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December 16, 1993

Michael J. Anderson  
Associate Solicitor  
Division of Indian Affairs  
United States Department of the Interior  
Office of the Solicitor  
Washington, D.C. 20240

Dear Mr. Anderson:

In a letter dated August 27, 1993, addressed to Attorney Daniel Boxer and myself, you advised us that the Penobscot Indian Nation has requested the Department of the Interior to examine the 1980 Maine Indian Claims Settlement Act (25 U.S.C. § 1721 *et seq.*) and the Maine Implementing Act (30 M.R.S.A. § 6201 *et seq.*) for the purpose of determining whether islands located in the West Branch of the Penobscot River are included within the Penobscot Indian Reservation.<sup>1</sup> You also advised us that at the request of the Bureau of Indian Affairs, your Office was conducting such an analysis. Your letter also indicated that you had met with the staff of the Maine Congressional Delegation and that you were writing to Mr. Boxer and myself at their suggestion to inquire if any documents in our possession might assist your Office in your legal analysis.

On November 3, 1993, a member of your staff, Attorney Kerry O'Hara, met with Mr. Boxer and his associate, and on November 4, 1993, Ms. O'Hara met with members of my staff. We provided her a Memorandum accompanied by supporting

<sup>1</sup>The term "Penobscot Indian Reservation" is defined in 30 M.R.S.A. § 6203(8) to mean "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all the islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act. If any land within Nicasow Island is hereafter acquired by the Penobscot Nation, or the secretary on its behalf, that land shall be included within the Penobscot Indian Reservation" (emphasis added).

materials, regarding this Office's position on the status of the islands in the West Branch.

Your letter of August 27, 1993, however, only asked us to produce documents for your analysis. You did not request this Office to provide you with its legal analysis of the issue you were studying. Moreover, during her meeting with members of my staff on November 4, 1993, Ms. O'Hara did not seek our views on this issue, but did receive the Memorandum prepared for her.

We find this somewhat peculiar since, in our view, the issue you are analyzing, namely, "Whether islands located in the West Branch of the Penobscot River are included within the Penobscot Indian Reservation," is uniquely a matter of Maine State law. Additionally, the correct resolution of this issue is of vital importance to the State of Maine. Finally, we believe this Office has a special ability to provide the appropriate analysis and resolution of this issue since it represented the State of Maine in the lengthy negotiations that ultimately culminated in the Settlement and Implementing Acts.

Accordingly, this letter will constitute the Opinion of this Office on the general issue you have identified in your August 27, 1993 letter, as well as various related issues relevant thereto.

#### I DOES MAINE LAW APPLY?

- (A) To resolve issues concerning the definition of "Penobscot Indian Reservation" within the meaning of 30 M.R.S.A. § 6203(8)?
- (B) To resolve title, dominion, possession and control issues as to whether a "transfer" under 30 M.R.S.A. § 6203(13) and 25 U.S.C. § 1722(n) has occurred?
- (C) To resolve land title and transfer issues arising under the Treaty of 1818 or other relevant treaties?

In our view, Maine law applies in all situations. Both the Federal Settlement Act and the State Implementing Act were drafted with the explicit intent that Maine law would apply to Indians within Maine with a few specifically delineated exceptions. The Maine Implementing Act (30 M.R.S.A. § 6204) provides that:

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

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

Moreover, in the legislative findings and declaration of policy contained within the Maine Implementing Act, it is specifically stated that the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in that Act. 30 M.R.S.A. § 6202. The Maine Implementing Act, therefore, explicitly makes the general laws of the State of Maine applicable to Indians and Indian lands. The Implementing Act also gave Maine courts jurisdiction over Indians and Indian lands to the same extent as any other Maine citizen or other lands in Maine.

The Federal Settlement Act specifically approved and ratified this jurisdictional provision and provided that:

The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the Tribe, Nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

25 U.S.C. § 1725(b)(1). Thus, as a matter of both federal and state law, Maine law is made specifically applicable to the Passamaquoddy Tribe and Penobscot Nation, their members, and the lands held by, or for, them within Maine.

Furthermore, the Federal Settlement Act explicitly provides that no law or regulation of the United States which "accords or relates to a special status or right of or to any Indian, Indian nation, tribe... Indian lands, Indian reservations... and which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine... shall apply within the State." 25 U.S.C. § 1725(h). This language has been held to include federal case law. See Penobscot Nation v. Stilphen, 461 A.2d 478, 488 (Me.), appeal dismissed, 464 U.S. 923 (1983). As counsel for the Maine tribes explained, "[t]he general body of Federal Indian law is excluded in part because that was the position that 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 the internal tribal matters." Hearings before the Select Committee on Indian Affairs, U.S. Senate on S. 2829, 96th Cong., 2nd Sess. (July 1 & 2, 1980) at 181-182.

These provisions confirm the intent of both Congress and the Maine Legislature to apply the civil law of Maine to civil matters, including title and other property-related issues concerning Maine Indians and Indian lands within the State.

The intent of these jurisdictional provisions is to treat Maine Indians as any other Maine citizen is treated under Maine's laws. Since land disputes do not fit within any of the exceptions to the general rule that Maine law will govern, it follows that Maine law will determine whether a "transfer" has occurred under 30 M.R.S.A. § 6203(13) and 25 U.S.C. § 1722(n) and that this issue and the legal principles involved in its resolution would fall within the jurisdiction of the courts of the State of Maine.

State law would also apply to the interpretation of any land ownership questions arising under the definition of "Penobscot Indian Reservation" as set forth in 30 M.R.S.A. § 6203(8) and under the Treaty of 1818 (and, to the extent relevant, the Treaty of 1796) which is an integral part of that definition. As an initial matter, it should be noted that the phrase "Penobscot Indian Reservation" is defined solely in the Maine Implementing Act. 30 M.R.S.A. § 6203(8). See note 1, *supra*. The Federal Settlement Act defines "Penobscot Indian Reservation" to mean "those lands as defined in the Maine Implementing Act." 25 U.S.C. § 1722(i). Thus, Congress did not create a definition of its own but utilized the definition already found in the Maine Implementing Act, a piece of state legislation.

Moreover, in enacting the Federal Maine Indian Claims Settlement Act, Congress approved and ratified all the treaties with the Penobscots, including the Treaty of 1818. See 25 U.S.C. § 1723(a)(1). The Federal Settlement Act provides that any aboriginal claim to lands ceded to Massachusetts in the Treaty of 1818 are deemed extinguished by Congress as of the date of the original transfer. See 25 U.S.C. § 1723(b).

The legislative history of the Acts demonstrates the intent to apply the laws of Maine, including Maine common law and the colonial ordinances to Indians and Indian lands. For example, the Federal Settlement Act itself defines the phrase, "laws of the State" to mean the "constitution and all statutes, regulations, and common law of the State of Maine and its political subdivisions and all subsequent amendments thereto or judicial interpretations thereof." 25 U.S.C. § 1722(d). See also 30 M.R.S.A. § 6203(4).

Moreover, an analysis prepared for the Maine Legislature when it was considering the Maine Implementing Act described the effect of 30 M.R.S.A. § 6204 as follows:

This section is the crucial section from the State's view. It provides that all laws of the State, including the Maine

Constitution and the Colonial Ordinances, apply to Indians, Indian lands, and Indian property rights.... This section, in effect, amends federal Indian law to provide that state law generally governs Indians and Indian land in the state. This section also amends the exclusive jurisdiction of federal courts to allow state court jurisdiction.

Memorandum to the Indian Land Claims Committee, re: preliminary bill analysis: L.D. 2037, at page 3 (March 31, 1980). See also Penobscot Nation v. Stilphen, 461 A.2d at 488-89. By specifying that Maine common law and the colonial ordinances would apply to Indian land, the Legislature and Congress unambiguously demonstrated an intent to apply Maine law to interpretations of transactions involving Indians and Indian lands during the colonial period.

Given (1) that Congress ratified treaties with the Penobscots, including the Treaty of 1818 and extinguished all Indian claims to these lands, (2) that the United States was not a party to these treaties, (3) that both Congress and the Maine Legislature specified that Maine law would apply to resolve disputes involving Indians and Indian lands in Maine, and (4) that both Congress and the Maine Legislature must be deemed to have clearly understood that application of Maine law would involve interpretation reaching as far back as the colonial period, it follows that Maine law is to be applied retroactively as well as prospectively under 30 M.R.S.A. § 6204 of the Maine Implementing Act. Thus, to resolve Indian land issues requiring interpretation of the 1818 Treaty, Maine law, including Maine common law and the laws in effect in 1818, must be applied.

In fact, since Maine was not yet a separate state in 1818, the laws of the Commonwealth of Massachusetts would have governed the transaction at the time the Treaty of 1818 was executed. Subsequent disputes requiring interpretation of the 1818 Treaty or its predecessor, the Treaty of 1796, therefore, must be decided under the laws of Maine and the laws of the Commonwealth of Massachusetts prior to Maine's separation from it. Title questions arising under the Treaty of 1818 are thus to be determined in accordance with the laws of the State of Maine, and the courts of the State of Maine would have jurisdiction to adjudicate such matters.

**II. DID THE MAINE INDIAN CLAIMS SETTLEMENT ACT EXTINGUISH ALL CLAIMS TO LAND, OR ISLANDS, WHICH MAINE INDIANS, INDIAN TRIBES OR INDIAN NATIONS ALLEGED THEY HAD A RIGHT TO IN THE INDIAN LAND CLAIMS LITIGATION PRIOR TO THE ENACTMENT OF THE SETTLEMENT AND IMPLEMENTING ACTS?**

The Federal Settlement Act extinguished any and all claims which the Interior Department alleged on behalf of the Passamaquoddy and Penobscot Indians during the 1970's. 25 U.S.C. § 1723. In the Federal Settlement Act Congress approved and ratified all previous transfers of land and natural resources from, by, or on behalf of the Penobscot Nation:

Any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, and any transfer of land or natural resources located anywhere within the State of Maine, from, by, or on behalf of any Indian, Indian Nation, or tribe or band of Indians, including but without limitation any transfer pursuant to any treaty, compact, or statute of any state, shall be deemed to have been made in accordance with the constitution and all laws of the United States..., and Congress does hereby approve and ratify any such transfer effective as of the date of said transfer.

25 U.S.C. § 1723(a)(1). Congress also explicitly extinguished aboriginal title to all of the lands described in § 1723(a)(1) and claimed by the Maine Indians in the litigation. See 25 U.S.C. § 1723(b). In exchange for voluntarily accepting the settlement, the Maine Indians received payments of more than eighty-one million dollars.

Furthermore, the legislative intent of Congress to extinguish these claims is abundantly clear. Senator William Cohen, the sponsor of the Federal Settlement Act legislation, stated that "S. 2829 extinguishes all claims the tribes might have based on aboriginal title and, in turn, establishes a trust fund of twenty-seven million dollars for the benefit of the Passamaquoddy and Penobscot Tribes." See Congressional Record, 26, 887 (September 23, 1980).

Senator George Mitchell stated his belief that "the legislation extinguishes all claims to land in Maine based on aboriginal title and abolishes actions for damages related to those claims." Congressional Record, 26, 888 (September 23, 1980). Senator Mitchell explained his intent to eliminate any questionable title to these lands:

The bill before us, S. 2829, would extinguish all Indian land claims in Maine, thus removing the cloud on title to two-thirds of the state...

Hearings before the Select Committee on Indian Affairs, U.S. Senate, on S. 2829, 96th Cong., 2nd Sess. (July 1 & 2, 1980) at 29. During his questioning of then Secretary of



the Interior Cecil Andrus, Senator Mitchell sought assurances that the Settlement Act would extinguish all claims.

Responding to Senator Mitchell's request, the Solicitor of the Interior Department provided a legal opinion to the Chairman of the Select Committee. This letter was made part of the hearing record and concluded that the Federal Settlement Act would "provide a complete settlement and full extinguishment of the Maine Indian land claims and all tribal claims which may have arisen prior to the date of the enactment of this legislation." *Id.* at 89-93 (emphasis added).

The Senate Report accompanying S. 2829 reiterated the opinion which the Department of the Interior gave to Congress that the Federal Settlement Act would "effectively and completely extinguish the Maine Indian land claims and all related tribal claims...". See Senate Report No. 96-957 at page 22 (96th Cong. 2nd Sess., 1980). This legislative history demonstrates that Congress intended that the Settlement Act would completely extinguish all land claims of the Maine Indians.

**III. DID THE MAINE IMPLEMENTING AND SETTLEMENT ACTS RATIFY THE TREATIES OF 1796 AND 1818? IF SO, DID THE PENOBSCOT INDIAN RESERVATION IN EXISTENCE IN 1818 BY VIRTUE OF THESE TREATIES INCLUDE ISLANDS IN THE BRANCHES OF THE PENOBSCOT RIVER?**

In addition to extinguishing all Indian aboriginal claims, Congress ratified and approved all prior treaties, including the Treaties of 1796 and 1818. 25 U.S.C. § 1723(a)(1).

In the Treaty of 1796, the Tribe relinquished to the Commonwealth of Massachusetts "all the lands on both sides of the River Penobscot, beginning near Col. Jonathan Eddy's dwelling house, at Nichel's rock..., extending up the said River thirty miles on a direct line,... on each side thereof; excepting however, and reserving to the said tribe, all the Islands in said River, above Old Town, including said Old Town Island, within the limits of the said thirty miles." Thus, the Treaty of 1796 dealt only with the land and islands in the Penobscot River for a length of thirty miles from Nichel's rock (near Old Town). See Penobscot Tribe v. Veazie, 58 Me. 402 (1870) (reservation referred to is 1796 Treaty was not a grant of islands - it merely reserved the title the Indians had before).

It was not until the Treaty of 1818 that the Commonwealth and the Penobscot Tribe reached an agreement concerning the land and islands in the Penobscot River

and its Branches above the thirty-mile tract. The Treaty of 1818 provided in relevant part as follows:

Witnesseth, that the said Penobscot tribe of Indians in consideration of the payments by them now received of said commissioners, amounting to four hundred dollars, and of the payments hereby secured and engaged to be made to them by said Commonwealth, do hereby grant, sell, convey, release and quit claim to the Commonwealth of Massachusetts, all their, the said tribes, right, title, interest and estate, in and to all the lands they claim, occupy and possess by any means whatever, on both sides of the Penobscot River, and the branches thereof, above the tract of thirty miles in length on both sides of said river, which said tribe conveyed and released to said Commonwealth by their deed of the eighth of August, one thousand seven hundred and ninety-six, excepting and reserving from this sale and conveyance, for the perpetual use of said tribe of said Indians, four townships of land...

And the said tribe do also release and discharge said Commonwealth from all demands and claims of any kind and description, in consequence of said tribes' indenture and agreement made with said Commonwealth, on the eighth day of August, one thousand seven hundred and ninety-six... and we the undersigned commissioners on our part in behalf of said Commonwealth, in consideration of the above covenants, and release of said Penobscot Tribe, do covenant with said Penobscot Tribe of Indians, that they shall have, enjoy and improve all the four excepted townships described as aforesaid, and all the islands in the Penobscot River above Old Town and including said Old Town Island.

By this Treaty the Penobscots released any claim to lands "on both sides of the Penobscot River, and the branches thereof, above the tract of thirty miles in length on both sides of said river." Further, the Penobscots released and discharged Massachusetts from any claims which may have existed under the Treaty of 1796. In exchange for their release, the Tribe was granted four townships (later sold in 1833 to the State of Maine for \$50,000), two acres of land in Brewer, and "all the islands in the Penobscot River above Old Town," and various articles. Whatever claims the

Tribe had to the lands and islands in the Branches above the main stem of the river were thus released and discharged by the 1818 Treaty.<sup>2</sup>

The reservation of "all islands in the Penobscot River above Old Town" to the Indians in the 1818 Treaty did not include any islands in the Branches. The language used in the Treaty specifically differentiates the "Penobscot River" in describing the islands reserved to the tribe, from the "branches thereof" in describing the claims relinquished by the tribe. This language demonstrates that the signatories to the Treaty understood the difference between the River and its Branches and could differentiate between them when they intended to. It would create a blatant inconsistency in the Treaty language to interpret "Penobscot River" as used in the reservation of islands to refer both to the River and its Branches when the drafters clearly distinguished the Branches from the River elsewhere in the same document.

The 1818 Treaty reserved to the Penobscots only the islands in the Penobscot River. Nothing in the Treaty even remotely suggests that any land or islands in any Branches or tributaries of the Penobscot River were being reserved. Indeed, exactly the opposite is true, since the Tribe, by the Treaty, was unequivocally ceding any claim to land in the Branches of the Penobscot River.

Similarly, the statutory definition of "Penobscot Indian Reservation" as found in 30 M.R.S.A. § 6203(8) refers only to the islands in the Penobscot River "and all islands in that river northward thereof...." (emphasis added). There is absolutely nothing in this statutory language that indicates that any islands in the Branches or tributaries were to be included. Today, as they were in 1818, the Penobscot River and its Branches are recognized as being separate and distinct bodies of water. See Atwood, The Length and Breadth of Maine at 218 (1947, repr. 1973).

Subsequent history confirms the interpretation that the 1818 Treaty reserved to the Penobscots only those islands in the main stem of the river from Old Town to Mattawamkeag. Numerous official Maine State reports and legislation required inventories of the Penobscot islands after 1818. For example, in 1835, the Maine Legislature enacted a law to survey Penobscot Tribal lands, and directed that the "land agent, shall cause the islands of the Penobscot River from the Old Town Falls

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<sup>2</sup>The Penobscots' claim to this land was tenuous even before the Treaties of 1818 and 1796. The Penobscot Tribe had forfeited all of its lands to the Crown when it joined with the French to war on the American Colonies in the French and Indian War (1755-1763). Two delegations of the Penobscot Tribe suing for peace in 1760 admitted that they had joined with the French in the war and recognized that they had forfeited all their lands as a consequence. See Memorandum of Joseph Brennan to William Gunter, re: Maine Indian Land Claims (May 5, 1977).

to Mattawamkeag Point, to be accurately surveyed...". See 1835 Laws, ch. 158. Almost one hundred years later, a 1942 report prepared at the request of the Legislative Research Committee identified the Reservation to include the 146 islands in the Penobscot River from Old Town to Mattawamkeag. See Proctor Report on Maine Indians, September 1942. Ten years after the Proctor Report, the Department of Health and Welfare did a report for the Legislative Research Committee in which it inventoried all 146 of the Penobscot Islands between Old Town and Mattawamkeag. Additional reports prepared in 1964, 1971, and 1975 reiterated the fact that the Penobscot Tribe held only the 146 islands in the main stem of the river from Old Town to Mattawamkeag. The State of Maine has thus consistently interpreted the Treaty of 1818 to reserve to the Tribe only those islands in the main stem of the river above Old Town.<sup>3</sup>

The Penobscots own Tribal Reservation Housing Authority identified only the 146 islands in the main stem as belonging to the Penobscots. The Penobscot Tribal Authority did an extensive inventory and study of the Penobscot islands in 1979 - notably at the same time that intense debate and negotiation over the land claims was occurring. This 1979 Penobscot Tribal Survey listed only the 146 islands from Old Town to Mattawamkeag.

Lastly, both the Department of the Interior which filed suit on behalf of the Indians in the 1970's, and the Indians' own counsel, Archibald Cox, have acknowledged in prior statements that the Penobscots hold only islands in the main stem.

In a January 10, 1977, letter to the Honorable Peter Taft, Assistant United States Attorney General, the Interior Department Solicitor outlined the history of treaties and land transactions with the Penobscots and summarized these transactions: "As a result, the Penobscot Nation today holds only the islands in the Penobscot River between Old Town and Mattawamkeag." Further, the Indians' own attorney, Archibald Cox, sent a letter to the Honorable William B. Gunter which included a historical summary prepared by the Interior Department. The historical summary contained the same conclusion, namely, that the Penobscot Nation held only the islands from Old Town to Mattawamkeag. See Letter to William Gunter from Archibald Cox (March 22, 1977).

These statements by the Penobscot Nation's own counsel and the Interior Department, constitute admissions of fact, particularly when one considers that the Penobscot Nation, aware of the statements, did not make any effort to modify or withdraw them prior to the enactment of the Implementing and Settlement Acts.

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<sup>3</sup>Copies of this and other historical materials were provided to Ms. O'Hara during her meeting with members of my staff on November 4, 1993.

Accordingly, in view of the fact that the Penobscots released any claim to lands above the main stem of the Penobscot River in the Treaty of 1818, they have no tenable claim to islands or any other land lying on or in the Branches of the Penobscot River, with the exception of the two townships received as part of the 1818 Treaty. The Indians sold those townships, along with two other townships in the main stem of the river, to the State in 1833 for \$50,000. The 1980 Implementing and Settlement Acts were intended to ratify these earlier treaties and transfers and to define the existing reservation as those islands in the main stem from Old Town to Mattawamkeag.

**IV. DOES THE DEFINITION OF "PENOBSCOT INDIAN RESERVATION" IN 30 M.R.S.A. § 6203(8) INCLUDE ISLANDS IN THE BRANCHES OF THE PENOBSCOT? DID THE IMPLEMENTING AND SETTLEMENT ACTS EXPAND THE PENOBSCOT INDIAN RESERVATION AS IT EXISTED IN 1980?**

It is the opinion of this Office that the definition of "Penobscot Indian Reservation" in 30 M.R.S.A. § 6203(8) does not include islands in the Branches of the Penobscot River and the Implementing and Settlement Acts did not expand the Penobscot Indian Reservation from what it was in 1980.

An analysis of the definition of "Penobscot Indian Reservation" makes it clear that reservation status is limited to islands located in the Penobscot River and even then an island must meet the other criteria specified in the statutory definition. There are four criteria for the inclusion of islands in the Reservation. First, the island must be an "island[ ] in the Penobscot River." Second, the island must have been reserved by agreement with Massachusetts and Maine. Islands meeting these first two criteria are then described as consisting solely of Indian Island and all the islands in "that river" northward. Third, the island must have existed on June 29, 1818. Fourth, ownership of the island must have been retained by the Penobscot Nation or one of its members between June 29, 1818 and the effective date of the Maine Act.<sup>4</sup>

Congress and the Maine Legislature intended the "Penobscot Indian Reservation" to include only those islands in the Penobscot River extending from Old Town to Mattawamkeag. Maps used by the Congressional Delegation during the

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<sup>4</sup>The definition explicitly provides that Nicatow Island, located in the main stem, would be included in the Penobscot Indian Reservation if it were later acquired by the Penobscot Nation. See 30 M.R.S.A. § 6203(8).

consideration of the Federal Settlement legislation and presented to the Senate Select Committee on Indian Affairs, clearly indicate that the contemplated reservation only extended as far as Mattawamkeag in the main stem of the Penobscot River. These maps show that no islands within the Branches of the Penobscot River were ever intended to be included within the reservation. See Hearing before the Select Committee on Indian Affairs, U.S. Senate on S. 2829, 96 Cong. 2nd Sess. at page 283 (July 1 & 2, 1980).<sup>5</sup>

Furthermore, the Senate Select Committee on Indian Affairs expressed its intent to recognize and define the "existing" Penobscot Indian Reservation and, therefore, not to extend the reservation to the Branches of the Penobscot. See Senate Report, No. 96-957, 96th Cong., 2nd Sess. (1980) at page 35. The Maine Legislature similarly understood that the definition of "Penobscot Indian Reservation" would establish the reservation as it existed prior to the Settlement Act. A State legislative analysis of the bill which ultimately became the Implementing Act, stated that "this definition establishes the boundary of the Penobscot Reservation as it is today." Memorandum to the Indian Claims Committee, re: preliminary bill analysis on L.D. 2037, at page 3 (March 31, 1980) (emphasis added).

In light of this legislative history, it is clear that both Congress and the Maine Legislature intended the definition of the "Penobscot Indian Reservation" to merely describe the well-understood fact that the Penobscots held the islands between Old Town and Mattawamkeag. There is no evidence suggesting that, at the time of the consideration and enactment of the Implementing and Settlement Acts, any representative of the Penobscot Nation did or said anything in disagreement of this understanding. This point is significant since a map showing the intended Reservation was available for all to see and was reprinted in the Senate Hearing Record. Hearings before the Select Committee on Indian Affairs, U.S. Senate, on S. 2829, 96th Cong., 2nd Sess. (July 1 & 2, 1980) at 283.

Furthermore, any lands which were transferred to a non-Indian subsequent to 1818 are not included within the definition of "reservation" under the Implementing and Settlement Acts. See 30 M.R.S.A. § 6203(8) and 25 U.S.C. § 1722(i). The definition of transfer is broadly drafted, under both the federal and state acts, to include but not be limited to:

Any voluntary or involuntary sale, grant, lease,  
allotment, partition, or other conveyance; any transaction  
the purpose of which was to effect a sale, grant, lease,

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<sup>5</sup>A copy of the map showing the extent of the Penobscot Indian Reservation as contemplated by the Implementing and Settlement Acts was provided to Ms. O'Hara during her visit to Augusta on November 4, 1993.

allotment, partition, or conveyance; and any act, event, or circumstance that resulted in a change in Title to, possession of, dominion over, or control of land or natural resources.

30 M.R.S.A. § 6203(13); 25 U.S.C. § 1722(n). In fact, even if actual title was not exchanged, mere dominion or control would qualify as a "transfer" under this definition.

The legislative history of the definition of "transfer" indicates that the definition was drafted to "cover all conceivable events and circumstances under which title, possession, dominion, or control of land or natural resources can pass." Senate Report, No. 96-957, 96th Cong. 2nd Sess., (1980), at 21. Therefore, under both the federal and state acts, any land which was transferred, possessed or controlled by a non-Indian between 1818 and 1980 could not be a part of the reservation because Congress extinguished any claim to this land.

V. UNDER MAINE LAW, IF A PROPERTY OWNER HAS TITLE TO A TRACT THROUGH WHICH A RIVER RUNS, DOES TITLE TO THE LAND ON BOTH BANKS OF THE RIVER INCLUDE TITLE TO ISLANDS IN THE RIVER? SIMILARLY, DOES TITLE TO THE LAND ON ONE BANK INCLUDE TITLE TO ISLANDS OUT TO THE THREAD OF THE RIVER?

The answer to this question may be of relevance to you during the course of your analysis of the issue which has been posed, namely, whether islands in the West Branch of the Penobscot River are part of the "Penobscot Indian Reservation."

Maine courts have consistently applied the rule of English Common Law that a riparian owner holds title to the thread of the river. See Brown v. Chadbourne, 31 Me. 9 (1849); Pearson v. Rolfe, 76 Me. 380 (1884); Wilson & Son v. Harrisburg, 107 Me. 207, 77 A. 787 (1910). If there are islands within the river or stream, riparian land ownership conveys ownership of any islands. Granger v. Avery, 64 Me. 292 (1874). This principle of property law predates Maine's separation from Massachusetts in 1820. See, e.g., Lunt v. Holland, 14 Mass. 149 (1817).

It is therefore clear, under both current Maine law and the law of the Commonwealth of Massachusetts in effect when the Treaty of 1818 was executed, that riparian owners holding both sides of a non-tidal river in Maine hold title to any island in the river arising from the river bed.

I hope this Opinion and the information and analysis contained herein is helpful to you and will assist you in the completion of your analysis. I also hope that it helps you to understand the uniqueness of the Maine Implementing and Settlement Acts and the jurisdictional relationship those Acts created between the State of Maine and Maine Indians. As the counsel for the Penobscot Nation stated during the public hearings before the State Legislative Committee considering the Maine Implementing Act, and as the Maine Supreme Judicial Court has recognized, the Implementing Act created "a governmental relationship between Indians and non-Indians alike - unlike that which exists anywhere else in the United States." See Transcript of March 28, 1980 Public Hearings before the Joint Select Committee on Indian Claims, at page 25 (1980) as quoted in Penobscot Nation v. Stilphen, 461 A.2d at 488-89.

Please do not hesitate to call me or any member of my staff if you have any questions or if I can be of any assistance to you.

Sincerely,

  
MICHAEL E. CARPENTER  
Attorney General  
State of Maine

MEC/sbr

cc: The Honorable George Mitchell  
The Honorable William Cohen  
The Honorable Olympia Snowe  
The Honorable Herbert Clark  
The Honorable Michael Michaud  
The Honorable Jerry Pardilla, Governor, Penobscot Indian Nation  
Daniel Boxer, Esquire