted as the Indians would have understood it.

[5] See, e.g., United States v. Arredondo, 31 U.S. (6 Pet.) 691, 736-37 (1832) (treaty with Spain was executed "in both languages").

boundaries of the Reservation as set forth in the 1818 Treaty. MIA § 6203(8) ("'Penobscot Indian Reservation' means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the State of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818 …."). The Court's starting point, then, must be to determine what the Penobscot Indians would have understood the boundaries of their Reservation to be upon conclusion of the 1818 Treaty. Consequently, this Court must interpret the 1818 Treaty, which means it must employ the canon on Indian understanding.

2. The Supreme Court also uses this canon when interpreting certain statutes. In 1871, the United States unilaterally stopped making treaties with Indian Tribes. Indian Appropriations Act of 1871, 16 Stat. 544, 566 (Mar. 3, 1871). It nevertheless continued to negotiate the terms of its relationships with Indian Tribes through various "treaty substitutes," which were negotiated with Tribes and ratified not by the Senate as treaties, but by Congress as statutes. PRUCHA at 311-33. Such treaty substitutes were subject to many of the same structural inequalities as treaties: the United States created and maintained the record of the negotiation and legislation, and Congress sometimes unilaterally changed the negotiated terms and instead ratified its amended version. DAVID E. WILKINS AND K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 170 (2001).

The Supreme Court treats treaty substitutes as if they were treaties[6]—it sometimes even mistakenly refers to them as treaties[7]—and interprets them as the Indians would have understood them. See, e.g., Marlin v. Lewallen, 276 U.S. 58, 64 (1928) ("[T]he agreements were between the United States and a dependent Indian tribe then under its guardianship, and therefore that they must be construed, 'not according to the technical meaning of their words to learned lawyers, but according to the sense in which they would naturally be understood by the Indians.'") (quoting Jones, supra); Alaska Pacific Fisheries, 248 U.S. at 89 ("The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation."); see also Carpenter v. Shaw, 280 U.S. 363 (1930) (construing Atoka Agreement); Choate v. Trapp, 224 U.S. 665 (1912) (same).

3. The Supreme Court has yet to interpret the Settlement Acts; they are, however, precisely the sort of statutes to which the Court would apply the canon on Indian understanding. As the District Court recounted, the Settlement Acts have their origins in an agreement between the Nation and the State: the MIA was enacted

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[6] The Court takes a similar approach when interpreting a congressionally ratified interstate compact, which it refers to as "both a contract and a statute" and interprets as it would a treaty. See, e.g., Oklahoma v. New Mexico, 501 U.S. 221, 235 n.5 (1991); Vermont v. New Hampshire, 289 U.S. 593, 605 (1933).

[7] See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977) (referring to the Act of March 2, 1889, 25 Stat. 888, as "the 1889 Treaty").

to settle land claims litigation brought by the Nation and other Maine Tribes; and through MICSA, Congress ratified the MIA. Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 189-95 (D. Me. 2015).

Moreover, the Settlement Acts suffer from the same structural inequalities that justify the use of the canon. Of course, by 1980 the use of English did not create the same imbalance it once did. However, the Nation still had no control over the instruments' final terms—the State had such control in drafting the MIA, as Congress did in drafting MICSA. See, e.g., To Provide for the Settlement of the Maine Indian Land Claims: Hearings on S. 2828 before the S. Select Comm. on Indian Affairs, 96th Cong., 2d Sess. vol. 1 411 (1980) ("Senate Hearing") (prepared statement of Dana Mitchell, Bear Clan, Penobscot Nation) ("[I]mportant information has not been supplied to the Indian people, or explained to them. There has been no impartial interpretation of these bills presented to the Penobscot or Passamaquoddy people."). In fact, in drafting the MIA and compiling its legislative history, the State excluded materials submitted by the Tribes expressing their understanding of the scope of their territory, thus ensuring that only the State's understanding would be part of the official record. Mills, 151 F. Supp. 3d at 191-93 & nn.17-18.

Where, as here, statutes that ratify a settlement between two sovereigns exhibit the same structural inequalities observed in Indian treaties, those statutes should be interpreted as if they were treaties.

B. This Court must construe ambiguities in the Settlement Acts in the Nation's favor.

This canon construing ambiguities in the Indians' favor applies to treaties, Herrera, 139 S. Ct. at 1699 ("Indian treaties 'must be interpreted . . . with any ambiguities resolved in favor of the Indians.'") (internal quotation omitted); treaty substitutes, Choate, 224 U.S. at 675 (ambiguous terms in treaty substitute); and statutes, Blackfeet, 471 U.S. at 766 ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). This canon has its roots not only in the trust responsibility, but also in "traditional notions of sovereignty and … the federal policy of encouraging tribal independence." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).[8]

1. This Court, too, interprets statutory ambiguities in the Indians' favor,[9] including ambiguities in Tribal settlement acts.[10] The Settlement Acts here are no

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[8] In the case of treaties and treaty substitutes, the Court also has analogized them to contracts—which, when drafted exclusively by one side, are construed "against the drafter who enjoys the power of the pen." Cougar Den, 139 S. Ct. at 1016 (Gorsuch, J. concurring).

[9] E.g. Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 545 (1997) ("the Supreme Court has instructed that federal statutes concerning Indian tribes must be construed 'liberally in favor of the Indians'") (quoting Blackfeet, 471 U.S. at 766).

[10] Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 691 (1994) (interpreting Narragansett settlement act) ("[W]e are cautioned to follow the general rule that doubtful expressions are to be resolved in favor of Indians.") (quoting Rosebud Sioux, 430 U.S. at 586) (internal alterations omitted).

exception. Penobscot Nation v. Fellencer, 164 F.3d 706, 709 (1st Cir. 1999) ("Fellencer") ("Before we examine the language of the [MIA], we must acknowledge some general principles that inform our analysis of the statutory language. … [S]pecial rules of statutory construction obligate us to construe 'acts diminishing the sovereign rights of Indian tribes strictly,' 'with ambiguous provisions interpreted to the Indians' benefit.") (quoting, respectively, Narragansett, 19 F.3d at 702; and Oneida, 470 U.S. at 247) (internal alterations omitted).[11] In doing so, this Court is no different from its sister circuits, which consistently construe ambiguities in the Indians' favor when interpreting a Tribal settlement, restoration, or acknowledgment act. See, e.g., Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 92 (2d Cir. 2000) (construing ambiguities in Connecticut Indian Land Claims Settlement Act); City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (construing ambiguities in Auburn Indian Restoration Act).

[11] The State erroneously asserts that this Court's invocation of the Indian canons in Fellencer was "dicta" and that this "Court has *never* applied [the Indian canons] when construing MIA or MICSA." State's Suppl. Br. 25 (emphasis in original). In fact, after setting forth these "general principles," the Court expressly said "that Congress 'explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act,'" Fellencer, 164 F.3d at 712 (quoting Penobscot Nation v. Akins, 130 F.3d 482, 489 (1st Cir. 1997)), and that "Congress signaled its intent that federal Indian common law give meaning to the terms of the settlement." Id.

2. The Settlement Acts' failure to expressly address submerged lands in the Penobscot River creates precisely the sort of ambiguity that this canon was intended to resolve. Alaska Pacific Fisheries is instructive, because the ambiguity there was the same as the ambiguity here. "The principal question for decision is whether the reservation … embraces only the upland of the islands or includes as well the adjacent waters and submerged land." 248 U.S. at 87. There, as here, the relevant statute referred only to "lands" and "islands," which the Supreme Court found to be ambiguous with respect to the issue of waters and submerged lands. Id. at 86-87. Yet here, the District Court found no ambiguity because each of the words in the MIA's definition of the Reservation had a "plain meaning,"[12] Mills, 151 F. Supp. 3d at 216-18, even though the same was true in Alaska Pacific Fisheries. The District Court erred.[13]

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[12] Even the most ardent textualists acknowledge that "[a]dhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism … loses sight of the forest for the trees.'" ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 356 (2012) (quoting New York Trust Co. v. Commissioner, 68 F.2d 19, 20 (2d Cir. 1933) (Hand, J.)) (emphasis in original, ellipses in SCALIA & GARNER). The fact that a word is defined in a dictionary does not mean that its meaning in a statute is clear, especially in Indian law, where history and context are so critical to interpretation. See Herrera, 139 S. Ct. at 1699.

[13] The District Court's error is made plain by the fact that, although the Reservation is a defined term, MIA § 6203(8), which the court purported to construe according to its "plain language," the court *also* concluded that its own construction would be "untenable and absurd" if applied to MIA § 6207(4), governing subsistence fishing rights. Mills, 151 F. Supp. 3d at 218-21. To avoid that absurdity, the court

C. This Court must construe the Settlement Acts to preserve the Nation's territory and inherent sovereignty unless presented with a clear statement of Congress's intent to diminish its territory or sovereignty.

When Congress impairs a Tribe's sovereign authority, it must do so clearly—whether diminishing Tribal sovereign territory, McGirt, slip op. 7 (Congress may disestablish a reservation, but the Court "require[s] that Congress clearly express its intent to do so") (citing Nebraska v. Parker, 136 S. Ct. 1072 (2016)); abrogating Tribal sovereign immunity, Michigan v. Bay Mills Indian Community, 572 U.S. 782, 790 (2014) (requiring Congress to "'unequivocally' express" intent to abrogate sovereign immunity from suit) (quoting C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411, 418 (2001)) (quoting in turn Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)); or abrogating Tribal treaty rights, Herrera, 139 S. Ct. at 1698 ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'") (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999)). "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Id. (quoting Mille Lacs, 526 U.S. at 202-03).

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construed the definition through the lens of Alaska Pacific Fisheries for purposes of § 6207(4), meaning that a defined term has two different meanings in the same statute. Id. at 221-22. That is the very essence of ambiguity.

This canon has its origins in the United States' recognition of and respect for Tribal sovereignty, and in the Constitution's separation of powers. From the beginning, the United States has recognized Tribes as sovereigns. U.S. CONST. art. I, § 3, cl. 8 (recognizing Foreign Nations, States, and Indian Tribes as the sovereigns with which Congress may regulate commerce); White Mountain Apache, 448 U.S. at 143-44; Worcester, 31 U.S. at 540 (United States' treaties with Indian Tribes acknowledge Tribes as sovereigns). Out of respect for Tribes' sovereignty, which predates that of the United States, United States v. Wheeler, 435 U.S. 313, 322-23 (1978) ("Before the coming of the Europeans, the tribes were self-governing sovereign political communities."), courts today "will not lightly assume that Congress in fact intends to undermine Indian self-government." Bay Mills, 572 U.S. at 790. Moreover, because the Constitution assigns Indian affairs to Congress, the courts must tread lightly so as not to impinge upon the Legislative domain. McGirt, slip op. at 7 ("the Constitution … entrusts Congress with the authority to regulate commerce with [Indians]," and "courts have no proper role in the adjustment of reservation borders"); Santa Clara Pueblo, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

1. The Penobscot Nation had inherent sovereignty from time immemorial over both lands and waters of the Penobscot River, and it ceded only those lands expressly surrendered in treaties as affirmed in the Settlement Acts. At the time of the United States' founding, the Penobscot River was considered to be "the exclusive tribal domain of the Penobscot people." J.A. 1153-1160. The treaties with Massachusetts in 1796 and 1818 that reduced the Nation's lands were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905).

A Tribe may cede aspects of its sovereignty, and Congress claims the power to abrogate Tribal sovereignty, but a Tribe retains its sovereignty unless expressly ceded or abrogated. Wheeler, 435 U.S. at 322-23. Thus, in examining the 1818 Treaty and the Settlement Acts, the question is *not* whether the Nation reserved parts of the River and the submerged lands beneath it, but rather, whether the Nation expressly ceded the River and submerged lands. Absent such a cession, those submerged lands remain the Nation's.

2. Where Tribal sovereignty is concerned, this Court joins the Supreme Court in requiring a clear statement of Congressional intent to countenance a finding of diminished sovereignty, both generally,[14] and in the context of settlement

[14] E.g. Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1066 (1st Cir. 1979) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers.") (quoting Wheeler, 435 U.S. at 323); see also Joint Tribal Counsel of the

agreements.[15] Again, the Settlement Acts here are no exception. See, e.g., Fellencer, 164 F.3d at 709, 712 (setting forth clear statement rule, and decision based on, *inter alia*, "federal Indian common law"); *see also* Maine v. Johnson, 498 F.3d 37, 47 (1st Cir. 2007) (land and water resources allocated to Nation in MICSA were "retained" by Nation, not acquired for Nation by Secretary of Interior).

D. These canons apply with equal force to the Settlement Acts.

Because "the standard principles of statutory construction do not have their usual force in cases involving Indian law," Blackfeet, 471 U.S. at 766, courts routinely recognize the Indian canons as more than mere tools in the interpretive toolbox, but instead as mandatory. See, e.g., Herrera, 139 S. Ct. at 1699 (treaties "must be construed" as Indians would have understood them); Yakima, 502 U.S. at 269 (resolving ambiguity "must be dictated by" canon favoring Indians); Bay Mills, 572 U.S. at 790 (Congressional action diminishing sovereignty "must be clear"). This court, then, must use these canons in interpreting the Settlement Acts: both the MIA (which implemented the settlement agreement between the State and the

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Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975) ("any withdrawal of trust obligations by Congress would have to have been plain and unambiguous to be effective.") (internal quotation omitted).

[15] Narragansett, 19 F.3d at 701 ("tribes retain their sovereign powers in full measure unless and until Congress acts to circumscribe them."); cf. Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah), 853 F.3d 618, 624-25 (1st Cir. 2017) (sovereign powers not expressly denied in settlement act are retained).

Nation, along with other Maine Tribes), and MICSA (by which Congress ratified the MIA).

Neither MICSA Section 1725(h) nor 1735(b) precludes application of the Indian canons. Section 1725(h) makes most Federal Indian law applicable within the State, with two narrow exceptions that are not implicated by the question presented here. The State asserts that "[t]he Senate Report describes the relevant law that *shall not apply in Maine* as 'the general body of Federal Indian law,'" State's Suppl. Br. 24 (emphasis added), when in fact the Senate Report says the exact opposite: "[U]nless otherwise provided in this Act, the general body of Federal Indian law … *shall be applicable* … within the State of Maine" save for Section 1725(h)'s two exceptions. S. Rep. No. 96-957, at 30 (1980) ("Senate Report") (emphasis added); see also Akins, 130 F.3d at 489 (MICSA "explicitly made existing general federal Indian law applicable to the [Nation]").[16]

Intervenors acknowledge as much, Intervenors' Suppl. Br. 24 (acknowledging that Fellencer applied Indian canons), but argue the canons cannot be invoked to "expand[] the Reservation" because doing so would run afoul of Section

[16] The State similarly misrepresents the Senate Report's reference to Bryan v. Itasca County, 426 U.S. 373 (1976). The Senate Report says nothing about the Indian canons, and instead merely addresses interpreting the word "jurisdiction." Senate Report at 30-31. In addition, the quotation the State proffers suggesting that MICSA interpretation should eschew "general principles of Indian law," State's Suppl. Br. 24 n.14, merely expressed preference of Maine's Attorney General, *not* the opinion of Congress or any of its members. Senate Hearing at 145, 149.

1725(h)(2)'s language preserving the State's jurisdiction. Senate Report at 23-24. This misapprehends Section 1725(h)(2), which bars application of some laws that demarcate jurisdiction, not the application of interpretive tools that might go against the State. If this Court holds that the 1818 Treaty and the Settlement Acts include the River and its submerged lands within the Reservation, it has not "expand[ed] the Reservation," it has clarified what the Reservation always included. The Nation and the United States demonstrate that, since the Settlement Acts were enacted, the State has frequently recognized the Reservation as including the Main Stem. Nation's Suppl. Br. 39-43; U.S. Suppl. Br. 33-36. To the extent the State has, at other times, wrongly denied that the Reservation includes the Main Stem, "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law," or to diminish an Indian reservation. McGirt, slip op. at 42.

Nor does Section 1735(b) does displace the Indian canons. It precludes the application in Maine of some Federal Indian law "enacted" after MICSA unless Congress expressly makes that law applicable in Maine. If it wasn't clear from the word "enacted"—the courts' interpretive rules are not "enacted"—the Senate Report shows that Congress's target was future Acts of Congress. Senate Report at 35 (under Section 1735(b) later-enacted "Federal statutes" and "Federal legislation … shall not be applicable within the State").

II. This Court should follow Alaska Pacific Fisheries.

Amici Curiae agree with the Nation and the United States that the canon against conveying navigable waters is inapplicable here, and that Alaska Pacific Fisheries controls this case. Nation's Suppl. Br. 20-29; U.S. Suppl. Br. 14-18. In the alternative, cases from the Supreme Court and the Ninth Circuit illustrate the interplay between the substantive canons when two sovereigns—a Tribe and a State—lay claim to submerged lands that are not clearly assigned in the relevant treaties and statutes.

It is true that "the ownership of land under navigable waters is an incident of sovereignty." Montana v. United States, 450 U.S. 544, 551 (1981) (citing Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 409-11 (1842)); see also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 283-85 (1997).[17] The Nation, no less than the State, has a sovereign claim to the submerged lands of the Penobscot River, arising from its inherent sovereignty that was not ceded in the 1818 Treaty or the Settlement Acts. In Montana, the Court held that title to the submerged lands of the Bighorn River "passed to the State of Montana upon its admission into the Union." 450 U.S. at 556-57. However, in Idaho and Alaska Pacific Fisheries, the Court held that

[17] Although the Court in Coeur d'Alene discussed the disposition of submerged lands, that case turned solely on a question of sovereign immunity; when the Court decided the case on the merits four years later, it determined that the submerged lands in question did not pass to the State, but instead were reserved for the Coeur d'Alene Tribe. Idaho v. United States, 533 U.S. 262 (2001).

submerged lands were held in trust for Tribes by the United States. How is this Court to reconcile these seemingly divergent outcomes?

The Ninth Circuit showed the way in Puyallup Indian Tribe v. Port of Tacoma. 717 F.2d 1251 (9th Cir. 1983). In Puyallup, some twelve acres of submerged lands from the Puyallup River, within the boundaries of the Puyallup Reservation, were exposed when the U.S. Army Corps of Engineers "straightened" the river. Id. at 1254. To reconcile conflicting canons of construction, the Ninth Circuit looked to Montana:

> The Supreme Court's opinion in Montana provides considerable guidance as to how a court can give proper effect to both the presumption against conveyance and the principle of construction favoring Indians. First, the Court recognized that "establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of Shively v. Bowlby, 152 U.S. [1, 48 (1894)], justifying a congressional conveyance of a riverbed …." 450 U.S. at 556. However, the Court also cautioned that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is not express reference to the riverbed that might overcome the presumption against its conveyance." Id. at 554. The Court cited two cases, apparently to illustrate proper resolutions in the face of competing principles: Alaska Pacific Fisheries and Skokomish Indian Tribe v. France.[18] See id. at 556.

Puyallup, 717 F.2d at 1257-58 (modifications in original, footnote added). Examining those two cases, the Puyallup court found that the holding in Alaska Pacific Fisheries, that the Annette Islands Reservation included submerged lands,

[18] 320 F.2d 205 (9th Cir. 1963).

turned on the importance of the waters generally and of fishing in particular to the purpose and the people of the reservation, while in Skokomish the reservation was limited to the uplands in large part because "the Tribe did not rely on the particular tidelands included in the reservation as an important source of food." Id. at 1258. The Puyallup court said that distinction—the relative importance of the waters and submerged lands to the purpose and people of the reservation—was "confirmed by the penultimate paragraph of that section of the Montana decision," id. at 1258-59, which read in relevant part:

> … [T]he situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds of navigable waters for the future States. See Shively v. Bowlby, supra, at 48. *As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.* … Cf. Alaska Pacific Fisheries, supra, at 88; Skokomish Indian Tribe v. France, 320 F.2d 205, 212 (CA9).

Id. at 1259 (quoting Montana, 450 U.S. at 556) (emphasis in Puyallup).

This is consistent, too, with the Supreme Court's decision in Idaho. Although the agreements outlining the boundaries of the Coeur d'Alene Reservation referred only to "lands," without expressly mentioning the lake or the submerged lands beneath it, the Court ultimately held that the submerged lands were reserved for the

Tribe in part because of the Tribe's insistence that any reservation "make adequate provision for fishing and other uses of important waterways." 533 U.S. at 266.[19]

The rule, then, is simple: Where the instrument(s) that created an Indian reservation are silent as to a body of navigable water within the reservation, a court must consider the importance to the Tribe of the waters and submerged lands. If the waters and submerged lands were unimportant to the Tribe, then silence might be read consistent with the presumption that navigable waters pass to the State upon statehood. E.g. Montana, 450 U.S. at 556-57; Skokomish, 320 F.2d at 212.

If, on the other hand, the waters and submerged lands were important to the Tribe's daily life, then silence should be read consistent with the power of the United States to reserve for Indians a reservation sufficient to meet their needs. E.g. Idaho, 533 U.S. at 265, 266 (Coeur d'Alene "[t]ribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities," and the Tribe insisted that its reservation "make adequate provision for fishing and other uses of important waterways"); Alaska Pacific Fisheries, 248 U.S. at 89 ("The Indians could not sustain themselves from the use of the upland alone."); Puyallup, 717 F.2d at 1259 ("Indeed, as the district court found, '[f]or Puyallup Indians, the fresh water courses of the area [from which they caught anadromous

[19] Idaho also is analogous to the present case in that it, too, involved both lands identified in treaties (like the 1818 Treaty) and lands identified in treaty substitutes (like the Settlement Acts). See generally Idaho, 533 U.S. 262.

fish] were the center of their world and their lives …. Puyallup Indians conceived of their territory as the Puyallup River and the surrounding land …. The Puyallups' spiritual, religious and social life centered around the river." (quoting Puyallup Tribe of Indians v. Port of Tacoma, 525 F. Supp. 65, 71 (W.D. Wash. 1981))).

Applying the rule to this case is simple, as well, because the record shows irrefutable evidence of the importance to the Nation of the River and the resources therein, both at the time of the 1818 Treaty, and continuing to the time of the Settlement Agreements. The Penobscot have lived along, and relied upon, the River from time immemorial. Nation's Suppl. Br. 3-4. The Nation, like Puyallup, even shares its name with the River. Nation's Suppl. Br. 3. In the years leading up to the 1818 Treaty, Massachusetts' Indian agent John Blake reported the Nation to be concerned not only about losing their land, but also about losing "the shad fishery, upon which the Penobscots depended for their subsistence." PAULEENA MACDOUGAL, THE PENOBSCOT DANCE OF RESISTANCE: TRADITION IN THE HISTORY OF A PEOPLE 121-22 (2004). The Nation consistently objected to attempts to install fish weirs or to dam tributaries in ways that would prevent fish from reaching their spawning waters. Id. at 123-24. At the time of the 1818 Treaty, the Nation could no more support itself on its uplands alone than could the Metlakahtlans on the Annette Islands; their reliance on the River and its bounty was like that of the Coeur

d'Alenes on Lake Coeur d'Alene and its rivers and the Puyallups on the Puyallup River.

Although much had changed between the 1818 Treaty and the Settlement Acts, the Nation's reliance on the River had not. Tribal members testified before Congress about their reliance on fishing the River for sustenance. Mills, 151 F. Supp. 3d at 193, 194 n.19. The MIA expressly provides that the "Penobscot Nation may take fish, within the boundaries of" their reservation, MIA § 6207(4), a provision that would be meaningless if the Reservation does not include the Main Stem, as "[n]one of th[]e islands contains a body of water in which fish live." Mills, 151 F. Supp. 3d at 186. And the District Court found, "the undisputed record is replete with evidence that members of the Penobscot Nation have continuously sustenance fished in the waters of the Main Stem both prior to the Settlement Acts and after the enactment of the Settlement Acts." Id. at 218.

As this Court seeks to navigate between the presumption that submerged lands in navigable waters belong to States, and the presumption that creation of an Indian reservation necessarily reserves those lands, waters, and other resources necessary for its people and its purpose, Alaska Pacific Fisheries lights the way. In light of the Nation's continued reliance on the Penobscot River and the resources it provides, from time immemorial until the present day, this Court should reverse the District Court and hold that the submerged lands of the Main Stem belong to the Nation.

CONCLUSION

For the foregoing reasons, *amici* join the Penobscot Nation and the United States in respectfully urging this Court hold that the Penobscot Indian Reservation includes the Main Stem of the Penobscot River and the submerged lands thereof.

Respectfully submitted by:

DATED: July 15, 2020

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1. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because this brief contains 6,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Word 2016.

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DATED: July 15, 2020

s/ Daniel D. Lewerenz
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I hereby certify that, on July 15, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. Counsel of record for all parties are registered as ECF Filers and will be served by the CM/ECF system:

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