

Nos. 21-838, 21-840

In the Supreme Court of the United States

PENOBSCOT NATION,

Petitioner,

v.

AARON M. FREY, ATTORNEY GENERAL FOR THE STATE OF
MAINE, *et al.*,

Respondents.

UNITED STATES

Petitioner,

v.

AARON M. FREY, ATTORNEY GENERAL FOR THE STATE OF
MAINE, *et al.*,

Respondents.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR THE MAINE INDIAN TRIBAL-STATE
COMMISSION AS *AMICUS CURIAE* IN SUPPORT
OF PETITIONERS**

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TABLE OF CONTENTS

	Page
Table of Authorities	II
Interest of <i>Amicus Curiae</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. MITSC IS EMPOWERED TO REGULATE FISHING IN CERTAIN WATERS WITHIN OR BORDERING ON INDIAN TERRITORY	3
II. MITSC HAS CONSISTENTLY RECOGNIZED THE MAIN STEM AS PART OF THE PENOBSCOT INDIAN RESERVATION	5
III. THE <i>EN BANC</i> MAJORITY DECISION ERRONEOUSLY TRAMMELS ON MITSC'S STATUTORY AUTHORITY AND DENIES THE PENOBSCOT NATION ITS HISTORIC RIGHTS	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Choctaw Nation v. United States</i> , 318 U.S. 423, 431–32 (1943)	5
<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i> , 526 U.S. 172, 202 (1999).....	5
<i>Penobscot Nation v. Frey</i> , No. 1:12-cv-00254- GZS (D. Me. Apr. 13, 2015)	7, 8, 10, 11

Statutes and Other Authorities

25 U.S.C. § 1723(a)(1).....	5
94-409 C.M.R. ch. 201, § 2(C)(1).....	4
94-409 C.M.R. ch. 201, § 2(C)(9).....	4
94-409 C.M.R. ch. 201, § 2(C)(10).....	4
Jessie Little Doe Baird et al., <i>Some Considerations of the Shape of Meaning: Algonquian Understandings of the Expression of Self 2</i> (2020)	6
Me. Stat. tit. 12, § 12763(2).....	8
Me. Stat. tit. 30, § 6203(8).....	5
Me. Stat. tit. 30, § 6205	3, 8
Me. Stat. tit. 30, § 6205(2)(A)	8, 9
Me. Stat. tit. 30, § 6205(5).....	1
Me. Stat. tit. 30, § 6207(3).....	1, 3, 4
Me. Stat. tit. 30, § 6207(4).....	7, 12

III

Me. Stat. tit. 30, § 6212(1)	1
Me. Stat. tit. 30, § 6212(3)	1
MICSA § 6(b)(1), Pub. L. No. 96-420, 94 Stat. 1785.....	3
Task Force on Tribal-State Relations, <i>At Logger- heads: The State of Maine and the Wabanaki</i> 5-19 (1997)	9

INTEREST OF *AMICUS CURIAE*¹

The Maine Indian Tribal-State Commission (*MITSC*) is a unique tribal-state entity created in 1980 by the Act to Implement the Maine Indian Claims Settlement (*MIA*),² the state implementing legislation for the federal Maine Indian Claims Settlement Act of 1980 (*MICSA*). Its thirteen members include representatives of the State of Maine (six members), the Houlton Band of Maliseet Indians (two members), the Passamaquoddy Tribe (two members), and the Penobscot Nation (two members), and a chair selected by the other members.³ *MITSC* has three principal statutory responsibilities: to regulate fishing in certain waters within or bordering on Indian territory,⁴ to evaluate applications for additions to certain Maine Indian landholdings,⁵ and to “continuously review” and report on “the effectiveness of [the *MIA*] and the social, economic and legal relationship between” the State of Maine and the three participating tribes.⁶

This case is of significant concern to *MITSC* because the outcome will affect the exercise of *MITSC*’s responsibilities to regulate fishing in waters within or bordering Maine Indian territory and to monitor the

¹ No counsel for a party authored this brief in whole or part. No party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae* and its counsel made any monetary contribution toward the preparation and submission of this brief. The parties were given timely notice and have consented to this filing.

² *MIA*, Me. Stat. tit. 30, § 6212(1) (2021).

³ *Id.*

⁴ *Id.* § 6207(3).

⁵ *Id.* § 6205(5).

⁶ *Id.* § 6212(3).

relationship between Maine and the Penobscot Nation. Pursuant to the authority granted it in the MIA, MITSC has consistently recognized that the Main Stem of the Penobscot River is part of the Penobscot Indian Reservation. The question presented in this case—whether the Penobscot Indian Reservation as defined in the MICSA and the MIA includes the Main Stem of the Penobscot River—thus directly affects MITSC’s statutory authority.⁷

SUMMARY OF ARGUMENT

This case concerns the construction of two statutes—the MICSA and the MIA—that together establish the boundaries of the Penobscot Indian Reservation. The MIA also confers on MITSC the exclusive authority to regulate fishing in certain waters within or bordering Maine Indian territory.

MITSC has consistently recognized that the Main Stem of the Penobscot River lies within the Penobscot Indian Reservation as defined in the MICSA and the MIA, and thus within the waters subject to MITSC’s statutory authority. This recognition is informed by the terms of the Penobscot Nation’s treaties and its historic exercise of its rights over the Penobscot River. Over the past four decades, MITSC has reiterated its recognition that the Main Stem is part of the Penobscot Indian Reservation in reports, legislative statements, and official correspondence.

⁷ *Amicus* submits this brief in support of both the Penobscot Nation, petitioner in case no. 21-838, and the United States, petitioner in case no. 21-840.

The decision below erroneously excludes the Main Stem from the Penobscot Indian Reservation, thereby trammeling upon MITSC’s statutory authority and denying the Penobscot Nation its historic rights. The important legal issues in this case merit the Supreme Court’s review.

ARGUMENT

I. MITSC IS EMPOWERED TO REGULATE FISHING IN CERTAIN WATERS WITHIN OR BORDERING ON INDIAN TERRITORY

MITSC is granted “exclusive authority” under the MIA⁸ to regulate fishing in certain waters lying within or bordering on Maine Indian territory.⁹ This statutory authority extends to “[a]ny pond” of at least ten acres whose shoreline is at least half in Indian territory; “[a]ny section of a river or stream” where both banks lie in Indian territory; and “[a]ny section of a river or stream” where one bank lies “within Indian territory for a continuous length of ½ mile or more.”¹⁰ “Indian territory” as defined in the MIA includes the Passamaquoddy and Penobscot Indian Reservations, together with certain other Indian landholdings.¹¹ Fishing rules and regulations that MITSC adopts for these areas supersede any laws, rules, and regulations

⁸ The MIA, although Maine state legislation, was also “approved, ratified, and confirmed” by the federal MICSA. MICSA § 6(b)(1), Pub. L. No. 96-420, 94 Stat. 1785, 1793.

⁹ MIA, Me. Stat. tit. 30, § 6207(3) (2021).

¹⁰ *Id.*

¹¹ *Id.* § 6205.

of the State of Maine that purport to regulate such fishing.¹²

In adopting fishing regulations, MITSC is required to “comply with the Maine Administrative Procedure Act.”¹³ It is also under a statutory duty, when adopting regulations, to “consider and balance” certain factors that lie within its special expertise,¹⁴ including “the needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes, the traditional fishing techniques employed by and ceremonial practices of Indians in Maine and the ecological interrelationship between the fishery regulated by [MITSC] and other fisheries throughout [Maine].”¹⁵

Pursuant to its statutory authority, MITSC has issued regulations on, *inter alia*, fishing in inland waters within the Passamaquoddy and Penobscot Indian Reservations, including limitations on the use of certain types of fishing equipment and the amount of fish that can be removed from tribal waters.¹⁶ MITSC has also published official reports on issues of importance to relations between and among the State of Maine, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, and the Penobscot Nation. These reports are often requested by the Maine Legislature or another MITSC stakeholder, and state and tribal

¹² *Id.* § 6207(3).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See* 94-409 C.M.R. ch. 201, § 2(C)(1), (9), (10) (2021).

decision makers consult these reports when relevant to their regulatory activities.

II. MITSC HAS CONSISTENTLY RECOGNIZED THE MAIN STEM AS PART OF THE PENOBSCOT INDIAN RESERVATION

MITSC has consistently understood the Main Stem of the Penobscot River to lie within the Penobscot Indian Reservation as defined in the MICA and the MIA, and thus considers it to be within the waters subject to MITSC's statutory authority. This understanding is grounded in the text of the Penobscot Nation's treaties and the history of the Penobscot Nation's exercise of its rights over the Penobscot River.

MITSC's position on the Penobscot Nation's rights over the Main Stem arises from the text of the Nation's treaties.¹⁷ The MICA and the MIA explicitly define the Penobscot Indian Reservation by reference to treaties between the Penobscot Nation and any State, including an 1818 treaty between the Penobscot Nation and Massachusetts in which the Nation ceded certain property over which it held aboriginal title.¹⁸ The

¹⁷ This interpretation is further supported by the Indian canon of construction that mandates that treaties with Indian nations should be construed in the sense in which the Indians understood them. *Choctaw Nation v. United States*, 318 U.S. 423, 431–32 (1943); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

¹⁸ See 25 U.S.C. § 1723(a)(1) (2018) (ratifying “[a]ny transfer of land or natural resources located anywhere within the United States from, by, or on behalf of . . . the Penobscot Nation” and “any transfer pursuant to any treaty”); MIA, Me. Stat. tit. 30, § 6203(8) (2021) (defining the “Penobscot Indian Reservation” as “the islands in the Penobscot River reserved to the Penobscot Nation by

Nation in that treaty ceded only the “lands” on “both sides of the Penobscot [R]iver,” along with the “right to pass and repass any of the rivers . . . which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same.”¹⁹ The 1818 treaty expressly reserved for the Nation “all the islands in the Penobscot [R]iver above Oldtown and including . . . Oldtown island,”²⁰ with no indication that there was also a cession of the Main Stem itself, which fell within the Penobscot Nation’s aboriginal title.²¹

Nor is it plausible that the Penobscot Nation would have ceded its title to the Main Stem, which was and is essential to the Penobscot Nation.²² In the Nation’s language, water, of which the Penobscot River is the Nation’s primary source, is understood to be “inalienable and part of one’s physical self.”²³ The Nation has also historically relied on the Main Stem for

agreement with the States of Massachusetts and Maine”). The Penobscot Nation in 1820 signed two additional treaties that released Massachusetts from its obligations under the 1818 treaty and substituted the new state of Maine in its place. *See* App. 98a. (Appendix citations are to the Petition Appendix in case no. 21-838.)

¹⁹ App. 323a, 325a–326a.

²⁰ App. 324a.

²¹ *See generally* App. 90a.

²² App. 162a.

²³ *See* Jessie Little Doe Baird et al., *Some Considerations of the Shape of Meaning: Algonquian Understandings of the Expression of Self 2* (2020), available at <https://www.mitsc.org/s/WORKING-PAPER-Some-Considerations-of-the-Shape-of-Meaning-6-2020.pdf>; *see also* App. 157a (noting that “the Penobscot locution ‘to fish my islands’ means to fish the waters surrounding the uplands of those islands”).

sustenance.²⁴ Michael Pearson, a former MITSC commissioner who served in the Maine Legislature during the time that the MIA was enacted, has affirmed that the Penobscot Nation has “always taken fish for their subsistence” from the Main Stem, and that the MIA “was intended to allow members of the Penobscot Nation” to continue to do so.²⁵

In light of the Penobscot Nation’s historic reliance on fish from the Main Stem for sustenance, and consistent with the plain language of prior treaties expressly incorporated in and ratified by the MIA and the MICSA, MITSC has understood the right to sustenance fishing “within the boundaries of” the Penobscot Indian Reservation under the MIA to include the Main Stem.²⁶ The Penobscot Nation’s Reservation could not be restricted to the uplands of the islands, as “[n]one of [them] contains a body of water in which fish live.”²⁷ The Nation’s right to sustenance fishing—which is expressly guaranteed by Section 6207(4) of the MIA—therefore confirms that the Main Stem forms part of their reservation.²⁸

²⁴ App. 46a n.24, 90a.

²⁵ Decl. of Michael D. Pearson, *Penobscot Nation v. Frey*, No. 1:12-cv-00254-GZS (D. Me. Apr. 13, 2015), ECF No. 119-37.

²⁶ MIA, Me. Stat. tit. 30, § 6207(4) (2021).

²⁷ App. 196a.

²⁸ See MIA, Me. Stat. tit. 30, § 6207(4) (2021) (“Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.”).

Consistent with this understanding, MITSC has consistently recognized that the Main Stem was part of the Penobscot Indian Reservation. And, until this dispute arose in 2012, the State of Maine agreed.²⁹

In the late 1980s and early 1990s, a conflict arose over the Penobscot Nation’s use of gill nets on the Penobscot River to catch salmon for ceremonial purposes and to support research undertaken by the Penobscot Nation Natural Resources Department. In connection with this conflict, the Maine Attorney General affirmed in 1988 that the Penobscot Nation had the right to use gill nets “in the Penobscot River *within the boundaries of the Penobscot Reservation*.”³⁰ The Penobscot Nation accordingly sought Maine legislation that would declare it and its members exempt from state regulations limiting the use of gill nets for scientific purposes. MITSC in 1991 provided testimony consistent with the Maine Attorney General’s prior opinion and in support of the legislative proposal.³¹ The Maine Legislature agreed, enacting a law that confirmed that the Penobscot Nation “may use gill nets for the purpose of scientific fisheries research and management on any waters within, flowing through or adjacent to Penobscot Indian territory as defined in Title 30, section 6205, subsection 2 [of the MIA].”³² Section 6205(2)(A) of the MIA defines “the Penobscot

²⁹ See App. 163a–164a (noting the 1988 opinion of Maine’s then-Attorney General Tierney, discussed further below).

³⁰ Ex. 80 at 1, *Penobscot Nation v. Frey*, No. 1:12-cv-00254-GZS (D. Me. Mar. 20, 2015), ECF No. 103-30 (emphasis added).

³¹ Ex. 3 to Scully Decl. 2–3, *Penobscot Nation v. Frey*, No. 1:12-cv-00254-GZS (D. Me. June 22, 2015), ECF No. 140-14.

³² See Me. Stat. tit. 12, § 12763(2) (2021).

Indian territory” as including the “Penobscot Indian Reservation.”³³ By testifying in support of this legislation, MITSC expressed its position that the Penobscot Nation’s reservation includes waters adjacent to the uplands in the Main Stem.

In 1994, MITSC was approached by the Maine Department of Environmental Protection regarding the relationship between Maine law governing the licensing of hydroelectric dams on the Penobscot River and the MICA and the MIA. MITSC formed an investigatory committee and, after receiving the committee’s report, adopted a determination that recognized the Penobscot Nation’s rights over the Main Stem. The determination found that the Maine Department of Environmental Protection’s Basin Mills hydroelectric project “could adversely affect fishing stocks” of the Main Stem “and[] therefore[] could prevent the members of the Penobscot Nation from fully recognizing their reserved fishing rights.”³⁴

In 1995, after the Bangor Hydro-Electric Company had argued to the Federal Energy Regulatory Commission that the Penobscot Indian Reservation did not include the waters of the Main Stem, MITSC issued a letter from its chair reaffirming that the Main Stem of the Penobscot River was “within the boundaries of the

³³ MIA, Me. Stat. tit. 30, § 6205(2)(A) (2021).

³⁴ Task Force on Tribal-State Relations, *At Loggerheads: The State of Maine and the Wabanaki* 5-19 (1997), available at <https://static1.squarespace.com/static/5c2e615b4611a08076e730e4/t/5cdc71de6e9a7f45753840ee/1557950960039/At+Loggerheads+-+The+State+of+Maine+and+the+Wabanaki.pdf>.

Penobscot Reservation.”³⁵ MITSC also explicitly rejected the view of the Bangor Hydro-Electric Company that “[o]nly the islands and none of the waters in the Penobscot River constitute the Penobscot Reservation” and that “[t]he sustenance fishing right granted to the Penobscot Indian Nation is not on the Penobscot River, because the river is outside the boundaries of the Reservation.”³⁶ Explaining that it was “the first time these particular arguments ha[d] come to the attention of the Commission,” MITSC observed that “the State ha[d] never questioned the existence of the right of the Penobscot Indian Nation to sustenance fishing in the Penobscot River.”³⁷ Writing from his own experience, MITSC chair Bennett Katz went on to state:

I was Majority Leader of the Maine Senate at the time of enactment of the Maine Indian Claims Settlement Act. I cannot imagine that [such a restrictive] meaning was intended by my colleagues in the Legislature who voted in support of the Settlement. Furthermore, I am certain that the Penobscots never would have agreed to the Settlement had it been understood that their fishing right extended only to the tops of their islands.³⁸

In 2012, for the first time, the Maine Attorney General took the position, sought by several power and paper companies, that the Penobscot Indian Reservation

³⁵ Ex. 2 to Scully Decl., *Penobscot Nation v. Frey*, No. 1:12-cv-00254-GZS (D. Me. June 22, 2015), ECF No. 140-13.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

was limited to the tops of the islands in the Main Stem of the Penobscot River. In a letter to Maine elected officials, MITSC reiterated its position that the Penobscot Indian Reservation included the Main Stem of the Penobscot River: “[T]he River inclusive of and north of Indian Island [is] recognized as Penobscot Reservation waters.”³⁹

III. THE *EN BANC* MAJORITY DECISION ERRONEOUSLY TRAMMELS ON MITSC’S STATUTORY AUTHORITY AND DENIES THE PENOBSCOT NATION ITS HISTORIC RIGHTS

As shown above, MITSC, in accordance with its statutory authority under the MIA, has always understood the Main Stem to be within the Penobscot Indian Reservation, thereby implicating MITSC’s authority.

The *en banc* majority decision of the First Circuit that the Main Stem is not entirely within the Penobscot Indian Reservation is erroneous. The decision relies on the modern dictionary definition of the word “island,” failing to consider the meaning of that term as used in the 1818 treaty, which the MIA expressly incorporates by reference in defining the Penobscot Indian Reservation.⁴⁰ Given the Penobscot Nation’s historic and cultural reliance upon the Main Stem, it is implausible that the Penobscot Nation did not reserve

³⁹ Ex. 1 to Scully Decl. 2, *Penobscot Nation v. Frey*, No. 1:12-cv-00254-GZS (D. Me. June 22, 2015), ECF No. 140-12.

⁴⁰ See App. 32a (concluding that “the Settlement Acts’ drafters . . . did not want courts to decide if, when, or how the Nation’s aboriginal title was extinguished by interpreting centuries-old documents”).

for its riverine people the waters adjacent to its “islands” when it ceded the “lands” on “both sides of the Penobscot River.”⁴¹ Neither the MIA nor the MICSA purports to nullify this historic right by reference to the modern dictionary definition of “island”; to the contrary, those statutes expressly incorporate by reference the use of that term in the 1818 treaty.

This is confirmed by the fact that Section 6207(4) of the MIA expressly grants the Penobscot Nation the right to sustenance fishing within its “Indian reservation[],” a right that could only be exercised by the Nation if the Main Stem was included within its “reservation.”⁴² Unable to reconcile this clear definition of the Penobscot Nation’s “reservation” with the modern dictionary definition of “island,” the *en banc* majority declared—without any support—that the “drafters did not intend for the phrase ‘Indian reservations,’ as used in § 6207(4) and applied to the Nation, to have the same meaning as ‘Penobscot Indian Reservation.’”⁴³ This is not tenable, and it turns the Indian canons of construction on their head.

The *en banc* majority’s contorted and acontextual interpretation of the MIA and the MICSA improperly trammels upon MITSC’s statutory authority and denies the Penobscot Nation its historic rights. The important legal issues in this case merit this Court’s review.

⁴¹ App. 323a–324a.

⁴² MIA, Me. Stat. tit. 30, § 6207(4) (2021); *see also* App. 46a (noting that “§ 6207(4) means that the Nation has the right to engage in sustenance fishing in the Main Stem” and that the legislative history of the MIA confirms that “the right to sustenance fish could be exercised in the Main Stem”).

⁴³ App. 33a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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