Roundtable to Review the Maine Indian Claims Settlement Act September 19, 2016

Briefing Booklet for the Roundtable to Review the Maine Indian Claims Settlement Act

Prepared by

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September 19, 2016

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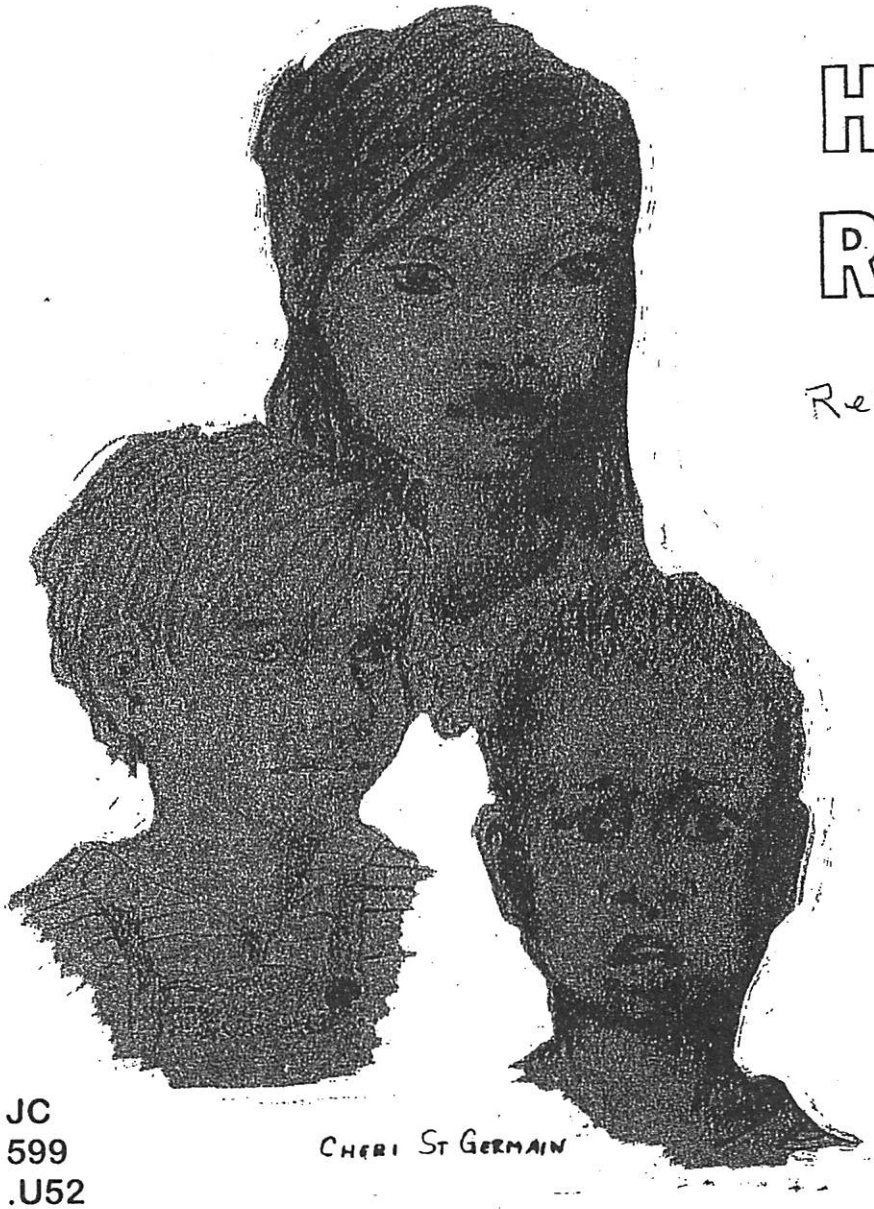
All of these documents can be found on the Maine Indian Tribal-State Commission website, www.mitsc.org.

Governor's Task Force on HUMAN RIGHTS

Report



SUBMITTED DECEMBER 1968

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DOCUMENT RESUME

ED 076 281 RC 006 965

TITLE	A Compilation of Laws Pertaining to Indians. State of Maine.
INSTITUTION	Maine State Dept. of Indian Affairs, Augusta.
PUB DATE	Jan 73
NOTE	50p.
EDRS PRICE	MF-$0.65 HC Not Available from EDRS.
DESCRIPTORS	*American Indians; Education; Forestry; Housing; *Laws; *Legal Responsibility; *State Agencies; *State Legislation; Welfare Services
IDENTIFIERS	*Maine; Passamaquoddies; Penobscots

ABSTRACT

The document is a compilation of laws pertaining to the American Indians in the state of Maine. These laws are compiled from: (1) the Maine Revised Statutes of 1964 and amendments through 1972; (2) the Constitution of Maine; and (3) the current resolves and private and special laws. Major topics are: education, elections, fish and game, forestry, health and welfare, highways, housing, tribes, legislature, motor vehicle taxes, and treaties. Also included are miscellaneous provisions such as liquor and public dumps. [Not available in hard copy due to marginal legibility of original document.] (FF)

STATE OF MAINE

A COMPILATION OF LAWS

PERTAINING

TO

I N D I A N S

Compiled from:

- the Maine Revised Statutes of 1964, including amendments through 1972
- the Constitution of Maine
- current Resolves and Private & Special Laws

Prepared by the Department of Indian Affairs

Augusta, Maine

Printed

JANUARY 1973

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DOCUMENT RESUME

ED 118 296 RC 008 969

AUTHOR Akins, Andrew; And Others
TITLE Federal and State Services and the Maine Indian. A Report of the Maine Advisory Committee to the United States Commission on Civil Rights.
INSTITUTION Maine State Advisory Committee to the U.S. Commission on Civil Rights, Augusta.
PUB DATE Dec 74
NOTE 119p.

EDRS PRICE MF-$0.83 HC-$6.01 Plus Postage
DESCRIPTORS Advisory Committees; *American Indians; *Civil Rights; Economic Development; Education; Evaluation; Federal State Relationship; Foster Children; Health; Law Enforcement; *Nonreservation American Indians; *Social Services; *State Federal Aid; Welfare
IDENTIFIERS Maine; *Maine Advisory Committee Civil Rights Commission; Maliseets; Micmacs; Passamaquoddys; Penobscots

ABSTRACT

Pursuant to its responsibilities to advise the Commission on Civil Rights, the Maine Advisory Committee's hearings, investigations, and recommendations relative to Federal and State services for American Indians in Maine are detailed in this report. Dealing first with policy and law as manifest in: (1) Self-Determination; (2) Federal Indian Services; (3) State Policy and State Services; (4) Conflict in the State of Maine, This report also presents the committee's recommendations for the following: (1) Economic and Community Development; (2) Housing; (3) Health; (4) Education; (5) Welfare; (6) Foster Care; and (7) Law Enforcement and Public Safety. Major conclusions cited in this report are: (1) Maine Indians are being denied services provided other Native Americans by Federal agencies which is not only discriminatory but is also placing a disproportionate tax burden on Maine taxpayers. (2) Half the Indians in Maine are not receiving State Indian services because they live off-reservation. (3) The State should develop an integrated service program to serve all Maine Indians (Maliseets, Passamaquoddys, Penobscots, and Micmacs) regardless of their residency. (4) Current socioeconomic statistics reveal longstanding discriminatory practices (45 percent substandard housing, 65 percent unemployment, severe health problems, nonexistent bicultural education, and 4 out of 136 Indian foster children in Indian foster homes). (JC)

MAINE ADVISORY COMMITTEE

TO THE

UNITED STATES COMMISSION ON CIVIL RIGHTS

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*No longer a member of the Maine Advisory Committee.

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INTRODUCTION

There are approximately 3,000 Indians living in Maine. All four tribes--Maliseet, Micmac, Passamaquoddy, and Penobscot--are of the Algonkian linquistic stock, they originally belonged to the Wabanaki Confederacy, and they are culturally homogeneous.[1]

The majority of the Indian population is located in northeastern Maine, above and around the 45th parallel, with the greatest numbers in Aroostook, Penobscot, and Washington Counties. Maine Indians have retained much of their culture, language, and government, and as this report will demonstrate, are aggressively seeking to redress the injustices of the past.

The Indians in Maine are Native Americans, their ancestors considered themselves one community, and today they comprise a distinct people. They have weathered the ridicule and racial discrimination of surrounding non-Indian communities. They have withstood long-standing governmental policies to separate them from other Indians in other parts

1. For general background on Maine Indian history, the Maine Advisory Committee referred to the following: Andrea Bear, "Malisite, Passamaquoddy Ethnohistory," Colby College Honors Thesis, 1966; Gregory Buesing, "Maliseet and Micmac Rights and Treaties in the United States," Association of Aroostook Indians, Inc., Houlton, Me., 1973; J.D. Prince, "Passamaquoddy Texts," Journal of the American Ethnographic Society, Vol. 10, 1921; Frank G. Speck, "Eastern Algonkian Wabanaki Confederacy," American Anthropologist, Vol. 17, 1915; R. Wallis and W. Wallis, The Micmac Indians of Eastern Canada, 1955.

of the continent, to erode their political and cultural ties, and to place them in categories such as "on-reservation" and "off-reservation" for administrative convenience. The attitudes of the dominant culture might have had a divisive effect on the Indians of Maine had they not been determined to maintain their identity.[2] This is important to keep in mind as this report outlines some of the dilemmas faced by Maine Indians today.

The Maine Advisory Committee spent more than a year reviewing statements, relevant documents and reports from the staff of the U. S. Commission on Civil Rights, and participating in a 2-day public hearing that it held in Bangor, February 1973.[3]

In view of the urgency of the conditions confronting Indians in Maine, the Advisory Committee in May 1973 released its preliminary findings and recommendations which received wide distribution throughout the State.[4]

Several of these recommendations have been put into effect, in whole or in part: an Office of Off-Reservation Indians has been established in the Department of Indian Affairs; the budget of the department was increased, though it is still not adequate; and an Indian Police Department has been established, headed by an Indian.

However, much remains to be done. The Maine Advisory Committee pledges to work diligently at the Federal, State, and local levels for the recommendations of this report. In this endeavor, we call upon all citizens of Maine to join us.

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2. Andrea Bear, "Passamaquoddy Indian Conditions," Preliminary Report to the Maine Advisory Committee, U.S. Commission on Civil Rights, 1972, Commission files.

3. Official transcript of the Maine Advisory Committee's open-meeting in Bangor, Me., Feb. 7-8, 1973 (hereafter cited as Bangor Transcript). Available in files of U.S. Commission on Civil Rights.

4. Federal and State Services and the Maine Indian, Preliminary Findings and Recommendations, Interim Report of the Maine Advisory Committee, December 1973. (second printing)

At Loggerheads–

The State of Maine and the Wabanaki

Final Report of the

Task Force on Tribal-State Relations

January 15, 1997

Task Force on Tribal-State Relations *

Members of the General Public

Roger Smith, Chairperson of Task Force on Tribal-State Relations and Member of Committee on Indian Relations, Episcopal Diocese of Maine
** Bennett Katz, Chairperson of Maine Indian Tribal-State Commission

Representatives of the Passamaquoddy Tribe

The Honorable Victoria Boston, Tribal Council Member, Indian Township
The Honorable Margaret "Dolly" Dana, Tribal Council Member, Pleasant Point
The Honorable Linda Meader, Tribal Council Member, Indian Township

Representatives of the Penobscot Nation

The Honorable Paul Bisulca, Tribal Representative to 117th Maine Legislature
** Mark Chavaree, Esq., Tribal Counsel
Deanna Pehrson, Tribal Member

Representatives of the State of Maine

Susan Bell, Senior Policy Advisor, Office of the Governor
The Honorable Stephen Hall, Senate Chair, Joint Standing Committee on Fish and Wildlife, 117th Maine Legislature
** Frederick Hurley, Director of Resource Management, Department of Inland Fisheries and Wildlife
Thomas Harnett, Esq., Assistant Attorney General, Department of Attorney General
** Evan Richert, Director, State Planning Office
The Honorable Sharon Treat, Esq., House Chair, Joint Standing Committee on Judiciary, 117th Maine Legislature

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Diana Scully, Executive Director, Maine Indian Tribal-State Commission

* This list includes the positions of people at the time of appointment to the Task Force.

** Also a member of the Maine Indian Tribal-State Commission.

Executive Summary

> Learning how an Indian thinks is difficult for a non-Indian and learning how to walk in an Indian's shoes is impossible. When things look the darkest, that is not the time to throw in the towel. We all must keep making the effort. We will never be the same, but we can work together. Bennett Katz, Chair, Maine Indian Tribal-State Commission

The 5,500 Wabanaki people in Maine are from four federally recognized Tribes: the Passamaquoddy Tribe, the Penobscot Nation, the Aroostook Band of Micmacs, and the Houlton Band of Maliseets. There are contacts between the State of Maine and the Tribes in all arenas affected by government, including natural resources, environmental protection, land use regulation, health and human services, law enforcement, transportation, taxation, and the courts.

As a result of the 1980 Maine Indian Claims Settlement Act, the Passamaquoddy Tribe and the Penobscot Nation have a special relationship with the State of Maine. The relationship between the State and these two Tribes, in particular, is an uneasy one and is growing more so every day. Some people believe that the Act is clear and resolved many tribal-state conflicts; others heartily disagree. The State of Maine and the Wabanaki are at loggerheads.

One of the places where this uneasy relationship plays out is before the Maine Indian Tribal-State Commission (MITSC), created as part of the Settlement. Among other things, the MITSC is required to review the effectiveness of the Act and the social, economic, and legal relationship between the State, Passamaquoddy Tribe, and Penobscot Nation. In recent years, the MITSC has informed both the State and the Tribes about its difficulty in fulfilling its responsibilities, given its meager budget and the fact that its recommendations often are not taken seriously.

The Task Force on Tribal-State Relations was created by the 117th Maine Legislature. It worked from June 1996 through early January 1997 to explore ways of improving the tribal-state relationship and the effectiveness of the MITSC, as well as to determine the appropriate role of the Aroostook Band of Micmacs and the Houlton Band of Maliseets in the MITSC.

The Task Force strongly encourages the State and the Tribes to build on the important dialogue and education which have begun during its short life. The Task Force offers several recommendations which can provide the foundation of mutual respect and trust, necessary to support a productive relationship between the State and the Tribes:

1. Round Table Discussions. The MITSC should facilitate "round table" or "talking circle" discussions involving representatives of the State and the Tribes to explore the issues of assimilation and sovereignty. This means *listening* to one another, not debating one another.

2. Annual Assembly. The MITSC should convene an annual Assembly of Governors and Chiefs, including the Governors of the State of Maine and the Passamaquoddy Tribe and the Chiefs of the Penobscot Nation, the Houlton Band of Maliseets, and the Aroostook Band of Micmacs. The desired outcomes of the Assembly include consensus about priority issues, issues to be addressed by the MITSC over the coming year, and any issues to be addressed outside the MITSC.

3. Advisory Committee. The State, the Passamaquoddy Tribe, and the Penobscot Nation should support the creation of an Advisory Committee on Tribal State Relations. Appointed and supported by the MITSC, the Advisory Committee should serve as a sounding board, bring

expertise not found among the MITSC members, and provide a forum for discussion of any aspect of tribal-state relations and concerns, whether or not they are related to the Settlement. The Advisory Committee should include at least the Passamaquoddy Tribal Representative, the Penobscot Tribal Representative, a repre-sentative of the Aroostook Band of Micmacs, a representative of the Houlton Band of Maliseets, and two members of the Maine Legislature.

4. Strengthening the Commission. The MITSC should develop a written conflict of interest policy to guide both appointments to the MITSC and the conduct of its members. The State, the Passamaquoddy Tribe, and the Penobscot Nation should support an amendment to the Settlement to change the quorum requirement for the MITSC from seven to six members, provided that at least one representative of each of the three parties is present. The MITSC should formulate an annual plan with long and short-term goals and distribute an annual report describing the priority issues it has addressed and the extent to which it has met its goals. The MITSC should propose a plan and budget for performing its public information function.

5. Protecting Tribal Fish and Wildlife. The MITSC should create a committee of the whole to undertake studies and make recommendations with respect fish and wildlife management policies on non-tribal lands, in order to protect fish and wildlife stocks on tribal lands. It should develop a long range plan for the regulation of tribal waters within its jurisdiction.

6. Consideration of Tribal Needs and Concerns. The Governor of Maine should consider issuing an Executive Order to require executive branch agencies to take into account tribal needs and concerns in the development of legislation, rules, policies, and programs. Legislative Leaders should consider instructing legislators to take into account tribal needs and concerns as they review and act upon the legislative proposals before them.

7. Workshops. The MITSC should develop and offer workshops about the Wabanaki, the racism they experience, the Settlement, and tribal-state relations to legislators and cabinet members on a bi-annual basis and to other state employees on an annual basis. Churches and other organizations should conduct prejudice reduction workshops for individuals involved in Indian/non-Indian relationships.

8. Tribal Representatives. The Micmacs and Maliseets each should have a non-voting representative in the Legislature.

9. MITSC's Need for Resources. State and tribal leaders should discuss and work toward agreement about the level of support for the MITSC and whether or not parity in cost sharing between the State and the Tribes should continue.

10. Legislation. The State, the Passamaquoddy Tribe, and the Penobscot Nation all should support legislation proposed by the Task Force to create the Advisory Committee on Tribal-State Relations (#3) and to change the MITSC's quorum requirement (#4). The Task Force has submitted this proposed legislation separately from this report.

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Impact of Maine Civil Laws on the Wabanaki

Report to the 118th Legislature by the
Maine Indian Tribal-State Commission
pursuant to Resolves 1997, Chapter 45

December 15, 1997

1. Resolve

Pursuant to Resolves 1997, Chapter 45, the Maine Indian Tribal-State Commission (MITSC) is authorized and directed to undertake a systematic review of the civil laws of the State of Maine over a period of four years. The purpose of the review is to determine the manner and extent to which these laws, as enforced, constrict or impinge upon the best interests of children with respect to the:

- Traditional culture and way of life as practiced in tribal communities;
- Ability of the Tribes to regulate their members, lands, schools, and other cultural institutions and communities in a manner that honors tribal traditions; and
- Respect and dignity appropriately given to all individual citizens in the State and members of the Tribes.

In carrying out its study, MITSC is required to identify policies and programs that could foster the social and economic strength without posing a significant risk of harm to the resources of the State held for the benefit of all or to property or rights of people who are not members of the Tribes. The resolve also instructs MITSC to consult with appropriate representatives of the State and Tribes; use conflict resolution techniques; and determine how to address concerns underlying legislation to amend the Act to Implement the Maine Indian Claims Settlement proposed by the Passamaquoddy Tribe during the First Regular Session of the 118th Legislature. MITSC is required to report its findings and legislative recommendations to the Legislature on December 15, of the years 1997, 1998, and 2000.

2. Review Process

During its meeting of June 5, 1997, MITSC created a Civil Law Review Committee to develop recommendations for consideration by MITSC's full membership. Serving on this Committee are two MITSC members representing the State of Maine, one MITSC member representing the Penobscot Nation, and two MITSC members representing the Passamaquoddy Tribe. The Committee also has invited other interested people representing both the State and the Tribes to participate in its work on particular issues. A list of Committee members and participants is attached.

Over the past six months, the Civil Law Review Committee met several times and held several teleconferences. In addition, the full membership of MITSC deliberated about the work of the Committee during two meetings.

3. Initial Issues Reviewed

The Civil Law Review Committee identified five issues to tackle first. It was agreed that these are just a starting point and that many additional issues will be analyzed during the four-year review process. These initial issues include: 1) the regulation of land use on trust lands in Passamaquoddy and Penobscot Territory; 2) place names within Passamaquoddy Territory; 3) the enforcement of tribal court decisions beyond the reservation; 4) the relationship between jurisdiction and child welfare resources for Indian children; and 5) economic basis of Tribal Government.

4. Proposed Legislation Resulting from Review

As a result of this initial review by MITSC and its Civil Law Review Committee, two pieces of legislation are being proposed now. Both were unanimously approved during MITSC's meeting of December 4, 1997. It is possible that tribal-state discussions about the enforcement of tribal court decisions and child welfare jurisdiction and resources may yield additional legislative proposals over the next few months.

Land Use Regulation. One legislative proposal being introduced now is the result of extensive study and discussion by the Civil Law Review Committee. The bill clarifies the process by which the Passamaquoddy Tribe and Penobscot Nation may control land use and development and protect natural resources within unorganized and deorganized lands within Indian Territory.

The bill provides that the Tribe and Nation each may submit a comprehensive land use plan and implementing ordinances to MITSC. Upon receipt of a plan and ordinances, MITSC is required to solicit public review and comments, including the comments of the Land Use Regulation Commission (LURC), and to determine whether the plan satisfies specified planning and land use management criteria. Indian Territory lands governed by a plan and ordinances approved by the Tribal-State Commission are not within LURC's jurisdiction.

Under the bill, any contiguous block of Indian Territory consisting of less than 500 acres, the plan for which allows for development activity other than natural resources management activities and noncommercial uses by tribal members, is not covered by this Act. Acreages that are not contiguous but are sufficiently proximate to each other to be managed as a single unit are considered to be a contiguous block.

Finally, the bill provides that in considering zoning changes or development permits elsewhere in the unorganized and deorganized areas of the State, LURC must consider any potential adverse impacts on Indian Territory and provide notice to the affected Tribe or Nation when a significant adverse effect may be anticipated.

Names of Geographic Features. The second legislative proposal being introduced now affirms that the Joint Tribal Council of the Passamaquoddy Tribe may change the names of geographic features within Passamaquoddy Territory and directs state entities to assist in making sure that the name changes appear in maps and other public documents. The bill also instructs MITSC to study and develop a proposal for changing offensive names beyond Indian Territory.

The Penobscot Nation is reviewing this and may wish to be included as the bill wends its way through the legislative process. The bill builds on LD 955, the bill introduced to the First Regular Session of the 118th Legislature by Passamaquoddy Representative Fred Moore.

5. Other Issues Emerging from Review

Child Welfare. The Civil Law Review Committee's discussion about child welfare opened with a review of a specific case involving a Passamaquoddy child who does not live on the reservation. The Tribe did not assert its jurisdiction over the child, because state/federal funds available for that child while under state jurisdiction would not have continued flowing if the child were under tribal custody. The question was asked: Why shouldn't state/federal funds follow an Indian child who does not live on a reservation, regardless of whether the State or a Tribe has jurisdiction over that child? In November, the Committee met at Pleasant Point with several child welfare representatives from the Maine Department of Human Services (DHS), the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseets to explore this question and other child welfare issues.

Subsequent to the meeting, the Tribes proposed draft legislation to recognize that children within the jurisdiction of the Passamaquoddy Tribe and Penobscot Nation under the federal Indian Child Welfare Act are Maine children who should be entitled to the same level of financial support as children within the custody of DHS. The proposal amends laws governing reimbursement for foster care and child care services to include Indian children as eligible and to recognize facilities approved by the Tribes under Indian Child Welfare Act standards. The proposal also amends the Maine Implementing Act of the Maine Indian Claims Settlement to provide expressly for tribal participation in child welfare programs.

DHS officials have expressed some concerns about the proposal. The Civil Law Review Committee will set up a meeting with them to review their concerns and to determine how to proceed. In addition, the Committee anticipates continuing discussions between state and tribal front line workers.

Enforcement of Tribal Court Orders. Tribal concerns about the enforcement of Tribal Court decisions beyond the reservations gave rise to LD 957, a bill introduced by Passamaquoddy Representative Fred Moore during the First Regular Session of the 118th. The Civil Law Review Committee has had several discussions about these concerns. Because this area involves legal procedures that are complex and arcane to the non-lawyer, the Committee convened a meeting of State and Tribal lawyers to review this matter. An outcome of the meeting was agreement to focus on the areas of child support and probate court to gain a full understanding of what specifically needs to be fixed so that Tribal Court orders are enforced in an effective manner.

During MITSC's November 14 meeting at Pleasant Point a representative of WomanKind, a program for victims of domestic abuse, indicated that if a Tribal Court order is not honored for police off the reservation this becomes a safety issue for victims. Noting that one partner may be a tribal member and the other not, she stressed that Tribal Court orders must be taken seriously.

Economic Basis of Tribal Government. Another topic under consideration by the Civil Law Review Committee is the economic basis of Tribal Government. Because land is held in common by tribal members, there are no property taxes to support the operation of Tribal Government. Thus, the Committee is examining how other revenue raised by the Tribes might stay with the Tribes. Discussions to date have focused on fines (e.g. traffic fines) and sales taxes. Proposals about the latter have ranged from sales tax exemptions on tribal lands to having sales taxes on tribal lands flow to the Tribes.

6. Assembly of Governors

Resolves 1997, Chapter 45 also requires MITSC to convene an annual Assembly of Governors and Chiefs. Included are the Governors of the State of Maine and the Passamaquoddy Tribe and the Chiefs of the Penobscot Nation, Houlton Band of Maliseets and Aroostook Band of Micmacs. The first annual Assembly was held on December 4, 1997 at the Wabanaki Center in Orono. The attendance was excellent and the session was productive and positive. There was consensus that over the next year:

- State agencies should discuss intended major actions with MITSC if the action is expected to affect the Tribes and that the Tribes should do the same when they are contemplating a major action that would affect the State.
- MITSC should review policy with respect to the surface use of waters in Indian Territory.
- MITSC should analyze the potential for resolving conflict over jurisdiction over the lakes at Indian Township and the St. Croix and Penobscot Rivers.
- MITSC should continue its examination of present practices with respect to the collection of fines and taxes on the Reservation, with the goal of allowing funds to be used for the support of Tribal Government.
- MITSC should continue with its review of child welfare issues.
- MITSC should recommend a formal means of including the Houlton Band of Maliseets and Aroostook Band of Micmacs as active participants in tribal-state discussions.

7. Other Issues Before the Legislature

MITSC is aware of three additional pieces of legislation that will be before the Second Regular Session of the 118th Legislature. MITSC has not yet had an opportunity to discuss these proposals in detail and, therefore, has not yet taken a position on them.

- A bill to correct a 1995 technical error in legislation relating to the jurisdiction of the Penobscot Tribal Court.
- A bill to continue the current method of financing the schools on the Passamaquoddy and Penobscot reservations.
- A bill relating to the regulation of marine resources, which includes a role for MITSC.

8. Summary

MITSC has been hard at work in its review of the civil laws of Maine, pursuant to Resolves 1997, Chapter 45. This report is a snapshot of issues at a point in time. MITSC's review of the civil laws is ongoing work. MITSC is looking forward to the opportunity to discuss this work with the Joint Standing Committee on Judiciary when the 118th Legislature reconvenes in January 1998.

MITSC has filed two pieces of legislation with the Legislature along with this report and has submitted them under separate cover:

- An Act to Implement the Recommendations of the Maine Indian Tribal-State Commission Relating to Tribal Land Use; and
- An Act to Implement the Recommendations of the Maine Indian Tribal-State Commission Relating to the Names of Geographic Features in Passamaquoddy Territory.

Civil Law Review Participants

MITSC Members Serving on Civil Law Review Committee

Eric Altvater, Lt. Governor, Passamaquoddy Tribe at Pleasant Point
Mike Best, Passamaquoddy Tribe at Indian Township
Alan Brigham, Maine Department of Economic and Community Development
Mark Chavaree, Penobscot Nation
Evan Richert, Maine State Planning Office

Participants in Child Welfare Meeting & Review

MITSC Members on Civil Law Review Committee
Don Aymonds, Passamaquoddy Tribe at Pleasant Point
Sonja Dana, Passamaquoddy Tribe at Indian Township
Susan Deveau, Houlton Band of Maliseet Indians
Nancy Goddard, Maine Department of Human Services
Sherry Moran, Houlton Band of Maliseet Indians
Earlene Paul, Penobscot Nation
Greg Sample, Lawyer for Passamaquoddy Tribe
Diana Scully, MITSC Executive Director
Fred Tomah, Houlton Band of Maliseet Indians
Susanna Wright, Houlton Band of Maliseet Indians

Participants in Other Civil Law Review Committee Meetings

MITSC Members on Civil Law Review Committee
John Banks, MITSC Member and Director of Natural Resources, Penobscot Nation
Elizabeth Butler, Chief Legal Counsel to Governor King
Fred Moore, Passamaquoddy Tribal Representative
Greg Sample, Lawyer for Passamaquoddy Tribe
Diana Scully, MITSC Executive Director
Paul Stern, Maine Department of Attorney General
Dwayne Socobasin, Council Member, Passamaquoddy Tribe at Indian Township

Impact of Maine Civil Laws on the Wabanaki: 1998

Report to the 119th Legislature by the
Maine Indian Tribal-State Commission
pursuant to Resolves 1997, Chapter 45

December 15, 1998

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Impact of Maine Civil Laws on the Wabanaki:

1997 - 2000

A Report by the
Maine Indian Tribal-State Commission

Submitted Pursuant to
Resolves 1997, Chapter 45

to the
120th Maine Legislature

December 15, 2000

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Executive Summary

Overview

Resolves 1997, Chapter 45, authorizes the Maine Indian Tribal-State Commission (MITSC) to undertake a review of the civil laws of Maine over four years to determine whether and how these laws affect the ability of the Tribes to regulate their members, lands, schools, cultural institutions, and communities in a way that honors tribal traditions. The resolve instructs MITSC to keep in mind the best interests of children and to identify policies and programs that can foster social and economic strength for the Tribes without posing a significant risk of harm to the resources of the State or to the property or rights of non-tribal members. The resolve also requires MITSC to convene an annual Assembly of tribal and state governors and chiefs. This report to the 120th Legislature is last of three required.

MITSC has examined issues relating to child welfare, tribal courts, the economic basis of Tribal Government, education and culture, Indian Territory, natural resources and environment, and the Maliseet quest to amend the Settlement Act. Over the past four years, MITSC has focused on legislation and other activities relating to all of these issues and has convened four successful Assemblies. There have been some successes, but many challenges remain.

Legislation Enacted

MITSC has been involved in different ways with several pieces of legislation related to the civil law review that have been enacted over the past four years:

Child Welfare: After having many tribal-state discussions and a workshop on child welfare issues, MITSC introduced LD 523 in early 1999. This bill provided that federal IV-E funds will be available for Indian children, and it affirmed that the Tribes may license their own foster homes. The Legislature enacted the bill, which was signed into law as Public Law1999, Chapter 392.

Economic Basis of Tribal Government: In 1999, Passamaquoddy Legislative Representative Donald Soctomah Tribe introduced LD 1029 to allow sales tax revenues generated by businesses on the reservations to flow to the Tribe rather than to the State. MITSC discussed this quite extensively. The bill passed with an amendment to have the State handle the collection of the sales taxes for on-reservation businesses and then give the Tribes a rebate. It was signed into law as Public Law 1999, Chapter 477.

Education and Culture: In 1998, the Legislature enacted a bill based on a recommendation in MITSC's 1997 civil law review report. Public Law 1997, Chapter 650 provides that the Passamaquoddy Tribe may change the names of features in their Indian Territory. Passamaquoddy Legislative Representative Donald Soctomah introduced LD 2418 on behalf of MITSC to the Second Regular Session of the 119th Legislature to prohibit the use of the word "squaw" in place names. MITSC prepared a summary of issues and views that the Legislature used

extensively in its discussions about the bill. The Legislature passed LD 2481 by an overwhelming margin, and the bill was enacted into law as Public Law 1999, Chapter 613.

As the result of the efforts of Representative Soctomah, working closely with the Maine Historic Preservation Commission, LD 2549 (An Act to Implement Recommendations Concerning the Protection of Indian Archaeological Sites) also was introduced to the Second Regular Session of the 119th Legislature. This was enacted as Public Law 1999, Chapter 748.

Indian Territory: MITSC supported LD 2499, Penobscot Legislative Representative Donna Loring's bill to the 119th Legislature to extend the deadline for acquiring 150,000 acres of Penobscot Indian Territory under the Maine Indian Claims Settlement Act by 20 years. The bill easily passed the Legislature and was enacted into law as Public Law 1999, Chapter 625.

Natural Resources and Environment: The Passamaquoddy Tribe introduced LD 2145 to the 118th Legislature concerning the taking of marine resources by tribal members. The Tribe did not seek MITSC's involvement, and the bill was signed into law as Public Law 1997, Chapter 708. During 1999 two related issues surfaced at MITSC. One was the Penobscot Nation's interest in being included in the law. The second was concern about the constant need to remind legislators that the law exempts tribal members from holding certain state licenses and permits.

Legislation Defeated

MITSC has devoted a substantial amount of time and effort to several other bills related to the civil law review that have been defeated over the past four years:

Tribal Court Orders: MITSC had many tribal-state discussions and a workshop about the enforcement of Tribal Court orders beyond Indian Territory. MITSC introduced LD 426 in early 1999 to require Maine institutions to recognize and enforce Tribal Court orders. The Legislature did not pass the bill.

Economic Basis of Tribal Government: MITSC examined the Tribes' concerns that their reservations had been excluded from a new property homestead tax exemption law. In 1999 the Passamaquoddy Tribe introduced LD 1247 to extend the exemption to the Penobscot and Passamaquoddy reservations. MITSC supported this, but the Legislature did not pass it.

Maine law allows the Penobscot Nation and Passamaquoddy Tribe to operate high-stakes beano within Indian Territory. MITSC opposed LD 793, a bill to limit gaming to their reservations. MITSC members felt that an existing law that is being legally followed by the Tribes should not be changed just because of opposition from a particular area (in this case, Albany Township). The Legislature did not pass LD 793.

Education and Culture: In 1999 the Passamaquoddy Tribe introduced LD 1384 to exempt the sales of traditional crafts products made by tribal members, and materials purchased to create those crafts, from sales and use tax. MITSC presented a letter to the Legislature in favor of LD 1384, pointing out that it supported an important aspect of Wabanaki culture. However, the bill did not pass.

Indian Territory: In sharp contrast to LD 2499, which had the unanimous support of MITSC and sailed through the Legislature, LD 2607 relating to Passamaquoddy land in Albany Township was extremely contentious. At the heart of the controversy was the intended use of the land by the Tribe. The issue temporarily harmed the working relationships within MITSC itself. The bill was defeated by the Legislature after prolonged debate.

Natural Resources and Environment: There have been intensive tribal-state discussions and several failed legislative attempts involving natural resources and the environment:

⇒ MITSC proposed LD 1961 to the 118th Legislature to clarify the regulation of land use by the Tribes, but this failed to pass by a single vote. MITSC then proposed LD 2030 to the 119th Legislature to exempt Indian Territory from the jurisdiction of the Land Use Regulation Commission, but this also was defeated.

⇒ In early 1998 MITSC supported an amendment to LD 1730, the Great Ponds Task Force bill, to authorize MITSC to regulate the use of motors on certain ponds within Indian Territory. This was passed by the Legislature, but the Tribes did not ratify this new provision and it did not take effect.

⇒ In 1999 the Passamaquoddy Tribe introduced LD 1255 to have the Tribes regulate the surface use of waters in their Indian Territories. There was not consensus among MITSC members about the language in the bill. Eventually, MITSC members agreed on a proposed amendment, but the Tribes did not support it. LD 1255 did not pass.

⇒ In 1999 the Passamaquoddy Tribe proposed LD 1914 to provide for concurrent tribal and state jurisdiction on rights-of-way and highways passing through reservations and Indian Territory and to provide that fines flow to the Tribes. Because its members could not agree about most of the bill, MITSC testified neither for nor against it. The Legislature did not pass LD 1914.

Maliseet Legislation: LD 2178 proposed to amend the Maine Indian Claims Settlement Implementing Act concerning the Houlton Band of Maliseets. Introduced during the First Regular Session of the 119th Legislature, the bill was held over until the Second Regular Session. MITSC supported having the Houlton Band participate on the same or similar terms as the Passamaquoddy Tribe and the Penobscot Nation. MITSC facilitated and participated in numerous meetings to help secure the passage of LD 2178. During negotiations, the State and the Maliseets came close to consensus, but the Maliseets and the City of Houlton remained far apart. In the end, the Legislature killed the bill.

Other Initiatives

Education and Culture: MITSC's review of civil laws led to several activities relating to education and culture that did not involve legislation:

⇒ In early 2000 MITSC hosted a workshop on tribal sovereignty at the 119th Legislature. This was presented from the tribal perspective so legislators could gain a fuller understanding of this complex issue and can see that there is a reasonable, legitimate basis for differences in views. In March 2000 MITSC co-sponsored Diversity Day at the Legislature.

⇒ Issues relating to the use of Baxter State Park for the annual Sacred Run to Katahdin first came to MITSC's attention during the 1998 Assembly of Governors and Chiefs. In October 2000, after two years of discussion, the Baxter State Park Authority approved an agreement with the Wabanakis.

⇒ The first-ever Wabanaki Day at the Legislature was held in April 1999, to inform legislators about Wabanaki culture and values. Tribal members of all ages from all the Wabanaki communities in Maine came to Augusta for this spectacular day. Wabanaki Day was received positively by legislators and others at the State House.

Natural Resources and Environment: One of the most divisive issues between the State and the Tribes in recent months has been the National Pollution Discharge Elimination System (NPDES) delegation process. In January 2000 MITSC hosted a meeting to explore tribal and state views about this federal process that authorizes States to administer major program elements of the federal Clean Water Act. Early in the year and again in early November, MITSC encouraged the parties to have facilitated discussions in order to try to resolve their differences. However, this suggestion has not been accepted, and the dispute is being fought vigorously in the courts.

An offshoot of the NPDES dispute is a major argument over whether the State's Freedom of Access Act (FOAA) applies to the Tribes. In November 2000, a Superior Court Judge ruled that three Tribal Governors must either turn over tribal documents requested by paper companies, appeal his decision, or go to jail. The Governors reluctantly decided to appeal the decision. Several MITSC members have commented that they never imagined that a state court would sentence Tribal Governors to jail. Several have stated that documents generated by the Tribes are the business of the Tribes and should be exempt from the FOAA. MITSC is developing a statement regarding the FOAA.

Recommendations for the Legislature

MITSC strongly urges the 120th Legislature to:

⇒ Create a new legislative mechanism for addressing tribal and tribal-state issues, such as a Joint Select Committee on Indian Affairs or a Standing Subcommittee of the Judiciary Committee.

⇒ Enact legislation to allow MITSC to introduce bills relating to tribal-state issues.

⇒ Enact legislation to continue the annual Assembly of Governors and Chiefs, and to add a biennual Assembly of Legislators and Tribal Council Members.

⇒ Seriously consider legislation which will be presented by Passamaquoddy Legislative Representative Donald Soctomah to add land in T19 MD in Washington County to Indian Territory.

⇒ Seriously consider legislation which will be presented by Penobscot Legislative Representative Donna Loring to make sure that Wabanaki History is taught in Maine public schools.

⇒ Seriously consider legislation, if proposed, to enact terms in the Maine Indian Claims Settlement Act for the Houlton Band of Maliseets that are similar to the terms already in the Act for the Passamaquoddy Tribe and Penobscot Nation.

⇒ Support the permanent appropriation of $15,000 in state funds for MITSC, as requested by Governor King in his Part II Budget. (This amount was appropriated in 1999 only for that biennium, and is badly needed for effective MITSC functioning.)

MITSC's Next Steps

As revealed by MITSC's review of the impact of Maine's civil laws on the Wabanaki, the Tribes and State have fundamentally different views about key aspects of the Settlement Act. A major MITSC activity in the coming months will be to analyze the key areas of disagreement from perspective of the State, the Tribes, and MITSC itself. For each disputed area examined, MITSC will look at the words in the Settlement Act, the legal rationale, the cultural rationale, fears and concerns, and whether there is room for rapprochement between the State and the Tribes.

STATE OF MAINE
123RD LEGISLATURE
SECOND REGULAR SESSION

Final Report
Of the Tribal-State Work Group
Created by
Resolve 2007, Chapter 142, 123rd Maine State Legislature
Resolve, To Continue the Tribal-State Work Group

January 2008

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18. Minutes for the Tribal-State Work Group Meeting January 11, 2008

Executive Summary

The 18 members of the Tribal-State Work Group met five times unanimously agreeing to eight specific recommendations, seven of which comprise suggested changes to the Maine Implementing Act (MIA) and the Micmac Settlement Act (see appendix one model legislation An Act To Amend the Maine Implementing Act and the Micmac Settlement Act). The Work Group agreed to the following eight recommendations:

1. Change the heading for Title 30 from "Municipalities and Counties" to "Municipalities, Counties and Indian Tribes"
2. Amend the law to achieve jurisdictional parity for all Tribes
3. Institute mandatory mediation by the Maine Indian Tribal-State Commission (MITSC) for tribal-state disputes prior to going to court with deadlines and requiring all parties to act in good faith
4. Require mandatory meaningful consultation with Tribes prior to any legislative, regulatory or policy change by the State that may have an impact on the Tribes
5. MITSC to continue studying and analyzing potential changes to the Act and may make formal recommendations to amend the Act to the Judiciary Committee every two years, or more often as it deems appropriate, with MITSC having the explicit authority to introduce such legislation
6. The Maine Tribes not be subject to the Freedom of Access laws (FOA) for any purpose. The Work Group said this should be included under the internal tribal matters language, not the municipality status language, in the MIA.
7. Include a new statement of intent for the settlement acts that specifies that the documents are to be viewed as dynamic, flexible, and to be regularly revisited. In addition, the Aroostook Band of Micmacs should be added to MITSC with a corresponding additional seat(s) for the State.
8. Task the Executive Branch of State Government to invite the Tribes to discuss unresolved issues and sovereignty

In addition to these eight recommendations, the Tribal-State Work Group also made several important findings:

1. Contrary to what some people have asserted for the past two decades, the negotiators themselves designed MIA to be a dynamic, living agreement with the flexibility to make adjustments in the jurisdiction and powers of each signatory and in the relationship between the Tribes and the State. This is supported by the statutory language of the Maine Indian Claims Settlement Act (MICSA).

2. The negotiators of the settlement agreement never intended to equate the Passamaquoddy Tribe and the Penobscot Indian Nation with Maine municipalities. The negotiators viewed the powers of self-government confirmed in MIA as more akin to home rule powers defining a specific bundle of rights that would be recognized by the State and the Tribes.

3. Despite the intentions of the settlement act negotiators that the agreements enhance Tribal Governments, Wabanaki living conditions, and Tribal culture, gains in these areas have been modest and lag far behind other population groups in Maine.

4. The Wabanaki's principal motivation for agreeing to MIA, MICSA, and the Aroostook Band of Micmacs Settlement Act (ABMSA) was to regain the freedom to control their lives and governments that they had lost due to European settlement in Maine and Maine becoming a state.

5. The Houlton Band of Maliseet Indians and Aroostook Band of Micmacs have different concerns about the interpretation and implementation of their settlement acts than the highly disputed internal tribal matters and municipality status in §6206 of MIA that principally concern the Passamaquoddy Tribe and Penobscot Nation.

6. The Houlton Band of Maliseets and Aroostook Band of Micmacs desire some accommodation to enjoy sustenance hunting rights now only practically available to the Passamaquoddy Tribe and Penobscot Nation.

Recommendations

The TSWG voted unanimously to support legislation to make several changes to Title 30 of the Maine Revised Statutes, MIA, and the Micmac Settlement Act. The proposed statutory changes include:

1. Change the heading for Title 30 from "Municipalities and Counties" to "Municipalities, Counties and Indian Tribes"
2. Amend the law to achieve jurisdictional parity for all Tribes
3. Institute mandatory mediation by MITSC for tribal-state disputes prior to going to court with deadlines and requiring all parties to act in good faith
4. Require mandatory meaningful consultation with Tribes prior to any legislative, regulatory or policy change by the State that may have an impact on the Tribes
5. MITSC to continue studying and analyzing potential changes to the Act and may make formal recommendations to the amend the Act to the Judiciary Committee every two years, or more often as it deems appropriate, with MITSC having the explicit authority to introduce such legislation
6. The Maine Tribes not be subject to the Freedom of Access laws (FOA) for any purpose. In MIA, the TSWG said this should be included under the internal tribal matters language, not the municipality status language.
7. That the statement of intent for the settlement acts specify that the documents are to be viewed as dynamic, flexible, and to be regularly revisited. In addition, that the Aroostook Band of Micmacs should be added to MITSC with a corresponding additional seat(s) for the State. Though the Maine Legislature passed a bill last year to add the Houlton Band of Maliseet Indians to MITSC, it did not become law due to the late certification of acceptance by one Tribe.

As previously stated, the TSWG passed as its final recommendation that the Executive Branch of State Government invite the Tribes to discuss unresolved issues and sovereignty

Maine Indian Tribal-State Commission

May 16, 2012

Mr. James Anaya
Special Rapporteur on the Rights of Indigenous Peoples
c/o OHCHR-UNOG
Office of the High Commissioner for Human Rights
Palais Wilson
1211 Geneva 10, Switzerland

Dear Mr. Anaya:

We are writing this letter on behalf of the Maine Indian Tribal-State Commission, or MITSC. The Tribal-State Commission was formed under the Maine Indian Claims Settlement Act or MICSA (25 USCS § 1721) and Maine Implementing Act or MIA (30 MRSA §6201) and is an intergovernmental body charged to "continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State."

MITSC requests an investigation into the impact of the implementation of the aforementioned MICSA and MIA. These Acts are in serious nonconformance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) both in the process leading up to their enactment and in how they have been implemented. The Acts have created structural inequities that have resulted in conditions that have risen to the level of human rights violations. We ask you to raise this structural violation of Maine Wabanaki Tribes' collective rights during your upcoming meetings with the US government. While the current administration of Maine Governor Paul LePage has consistently demonstrated a high interest and responsiveness to Wabanaki governmental concerns, these structural inequities have become entrenched over the past 30 years.

The Maine Indian Claims Settlement was intended to prevent the acculturation and to safeguard the sovereignty of the Maine Wabanaki Tribes: the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, and the Penobscot Indian Nation, hereinafter referred to as the Wabanaki. Later the Aroostook Band of Micmacs was recognized with a distinct agreement in 1991, the Aroostook Band of Micmacs Settlement Act (25 USC 1721 (1991 Amendment)). As Reuben Phillips, one of the Penobscot Nation's negotiators of the settlement agreement, told the Tribal-State Work Group on November 19, 2007, "... the most important part of the negotiated settlement as far as the Tribes are concerned was that we would exercise self-government without interference of the State of Maine as they had controlled our lives for the last 160 years."

John Dieffenbacher-Krall
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Despite some small gains due to federal recognition and accompanying funding from the federal government, the four Tribes continue to experience extreme poverty, high unemployment, markedly shorter life expectancy, much poorer health, limited educational opportunities, and thwarted economic development. MITSC has determined that the entrenchment of these social and economic factors is a direct result of the framework created by the MICSA and MIA.

The expectation that the Maliseet, Passamaquoddy, and Penobscot Peoples' quality of life would significantly improve with passage of MIA and MICSA has not been realized. No Tribe enters into an agreement with a state to remain impoverished. The Maine Wabanaki Tribes' understanding of the agreement is very clear and is articulated in the many court cases brought on their behalf. Since the adoption of MICSA and MIA, the State of Maine has utilized the full range of its powers, including its judicial and legislative branches, to promote an interpretation of the Settlement Acts without regard to the equally valid Wabanaki interpretation. Largely as a result of court decisions, the Maine Indian Claims Settlement has changed from a collectively negotiated agreement between co-equals to a unilateral determination by one signatory.

The subjugation of Wabanaki people under the framework of these laws severely impacts the capacity of the Wabanaki in economic self-development, cultural preservation and the protection of natural resources in Tribal territory. Life expectancy for the four Maine Wabanaki Tribes averages approximately 25 years less than that of the Maine population as a whole. Only one percent of the Houlton Band of Maliseets' population exceeds 55 years of age. Unemployment rates within Wabanaki communities range up to 70%, many times higher than the surrounding Maine communities. Many traditional Wabanaki food sources are no longer safe to eat due to toxic contamination by the paper mills that discharge pollutants into Wabanaki waters. At this time, the incarceration rate of Passamaquoddy people in state prisons is six times that of the general population. When the Maine Wabanaki Tribes attempt to address the causes of many of these problems, they consistently encounter structural roadblocks due to MICSA and MIA.

Location and context:

The Passamaquoddy Tribe and Penobscot Indian Nation filed a lawsuit compelling the US Department of Justice to sue the State of Maine in 1972 in order for the two Tribes to recover approximately 12.5 million acres of land taken from them. Later the Houlton Band of Maliseet Indians became a party to the proceeding. Key court decisions decided after the filing of the land claims affirmed Passamaquoddy and Penobscot inherent sovereignty, including Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), Bottomly v. Passamaquoddy Tribe, 599 F.2d 106 (1st Cir. 1979), and State v. Dana, 404 A.2d 551 (Me. 1979).

The land claim was settled in two phases. The State of Maine enacted the Maine Implementing Act (MIA) in April 1980 that primarily addresses jurisdictional issues and the government-to-government relationship between the State and the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and the Penobscot Indian Nation. On October 10, 1980, President Carter signed the Maine Indian Claims Settlement Act (MICSA) that ratifies the Maine Implementing Act and determines the settlement among the US, the State of Maine, and the Tribes.

Evidence exists that Tribal members were not made aware of important changes made to the MICSA during the final stages of its consideration. First, the Maine Legislature enacted and Governor Joseph Brennan signed the Maine Implementing Act in April 1980. Second, the Passamaquoddy and Penobscot Peoples gave preliminary approval to the settlement agreement contingent upon any changes coming back to them for their approval in the same month. Third, Congress actively worked on the Maine Indian Claims Settlement Act from July to September 1980 with significant changes made to the proposal during the legislative deliberations. There is no record of these changes ever returning to the Passamaquoddy and Penobscot Tribes for approval. Clearly, this action conflicts with the UN Declaration on the Rights of Indigenous Peoples Article 19 that specifies:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

Affected Indigenous Peoples:

All of the Maine Wabanaki Tribes were affected by the MICSA and MIA in that the MICSA stipulates that all other Maine Tribes that would be recognized by the Federal Government in the future would be subject to state law in the same way as the Passamaquoddy Tribe, Penobscot Indian Nation, and the Houlton Band of Maliseet Indians. Recent court decisions regarding the Aroostook Band of Micmacs' settlement agreement have borne out that truth. We list the Wabanaki Tribes of Maine:

1. Aroostook Band of Micmacs, 7 Northern Road, Presque Isle, Maine 04769 (Though not a party to MICSA and MIA, provisions of the two Acts affect the Tribe.)
2. Houlton Band of Maliseet Indians, 88 Bell Road, Littleton, ME 04730
3. The Passamaquoddy Tribe consists of one people with two communities in Maine.
    a. Passamaquoddy Tribe at Motahkmikuk, Box 301, Princeton, ME 04668
    b. Passamaquoddy Tribe at Sipayik, 9 Sakom Road, Perry, ME 04667
4. Penobscot Indian Nation, 12 Wabanaki Way, Indian Island, ME 04468

Factual Background:

Two provisions of the federal and state agreements especially illustrate the compromised rights of the Tribal governments under MICSA and MIA. Section 1735(b) of MICSA states:

> The provisions of any Federal law enacted after the date of enactment of this Act [enacted Oct.10, 1980] for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

MIA section 6204 states:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

These two sections of law conflict with multiple articles of UNDRIP, including Articles 3, 4, 5, 19, 23, 27, 29, 32, 34, and 40. The imposed diminishment of Maine Wabanaki Tribes' inherent rights of self-determination as compared to hundreds of other federally recognized tribes has caused severe negative impacts within Wabanaki communities. As a result of section 1735(b) of MICSA, Maine Wabanaki Tribes have not been able to utilize the Indian Gaming Regulatory Act (25 USC §2701 et. seq.) as a possible means of economic development. This same section blocks Wabanaki utilization of "Treatment As a State" status under the Clean Air Act (40 CFR Part 49 Tribal Clean Air Authority) and Clean Water Act (40 CFR 123.31 – 123.34) to assume regulatory authority over polluters contaminating the air and water of Wabanaki territory. In addition, the non-applicability of post-1980 laws limits the impact of pre-1980 laws that supported tribal self-determination, such as the Indian Civil Rights Act, passed by Congress in 1968. Economic and legal tools available to hundreds of other federally recognized tribes are not available to the Wabanaki due to the legal limitations imposed by MICSA and MIA.

Responsible Parties:

The principal actors have been the governments and courts of the State of Maine and the United States federal government.

Despite executing its first foreign treaty (Treaty of Watertown July 19, 1776) with some of the Wabanaki Peoples, the Míkmaq and St. John's Tribes (Maliseet and Passamaquoddy), the US abdicated its responsibility for acting as the primary manager for the relationship between the American people and the Wabanaki, allowing initially Massachusetts and then Maine to determine the relationship. The State of Maine did not recognize Indigenous sovereignty until compelled to do so by Passamaquoddy v. Morton decided January 20, 1975. Until that Federal District Court decision, the State of Maine's disposition toward the Wabanaki is reflected in a portion of the decision Murch v. Tomer, 21 Me. 535; 1842 Me. Lexis 141. "Imbecility on their part [Indians], and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man."

Passamaquoddy v. Morton provided a brief period in which the State of Maine had no control over the Passamaquoddy Tribe and Penobscot Indian Nation. Following the Passamaquoddy v. Morton decision and during the intensive negotiations leading up to the settlement of the Maliseet, Passamaquoddy, and Penobscot land claims, the State of Maine insisted that state laws

apply to the Tribes except in narrow instances (30 MRSA §6204). Maine's insistence on its continued control over the Wabanaki except in certain instances has resulted in the crisis experienced by Wabanaki peoples and threatens their ability to function as distinct, independent governments, something MICSA was supposed to guarantee.

At the time MICSA was signed, all the parties agreed that, though it was a significant diplomatic accomplishment, it was also one that would necessitate continuous review and adjustments to reflect the changing relationship between the Tribes and the State. Despite Congress' clear intent to provide for these periodic adjustments (25 USCS §1725(e)(1)), a conviction among State and Federal officials emerged sometime after enactment of MICSA that the agreement should never be adjusted despite Congressional authorization to do so. The State of Maine reaction to the Wabanaki contention that MICSA should be viewed as a living, dynamic document and adjusted as changed conditions and circumstances dictated, was to align increasingly with powerful private economic interests in opposition to Tribal rights. Key State of Maine and corporate decision makers claimed the Tribes were attempting to renege on a fundamental aspect of the agreement.

During the 2006 – 2008 deliberations of the Tribal-State Work Group, an initiative that emerged from the May 2006 Assembly of Governors and Chiefs intended to address problems with the MIA, the principal negotiators of the Settlement Act for the State of Maine and federal government verified by their testimony the Wabanaki understanding that MIA should be viewed as a dynamic document and periodically adjusted. Tim Woodcock, staff person to the Senate Select Committee on Indian Affairs during the period that the US Senate deliberated about the settlement, told the Tribal-State Work Group on November 19, 2007:

> It [referring to MICSA] also ratified and approved and sanctioned agreements prospectively that the State and Tribes might make respecting jurisdiction and other important issues that otherwise you might have to go to Congress to get approval for so you have that authority in advance... And I recognized that the MICSA and the MIA might well just be the beginning of an ongoing relationship that might well have a considerable amount of dynamism in it and it might well be revisited from time to time to be adjusted. There was a mechanism for that to happen and I have to say in retrospect it's been a surprise to me that it really hasn't been amended at some point but I also recognize certainly that these are knotty issues.

Though the negotiators understood that MICSA and MIA would need periodic adjustments and created a provision within the agreement for the signatories to take such action, actual structural change has never occurred. The Wabanaki have become increasingly frustrated with the failure of the State of Maine to agree to any substantial changes to the settlement. Litigation has arisen. As a result, instead of the signatories negotiating changes to the Settlement Agreement, state and federal judges have consistently interpreted in favor of state and private interests, further diminishing Wabanaki self-determination and violating UNDRIP Article 19.

The Maine Supreme Judicial Court has expressed an extremely narrow interpretation of "internal tribal matters" under the Maine Indian Claims Settlement. The court has disregarded the rules of

federal Indian common law and statutory interpretation that evolved from almost two centuries of Indian law jurisprudence. The trend began in 1983 with *Penobscot Nation v. Stilphen* 461 A.2d 478 (Me. 1983), the case in which the court held that the Tribe could not operate gaming operations without state licensing.

Not only have Maine courts adopted an extremely narrow interpretation of "internal tribal matters," but also certain Maine regulatory bodies have as well. Despite MITSC offering a contrary opinion on three separate occasions, the Land Use Regulation Commission (LURC), a body with planning and regulatory responsibility over areas of Maine without local governments, has asserted jurisdiction over Tribal projects on Wabanaki trust land. As a result, the Maine courts and executive branch have impeded the efforts of the Tribal communities to economically self-develop in order to preserve their cultures, protect their natural environments, and improve living conditions for Native people.

The federal courts have also been unfriendly to the Maine Tribes. By narrowly interpreting Tribal rights under the settlements, the federal courts have dealt some devastating blows to the Tribes, including the cases of *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73 (1st Cir. 2007) and *Aroostook Band of Micmacs v. Ryan* 484 F.3d 41 (1st Cir.2007). The immediate impact of the court decisions subjects tribal employment disputes to state employment laws. But the full impact is much greater. After the *Ryan* decision, from the viewpoint of the First Circuit Court of Appeals, the historical Tribal sovereignty of the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs is severely constricted because, in contrast to the Passamaquoddy Tribe and Penobscot Nation, their internal tribal matters are not protected under MICSA. Neither the Maliseet nor the Micmac have accepted the First Circuit Court of Appeals' interpretation of their inherent right to self-determine their governmental affairs, including their relationships with their employees.

In 2007, the First Circuit Court of Appeals decided *State of Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). That case involved a decision by the Environmental Protection Agency (EPA) which gave the State of Maine permitting authority, under the Clean Water Act and MICSA, with regard to discharge of pollutants into territorial waters of the Penobscot Nation and Passamaquoddy Tribe, but exempted two Tribal-owned facilities from the State's permitting program. Despite a detailed Opinion Letter from the U.S. Department of the Interior supporting the Tribe's claims, the court upheld the State's authority to regulate all of the disputed sites, including the two tribal-owned sites located on tribal lands which the EPA had found to have insignificant consequences for non-members of the tribes. With respect to the "internal tribal matters" exemption from state regulatory power in the MIA, and in keeping with the restrictive *Stilphen* rationale, the court stated that discharging pollutants into navigable waters is not of the same character as the list of Tribal powers which were intended to be shielded from state control, such as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of Tribal property. Significantly, the court held that the issue at hand was not even a close call and therefore did not require consideration of the balancing tests and factors that the First Circuit had previously applied in cases involving MICSA.

Understandably content with the strong advantage they have enjoyed in state and federal courts, the State of Maine has resisted Wabanaki efforts to have the parties agree to structural changes to MICSA and MIA that would address provisions that limit Wabanaki rights of self-determination and jurisdiction on their lands. By way of example, the State of Maine chose to join litigation initiated by three private paper corporations to diminish Passamaquoddy and Penobscot authority under the MIA's internal tribal matters provision (30 MRSA §6206). (See *Great Northern Paper v. Penobscot Nation*, 770 A.2d 574 (Me. 2001).

Action taken by government authorities:

The Maine Tribes' longstanding concerns with these Acts predate the current administrations in Washington, DC and Augusta, Maine. The initiatives undertaken by the administrations of President Barack Obama and Governor Paul LePage to recognize and strengthen the government-to-government relationship between their governments and Maine Tribes are appreciated.

State Government:

Governor LePage issued Executive Order 21 FY 11/12 An Order Recognizing the Special Relationship Between the State of Maine and the Sovereign Native American Tribes Located Within the State of Maine.

The last two administrations (Baldacci and Le Page) have appointed distinguished Indigenous People to important positions, with Governor LePage nominating Penobscot citizen Bonnie Newsom to the University of Maine System Board of Trustees and Passamaquoddy citizen Dr. Gail Dana-Sacco to a State seat on the Maine Indian Tribal-State Commission.

In addition, Governor LePage has been a strong supporter of the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission to address what happened to Wabanaki children and families who have had involvement with the Maine child welfare system. On May 24, 2011, Governor LePage joined representatives from all five Tribal governments to sign a Declaration of Intent committing the parties to undertake a Truth and Reconciliation Commission (TRC). In March 2012, Governor LePage stated his support for the next step in the TRC process by committing to signing the Mandate document specifying how the Truth and Reconciliation Commission would be seated, its charge, and time allowed to conduct its work. Though all these actions have been positive, they do not address the deep-seated structural flaws of the Maine Indian Claims Settlement Act (MICSA) and Maine Implementing Act (MIA).

Pertinent to this discussion, on April 15, 2008, the Maine Legislature passed a joint resolution "to express support for the United Nations Declaration on the Rights of Indigenous Peoples."

MITSC:

MITSC, as an intergovernmental body, has focused its energy during the last decade on attempting to persuade the State of Maine to listen to Wabanaki grievances concerning the

content, interpretation, and implementation of MICSA and MIA and the need to amend the Acts. In 2002 – 2003, MITSC worked on crafting possible amendments to the MIA that would have been presented to Wabanaki governments and the State of Maine for legislative action. That process ended when the Wabanaki signatories withdrew from MITSC for a period of 14 months to protest the results of a statewide vote on a Wabanaki gaming initiative and other longstanding grievances. At the Assembly of Governors and Chiefs in 2006, a seeming diplomatic breakthrough occurred when Maine Governor John Baldacci agreed to create a work group comprised of Tribal and State representatives to examine specific aspects of MIA and report back to the signatories with recommended changes.

The Tribal-State Work Group made eight unanimous recommendations in its January 2008 report. In the second session of 123rd Legislative Session, the Maine Legislature's Judiciary Committee substantially altered the recommendations, resulting in the Wabanaki withdrawing their support for the final bill and causing extreme ill will between the parties, with Wabanaki accusations that the State had acted in bad faith.

Despite these major diplomatic initiatives by MITSC, Tribal leaders and State legislators, the fundamental differences between the Wabanaki and the State of Maine remain. Over the years, some minor changes have been made to MIA but never any amendments that address the core of Wabanaki concerns and which have been the direct cause of the disparate living conditions for Tribal peoples.

Federal Government:

President Obama issued his Presidential Memorandum on November 5, 2009 directing implementation of Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments.

On December 16, 2010, the US issued its "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples."

With regard to the Wabanaki specifically, the Federal Government that holds ultimate responsibility for the relationship with the Indigenous Peoples living within the borders of the US has been completely absent from any initiative to address the framework of the MICSA and MIA. The Federal Government has the responsibility to fix what was promoted in 1980 as a model settlement because it has not only failed to end the stark disparities in Wabanaki living conditions, but it continues to restrict the Houlton Band of Maliseets', Passamaquoddy Tribe's, and Penobscot Nation's capacity to self-determine solutions to these issues.

In closing, MITSC raises these concerns to you with the hope that your office can engage the US to address the human rights concerns of the Maine Tribes and the flawed MICSA and MIA that conflict with UNDRIP. **There are also other Tribes located in the Eastern US that entered into similar settlement agreements that restrict their inherent rights to self-determination.**

Ideally, all of these flawed agreements should be reviewed with the aim to restructure them to conform with UNDRIP and other international agreements and covenants applicable to Indigenous peoples.

Sincerely,

John Dieffenbacher-Krall
Executive Director

Matt Dana
Passamaquoddy Representative to MITSC

Jamie Bissonette Lewey
Chair

Gail Dana-Sacco
State Representative to MITSC

Denise Altvater
Passamaquoddy Representative to MITSC

Bonnie Newsom
Penobscot Representative to MITSC

Cushman Anthony
State Representative to MITSC

Roy Partridge
State Representative to MITSC

John Banks
Penobscot Representative to MITSC

Linda Raymond
Maliseet Representative to MITSC

John Boland
State Representative to MITSC

Brian Reynolds
Maliseet Representative to MITSC

Harold Clossey
State Representative to MITSC

Paul Thibeault
State Representative to MITSC

United Nations A/HRC/21/47/Add.1

General Assembly

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Human Rights Council
Twenty-first session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya

Addendum

The situation of indigenous peoples in the United States of America* **

Summary

In this report the Special Rapporteur examines the human rights situation of indigenous peoples in the United States, on the basis of research and information gathered, including during a visit to the country from 23 April to 4 May 2012. During his mission, the Special Rapporteur held consultations with United States officials as well as with indigenous peoples, tribes, and nations in Washington, D.C., Arizona, Alaska, Oregon, Washington state; South Dakota and Oklahoma, both in Indian country and in urban areas. Appendices I and II to this report include, respectively, summaries of information provided by the Government and of information submitted by indigenous peoples, organizations and individuals in connection with the mission.

The Special Rapporteur concludes that indigenous peoples in the United States – including American Indian, Alaska Native and Native Hawaiian peoples – constitute vibrant communities that have contributed greatly to the life of the country; yet they face significant challenges that are related to widespread historical wrongs, including broken treaties and acts of oppression, and misguided government policies, that today manifest themselves in various indicators of disadvantage and impediments to the exercise of their individual and collective rights.

* The summary of the present report is circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the language of submission only.

** Late submission.

Appendix II

Summary of information and allegations presented by indigenous peoples, groups, and organizations to the Special Rapporteur on the rights of indigenous peoples

1. During his mission, the Special Rapporteur held consultations with United States officials as well as with indigenous peoples, tribes, and nations in Washington, D.C.; Arizona; Alaska; Oregon; Washington state; South Dakota; and Oklahoma, both in Indian country and in urban areas. The Special Rapporteur is very grateful for the assistance he received from the National Congress of American Indians; the Navajo Nation; the Indian Law Resource Center; the International Indian Treaty Council; the University of Arizona Indigenous Peoples Law and Policy Program; the Alaska Native Heritage Center; Port Graham Village; Chickaloon Village; the Curyung Tribal Council; the National Indian Child Welfare Association; the Cowlitz Indian Tribe; the University of Tulsa; and Sinte Gleska University for their assistance in planning key consultations in the various locations visited. He would also like to thank the numerous individuals who provided essential assistance in this regard, in particular, Dalee Sambo Dorough (Alaska), Armstrong Wiggins (Washington, D.C.), William Means (South Dakota), Andrea Carmen (Alaska), Melissa Clyde (Oregon), Gabe Galanda (Oregon), Bill Rice (Oklahoma), and Seanna Howard and Robert Williams, Jr. (Arizona).

2. The Special Rapporteur received the following information either in person during his consultations or via electronic or other means. The submissions are divided roughly by the region of their origin for organizational purposes.

Northeast and Washington, D.C.

3. Seneca Nation of Indians: United States has frequently breached treaty promises to the Seneca Nation; Government infringement on Seneca rights, including the construction of the Kinzua Dam and the violation of treaty-protected lands rights, waters rights, and resources rights, and the right to economic development.

4. Algonquin Confederacy of the Quinnipiac Tribal Council, Inc.: Discriminatory practices and removal of Quinnipiac artifacts and landmarks from traditional territories.

5. Haudenosaunee Ska-Roh-Rèh: Contaminated drinking water; barriers to practising traditional religion; treaty breach by the United States Government.

6. Association of American Indian Affairs: Stronger protection needed for sacred sites; reform is needed for the federal recognition process; promotion of international repatriation with recommended modalities; call to create a Special US/Tribal Nations Joint Commission on Implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

7. Ramapough Lunaape Nation: Industrial pollution threatens the health and well-being of community; state recognition by resolution has been achieved but federal recognition is still lacking.

8. Maine Indian Tribal - State Commission (MITSC): Maine Indian Claims Settlement Act and Maine Implementing Act create structural inequalities that limit the self-determination of Maine tribes; structural inequalities contribute to Maine tribal members experiencing extreme poverty, high unemployment, short life expectancy, poor health, limited educational opportunities and diminished economic development.

Sproul, Alice E

From: Stern, Paul D
Sent: Wednesday, November 14, 2012 10:53 AM
To: Woodcock, Carol (Collins)
Cc: Sproul, Alice E; Reid, Jerry
Subject: Stafford Act Amendments

Carol,

If enacted, the proposed Stafford Act Amendments (S. 2283) would *not* apply to Maine Tribes. "The relations between Maine and the Maine Tribes are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement." *Akins v. Penobscot Nation,* 130 F.3d 482, 483 (1st Cir. 1997). Those statutes are the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721, *et seq.* (the "Federal Settlement Act"), which ratified and confirmed the "Act to Implement the Maine Indian Land Claims Settlement," 30 M.R.S.A. §§ 6201, *et seq.* (the "State Settlement Act"). The legislation was designed to "create a unique relationship between state and tribal authority," by "submit[ing] ... the [Maine Indians] and their tribal lands to the State's jurisdiction [and] ... g[i]v[ing] the State a measure of security against future federal incursions upon these hard-won gains." *Passamaquoddy Tribe v. Maine,* 75 F.3d 784, 787 (1st Cir. 1996). S. 2283 is such a federal incursion.

Except as specifically provided in the State Act, Maine's Indians and their land and natural resources are subject to the laws of the State "to the same extent as any other person or lands." 30 M.R.S. § 6204. This principle was specifically confirmed by Congress:

> The Passamaquoddy Tribe, the Penobscot Nation and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or [its] members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

25 U.S.C. § 1725(b)(1).

> [A]ll Indians, Indian nations, or tribes ... in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

25 U.S.C.A. § 1725(a)

Congress ensured this principle in two savings clauses, which mandate that federal Indian law existing at the time of the Settlement in 1980 or enacted thereafter would not apply in Maine if it affected Maine's civil and regulatory jurisdiction:

> The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or

> held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735; *see also* 25 U.S.C. § 1725(h) (any federal law that "accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians" as of October 10, 1980, that "affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine," shall not apply in Maine).

S. 2283 is a "one size fits all" approach that allows all federally recognized "Indian tribal governments" to request presidential disaster and emergency declarations directly. The proposed amendment according to FEMA is designed to establish a "government to government relationship" between tribes and the federal government. It is also known as "treatment as state" status. This model was specifically rejected in the Federal and State Settlement Acts of 1980:

> Thus, for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

S. Rep. No. 96-957, 96th Cong., 2nd Sess. at 31 (1980).

The Maine Act provides that the Penobscot Indian Nation and the Passamaquoddy Tribe are subject "to all the duties, obligations, liabilities and limitations of a municipality ... provided, however, that internal tribal matters ... shall not be subject to regulation by the State." 30 M.R.S. § 6206(1). As subdivisions of the State, of course, municipalities are fully subject to the State's governmental oversight, including federal disaster and emergency relief requests. Therefore, unless the Amendments specifically include the Maine Tribes, S. 2283 if enacted would not apply to them.

By way of example, in 1987, Congress amended the Clean Water Act by, *inter alia,* adding section 518, which allows Indian tribes to apply for "treatment as state" status. 33 U.S.C. § 1377(e). A tribe may be granted jurisdiction to regulate water resources within its borders in the same manner as states, including in particular establishing tribal water quality standards to be approved by EPA and issuing NPDES permits for discharges into such waters. *City of Albuquerque v. Browner,* 97 F.3d 415 (9th Cir. 1996). This provision has been construed by some courts to allow EPA to restrict dischargers upstream from Indian land to comply with a tribe's water quality standards. *City of Albuquerque,* 97 F.3d at 424. Section 518 does not apply in Maine under the savings clause of the Federal Settlement Act because section 518 was not made explicitly applicable to Maine and would affect Maine's regulatory jurisdiction. Indeed, Congress considered this very issue:

> This section does not override the provisions of the Maine Indian Claims Settlement Act.... [T]he tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes...

Water Quality Act of 1987, Section-by-Section Analysis, H.R. Rept. 99-1004 at 166 (1986). Even without that legislative history, Section 518 would not apply. *See also Passamaquoddy Tribe,* 75 F.3d at 788-90 (federal Indian Gaming Regulatory Act passed after Maine Settlement Acts does not apply in Maine).

The Stafford Act currently treats tribes as local governments. 42 U.S.C. 5122(7). This is completely consistent with the carefully crafted Federal and State Settlement Acts of 1980. In fact, the treatment of

the Passamaquoddy Tribe and Penobscot Nation as municipalities was a central feature of the negotiated jurisdictional arrangement. The Senate committee noted that "the Maine Implementing Act accords the Passamaquoddy Tribe and Penobscot Nation the status of municipalities under State law; ..." S. Rep. No. 96-957, 96th Cong., 2nd Sess. at 18. (1980). It further explained that

> The treatment of the Passamaquoddy Tribe and Penobscot Nation in the Maine Implementing Act is original. It is an innovative blend of customary state law respecting *units of local government* coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.... Section 6206 of the Maine Implementing Act provides that the Passamaquoddy Tribe and Penobscot Nation shall have all the powers, immunities, and obligations of any municipality under state law....

Id. at 29 (emphasis added). The two other Maine tribes -- the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs -- do not have municipal status. In fact, it is important to note that their tribal offices are located within existing municipalities – Presque Isle and Littleton – and their other small land holdings are located there and within other Aroostook County municipalities.

S. 2283 does not specifically include the Maine Tribes; therefore, if enacted it will not affect Maine's jurisdiction under section 1735(b).

In order to be clear on this point, we suggest including in the legislative history the following:

> This law does not override the provisions of the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721, *et seq.*, which ratified and confirmed the "Act to Implement the Maine Indian Land Claims Settlement," 30 M.R.S.A. §§ 6201, *et seq.* The Maine Tribes are not eligible to submit a request for a declaration by the President that a major disaster or emergency exists. No problem with the present structure in Maine has been identified.

Thank you.

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 112th CONGRESS, SECOND SESSION

Vol. 158 WASHINGTON, THURSDAY, DECEMBER 20, 2012 No. 165

Senate

The Senate met at 11 a.m. and was called to order by the Honorable SHERROD BROWN, a Senator from the State of Ohio.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

O God, whose mercy exceeds our sins, we thank You for the failures that drive us again and again to You for forgiveness and restoration. May we see in our setbacks opportunities for growth and progress.

Lord, change our lawmakers not from what they were but toward what they really are: generous, wise, and responsible stewards of Your bountiful grace. Keep us from becoming a country that wants to feel good rather than be good, as You empower us to live worthy of our forebears who sacrificed so much for freedom.

We pray in Your great Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable SHERROD BROWN led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. LEAHY).

The bill clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, December 20, 2012.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable SHERROD BROWN, a Senator from the State of Ohio, to perform the duties of the Chair.

PATRICK J. LEAHY,
President pro tempore.

Mr. BROWN of Ohio thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

MODIFICATIONS TO AMENDMENTS—H.R. 1

Mr. REID. Mr. President, I ask unanimous consent that the clerk be authorized to modify the instruction lines on amendments proposed to the substitute amendment No. 3395.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

SCHEDULE

Mr. REID. Mr. President, following leader remarks, the Senate will resume consideration of H.R. 1, which is the legislative vehicle for the supplemental appropriations bill involving the terrible storm that struck New England. The filing deadline for the first-degree amendments is 1 p.m. today. We will work on an agreement for amendments in order to complete action on the bill.

We are also hopeful that we can complete the extremely important Defense authorization bill today, and we are moving forward on FISA today. We are moving forward one way or the other. I hope we can get an agreement to move forward. If not, we will move forward without an agreement.

We will need everyone to pay attention as they always do but maybe more so today. There are a lot of things going on here, and people need to understand that we have things to do if we want to be able to get home for a few days for Christmas, even though we will be back on the Thursday after Christmas.

TRIBUTES TO DEPARTING SENATORS

JEFF BINGAMAN

Mr. REID. Mr. President, I wish to take a few minutes today to honor my colleague, the senior Senator from New Mexico, JEFF BINGAMAN, as he retires from a long career of service to our country.

For 30 years Senator BINGAMAN has been a dedicated representative of the people of New Mexico, but for 26 of those years he was the junior Senator from New Mexico. The only person I know of who was a junior Senator longer than Senator BINGAMAN was Fritz Hollings. He was a junior Senator for many decades to Strom Thurmond. But 26 years as a junior Senator still makes you a fairly senior Senator. JEFF served alongside Senator Pete Domenici, the longest serving Senator in New Mexico's history. Until 2009 he was the most senior junior Senator.

JEFF BINGAMAN has never been one to get hung up on titles and credits. If there was ever a conscience of this body, it is JEFF BINGAMAN, a man who has been called by others, including Byron Dorgan, a workhorse. That is really true. For three decades he has quietly but diligently fought for the people of New Mexico and this country.

American industrialist Henry Kaiser once gave this bit of advice: "When your work speaks for itself, don't interrupt." And that is JEFF BINGAMAN. That could have been written for JEFF BINGAMAN by Henry Kaiser. That has been JEFF BINGAMAN's motto for years. He is not one for flashy press conferences. Most of the time he is too busy.

JEFF learned humility in the small town of Silver City, NM, where he grew up. His father was a professor and his

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

It is well recognized that small- and medium-sized business are the backbone of our economy, employing half of private sector workers and accounting for the creation of two out of three new jobs in the United States. Immediate support and stabilization is critical to full recovery of small businesses, which, as noted, make up about 90 percent of the 265,000 estimated New York firms impacted by Sandy. Business continuation, including keeping the doors open while loans, insurance payments and other incentives are realized, is essential. One Federal investment worthy of consideration is temporary employment support, which will help maintain both business operations and help prevent the loss of jobs through the recovery, reducing the need for unemployment and other Federal benefits.

In addition to Federal investment in workforce retention programs, rapid response in identifying and servicing impacted businesses and unemployed workers is required. As recovery efforts move forward, Federal, State, and local authorities should look for ways to invest in and partner with the extensive networks of community-based organizations, economic development groups, as well as organized labor and affiliated management to deliver workforce development services, including outreach for job opportunities, job training, and placement for in-demand occupations and other related reemployment activities.

For example, the Consortium for Worker Education, CWE, a nonprofit agency specializing in workforce preparation, industry specific training, and employment services has partnered in the past with all levels of government and other community based organizations to deliver job placement services and temporary employment support programs to ensure worker retention in the aftermath of disasters. Their efforts alone have helped train and put back to work thousands of people during similar workforce crisis situations as New York finds itself in now following Sandy.

By investing in innovative programs like CWE's, workforce recovery efforts will more effectively take into account the unique needs of each impacted area and deliver tailored services to impacted businesses and displaced workers alike.

Mr HARKIN. Mr. President, let me commend the Senator from New York for highlighting the critical employment and workforce needs in the areas impacted by Superstorm Sandy. Now more than ever, Congress must give our States and localities that have been hard hit by Sandy the tools and resources that help dislocated workers return to their jobs or, if necessary, find new, good-paying employment. The supplemental appropriations for disaster assistance bill's funding for dislocated workers is just one step in the recovery process, but an important one to help workers get back on their feet.

As New York, New Jersey, and the other impacted areas move forward with their recovery, I will continue to work with Senator GILLIBRAND so that the short- and long-term needs of impacted workers are addressed.

Ms. COLLINS. Mr. President, I rise today to engage my colleague, Senator TESTER, in a colloquy regarding language he authored in this bill that would amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act. This language would authorize chief executives of federally recognized tribes to submit a request for a major disaster or emergency declaration directly to the President of the United States.

The principal effect of this language would be to eliminate the current requirement that tribal chief executives submit such requests to the Governor of the State in which the tribal reservation is located; tribal chief executives would be permitted to submit such requests to the President without first obtaining the Governor's approval.

The tribes of Maine—the Penobscot, the Passamaquoddy, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs—have a jurisdictional relationships with the State of Maine which is unique among the 50 States. Although, based on my analysis, this language would not in any way affect the relationship between the State of Maine and the tribes of Maine, to make this clear, I would like to pose some questions to the Senator regarding the intent of the language.

The jurisdictional relationship between the tribes of Maine and the State of Maine is set forth in the Maine Indian Claims Settlement Act and the Maine Implementing Act, the latter having been enacted by the Maine State Legislature and ratified and approved by Congress when it enacted the Maine Indian Claims Settlement Act.

If the language the Senator authored was to be enacted into law, would this in any way change the relationship of the State of Maine and the tribes of Maine?

Mr. TESTER. No. I understand that the Maine Indian Claims Settlement Act not only recognized the uniqueness and significance of that jurisdictional arrangement but specifically provided that, following the enactment of the Settlement Act, no future congressional legislation would in any way alter or affect that arrangement unless Congress specifically so provided. This requirement is set forth in Title 25, Section 1735, of the United States Code.

Ms. COLLINS. Did the Senator take Section 1735 into account in his drafting of this legislation?

Mr. TESTER. Yes. I understood that, given the requirement that Section 1735 imposed on Congress, this provision would not and should not apply within or to the State of Maine unless Congress specifically so provided. Knowing that Section 1735 operated to that effect, I did not include specific language making this legislation inapplicable to Maine, as such language was unnecessary. Our Senate colleagues should understand that this legislation in no way supersedes Section 1735.

Ms. COLLINS. Did my colleague also consider the unique foundation for the Maine Indian Claims Settlement Act and the Maine Implementing Act, as well as the subsequent acts for the Houlton Band and the Aroostook Band?

Mr. TESTER. Yes, I understood that the Maine Indian Claims Settlement Act and the Maine Implementing Act constitute statutory settlement documents. Therefore, our colleagues should understand that the current legislation respects the intent of the parties to Maine's historic and complex settlement and does not in any way disturb the settlement agreement or the statutory construct on which that settlement rests.

The intent of this legislation is to improve communication, response times, and recovery of disasters in Indian Country while better respecting tribal sovereignty. I understand that tribes in Maine have a unique relationship with the State of Maine and nothing in this Act should be interpreted to change or degrade that relationship.

This legislation, if enacted into law, would in no way change the relationship between the State of Maine and the tribes of Maine. That means that, even after the enactment of this legislation, if any of the tribes of Maine wished to obtain a declaration from the President that a major disaster existed, they would have to bring their request to the Governor of Maine, who would have to consider the request in accordance with existing standards and procedures but who would retain the discretion to deny that request.

Ms. COLLINS. I appreciate the time and attention of my colleague from Montana, Senator TESTER, regarding the intent of this language, as well as the care that he took in crafting this legislation.

Mr. REID. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. MERKLEY). Without objection, it is so ordered.

MORNING BUSINESS

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

Maine Indian Tribal-State Commission

March 26, 2013

Senator Susan M. Collins
U.S. Senate
413 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Collins:

We, the Maine Indian Tribal-State Commission (MITSC), function as an intergovernmental body under the Maine Implementing Act of 1980 (30 MRSA §§ 6201, *et. seq*) as ratified by the Maine Indian Claims Settlement Act (MISCA) (25 U.S.C. §§ 1721, *et. seq*.). Our charge is to "continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State." Accordingly, we understand that our primary function is to serve as the body charged by law to examine and offer recommendations in regard to questions or disputed provisions concerning the Maine Implementing Act (MIA).

Late last year we received a copy of a November 14, 2012 memo from Maine Assistant Attorney General Paul Stern to Carol Woodcock of your staff concerning the Stafford Act Amendments (S. 2283) that were pending before the US Senate. This letter details a singular interpretation of the Maine Indian Claims Settlement Act. While we recognize that the Maine Attorney General's office provides a particular perspective on questions concerning MISCA, the body charged by the land claims settlement legislation to continually review the legislation is MITSC. MITSC, composed of equal numbers of Tribal and State appointees, has a deep knowledge and a long history examining these issues. We invite you to work with us to develop a formal protocol between your office and MITSC to better inform your understanding of the Maine Indian Claims Settlement Agreement.

Background, Statutory Authority, and Responsibilities of the Maine Indian Tribal-State Commission (MITSC)

During the extensive negotiations that culminated in the Maine Indian Claim Settlement Act (MICSA), the State of Maine and Wabanaki Tribal Governments recognized that unresolved matters remained. In the interest of completing the negotiations, negotiators for the State of Maine and the Tribal Governments involved decided to create by statute a *permanent intergovernmental body* to address both unresolved issues and issues that might arise over time. The legislative record amply demonstrates that MITSC was envisioned as a body that would consider issues related to the implementation of the Settlement Act.

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John Patterson, a Deputy Attorney General for the State of Maine during the period of the Settlement Act negotiations and principal negotiator for the State, reiterated those expectations to the Tribal-State Work Group (TSWG) in November 2007. "It (referring to MITSC) was intended to be a forum in which agreements could be reached and then go back to the Legislature and the Tribes, and to recommend that they both adopt -- the Tribes would have to adopt the change to the legislation and the Legislature would do it too." The governments charged MITSC with continually reviewing the effectiveness of the Act and making recommendations for amendments to the Act and resolutions to lingering problems.

Reuben "Butch" Phillips, a member of the Penobscot Nation Negotiating Team, also spoke at the November 19, 2007 TSWG regarding MITSC's origin and purpose.

> He said (referring to Andrew Akins, head of the Tribal Negotiating Team) let's form a commission or committee of State and Tribal people to look at these disputes on these waters and from there it expanded. This commission would be the liaison between the Tribes and the State, and they would listen to disputes and try to come up with some resolutions, and, if you recall, we had an equal number of Tribal members and State people.

MITSC derives its statutory authority directly from the Maine Implementing Act (30 M.R.S.A. §§ 6201, *et. seq.*), the legislation passed by the Maine Legislature in April 1980 and ratified as part of the Federal agreement upon the enactment of MICSA in October 1980. MITSC's mandate under 30 MRSA § 6212, §§ 3 is to:

> continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State and shall make such reports and recommendations to the Legislature, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation as it determines appropriate.

MITSC also holds responsibility for regulating fisheries in MITSC waters (30 MRSA § 6207, §§ 3) offering its recommendation on any additions to Passamaquoddy or Penobscot Indian Territory (30 MRSA § 6205, §§ 5); and responding to petitions from Passamaquoddy or Penobscot Nation citizens to establish extended reservations (30 MRSA § 6209-A, §§ 5 and 30 MRSA § 6209-B, §§ 5).

While MITSC faithfully strives to fulfill all of its statutory responsibilities, our recommendations for resolving disputed interpretations of MICSA constitute our most essential function. In order to effectively carry out this responsibility, substantive issues related to the tribal-state relationship must specifically be brought to the attention of MITSC. The opinion of the Maine Attorney General's Office is a one-sided interpretation of the MISCA and the MIA. We would expect US Senators and Congresspeople representing the State of Maine to uphold federal and tribal as well as state interests. Thus, the actions of your office, undertaken after consulting only with the Maine Attorney General not only undermine and subvert MITSC's role in resolving disputes but this practice has unnecessarily antagonized tribal-state relations.

Barriers to MITSC's Statutorily Mandated Function to Examine Disputed Interpretations of the Act and Render Recommendations to Resolve Them

MITSC experiences two prevailing practices that hinder our ability to serve as the problem solving body envisioned by the Settlement Agreement negotiators:

1) the consistent lack of attention to the statutorily mandated process for addressing issues inherent in the Settlement Agreement by bringing issues to MITSC;

2) the repeated use of section 6204 of the MIA by the Maine Attorney General's Office to downplay the practical necessity of all of the parties to have a voice in resolving conflicts.

The result of this consistent pattern of response to Wabanaki-Maine disputes leaves no clear avenue for the Maliseets, Passamaquoddies, and Penobscots to have their concerns heard and acted upon in a forum that recognizes their right to participate in solving problems that arise from the Settlement Agreement. This failure to comply with this key provision of MICSA demonstrates a lack of commitment to the joint resolution of concerns fundamental to a well-functioning Tribal-State relationship. Such tensions don't comport with the vision expressed by the Settlement Act negotiators:

> I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship, in my view there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine. I can also tell you that if this matter is litigated over a period of years, the atmosphere in Maine certainly will be quite different. I cannot put a price tag on human relationships, nor am I suggesting that this factor alone justifies enactment of the legislation before you. I am asking only that you give appropriate consideration to the historical significance not only of the settlement itself, but also of the manner in which it was reached. (Hearings Before the Select Committee on Indian Affairs, United States Senate On S. 2829, July 1 & 2, 1980, Maine Attorney General Richard Cohen, p.164.)

At the public hearing for the bill at the Augusta Civic Center, Andrew Akins, chair of the Tribal Negotiating Committee, stated: ""We are interested in building a new relationship with Maine, one of mutual trust and respect."" (The Original Meaning and Intent of the Maine Indian Land Claims: Penobscot Perspectives, Thesis, Maria Girouard, May 2012, p. 57)

The key words in Attorney General Cohen's and Negotiating Committee Chair Akins' remarks involve the manner in which the Settlement Agreement was reached, through work "as equals and jointly determined our future relationship" and "building a new relationship...one of mutual trust and respect." The promise of mutual determination of the meaning and interpretation of the Settlement Agreement operating in a relationship of trust and respect has been badly damaged as state or federal courts have issued decisions interpreting some of the Act's most contentious provisions. The extensive litigation that has taken place over nearly three

decades has eroded the relationship between the State of Maine and the Tribes. This tension is exacerbated when, outside of a lawsuit, only the Maine Attorney General—the legal representative of only one of the three parties—is sought out for comment.

During its history as the body charged to "continually review the effectiveness of this Act," MITSC has consistently received reports that efforts to include the federally recognized tribes residing in Maine in federal legislation intended to benefit all tribes has been met with efforts to exclude them. We must remind you that section 1735 (b) of the MICSA was intended to limit the automatic inclusion of Maine tribes in federal Indian legislation only under certain conditions. 1735 (b) is tempered by 1725 (h) which states:

> the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

This section of law was crafted to provide the means to ensure that federal legislation that is not in conflict with Maine civil and criminal code *would* benefit the Maine Wabanaki Tribes, and thus the State of Maine.

Our job, along with all who inherit the trust of all of the negotiators, is to look for the best solution to conflicts arising from different interpretations of the legislation. Finding the best solution requires hearing all of the voices. We want to work with you and other members of the Maine Congressional Delegation to practice inclusion rather than exclusion when dealing with these issues. The State of Maine and the Tribes stand to gain when the Wabanaki Tribes are included as recipients of essential federal services and benefits that accrue to all federally recognized tribes.

For example, the amendments to the Robert T. Stafford Disaster Relief and Emergency Assistance Act passed by the Congress in January would not have adversely affected the State of Maine in any way. In fact, the Tribes' ability to declare emergencies in their communities has the potential to draw more total dollars coming into Maine than is currently the case when only the Governor of the State of Maine can make such declarations. Likewise, applying the Tribal Law and Order Act can provide hundreds of thousands of dollars in new law enforcement resources flowing into Maine. Inclusionary language making explicit the applicability of the acts to the Wabanaki should be added to this law and to the to the Violence Against Women Act.

MITSC encourages you to use the power of your office to improve the relationship between the Wabanaki Tribes and the State of Maine to recognize the inherent sovereignty of the Wabanaki Tribal Governments, which are the oldest formal allies of the US based on the Treaty of Watertown signed July 19, 1776. The State of Maine has committed itself to respecting the

human rights of the Wabanaki and all Indigenous Peoples when it expressed its support on April 15, 2008 for the UN Declaration on the Rights of Indigenous Peoples. Yet Maine's commitment to the human rights of the Maliseets, Micmacs, Penobscots, and Passamaquoddies is called into question by UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya. In his report on his official visit to the US conducted last year, Rapporteur Anaya reports:

> Maine Indian Claims Settlement Act and Maine Implementing Act create structural inequalities that limit the self-determination of Maine tribes; structural inequalities contribute to Maine tribal members experiencing extreme poverty, high unemployment, short life expectancy, poor health, limited educational opportunities and diminished economic development. (*Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the United States of America*, p. 36)

We recommend that when you examine federal legislation that may benefit Wabanaki Tribal Governments you consider how that legislation might benefit both the State and the Tribes and work to include them whenever possible. We stand ready to work with you to advance this process. Additionally, we recommend a formal protocol be established between the congressional delegation and MITSC that ensures that the statutorily mandated process of reviewing issues relative to the Settlement Agreement is routinely followed rather than ignored. The designation of one of your staff as the MITSC point of contact might be a helpful action to ensure the desired communication takes place.

We would welcome an opportunity to speak to you about this matter in Maine. MITSC Executive Director John Dieffenbacher-Krall will be in contact with your scheduler to set up the meeting.

Sincerely,

John Dieffenbacher-Krall
Executive Director

Jamie Bissonette Lewey
Chair

Denise Altvater
Passamaquoddy Representative to MITSC

John Banks
Penobscot Representative to MITSC

John Boland
State Representative to MITSC

Harold Clossey
State Representative to MITSC

Matt Dana
Passamaquoddy Representative to MITSC

Gail Dana-Sacco
State Representative to MITSC

Roy Partridge
State Representative to MITSC

Linda Raymond
Maliseet Representative to MITSC

Brian Reynolds
Maliseet Representative to MITSC

Cc: Chief Reuben Clayton Cleaves
Chief Brenda Commander
Chief Kirk Francis
Chief Richard Getchell
Chief Joseph Sockabasin
U.S. Senator Angus S. King
Representative Michael H. Michaud
Representative Chellie Pingree
Governor Paul R. LePage
Attorney General Janet T. Mills

Maine Indian Tribal-State Commission

August 8, 2013

Mr. James Anaya
Special Rapporteur on the Rights of Indigenous Peoples
c/o OHCHR-UNOG
Office of the High Commissioner for Human Rights
Palais Wilson
1211 Geneva 10, Switzerland

Dear Mr. Anaya:

Thank you for your invitation to provide supplemental material to our original filing with you on May 16, 2012. Accompanying this letter you will find 21 items responding to your question of how "the [Maine Indian Claims Settlement Act] MICSA and [Maine Implementing Act] MIA framework severely limits Wabanaki tribes with regard to economic self-development, cultural preservation and the protection of natural resources." Some of these documents also demonstrate how the "MICSA and MIA framework" impede tribal government self-determination. When we use the term "self-determination" we mean the accepted definition as understood within the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The State of Maine Legislature passed a resolution in support of the UNDRIP in April 2008. Our supplemental filing includes:

Addendum 1. A compilation of all the addenda for this submission

Addedum 2. *At Loggerheads The State of Maine and the Wabanaki* Final Report of the Task Force on Tribal-State Relations January 15, 1997

Addendum 3. *Final Report of the Tribal-State Work Group Created by Resolve 2007, Chapter 142, 123rd Maine Legislature, Resolve, To Continue the Tribal-State Work Group* January 2008

Addendum 4. 5/31/12 letter from Paul Stern, Deputy Attorney General, and Gerald D. Reid, Assistant Attorney General, Office of the Maine Attorney General, to Lisa Jackson, Administrator, US Environmental Protection Agency, and Eric Holder, Attorney General, US Department of Justice

Addendum 5. *Great Northern Paper v. Penobscot Nation*, 770 A.2d 574 (Me. 2001)

Addendum 6. *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73 (1st Cir. 2007) and *Aroostook Band of Micmacs v. Ryan* 484 F.3d 41 (1st Cir. 2007)

Addendum 7. *Penobscot Nation v. Stilphen* 461 A.2d 478 (Me. 1983)

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Addendum 8. *Passamaquoddy v. State of Maine* 75 F.3d 784 (1996)

Addendum 9. *State of Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007)

Addendum 10. *The Official State of Maine Open Water & Ice Fishing Laws and Rules: April 1, 2013 – December 31, 2013*, Page 47 (contains health advisories for dioxin, PCBs, mercury)

Addendum 11. *The Official 2012-13 State of Maine Hunting & Trapping Laws and Rules* Page 23 (contains health advisory for cadmium in moose, deer liver)

Addendum 12. MITSC Positions on Natural Resource Management and River Herring Restoration to the St. Croix Watershed adopted October 17, 2012

Addendum 13. 7/9/12 EPA letter from Stephen Perkins to Maine Attorney General William Schneider re: alewives in the St. Croix River

Addendum 14. 8/8/12 State of Maine letter from Attorney General William Schneider to Stephen Perkins, EPA re: alewives in the St. Croix River

Addendum 15. 11/14/12 memo from Paul D. Stern, Chief, Litigation Division, Maine Office of the Attorney General, to Carol Woodcock, State Office Representative to US Senator Susan Collins

Addendum 16. Correspondence between the Maine Indian Tribal-State Commission to US Senator Susan Collins a) 3/26/13 letter from MITSC to Sen. Collins b) Sen. Collins 4/8/13 response to MITSC's 3/26 letter c) 5/13/13 letter from MITSC to Sen. Collins d) Sen. Collins 5/28/13 response to MITSC's 5/13 letter

Addendum 17. Congressional Record, Vol. 158, No. 165, December 20, 2012, colloquy between US Senator Susan Collins and US Senator Jon Tester

MICSA & MIA Constrain Wabanaki Self-Determination

The Maine Implementing Act (MIA) and the Maine Indian Claims Settlement Act (MICSA) were crafted over a two-year period that closed in October 1980 during the waning months of the James Earl "Jimmy" Carter Jr. presidency. The constraints inherent in these Acts were developed through legislative processes and do not constitute a formal negotiated agreement with the tribes affected by the legislation. Indeed certain provisions of the legislation described below align closely with tribal termination provisions. Because of the experimental nature of the legislation, mechanisms to allow for flexibility and amendment were included. These mechanisms have been undermined and in some cases untested. The ways in which these provisions have been interpreted by state and federal courts constitute the partial termination of tribal self-governance and thus the Tribes' ability to provide for the protection of natural resources, the provision of an economic base, and preservation of their unique cultures. This submission will focus on the evidence of structural oppression of the Maine Wabanaki Tribes as a direct result of the MIA and MICSA.

Formal Initiatives to Address Inequities Caused by MICSA & MIA

Seventeen years ago, the Maine Legislature created a Task Force on Tribal-State Relations (Resolve 84, 1996). In part, Resolve 84 directed the Task Force on Tribal-State Relations to "explore ways to improve the relationship between the State and the commission [Maine Indian Tribal-State Commission] and between the State and federally recognized Indian tribes." The Task Force included representatives from the Passamaquoddy Tribe, Penobscot Nation, State of Maine, Maine Indian Tribal-State Commission, State of Maine legislators, the Maine Attorney General or his/her designee, and general public. It published a report, *At Loggerheads – The State of Maine and the Wabanaki* (Addendum 2).

In our previous letter to you, we raised Section 1735(b) of the MICSA, which limits Wabanaki access to federal beneficial acts passed after October 10, 1980. *At Loggerheads* also points to another section of MICSA that should be considered with 1735(b), 1725(h). Section 1725(h) of MICSA states:

> (h) General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine. Except as other wise [otherwise] provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

The Task Force on Tribal-State Relations notes on page 11 of its report, "These special provisions have made a great many federal Indian laws inapplicable in the State."

Later in the *At Loggerheads* report appears Section E. Findings and Analysis (page 17). Section E. Findings and Analysis includes 1. Assimilation and Sovereignty, 2. Effectiveness of the Settlement, 3. Intent of the Settlement, 4. Reference Points for Tribal-State Relations, 5. Status of Tribal-State Relations, 12. Racism, and 13. Lack of Awareness. These items were salient to the period of the report's publication and still applicable to the political and social situation faced by the Wabanaki Tribes within the State of Maine today. The subsection 1. Assimilation and Sovereignty contains an insightful description of the problems associated with section 6204[1] of MIA:

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[1] 30 MRSA §6204 reads, "Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein."

> Section 6204 refers to the laws of the State applying to the Tribes. This is not self-determination [...]The most heated point of contention is the applicability of state law to native people, who had nothing to do with creating the laws. This is an erosion of sovereignty. It strikes at the heart of sovereignty and should be amended. (Ed Bassett, Passamaquoddy Tribe at Pleasant Point)

Eleven years later the Tribal-State Work Group (TSWG), initially created under a gubernatorial executive order and later continued under a Maine State legislative resolve, formed to "examine the issues identified in the framework document prepared for the Assembly of the Governors and Chiefs held May 8, 2006" along with specified documents from the initial phase of the process. The Work Group, comprised of representatives from all five Wabanaki tribal communities of Maine, state legislators, Chief Legal Counsel for the State of Maine Governor, and the MITSC Chair, met five times from August 2007 until January 2008. During its deliberations, the TSWG heard testimony and received information citing many of the same issues documented by the Task Force on Tribal-State Relations eleven years earlier. It issued a report with eight unanimous recommendations (Addendum 3).

State imposed limits on tribal self-determination emerged as a consistent issue during the TSWG sessions. Reuben Phillips, a Penobscot citizen who negotiated (along with others) on behalf of the Penobscot Indian Nation with the State and Federal Government to reach the 1980 Settlement Agreement, told the TSWG:

> The ability to govern ourselves within our own territory free from outside interference was agreed to in 1980. The constrained interpretation that the courts have placed on the phrase "internal tribal matters" and the municipal language of the Settlement Act has supplanted this agreement and as a result the Settlement Act has not provided the opportunity for true self-determination and self-governance for the Maine Tribes. (Reuben Phillips, 10/3/2007 TSWG meeting opening statement, p. 9)

The MIA and MICSA are unique laws that do restrict tribal governments in ways not experienced by other federally recognized tribes. This is inconsistent with the Tribal negotiators' reported understanding that the core principle of Tribal self-determination was preserved by these laws. Given that the courts have not recognized this preservation,[2] the Passamaquoddy and Penobscot proposed an amendment to address the limiting language of MIA in §6206[3]. Their

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[2] Relevant cases include *Penobscot Nation v. Stilphen, Great Northern Paper v. Penobscot Nation, State of Maine v. Johnson*

[3] 30 MRSA §6206(1) states, "**General Powers.** Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. The Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to implement and administer those laws of the State applicable to the respective Indian territories and the residents

proposal would have replaced the existing statutory language with the new language "shall have, exercise, and enjoy all the rights, privileges, benefits, powers and immunities of any federally-recognized sovereign tribe within their respective Indian territory relating to their respective tribal members, lands and natural resources." This proposal was rejected by the Tribal-State Work Group.

Though both the Task Force on Tribal-State Relations and the TSWG had slightly different foci, neither initiative resulted in substantive changes to MIA and MICSA that would rectify the structural problems caused by MICSA 25 USCS §1721(b)(4), 25 USCS §1725(a), 25 USCS §1725(b)(1), 25 USCS §1725(h), 25 USCS §1735(b), and MIA 30 MRSA §6202, 30 MRSA §6204, 30 MRSA §6206(1), and 30 MRSA §6206-A. This reality, **combined with the fiction that developed that the MIA and MICSA should not be changed despite the fact that the US Congress provided advance approval and the statutory authority to the State and Wabanaki Tribes within the State of Maine to do so**, have contributed to the deteriorating socio-economic conditions experienced by the Indigenous Peoples living in Maine.

Additional Constraints on the Houlton Band of Maliseet Indians

The Houlton Band of Maliseet Indians joined the Passamaquoddy and Penobscot negotiations with the Federal Government during the latter stages of the Settlement Agreement deliberations. Specific sections of MIA only apply to the Maliseets (30 MRSA §6206-A, 30 MRSA §6206-B, 30 MRSA §6208-A, 30 MRSA §6209-C). Section 6206-A contains extremely harsh provisions concerning self-determination:

> The Houlton Band of Maliseet Indians shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers.

The Aroostook Band of Micmac Settlement Agreement (ABMSA)

In 1991, an Act of Congress resulted in the Aroostook Band of Micmacs Settlement Agreement (25 USC 1721 (1991 Amendment)). Similar to the Houlton Band of Maliseet Indians, the Aroostook Band of Micmacs received $900,000 to acquire an unspecified amount of land. The Micmacs did not receive any other financial compensation from the Federal Government.

Even though the Micmacs were not a party to the Maine Indian Claims Settlement Act negotiations, MICSA §1725(a) makes the Tribe, and any other subsequently recognized tribes, subject to State of Maine law:

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thereof. Any resident of the Passamaquoddy Indian territory or the Penobscot Indian territory who is not a member of the respective tribe or nation nonetheless shall be equally entitled to receive any municipal or governmental services provided by the respective tribe or nation or by the State, except those services which are provided exclusively to members of the respective tribe or nation pursuant to state or federal law, and shall be entitled to vote in national, state and county elections in the same manner as any tribal member residing within Indian territory."

(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State. Except as provided in section 8(e) and section 5(d)(4) [25 USCS §§ 1727(e) and 1724(d)(4)], all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

Distinctions in the Respective Settlement Acts Resulting in Legal Inconsistencies

Though several limitations exist on the degree of protection provided by the "internal tribal matters" provision of 30 MRSA §6206(1), the Maliseets and Micmacs are not even afforded the narrow protections of this provision that was intended to protect tribal self-determination. Another disparity concerns the power of the Wabanaki Tribes within the State of Maine to manage fishing, hunting, and trapping on their lands. While 30 MRSA §6207(1) affirms the authority of the Passamaquoddy Tribe and Penobscot Nation to regulate "hunting, trapping or other taking of wildlife" within their respective Indian territories, no such jurisdiction exists for the Maliseets or Micmacs. Additionally, the Passamaquoddy Tribe and Penobscot Nation possess sustenance fishing rights within the boundaries of their reservations (30 MRSA §6207(4)). The State of Maine only recognizes the Maliseets and Micmacs as possessing trust lands, not reservations. No provision is made in either MIA or the ABMSA for sustenance fishing rights for Maliseet and Micmac citizens.

Last year the State of Maine sought to further diminish Maliseet and Micmac self-determination when it notified the US EPA and US Department of Justice that it intended to sue if the Federal Government failed to take action on a matter concerning the Clean Water Act (Addendum 4). Maine applied for sole authority to administer the National Pollution Discharge Elimination System (NPDES) on November 19, 1999. This action affected interests of all the Wabanaki Tribes within the State of Maine but the administrative proceeding became separated with the Maliseets and Micmacs becoming referenced as the "northern tribes." While extensive litigation ensued concerning the "southern tribes," the Passamaquoddy Tribe and Penobscot Nation (see *Great Northern Paper v. Penobscot Nation, State of Maine v. Johnson* discussions below), the EPA chose to take no action on Maine's application as it applied to the territory of the Maliseets and Micmacs. EPA's non-action caused the State to file its notice of intent to sue.

Maine took this action with no consultation with the affected Tribes. The Tribes questioned why Maine would pursue such action when no wastewater dischargers potentially subject to NPDES regulation exist within Maliseet or Micmac territory. The legal question is currently pending before the US First Circuit Court of Appeals.

Court Decisions Create a One-Sided MICSA & MIA Framework Impinging on Tribal Self-Determination

Great Northern Paper v. Penobscot Nation, 770 A.2d 574 (Me. 2001)

In the mid 1990's, the State of Maine began contemplating an application to the Federal Government to obtain sole authority to administer the wastewater permitting program under the Clean Water Act. The Tribes (and a number of citizen and environmental groups) opposed the Federal Government ceding its permitting authority to the State due to concerns Maine might choose to give greater weight to the financial considerations of wastewater dischargers over public health and environmental issues. As the Environmental Protection Agency (EPA) considered the State's application, three paper companies chose to file a Freedom of Access Act request seeking documents from the Passamaquoddy Tribe and Penobscot Nation related to their communications with several federal agencies concerning Maine's request for sole permitting authority. When the Tribes refused to give the paper corporations the requested documents claiming the right to withhold them as a protected activity under the internal tribal matters provision of 30 MRSA §6206(1), the paper corporations sued the Tribes (Addendum 5). The lawsuit, *Great Northern Paper v. Penobscot Nation*, sought to limit Passamaquoddy and Penobscot self-determination by challenging the scope of the "internal tribal matters" provision of MIA (30 MRSA §6206(1)). The State of Maine joined with the paper corporations.

After Justice Robert E. Crowley rendered his decision, MITSC carefully examined the issues involved. MITSC's deliberations led to a statement that reads in part:

> The Maine Indian Tribal-State Commission has considered at great length the decision of Justice Robert E. Crowley which holds that the Maine Freedom of Access Act (FOAA) applies to the Penobscot Nation and the Passamaquoddy Tribe. We unanimously agree that this decision does not reflect our understanding of the Maine Indian Claims Settlement Act and its companion Implementing Act. In general, under the settlement acts, "tribal government" is an internal tribal matter, over which the tribes have sole authority. "Government," by its common meaning, includes the right to set the procedures by which governmental decisions are made. Freedom of information acts are procedural mechanisms that may or may not be adopted by a tribe as part of its system of ruling. Because tribal government is defined by the settlement acts as an internal tribal matter, the State cannot impose its own governmental procedures upon the tribes.

Despite the considerable information submitted by the Passamaquoddy Tribe and Penobscot Nation in their defense and the opinion offered by MITSC, the Maine Supreme Judicial Court ruled largely in favor of the paper corporations and the State. The Court's action reflects a unilateral State definition of "internal tribal matters" consistent with Maine's advancement of its interpretation of this key term without regard to the tribal understanding of the definition. The Court found that when the Tribes are engaged in the deliberative processes of self-governance, the Maine Freedom of Access Act does not apply due to 30 MRSA §6206(1). Conversely, the Court decided when the Passamaquoddy Tribe and Penobscot Nation act in their municipal capacity "with persons or entities other than their tribal membership, such as the state

or federal government, the Tribes may be engaged in matters that are not "internal tribal matters.""

***Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73 (1st Cir. 2007) and *Aroostook Band of Micmacs v. Ryan* 484 F.3d 41 (1st Cir.2007)**

The federal courts have not proved much more receptive to tribal perspectives than the state courts. We briefly described the *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73 (1st Cir. 2007) and *Aroostook Band of Micmacs v. Ryan* 484 F.3d 41 (1st Cir.2007) cases in our May 2012 submission (Addendum 6). In both cases, former employees of the Maliseets and Micmacs filed complaints with the Maine Human Rights Commission alleging violations of their rights under state law. With similar arguments, the Maliseets and Micmacs contended that they possess inherent sovereign rights to control their internal tribal matters. According to the Tribes, employment decisions are a function of tribal government not subject to state regulation. The First Circuit concurred with the State's argument that MICSA 25 USCS §1725(a) applies to the Maliseets and Micmacs.

***Penobscot Nation v. Stilphen* 461 A.2d 478 (Me. 1983)**

One of the most impactful court decisions adversely affecting tribal economic self-development in Maine is *Penobscot Nation v. Stilphen* 461 A.2d 478 (Me. 1983) (Addendum 7). This decision rendered by the Maine Supreme Judicial Court greatly narrowed the activities protected under the "internal tribal matters" of 30 MRSA §6206(1) while deepening the conflict between the Wabanaki Tribes of Maine and the State on the development of Tribal Gaming.

In 1982, the Penobscot Nation filed for injunctive relief asserting in part that MIA Section 6206(1) protects against State interference in internal tribal matters. The Court rejected the Penobscot Nation argument. As a result, the State view that the Penobscot Nation beano operation was subject to State law under 30 MRSA §6204 prevailed:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

Stilphen was decided several years before the US Supreme Court handed down the *Cabazon* decision (*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)). The *Stilphen* decision was based on two independent grounds: 1.) analysis under federal Indian common law; and 2.) the statutory construction of the Maine Implementing Act. With respect to federal Indian common law, the Court was apparently persuaded by, and adopted, the arguments by the State of Maine that were rejected by the U.S. Supreme Court when the State of California made essentially the same arguments a few years later in the *Cabazon* case. Events in Maine subsequent to the 1983 Stilphen decision have further eroded the premises on which the federal Indian common law analysis in Stilphen was based. The Court in *Stilphen* emphasized that

gambling for profit was generally a criminal practice in Maine. Since that time, there has been tremendous growth of lawful, regulated gambling in Maine, including non-Indian casinos, a greatly expanded state-run lottery, and provision for Off-Track Betting related to horse racing.

With respect to the separate analysis under principles of statutory interpretation, the Court in *Stilphen* stated that it looked at the statute itself and the legislative history, and not to federal common law, to define "internal tribal matters." The Court noted that MIA follows the term "internal tribal matters" with a list of matters included in the term. It then invoked the rule of *ejusdem generis*, i.e. that a general term followed by a list of illustrations is ordinarily assumed to embrace only concepts similar to those illustrations. Relying on that rule of construction (and not on Indian law canons of construction) the Court rejected the Tribe's assertion that the term "tribal government" in the list of "internal tribal matters" supported the Tribe's operation of high stakes beano because the income was used to support tribal government programs and services. The Court stated that if beano was an "internal tribal matter" because of the use to which the income was put, the same logic would make other forbidden and criminal practices legal as long as they turned a profit for the Penobscot Nation. The Court stated that such a result would violate the overall spirit of the settlement acts as well as common sense. The *Stilphen* decision has not been overturned and remains today as a major barrier to economic development by the Maine Tribes.

The immediate ramification of the *Stilphen* decision was to subject the Penobscot Nation beano operation to State regulation, negatively affecting an enterprise generating an estimated $50,000 per month in gross revenues with the net proceeds used to fund tribal government. Longer term the *Stilphen* decision formed part of the legal framework, along with MICSA Sections 1725(h) and 1735(b), to block the Wabanaki Tribes within the State of Maine from pursuing Class III gaming and entering a compact with the State of Maine.

***Passamaquoddy v. State of Maine* 75 F.3d 784 (1996)**

In 1996, the Passamaquoddy Tribe brought suit against the State of Maine on gaming (*Passamaquoddy v. State of Maine* 75 F.3d 784 (1996)) (Addendum 8). The Tribe argued that the Indian Gaming Regulatory Act (enacted after *Stilphen* and in the wake of *Cabazon*) opened the door for Tribal gaming in Maine and compelled the State to compact with the Tribe. The case was ultimately argued on appeal before the Federal First Circuit. Judge Bruce M. Selya wrote the decision. In deciding for the State, Judge Selya rested his decision on Section 1735(b) of the MICSA:

> General legislation. The provisions of any Federal law enacted after the date of enactment of this Act [enacted Oct. 10, 1980] for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

The Court found that section 1735(b) was a valid "savings clause" that precluded application of Indian Gaming Regulatory Act (IGRA) in Maine unless Congress specifically made it applicable in Maine. The Court concluded that the text of IGRA gave no indication that Congress intended to make that Act specifically applicable within Maine:

> To recapitulate, the Tribe and the State negotiated the accord that is now memorialized in the Settlement Act as a covenant to govern their future relations. Maine received valuable consideration for the accord, including the protection afforded by section 16(b). The Tribe also received valuable consideration, including land, money, and recognition. Having reaped the benefits, the Tribe cannot expect the corollary burdens imposed under the Settlement Act to disappear merely because they have become inconvenient.
>
> We need go no further. We hold that Congress did not make the Gaming Act specifically applicable within Maine, and that, therefore, the Tribe is not entitled to an order compelling the State to negotiate a compact for Class III gaming.

This struggle for economic self-determination continues. At the time of the *Stilphen* decision, Class III gaming was illegal in Maine. Under the Indian Gaming Regulatory Act (25 U.S.C. Sec. 2701 *et seq.*), states must compact with Tribes when they authorize the same forms of gaming that a particular Tribe wants to pursue. Today Maine permits two Class III gaming operations while multiple tribal attempts to create such facilities have been thwarted. The State of Maine stands on the state statutory construction argument advanced in *Stilphen* to require the Tribes to advance their gaming initiatives by the initiative provision under the Maine Constitution or the regular legislative process. The Tribes face not only the anti-gaming organizations but are confronted with virulent open racism. In this political climate, the Tribes have been unable to advance their proposals.

MICSA & MIA Restrictions on Wabanaki Cultural Preservation, Protection of Natural Resources

State of Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007)

Another court decision profoundly affecting the Passamaquoddy Tribe's and Penobscot Nation's ability to protect Tribal waters in order to insure the health of Tribal members who exercise their sustenance fishing rights to feed their families is *State of Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007) (Addendum 9). We discussed this decision in our May 16, 2012 letter. Again, the First Circuit decision makes extensive reference to 30 MRSA §6204 to uphold State jurisdiction over all wastewater discharges into tribal waters, even those originating on the Passamaquoddy and Penobscot Reservations.

Results of State NPDES Jurisdiction and Other Water Quality Laws

State jurisdiction over water quality has resulted in the following:

1. Greatly diminished formerly abundant species such as sea-run fisheries now blocked by dams.

2. What traditional foods that remain are unsafe for human consumption: the Maine Bureau of Health has issued a statewide advisory (see Maine Open Water & Ice Fishing Laws p. 47) applicable to all Maine waters suggesting pregnant and nursing women and children under eight years of age should not eat any freshwater fish from Maine waters due to mercury contamination (Addendum 10). Others in the general population are advised to restrict freshwater fish consumption to two meals per month.
3. The Penobscot River, home to the Penobscot People, also suffers from contamination due to dioxin and other chemicals linked in large part to wastewater dischargers subject to the *Johnson* decision.

Both the Wabanaki Tribes within the State of Maine and the Federal Government have found the State of Maine deficient in implementing the Clean Water Act. In 1995, without formal consultation with the Passamaquoddy Tribe, the State of Maine passed legislation (12 MRSA §6134(2)) to close fish passage to river herring on the St. Croix River. The St. Croix River runs through the heart of Passamaquoddy aboriginal territory. The effect of this unilateral decision by the State of Maine was to reduce the alewife population from more than 2.6 million fish in 1987 to 900 fish in 2002, jeopardizing the continued existence of the species in the St. Croix watershed. Action by the Canadian Government to trap and truck the alewives to release them above the Grand Falls Dam may have prevented their extirpation. (See Addendum 12 MITSC Positions on Natural Resource Management and River Herring Restoration to the St. Croix Watershed adopted October 17, 2012).

On July 9, 2012, Stephen Perkins, Director, Office of Ecosystem Protection, US Environmental Protection Agency Region I, wrote to William Schneider, Maine Attorney General (Addendum 13). The EPA found 12 MRSA §6134(2), the law passed by Maine in 1995 to block river herring passage on the St. Croix River, in noncompliance with the overall water quality standards set by Maine for that stretch of river which must support naturally occurring species. EPA concluded its letter by stating, "To address EPA's disapproval and protect designated and existing uses, Maine should take appropriate action to authorize passage of river herring to the portions of the St. Croix River above the Grand Falls Dam." Attorney General Schneider responded to the Perkins letter with an August 8, 2012 letter (Addendum 14).

In a prime example of the Maine Attorney General Office's ongoing campaign to promote its interpretations of MICSA and MIA, Schneider chose to assert that because the EPA failed to raise in its July 9 letter certain jurisdictional issues that have been in dispute concerning the St. Croix River "it will never suggest that Maine's environmental regulatory jurisdiction is in question." This assertion of Maine authority runs counter to the rights of the Passamaquoddy Tribe under the UN Declaration on the Rights of Indigenous Peoples, including Articles 8, 18, 19, 20, 25, 26, 29, and 32.

Due to the leadership within the Passamaquoddy Tribe and the Schoodic Riverkeepers, LD 72 An Act To Open the St. Croix River to River Herring was advanced by Passamaquoddy Tribal Representative Madonna Soctomah and other legislators resulting in free and unhindered passage for sea-run alewives. All indications are that the recovery of the alewife will be a long one requiring the full restoration of the St. Croix watershed. This year only 16,677 alewives climbed the fish ladder at the Milltown Dam.

US Response to the Legal & Political Situation Faced by the Wabanaki Tribes Within the State of Maine

Not only have the US Department of Interior, Bureau of Indian Affairs and Congressional committees charged with oversight responsibilities over Indian matters largely ignored their responsibilities to the Wabanaki Tribes within the State of Maine, the rules of the US Senate allow any single senator to stymie legislative action. Last year one of Maine's two US senators used her power to block the Wabanaki Tribes within the State of Maine from inclusion in the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

The amendment proposed to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (referred to as the Stafford Amendment) and eventually passed into law allows federally recognized tribes to apply for disaster relief from the Federal Government independent of any decision by a state governor. Because of the language contained in MICSA (25 USCS §1725(h), 25 USCS §1735(b)), a question arose whether the Stafford Amendment would apply to the Wabanaki Tribes within the State of Maine. Senator Collins requested the Maine Office of the Attorney General to offer an opinion on whether the Stafford Amendment would apply to the Wabanaki Tribes (see Addendum 15 11/14/12 memo from Paul D. Stern, Chief, Litigation Division, Maine Office of the Attorney General, to Carol Woodcock, State Office Representative to US Senator Susan Collins). Senator Collins never formally consulted the affected Tribes for their understanding of the question. She also failed to ask MITSC, the intergovernmental body charged to "continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State (30 MRSA §6212(3))." (See Addendum 16 Correspondence between the Maine Indian Tribal-State Commission to US Senator Susan Collins a) 3/26/13 letter from MITSC to Sen. Collins b) Sen. Collins 4/8/13 response to MITSC's 3/26 letter c) 5/13/13 letter from MITSC to Sen. Collins d) Sen. Collins 5/28/13 response to MITSC's 5/13 letter). Senator Collins also chose to enter into a colloquy with Senator Jon Tester recorded in the Congressional Record to offer an opinion on the Stafford Act applicability to the Wabanaki Tribes within the State of Maine largely derived from the opinion of the Maine Attorney General (Addendum 17 Congressional Record, Vol. 158, No. 165, December 20, 2012, colloquy between US Senator Susan Collins and US Senator Jon Tester).

Collaborative Work by the Wabanaki Tribes Within the State of Maine and Other Indigenous Peoples Affected by Restrictive Settlement Acts

One avenue of redress that the Maliseets, Micmacs, Passamaquoddies, and Penobscots have pursued is to work with other federally recognized tribes affected by adverse interpretations of their similar land claim settlement agreements which ultimately restrict tribal self-determination and result in non-uniform application of federal law to Indian tribes. The Maine Indian Claim Settlement Act requires an express statement in every federal law passed for the benefit of Indians generally that such law will also apply in the State of Maine. In recognition of the difficulty of including "Maine specific" language in every law passed for the benefit of Indians generally, an initiative developed under the coordination of the United South and Eastern Tribes, Inc. (USET). The USET Restrictive Settlement Act Initiative has engaged the U.S. Department of the Interior and other agencies on the pressing need for the Federal Government

to identify opportunities in the promulgation and implementation of federal law that may serve to alleviate the restrictions on self-determination arising from anti-tribal interpretations of these settlement agreements. USET has retained Mr. John T. Plata of Hobbs, Straus, Dean & Walker, LLP to coordinate this work. He can be reached at (202) 822-8282 or by email at jplata@hobbsstraus.com.

The result that the Wabanaki Tribes within the State of Maine must be specifically included in federal beneficial acts in order to access the benefits provided stems from MICSA Section 1725(h) previously discussed in our letter. The statute only excludes the Wabanaki Tribes within the State of Maine in instances of a federal beneficial act:

> (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

At this point, MITSC would like to specifically draw your attention to the language in Section 1725(h) that provides flexibility in determining whether or not inclusive language is warranted. Statutory language inclusive of the Maine Tribes is only required if the statute "affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine." After study and research into both the Congressional record in the development of 1725(h) and the implementation of this provision, MITSC has found that the State of Maine has consistently interpreted the language "effect" to be all effects: positive, neutral and negative. When MITSC studied the actual Congressional record we found that the BIA crafted this language after nearly three months of negotiation among the parties. The BIA suggested this approach with the clear intention of triggering this inclusionary language only if the affect was negative i.e. limiting to the "unique jurisdictional arrangement" articulated in the Settlement Acts. In the implementation of the MICSA and MIA, no criteria was agreed upon for determining "effect" and no mechanism for consultation with the Tribes on the point of inclusion in federal Indian laws passed for the benefit of Indian people was designed. In this way, all decisions on the inclusion of the Wabanaki Tribes within the State of Maine are made without consultation with the affected Tribes.

Current Litigation, Policy Disputes between the Wabanaki Tribes Within the State of Maine and the State of Maine

On August 20, 2012, the Penobscot Nation filed a lawsuit in US District Court after the Maine Attorney General issued an opinion concerning the boundaries and scope of the Penobscot Nation Reservation (Case No. 1:12–cv-254-GZS). Over the course of 25 years, MITSC knows of three differing opinions that the Maine Attorney General has offered on the question of the Penobscot Nation Reservation boundaries while no amendments to that definition found in 30 MRSA §6203(8) have occurred. For more information on the Penobscot lawsuit, contact Penobscot Nation Chief Kirk Francis through his Executive Secretary Mary Settles at (207) 817-7349.

Earlier this year the Passamaquoddy Tribe also found itself confronted by aggressive State action seeking to limit its authority. One of the many sea-run fish species that the Passamaquoddy Tribe has traditionally harvested is eels. In recent years, an early life-stage of the American eel - known as the elver - has commanded over $2,000 per pound. As elver fishers received record prices for their catch, the Atlantic States Marine Fisheries Commission (ASMFC) had been monitoring a long-term decline in the eel population through much of its historic range along the Eastern Seaboard of the US due to a number of factors. In fact, Maine and South Carolina remain the only states with an open elver harvesting season.

A bill was introduced, LD 451 An Act To Cap Certain Marine Resources Licenses Issued by the Passamaquoddy Tribe, to limit the Tribe's authority to issue elver fishing licenses to its citizens. The State of Maine claimed authority to regulate Passamaquoddy fishing citing 30 MRSA §6204. In the Passamaquoddy Tribe's opinion, it never yielded any of its traditional salt water fishing rights in the Maine Indian Claims Settlement negotiations.

The Maine Legislature passed LD 451 in an amended form over Passamaquoddy objections that saltwater fishing rights constitute reserved rights never ceded by the Tribe. The Tribe intends to file a human rights complaint under the International Covenant on Civil and Political Rights (ICCPR) concerning this matter. We encourage you to learn more about this issue by contacting either Passamaquoddy Tribal Councilor Newell Lewey, newell.lewey@gmail.com, or Passamaquoddy citizen Vera Francis, verafrancis13@gmail.com.

Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (TRC)

Three of your questions in your July 17 letter to MITSC concern the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (TRC). We have forwarded those questions to Heather Martin, Executive Director of the TRC, and Esther Altvater Attean, a community organizer for Wabanaki REACH, a group supporting the TRC process. They intend to respond directly to your office. Ms. Martin's email address is heather@instigus.com. Ms. Attean can be contacted at eattean@usm.maine.edu.

We remain hopeful that your potential discussions with the US Government will cause the necessary changes to amend the MICSA and MIA to conform with UNDRIP and other international agreements and covenants applicable to Indigenous Peoples.

Sincerely,

John Dieffenbacher-Krall

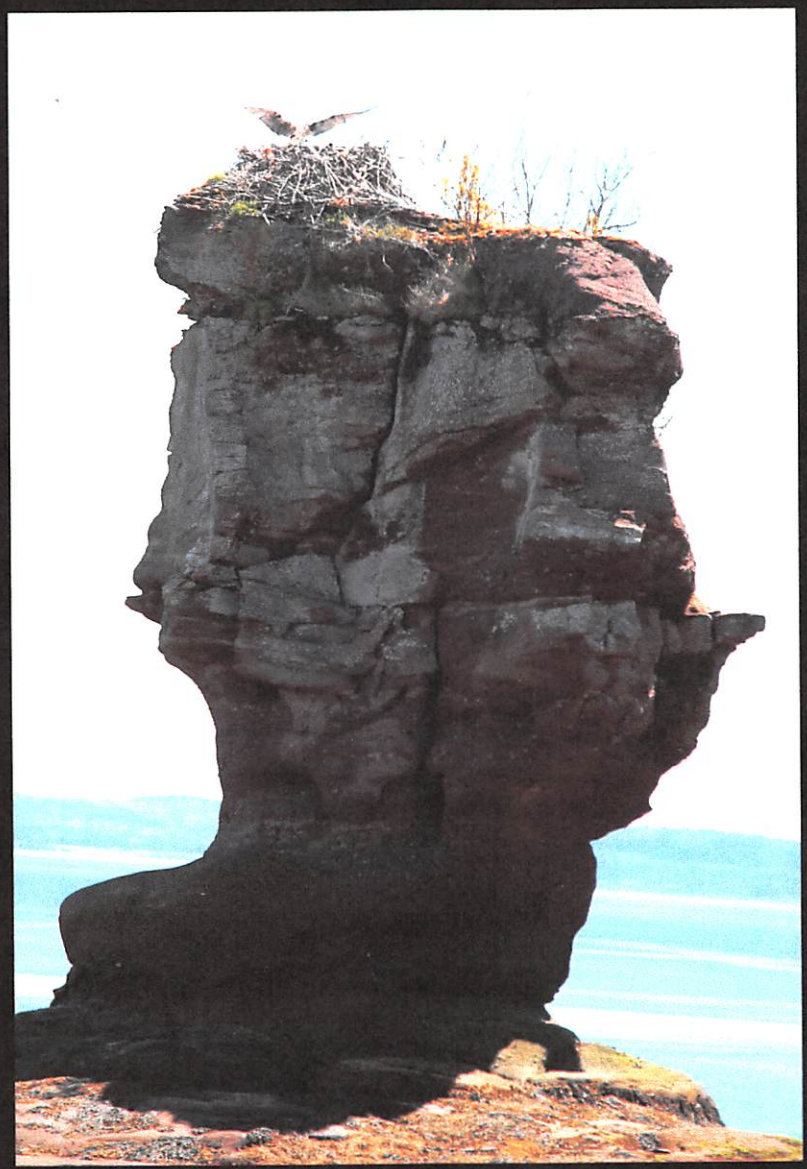
Jamie Bissonette Lewey

John Dieffenbacher-Krall
Executive Director

Jamie Bissonette Lewey
Chair

Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine

Maine Indian Tribal-State Commission: Special Report 2014/1
June 17, 2014



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Executive Summary

This report reviews the intergovernmental saltwater fisheries conflict between the Passamaquoddy Tribe and the State of Maine; attempts by the Tribe and the State to negotiate solutions; resulting litigation; Maine legislation affecting Tribal management of the fishery; and the impact of this conflict and the legislation on Tribal-State relations from 1997 to 2014.

The conflict arises from opposing interpretations of how the 1980 federal Maine Indian Claims Settlement Act (MICSA) and the Act to Implement the Maine Indian Claims Settlement (MIA) impact the Passamaquoddy saltwater fishery. The Passamaquoddy Tribe stands on its retained Aboriginal rights to fish within its traditional territory beyond reservation boundaries without interference from the state. They hold that these rights have never been abrogated since they are not mentioned in the extinguishment provisions in the MICSA. The State of Maine maintains that the Tribes have no rights except as specified in the MIA and that the State of Maine has the authority to regulate the Passamaquoddy saltwater fishery and prosecute Passamaquoddy fishers who fish according to Passamaquoddy law rather than state law. The articles of construction in the MICSA read, "In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern."

In 1997, LD 297 was passed to require the Department of Marine Resources to negotiate with the Passamaquoddy. By June, thirteen Passamaquoddy were charged with various violations of state commercial fishing laws. In 1998, despite objections by Maine legislators, a new law was passed. This law (12 M.R.S.A. § 6302-A) changed the sustenance definition specified in the MIA and included a "blow-up" clause, designed by the Office of the Attorney General, which overrode the authority of the Tribe to approve or reject amendments to the MIA. In 2013 and 2014, the state legislature further amended 12 M.R.S.A. § 6302-A and further subverted the Tribe's equal participation with the legislature in amending the Settlement Acts. The legislative and executive branch processes employed to resolve the intergovernmental saltwater fisheries conflict have failed to achieve tribal-state cooperation, and undermined potential for the development of mutually beneficial solutions in a sustainable fishery.

After a complete review of these events, the Maine Indian Tribal-State Commission (MITSC) recommends a process of seeking mutually beneficial solutions that are grounded in respect for and adherence to the MICSA articles of construction and the mutual approval processes for amendments to the MIA. Recommendations to accomplish this aim include federal-tribal-state co-management of marine resources; development of a MOU to address unresolved issues regarding the saltwater fishery conflict and replace 12 M.R.S.A. § 6302-A; development of clear responsibilities and reporting standards for the OAG and the MITSC when reviewing any aspect of the MIA or MICSA; and fully resourcing further inquiry, regular reporting and information sharing among the concerned parties.

We conclude that open dialogue, negotiations, and formal agreements are mechanisms that are both pragmatic and constructive, and have value for all of the people of Maine. We offer this report with sincere hope for a renewed commitment to advance conflict resolution among all of the peoples who live within the State of Maine.

Introduction

In 1980, legislation passed at both the state and federal levels that established specific legal parameters for the settlement of claims by the Passamaquoddy Tribe and the Penobscot Indian Nation for the return of 12.5 million acres of land, roughly 60% of the state of Maine, and damages of 25 billion dollars. A settlement negotiated among the parties became law with the passage of two separate pieces of legislation: the Act to Implement the Maine Indian Claims Settlement, commonly known as the Maine Implementing Act (MIA) and the Maine Indian Claims Settlement Act (MICSA). The MIA (M.R.S.A Title 30, Chapter 601) created the Maine Indian Tribal-State Commission (MITSC, 30 M.R.S.A. § 6212(3)), an intergovernmental organization charged in part to:

Continually review the effectiveness of the Act and the social, economic, and legal relationship between the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, the Penobscot Indian Nation, and the State (30 M.R.S.A. § 6212(3)).[1]

The Maine Indian Claims Settlement Act, (MICSA), 25U.S.C. 1721-1735 was passed in October of the same year. The MICSA gave federal permission for the MIA to take effect while retaining intact the federal trust relationship between the federally recognized tribes of Maine and the US Congress; and placed constraints on the implementation of the MIA. Of particular interest to the inquiry into the saltwater fishery conflict between the Passamaquoddy Tribe and the State of Maine are the following provisions of the federal act:

1. MICSA (25 U.S.C. § 1735 (a)) provides that "In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern." The provisions of the federal MICSA thus override the MIA provisions when there is a conflict between the two.
2. MICSA (25 U.S.C. § 1725 (e)(1)) provides that tribal approval is required for any amendments to the MIA that relate to "the enforcement or application of civil, criminal or regulatory laws" of the tribes and the state within their respective jurisdiction or the allocation of responsibility or jurisdiction over governmental matters between the tribes and the state.

This report reviews:

1. **The emerging conflict of interpretation over the saltwater fishing rights of the Passamaquoddy Tribe beginning in 1983, shortly after the Settlement Acts became law;**
2. **The evidence of good faith negotiations among the Passamaquoddy Tribe, the Maine Department of Marine Resources (DMR), and Governor King's administration to arrive at a solution;**

[1] Originally, the MITSC included representation from the Passamaquoddy Tribe, Penobscot Indian Nation and the State of Maine. It was amended in 2009 to include the Houlton Band of Maliseet Indians.

3. **State law enforcement responses in Passamaquoddy territory and subsequent criminal charges brought against Passamaquoddy fishers;**
4. **The Passamaquoddy response to jurisdictional disputes and resulting litigation;**
5. **The passage of state legislation regarding the management of the Passamaquoddy saltwater fishery (LD 2145);**
6. **The role of the Maine Office of the Attorney General as advisor to the Maine legislature when they consider new law that may impact the Maine Implementing Act.**

The MITSC 's charge to further examine and report on the Passamaquoddy saltwater fishery was specifically included in LD 2145, and reads in part:

> *The Maine Indian Tribal-State Commission shall study any question or issue regarding the taking of marine resources by members of the Passamaquoddy Tribe and the Penobscot Nation. The commission shall report any findings and recommendations to the Joint Standing Committee on Marine Resources by December 15, 1998.*

To carry out this charge, the MITSC formed a Marine Resources Ad Hoc Committee charged with making recommendations on marine resource issues to the full commission. The MITSC issued its report to the Joint Standing Committee on Marine Resources, as mandated, on December 15, 1998. The report, *Taking of Marine Resources by Passamaquoddy and Penobscot Tribal Members,* indicated that marine resource issues were likely to be ongoing and stated that, "The [Ad Hoc] committee will discuss these issues and questions, undertake any research required and bring forward the issues and questions as agenda topics for the meetings of MITSC . . . MITSC will share any findings and recommendations with the Joint Standing Committee on Marine Resources and the Tribal Councils." (Addendum 1)

In the preparation of this report, the MITSC conducted an extensive search for and a comprehensive review of primary material available in the public domain. The primary documents examined by the MITSC were, for the most part, State of Maine records. While this report focuses specifically on the saltwater fishery, one of many areas of interest to the MITSC, more materials from these and other federal and tribal sources need to be comprehensively examined in order to fully assess the tribal-state relationship relative to the settlement acts.

Relying on both its statutory responsibility in 30 M.R.S.A. § 6212(3) and its charge pursuant to 12 M.R.S.A. § 6302-A, the MITSC offers the following report.

Section VIII: Recommendations

1. The MITSC must be sufficiently resourced to carry out its role of advancing recommendations that have the potential to resolve conflicts and result in mutually beneficial solutions between the tribes and the state. (Findings 6 and 19)
2. The articles of construction in the Maine Indian Claims Settlement Act outlined in 25 U.S.C.S § 1735 (a) must be applied by all parties: federal, state and tribal. (Finding 4)
3. The statutory process to amend MIA, as specified in MICSA 25 U.S.C. § 1725 (e)(1), must be conscientiously followed by all parties. (Findings 5 and 10)
4. A tribal-federal-state summit should be held on marine resource co-management. (Findings 2, 3 and 7 a and b)
5. Where the tribal-state jurisdictional relationship remains contested, the state and the tribes should commit to good faith negotiations at the highest level in order to execute Memoranda of Understanding (MOU) using model MOU that have proven to be effective in other states. (Findings 1, 2, 3 and 7)
6. The tribes and the Maine State Legislature should use formal MOUs that specifically recognize and reaffirm the equal standing of each of the parties to enter into agreements for mutually beneficial purposes. (Findings 1, 2, 3 and 7)
7. A MOU between the tribes and the state should be developed to address unresolved issues regarding the saltwater fishery conflict and it should replace 12 M.R.S.A. § 6302-A. (Findings 1, 2, 3 and 7)
8. The OAG, the tribes, and the MITSC should routinely review proposed legislation that affects the MIA or the MICSA for adherence to the negotiated settlement reflected in the MIA and MICSA. (Finding 8 and 9)
9. All reviewing entities should make their findings available in writing to the relevant legislative committee in a timely fashion so that these reports can inform the legislative process. (Finding 8, 9, 12 and 14)
10. In order to advance mutually beneficial solutions and build trust, provisions for the OAG to provide advice and counsel to the legislature and the administration, to provide formal, well-reasoned, written responses to legislative and administrative requests, and to report on actions that affect the negotiated settlement reflected by the MIA and MICSA should be incorporated into M.R.S.A. Title 5, Chapter 9. (Finding 11)
11. Since tribe members are also citizens of the state, the negotiated agreement reflected in the Settlement Acts should be supported and protected by the state and by the OAG. (Findings 11 and 18)
12. The Judiciary Committee of the Maine State Legislature should consider the development of clear responsibilities and reporting standards for the OAG and the MITSC when reviewing any aspect of the MIA or MICSA. This legislation should be introduced in the next legislative session in 2015. Necessary funding should be available to make this possible. (Findings 11 and 18)
13. In order for the MITSC to carry out its statutorily mandated charge, it needs a way to evaluate the impact of legislative, judicial and administrative actions that affect tribal-state relations. A process for regular reporting to the MITSC and information sharing

with the MITSC must be developed that includes the OAG, OPLA, relevant legislative committees, and relevant departments. (Findings 15 and 16)

14. In order to deepen understanding of the Settlement Acts, promote constructive dialogue and advance mutually beneficial solutions, the MITSC should continue its active review of the negotiated agreements as they are reflected in the Settlement Acts, the congressional records and the state records that were produced during the construction of these Acts, and ensuing laws and public policy that affect the federally recognized tribes in Maine. This review, coupled with strong recommendations rooted in conflict resolution and the development of mutually beneficial solutions, should be the foundation of any report or position that the MITSC takes. (Finding 16)
15. The development and implementation of concrete recommendations to address racism are necessary in order to deepen the potential for respectful relationships among all who live in the State of Maine. (Findings 17, 18, 19 and 20)
16. Every effort to maintain peace and respect should be exercised in all public venues and in the areas where tribal fishers work. Policies and procedures backed by the force of law should be legislated by the tribes and the state to accomplish this aim. (Findings 10, 17, 18 and 19)
17. All parties to the Settlement Agreements engage in pragmatic and constructive dialogue, with renewed commitment to advance conflict resolution, openness, negotiations, formal agreements and mutually beneficial solutions for all of the peoples who live within the State of Maine. (Findings 14, 17, 19 and 20)