

Lawmakers Back Penobscot Nation Rights In Maine River

By [Andrew Westney](#)

Law360 (July 16, 2020, 8:18 PM EDT) -- Leaders of the Congressional Native American Caucus have urged the First Circuit to rule that the Penobscot Nation has authority over its namesake river's waters in Maine, saying Congress intended the river to be part of the tribe's reservation and the court should help the government satisfy its obligations to the tribe.

Lawmakers from both sides of the aisle — including the caucus's current co-chairs, Rep. Tom Cole, R.-Okla., and Rep. Deb Haaland, D-N.M. — filed an amicus brief Wednesday backing the federally recognized Penobscot tribe in its bid to have the en banc circuit court rule that it has treaty-protected fishing and hunting rights and regulatory authority over the main stem of the Penobscot River, and not just the islands there.

"Congress plainly intended to include the Penobscot River within the Penobscot Reservation when it ratified" a 1980 federal law implementing a state act settling tribal claims, and a First Circuit panel's 2017 "opinion to the contrary cannot be squared with Congress's intent to draft a statute that fulfills its trust responsibilities to the Penobscot Nation," according to the brief.

"When the United States acts as a trustee to settle a dispute over an Indian tribe's aboriginal property and fishing rights, Congress expects the federal courts to act as a partner in fulfilling the United States' solemn trust responsibilities by giving full effect to its actions," the lawmakers said.

The First Circuit [agreed in April](#) to review en banc the divided panel ruling that the tribe's reservation includes the roughly 150 islands within a 60-mile navigable stretch of the river but not the water itself, based on the two 1980 settlement acts.

The case started in 2012 when the tribe and the federal government sued Maine over the state's determination that the Penobscot Nation didn't have authority to regulate fishing or hunting in the waters of the river's main stem and that Maine has exclusive regulatory and enforcement authority over all activities occurring there.

The federal government, Maine and the Penobscot Nation all won partial victories from the lower court in December 2015 that said the 1980s settlement acts clearly defined the boundaries of the nation's reservation to include the islands within the river's main stem, but not the waters in that area.

In granting en banc review, the First Circuit asked the parties to address a list of 12 questions, including

where the tribe's reservation boundaries lie and how the Indian canon of construction, which calls for ambiguous laws to be interpreted in favor of tribes, applied to the settlement acts, if at all.

When the federal government and tribe argued for rehearing, they cited a sharp dissent from U.S. Circuit Judge Juan R. Torruella, who wrote that the waters should be considered part of the reservation. According to his dissent, the waters should be included because the settlement acts give the tribe the rights to fish within its reservation, which the majority's ruling would limit to dry land.

The tribe, the federal government, Maine and several municipalities all appealed the ruling to the First Circuit in April 2016. The Penobscot Nation is challenging the lower court ruling that the reservation includes the islands but not the water, while Maine is challenging the judge's ruling that the tribe has the right to fish anywhere in the area.

In a July 8 brief, Maine said the settlement acts should be interpreted using "ordinary rules of statutory construction" rather than the Indian canon of construction, because the laws "unambiguously define the reservation as solely the islands within the main stem" of the Penobscot River.

In another amicus brief Wednesday supporting the Penobscot Nation, the [National Congress of American Indians](#) and the [United South and Eastern Tribes Inc.](#) said there are "three distinct Indian canons of construction" that all apply to the settlement acts: "treaties and certain statutes must be interpreted as the Indians would have understood them," any ambiguities in them "touching on Indian interests must be construed to the Indians' benefit," and "only a clear statement of congressional intent is sufficient to diminish tribal lands or tribal sovereign authority," the groups said.

In accordance with the first canon, the Penobscot Nation understood its 1818 treaty to encompass the waters of the main stem to allow the tribe to exercise its treaty fishing rights, the groups said.

In keeping with the second canon, 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," the groups said.

And the tribe never expressly gave up its authority over the river and submerged lands, so it kept those areas in its reservation, according to the brief.

The groups also seconded the Penobscot Nation's argument in its own July 8 brief that the [U.S. Supreme Court's ruling in Alaska Pacific Fisheries Co. v. U.S.](#) [— in which the justices found that the Metlakahtlan Indians' reservation included its fishing grounds because the tribe members couldn't have sustained themselves on the island uplands alone — governs the current case because the Penobscot tribe is in a similar situation.](#)

[The Maine Indian Tribal-State Commission, which is composed of members named by the state and the Penobscot Nation, Passamaquoddy Tribe and Houlton Band](#) of Maliseet Indians, said in its own amicus brief that Maine's "claim in this case conflicts with the historical position [the commission] has taken since the enactment of the Settlement Acts, and also conflicts with all of the state's own prior positions."

Counsel for the Penobscot Nation and Maine declined to comment Thursday.

Representatives for the federal government and the municipalities did not immediately respond to requests for comment Thursday.

The Maine Indian Tribal-State Commission is represented as an amicus by its own Robert Checkoway.

The current and former leaders of the Congressional Native American Caucus are represented as an amicus by David W.S. Lieberman of [Whistleblower Law Collaborative LLC](#) and Seth Davis.

The NCAI and USET are represented as an amicus by Daniel D. Lewerenz of Native American Rights Funds, while NCAI is also represented by its own Derrick Beetso and USET is also represented by Gregory A. Smith and Kaitlyn E. Klass of [Hobbs Straus Dean & Walker LLP](#).

The Penobscot Nation is represented by Kaighn Smith Jr. and David M. Kallin of [Drummond Woodsum](#) and Pratik A. Shah and Lide E. Paterno of [Akin Gump Strauss Hauer & Feld LLP](#).

The U.S. is represented by Steven Miskinis, William B. Lazarus and Mary Gabrielle Sprague of the [U.S. Department of Justice's](#) Environment and Natural Resources Division and Samuel E. [Ennis](#) of the [U.S. Department of the Interior](#).

Maine is represented by Susan P. Herman, Kimberly Patwardhan and Christopher C. Taub of the state attorney general's office.

The municipalities, Kruger Energy (USA) Inc. and Duvaltex (US) Inc. are represented by Matthew D. Manahan and Joshua D. Dunlap of [Pierce Atwood LLP](#).

The cases are U.S. v. Mills et al., case numbers 16-1424, 16-1435, [16-1474](#) and 16-1482, in the [U.S. Court of Appeals for the First Circuit](#).

--Additional reporting by Michael Phillis. Editing by Orlando Lorenzo.

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