Federal Indian Law—First Circuit Court of Appeals Clarifies Penobscot Nation's Reservation Boundary—*Penobscot Nation v. Mills*, 861 F.3d 324 (1st Cir. 2017).

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The principles of Federal Indian law developed to address the unique relationship and history between the United States federal government and the Native American people, nations, and tribes.[1] In *Penobscot Nation v. Mills*,[2] the First Circuit Court of Appeals examined the Maine Indian Claims Settlement Act (MICSA) and the Maine Implementing Act (MIA), together known as the "Settlement Acts," to determine whether the Penobscot Nation's reservation (Reservation) boundary included a sixty-mile stretch of the Penobscot River known as the "Main Stem."[3] After a thorough analysis, the First Circuit Court of Appeals held that the Reservation boundary was limited to certain islands in the Main Stem.[4]

Prior to the first North American settlers, descendants of the federally recognized Penobscot Nation, a riverine people, occupied a large area of land in Maine, including the Main Stem section of the Penobscot River.[5] Over time

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1. *See* MATTHEW FLETCHER, FEDERAL INDIAN LAW 21-22, 30, 43-44, 175 (1st ed. 2016) (discussing early development of Supreme Court jurisprudence, congressional plenary power, and federal trust responsibility); AMERICAN INDIAN LAW DESKBOOK: CONFERENCE OF WESTERN ATTORNEYS GENERAL at 24-25 (Larry Long & Clay Smith eds. 2008) (explaining Indian canons of construction originated due to unequal bargaining power); *see also infra* notes 22-25 (discussing development of Indian canons of construction, trust relationship, and congressional treaty abrogation).

2. 861 F.3d 324 (1st Cir. 2017).

3. *See* 861 F.3d at 327 (reviewing lower court's holding and affirming in part); Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 186-87 (D. Me. 2015) (identifying Main Stem stretch of Penobscot River with around 146 islands, totaling about 5,000 acres), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017). The First Circuit also considered whether the Penobscot Nation had standing to assert their sustenance fishing right on the Penobscot River. *See id.* at 336 (holding sustenance fishing issue not ripe and Penobscot Nation lacked standing to assert issue); *see also* Paul J. Bisulca, *Indian Sustenance Fishing Rights in the Penobscot River Must Continue*, BANGOR DAILY NEWS (Sept. 23, 2012), http://bangordailynews.com/2012/09/23/opinion/contributors/indian-sustenance-fishing-rights-in-the-penobscot-river-must-continue/ [https://perma.cc/JUQ6-V8JJ] (describing Penobscot Nation sustenance fishing rights where tribal members take fish for sustenance within Reservation). The United States intervened on its own behalf and as a trustee for the Penobscot Nation, and multiple parties intervened in support of the state defendants. *See* 861 F.3d at 324 (naming parties).

4. *See* 861 F.3d at 327 (holding waters of Main Stem not part of Reservation). By holding that the Reservation included only the islands and not the water of the Main Stem section of the Penobscot River, the court affirmed the district court's holding. *Id.*

5. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017) (listing federal recognition of Penobscot Nation); Final Principal Brief for Penobscot Nation at 4-6, Penobscot Nation v. Mills, 861 F.3d 324 (1st Cir. 2017) (Nos. 16-

the Penobscot Nation engaged in land dealings, resulting in the confinement of the Reservation to the Main Stem section.[6] Sparking the subject litigation, Maine's Attorney General issued an opinion that Maine has "exclusive regulatory jurisdiction over activities taking place on the [Penobscot] River," and that the Penobscot Nation may only regulate activities on the islands, not on the river itself.[7] Just eight days after the issuance of the opinion, the Penobscot Nation filed suit in federal court against the State of Maine and various state officials, seeking a declaratory judgment clarifying the Reservation boundary.[8]

The decisions of both the Maine District Court and the First Circuit Court of Appeals focused on the interpretation of the Settlement Acts.[9] The District Court found the statutory language of the Settlement Acts unambiguous, and used traditional canons of statutory construction to hold that the Reservation included only the islands in the Main Stem section of the Penobscot River.[10] Similarly, the First Circuit, affirming in part, held that the "plain text of the definition of 'Penobscot Indian Reservation'" in the Settlement Acts did not include the waters of the Main Stem.[11]

In 1790, Congress passed the Indian Nonintercourse Act (ITIA), which provided, in relevant part, that no land sales made by Native Americans, or any nation or tribes of Native Americans, would be valid unless approved by

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1424, 16-1435, 16-1474, 16-1482) [hereinafter Penobscot Nation Brief] (explaining importance of Penobscot River to Penobscot Nation in past and present); William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 826-29 (2004) (discussing history of Penobscot Nation). In the mid-eighteenth century, the Penobscot Nation controlled the entire Penobscot River watershed with their family hunting territories, which consisted of about 5,303,511 acres in total. *See* Rodgers, *supra*, at 827 (describing historical family hunting territory of Penobscot Nation). The Penobscot River is non-tidal, and under Maine and Massachusetts state common law, owners of land adjacent to rivers, known as riparian owners, own to the middle of rivers. *See In re* Opinions of the Justices, 106 A. 865, 880 (Me. 1919) (noting under state common law riparian owners of streams owned to "middle thread" of stream); Veazie v. Dwinel, 50 Me. 479, 479 (1862) (determining Penobscot River non-tidal); McFarlin v. Essex Co., 64 Mass. 304, 309-10 (1852) (describing ownership of submerged lands to "middle or thread" of river).

6. *See infra* note 14 and accompanying text (outlining Penobscot Nation's land dealings).

7. *See* 861 F.3d at 327-28 (noting Attorney General published opinion after request from Maine officials).

8. *See* 861 F.3d at 328 (tracing initial stages of litigation); Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 186 (D. Me. 2015) (summarizing parties' claims and stating state defendants asserted own declaratory judgment claim on same issues), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017).

9. *See* 861 F.3d at 329 (interpreting Settlement Acts to determine Reservation boundary and applying traditional rules of statutory construction); Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 216-18 (D. Me. 2015) (analyzing language of Settlement Acts' definition sections), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017).

10. *See* Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 216-18 (D. Me. 2015) (explaining unambiguous nature of Settlement Acts and asserting even if ambiguous, holding not changed), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017).

11. *See* 861 F.3d at 327, 336 (announcing First Circuit holding); Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 183, 216-18, 222 (D. Me. 2015) (holding no ambiguity in language of Settlement Acts), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017).

Congress in a public treaty.[12] Congress, which has plenary power over Indian affairs, intended ITIA to protect against unequal bargaining power between the Native Americans and non-natives.[13] After the ITIA's passage, the Penobscot Nation entered into land treaties with Massachusetts in 1796 and 1818, and a land sale with Maine in 1833 (Penobscot Treaties), transferring some of the Penobscot Nation's territory to the state.[14] Given the ITIA's prohibition against such treaties, during the 1970s, the Penobscot Nation, along with other Maine tribes, asserted title to lands that were subject to past treaties, claiming that Congress did not confirm the agreements as required by the ITIA.[15]

In total, the Maine tribes asserted legal title to nearly two-thirds of Maine's landmass and filed lawsuits in support of their claims.[16] In response to the land

12. 25 U.S.C. § 177 (2012). In relevant part, the ITIA provides: "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." *Id.*

13. *See* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) (emphasizing purpose of ITIA to "prevent unfair, improvident or improper" land deals); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (stressing congressional plenary power over Indian affairs); *see also* Susan C. Antos, Comment, *Indian Land Claims Under the Nonintercourse Act*, 44 ALB. L. REV. 110, 111 (1979) (noting President George Washington's desire for ITIA passage).

14. *See* Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 187-89 (D. Me. 2015) (discussing history of Penobscot Treaties), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017); *see also* Maine v. Johnson, 498 F.3d 37, 47 (1st Cir. 2007) (discussing waters retained by Penobscot Nation under Settlement Acts); Brief of State of Maine as Intervenor-Respondent, at 3 n.2, Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007) (stating Maine's position of riparian rights). At the time the parties entered into the Penobscot Treaties, Massachusetts controlled the landmass that later became Maine. *See* 861 F.3d at 341 (Torruella, J. dissenting). Under the Treaty of 1796, the Penobscot Nation ceded a six mile wide strip of land on each side of the Penobscot River that stretched for thirty miles of the Main Stem. *See* Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 187 (D. Me. 2015), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017). Then, under the Treaty of 1818, the Penobscot Nation ceded an additional portion of the lands on both sides of the Penobscot River, but reserved four townships and certain islands in the river. *See id.* at 188. Through a deed dated 1833, the Penobscot Nation sold four of the reserved townships from the 1818 treaty to Maine. *See id.* at 189.

15. *See* Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 189 (D. Me. 2015) (outlining history of Penobscot Nation's land claims litigation), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017). Other Maine Native American tribes initiated analogous claims, and in all, they claimed ownership to almost two-thirds of Maine's landmass. *See* Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787 (1st Cir. 1996) (delineating history of Settlement Acts in regard to Passamaquoddy Tribe); Joseph O. Gribbin, *The Glass Eeling: Maine's Glass Eel and Elver Regulations and Their Effects on Maine's Native American Tribes*, 20 OCEAN & COASTAL L.J. 83, 89-91 (2015) (reviewing historical development of land claims from initial discovery, to lawsuits, to settlement). A Department of Justice attorney described these land claims as having the potential to be "the most complex litigation ever brought in federal courts." *See* PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND 98-99 (1985).

16. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 372 (1st Cir. 1975) (outlining Passamaquoddy Tribe's claim, alleging, in part, divesture of aboriginal title); H.R. REP. NO. 96-1353, at 14 (1980) (emphasizing barriers to litigation and need for passage of Settlement Acts); BRODEUR, *supra* note 15, at 69-70, 98-99 (discussing steps leading to Passamaquoddy discovery of land claim and pressure for settlement); NICOLE FRIEDERICHS, ET AL., THE DRAFTING AND ENACTMENT OF THE MAINE INDIAN CLAIMS SETTLEMENT ACT 7-8 (Feb. 2017), http://www.mitsc.org/documents/157_2017-2-22Suffolk.MICSAReport.Final.Feb2017.pdf [https://perma.cc/3LTJ-JESF] (presenting archival research on, and analysis of, drafting of MICSA); *Different Versions/Bills of the Maine Indian Claims Settlement Act*, THE DRAFTING AND ENACTMENT OF THE MAINE INDIAN CLAIMS SETTLEMENT ACT: MARCH, 1977 TO JULY, 1980,

claims, Congress and the Maine Legislature passed the Settlement Acts, which defined the Reservation's boundary.[17] The Penobscot Nation and the Maine Passamaquoddy Tribe participated in the Settlement Acts' negotiation process via appointed representatives who formed a negotiation committee.[18] The parties eventually agreed to the Settlement Acts that, in part, extinguished all land claims in exchange for an $81.5 million appropriation, defined reservation boundaries for the Maine tribes, and subjected Maine tribes to state laws.[19] Although the Settlement Acts resolved multiple issues, certain issues remained, including whether Congress intended to abrogate the rights contained in the Penobscot Nation's treaties.[20]

In federal Indian law jurisprudence, courts use established principles to interpret provisions contained in treaties, statutes, and certain congressional actions.[21] Because only Congress has the power to abrogate a treaty or a right or reservation boundary contained in a treaty, courts apply the *Dion* test to determine abrogation; the test consists of two inquiries: whether Congress had notice that the legislation affected treaty rights and whether the legislation indicated a clear and plain intent to abrogate those rights.[22] To determine Congress's intent, courts look to the statutory language, legislative history, and, where they exist, "express declaration[s]" of intent.[23] Another tenet of federal Indian law is that courts apply the Indian canons of construction when

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http://www.mitsc.org/documents/158_2017-2-6MICSATimeline.pdf [https://perma.cc/7RR5-S7Q4] (showing graphic of development of MICSA).

17. *See* 25 U.S.C. § 1722(i) (1980) (MICSA remains in force but was removed from the United States Code) (defining "Penobscot Indian Reservation" for purposes of MICSA); ME. REV. STAT. ANN. tit. 30, § 6203(8) (2010) (defining "Penobscot Indian Reservation" for purposes of MIA); Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 189-95 (D. Me. 2015) (examining progression from land claims to settlement discussions and eventual passage of Settlement Acts), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017).

18. *See* Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 189-90 (D. Me. 2015) (outlining settlement discussion process with tribal representatives), *aff'd and vacated*, 861 F.3d 324 (1st Cir. 2017); FRIEDERICHS, *supra* note 16, at 7-8, 33-38 (summarizing negotiation process and listing participants in negotiating, drafting, and passing of MICSA).

19. *See* 25 U.S.C. § 1724(a), (c) (1980) (creating Settlement Fund and Land Acquisition Fund); ME. REV. STAT. ANN. tit. 30, § 6203 (2A)-(9) (2010) (defining Penobscot, Passamaquoddy, and Houlton Band of Maliseet Indians land); ME. REV. STAT. ANN. tit. 30, § 6204 (1979) (providing state laws apply on Indian lands); *see also* Whitney Austin Walstad, Note, *Maine v. Johnson: A Step in the Wrong Direction for the Tribal Sovereignty of the Passamaquoddy Tribe and the Penobscot Nation*, 32 AM. INDIAN L. REV. 487, 492-93 (2008) (discussing terms of Settlement Acts and how some terms favor Maine).

20. *See* 25 U.S.C. § 1723(a)(1) (1980) (ratifying prior land transfers by or on behalf of Maine tribes including transfers by treaty); FRIEDERICHS, *supra* note 16, at 3 (noting limited archival documents related to reservation of treaty rights in drafting of § 1723).

21. *See infra* notes 23-26 and accompanying text (explaining select federal Indian law principles).

22. *See* United States v. Dion, 476 U.S. 734, 738-40 (1986) (detailing "clear and plain" intent standard for congressional treaty abrogation); Tracy A. Diekemper, Comment, *Abrogating Treaty Rights Under the Dion Test: Upholding Traditional Notions That Indian Treaties Are the Supreme Law of the Land*, 10 J. ENVTL. L. & LITIG. 473, 476-77, 486-87 (1995) (providing how courts determine congressional intent and describing *Dion* test); *see also* FLETCHER, *supra* note 1, at 226-29 (summarizing clear statement rule).

23. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 330 (1998) (applying *Dion* standard to determine congressional intent); United States v. Dion, 476 U.S. 734, 739-40 (1986) (describing factors Court looks to in determining congressional intent and indicating preference for "express declaration").

interpreting treaties or ambiguous statutory language relating to Native American interests.[24] These canons developed over time due to the trust relationship between the federal government and the Native American tribes, and the unequal bargaining power between those two parties.[25] When applying the Indian canons of construction for statutory interpretation, courts interpret ambiguous language in favor of Native American interests.[26]

In *Penobscot Nation*, the First Circuit Court of Appeals affirmatively answered whether the court should construe the Settlement Acts' Reservation boundary section using only the plain language of the statutory text.[27] After determining that the statutory language was unambiguous, the court concluded that traditional rules of statutory construction—and not the Indian canons of construction—apply to the Settlement Acts, an assertion the dissent vehemently opposed.[28] The court also held that the Penobscot Treaties no longer retained

24. *See* Hynes v. Grimes Packing Co., 337 U.S. 86, 115-16 (1949) (warning against relying on dictionary meaning in Indian law context); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87 (1918) (stressing need to take surrounding circumstances into account when determining congressional intent); *contra* Matal v. Tam, 137 S. Ct. 1744, 1756 (2017) (stating inquiry into statute's meaning ceases when statutory language unambiguous); Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (holding court must enforce plain meaning where language unambiguous). The four general canons of construction used to interpret Native American treaties and statutes are: a treaty must be interpreted in favor of the Native Americans or tribes who are party to the treaty, a treaty must be interpreted as the Native Americans understood it at the time it entered into force, doubtful or ambiguous treaty terms must be resolved in favor of the Native American tribe in question, and courts may look to surrounding circumstances and history in interpreting unclear treaty provisions. *See* MATTHEW FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 155-56 (1st ed. 2017). The Supreme Court has stated that "[t]he canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." Antoine v. Washington, 420 U.S. 194, 199 (1975) (stating legal principles courts use to interpret statutory and treaty provisions); *see also* Choate v. Trapp, 224 U.S. 665, 675 (1912) (explaining construction liberal with doubtful expressions resolved in favor of native interests).

25. *See* United States v. Winans, 198 U.S. 371, 380 (1905) (justifying interpretation of treaty terms in favor of Indians based on unequal bargaining power); United States v. Kagama, 118 U.S. 375, 383-84 (1886) (recognizing trust relationship between United States and Indians due to dependency of Indians); FLETCHER, *supra* note 24, at 155, 158 (articulating history of Indian canons of construction regarding treaties and statutes); *see also* Scott C. Hall, *The Indian Law Canons of Construction v. the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 505 (2004) (discussing development of canons and noting first appearance in Supreme Court cases in 1832); Peter S. Heinecke, Comment, *Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1028 (1993) (noting first Supreme Court application of canons to statutory interpretation in 1912).

26. *See* Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (providing principle of construing statutes in favor of Native Americans); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (stating treaties interpreted according to Indian party's understanding of them).

27. *See* 861 F.3d at 335 (stating First Circuit's holding).

28. *See* 861 F.3d at 329 (highlighting unambiguity of Settlement Acts' language and how Indian canons of construction not applicable). The court first stated that MIA section 6203(8) sets out what "Penobscot Indian Reservation" "means" under MIA and that this meaning controls the definition of "Penobscot Indian Reservation" under MICSA section 1722(i). *Id.* at 329. The court then noted that "[a]s a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Id.* (quoting Burgess v. United States, 553 U.S. 124, 130 (2008)) (laying foundation for plain meaning interpretation). The court also analyzed the meaning of the term "island" as it is used in section 6203(8), reasoning that because it is not given a meaning in MIA, it should be interpreted according to its plain meaning, which does not encompass water or submerged lands. *See* 861 F.3d at 330-31 (looking to dictionary for "ordinary" meaning of "island"). On this point, the dissent argued the majority took the word "island" out of context and ignored Supreme Court

any meaning independent of the Settlement Acts, and therefore, the state common law and the Penobscot Treaties could not inform the court's interpretation of the Settlement Acts.[29] Central to the First Circuit's analysis was whether *Alaska Pacific Fisheries v. United States*[30]—in which the Supreme Court analyzed similar language and held in favor of the tribe—was determinative of the outcome.[31] The majority differentiated *Alaska Pacific Fisheries* from the case at hand, holding that the MIA's usage of "solely" in the Reservation's statutory definition limits the Reservation's boundary to only those areas described in the plain language of the Settlement Acts.[32] Ultimately, the court held that the Reservation included only the islands within the Main Stem because the "Settlement Acts mean what they plainly say."[33]

The First Circuit Court of Appeals incorrectly declined to apply the Indian canons of construction when interpreting the Reservation boundary as defined in the Settlement Acts.[34] Given the Penobscot Nation's historical use of the Penobscot River, coupled with the Penobscot Nation and United States' assertions of ambiguity, the majority incorrectly concluded that the language of the Settlement Acts was unambiguous, a critique appropriately noted by the dissent.[35] In fact, there are many factors contributing to the ambiguity of the Reservation definition, including: state common law definitions that differ

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precedent. *See* 861 F.3d at 347 (Torruella, J. dissenting) (noting two ways Supreme Court applied *Alaska Pacific Fisheries*); *see also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 628, 635 (1970) (holding grant of "land" on both sides of Arkansas River included submerged lands of river); Hynes v. Grimes Packing Co., 337 U.S. 86, 110-11 (1949) (applying *Alaska Pacific Fisheries* to hold grant of "public lands" included "waters"). The dissent further argued that state common law should also apply to the interpretation of the word "island." *See* 861 F.3d at 349 (Torruella, J. dissenting) (discussing misapplication by majority of state common law); *see also* ME. REV. STAT. ANN. tit. 30 §§ 6202, 6204 (1979) (stating Maine common law applies to Penobscots); *infra* note 43 (describing state common law).

29. *See* 861 F.3d at 333 (asserting Penobscot Treaties became part of Settlement Acts and have no meaning on their own). The dissent disagreed, arguing that the majority renders superfluous the MIA language of lands "reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine." *See* ME. REV. STAT. ANN. tit. 30, § 6203(8) (2010) (defining Reservation); 861 F.3d at 348 (Torruella, J., dissenting) (noting Penobscot Treaties referred to in MIA definition of Reservation).

30. 248 U.S. 78, 86 (1918).

31. *See* 861 F.3d at 333 (introducing *Alaska Pacific Fisheries*); *see also* Alaska Pacific Fisheries v. United States, 248 U.S. 78, 86-87, 89-90 (1918) (presenting statutory language and applying Indian canons).

32. *See* 861 F.3d at 333-34 (discussing differences between *Alaska Pacific Fisheries* and case at hand); *see also* Heinecke, *supra* note 25, at 1028-29 (summarizing *Alaska Pacific Fisheries* in relation to statutory interpretation). The dissent disagreed with the majority's approach, explaining that *Alaska Pacific Fisheries* "mandates an approach to interpreting statutes" that "places the statute in its context, and looks to Congressional intent." *See* 861 F.3d at 345 (Torruella, J., dissenting) (emphasis in original) (attacking majority's application of Supreme Court precedent).

33. *See* 861 F.3d at 334 (restating holding of First Circuit in *Penobscot Nation*). Justice Torruella began his dissent by pointing out that the majority ignores its own precedent; Justice Lynch previously wrote for the First Circuit that plain meaning interpretation has flexibility and can be informed by the context and purpose of the statute. *See id.* at 339 (Torruella, J., dissenting).

34. *See* 861 F.3d at 339 (Torruella, J., dissenting) (criticizing majority for insisting Settlement Acts define Reservation unambiguously).

35. *See id.* at 338-39 (highlighting Settlement Acts ambiguous because of Supreme Court precedent, treaty rights, and fishing rights); *infra* notes 36-39 and accompanying text (continuing ambiguity explanation).

from the court's holding, the Penobscot Nation's interpretation of the definition, the MIA provision that the Penobscot Nation can fish "within" its Reservation, and the extensive history of the Penobscot Nation's use of the Penobscot River.[36] If the court determined the language to be ambiguous and applied the Indian canons of construction, the court would have likely given weight to the Penobscot's understanding of "islands" as including the surrounding waters.[37] The Penobscots asserted that they had this view when negotiating the Settlement Acts, and they would not have consented if they knew these agreements would extinguish the tribe's rights in the Penobscot River.[38] Thus, the court should have established a baseline level of ambiguity so that it could carry out a more appropriate analysis—like that performed by the dissent.[39]

By denying the ambiguous nature of the statutory definition, thereby avoiding application of the Indian canons of construction, the court edged away from established Indian law principles.[40] If the dissent's interpretation of the statutory language as ambiguous prevailed, therefore compelling the court to apply the Indian canons of construction, the court would have likely read the statutory definition of the Reservation to include the waters of the Penobscot River.[41] By construing the statutory language in favor of the Penobscot Nation, the court could have considered important additional factors, including the Penobscot Nation's understanding of the Penobscot River and islands as one in the same.[42] Analyzing the statutory language through the lens of the Indian canons of construction would also have permitted the court to apply state common law, under which riparian owners own to the middle thread of the river.[43] If the court applied this body of law, it could reasonably have

36. *See* ME. REV. STAT. ANN. tit. 30, § 6207(4) (1997) (providing Penobscot Nation may take fish within boundaries of Reservation); 861 F.3d at 332, 344, 347-48, 351-52, (detailing reasons why language in Settlement Acts ambiguous and mentioning importance of sustenance fishing); Penobscot Nation Brief, *supra* note 5, at 4-6 (noting Penobscots do not distinguish between islands, waters, and beds of Penobscot River).

37. *See* 861 F.3d at 340 (Torruella, J., dissenting) (determining Indian canon dictates treaty interpretation understood by Indians at time of signing); Penobscot Nation Brief, *supra* note 5, at 36 (emphasizing Penobscot Nation's understanding of term "island").

38. Penobscot Nation Brief, *supra* note 5, at 16 (underscoring view and importance of water included in Reservation).

39. *See* 861 F.3d at 340 (Torruella, J. dissenting) (determining statutory language ambiguous and applying Indian canons of construction).

40. *See* Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (stating Indian canon of construction "deeply rooted in this Court's Indian jurisprudence").

41. *See* 861 F.3d at 339 (Torruella, J. dissenting) (explaining ambiguity, need for use of Indian canons, and why Main Stem included in Reservation).

42. *See id.* at 340, 352-53 (Torruella, J. dissenting) (describing Penobscot Nation's understanding of statutory language and relevance of fishing rights provision); Penobscot Nation Brief, *supra* note 5, at 4-6 (portraying Penobscot people's lack of distinction between river and land in past and present).

43. *See In re* Opinions of the Justices, 106 A. 865, 880 (1919) (describing how riparian owners of rivers owned to "middle thread" under Maine common law); Veazie v. Dwinel, 50 Me. 479, 479 (1862) (stating Penobscot River non-tidal stream); McFarlin v. Essex Co., 64 Mass. 304, 309-10 (1852) (recognizing ownership of submerged lands to "middle or thread" of river).

determined the submerged lands and Main Stem waters to be part of the Reservation.[44]

Moreover, the court did not provide a thorough analysis of *why* the Penobscot Treaties no longer retained any interpretative value.[45] Responding "[a]gain, not so" to the Penobscot Nation's and United States' argument that the Penobscot Treaties inform the interpretation of the statutory language, the majority failed to account for the well-established rule that Congress must express a "clear and plain" intent to abrogate treaty provisions.[46] Although the outcome may have remained the same, the court should have engaged in the two-step *Dion* analysis of congressional intent to abrogate the treaty, rather than merely concluding that the "treaties were subsumed within the [Settlement] Acts."[47] Unlike in *Dion*, where the Supreme Court fully analyzed the statutes at issue, in *Penobscot Nation,* the court simply dismissed the Penobscot Nation's argument that the MIA's Reservation definition incorporates both state common law and the Penobscot Nation's understanding of the treaties.[48] Before asserting that the Penobscot Treaties were "subsumed" within the Settlement Acts, the court should have engaged in a *Dion* test to determine whether Congress had notice of the Settlement Acts' impact on the Penobscot Treaties and whether Congress evinced a clear intent to abrogate the relevant provisions of the Penobscot Treaties.[49] Had the majority not relied substantially upon plain meaning interpretation, the court may have discovered that Congress had not thoroughly discussed abrogation in the legislative history of the Settlement Acts, thereby failing to demonstrate a "clear and plain" intent to abrogate the Penobscot Treaties.[50]

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44. 861 F.3d at 349 (Torruella, J. dissenting) (arguing state common law applies and Reservation extends to midline of Penobscot River).

45. *See* 861 F.3d at 333 (concluding Penobscot Treaties retain no meaning independent of Settlement Acts).

46. *See id.* (addressing possibility of reserved treaty rights); *supra* note 22 and accompanying text (describing treaty abrogation standard).

47. *See* 861 F.3d at 333 (stating only statutory text informs understanding of Reservation boundaries); Diekemper, *supra* note 22, at 486 (outlining two steps of *Dion* test).

48. *See* United States v. Dion, 476 U.S. 734, 740-45 (1986) (examining statutory language, face of statute, and legislative history to determine congressional intent); 861 F.3d at 333 (dismissing Penobscot Nation's and United States' argument regarding incorporation of Penobscot Treaties into Settlement Acts); *see also* Diekemper, *supra* note 22, at 478-80 (summarizing *Dion* Court's analysis of congressional intent to abrogate treaty rights).

49. *See* 861 F.3d at 333 (determining Treaties retained no meaning); *see also* United States v. Dion, 476 U.S. 734, 738-40 (1986) (outlining abrogation test).

50. *See* United States v. Dion, 476 U.S. 734, 738 (1986) (necessitating "clear and plain" intention to abrogate Indian treaty); FRIEDERICHS, ET AL., *supra* note 16, at 3 (summarizing relative lack of archival materials relating to congressional intent to abrogate treaty rights). The Senate Report on MICSA states that the settlement provides that "[t]he Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them." FRIEDERICHS, ET AL., *supra* note 16, at 3. As the dissent noted, the Indian canons of construction mandate reading the MIA and MICSA language together in order to give full meaning to their construction, thereby leading to the conclusion that the Penobscot Treaties' rights were retained in the Settlement Acts. *See* 861 F.3d at 348-49 (Torruella, J. dissenting).

In *Penobscot Nation*, the First Circuit interpreted the Settlement Acts to determine the Penobscot Nation's reservation boundary. Circumventing the application of the Indian canons by holding the statutory language unambiguous, the court was able to dismiss the Penobscot Nation's deep-rooted history with the Penobscot River as immaterial. By failing to apply the Indian canons, the court set a precedent that favors state interests over Native American interests, in direct contrast to longstanding legal principles of Indian jurisprudence.