



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

Ms. Lois Cashell  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

Re: Milford Hydroelectric Project  
FERC No. 2534

Dear Ms. Cashell:

In the Final Environmental Impact Statement for the Lower Penobscot River Basin Projects (FEIS), the Federal Energy Regulatory Commission (Commission) indicates that the issue of the Department of the Interior's (Department) authority to prescribe conditions under section 4(e) of the Federal Power Act (FPA) will be addressed in the licensing order for the Milford Project. The Department is of the view that the FPA does not grant the Commission the authority to make such a determination. To ensure that the record before the Commission is clear on this and other issues, however, and not subject to misinterpretation based upon the May 19, 1997, filing of the License Applicant, Bangor Hydro-Electric Company (Bangor), or upon the May 30, 1997, filing of the State of Maine (State), the Department takes this opportunity to correct some misunderstandings and purposeful misconstructions of our position as set forth in those filings. This filing includes two attachments, responding to technical issues raised in Bangor's May 19, 1997, filing.<sup>1</sup>

As the Commission is aware, on July 17, 1996, the Department filed its section 4(e) conditions and supporting record to provide for the protection and utilization of the Penobscot Indian Reservation, portions of which are occupied by, and necessary for the operations of, the Milford Project. At that time, the Department offered the parties to the Milford proceeding an opportunity to provide comments to the Department on the conditions so prescribed. Bangor and the State filed comments. On April 9, 1997, the Department filed its Decision Document and Response to

<sup>1</sup> The Department's Attachments consist of a November 7, 1997, Response to Bangor's filing prepared by Northwest Economic Associates, and an October 23, 1997, Response to Bangor's filing prepared by Stetson Engineers, Inc.

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Comments received to the section 4(e) conditions and supporting materials, and filed its Recommendation for section 10(e) annual charges. The above-referenced May 19 and May 30 filings constitute responses by Bangor and the State to the Department's April 9 Response. In this filing, the Department re-states its position with regards to the status under the FPA of the Penobscot Indian Reservation, while also clarifying the misconstructions and misunderstandings presented by Bangor and the State in their May filings.

- I. **The Penobscot Reservation is a "reservation" under the FPA, and thus the Secretary of the Interior is authorized pursuant to section 4(e) to mandate conditions in the Milford Project license.**

First, Bangor and the State question the applicability to this proceeding of those provisions in the FPA which provide protections to Indian lands, the use of which is necessary for Bangor's Milford hydropower operations. 16 U.S.C. § 797(e), 803(e)(1). The comments reflect Bangor and the State's continuing misunderstanding of Indian lands and the nature of the federal interest in those lands. This misunderstanding also permeates the Commission's analysis in the Final Environmental Impact Statement (FEIS) for the Lower Penobscot Projects, in which the Commission considers the occupied PIN Reservation lands to be owned by the Penobscot Indian Nation (PIN). (FEIS, p. 3-65).

Bangor states that the Department has failed to explain how "the fact that a reservation is created or confirmed by treaty instead of by fee purchase and involves aboriginal land instead of fee land has any significance as to the 'proprietary interest' issue or creates some unidentified United States 'proprietary interest.'" (Bangor, May 19, 1997 filing, p. 15). This distinction in status between tribal reserved lands and tribal fee lands is the critical factor in this case, and that which distinguishes the Penobscot Reservation from the lands in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960). Here, in contrast to the lands in Tuscarora,<sup>2</sup> the tribal lands used by the Milford Project are Indian aboriginal lands, held for generations by the Penobscots as Indian lands were held; i.e., without indicia of ownership nor written documents attesting to whom they belonged. As with all Indian Tribes whose reservations were carved out of

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<sup>2</sup> The lands in the Tuscarora case were purchased and owned in fee simple by the Tuscarora Nation. Tuscarora, 362 U.S. at 100. As such, they were not lands to which aboriginal Indian title applied, nor were they subject to any treaty, the lands having been conveyed in fee simple to the Tuscarora Nation free of any encumbrances from the Holland Land Company and Henry Dearborn. Tuscarora, 362 U.S. at 121-3 N. 18.

their aboriginal lands, the PIN was recognized to have a right of occupancy, or Indian title,<sup>3</sup> to its aboriginal territory, subject only to termination by the act of the sovereign. After the United States was organized and the Constitution adopted, this right of termination became the exclusive province of the federal government. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

Thus, where aboriginal title is implicated, the principal historic indicia of United States interest in those lands would be the historic treaties by which the Indian Tribes ceded certain lands in exchange for the reservation of other areas of territory. In Maine, the historic treaties reserving the PIN's aboriginal lands were entered between the PIN and the Commonwealth of Massachusetts in 1796 and 1818. Because these treaties were entered without involvement of the United States, they violated federal law. However, the United States ratified the treaties, and confirmed to the PIN its treaty-based Reservation, when Congress enacted, and the President signed, the Maine Indian Claims Settlement Act in 1980 (MICSA). 25 U.S.C. § 1721, et seq. At that time, the United States officially discharged Maine from all obligations arising from its 1820 treaty with the PIN (by which Maine had assumed Massachusetts' obligations under the earlier treaties) and directed the transfer of all trust funds held by Maine, including those funds received from the sale of tribal lands, to the Secretary of the Interior. 25 U.S.C. § 1731, 1730.

There is a fundamental difference in an Indian Reservation, such as the PIN Reservation, created pursuant to Treaty, Executive Order, or Statute, and lands held by a Tribe in fee simple status. The MICSA, and the Maine Implementing Act (MIA), 30 M.R.S.A. § 6201, et seq., establish a dual system of land tenure for the PIN. The MICSA and the MIA recognize that the first type of land, Penobscot Territory, includes both the treaty-based Penobscot Reservation and the first 150,000 acres of land acquired by the Secretary of the Interior subsequent to the MICSA and held in trust for the benefit of the Penobscot Nation, as provided in 30 M.R.S.A. § 6205(2); 25 U.S.C. § 1724(d). MICSA further recognizes that the second type consists of lands PIN could acquire itself, to be held in fee simple, for which the United States would have no trust

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<sup>3</sup> This tribal interest in and right to its Reservation does not defeat the United States corresponding interest in Indian Reservation lands. Instead, it creates a unique situation of land tenure, one which does not fit within the neat patterns to which Bangor and the State attempt to ascribe this situation. The mere fact that the Department has described the lands at issue here as Penobscot lands or as lands of the Penobscot Nation does not mean that PIN holds these lands in fee simple, nor does it defeat the United States proprietary interest in the Reservation lands.

responsibility.<sup>4</sup> 25 U.S.C. § 1724(d)(3). The lands occupied by the Milford Project are of the first type.

The First Circuit recently set forth its view as to these two types of land tenure in a decision holding that the requirements of section 81 (25 U.S.C. § 81, which requires Secretarial approval of any service agreements relative to Indian lands) did not apply to lands purchased by the PIN in fee simple for investment purposes. Penobscot Indian Nation v. Key Bank, et al., 112 F.3d 538, 554 (1st Cir. 1997), cert. denied, 1997 WL 457740 (October 14, 1997). In reaching this determination, the court engaged in a painstaking review of whether section 81's approval requirements apply only to PIN's Indian trust and Indian tribal lands, which the court labelled as "Indian trust lands," or also to PIN's Indian fee lands. The latter type consists of those lands held in fee simple by Indian Tribes in which the Tribe "is entitled to the entire property with unconditional power of disposition." 112 F.3d at 546 N. 10. The court determined that a different standard does apply to the "Indian trust lands," which include PIN Reservation and Territory lands, than to PIN's lands acquired and held in fee simple. The court thus recognized the applicability of section 81's approval requirement to the PIN trust lands, which include both Reservation and Territory lands, but found section 81 does not apply to PIN's fee simple lands. In so holding, the court noted that the fee simple lands at issue in Key Bank resembled the lands in Tuscarora ("lands that Indian tribe purchased in fee simple were not subject to federal oversight pursuant to Federal Power Act, 16 U.S.C. § 797(e)"), because the United States neither owned these lands nor owned an interest in these lands." 112 F.3d at 553.

Key Bank further suggested that MICSA had repealed the normal federal protections to Indian lands and thus had repealed the applicability of section 81 to any of the PIN lands in Maine. The court declined to so hold, replying that "[a]lthough section 1724 provides that several statutes, including 25 U.S.C. § 177, no longer apply to PIN, it makes no mention of § 81. If Congress desired to repeal completely § 81 with respect to all PIN real property it could easily have done so, as it did with § 177 [the Nonintercourse Act]". Key Bank, 112 F.3d at 554 N. 19. Similarly, here, the protective provisions of the FPA apply to PIN's Indian trust lands, as labelled by the First Circuit and including the Reservation lands at issue; they would not apply to those lands acquired by the PIN in fee simple.

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<sup>4</sup> In its provision stating that Laws of the State apply to Indian lands, the MIA delineates the two types of Indian lands in Maine as those lands owned by the Indians and lands held in trust for the PIN by the United States or by any other person or entity. 30 M.R.S.A. § 6204.

Bangor and the State take issue with the Department for failing to establish those "essential rights associated with land ownership: exclusive possession, dominion, and control over the land." Bangor, p. 11, citing to Colten v. Marchais, 61 N.Y.S.2d 269, 271 (N.Y. 1946); State, pp. 7-13. The Department has already set forth in several filings the basis upon which it asserts section 4(e) conditioning authority over the Milford Project license, and has further provided the Commission with copies of the historic treaties and referenced the Commission to the statutes by which the United States claims this authority. See inter alia, August 23, 1993, July 17, 1996, and April 9, 1997, filings.

The request that the Department establish certain rights traditionally associated with land ownership, such as exclusive possession, is inappropriate to this situation. Obviously, the United States cannot establish exclusive use, possession or occupancy of the Penobscot Indian Reservation, nor of any Indian Reservation, as the Indian Tribe to whom the reservation was confirmed has exclusive possession of its lands. The United States is the trustee of Indian lands, while it is the beneficiary, the tribes, who have physical possession and use.

The United States does exercise dominion and control over the PIN Reservation lands. One component of this dominion and control over the Penobscot Indian Reservation is the proprietary interest the United States has in lands taken for public purposes, as described in the Department's April 9, 1997, filing. As described there, if compensation for lands taken is provided in monetary form, this compensation is deposited in the United States Treasury and then used by the United States to acquire lands in trust up to the value of lands taken. 25 U.S.C. § 1724(i)(1) and (2).<sup>5</sup>

That the United States exercises dominion and control over the Reservation lands, to the exclusion of the State, is further evident in the MICSA provisions by which tribal alienation of its Reservation is restricted. In contrast to Tuscarora, in which the Tribe relied upon the Nonintercourse Act (25 U.S.C. § 177) as its

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<sup>5</sup> The State, attempting to cloud this issue, claims that "under other circumstances, however, such compensation will be used to purchase lands that shall not be held in trust by the United States." (State, p. 5). These "other circumstances" relied upon by the State occur only if the acreage acquired exceeds that taken. In those situations, while the surplus lands may be held in fee by the PIN, lands equal in amount to the Reservation land taken shall be acquired by the United States and held in trust. 25 U.S.C. § 1724(i)(2).

sole restriction on alienation,<sup>6</sup> in the MICSA, Congress subjected the Penobscot Reservation to several specific statutory restrictions against alienation,<sup>7</sup> all of which rest approval authority for such alienations in the Secretary of the Interior. These provisions restrict:

- ◆ the leasing of lands within Penobscot Territory, including the Reservation, unless in accordance with 25 U.S.C. § 415, et seq. (requires approval of Secretary of Interior); and 25 U.S.C. § 396a, et seq. (subject to advice of Secretary of Interior, who has the right to reject all bids and readvertise such leases if in best interest of Indians);
- ◆ the sale of timber from Penobscot Territory, including the Reservation, unless in accordance with 25 U.S.C. § 407 (which requires compliance with regulations prescribed by the Secretary of the Interior);
- ◆ grants of rights-of-way on Penobscot Territory lands, including the Reservation, unless by the Secretary pursuant to 25 U.S.C. § 323, et seq. (Secretary of Interior empowered to grant rights-of-way, subject to such conditions as he may prescribe);
- ◆ the exchange of lands unless for other land or natural resources of equal value or equalized in value by payment of money either to the grantor or to the Secretary of the Interior for deposit in the PIN land acquisition fund;
- ◆ the sale of lands, unless at the time of sale the Secretary of the Interior has entered into an option agreement or contract of sale to purchase other lands of approximate equal value. 25 U.S.C. § 1724(g).

Obviously, the Secretary exercises dominion and control over the Penobscot Reservation lands since the Penobscot Nation may not exercise the basic elements of ownership, the most fundamental being the right to sell, lease or grant a right-of-way, without Secretarial consent. In contrast, the Tuscarora lands were held by the Tribe free of any encumbrance.

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<sup>6</sup> The Nonintercourse Act is no longer applicable to the PIN Reservation or Territory lands. 25 U.S.C. § 1724(g)(1); Key Bank.

<sup>7</sup> Moreover, the MICSA prohibits transfers of land within PIN Territory (to include the Reservation), except for certain takings for public uses under the MIA and MICSA. Such transfers are void ab initio and without any validity in law or equity. 25 U.S.C. § 1724(g)(2).

In short, the Department has a clear and overriding proprietary interest in the Reservation lands occupied by the Milford Project. As the agency with jurisdiction over these lands, the Department has asserted its section 4(e) mandatory conditioning authority over this prospective license. Those conditions as submitted by the Secretary pursuant to this authority are mandatory upon the Commission. Escondido Mutual Water Company v. La Jolla Band, 466 U.S. 765 (1984). Further, as the Executive with jurisdiction over the Penobscot Indian Reservation, it is the Secretary of the Interior, not the Commission, who makes the determination that this is a "reservation" under the FPA. It is the Commission's role to accept the conditions thus prescribed and include them in any license issued for the Milford Project.

## II. Flowage of Reservation Lands

The Department's April 9, filing responded to several comments of Bangor and the State regarding Bangor's flowage of PIN Reservation lands. In its May 19, 1997, comments, Bangor clarifies its position to now agree with the Department that its flowage of Reservation lands did not result in the transfer of fee title to it of the flowed Reservation lands. (Bangor, pp. 24-5). The Department appreciates this clarification of Bangor's position.

Unfortunately, however, the State is less discerning of the consequences of its position. In its May 30, 1997, comments, the State asserts that flowage of Reservation lands clearly resulted in a change in possession, dominion, or control of the flowed Reservation lands, extinguishing all tribal claims to the lands flowed. (State, pp. 9-10). Then, the State goes on to recognize that the PIN possesses riparian rights to the midpoint of the Penobscot River, between islands and upland. (p. 13). The State acknowledges that PIN has rights to fish within the noted area of riparian ownership. (p. 12). 30 M.R.S.A. § 6207(8). Apparently, however, the State does not realize that its broad view of the transfer provision cannot be reconciled with its recognition of a PIN fishing right, as the asserted extinguishment of tribal claims to flowed lands would defeat PIN's riparian ownership and thus the fishing right the State recognizes.<sup>8</sup> If followed, the State's position defeats PIN's fishing right, a result contrary to the intent of Congress in enacting the MICSA, and of the express language of Maine in enacting the MIA. The State's position regarding flowage is simply incorrect.

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<sup>8</sup> If accepted, Maine's view that tribal rights to flowed lands were extinguished would lead to the result of Bangor now standing as owner of the flowed portions of islands, and thus in possession of the riparian rights, including fishing rights. This position obviously would deprive the PIN of the fishing right within its Reservation that the State has recognized, and moreover, is a result which even Bangor does not assert.

Bangor misconstrues the Department's Response to its claimed rights to the flowed Reservation lands. (Bangor, p. 24). To clarify, the Department's position is this:

- ◆ the flowage of Reservation lands by operation of the Milford Project has not resulted in the severance of Reservation title to those flowed lands;
- ◆ the Department rejects Bangor's alleged prescriptive easements to flow PIN lands as such easements by prescription on Reservation lands were not recognized under Maine law and were thus not a valid interest to be ratified by MICSA in 1980;
- ◆ the Department does recognize that the Maine Legislature in 1917 authorized PIN members to grant a "right of flowage" to Bangor Power Company. The easements subsequently granted and approved by the State Indian Agent in accordance with the legislative authorization and recorded in the County Registry of Deeds were valid under Maine law, and thus were ratified by MICSA in 1980.

As noted in the Department's April 9 Response, prior to 1980 and Congressional enactment of the MICSA, the State of Maine considered that it held legal title to the Indian Reservation lands in Maine.<sup>9</sup> As such, the State's position was that prescriptive easements could not be acquired on Indian Reservation lands, nor could easements be obtained from individual Indians without legislative authorization.<sup>10</sup> Under state law, then, Bangor could NOT acquire an easement by prescription to flowed Reservation lands and thus had no prescriptive easements in 1980 which could have been ratified by MICSA.

In 1917, however, the Maine Legislature did authorize PIN members to grant a "right of flowage" to Bangor Power Company. It was under this authorization that 33 easements were acquired from PIN members and recorded by Bangor. Although these easements and the underlying state legislative authorization were accomplished without federal involvement or consent, and thus violated federal law, they were valid under state law and thus were ratified by

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<sup>9</sup> Contrary to the State's assertion, the Department has not embraced "the contention that the State holds title to the Penobscot Reservation." (State, p. 3 N. 2). The Department has merely reported on the State's own stated position at the time, which was that prescriptive easements could not be obtained on Reservation lands (Dept.'s April 9 Response to Comments, p. 28). The State has not refuted this point.

<sup>10</sup> See Department's April 9, Response, p. 28, citing to Att. Gen. Report, 1972, pp. 425-6.

MICSA. The Department recognizes that Bangor has 33 easements to flow Reservation lands.<sup>11</sup> As the Commission has held, however, an easement to flow does not defeat the exercise of section 4(e) conditioning authority. South Carolina Electric and Gas Company, 75 FERC ¶ 61,308, at p. 61,988 N. 9, (1996); Wisconsin Valley Improvement Company, 76 FERC ¶ 61,050 (1996). An easement to flow may affect computation of section 10(e) annual charges and, consequently, those Reservation lands to which recorded easements apply were not included in the Department's Recommendation of section 10(e) annual charges filed on April 9, 1997.<sup>12</sup>

Both Bangor and the State claim that Taylor and Tribal Council of Penobscot Nation v. Bangor Hydro-Electric Company recognizes a broader transfer of interests than that based upon the recorded easements. The Department disagrees, and refers the Commission to our discussion of this issue in the April 9, 1997, Response. As noted in that filing, and unrefuted by either Bangor or the State, no evidence has been presented establishing that Taylor was a properly certified class action. As such, it cannot bind beyond its terms. Since Taylor's predecessors were among the 33 PIN members who granted Bangor easements to flow, the Taylor case can be applied only to those recorded easements.

### III. PIN's Riparian Rights to the Penobscot River

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

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<sup>11</sup> Bangor further erroneously characterizes the Department's report of State approval of the 33 recorded easements. (Bangor, p. 27-8). Contrary to Bangor's claim that there is no evidence in the record showing that the 33 easements were approved by the State, we direct the Commission, and Bangor, to Attachment B to the Department's April 9, Response, which is the 1917 Maine Act, Ch. 78, by which the Maine Legislature authorized PIN members to grant a right of flowage to Bangor for operation of the Milford Project, subject to the approval of the State Indian Agent. In the Department's July 17, 1996, filing of section 4(e) conditions, included in the record are the easements which were granted pursuant to this legislative authorization and duly recorded in the Penobscot County Registry of Deeds. An examination of those deeds reveals that they were approved by the State Indian Agent, acting pursuant to legislative authorization.

<sup>12</sup> Similarly, the Department acknowledges that Gut Island was transferred to PIN and included in the PIN Reservation (Laws 1987, C. 712) subject to an easement to flow. Gut Island was thus not included in the section 10(e) calculation, but it does remain subject to the Department's section 4(e) authority.

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 the common law, and therefore 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 above the tide was not navigable, although floatable and used as a public highway, and thus open 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 MIA expressly provides, however, that "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, we disagree 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 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>13</sup> Further, the legislative history of MICSA confirms that Congress concurred in the PIN's permanent and retained sovereign and riparian "right to control hunting and

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<sup>13</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. (Included as Attachment F in Department's April 9, response.)

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>14</sup>

Also unsupported is the State and Bangor's interpretation that the right of passage reserved to the public in the 1818 Treaty between PIN and Massachusetts pertained only to the four townships retained by PIN, not to passage through the reserved islands in the Penobscot River, and thus operated to defeat PIN's retained riparian rights in the beds and banks of the Penobscot River. The language of the Treaty speaks for itself - in reserving to PIN the islands in the Penobscot River and the four townships, and thus the associated riparian rights, it provided the citizens of said Commonwealth a "right to pass and repass **any of the rivers, streams, and ponds, which run through any of the lands hereby reserved**, for the purpose of transporting their timber and other activities through the same." There is no restriction in the plain language of the Treaty limiting the applicability of this provision to the townships. The State and Bangor's position on this issue is without merit.

**IV. The Department's section 4(e) conditions are properly applied to this proceeding.**

Bangor asserts that, based upon Commission precedent, the Department's conditions are not proper section 4(e) conditions, citing to Minnesota Power & Light Co. (MP&L), 72 FERC ¶ 61,028 (1995), Order on Rehearing, 75 FERC ¶ 61,131 (1996). Based on the Commission's holding in MP&L, Bangor asserts that the Department's section 4(e) conditions cannot be considered since they are not limited to that portion of the Milford reservoir lying upon the PIN Reservation. (Bangor, p. 38). We note that the Department and the Fond du Lac Tribe have appealed the Commission's decision in MP&L to the D.C. Circuit Court of Appeals. (Minnesota Power & Light, et al. v. FERC, D. C. Cir. Nos. 96-1219, 96-1222, 96-1223).

The Department's disagreement with the Commission's holding in MP&L has been expressed to the Commission and in the pending court appeal. We further object to Bangor's attempt to apply that holding in this disparate factual scenario. The MP&L proceeding involves a project containing numerous developments, of which one is located on the Reservation lands of the Fond du Lac Band of Lake Superior Chippewa Indians. The section 4(e) conditions prescribed in that case pertain to several developments included within the one license issued by the Commission for the St. Louis River Project. Here, in contrast, while there are two dams within the Milford Project (Milford and Gilman Falls), both create one impoundment which occupies Penobscot Reservation lands. The

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<sup>14</sup> H.R. Rep. No. 96-1353 at 16-17 (1980), reprinted in 1980 U.S.C.C.A.N., 3786, pp. 3792-3.

Department's conditions go to the Milford Project, which is located on Reservation lands.

In interpreting section 4(e), the Supreme Court has stated that "[i]f a project is licensed 'within' [an Indian] reservation, ... the Secretary [of the Interior] may impose conditions for the protection of such reservation." Escondido, 466 U.S. at 780. It is beyond dispute that the Secretary's authority is mandatory.

The FPA defines "project" to consist of the "complete unit of improvement or development," including "all dams and appurtenant works and structures ... which are a part of said unit, and all storage, diverting or forebay reservoirs directly connected therewith." 16 U.S.C. § 796(11). Here, the Milford Project is the "complete unit of development," or project, for which the Secretary is authorized to prescribe conditions. The language of the statute provides that the Secretary's authority to impose conditions runs to the license; it is not limited to the component development or project works located on the reservation. 16 U.S.C. § 797(e).

Both the FPA and the Supreme Court's interpretation of Section 4(e) in Escondido support the view that the Secretary's authority to prescribe conditions for the protection and utilization of a reservation applies to a project **license** if at least some of the project **works** are actually within the reservation. Escondido, 466 U.S. at 784. Bangor's claim that the Department's section 4(e) conditions are only permissible to the extent they impact the portion of the project works occupying reservation lands is without merit.

Thank you for your consideration.

Sincerely,



Kerry O'Hara  
Attorney of Record

cc: Service List, Project No. 2534

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF )  
MILFORD HYDROELECTRIC PROJECT ) Project No. 2534  
Penobscot River, Maine )  
Bangor Hydro-Electric Company )

Certificate of Service

I hereby certify that the foregoing letter and two attachments have this day been filed with the Commission and served upon each person designated on the Service List compiled by the Secretary for the Milford (FERC No. 2534) Project proceeding.

Dated at Washington DC this 10<sup>th</sup> day of November, 1997.

Name: K. O. Utter