



# United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

NOV 14 1997

Mr. John DeVillars  
Regional Administrator  
Environmental Protection Agency  
Region 1  
J.F.K. Federal Building  
Boston, MA 02203-0001

Re: Penobscot Indian Nation Request for Evidentiary Hearing  
Lincoln Pulp & Paper NPDES Permit No. ME0002003

Dear Mr. DeVillars:

The Department of the Interior (Department) wishes to briefly respond to the assertions contained in the September 25, 1997, letter of the State of Maine Attorney General's Office, relating to the Opinion of the Justices, 118 Me. 503 (1919) which was quoted by the Department in its September 2, 1997, filing with you.

Interestingly, the State refutes the Opinion of the Justices of the Maine Supreme Court with regard to the rights of riparian owners in Maine. (State, pp. 14-15 N. 11). Suggesting that the views in the 1919 Opinion of the Justices, 118 Me. 503 (1919), are *dicta*, the State further asserts that because those views were based upon an 1827 Massachusetts case, Waters v. Lilley, 21 Mass. (4 Pick.) 145 (1827), which dealt with non-navigable streams, the "principle set forth would thus be inapplicable to the Penobscot River." (State, pp. 14-15 N. 11). The Department disagrees, as the Penobscot River was considered a non-navigable river under Maine common law, to which the Justices' opinion was directly applicable. Under the common law in Maine, a distinction was recognized between navigable rivers and those which were floatable and thus used as public highways. A "river is deemed navigable in the technical sense of the term as high from the mouth as the tide ebbs and flows." Veazie v. Dwinel, 50 Me. 479, 484 (1862) (Interpreting the 1840 Mill Act to authorize the construction of water mills and dams on non-navigable rivers). In Veazie, the court found that the Penobscot River, although floatable and used as a public highway, was **not** navigable above the tide and thus was available for mill and dam construction. 50 Me. at 486.

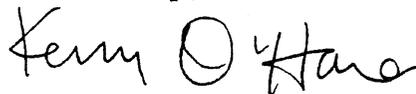
Specifically, the State objects to the application to the PIN of the Justices' view that a "riparian proprietor has the right to take fish from the water over his own land, to the exclusion of the public" Opinion of the Justices of the Supreme Judicial Court, 118 Me. at 507. The Maine Implementing Act (MIA) expressly provides, however, that the "laws of the State" applicable to the interpretation of its provisions include the common law of the State and judicial interpretations thereof. 30 M.R.S.A. § 6203(4). In setting out its views of the rights of riparian owners, the

Maine Supreme Judicial Court was certainly expressing an interpretation of the common law of Maine with regard to the rights of riparian owners in non-navigable rivers. Under the MIA, this opinion is applicable to the Penobscot River and to the interpretation of PIN's retained rights, including fishing rights, in its Reservation.

Moreover, the Department disagrees with the State's assertion that the provisions of the Maine Settlement negate the retention of the riparian right to take fish, to the exclusion of the public, as described by the Justices. The State's current view is directly contrary to the expressed intent of the Maine Legislature, which stated that the PIN Reservation includes "any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law."<sup>1</sup> Further, the legislative history of the Maine Indian Claims Settlement Act confirms that Congress concurred in the PIN's permanent and retained sovereign and riparian "right to control hunting and fishing not only within [its] reservations, but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well."<sup>2</sup>

Thank you for your attention.

Sincerely,



Kerry O'Hara  
Attorney  
Division of Indian Affairs

cc: The Honorable Francis Mitchell, Chief, PIN  
Patty Goldman, Esq.  
Paul Stern, Esq.  
Kate Geoffroy, Esq.  
Tim Williamson, Esq.

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<sup>1</sup> Report of the Joint Select Committee on Indian Land Claims Relating to L.D. 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory," included within Appendix, Senate Select Committee on Indian Affairs, hearing July 1-2, 1980.

<sup>2</sup> H.R. Rep. No. 96-1353 at 16-17 (1980), reprinted in 1980 U.S.C.C.A.N. 3786, 3792-3.