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# Maine Indian Tribal-State Commission Annual Report 2013-2014

Maine Indian Tribal-State Commission

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# Maine Indian Tribal-State Commission Annual Report 2013-2014



# **A Summary of the Activities of the Maine Indian Tribal-State Commission (July 1, 2013 – June 30, 2014)**

*Prepared by*

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**December 2014**

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Matt Dana

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Vera Francis

Richard Gould

Joan Nass

H. Roy Partridge

Robert Polchies

Linda Raymond

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*Note: The report in its entirety can be found on the MITSC website, [www.mitsc.org](http://www.mitsc.org).*

## I. Executive Summary

The MITSC began and ended fiscal year 2013-2014 with significant inquiries examining the impacts and effectiveness of the Maine Indian Claims Settlement.

In August 2013, the Commission responded to a request from the UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya to provide him with additional information to supplement the letter that the Commission sent him dated May 16, 2012 regarding how the Maine Indian Claims Settlement Act and the Maine Implementing Act constrain Wabanaki self-determination negatively affecting health, socioeconomic conditions, culture and natural resource protection. And at the June 17, 2014 meeting, the MITSC Commissioners approved the *Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine*. The *Assessment* documents more than thirty years of conflict over saltwater fishing rights between Passamaquoddy and State of Maine. Prior to publishing the *Saltwater Fisheries Conflict* report the Commission formally registered its concerns regarding the Elver Project, a multi-department executive branch initiative involving the cross-referencing of elver licenses with individuals receiving State assistance in a letter to Governor LePage on December 20, 2013.

In order to support the implementation of the two executive orders issued in 2010 and 2011, to advance the gathering of socioeconomic data concerning the Tribes, and to provide assistance when requested to help resolve disputes, the MITSC undertook three activities. The MITSC participated in a working group, appointed by their Chiefs and representing all of the federally recognized tribes within Maine, to develop a Maine Department of Health and Human Services Tribal consultation policy. The MITSC met with Department of Corrections Commissioner Joseph Ponte in September 2013 to discuss the collection of data pertinent to Wabanaki and other Native American inmates, resulting in the commitment to compile this information quarterly and make it available to the Tribes. At the request of the Penobscot Nation, the Commission facilitated discussions between the Tribe and the Department of Agriculture, Conservation and Forestry resulting in an agreement providing Penobscot vehicular access via the KI Multi-Use Trail to its trust lands located in Williamsburg.

To advance its educational goals, for a second consecutive year the MITSC collaborated with the Wabanaki Center at the University of Maine and the American Friends Service Committee Healing Justice Program in New England to organize two Wabanaki Treaty Learning Series events, one on March 19, 2014 at the Passamaquoddy reservation of Sipayik followed by a program at the University of Maine entitled, “Wabanaki Self-Determination: Earth Treaties to Settlement Acts & Beyond.” Both events received in-depth news coverage.

During the second half of the 126th Legislative Session, the MITSC engaged in diplomatic efforts concerning LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing License, and, subsequently, LD 1723, An Act To Improve Enforcement of Marine Resources Laws, urging the Legislature to create a framework that would allow for the negotiation of a mutually beneficial solution with the federally recognized tribes within the State of Maine.

## **II. Introduction**

### **A. Purpose and Organization of This Report**

This report summarizes MITSC's work from July 1, 2013 to June 30, 2014. The MITSC's bylaws specify an annual report will be transmitted to the State, the Penobscot Indian Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians at the close of each year. The Commission routinely provides the Aroostook Band of Micmacs Government its Annual Report as part of the standard report distribution.

## **III. Overview of the MITSC**

### **A. Purpose and Responsibilities**

The MITSC is an intergovernmental entity created by An Act to Implement the Maine Indian Claims Settlement (known hereafter as the Maine Implementing Act (30 MRSA §6201 - §6214) or MIA). The Act specifies the following responsibilities for the MITSC:

- Effectiveness of the Act. Continually review the effectiveness of the Act and the social, economic, and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, the Penobscot Indian Nation, and the State of Maine.
- Land Acquisition. Make recommendations about the acquisition of certain lands to be included in Passamaquoddy and Penobscot Indian Territory.
- Fishing Rules. Promulgate fishing rules for certain ponds, rivers, and streams adjacent to or within Indian Territory.
- Studies. Make recommendations about fish and wildlife management policies on non-Indian lands to protect fish and wildlife stocks on lands and waters subject to regulation by the Passamaquoddy Tribe, the Penobscot Indian Nation, or the MITSC.
- Extended Reservations. Review petitions by the Tribes for designation as an "extended reservation."

The MITSC also performs an informal information and referral function.

### **B. MITSC Members and Staff**

The MITSC has thirteen members, including six appointed by the State of Maine, two by the Houlton Band of Maliseet Indians, two by the Passamaquoddy Tribe, and two by the Penobscot Nation. The thirteenth member is the chair, who is selected by the twelve appointees. Nine members constitute a quorum. Since September 2011, the Aroostook Band of Micmacs has sent an observer to participate in MITSC meetings. With a new Tribal Government taking office in May 2013, the Aroostook Band of Micmacs decided to designate two Micmac representatives to serve as official observers for the Tribe beginning June 18, 2013.



In December of 2013, citing a desire to focus locally and directly on issues that impact their Tribe, the Houlton Band of Maliseet Indians gave the MITSC notice that they would no longer be participating in the MITSC's meetings. The Houlton Band of Maliseet Indians has not formally resigned, the appointed Maliseet MITSC Commissioners and Tribal Representative receive all information and the Executive Director calls them regularly to solicit feedback on the MITSC's proposed decision points and potential positions.

The MITSC contracts for the services of an Executive Director, the sole position for the Commission.

### **C. Funding**

The MITSC finished fiscal year FY 2014 (July 1, 2013 to June 30, 2014) with a balance of \$8,661. During the 2014 fiscal year, the MITSC received \$95,575 and spent \$105,480.

## **IV. MITSC Activities**

### **Reviewing Effectiveness of the Settlement Act**

#### **MITSC Responds to Request for Input from UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya**

The office of the UN Special Rapporteur on the Rights of Indigenous Peoples comprises one of the three United Nations (UN) entities charged with reviewing the human and political rights of Indigenous Peoples. The two other UN bodies with Indigenous Rights responsibilities include the UN Permanent Forum on Indigenous Issues and the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples. In 2012, UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya conducted his first official visit to the US to investigate the human rights situation of Indigenous Peoples. He invited testimony from the MITSC and other interested parties as part of his official visit. The MITSC's May 16, 2012 letter signed by the entire Commission finds, "The Acts (referring to the Maine Indian Claims Settlement Act and Maine Implementing Act) have created structural inequities that have resulted in conditions that have risen to the level of human rights violations." In Mr. Anaya's official report on his 2012 visit to the US, he finds:

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.

On July 17, 2013, Mr. Anaya wrote to the Commission seeking additional information concerning the Maine Indian Claims Settlement Act (MICA), Maine Implementing Act

(MIA), and the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (TRC). The MITSC forwarded the questions concerning the TRC to both the TRC and Wabanaki REACH for a response. The Commission's August 8, 2013 response to Mr. Anaya (Appendix 1) focuses on 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." (Articles 11, 20, 21, 23, 25, 26, 29, 31, 32 of the UNDRIP) In addition, the Commission analyzes "how the "MICSA and MIA framework" impede tribal government self-determination." (Article 3 of the UNDRIP)

The MITSC letter states in part:

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.

**MITSC Letter to Department of Inland Fisheries and Wildlife (DIF&W)  
Commissioner Chandler Woodcock to Better Coordinate Rulemaking between the  
Commission and DIF&W**

The MITSC possesses exclusive authority under 30 MRSA §6207, §§3 to promulgate fishing rules or regulations on:

- A. Ponds not under the jurisdiction of the Passamaquoddy Tribe or Penobscot Nation, 50% or more of the linear shoreline of which is within Indian territory;
- B. Any section of a river or stream both sides of which are within Indian territory; and
- C. Any section of a river or stream one side of which is within Indian territory for a continuous length of 1/2 mile or more.

Despite this clear and uncontested authority, several times the State of Maine has initiated changes to the fishing rules on MITSC waters through rulemaking or legislation. The most recent example involved LD 170, Resolve, To Allow the Use of Live Bait When Ice Fishing in Certain Waters of the State. The resolve, considered by the Maine Legislature during the 1<sup>st</sup> session of the 126<sup>th</sup> Legislature (2013), sought to reverse rules that DIF&W had enacted to prohibit the use of live bait on certain brook trout waters. Three of the waters that LD 170

sought to impact are actually under the jurisdiction of the MITSC, not the State of Maine. At the March 26, 2013 public hearing for the bill, MITSC Commissioner and DIF&W Director of the Bureau of Resource Management John Boland informed the Inland Fisheries and Wildlife Committee of the erroneous inclusion of the MITSC waters in the bill. The legislation was ultimately defeated.

To prevent what happened with LD 170 and to improve the coordination of rulemaking between the MITSC and DIF&W, John Boland proposed at the February 20, 2013 Commission meeting that DIF&W Fisheries Management Supervisor David Boucher take the lead to produce a document that describes how DIF&W and MITSC will work together when situations arise and the state would like to petition the MITSC to change its regulations on MITSC waters. This document would also clearly identify a process for rulemaking. David Boucher attended the April 10, 2013 Commission meeting to present a draft of the “Policy for Fisheries Rulemaking on Tribal (MITSC) Waters.” At the following MITSC meeting held June 19, 2013, the Commission formed a committee to analyze the proposed “Policy for Fisheries Rulemaking on Tribal (MITSC) Waters” and to report back to the Commission with any recommended changes. The committee tasked with analyzing the fisheries rulemaking coordination document reported its recommended changes to the full Commission at the meeting held November 18, 2013. The Commission accepted all of the recommended changes and unanimously approved the “Policy for Coordination of Fisheries Rulemaking on MITSC Waters between IF&W and MITSC.”

On December 17, 2013, the MITSC wrote to DIF&W Commissioner Chandler Woodcock (Appendix 8) to offer its official response to the proposed policy and offer the rulemaking procedures adopted by the Commission on Nov. 18th. Although the MITSC has had subsequent conversations with David Boucher, as of the date of publication of this report, the MITSC has not received an official response from the DIF&W.

### **MITSC Letter to the Marine Resources Committee Chairs Concerning LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing License, and the Impact on Tribal-State Relations**

LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing License, originally proposed making any license to take marine organisms issued to a citizen of the Passamaquoddy Tribe, Penobscot Nation, Aroostook Band of Micmacs or Houlton Band of Maliseet Indians by their respective Tribal Governments invalid until approved by the Department of Marine Resources. It also made other changes to the law affecting the elver fishery. On January 23, 2014, the MITSC wrote to the Marine Resources Committee Chairs, Senator Christopher Johnson and Representative Walter Kumiega, (Appendix 9) to offer the Commission’s “best thinking ... and to clarify the impact this type of legislative initiative has on tribal-state relations and the ongoing application of the Maine Implementing Act (30 MRSA §6201 - §6214).” The Commission letter cites three principal concerns with section one of LD 1625, including:

1. Violating Governor LePage’s Executive Order 21 FY 11/12 (Appendix 27) and the earlier Baldacci EO 06 FY 10/11 (Appendix 28) that require departments to develop “standard operating procedures to engage Tribal Governments at the earliest possible juncture of the development of any legislation, rules, and policies proposed by the State agency on matters that significantly or uniquely affect those Tribes.”

2. Proposing highly discriminatory provisions, based solely on political and racial identity, applicable only to elver harvesters who obtain their licenses from Wabanaki Tribal Governments.
3. Eroding Passamaquoddy and Penobscot sustenance fishing rights protected in 30 MRSA §6207, §§4.

Eventually, LD 1625 was split into two bills. The companion legislation became LD 1723, An Act To Improve Enforcement of Marine Resources Laws. A major feature of LD 1723 includes the requirement that all elver harvesters possess an Elver Transaction Card in order to sell elvers to a licensed elver dealer. Governor LePage signed LD 1723 into law on March 13, 2014. Five days later Governor LePage signed an amended version of LD 1625 into law. It features an annual allocation of 21.9% of the overall Maine elver harvest to the federally recognized tribes within Maine including 14% reserved for the Passamaquoddy Tribe, 6.4% allocated to the Penobscot Nation, 1.1% designated for the Houlton Band of Maliseet Indians, and .4% set aside for the Aroostook Band of Micmacs.

**Collaboration w/ the Wabanaki Center at the University of Maine and American Friends Service Committee (AFSC) Healing Justice Program in New England on Treaty Learning Series and Work to Hold Events at Sipayik 3/19/14 and UMaine 3/20/14**

The MITSC collaborated with staff from the Wabanaki Center at the University of Maine and the American Friends Service Committee (AFSC) Healing Justice Program in New England to create a Treaty Learning Series in order to increase public awareness of treaties Wabanaki Peoples entered into with a number of governments. An important goal of the Treaty Learning Series is to increase overall understanding of treaties and how these agreements affect tribal-state relations today.

In March 2013, the MITSC, the Wabanaki Center, and the AFSC Healing Justice Program in New England hosted Indigenous rights attorney, scholar, and author Walter Echo-Hawk to appear as the initial guest speaker in the Treaty Learning Series. He visited the Passamaquoddy Tribe at Motahkmikuk followed the next day by an afternoon teach-in and evening lecture at the University of Maine. Mr. Echo-Hawk discussed the UN Declaration on the Rights of Indigenous Peoples and how the application of its human rights principles to the Maine Indian Claims Settlement could introduce missing human rights protections. After his evening lecture, a panel of Wabanaki scholars and leaders offered their thoughts on Mr. Echo-Hawk's analysis.

For the 2014 event, the sponsoring entities decided to retain the same two-day format shifting the community event to the Passamaquoddy Tribe at Sipayik for 2014. This year's program covered a range of Wabanaki treaties and the negotiated settlement to the Maine Indian land claims of 1980. The March 2014 event was titled, "Wabanaki Self-Determination: Earth Treaties to the Settlement Acts & Beyond." (Appendix 12) Presenters included Andrea Bear Nicholas, Maliseet from Nekohtkok (Tobique First Nation) and recently retired Chair of Studies of Aboriginal Cultures of Atlantic Canada at St. Thomas University; Mark Chavaree, Penobscot and the Tribe's General Counsel; Dr. Gail Dana-Sacco, Passamaquoddy, founder of Wayfinders for Health, and an Assistant Research Professor at the University of Maine; and Vera Francis,

Passamaquoddy, Economic Development Planner for the Passamaquoddy Tribe at Sipayik, and a traditional storyteller.

On March 19, Andrea Bear Nicholas, Dr. Gail Dana-Sacco, and Vera Francis made presentations followed by a robust community discussion in the Tribal Council Chambers/Tribal Court of the Passamaquoddy Tribe at Sipayik. More than 50 people attended the event, and it received in-depth news coverage by *The Quoddy Tides* (Appendix 13). The next day the same three presenters were joined by Mark Chavaree for an evening session held in Wells Commons at the University of Maine. The *Bangor Daily News* (Appendix 14) ran both an advance article on the UMaine event and it covered the March 20 session (Appendix 15).

### ***MITSC Report Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine***

At the March 17, 2014 Commission meeting, the Commissioners approved writing a report on the history of LD 2145, An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe (118<sup>th</sup> Legislature), legislative consideration of LD 451, An Act Relating to Certain Marine Resources Licenses (1<sup>st</sup> session, 126<sup>th</sup> Legislature), and LD 1625, An Act Concerning Maine's Elver Fishery, and LD 1723, An Act To Improve Enforcement of Marine Resources Laws (2<sup>nd</sup> session, 126<sup>th</sup> Legislature), and how all the legislation relates to MIA, MICSA, and tribal-state relations. The Commission received a draft report at the April 30, 2014 meeting, and the Commissioners approved the final report on June 17, 2014. (See the executive summary, findings, and recommendations in Appendix 16.) To read the entire, go to [http://www.mitsc.org/documents/148\\_2014-10-2MITSCbook-WEB.pdf](http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf).

Before publicly releasing the report July 11, 2014 the Commission met with a number of leaders and top staff people for the State of Maine to brief them about the *Saltwater Fisheries Conflict* report. On May 6, Jamie Bissonette Lewey, Dr. Gail Dana-Sacco, Robert Polchies, and John Dieffenbacher-Krall met with Jon Clark, Deputy Director of the Office of Policy and Legal Analysis (OPLA), and Amy Winston, the OPLA analyst assigned to staff the Marine Resources Committee. Later that same day the Commission met with Senate President Justin Alfond, House Speaker Mark Eves, Marine Resources Committee Co-Chairs Senator Christopher Johnson and Representative Walter Kumiega, Judiciary Committee Co-Chair Charles Priest, Michael LeVert, Chief of Staff, President Alfond, Ken Hardy, Policy Director, President Alfond, Ana Hicks, Chief of Staff, Speaker Eves, and Alysia Melnick, Legal Counsel, Speaker Eves. On July 2, the Commission met with Carlisle McLean, Chief Legal Counsel to Governor LePage, Hank Fenton, Deputy Legal Counsel to Governor LePage, and Department of Marine Resources Commissioner Patrick Keliher. Jamie Bissonette Lewey, Matt Dana, Dr. Gail Dana-Sacco, Richard Gould, Robert Polchies, Roy Partridge, and John Dieffenbacher-Krall represented the Commission during the meeting with the Governor's staff and cabinet member. Following that meeting the same contingent from the Commission except Roy Partridge met with Attorney General Janet Mills, Office of the Attorney General Natural Resources Chief Jerry Reid, and Commissioner Keliher.

*Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine* examines the saltwater fishing conflict from the passage of the Maine Indian Claims Settlement Act in 1980 through the legislative session that ended in April 2014. It



documents differing interpretations of saltwater fishing rights by the Passamaquoddy and State of Maine as early as 1984. The report finds that the Maine Legislature circumvented the amendment process required under the Maine Indian Claims Settlement Act on three separate occasions when it legislated on saltwater fishery issues without the consent of the Passamaquoddy Tribe in 1998, 2013, and 2014. Overall, the report contains 20 findings and 17 recommendations. Key recommendations include:

- The articles of construction in the Maine Indian Claims Settlement Act outlined in 25 U.S.C. § 1735 (a) must be applied by all parties: federal, state, and tribal.
- The statutory process to amend MIA, as specified in MICSA 25 U.S.C. § 1725 (e)(1), must be conscientiously followed by all parties.
- Where the tribal-state jurisdictional relationship remains contested, the state and the tribes should execute Memoranda of Understanding (MOU).
- The Office of the Attorney General (OAG), the Tribes, and the MITSC should routinely review proposed legislation that could be considered a potential amendment to the Settlement Agreement.
- The Judiciary Committee should consider the development of reporting standards for the OAG when reviewing any aspect of the MIA or MICSA.
- All parties to the Settlement Agreements should engage in pragmatic and constructive dialogue.
- The MITSC must be fully resourced to carry out its role.

The *Saltwater Fisheries Conflict* report generated considerable media coverage over a period of several weeks (see Addenda 18 – 26).

## **Reviewing Effectiveness of the Social, Economic, and Legal Relationship Between the Tribes and the State**

### **MITSC Participation in the Development of a Wabanaki Proposal to the State of Maine Re: Tribal Consultation**

Communication, both substantive and timely, is evidence of good tribal-state relations. On August 26, 2011, Governor Paul 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 (EO 21). (Addendum 27) EO 21 requires every department and agency in State Government to designate a tribal liaison; each tribal liaison must develop a communications plan to facilitate information sharing between the department/agency for whom the liaison works and Tribal Government and “standard operating procedures to engage Tribal Governments at the earliest possible juncture of the development of any legislation, rules, and policies proposed by the State agency on matters that significantly or uniquely affect those Tribes.”

The MITSC and Tribal Governments reacted to the LePage Executive Order 21 FY 11/12 with enthusiasm. Despite the issuance of EO 21, severe communication and consultation problems persist at the departmental level. Although the departments are required “to engage Tribal

Governments at the earliest possible juncture of the development of any legislation, rules, and policies proposed,” the Tribes continually experience receiving no advance notification or consultation beyond the regular process for the consideration of any proposal potentially affecting them.

During the winter of 2012, Governor LePage’s former Chief Legal Counsel Dan Billings invited the Tribes to provide input on how the State could best communicate with them to fulfill the Executive Order 21 FY 11/12. At the request of all of the Wabanaki Chiefs, former Motahkmikuk Tribal Councilor and Passamaquoddy health director Elizabeth Neptune facilitated a working group, comprised of representatives from all of the federally recognized Maine tribes, tasked with the development of a model tribal consultation policy for use with the Maine Department of Health and Human Services (DHHS). The Chiefs invited the MITSC to participate in the working group. The Chair and Executive Director attended all planning and committee meetings and provided additional resources to the working group as requested. Early discussion with the DHHS led the working group to anticipate a favorable response from the Department. The working group hoped that successful implementation of a consultation policy could serve as a model for all Maine agency/departamental policies and the elements for a comprehensive State tribal consultation policy.

### **MITSC Work with the Maine Department of Corrections Concerning the Collection of Incarceration Data Applicable to the Wabanaki and Overall American Indian Corrections Population**

During the August 21, 2013 Commission meeting, Commissioners approved the MITSC scheduling a meeting with Joseph Ponte, Commissioner, Department of Corrections, to request that the Department of Corrections specifically document the numbers of Wabanaki People in state prisons & county jails. The MITSC followed up by arranging a meeting with Commissioner Ponte and Associate Commissioner Jody Breton on September 11, 2013. The meeting was attended by Jamie Bissonette Lewey, Robert Polchies, and John Dieffenbacher-Krall. The MITSC asked the Dept. of Corrections to add questions to the prisoner intake questionnaire and report the data to the MITSC and the Tribes quarterly. They also offered to survey existing inmates posing the same questions as those presented to new prisoners. The Commission received demographic information from the Dept. of Corrections on January 14, 2014 and the first quarterly update on October 31, 2014.

### **MITSC Letter to Governor Paul LePage Regarding the Elver Project**

Passamaquoddy citizen Vera Francis requested that the MITSC consider taking action on the Elver Project at the Commission meeting held November 18, 2013. Many people became initially aware of the Elver Project by the publication of a November 3, 2013 article in the *Portland Press Herald* titled, “Maine elver fishermen targeted for welfare fraud.” The *Portland Press Herald* article and other news accounts described the Elver Project as a collaborative initiative between the Maine Dept. of Health and Human Services, Maine Dept. of Marine Resources, and Maine Revenue Services involving the cross-referencing of elver licenses with individuals receiving State assistance. The described purpose of the initiative was to review

elver catch records and tax filings for the period 2010 to 2013 to determine whether any elver harvesters who received welfare benefits failed to report that income to the State of Maine.

On November 18, 2013, the Commission voted to write a letter conveying the MITSC's concern about the impact of the Elver Project to the relevant parties. On December 20, 2013, the Commission wrote to Governor LePage (Appendix 29). In the letter, the Commission states in part, "We write with deep concern about the Elver Project" ... "(w)hile the MITSC understands the importance of investigating welfare fraud, we think there are deeper issues that will come to the forefront if the Elver Project is implemented the way that it has been framed by the media." Governor LePage responded with a letter dated November 18, 2014 (Appendix 30).

### **MITSC Work Related to LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing License, and LD 1723, An Act To Improve Enforcement of Marine Resources Laws**

The Commission expended considerable diplomatic effort during a two-month period from mid-January 2014 through Governor LePage's signing LD 1625 and LD 1723 in mid-March to avoid the deterioration in Wabanaki-Maine relations that occurred in the winter/spring of 2013 (see pages 6 – 8 *MITSC Annual Report 2012 – 2013*).

LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing License, was introduced as emergency legislation and scheduled for a public hearing on January 13, 2014. As originally printed, LD 1625 proposed requiring any citizen of the Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, or Penobscot Nation to obtain written confirmation from the Maine Department of Marine Resources (DMR) to validate their tribally issued license. At the January 13 public hearing, DMR Commissioner Patrick Keliher told the Marine Resources Committee members that he supported the written confirmation proposal as a means to strengthen the State's enforcement authority over the elver fishery. On January 21, the Commission represented by Chair Jamie Bissonette Lewey, Motahkmikuk Commissioner Matt Dana, Penobscot Commissioner Robert Polchies, and Executive Director John Dieffenbacher-Krall met with the Marine Resources Committee Co-Chairs, Senator Christopher Johnson and Representative Walter Kumiega, along with Maliseet Tribal Representative Henry Bear, Jon Clark, Deputy Director, OPLA, and Amy Winston, Committee Analyst, Marine Resources Committee to review a draft letter the Commission had written concerning LD 1625. The Commission finalized and sent the letter two days later (Appendix 9). On February 3, the Marine Resources Committee Chairs responded to the letter (Appendix 31).

During the formal legislative consideration of LD 1625 and later LD 1723, one or more MITSC representatives attended all public hearings and work sessions and arranged for the Passamaquoddy Tribal Leaders to meet with the Office of the Attorney General. As the legislative session advanced, the MITSC acted on its primary role to assess the implementation of the Maine Implementing Act, and began a review of all documents relative to the Passamaquoddy saltwater fishery. At every step of the way, we kept the governments that comprise the MITSC aware of this process.

To ensure its perspective on LDs 1625 and 1723 was communicated to the committee assigned the responsibility to review the bills, the MITSC held five in-person or conference call meetings with the Marine Resources Committee Chairs, Senator Christopher Johnson and Representative

Walter Kumiega, to urge them to support a negotiated agreement with the Passamaquoddy Tribe and to avoid a legislatively imposed outcome. The Commission also held three meetings with Jon Clark and Amy Winston. Before LD 1625 and a companion bill, LD 1723, An Act To Improve Enforcement of Marine Resources Laws, were enacted, the Commission met with legislative leadership, Senate President Justin Alford and House Speaker Mark Eves, and in a separate meeting with Governor LePage. Despite this considerable diplomatic effort and evidence that the MITSC presented that passage of LDs 1625 and 1723 would constitute amendments of the Maine Indian Claims Settlement Act in violation of the law, LD 1723 was enacted March 13, 2014 and Governor LePage signed LD 1625 into law March 18, 2014.

### **MITSC Work with Executive and Legislative Branches of Maine State Government to Stop Racialized Speech and Combat Intimidation during Public Hearings, Work Sessions of Legislative Committees**

The MITSC wrote in its *2012-2013 Annual Report* that Commission Chair Jamie Bissonette Lewey heard several remarks during a March 6, 2013 public hearing on LD 451, An Act To Cap Certain Marine Resources Licenses Issued by the Passamaquoddy Tribe, that constituted racialized speech. In addition, the Commission received reports that some Passamaquoddy citizens felt intimidated during the public hearing due to an atmosphere of hostility directed toward them inside the hearing room and immediately outside of it.

During legislative consideration of LDs 1625 and 1723 in 2014, multiple MITSC Commissioners, the Chair and the Executive Director witnessed racialized speech similar to the disparaging comments observed in 2013. In addition, Wabanaki leaders were disrespected by both members of the public and the Maine Legislature in subsequent work sessions. One MITSC Commissioner who attended a February 19, 2014 work session on LD 1625 perceived such an intense atmosphere of conflict that she began formulating an individual action plan to protect herself in case violence might erupt in the room.

At its February 26, 2014 meeting, the Commission discussed the impact of racism and prejudice, examining the unacceptable and disrespectful language that multiple Commissioners heard during legislative consideration of LDs 1625 and 1723. In the MITSC Special Report 2014/1: *Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine*, MITSC writes:

After a particularly charged public work session on February 19, 2014, the MITSC discussed the need to address racism, unacceptable language, the disrespect of Wabanaki leaders, and the impact these factors have on tribal-state relations.

Subsequently, a conference call was scheduled with top legislative staff on February 28, 2014. That same day three members of the Commission, the Chair, and Executive Director held a conference call with House Judiciary Committee Chair Charles Priest. During both calls, the Commission suggested the development of guidelines on how to address and to accord proper respect to Wabanaki elected officials and dignitaries would be helpful. Both Representative Priest and legislative staff agreed such a guidance document would be beneficial.

On March 11, 2014, the MITSC Chair Jamie Bissonette Lewey, Penobscot Commissioner Robert Polchies, Executive Director John Dieffenbacher-Krall, Passamaquoddy Chief Reuben Cleaves and Sipayik Councilor Christine Downing met with Governor LePage along with his top legal staff. Part of the agenda focused on public safety in the State Capital and adjoining Cross Office Building. All visitors to the State Capital undergo weapons screening but no such screening exists for people entering the Cross Office Building where many legislative committees hold their meetings. The Commission stated its concern regarding this public safety vulnerability.

Later that day the same Commission representatives along with Sipayik Councilor Downing met with Senate President Justin Alford, House Speaker Mark Eves, and legislative staff. Speaker Eves said he would welcome the development of a handbook on tribal protocol and the incorporation of these guidelines into the formal orientation process for the 127<sup>th</sup> Legislature.

### **Work on LD 1828, An Act To Limit Consent Regarding Land Transfers to the Federal Government**

On March 24, 2014, the Commission reviewed LD 1828, An Act To Limit Consent Regarding Land Transfers to the Federal Government. The bill proposed rescinding the blanket consent in Maine law permitting the Federal Government to acquire State land for governmental purposes. Upon reading the bill, the Commission uncovered proposed statutory language that could affect the Federal Government's ability to take land into trust on behalf of the Wabanaki Tribes within Maine. The Commission alerted the Wabanaki Chiefs about the bill and the public hearing scheduled for the next day. None of the Tribes had been consulted about the bill prior to its introduction. The MITSC also alerted Judiciary Committee Analyst Margaret Reinsch concerning the potential negative implications of LD 1828 on the land into trust process.

Penobscot Tribal Representative Wayne Mitchell worked with the LePage Administration on an amendment to the legislation to specify that the Legislature consented to land transfers affecting the Federal Government taking land into trust on behalf of one of the four federally recognized tribes. A majority of the Judiciary Committee voted to recommend defeat of the bill. The bill was rejected by both houses of the Maine Legislature.

### **Fulfilling MITSC Responsibility When the Passamaquoddy Tribe or Penobscot Nation Seek to Add to Their Land in Trust Holdings**

#### **Work with Department of Agriculture, Conservation & Forestry on the Penobscot Nation Gaining Vehicular Access to Trust Land in Williamsburg Via the KI Multi-Use Trail**

At its January 16, 2014 meeting, the Commission considered a request from the Penobscot Nation to assist it with gaining motorized vehicular access to some Tribal trust land located in Williamsburg. When the Penobscot Nation initially acquired a parcel known as the Katahdin Iron Works property multiple vehicular access points to the land existed. Following the Penobscot Nation acquisition Roxanne Quimby purchased the surrounding property and eventually closed all motor vehicle access points. This action resulted in the KI Multi-Use Trail



as the only potential Penobscot Nation vehicular access to its trust land in Katahdin Iron Works. Though the Penobscot Nation had initiated dialogue with the Maine Department of Agriculture, Conservation & Forestry about using the KI Multi-Use Trail to gain motor vehicle access to their land, the conversation had not produced an agreement.

After considering the Penobscot Nation request, the MITSC decided to seek a meeting with Will Harris, Director of the Bureau of Parks and Lands, Dept. of Agriculture, Conservation, & Forestry, with representatives from the Penobscot Nation. The Commission met with him and Brian Bronson, Recreational Safety and Vehicle Coordinator, Lana Laplant-Ellis, Senior Planner, and Scott Ramsay, Director, Off-Road Vehicle Office, on March 25, 2014. Penobscot Elder Reuben Butch Phillips and Penobscot MITSC Commissioner John Banks attended the meeting.

During the meeting, the Penobscot Nation and Dept. of Agriculture, Conservation, & Forestry representatives reached a tentative agreement on temporary use of the KI Multi-Use Trail dependent on the Federal Government's consent. The Dept. of Agriculture, Conservation, & Forestry claimed the Federal Dept. of Transportation's support was needed as it provided the funding for the State purchase of the KI Multi-Use Trail. One of the conditions of the funding stipulated that the State of Maine would not allow motor vehicle use on the trail.

To facilitate the finalization of the agreement, the Commission volunteered to contact Christopher Trenholm at the Federal Dept. of Transportation (DOT). After an initial conversation with Mr. Trenholm explaining the background of the situation and the tentative agreement, he consented to participating in a conference call with the Penobscot Nation, the Dept. of Agriculture, Conservation, & Forestry, and the MITSC. The call was held April 24, 2014. Mr. Trenholm expressed a willingness of the Federal DOT to support the Penobscot/State of Maine agreement with certain conditions met. A license agreement was executed May 19, 2014 (Appendix 32) between the Dept. of Agriculture, Conservation, & Forestry and the Penobscot Nation granting the Tribe temporary access to the KI Multi-Use Trail for a three-year period.

## **MITSC Organizational Development/Resources**

### **MITSC September 30/October 1, 2013 Retreat**

The MITSC held its third consecutive annual retreat on September 30 and October 1, 2013 at the Maliseet commercial campground, Wilderness Pines, located at Conroy Lake in Monticello. On the initial day of the retreat, the Commission reviewed MITSC operating procedures; explored the role of Commissioners, including potential differences and commonalities in the experiences of Tribal and State Commissioners; and it examined the relationship between the Chair and the Executive Director. The Commission held a regular MITSC meeting during the evening of September 30 featuring a presentation from Chief Edward Peter Paul of the Aroostook Band of Micmacs. Day two of the MITSC retreat focused on a review of the MITSC budget for FY 2014, MITSC Annual Report for 2012-2013, and a debrief of the Commission's September 11, 2014 meeting with Dept. of Corrections Commissioner Joseph Ponte and Deputy Commissioner Jody Breton.

## **MITSC Outreach**

### **Maine Indian Tribal-State Commission Activity Report 2009-2012**

The MITSC published the *Maine Indian Tribal-State Commission Activity Report 2009-2012* on August 7, 2013. It can be found on the MITSC website at [http://www.mitsc.org/documents/84\\_2013-8-7MITSCactivityrpt7-1-09to6-30-12%5Bfinal%5D.pdf](http://www.mitsc.org/documents/84_2013-8-7MITSCactivityrpt7-1-09to6-30-12%5Bfinal%5D.pdf).

### **Maine Indian Tribal-State Commission Annual Report 2012-2013**

The Commission released the *Maine Indian Tribal-State Commission Annual Report 2012-2013* on February 6, 2014. With the *2012-2013 Annual Report*, the Commission established a regular publication scheduled for it that includes production of an initial draft by the annual fall retreat and final publication by the first quarter of the following year. The 2012-2013 Annual Report can be read at [http://www.mitsc.org/documents/136\\_2014-2-4MITSCannualrpt7-1-12to6-30-13%5Bfinal%5D.pdf](http://www.mitsc.org/documents/136_2014-2-4MITSCannualrpt7-1-12to6-30-13%5Bfinal%5D.pdf).

### **3<sup>rd</sup> Tribal Career & College Expo, Wabanaki Cultural Center, 5/22/14**

The MITSC staffed a table and spoke to dozens of Wabanaki students at the 3<sup>rd</sup> Tribal Career & College Expo held at the Wabanaki Cultural Center located in Calais on May 22, 2014. The objective of the event is to provide Native students and their families with an opportunity to receive testimony, engage in hands-on activities, and converse with participating tribal career professionals, in addition to speaking with college admission representatives. Several people asked to add their name to the MITSC Interested Parties email information list. The Commission donated several copies of *Wabanaki: A New Dawn*, the Commission's 1995 film that shows the quest for cultural survival by today's Wabanaki, the Maliseet, Micmac, Passamaquoddy and Penobscot Peoples, for distribution to the students.

### **MITSC Report *Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine***

The MITSC released the *Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine* on July 11, 2014. To read the entire report and accompanying addenda, go to [http://www.mitsc.org/documents/148\\_2014-10-2MITSCbook-WEB.pdf](http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf).



# Maine Indian Tribal-State Commission

August 8, 2013

Jamie Bissonette Lewey  
Denise Altvater  
John Banks  
Harold Clossey  
Matt Dana  
Gail Dana-Sacco  
H. Roy Partridge  
Linda Raymond  
Brian Reynolds

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

Addendum 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 (1<sup>st</sup> 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 otherwise [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<sup>1</sup> of MIA:

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<sup>1</sup> 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 MICA 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,<sup>2</sup> the Passamaquoddy and Penobscot proposed an amendment to address the limiting language of MIA in §6206<sup>3</sup>. Their

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<sup>2</sup> Relevant cases include *Penobscot Nation v. Stilphen*, *Great Northern Paper v. Penobscot Nation*, *State of Maine v. Johnson*

<sup>3</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 MICA (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](mailto: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.

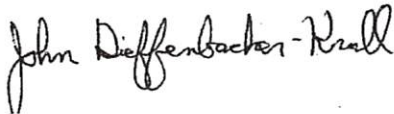
The Maine Legislature passed LD 451 in an amended form over Passamaquoddy objections that saltwater fishing rights constitute reserved rights never ceded by the Tribe. The Tribe intends to file a human rights complaint under the International Covenant on Civil and Political Rights (ICCPR) concerning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

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

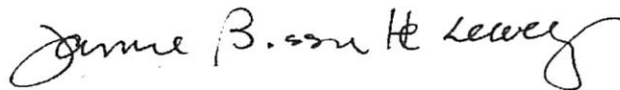
Three of your questions in your July 17 letter to MITSC concern the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (TRC). We have forwarded those questions to Heather Martin, Executive Director of the TRC, and Esther Altvater Attean, a community organizer for Wabanaki REACH, a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

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

Sincerely,



John Dieffenbacher-Krall  
Executive Director



Jamie Bissonette Lewey  
Chair

## NEWS RELEASE

For Immediate Release: Friday, August 9, 2013

For More Information: John Dieffenbacher-Krall, (207) 817-3799 (c) (207) 944-8376

### **Maine Indian Tribal-State Commission Documents Humanitarian Crisis Faced by Wabanaki Tribes Within the State of Maine Due to Maine Indian Claims Settlement Act & Maine Implementing Act; Commission Calls for Action To Address Human Rights Crisis**

Responding to a request from UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya, the Maine Indian Tribal-State Commission (MITSC) recently submitted a fourteen page letter and twenty-one documents supplementing its original filing of May 16, 2012 asserting that the Maine Indian Claims Settlement Act (MICSA) and Maine Implementing Act (MIA) “have created structural inequities that have resulted in conditions that have risen to the level of human rights violations.” The MITSC’s August 8, 2013 filing with the UN Special Rapporteur states “certain provisions of the legislation... align closely with tribal termination provisions.” The Commission adds “[t]he 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.”

“For more than two years, the MITSC has thoroughly researched what impacts the MICSA and MIA are having on the Wabanaki Tribes within the State of Maine today consistent with our charge to “continually review the effectiveness of this Act [Maine Implementing Act],”” said Jamie Bissonette Lewey, MITSC Chair. “What we found is for many key indicators of community health conditions have deteriorated for the Maliseets, Micmacs, Passamaquoddies, and Penobscots since MIA and MICSA took effect in 1980. Specific provisions in MIA and MICSA are causing this structural oppression.”

The MITSC filing cites two formal State of Maine investigations into the effects of the Maine Implementing Act on the Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Indian Nation, several state and federal court cases, letters, its own policy position statement on river herring restoration in the St. Croix River, and health advisories warning against consuming fish and game due to toxic contamination as evidence to support its conclusions. The MITSC responded to UN Special Rapporteur James



Anaya's question asking how "the MICSA and MIA framework severely limits Wabanaki tribes in Maine with regard to economic self-development, cultural preservation and the protection of natural resources in tribal territories."

The MIA and MICSA comprise laws enacted by the State of Maine and US to complete the Maine Indian Claims Settlement Agreement in response to a lawsuit filed by the Passamaquoddy Tribe and Penobscot Nation in 1972. During the latter stages of the Passamaquoddy and Penobscot negotiations with the State of Maine and the US, the Houlton Band of Maliseet Indians became involved. The Aroostook Band of Micmacs has a separate settlement agreement with the US enacted by Congress in 1991.

The MITSC submitted its original letter to UN Special Rapporteur James Anaya in response to his request for information as part of his first official country visit to the US. Representatives of MITSC and the Wabanaki Tribes met with Mr. Anaya and members of his support staff on May 16, 2012 at the United Nations in New York City to allow him to hear from Tribal citizens directly and to present information on the systemic human rights violations occurring due to specific provisions of MICSA and MIA. In his final report on his official visit to the US, Mr. Anaya finds that the "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."

"MIA and MICSA are not working. No Tribe negotiates to deepen its People's poverty. Provisions included in the MIA and MICSA designed to provide flexibility have been either blocked or unused. Unilateral interpretations of the Acts by the Office of the Maine Attorney General and state and federal courts contrary to the process that produced the laws have magnified the inequities of MIA and MICSA. As the nation states of the world and the United Nations recognize today as International Day of the World's Indigenous Peoples, Maine and the US can truly honor the meaning of this day by addressing the structural problems in MIA and MICSA causing a human rights crisis for the Wabanaki Tribes within the State of Maine," stated Jamie Bissonette Lewey.

MITSC consists of an equal number of representatives from three of the Wabanaki Tribes, the Maliseets, Passamaquoddies, and Penobscots, and the State of Maine with the twelve

Commissioners electing a thirteenth member as chair. Besides continually reviewing the effectiveness of the Maine Implementing Act (30 MRSA §6201 - §6214), it is also charged with monitoring “the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State.”

Professor James Anaya fulfills his duties as Special Rapporteur on the Rights of Indigenous Peoples under a mandate of the United Nations Human Rights Council. The Human Rights Council [resolution 15/14](#) authorizes and requests the Special Rapporteur to *"examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous people, in conformity with his/her mandate, and to identify, exchange and promote best practices"*. To learn more about the responsibilities and work of the Special Rapporteur, go to <http://unsr.jamesanaya.org>.

# Maine Tribal-State Commission airs human rights concerns to United Nations

By [Nick McCrea](#), Bangor Daily News Staff Posted Aug. 13, 2013, at 8:01 p.m. Last modified Aug. 13, 2013, at 11:37 p.m.

BANGOR, Maine — Maine tribal representatives said they are encouraged by a United Nations investigator's apparent interest in Maine tribes' concerns about inequities that have "risen to the level of human rights violations," according to the head of the Maine Indian Tribal-State Commission.

James Anaya, the UN's special rapporteur on the rights of indigenous people since 2008, visited the United States in 2012 to examine the relationship between U.S. tribes and indigenous populations and find ways of "overcoming existing obstacles to the full and effective protection of their human rights," according to the UN. The former University of Arizona human rights professor urged tribes from across the nation to contact him with their concerns.

The Maine Indian Tribal-State Commission stepped forward, sending a letter and delegation to meet Anaya at the U.N. in New York City in May 2012 to outline their concerns. Recently, Anaya asked the group for more information. The commission sent a more detailed 14-page letter and dozens of pages of supporting documents in response, according to commission Executive Director John Dieffenbacher-Krall.

Almost all the complaints traced back to the 1980 federal Maine Indian Claims Settlement Act, which sought to resolve disputes over tribal land by paying the tribes' more than \$80 million and giving them federal recognition. In exchange, the tribes agreed to be subject to regulation by the state of Maine, except as to internal tribal matters.

Among the dozens of issues raised about regulations and inequities were:

- That the state has imposed "limits on tribal self-determination" through court rulings since the federal agreement was crafted that were not inherent in the agreement.
- The state's restrictions on the lucrative elver fishery and other fishing opportunities, which have met opposition from Maine tribes who argue they have sovereign rights to regulate their own fisheries.
- The Houlton Band of Maliseets is not permitted to "exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands."
- Multiple court cases that restricted what is considered an "internal tribal matter," which the tribes say have resulted in infringements of sovereign tribal rights, ranging from environmental regulation oversight to restrictions that halted efforts to start the state's first casinos.

In his final report on the visit, Anaya sums up concerns expressed by the commission that Maine's Indian Claims Settlement Act "creates structural inequalities that limit the self-determination of Maine's 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."

It's a short statement, and Maine's only specific mention in the report, but Dieffenbacher-Krall said the commission believes it's significant. He said Anaya's request for more information is a sign that the U.N. could use Maine's case to help shape any future work with the U.S. government on indigenous rights.

When asked to respond to the frequent counter to tribal settlement act complaints that the tribes had representation and agreed to certain regulations and concessions when the agreement was formed in 1980, Dieffenbacher-Krall said inequalities have grown over the years because "unilateral interpretations of the act" by the Office of the Maine Attorney General, state and federal courts have dampened that initial collaboration and revealed inequities.

Maine's Tribal-State Commission is made up of two representatives each of the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, Penobscot Indian Nation — three of Maine's Wabanaki Tribes — as well as six state representatives.

In the U.S. as a whole, Anaya argued that "although competency over indigenous affairs rests at the federal level, states of the United States exercise authority that in various ways affects the rights of indigenous peoples. Relevant state authorities should become aware of the rights of indigenous peoples affirmed in the Declaration on the Rights of Indigenous Peoples, and develop state policies to promote the goals of the Declaration and to ensure that the decisions of state authorities are consistent with it."

It's unclear what, if any, action the U.N. might take in response to Anaya's visit to the United States. Based on information they received from tribes across the nation, it's possible the U.N. would approach the U.S. Congress or federal branch to recommend changes in how the federal government deals with tribes.

"At a minimum, Congress should continuously refrain from exercising any purported power to unilaterally extinguish indigenous peoples' rights, with the understanding that to do so would be morally wrong and against United States domestic and foreign policy," Anaya wrote.

To see Anaya's complete report on his United States trip, visit, [unsr.jamesanaya.org/country-reports/the-situation-of-indigenous-peoples-in-the-united-states-of-america](https://unsr.jamesanaya.org/country-reports/the-situation-of-indigenous-peoples-in-the-united-states-of-america).

Maine State-Tribal Commission Raises Human Rights Concerns with United Nations

MPBN 08/14/2013 Reported By: [Jay Field](#)

**A state-tribal relations commission is raising concerns that enforcement of the Indian Claims Settlement Act of 1980 is violating the human rights of the state's Native Americans. The law, signed by former President Jimmy Carter in 1980, gave the tribes more than \$80 million, and offered them federal recognition.\* In return, the tribes agreed to abide by Maine's laws. But in a recent letter to a United Nations official, the tribes say the arrangement has been enforced and interpreted in a way that has violated the human rights of Maine's Wabanaki people. Jay Field reports.**

**\* See Editor's Note below**

James Anaya is the guy at the UN whose job is to make sure that the human rights of indigenous people are being respected around the world. He's the UN's Special Rapporteur on the rights of indigenous people. And in May of last year, he traveled to New York from his home in Europe and met with top tribal leaders from Maine.

John Dieffenbacher-Krall is with the [Maine Indian Tribal State Commission](#). "We asserted that the situation that the indigenous peoples of Maine face rises to the level of human rights violations," he says. "This July, Mr. Anaya requested additional information from us."

Dieffenbacher-Krall says Anaya wanted specific examples of how the federal Indian Claims Settlement Act and a state law were discriminating against Maine's tribes. So the commission drafted a 14-page letter, which it filed with the UN last week.

Dieffenbacher Krall says that under the Indian Claims Settlement Act and the Maine statute that implements the federal law, "the tribes are subject to state control," which, he says, has blocked the tribes from achieving the kind

of economic development that would lift more of their people out of poverty.

"Efforts by the tribes to develop facilities have been stymied because of state assertion of its control," he says. "The tribes' ability to take advantage of natural resources that they've depended on for thousands of years to sustain their people - I'm talking about fishing, hunting and gathering - they are restricted from protecting those resources from pollution."

Dieffenbacher-Krall says the commission has forwarded the letter it sent the UN to legislative leaders in Maine and the offices of Gov. Paul LePage and Attorney General Janet Mills. He says the commission has been talking with the legislative and the executive branches about changing provisions of the Maine law that implements the Indian Claims Settlement Act.

Rep. Charles Priest, a Brunswick Democrat, is co-chair of the Legislature's Judiciary Committee. He says it's possible that the state could take some action. "Obviously, the state could pass laws to try to change some of the aspects of the Indian Land Claims Settlement Act," he says.

But Priest says Maine would likely have to defer to Washington before moving in that direction. "I think that any basic change would have to go through Congress," he says.

And Priest says he thinks Congress would be very cautious about making any changes to the Indian Claims Settlement Act, a law that took years to negotiate before it finally arrived on President Carter's desk.

**\*Editor's Note:** After this story aired, John Dieffenbacher Krall, executive



*director of MITSC, wrote to clarify in more detail the terms of the Land Claims Settlement Act:*

*"Two of the four Wabanaki Tribes within the State of Maine, the Passamaquoddy Tribe and the Penobscot Indian Nation, received \$81.5 million from the federal government. The Houlton Band of Maliseet Indians received no money from the federal government. The \$900,000 they received for land acquisition came from the proceeds of the Passamaquoddy Tribe's and Penobscot Nation's settlement. The Aroostook Band of Micmacs were not a party to the Maine Indian Claims Settlement agreement, though certain provisions of the federal and state acts apply to them. Separate legislation was passed by Congress in 1991 pertaining to the Micmacs. The Micmacs received \$900,000 in the Aroostook Band of Micmacs Settlement. The Passamaquoddy Tribe and Penobscot Nation were federally recognized five years previous to the Maine Indian Claims Settlement Act (MICA) due to the U.S. District Court and 1 st Circuit Court of Appeals decisions in Passamaquoddy v. Morton. Federal recognition was conferred on the Houlton Band of Maliseet Indians in MICA. The Aroostook Band of Micmacs were federally recognized in the Aroostook Band of Micmacs Settlement." -John Dieffenbacher-Krall.*

## Maine Commission Seeks UN Action on State's Tribal Human Rights Violations

ICTMN [Gale Courey Toensing](#)  
August 22, 2013

A mix of anti-Indian laws and court rulings along with the Maine state attorney general's unilateral interpretations of the Wabanaki nations' settlement acts have imposed restrictive conditions on the tribes that now rise to the level of human rights violations, the [Maine Indian Tribal-State Commission](#) (MITSC) has reported to the United Nations Human Rights Council.

On August 8, the commission sent [James Anaya](#), the council's Special Rapporteur on the Rights of Indigenous Peoples, a 14-page letter with 21 documents supporting its claim that the [Penobscot Indian Nation](#), the [Passamaquoddy Tribe](#), the [Houlton Band of Maliseet Indians](#) and the [Aroostook Band of Micmac Indians](#) face a humanitarian crisis due to the state's misinterpretation and manipulation of the 1980 federal [Maine Indian Claims Settlement Act](#) (MICSA) and its state companion, the 1980 [Maine Implementing Act](#) (MIA). The commission hopes Anaya's discussions with the federal government will help bring about changes to the settlement acts' "structural inequities" to bring them in line with the United Nations Declaration on the Rights of Indigenous Peoples and other covenants and international laws.

The filing may have far-reaching impacts on other east coast tribal nations who also struggle under flawed settlement acts and colonial-minded anti-Indian state governments that continue to impose oppressive restrictions on the Indigenous Peoples whose land their ancestors settled, according to Penobscot Chief Kirk Francis. "This isn't just about the Wabanaki Nations," Francis told Indian Country Today Media Network. He heads up the [United South and Eastern Tribes' Restrictive Settlement Acts Initiative](#), a three-year old effort to amend restrictive settlement acts that "substantially restrict [tribes'] sovereign rights, essentially limiting them to a form of second class tribal sovereignty." The initiative is currently focused on the Wabanaki nations, the [Wampanoag Tribe of Gayhead](#) on Martha's Vineyard in Massachusetts, the [Narragansett Indian Tribe](#) in Rhode Island and the [Cawtaba Indian Nation](#) of South Carolina. "My hope is that collectively we all bring a greater power to this argument and these [MITSC] documents are not just helpful to the Maine tribes but to all the tribes experiencing this kind of [state] intrusion and restriction and encroachment that we're living with. I think it's a huge piece," he said applauding MITSC's action.

Maine State Attorney Janet Mills received but did not respond to an e-mail seeking comment.

MITSC is an inter-governmental entity created by the Maine Implementing Act consisting of tribal and state representatives. Its principal responsibility is to "continually review the effectiveness of (the MIA) and the [social, economic and legal relationship](#)" between the Wabanaki nations and the state. For the past two years, the commission has thoroughly researched and documented the impacts that the MICSA and MIA are having on the Wabanaki tribes, Jamie Bissonette Lewey, MITSC chairwoman, said in a statement.

“MIA and MICSA are not working,” Bissonette said. “No tribe negotiates to deepen its people’s poverty. Provisions included in the MIA and MICSA designed to provide flexibility have been either blocked or unused. Unilateral interpretations of the Acts by the Office of the Maine Attorney General and state and federal courts contrary to the process that produced the laws have magnified the inequities of MIA and MICSA. As the nation states of the world and the United Nations recognize today [August 9] as International Day of the World’s Indigenous Peoples, Maine and the U.S. can truly honor the meaning of this day by addressing the structural problems in MIA and MICSA causing a human rights crisis for the Wabanaki Tribes within the State of Maine.”

John Dieffenbacher-Krall, MITSC’s executive director, provided Anaya with information about the settlement acts in an initial filing in 2012 and at a meeting during the [U.N. Permanent Forum on Indigenous Issues](#) in New York that year. Anaya was on his first official visit to the United States to gather information and evaluate the situations of Indigenous Peoples and find ways to protect their human rights. In his [report](#) on the visit, Anaya wrote, “The 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.”

The current filing responds to a request from Anaya for more information about how the MICSA and MIA’s “framework severely limits Wabanaki tribes in Maine with regard to economic self-development, cultural preservation and the protection of natural resources in tribal territories.”

The filing’s 21 supporting documents include two formal State of Maine investigations into the effects of the Maine Implementing Act on the Wabanaki tribes, several state and federal court cases, letters, MITSC’s own policy position statement on river herring restoration in the St. Croix River, and health advisories warning against consuming fish and game due to toxic contamination in and on Indian waters and territories as evidence to support its claims that the state has imposed “limits on tribal self-determination” through court rulings and its own interpretations of the settlement act that were not inherent in the agreement.

In addition, the settlement act itself contains inherent flaws, the filing says. “Certain provisions of the legislation. ... align closely with tribal termination provisions. ... 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.”

A particularly bad section of the settlement act limits Wabanaki access to beneficial federal laws passed after October 10, 1980, unless the legislation includes specific language including the tribes, an almost impossible criteria for Congress to meet. This was clearly illustrated earlier this year when Maine [Sen. Susan Collins](#) argued against including the Wabanaki nations from Stafford Act amendments that included a provision allowing federally recognized tribes to apply directly for disaster relief under their status as sovereign nations on par with states instead of having to apply through states. Once again the attorney general’s office intruded into tribal affairs, Wayne Mitchell, Penobscot’s representative in the Maine legislature said, in a [Bangor](#)

[\*Daily News\*](#) report. Mitchell gave a legislative committee copies of Collins' testimony as well as an e-mail between her office and the Maine attorney general's office. "It's clear that the attorney general wrote this for the senator without consultation and we argue with the much-skewed facts," Mitchell said.

What that shows, Francis said, is "at the end of the day, it can all come down to one senator."

The filing also documents the state's continuing success in thwarting the tribes' efforts at economic self-determination through Indian gaming while permitting non-Indians to own and operate two Class III casinos. "The tribes face not only the anti-gaming organizations but are confronted with virulent open racism," the filing says.

That's why MITSC's filing in the international arena is important, Francis said. "It puts the factual substance behind the conditions the tribes have been screaming about for over a decade in saying this is not what we intended this agreement to be and we now see intrusion into tribal life at every level."

The contentious lawsuits filed every two to three years for the past 30 years prove a total lack of common ground or government to government consultation on the settlement agreement and the state consistently bypassing MITSC whose purpose is to deal with these issues, Francis said. "So the state gets to tell us what our place is under this agreement that was supposed to turn around a century of the tribes being wards of the state, but it's become another document to ensure that that stays in place." When Anaya speaks about the Wabanaki condition as a human rights crisis it's significant, because he tells the international community and the U.S. that states don't have the legal or moral right to do what they want to Indian tribes, Francis said. "It compromises the federal relationship, it compromises the trust responsibility and what it says to the federal government is 'We don't care what level of standards you hold this relationship to, we have states' rights and we're going to do whatever we want and these Indian tribes are never going to be successful under our watch.'"

MITSC reports humanitarian crisis in tribes  
The Quoddy Tides by Edward French 8/23/13

The Maine Indian Tribal-State Commission (MITSC) has forwarded documents to a United Nations investigator that the commission says show a humanitarian crisis facing Wabanaki tribes in Maine caused by the Maine Indian Claims Settlement Act (MICSA) and the Maine Implementing Act (MIA).

"For more than two years, the MITSC has thoroughly researched what impacts the MICSA and MIA are having on the Wabanaki tribes within the State of Maine today, consistent with our charge to continually review the effectiveness of this act [Maine Implementing Act]," says Jamie Bissonette Lewey of Pembroke, chair of MITSC. "What we found is that many key indicators of community health conditions have deteriorated for the Maliseets, Micmacs, Passamaquoddys and Penobscots since MIA and MICSA took effect in 1980. Specific provisions in MIA and MICSA are causing this structural oppression."

Responding to a request from U.N. Special Rapporteur on the Rights of Indigenous Peoples James Anaya, MITSC recently submitted a 14-page letter and 21 documents supplementing its original filing of May 16, 2012, asserting that the two acts "have created structural inequities that have resulted in conditions that have risen to the level of human rights violations." The letter from MITSC notes that the ways in which provisions of the acts 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."

"MIA and MICSA are not working," says Bissonette Lewey. "No tribe negotiates to deepen its people's poverty. Provisions included in the MIA and MICSA designed to provide flexibility have been either blocked or unused. Unilateral interpretations of the acts by the Office of the Maine Attorney General and state and federal courts, contrary to the process that produced the laws, have magnified the inequities of MIA and MICSA."

While Congress preauthorized the ability to amend the Maine Implementing Act and while the implementing act has been amended numerous times, John Dieffenbacher-Krall, executive director of MITSC, says it's never been changed "in the areas of greatest dispute" between the state and the tribes.

He describes the difficulty in amending the act by noting that while a measure may be supported by one branch of state government, another branch may object. He points out that the state government has been described by some as "a multi-headed Hydra" and that, beyond the three branches, the Attorney General's Office also plays a role. "The legislative or executive branch might express an openness on paper for an action, but then the Attorney General's Office objects," he says. "This type of cycle has been repeated over and over again."

One example was the effort to restore alewife passage in the St. Croix River, when the Attorney General's Office asserted the state's authority to control the passage of the fish, in replying to the U.S. Environmental Protection Agency's statement that Maine should open up the river. The assertion by the AG's Office "runs counter to the rights of the Passamaquoddy Tribes under the U.N. Declaration on the Rights of Indigenous Peoples," the MITSC letter to Anaya states. This spring, though, the legislative branch did end up supporting the opening up of the river. Numerous other actions, including the new state law to cap the number of



Passamaquoddy elver fishing licenses, are cited in the letter to demonstrate the "structural oppression" of the tribes.

Among the court cases cited is the suit brought by three paper companies to force the Penobscot and Passamaquoddy tribes to turn over documents related to their communications with federal agencies concerning Maine's request for sole permitting authority to administer the wastewater permitting program under the Clean Water Act. The state joined with the paper companies, and the Maine Supreme Judicial Court ruled largely in favor of the paper companies and the state. In another case in 1996, the Passamaquoddy Tribe sued the state, arguing that the federal Indian Gaming Regulatory Act opened the door for tribal gaming in Maine and compelled the state to reach an agreement with the tribe. A federal court ruled against the tribe, citing the section of the settlement act that makes many federal laws related to Natives that were enacted after 1980 inapplicable in Maine.

Concerning the role of state and federal courts, Dieffenbacher-Krall says that from a Wabanaki perspective there is "a huge conflict of interest" for them to be ruling on cases involving the state or federal governments. While the Tribal-State Work Group had recommended a tribal-state court that would be similar to the model used by MITSC, which includes equal representation from the tribes and the state, that proposal was rejected by the state. The perceived conflict of interest by the courts "takes a toll on tribal-state relations" and leads tribal members to feel that the process is "stacked against them," he says.

Meanwhile, Wabanaki people continue to suffer in "terrible living conditions," Dieffenbacher-Krall says. MITSC keeps trying to show decision-makers those conditions and make recommendations on how they can be improved.

MITSC had submitted its original letter to Anaya in response to his request for information as part of his first official visit to the U.S. Representatives of MITSC and the Wabanaki tribes met with Anaya and members of his staff on May 16, 2012, at the United Nations in New York City to allow him to hear from tribal citizens directly and to present information on the alleged human rights violations occurring because of specific provisions of MICSA and MIA.

The settlement act and implementing act comprise laws enacted by the State of Maine and the U.S. to complete the Maine Indian Claims Settlement Agreement in response to a lawsuit filed by the Passamaquoddy Tribe and Penobscot Nation in 1972 over the tribes' claims to lands in the state. In 1980, the tribes received over \$80 million and federal recognition, while agreeing to regulation by the state, except for internal tribal matters. During the latter stages of the Passamaquoddy and Penobscot negotiations with the State of Maine and the U.S., the Houlton Band of Maliseet Indians became involved. The Aroostook Band of Micmacs has a separate settlement agreement with the U.S. enacted by Congress in 1991.

In his report issued in August 2012 examining the human rights situation of indigenous peoples in the U.S., Anaya included a brief mention of the issues facing Maine tribes. He wrote that the two acts "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."

While not every problem that the tribes face can be traced to structural problems with the settlement act and implementing act, Dieffenbacher-Krall says that some of the issues are caused by the laws. He comments, "Our hope is that our drawing attention to this may be a

positive impetus for taking action." He points out that all parties "have a tremendous amount to gain by having an optimal relationship between these governments." If the structural impediments are removed, he believes the tribes will be able to improve their economies and the resulting economic development will help surrounding communities.

In his report, Anaya makes recommendations for the U.S. government's executive, legislative and judiciary branches so that any legislation and decisions are in alignment with the United Nations' Declaration on the Rights of Indigenous Peoples. In addition, state authorities "should become aware of the rights of indigenous peoples" affirmed in the declaration and should "develop state policies to promote the goals of the declaration and to ensure that the decisions of state authorities are consistent with it." Any further actions in dealing with the U.S. government will be determined by Anaya and the United Nations.

## A chance for Maine to lead on indigenous human rights



[Gabor Degre](#) | BDN

Gov. Joseph Socobasin (from left), Chief Reuben Cleaves, Gov. Paul LePage and Chief Kirk Francis sign a declaration of intent on Indian Island to begin a truth and reconciliation process between the tribes and the state child welfare system.

By Walter R. Echo-Hawk, Special to the Bangor Daily News  
Posted Sept. 02, 2013

In August, the Maine Indian Tribal State Commission [sent a 14-page letter](#) accompanied by more than 400 pages of addenda to [James Anaya](#), the United Nations Special Rapporteur on the Rights of Indigenous Peoples.

The pages contained reams of evidence bolstering the commission's claim that the Maine Indian Claims Settlement Act and the Maine Implementing Act have resulted in members of the state's Wabanaki tribes living in socioeconomic conditions that have risen to the level of human rights violations. This is a serious, but not surprising, allegation.

Last March, I spent a week in the state of Maine. I was invited by the Maine Indian Tribal State Commission, or MITSC, to offer three workshops where I analyzed the [settlement acts passed by Congress](#) through the lens of both federal Indian law and the United Nations Declaration on the Rights of Indigenous Peoples. I prepared by reviewing many of the treaties, all of the case law

and studying the evidence that MITSC had provided the United Nations a year ago when it wrote to Anaya on May 16, 2012, as part of his official country visit to the United States.

As a country, the U.S. prides itself on its founding principles that make human rights the core of governance. We are rightfully proud of our Constitution that articulates and protects those rights. Yet, the canon of federal Indian law is devoid of human rights principles.

Instead, the 19th-century law of colonialism including doctrines of conquest, discovery, plenary power, unfettered guardianship and race defines indigenous rights within the United States. These same principles were written into the acts that would implement the settlement negotiated by the Wabanaki tribes within Maine, the U.S. and the state of Maine. The result is a humanitarian crisis in the five native communities within Maine.

MITSC rang the bell in May 2012 when it sent its [first letter to the United Nations](#).

Anaya reviewed the evidence that life expectancy was 48 to 52 years of age among the Wabanaki tribes living in Maine, that unemployment was between 50 percent and 75 percent, that a mere 40 percent of tribal children in some communities were graduating from high school, that incarceration rates were disproportionately higher than those of other racial and ethnic groups and that lifelong poverty is experienced by a quarter of Wabanaki families.

In [his 2012 report](#), “The Situation of Indigenous Peoples in the United States of America,” Anaya agreed that MITSC proved that this reality is a direct result of the structural impediments embedded in the settlement acts that restrict the capacity of the tribes to develop economic solutions to the barriers they confront. The commission also proved that the tools offered other federally recognized tribes since the Maine acts were passed have been denied to the tribes in Maine simply because the Maine acts prohibit the application of federal Indian laws passed for the “benefit of Indian people.”

MITSC was right to go to the United Nations because this international body has recognized and articulated a human rights framework as the foundation of its dealings with indigenous peoples in the [Declaration on the Rights of Indigenous Peoples](#). Maine led the way and was the first government in the western hemisphere to pass a resolution in support of the U.N. declaration. This declaration provides a hopeful framework that Maine and the tribes can follow to remedy this humanitarian crisis.

This is not easy work. It is not something that can be done quickly.

This current inequitable situation in our midst is an inherited problem that no one living created. But it is one that we must all solve: It is the necessary work of a generation.

This work cannot start without an acknowledgment that harm has taken place and continues. The MITSC submission to Anaya is an acknowledgement of that harm. Now, Maine has the opportunity to lead again by using the U.N. Declaration on the Rights of Indigenous Peoples as a framework for healing.

This is a time for hope, and this is a time for action.

*Walter R. Echo-Hawk (Pawnee) worked as a staff attorney for the Native American Rights Fund for 35 years. To learn more, visit [www.walterechohawk.com](http://www.walterechohawk.com).*





## Maine Indian Tribal-State Commission

December 17, 2013

Commissioner Chandler E. Woodcock  
Department of Inland Fisheries and Wildlife  
41 State House Station  
Augusta, ME 04333-0041

Jamie Bissonette Lewey  
Denise Altvater  
John Banks  
Harold Clossey  
Matt Dana  
Gail Dana-Sacco  
H. Roy Partridge  
Robert Polchies  
Linda Raymond  
Brian Reynolds

Dear Commissioner Woodcock:

The purpose of this letter is to inform you about work that the Maine Indian Tribal-State Commission (MITSC) has undertaken to clarify our rulemaking authority as delineated under 30 MRSA §6207, §§3 and to improve the coordination of that rulemaking authority with the Department of Inland Fisheries and Wildlife. During John Boland's final months serving on the Commission, he worked to formalize the coordination of the MITSC's rulemaking with IF&W. He asked Dave Boucher to draft a document that would guide the process. Dave attended the April 10, 2013 MITSC meeting and presented the proposed written guidelines for IF&W and MITSC rulemaking coordination. The document is titled "Chapter X (13?). POLICY FOR FISHERIES RULEMAKING ON TRIBAL (MITSC) WATERS." We appreciate the work done by Dave to formalize the process and to enhance IF&W/MITSC cooperation.

Since Dave Boucher's presentation and request for MITSC input, we formed a Natural Resources committee that was tasked in part with reviewing the document prepared by Dave Boucher and to offer MITSC comments on it. The MITSC Natural Resources Committee considered the document presented by Dave Boucher. It made a number of suggested changes that were reviewed and approved by the full Commission on November 18. Please find attached the MITSC's proposed revisions to the "POLICY FOR FISHERIES RULEMAKING ON TRIBAL (MITSC) WATERS." Our principal suggested revisions include:

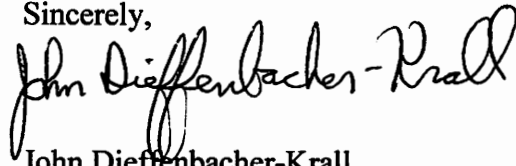
- 1) To emphasize that MITSC has exclusive authority to promulgate fishing rules or regulations on MITSC waters as defined under 30 MRSA §6207, §§3.
- 2) Whenever an IF&W biologist contemplates a fishing rule change, he/she verifies whether the water under consideration for a rule change is subject to MITSC, Passamaquoddy, Penobscot, or State of Maine rulemaking authority. We believe this is a crucial step as the MITSC and the Tribes have experienced multiple instances of the State initiating and even mistakenly promulgating rule changes on MITSC waters in violation of the law.
- 3) To have IF&W staff present the draft rule change directly to MITSC as we solely possess the rulemaking authority.
- 4) That MITSC officially notify the IF&W Commissioner of any rule changes on MITSC waters automatically causing the amended rule to be included in the next edition of the IF&W fishing rulebook.

John Dieffenbacher-Krall  
Executive Director  
P.O. Box 241  
Stillwater, ME 04489  
(207) 817-3799  
mitsced@roadrunner.com



We believe that the changes we have suggested will clarify the MITSC's statutory authority and reduce inadvertent State rulemaking on MITSC waters. Please let us know how IF&W and the Commission can move forward to make this guidance official policy for the coordination of fisheries rulemaking on MITSC waters.

Sincerely,

A handwritten signature in black ink that reads "John Dieffenbacher-Krall". The signature is written in a cursive, flowing style with a large, prominent "J" and "K".

John Dieffenbacher-Krall  
Executive Director



## Maine Indian Tribal-State Commission

Jamie Bissonette Lewey  
Denise Altvater  
John Banks  
Harold Clossey  
Matt Dana  
Gail Dana-Sacco  
H. Roy Partridge  
Robert Polchies  
Linda Raymond  
Brian Reynolds

January 23, 2014

Senator Christopher K. Johnson  
Chair  
Committee on Marine Resources  
Maine Senate  
3 State House Station  
Augusta, ME 04333

Representative Walter A. Kumiega III  
Chair  
Committee on Marine Resources  
Maine House of Representatives  
2 State House Station  
Augusta, ME 04333

### **Re: LD 1625 and the Impact on Tribal-State Relations**

Dear Senator Johnson and Representative Kumiega:

The Maine Indian Tribal-State Commission (MITSC) is carefully following LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing Licenses. LD 1625 specifically affects the four federally recognized Indian Tribes in the State of Maine.

When the MITSC met on January 15<sup>th</sup>, a significant portion of our meeting was devoted to discussing LD 1625 at the request of Penobscot Commissioner, Robert Polchies. We are aware that this legislation is emergency legislation and fast-tracked. Additionally, Passamaquoddy leadership informed the MITSC that the Passamaquoddy Tribe and the Penobscot Indian Nation are in dialogue with Department of Marine Resources (DMR) about this legislation and the overall management of the elver fishery. The intent of the MITSC is to offer our best thinking to the Joint Standing Committee on Marine Resources and to clarify the impact this type of legislative initiative has on tribal-state relations and the ongoing application of the Maine Implementing Act (30 MRSA §6201 - §6214).

Last year, during your consideration of LD 451, An Act Relating to Certain Marine Resources Licenses, the MITSC drew your attention to the lack of sustained dialogue between the State of Maine and the Passamaquoddy Tribe over the Tribe's salt-water fishing rights. Sustained dialogue is more likely to produce an equitable solution than negotiation under threat to sovereignty and treasured Aboriginal rights.

Unlike LD 451, LD 1625 directly affects all of the Tribes and undermines tribal-state relations in a number of ways.

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1. The legislation as developed and introduced violates Governor LePage's Executive Order 21 FY 11/12 and the earlier Baldacci EO 06 FY 10/11 that require departments to develop "standard operating procedures to engage Tribal Governments at the earliest possible juncture of the development of any legislation, rules, and policies proposed by the State agency on matters that significantly or uniquely affect those Tribes." Though we understand some conversations took place between the Passamaquoddy Tribe, the DMR and Governor LePage concerning elver management prior to the public hearing for LD 1625, we listened as Chief Francis told the Joint Standing Committee on Marine Resources on January 13 that he became aware of the bill only days before it was heard. One member of the Passamaquoddy Fishery Committee told the MITSC that our notice of the hearing emailed January 10 was the first time he had seen the text of the bill. The Aroostook Band of Micmac Indians' observer to MITSC confirmed that the ABMI was not sent an advance copy of the bill.
2. Section 1 of LD 1625 proposes highly discriminatory provisions, based solely on political and racial identity, applicable only to elver harvesters who obtain their licenses from Wabanaki Tribal Governments. If section 1 as introduced becomes law, Wabanaki harvesters would be forced to carry what amounts to two legal permissions, one from their Tribal Government and one from the State of Maine. No other licensed elver harvester would have to submit to such onerous provisions. This, in essence, guts the legislative intent of PL 1997, c. 708, signed into law in 1998, that recognized Passamaquoddy authority in issuing commercial, sustenance, and ceremonial licenses to harvest marine resources and was later expanded to include all of the Tribes. Such a step should be taken only after open and transparent consultation with the Passamaquoddy Tribe and, in this case, all of the federally recognized Tribes within the State of Maine.
3. The bill as printed potentially erodes Passamaquoddy and Penobscot sustenance fishing rights protected in 30 MRSA §6207, §§4. This section of the Maine Implementing Act states:

Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.

The St. Croix River is Passamaquoddy territorial water and sections of the St. Croix watershed comprise reservation waters in Indian Township. Likewise, the whole of the Penobscot River is Penobscot Territory with the River inclusive of and north of Indian Island recognized as Penobscot Reservation waters. Therefore, Section 1 of LD 1625 would restrict Passamaquoddy and Penobscot citizens from exercising their right to engage in sustenance harvesting of elvers in violation of 30 MRSA §6207, §§4.



## **Further Discussion of Sustenance Fishing Rights**

LD 1625 presents a threat to statutorily protected Aboriginal sustenance fishing rights. This threat comes in the context of a legal dispute around the sustenance fishing rights of Penobscot Indian Nation citizens currently under litigation (*Penobscot Nation v. Mills*). The MITSC engaged in a discussion about which activities are protected as sustenance activities: fishing and hunting in order to feed and assure the health and well being of one's family and community. The MITSC recognized that, given the level of environmental degradation, these rights needed to evolve beyond the traditional "hook to mouth" definitions. Tribal Commissioners discussed the danger of feeding Wabanaki families through sustenance activities even though Indigenous Peoples in Maine have always relied on these practices to provide for their families. Now, many traditional foods and medicines are no longer safe for human consumption. Due to pervasive mercury pollution, Maine warns "all pregnant and nursing women, women who may get pregnant, and children under the age of 8" to refrain from eating freshwater fish from Maine's inland waters except for brook trout and landlocked salmon. In the case of these two species, Maine health authorities advise one meal per month is safe. All other adults and children older than 8 can eat two fresh water fish meals per month. For brook trout and landlocked salmon, the limit is one meal per week. The Penobscots suffer the added burden of specific health advisories applicable to the Meduxnekeag and Penobscot Rivers (*The Official State of Maine Open Water & Ice Fishing Laws and Rules: January 1, 2014 – December 31, 2014*, p. 54).

In the MITSC discussion, Tribal Commissioners were quick to point out that this reality has developed under a jurisdictional framework where the State exercises court awarded NPDES jurisdictional authority over all who discharge into MITSC, Passamaquoddy and Penobscot waters. In other words, the Tribes do not have the authority to protect their waters and their food sources. This reality demands that we revisit the concept of sustenance and recognize that trade or commerce has always been a part of Wabanaki sustenance practices. Historically, Tribal members, after gathering natural resources, would trade among themselves to assure diverse and healthy diets and access to sufficient resources to meet the needs of their communities.

## **The United Nations Declaration on the Rights of Indigenous Peoples**

On April 15, 2008, the Maine Legislature unanimously endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), an international human rights instrument. The State of Maine was the first legislative body in the United State to endorse the UNDRIP through a joint resolution sponsored by Tribal Representatives Donna Loring and Donald Soctomah. In 2012 and 2013, the MITSC submitted information about the humanitarian crisis experienced by the Maine Federally Recognized Tribes to James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples. After reviewing the MITSC documentation, Mr. Anaya found:

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*, p. 36, UN document A/HRC/21/47Add.1)

It is in this context that the MITSC reminds the Joint Committee on Marine Resources that the State of Maine's failure to consult with the federally recognized Tribes within the State of Maine; the discriminatory effects of LD 1625; the contamination of traditional Wabanaki foods and medicines; and the persistent State effort to deny Tribal responsibilities to the land and resources all violate UNDRIP Article 19 which reads:

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.

The UNDRIP in combination with EO 21 FY 11/12 lay the foundation for healthy tribal-state relations. We ask you to require that the Department of Marine Resources follow EO 21 FY 11/12 and utilize these strong tools to work out a solution that respects the sovereignty of all governments involved.

#### **Response to the March 12, 2013 Letter from Maine Attorney General, Janet Mills**

Last year Maine Attorney General Janet Mills wrote a letter dated March 12, 2013 to Department of Marine Resources Commissioner, Patrick Keliher, offering her opinion on the State's regulatory jurisdiction over marine resources, whether the MITSC has a statutory role in resolving questions concerning saltwater fishing matters, and the applicability of the 1776 Treaty of Watertown. We deliberately chose not to respond to Attorney General Mills' letter at that time in order to focus on our diplomatic role of encouraging dialogue between the parties. Last year, we encouraged the DMR and the Joint Committee on Marine Resources to live up to the highest expectations of consultation and respect articulated in the Maine Implementing Act. Now, as the body with the statutory responsibility (30 MRSA §6212, §§3) to consider questions related to the Maine Implementing 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," we want to offer our assessment regarding the subject matter addressed in Attorney General Mills' letter.

#### **Extinguishment of Aboriginal Claims to Maine's Marine Resources**

On the question of State regulation of the saltwater fishery, Attorney General Mills states, "As a result of the lengthy negotiations leading up to the Settlement Acts, and with the agreement of the Maine tribes, Congress specifically extinguished tribal aboriginal claims to Maine's marine resources." After exhaustive review of the MIA, the Maine Indian Claims Settlement Act (MICA), and the Congressional record we could find no reference to any discussion, let alone agreement, which would lead us to conclude that Aboriginal claims to marine resources were included in the subject matter discussed at the time of the settlement agreements.



Attorney General Mills bases her assertion that Congress “extinguished tribal aboriginal claims to Maine’s marine resources” on the inclusion of 30 MRSA §6204 in MIA and Congress’ eventual ratification of all of MIA’s provisions with enactment of MICSA. The Attorney General’s Office has consistently interpreted 30 MRSA §6204 to mean that the Tribes and their citizens, lands and natural resources are wholly subject to Maine’s laws and civil and criminal jurisdiction except where otherwise specified in the Act. The Passamaquoddy Tribe and the Penobscot Indian Nation have always interpreted 30 MRSA §6204 to refer to the traditional lands of their Peoples, the jurisdictional agreements hammered out over 8 years of negotiation, and fresh water concerns discussed at the time of the settlement negotiations and agreements. Each side has been consistent in their interpretation of this negotiated language. 30 MRSA §6204 remains a hotly contested grey area. The MITSC recommends that when areas of contested rights arise, all parties should implement the most effective tools available and proceed in the most respectful way at all stages of policy development as required by EO 21 FY 11/12.

The Attorney General ended her exploration of Aboriginal rights without examining the MICSA: 25 US Code §1722(n) and §1723. §1722(n) defines the act of transfer as actively giving up rights. §1723 is titled “Approval of prior transfers and extinguishment of Indian title and claims of Indians within State of Maine.” 1723 §§ (b) and (c) carefully detail what Aboriginal title is actually transferred. §1723 explains that transferred Aboriginal claims to lands or natural resources are extinguished “to the extent that they are transferred by the Tribes.” The MICSA extinguishes rights to the land other than that which was kept by the Tribe in the 1794 Treaty. This Treaty refers to lands not fishing rights. No one has ever produced any documentation that demonstrates that any of the Wabanaki Tribes within the State of Maine ceded salt-water fishing rights as a part of the Maine Indian Claims Settlement. Fresh water rights were only transferred in as far as defined by the MICSA and in §6207 of the MIA.

### ***State v Beal***

In the Attorney General’s letter, she argues that the Passamaquoddy Tribe brought a “test case” regarding Maine’s jurisdiction over marine resources. This is not true. Tribal members were charged with harvesting marine resources without a license and other offenses. As indicated in the title of the case, the State was prosecuting the harvesters. In the course of fighting this criminal charge, the Tribal members submitted a motion to dismiss claiming that the State had no jurisdiction to regulate their activity because the Tribe had reserved salt water fishing rights. That motion to dismiss was rejected by District Court Judge John Romei.

Romei based his decision on the disputed state interpretation of 30 MRSA §6204 (already addressed in this letter), the decision in *Penobscot Nation v. Feller* which was subsequently reversed, and a question posed to then Attorney General Richard Cohen addressing the Passamaquoddy Tribe’s right to regulate shellfish gathering on the tidal flats that are part of reservation land (the answer was yes). When the motion to dismiss was denied, the Tribal members agreed to a plea bargain and the Tribe pursued a legislative fix that would recognize the Passamaquoddy Tribe’s right to issue sustenance, ceremonial and commercial fishing licenses to harvest marine resources as long as the commercial fishers honored the State’s various harvesting seasons, and maintained conservation efforts that were at least as stringent as those implemented



by the State. This law was passed in 1998, the same year that *Maine v. Beal* was adjudicated. In this instance, the Passamaquoddy Fisheries Management Plan maintains the integrity of the elver harvesting season and exceeds the state's conservation measures.

### **MITSC Authority Over Salt Water Fisheries**

Attorney General Mills asserts that the MITSC “has no regulatory role regarding saltwater fisheries and nothing in law requires consultation with MITSC prior to the Legislature taking any action.” We agree that MITSC has no regulatory role in the area of saltwater fisheries, but we do have an explicit statutory responsibility 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. [30 MRSA §6212, §§3]

We have consistently recommended dialogue, making the highest commitment to finding solutions acceptable to all parties. When legislation or policies are developed that the Tribes will find unacceptable and emergency legislation is utilized to force parties to the table at the last available moment, these actions fall far short of this mark. The MITSC has witnessed this strategy twice in this legislative session despite our unheeded and repeated request that the DMR consult with the Passamaquoddy Tribe immediately following the 2012 elver season. The lack of constructive leadership on the part of the DMR has gravely affected the American eel population and put this entire fishery in danger.

### **30 MRSA §6207 §§8 as a Model for Consultation**

When the MITSC cited 30 MRSA §6207 §§8 as a rationale for our involvement in a diplomatic role, we assumed that the State wants to make the Settlement Agreement work. We looked for examples of problem solving methodologies in the area of natural resources within the Act. 30 MRSA §6207 §§8 is an example of cooperative policy development through consultation, public hearing and negotiation. Given the grey area presented by 30 MRSA §6204, the MITSC invoked 30 MRSA §6207 §§8 as an example of the level of respect and consultation necessary to resolve this and similar conflicts. Our recommendation was practical. If implemented as we first recommended in March of 2013, the MITSC is confident we would not be at this impasse today.

### **Conservation Issues**

The MITSC has reviewed The Passamaquoddy Fisheries Management Plan (PFMP), the Atlantic States Marine Fisheries Commission’s (ASMFC) report and accompanying recommendations. We are not alone in concluding that the PFMP reflects a deep commitment to the protection and conservation of American eels at all stages of their life cycle, and comes far closer to the ASMFC’s goals than the State’s management

plan. We recognize that there are many political considerations when fishery practices are changed. Rather than force the Passamaquoddy Tribe to adhere to regulations that put the American eel and the fishery in danger, the DMR could have easily worked with the Tribe to test and evaluate their model of elver fishery management. Working together would have also allowed the State to demonstrate that it was actively seeking a conservation model that had at its core the protection of the American eel.

### **Statistical Conclusions Reached by the MITSC**

Ultimately, a factually unsupported focus has been placed on the potential effect Passamaquoddy elver harvesters would have on the overall elver population and the State's effort to remain in compliance with conservation goals set by the ASMFC. We constructed the table below based on information in the public record and data provided to us by the Tribes. Unfortunately, several phone calls to the DMR went unreturned despite the State's obligation under 30 MRSA §6212, §§5 that "all other agencies of the State shall cooperate with the commission and make available to it without charge information and data relevant to the responsibilities of the commission."

Government	2013 landings	2013 licensed harvesters	2013 lbs harvested per person
State of Maine	15,970	654	24.4
Maliseet	38	8	4.75
Micmac	?	8	?
Passamaquoddy	1,653	575	2.9
Penobscot	592	48	12.3

According to the data collected by the MITSC, elver harvesters licensed by the State caught the highest average amount of elvers per licensee, an average of 24.4 lbs. Penobscot harvesters caught about half the amount captured by State licensed harvesters. Passamaquoddy harvesters caught the lowest average amount of elvers per licensee, 2.9 lbs, less than an eighth of the amount caught by State licensed anglers. The total Passamaquoddy take as a percentage of the total 2013 harvest amounts to a little more than 10%. Yet more than 25% of all criminal charges brought by State of Maine law enforcement for alleged elver harvesting violations were levied against Passamaquoddy harvesters, raising serious questions of racial profiling.

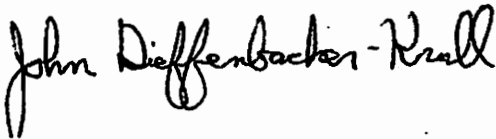
If the Maine Legislature decides to adopt the proposal that Commissioner Keliher is expected to present to the Marine Resources Committee at the January 29 work session, Maine State Government will reinforce the unequitable distribution of the elver harvest. Should Commissioner Keliher's proposed 35% catch reduction be implemented on an individual

harvester basis, Penobscot fishers would be limited to 8 lbs on average and Passamaquoddy harvesters to less than 1.9 lbs compared to State licensed anglers able to keep close to 16 pounds. At an average price of \$1650 per lb (2013 reported average price \$1500 to \$1800 per pound), State licensed fishers could reap \$26,400, Penobscot licensed harvesters could earn \$13,200, and Passamaquoddy harvesters would be limited to \$3,135 should the number of licensed harvesters remain the same as 2013. The effect of such a policy would be to dramatically limit the economic opportunity of those documented as the poorest people living in the State of Maine.

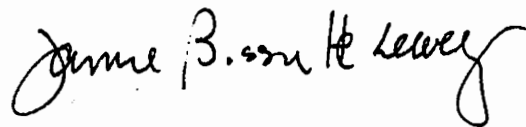
Maine can remain in compliance with the ASMFC conservation goals for elvers without resorting to discriminatory policies only applicable to the Tribes. We urge the Marine Resources Committee to redirect their energy toward a collaborative approach. Better tribal-state relations and a sustainable elver fishery are more likely to be realized with such an approach.

Thank you for considering our perspective.

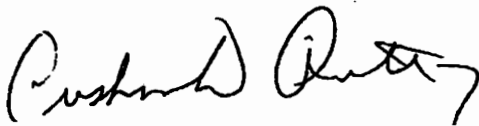
Sincerely,



John Dieffenbacher-Krall  
Executive Director



Jamie Bissonette Lewey  
Chair



Cushman Anthony  
Former Chair, MITSC 1998 - 2004  
& State Commissioner 2010 - 2012



Paul Bisulca  
Former Chair, MITSC 2005 - 2010

Cc: Senator Edward J. Mazurek  
Senator Richard G. Woodbury  
Representative Chuck Kruger  
Representative Ralph Chapman  
Representative Michael Gilbert Devin  
Representative Elizabeth E. Dickerson  
Representative Jeremy G. Saxton  
Representative Windol C. Weaver  
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Chief Kirk Francis  
Chief Edward Peter Paul  
Chief Joseph Socobasin  
Governor Paul LePage  
Attorney General Janet Mills  
Senator Linda Valentino  
Representative Charles Priest  
Commissioner Patrick Keliher  
Jerry Reid

## NEWS RELEASE

For Immediate Release: Monday, January 27, 2014

For More Information: John Dieffenbacher-Krall, (207) 817-3799 (c) (207) 944-8376

### **Maine Indian Tribal-State Commission Urges Dialogue Between Tribes, State on Elvers; Maine Can Meet Elver Conservation Goals without Harming Tribal Self-Determination**

Today the Maine Indian Tribal-State Commission (MITSC) released a letter addressed to the Marine Resources Committee joined by all of its former elected Chairs urging the legislators to reject changes proposed in LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing License, that would undermine contested Tribal salt-water fishing rights and strain tribal-state relations. In its January 23 letter, the Commission puts the Legislature and Attorney General's Office on notice that the Maine Indian Claims Settlement Act (MICSA) prohibits extinguishing Aboriginal unceded reserved rights through State legislation.

The Commission letter cites detrimental aspects of LD 1625 including its discriminatory nature, negative effects on statutorily guaranteed Passamaquoddy and Penobscot sustenance fishing rights, and violations of the UN Declaration on the Rights of Indigenous Peoples, a human rights instrument unanimously supported by the Maine Legislature in 2008. The MITSC also warns potential amendments to LD 1625 under discussion could reduce the average Passamaquoddy elver harvester take from 2.9 lbs to 1.9 lbs.

"The MITSC recommends continued consultation with all of the federally recognized Tribes and the development of mutually beneficial agreements to advance self-determined solutions to the indisputable humanitarian crisis within the borders of the State of Maine," stated Dr. Jamie Bissonette Lewey, Chair, MITSC. "LD 1625 works against this recommendation. It was submitted as emergency legislation without Tribal input. This is unacceptable."

The MITSC letter presents some eye-opening data concerning the 2013 elver harvest that casts serious doubt on claims Tribal elver harvesters threatened State compliance with Atlantic States Marine Fisheries Commission (ASMFC) conservation goals for the American eel population. Based on information in the public record and collected by the MITSC from the Tribes it reports harvesters licensed by the State caught on average 24.4 lbs of elvers compared to 12.3 lbs harvested by Penobscot fishers and 2.9 lbs landed by Passamaquoddy harvesters. The



overall Passamaquoddy harvest amounted to a little more than 10% of the total catch, and individual Passamaquoddy harvesters landed on average less than an eighth of the quantity of elvers caught by individuals licensed by the State. Yet more than 25% of all criminal and civil charges brought by the State of Maine alleging elver harvesting violations were levied against Passamaquoddy harvesters, raising questions of racial profiling.

"Right now, all of the Tribes within Maine experience extreme and deeply entrenched poverty. The only solution for addressing such stark disparities lies in allowing their respective governments the opportunity to implement solutions that they themselves develop. Even the United States government has acknowledged that in the recent past," said Cushman Anthony, State Representative from 1987 – 1992, MITSC Chair from 1998 – 2004, and a MITSC State Commissioner from 2010 – 2012.

A significant portion of the MITSC communication critiques a March 12, 2013 letter by Maine Attorney General Janet Mills written at the request of DMR Commissioner Patrick Keliher. Keliher sought opinions from the Attorney General on a number of issues related to the Marine Resources Committee's consideration last year of LD 451, legislation that attempted in part to restrict the Passamaquoddy Tribe's exercise of their salt-water fishing rights. The MITSC offers a point-by-point rebuttal refuting many of the Attorney General's assertions. It also asks why the Attorney General would question MITSC's involvement in offering recommendations to resolve a dispute between the Tribes and the State when that is the fundamental reason that the Commission exists.

Paul Bisulca, Penobscot Tribal Representative to the Maine Legislature from 1995 – 1997 and MITSC Chair from 2005 until 2010, pointed to a need for the State to move toward a more neighborly, solution oriented approach and away from unilateral, legalistic interpretations. Bisulca observed, "During the 1980 Maine Land Claims Settlement hearings in Washington, DC, Maine's Attorney General Richard Cohen testified that during negotiations with the Indians there existed, ..." "a far greater mutual respect and understanding than has ever existed in the past in Maine."<sup>1</sup> Bisulca added, "We need to move back toward that."

Cohen, who later became MITSC Chair, observed in an interview with the *Working Waterfront/Inter-Island News*, "There seems to be a belief that the Indian Land Claims

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<sup>1</sup> Hearings Before the Select Committee on Indian Affairs United States Senate On S. 2829, July 1 & 2, 1980, p. 164.

Settlement Act was signed and that it's carved in stone. There has to be some disabusing about that."<sup>2</sup> Bisulca continued, "One of those subjects was and still is sustenance fishing. Dick Cohen, as a previous MITSC Chair, and I, as a later chair, believed in the Maine Indian Tribal-State Commission as a forum to discuss tribal-state problems and formulate mutually beneficial solutions. Sustenance fishing is an appropriate subject for opening the conversation concerning changes to the Maine Implementing Act that MITSC, and ultimately the governments party to the agreement, should consider." Agreeing with Bisulca, Bissonette Lewey said, "As introduced, LD 1625 is in conflict with the Passamaquoddy and Penobscot sustenance fishing rights delineated in the Maine Implementing Act."

The MITSC concludes its letter to the Marine Resources Committee that the State can comply with ASMFC conservation goals "without resorting to discriminatory policies only applicable to the Tribes." It urges the Marine Resources Committee "to redirect their energy toward a collaborative approach. Better tribal-state relations and a sustainable elver fishery are more likely to be realized with such an approach."

The Marine Resources Committee will resume work on LD 1625 at a work session scheduled for 1/29 at 10 am.

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<sup>2</sup> *Working Waterfront/Inter-Island News*, 1997

# Maine must keep promises to tribes, protect elvers before they disappear

By Jamie Bissonette Lewey, Special to the BDN  
Bangor Daily News Posted Feb. 02, 2014



Contributed photo  
Jamie Bissonette Lewey



Bill Trotter

Elver fishermen Rob Stanley of Gouldsboro works on setting up one of two fyke nets he has in the Union River in downtown Ellsworth in this April 2013 file photo. [Buy Photo](#)

I spent significant portions of my childhood on Lake Champlain, a habitat for American eel, with my mother's people. My grandmother enjoyed eel and prepared it well.

There came a time when the eel were elusive; for five or six years we did not see them. One day, when I was 12, we finished fishing and began to troll toward shore. My line was still in the water when I saw the reel spin. Whatever I'd hooked, it was big.

My grandfather knew that I'd hooked an eel. I became excited. "Grandma will be so happy!" I said. My grandfather's face hardened, and he directed me to cut the line.

"This one goes free."

It was my first conservation teaching: Conservation requires sacrifice. Today, the eel has all but vanished from Lake Champlain.

This story framed my thinking as the price of elvers skyrocketed and harvesters jockeyed for licenses to fish them at their most abundant and most vulnerable life stage when they are translucently miraculous and singularly determined to swim from the salt to the fresh water.

This is “first contact,” and what happens here will determine the health of the species.

Similarly, what Maine government decides now with regards to the elver fishery will have long-lasting impact.

The [Maine Indian Claims Settlement Act](#), a federal law that returned land to the tribes, lays out the legal basis for the Maine Implementing Act, which defines the relationship between the state and tribes. Without the settlement act, the implementing act does not exist.

The settlement act lists the rights and resources the tribes deliberately transferred. Saltwater fishing is not listed. It is a “reserved right.” By definition, the state of Maine has no jurisdiction over reserved rights.

Last year’s [LD 451](#) — which limited the Passamaquoddy Tribe to issuing 200 elver licenses — and this year’s [LD 1625](#) — which would require state fishery officials to approve each individual tribal elver license in writing — are in conflict with the settlement act and the implementing act. The Passamaquoddy rightfully refused to comply with LD 451.

The Passamaquoddy wisdom teachings embrace conservation. Conservation and protection of the eel are central to their plan.

Last year, the state limited gear, not catch. In comparison, the tribe offered access to any Passamaquoddy who wanted to fish but managed the take through a total allowable catch of 3,600 pounds — less than the recorded take of the top 50 state harvesters. Amid claims that the Passamaquoddy were ruining the fishery, the tribe predicted reaching this total allowable catch would be difficult. The tribe’s take was 1,650 pounds.

Under pressure from federal and multi-state agencies, the Department of Marine Resources is struggling to retain a fishery that is devoid of conservation benchmarks. Over the past year, the department did not engage its harvesters in the necessary conversation about protection of the eel. Instead, it implemented a complex quota system and turned its attention to the “Passamaquoddy problem.”

The Passamaquoddy returned with stronger conservation markers. Their plan prohibits the use of fyke nets and reduces their total allowable catch to 1,650 pounds — more than 1,000 pounds less than the top 50 state harvesters take under the new quota system.



The department and the Joint Standing Committee on Marine Resources welcomed these changes and worked diligently with the Passamaquoddy to draft a memorandum of agreement in advance of this season.

On Jan. 29, the attorney general's office raised a “[constitutional concern](#)” stating the memorandum creates an equal protection problem because it creates a “special class” of people who would be dealt with differently should legal conflict arise.

This is startling given that federal Indian law, the law that governs this state's “special relationship” with four sovereign nations, explicitly states that equal protection concerns apply differently to Indian tribes. The attorney general knows this yet chooses to advance an empty legal argument that will only serve to deepen enmity.

Fishermen know that cutting bait is necessary preparation. And every fisherman knows there is a time when they must cut the line. The tribe, the department and the joint committee have worked hard to prepare a solution. Let's hope that the actions of the attorney general do not force the Atlantic States Marine Fisheries Commission to “cut the line” on Maine's elver fishery.

*Jamie Bissonette Lewey is chairman of the [Maine Indian Tribal-State Commission](#), an intergovernmental body charged under Maine law to review the effectiveness of the Maine Implementing Act.*

The Wabanaki Center, Maine Indian Tribal-State Commission, and American Friends Service Committee Healing Justice Program New England present the 2<sup>nd</sup> events in the Wabanaki Treaty Lecture Series.

## **Wabanaki Self-Determination: Earth Treaties to Settlement Acts & Beyond**

March 19 & 20, 2014

Two locations, two great events

**March 19, Noon – 4 pm  
Tribal Council Chambers**

**Passamaquoddy Tribe at Sipayik (Pleasant Point)**

Hear Vera Francis, M.Ed. (Passamaquoddy), Andrea Bear Nicholas, M.Ed. (Maliseet) and Gail Dana-Sacco, PhD., MPH (Passamaquoddy) discuss three distinct eras in Wabanaki treaty making. A community discussion will follow the speakers' presentations.

**March 20, 7 – 9 pm  
Wells Conference Center  
UMaine, Orono**

The evening session will feature a keynote address by Andrea Bear Nicholas with responses from Vera Francis, Gail Dana-Sacco, and Mark Chavaree, Esq. (Penobscot). A question and answer period will follow the presentations.

For more information about the Sipayik event, contact Plansowes Dana via email at [buntz\\_wez@hotmail.com](mailto:buntz_wez@hotmail.com) or phone at 214-8065. Questions concerning the UMaine event should be directed to Bethany Haverlock via email at [bethany.haverlock@umit.maine.edu](mailto:bethany.haverlock@umit.maine.edu) or phone 581-4450.

Special thanks to sponsors: American Friends Service Committee Healing Justice Program New England, Cushman D. Anthony Charitable Giving Fund at Maine Initiatives, Friends Committee on Maine Public Policy, Wabanaki Public Health, Donna Gann, Anne Funderburk, Neil Rolde, & Diana Scully

Scholars discuss tribal treaties,  
loss of rights and elver fishery  
3/28/2014 The Quoddy Tides by Edward French

A March 19 discussion at Sipayik by three tribal scholars on different eras of treaty making by the Wabanaki tribes looked at how the rights of the tribes had been reduced, focusing in particular on the elver fishery in Maine, and how the tribes had been moved from shared communal living into profit-based systems. The program, titled "Wabanaki Self-Determination: Earth Treaties to Settlement Acts and Beyond," featured presentations by Andrea Bear Nicholas, a Maliseet from the Tobique First Nation, Gail Dana-Sacco, an assistant research professor at the University of Maine, and Vera Francis, the economic development planner for the Passamaquoddy Tribe at Sipayik.

Focusing on the elver fishery, Francis noted that last year the state imposed its elver legislation on the tribe, capping the tribe's authority to issue on unlimited number of elver fishing licenses. Tribal members, though, believed in the tribe's authority to issue licenses and fished for elvers that spring. "All of us had the right to access the fishery," stated Francis. "It's through access that we learn. It's through access that we grow in our knowledge, and it's through access that we grow new technology to do things better."

The state, though, conducted a raid on the Pennamaquan River in Pembroke, where most of the Passamaquoddys who were fishing were young families. "They came here to intimidate our members," she said, and eventually the state summonsed over 60 tribal members for fishing without a valid license. "We had to live under that threat," stated Francis. "There was no outrage about that. That disturbs me." She noted that the charges were later dropped "because they couldn't defend the law," which she said was discriminatory by targeting Passamaquoddys.

This year another law, LD 1625, also seeks to restrict tribal access to the fishery. "What is the fear about Passamaquoddys fishing?" she asked, suggesting that the state is afraid that the tribe will place a spotlight on the loss of fisheries in Maine. "If we do not go back to fish, if we do not go back to who we are, it will be harder" for non-Natives to fight "extreme natural system extractions" such as hydro-fracking of shale rock and tar sands extraction.

She noted that the fishery is an example of people taking control of their food system and helping each other, instead of trying to catch whatever they could. "We have a right to determine our future and our children's future," she said. "Our challenge is how to do this gracefully, respectfully and without too much internal conflict."

Passamaquoddy Vice Chief Clayton Sockabasin of Indian Township said that, with the state's swipe card system this year, tribal members will not be able to sell elvers if they do not have an individual quota allocation from the tribe, under the new law. He said the state is relying on Maine Indian Claims Settlement Act to argue that the tribes surrendered their saltwater fishing rights, while the position of the tribes is that they never gave up those rights. The tribe is considering a lawsuit in federal court over the issue.

While the state has a sovereign right to limit access to the fishery, it's challenging the tribe's sovereign right to allow open access, the vice chief stated. He noted that the Maine Attorney General's Office treats tribal members as citizens of the state, instead of viewing the tribes as sovereign.

Gail Dana-Sacco asked how such disputes can be resolved. "When you're in an unequal power situation, how do we equalize that equation?" While the AG's office had objected to the tribe being able to issue an unlimited number of licenses, raising the constitutional issue of equal protection under the law, she commented, "I ask when were we ever equally protected?"

Dana-Sacco noted that the state has decided to follow the commercial model for the elver fishery, while the tribe has decided to allow open access to the fishery and to provide for sustenance fishing. Noting that not only the Passamaquoddys but other citizens are struggling economically, particularly in a cash economy that does not provide benefits, she said the state does "not want to open the door" so that people would see the corporate influence on government.

Andrea Bear Nicholas said the issue is part of a larger one concerning how the rights of all the tribes have been reduced. In New Brunswick, a proposed new oil pipeline, hydro-fracking for natural gas, a proposed open-pit mine in the Nashwaak Valley and increased harvesting of wood on Crown lands are all moving forward despite objections by the tribes. "I'm in awe that you have your act more together here," she said of the Maine tribes, referencing the organizations and the federal government that can assist the tribes. "As soon as we stop fighting, the battle's over, so we have to keep up the good fight."

Nicholas noted how governments have moved tribal chiefs and councillors in New Brunswick "into profit-based systems" instead of shared communal living, which she said "is the biggest violation of who we are." Because the Native value system is embedded in the language, she said that the destruction of the language "was part of getting us off the land" and the colonization of the tribes. Noting that tribes used to act collectively for the benefit of all of their members, she recalled a custom that began as a response when economic inequality from western culture started to take hold. People used to dress up and go to different households, bringing food if the family was poor, and that family would give something to be taken to the next household. Now, communities are stratified into wealthy and poor. She felt that, to address the issue, tribes need to look at changing the education system and keeping their language alive.

Dana-Sacco said the 1980 settlement act for the Maine tribes was "an experiment" for "how to bring people into a more business-like model" in order to accommodate corporate interests. While the Penobscots and Passamaquoddys had sought \$25 billion in damages and 12.5 million acres of land, the settlement ended up being for \$80.6 million, to be divided between the two tribes, and 300,000 acres, to be purchased with those funds. While the tribes had previously been dependent on Indian agents, "now they had to figure out how to manage" their finances and government. "What was our capacity to do that?" she asked. The tribes "need to have control of our territories," she said, but need the ability to manage them. "We need to learn back the collective good and the collective health" of the tribe.

Hugh Akagi, chief of the Passamaquoddy St. Croix Schoodic Band, said "divide and conquer" and assimilation strategies have been used "for stealing from us." He added, "We shouldn't play by their rules, and we shouldn't think like them." The tribes should work with environmental groups, cooperatives and other organizations. He commented, "When they isolate us, they're going to win."

The presentation was co-founded by the Wabanaki Center at the University of Maine, the Maine Indian Tribal-State Commission and the American Friends Service Committee's Healing Justice Program New England. A similar program was held the following evening at the University of Maine at Orono.



## Wabanaki scholars to discuss history of tribes' treaties at Thursday event



Courtesy of John Dieffenbacher-Krall  
Andrea Bear Nichoals



Bangor Daily News By [Nell Gluckman](#), BDN Staff  
Posted March 19, 2014



Julie Bishop  
Gail Dana-Sacco



Vera Francis

ORONO, Maine — Four Wabanaki scholars will discuss the history of Wabanaki treaty-making on Thursday at the University of Maine as part of a series meant to educate the public on the historical and political foundation of the relationship between Maine’s tribes and settlers.

Andrea Bear Nicholas, former chair of the studies of aboriginal cultures of Atlantic Canada at St. Thomas University in New Brunswick and member of the Maliseet tribe, will give a keynote address at the event.

The address will be followed by a discussion with Vera Francis, Passamaquoddy economic development planner, Mark Cavaree, legal counsel for the Penobscot Indian Nation, and Gail Dana-Sacco, assistant research professor and former director at the Wabanaki Center at UMaine.

The event will be held at the Wells Conference Center at 7 p.m. and was organized by the Wabanaki Center, the [Maine Indian Tribal-State Commission](#) and the [American Friends Service Committee’s Healing Justice Program](#).

## Tense relationship between Wabanaki tribes, state of Maine dissected by scholars during panel at UMaine



[Nell Gluckman](#) | BDN

Mark Chavaree, Vera Francis, Gail Dana-Sacco and Andrea Bear Nicholas talked about the history and implications of Wabanaki treaty-making at a discussion at Umaine.

Bangor Daily News By [Nell Gluckman](#), BDN Staff

Posted March 21, 2014

ORONO, Maine — The Indian Land Claims Act of 1980 has been inappropriately interpreted by the state of Maine to restrict the sovereignty of Wabanaki tribes, said speakers at a panel discussion Thursday night at the University of Maine.

About 80 people attended the conversation about the history of Wabanaki treaty-making with American governing bodies and the implications in today's debates about fishing and gaming rights. Tribal scholars likened the land claims act to a modern-day treaty. The Wabanaki tribes are the Maliseet, Micmac, Penobscot and Passamaquoddy.

Panel member Gail Dana-Sacco, an assistant research professor at UMaine and member of the Passamaquoddy tribe, recalled being a young woman in 1980 when her tribe voted on the settlement agreement, which would later result in the [Land Claims Act](#).

“We went into this room,” she told the audience. “All the tribal members were invited. There was a table right here on the side, stacks of papers. Before we left the room, within two or three hours there was a vote, whether or not we were in favor. I bring that forward to bring up a question about decision making.”

Dana-Sacco, aware that some in the audience had been involved in negotiating the Indian Land Claims Act, was careful to state that she was telling the story from her perspective and urged the audience to participate in the conversation.

“I’m not here to criticize anyone who was involved in that process, but I’m raising the question, what that kind of agreement is that?” she asked.

A response to her question would come later when Reuben Butch Phillips, who was selected by the Penobscot Nation to negotiate with the state of Maine over the act in 1980, stood up to speak.

“Almost every single day since 1980, I regret not pressing some of the issues that we are now fighting that pertain to the Land Claims Act,” he said. He explained that he had been mandated by the tribe to negotiate for a return of land to the tribes that had been lost, for a monetary settlement and for a guarantee that the state of Maine would no longer control the tribes.

“I’m speaking as a negotiator,” he said. “I’m telling you we were under a tremendous amount of pressure.”

The pressure to reach an agreement came from the fact that President Jimmy Carter, who was supportive of the tribes, was up for reelection that year and his prospects did not look good. Tribal representatives felt they needed a settlement before he was voted out of office.

As a result of the Settlement Act, Maine tribes received \$81.5 million, some of which was designated to buy back land. But the state and the tribes have interpreted the terms of the agreement differently, particularly fishing rights.

“They call this something we gave up, and we say we never gave it up,” said Vera Francis, referring to the salt water fishery. Francis is the Passamaquoddy economic development planner and also participated at Thursday night’s panel.

“We are a marine based culture,” she said. “We require 100 percent access to the land and to the water so that we can know and be who we are.”

The state is attempting to infringe on that access by limiting the amount of elver fishing the Passamaquoddy tribe can do. [A bill approved by the House and Senate](#) on Tuesday establishes the percentage of the statewide catch limit that will be reserved for Maine’s Indian tribes.

Another bill, approved last week, requires all elver fishermen to use a swipe card that would keep track of recorded landings in a database managed by the Department of of Marine Fisheries.

Mark Chavaree, a citizen and legal council of the Penobscot Indian Nation, and Andrea Bear Nicholas, chair of the studies of aboriginal cultures of Atlantic Canada at St. Thomas University in New Brunswick, also spoke at Thursday's event.

Nicholas opened the discussion with an overview of the history of Wabanaki-treaty making, which Chavaree added to by explaining the tribe's legal relationship with the state and federal governments.

"We had the right as free people to come together and create our own form of government, and that's what we did," said Chavaree. "And that form of government is where our authority comes from."

Toward the end of the night, Dana-Sacco, with a hand on her heart, thanked Phillips for his comments. The entire room stood up, faced Phillips and applauded.



# **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**

**The full report and addenda can be found at:**

**[http://www.mitsc.org/documents/148\\_2014-10-2MITSCbook-WEB.pdf](http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf)**

## ***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.

## ***Section VII: Findings***

1. The intergovernmental saltwater fishery conflict between the Passamaquoddy Tribe and the State of Maine arises from cultural distinctions and opposing interpretations of how the federal Maine Indian Claims Settlement Act of 1980 (MICA) and the Maine Implementing Act (MIA) impact the Passamaquoddy fishery.
2. The Passamaquoddy Tribe stands on its retained aboriginal rights to fish within its traditional territory, which extends beyond the reservation boundaries, without interference from the state. They contend that these rights have never been extinguished.
3. The State of Maine through the OAG counters that the MIA Sec. 6204 “LAWS OF THE STATE APPLY TO INDIAN LANDS” means that the tribes have no rights except as specified in the MIA. This position is amply supported in case law and the OAG has advised that the Passamaquoddy Tribe retains no rights to the saltwater fishery, and that the State of Maine has the sole authority to regulate that fishery and to prosecute Passamaquoddy fishers who fish according to Passamaquoddy tribal law rather than State law.
4. The articles of construction specified in the federal MICA (25 U.S.C. § 1735 (a)) provide 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 MICA thus override the MIA provisions when there is a conflict between the two.
5. MICA (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 Passamaquoddy Tribe, the Penobscot Nation and the State within their respective jurisdictions” or the allocation of responsibility or jurisdiction over governmental matters between the tribes and the state.
6. Although the MIA was passed first chronologically, the U.S. Constitution and federal Indian law give Congress control over Indian Affairs, making the MIA subordinate to the MICA, and the federal Act requires the approval of affected tribes to amend the MIA. Thus, the MIA is subordinate to the MICA.
7. The escalating conflict between the Passamaquoddy Tribe and the State of Maine about the reach and jurisdiction of the Passamaquoddy saltwater fishery described in this report illustrates that:
  - a. When saltwater fishery issues have arisen—in the late 90’s, and, to some extent, over the last year—the governor of the state and/or the Commissioner of Marine Resources have made concerted efforts to cooperate, negotiate in good faith and develop mutually acceptable agreements.
  - b. Through these negotiations, prospects for employing conservation-based measures to ensure a sustainable fishery have emerged, and promising strategies for cooperation and co-management of the fishery through a formal Tribal-State agreement have been developed.

- c. LD 2145 constitutes an amendment to the Maine Implementing Act. In 1998, both OPLA and the OAG provided legal opinions to the Joint Standing Committee on Marine Resources that LD 2145 constituted an amendment to the MIA.
  - d. By passing LD 2145 the state unilaterally codified contested jurisdictional issues without the approval of the affected tribe and it arbitrarily changed the sustenance definition specified in 30 M.R.S.A. § 6207 (1) (4) (6).
- 8. LD 2145's blow-up clause, designed by the OAG, created a legislative pathway to avoid the statutory requirements of the MICSA requiring tribal approval of amendments to the negotiated agreements codified in the Maine Indian Claims Settlement Acts.
- 9. The implementation of LD 2145's blow-up clause leaves the Passamaquoddy Tribe with no recourse but to prove in a "court of competent jurisdiction" that LD 2145 improperly amended the MIA. Defending against persistent attempts to diminish legitimate tribal authority through the state's legislative process produces an undue burden on limited tribal resources.
- 10. In 1998, 2013 and 2014, the state legislature voted to approve legislation that violates both the spirit and the law of both MICSA and MIA.
- 11. The OAG is responsible for protecting the state's interest and the interests of all of its citizens and the legal analysis of the OAG is an essential perspective for the development of state policy that affects tribal-state relations.
- 12. M.R.S.A. Title 5, Chapter 9 provides no clearly articulated set of provisions regarding the OAG's responsibility to provide guidance to state government on the application of the MIA and the MICSA. These provisions already exist in the areas of hate crimes and domestic violence.
- 13. In order to promote good problem solving and advance solutions to tribal-state conflict, it is important that the OAG be part of seeking a solution. Legal opinions offered in writing would better inform discussions and possibly yield a durable result that meets the needs of the tribes and the state.
- 14. After a hopeful beginning, the extensive legislative, judicial, and executive branch processes employed to resolve the intergovernmental saltwater fisheries conflict, as documented in this report, became costly, ineffective and adversarial. The tribal-state relationship was negatively affected as opportunities for cooperation and the potential for mutually beneficial solutions eroded.
- 15. Although the MITSC has completed a thorough review of extensive primary material, there remains much to study. The ongoing process of reviewing the negotiated agreements as they are reflected in the Settlement Acts, the Congressional Records and the state records and tribal records and assessing ensuing laws and public policy that affect the federally recognized tribes in Maine is within the scope of the MITSC.
- 16. The state has a statutory responsibility (30 M.R.S.A. § 6212 (5)) to provide data to MITSC to carry out its task.
- 17. The MITSC has identified a need to address racism and the impact it has on tribal-state relations.

18. A significant lack of knowledge about the governmental status of federally recognized tribes as sovereign nations and confusion about the nature of the State of Maine's responsibilities in implementing the negotiated agreement reflected in the Settlement Acts affects the quality of tribal-state relations.
19. A deeper understanding of the Settlement Acts, the issues that the tribes confront, and the importance of treating each other with respect and dignity will increase the possibility of resolving longstanding issues between the tribes and the state.
20. The ongoing review of the Settlement Acts and the mechanisms of implementation will better inform legislators, courts and the general public while advancing a climate of problem solving and creating an environment in which mutually beneficial solutions can be developed and implemented.



## ***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)

## NEWS RELEASE

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**Maine Indian Tribal-State Commission (MITSC) Releases Report**  
**[http://www.mitsc.org/documents/148\\_2014-7-11Assessmentofthe](http://www.mitsc.org/documents/148_2014-7-11AssessmentoftheIntergovernmentalSaltwaterFisheriesConflictBetweenPassamaquoddyandtheStateofMaine.pdf)**  
**IntergovernmentalSaltwaterFisheriesConflictBetweenPassamaquoddyandthe**  
**StateofMaine.pdf**

**Commission Finds Maine Legislature Circumvented Statutorily Required**  
**Amendment Process On Three Occasions During Three Separate Years**

The Maine Indian Tribal-State Commission (MITSC) released a report on the saltwater fisheries conflict between Passamaquoddy and the State of Maine, finding the Maine Legislature circumvented the amendment process required under the Maine Indian Claims Settlement Act (MICSA, [http://www.mitsc.org/documents/33\\_FedSettActALL.pdf](http://www.mitsc.org/documents/33_FedSettActALL.pdf)) on three separate occasions when it legislated on saltwater fishery issues without the consent of the Passamaquoddy Tribe in 1998, 2013, and 2014. The MITSC calls all parties back to the table to resolve the conflict and reminds the Maine Legislature that it must follow the amendment process specified in the MICSA. The Commission also recommends the use of memoranda of understanding (MOU) between the tribes and the state to resolve long-standing and pervasive conflicts.

“The central MITSC role is to continually review the effectiveness of the Maine Implementing Act (MIA, [http://www.mitsc.org/documents/38\\_2010-10-6MIAtitle30ch601.pdf](http://www.mitsc.org/documents/38_2010-10-6MIAtitle30ch601.pdf)). This led us to examine the long-standing and pervasive conflict between Passamaquoddy and the State of Maine over the Tribe’s management of their fishery. This report sheds light on the costly, ineffective and adversarial attempts to resolve this conflict, including contravention of the statutorily mandated process to amend the MIA,” said Jamie Bissonette Lewey, Chair of the MITSC. “We encourage the parties to the Settlement Agreements to 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,” added Dr. Gail Dana-Sacco, MITSC Commissioner and co-author of the report.

The MITSC report examines the saltwater fishing conflict from the passage of the Maine Indian Claims Settlement Act in 1980 through the legislative session that ended in April of this year. It documents the articulation of differing interpretations over saltwater fishing rights between the Passamaquoddy and State of Maine as early as 1984. The conflict persisted and was included as an issue area in the 1997 report *At Loggerheads – the State of Maine and the Wabanaki*. ([http://www.mitsc.org/documents/77\\_1997-1-15AtLoggerheads-TheStateofMaineandtheWabanaki.pdf](http://www.mitsc.org/documents/77_1997-1-15AtLoggerheads-TheStateofMaineandtheWabanaki.pdf))

In one of many efforts to resolve the saltwater fishing conflict, LD 2145, An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, was introduced in the Maine Legislature. The original bill featured the development of a licensing compact between the Passamaquoddy Tribe and the State governing the taking of marine resources. Though the initial version of the bill acknowledged that legislating in the area of saltwater fishing would constitute an amendment to the MIA, the provision requiring Passamaquoddy approval of any laws proposed in the contested issue area of jurisdiction over the saltwater fishery was later stripped from the bill through the creation of a “blow-up” or severability clause offered by the Office of the Attorney General (OAG). The use of a “blow-up” clause allowed the Maine Legislature to unilaterally decide contested jurisdictional issues involving saltwater fishing. LD 2145 also changed the definition of sustenance without the required approval of the Tribe.

The MITSC report makes 17 recommendations for improving tribal-state relations and resolving the saltwater fishing conflict. Some of the recommendations include:

- The articles of construction in the Maine Indian Claims Settlement Act outlined in 25 U.S.C. § 1735 (a) must be applied by all parties: federal, state, and tribal.
- The statutory process to amend MIA, as specified in MICSA 25 U.S.C. § 1725 (e)(1), must be conscientiously followed by all parties.
- Where the tribal-state jurisdictional relationship remains contested, the state and the tribes should execute Memoranda of Understanding (MOU).
- The OAG, the Tribes, and the MITSC should routinely review proposed legislation that could be considered a potential amendment to the Settlement Agreement.
- The Judiciary Committee should consider the development of reporting standards for the OAG when reviewing any aspect of the MIA or MICSA.



- All parties to the Settlement Agreements should engage in pragmatic and constructive dialogue.
- The MITSC must be fully resourced to carry out its role.

Because the central message of the report is a clarion call for all of the governments to return to the table, engage in conflict resolution, and develop mutually beneficial solutions for all of the peoples within Maine, the MITSC briefed key leaders: the Passamaquoddy Chiefs from Motahkomikuk and Sipayik, the Chief of the Penobscot Indian Nation, the Vice Chief of the Passamaquoddy from Motahkomikuk, the President of the Maine Senate, the Speaker of the Maine House, the House chair of the Judiciary Committee, both chairs of the Marine Resources Committee, and Tribal Councilors from Sipayik. In addition, the Office of the Maine Attorney General was briefed on the contents of the report.

Chief Reuben (Clayton) Cleaves of the Passamaquoddy Tribe at Sipayik stated, “The Passamaquoddy People view saltwater fishing as an inherent right. This right was not given to us by the State of Maine or any other state. We have always said that right was never discussed during the Settlement Act negotiations therefore it is retained. The MITSC report proves what we have always known. Yet, we recognize other peoples now live within our traditional territories. We remain committed to discussing how to share these resources in a manner that does not harm the fish. As Passamaquoddy, we follow the fish—their health is the foundation of our well-being, and everyone else’s, for that matter.”

Chief Joseph Socobasin of the Passamaquoddy Tribe at Motahkmikuk added to the Passamaquoddy message, reminding the MITSC “Saltwater fishing has sustained the Passamaquoddy throughout all of our history. Fishing in the ocean is not a commercial venture: it is our culture. Our relationship with the ocean is core to our concepts of sustenance as a people living on this bay that bears our name. For us, sustenance has always included components of barter and exchange. At the same time, we are very worried about the damage to our intertidal zones and to the saltwater fishery. This is why we have set a high standard of conservation and encouraged the state to do likewise. This report sheds light on some hard truths, some very disturbing truths, about the relationship between the Passamaquoddy and the State of Maine.” Echoing the Commission’s call for the development of solutions, Chief Socobasin continued, “It is my hope that the contents of the report will bring us all back to the table with a newfound respect and commitment to finally resolve this conflict.”

Chief Kirk Francis of the Penobscot Nation responded to the report saying, “It is clear from this report that the complaints of the Wabanaki in Maine have been justified. This report documents total disregard of the statutory rights of the tribes that require our consent to any change in the negotiated settlement. By using legal instruments that are not in the spirit of the law to influence legislation on aboriginal rights and place these rights under state law, the legislature is trying to make the tribes perpetual wards of the State,” said Chief Francis. “What’s more deplorable is that the state takes this approach on the most important core right of the tribes which is their right to a subsistence and sustenance lifestyle and our right to self-govern it. It is crucial that all of the parties return to the table to resolve this conflict. ”

After the MITSC briefed his senior staff, Governor Paul R. LePage commented, “I congratulate the members of the MITSC for their hard work in producing the report, and I look forward to the continuation of healthy dialogue between the state and tribal governments.”

House Judiciary Chair Charles Priest reflected a similar sentiment, “This assessment shows the urgent need for the Indian tribes in Maine and Maine’s state government to continue to work out conflicts together. Both parties know that the ocean’s resources are not infinite; both sides must recognize the Passamaquoddy’s historical dependence on the ocean. Both sides recognize the State and the Passamaquoddy interest in ensuring that those ocean resources continue in abundance into the future.”

Passamaquoddy Tribal Representative Madonna Soctomah attended many of the MITSC briefings. She explained, “Although the Maine Implementing Act does address sustenance, it is silent on saltwater fishing. Legislation in this area can only be done with consent of the Passamaquoddy. Saltwater fishing is not a commodity, it is a treasured resource tied into being Passamaquoddy. Legislation that disconnects the Passamaquoddy from the saltwater is like legislation that would transform me, or my people, into non-Indians. This did not happen in 1980, 2013 or 2014. I will always be a Passamaquoddy woman. We will always fish in the saltwater.”

Supporting the MITSC call for continued dialogue, Representative Priest further commented, “The key to a fruitful relation between the State and the Passamaquoddy is respect. The Passamaquoddy and the State will exist for the indefinite future. This respect must also exist into the future.”

The report finishes with the following summation, “The MITSC concludes that open dialogue, negotiations, and formal agreements are mechanisms that are both pragmatic and constructive. We offer this report with sincere hope for a renewed commitment to advance conflict resolution among all of the peoples who live with the State of Maine.”

To view all of the 37 addenda contained in Appendix 1, go to [http://www.mitsc.org/documents/147\\_2014-7-11Addenda1-37-1.pdf](http://www.mitsc.org/documents/147_2014-7-11Addenda1-37-1.pdf).

-30-

# Panel finds Maine Legislature erred in passing laws on tribal fishing rights, calls parties back to negotiating table

By [Dawn Gagnon](#), BDN Staff  
Posted July 11, 2014

BANGOR, Maine — The [Maine Indian Tribal-State Commission](#) released a report Friday in which it found the Maine Legislature circumvented the amendment process set forth in the [Maine Indian Claims Settlement Act](#) when it passed laws on saltwater fishery matters without the consent of the Passamaquoddy Tribe in 1998, 2013 and 2014.

[The 41-page report](#) examines the saltwater fishing conflict between the tribe and the state from the passage of the settlement act in 1980 through the legislative session that ended in April of this year.

The report documents the differing interpretations over saltwater fishing rights from as early as 1984. The conflict persisted and was cited as an issue in a report published in 1997 titled [“At Loggerheads: the State of Maine and the Wabanaki.”](#)

In one of many efforts to resolve the saltwater fishing conflict, LD 2145, or An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, was introduced in the Maine Legislature.

The original bill included a licensing agreement between the tribe and the state governing the taking of marine resources, the commission noted.

The initial version of the bill acknowledged enacting legislation related to saltwater fishing would constitute an amendment to the [state law that implements the federal settlement act](#), but the provision requiring Passamaquoddy approval of any laws proposed in the contested area of jurisdiction over the saltwater fishery later was stripped from the bill, the commission noted.

The legislation also changed the definition of “sustenance” without the required approval of the tribe, the commission contends.

Patrick Keliher, commissioner of the Maine Department of Marine Resources, could not be reached for comment Friday.

To that end, the commission has called all parties back to the bargaining table to resolve the conflict and reminded the Maine Legislature it must follow the amendment process specified in the settlement act, according to a news release the commission issued Friday about its findings.

“The central [tribal-state commission] role is to continually review the effectiveness of the [Maine Implementing Act](#),” MITSC Chairman Jamie Bissonette Lewey noted.

“This led us to examine the long-standing and pervasive conflict between Passamaquoddy and the state of Maine over the tribe’s management of their fishery,” she said. “This report sheds light on the costly, ineffective and adversarial attempts to resolve this conflict,” including circumvention of the legally mandated process for amending the implementing act, she said.

MITSC Commissioner Gail Dana-Sacco, co-author of the report, added, “We encourage the parties to the settlement agreements to 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.”

The commission’s report makes 17 recommendations for improving tribal-state relations and resolving the saltwater fishing conflict. In addition to returning to the bargaining table, the report suggests engaging in conflict resolution measures.

The report noted the state and the tribes should negotiate memoranda of understanding where the tribal-state jurisdictional relationship remains contested. In addition, the Office of the Attorney General, the tribes and the tribal-state commission should routinely review proposed legislation that could be considered a potential amendment to the settlement act.

The commission has briefed key leaders — namely Passamaquoddy and Penobscot tribal officials, state Senate and House leaders, both chairs of the legislature’s Marine Resources Committee and the Office of the Attorney General — on the contents of the report.

“The Passamaquoddy people view saltwater fishing as an inherent right,” Chief R. Clayton Cleaves of the Passamaquoddy Tribe’s Pleasant Point community. “This right was not given to us by the state of Maine or any other state. We have always said that right was never discussed during the Settlement Act negotiations, therefore it is retained.”

Cleaves said the report “proves what we have always known. Yet we recognize other peoples now live within our traditional territories. We remain committed to discussing how to share these resources in a manner that does not harm the fish. As Passamaquoddy, we follow the fish — their health is the foundation of our well being, and everyone else’s, for that matter.”

Chief Joseph Socobasin of the Passamaquoddy Tribe at Indian Township agreed, reminding the commission saltwater fishing has sustained the tribe throughout all its history.

“Fishing in the ocean is not a commercial venture: It is our culture. Our relationship with the ocean is core to our concepts of sustenance as a people living on this bay that bears our name,” he said.

“For us, sustenance has always included components of barter and exchange,” he said. “At the same time, we are very worried about the damage to our intertidal zones and to the saltwater fishery. This is why we have set a high standard of conservation and encouraged the state to do



likewise,” he said. “This report sheds light on some hard truths, some very disturbing truths, about the relationship between the Passamaquoddy and the state of Maine.”

Chief Kirk Francis of the Penobscot Nation added the report justifies the complaints of the Wabanaki people in Maine.

“This report documents total disregard of the statutory rights of the tribes that require our consent to any change in the negotiated settlement,” he said. “By using legal instruments that are not in the spirit of the law to influence legislation on aboriginal rights and place these rights under state law, the legislature is trying to make the tribes perpetual wards of the state.”

House Judiciary Committee Chairman Charles Priest said the report shows the need for Maine’s tribes and state government to continue to work out conflicts together.

“Both parties know that the ocean’s resources are not infinite,” he said. “Both sides must recognize the Passamaquoddy’s historical dependence on the ocean. Both sides recognize the state and the Passamaquoddy interest in ensuring that those ocean resources continue in abundance into the future.”

# State Failed To Work With Tribe In Marine Fish Laws, Says Report

MPBN By [Jennifer Mitchell](#) 7/12/14

A commission of state and tribal representatives has found that the state of Maine did not always follow prescribed processes in its dealings with the Passamaquoddy tribe and its use of marine resources.

The [report](#) was released Friday on the website of the Maine Indian Tribal State Commission. That's a 13 member, inter-governmental entity created in 1980 to oversee issues surrounding the Maine Indian Claims Settlement Act -or MICSA- and its implementation act- known as MIA. The report says the state failed to work with the Passamaquoddy as described in those acts, by passing marine fisheries laws in 1998, 2013, and 2014, without the tribe's consent.

In the report's summary, the commission makes several recommendations. One is to replace the 1998 rule that changed the definition of "sustenance" and made it possible for the state override the tribe's approval or rejection of amendments. It also recommends clearer reporting standards when aspects of MICSA or MIA are up for review.

## **Report: Lawmakers didn't work with Passamaquoddy on fisheries**

**A Maine commission says all parties should go back and properly address saltwater fishery issues.**

AP as published in the PPH 7/14/14

AUGUSTA – The Maine Indian Tribal-State Commission says lawmakers failed to follow the proper process when they passed laws regarding saltwater fishery issues without the consent of the Passamaquoddy Tribe.

The commission's report says that the Legislature circumvented the process required by the Maine Indian Claims Settlement Act when it passed laws in 1998, 2013 and 2014 without working with the tribe.

The commission, which is made up of tribal and state representatives, said lawmakers, the tribe and other parties should be brought back to address the issues through the proper amendment process.

The report points to a measure that sought to resolve a debate between the state and the tribe over the taking of marine organisms. Lawmakers removed a part of the bill that required tribal approval regarding saltwater fishery issues.

## ‘Racism Is Central’ to Tribal Conflict with Maine, Says Report

ICTMN [Gale Courey Toensing](#)  
7/17/14

When Maine lawmakers passed a law this spring that limited the Passamaquoddy Tribe’s jurisdiction over elvers fishing, they violated the Maine Indian Claims Settlement Act by acting without the tribe’s consent, an important new report says.

RELATED: [Mills Kills Passamaquoddy-State Elvers Agreement](#)

RELATED: [Passamaquoddy Tribe Amends Fishery Law to Protect Its Citizens From State Threat](#)

But that wasn’t the only time state legislators violated the treaty by which the Passamaquoddy Tribe and the Penobscot Indian Nation gave up their land rights claim to 12.5 million acres of land – roughly a third of Maine. The carefully researched 41-page report, called [Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine](#) found that the legislature violated the [MICA](#) by circumventing its amendment process when it legislated on saltwater fishery issues without the consent of the Passamaquoddy Tribe in 1998, 2013, and 2014. The amendment process requires tribal approval for any amendments to the [Maine Implementing Act](#) (MIA) – the state law that implements the federal Settlement Act – that relate to “the enforcement or application of civil, criminal or regulatory laws” that affect the tribe.

The report was co-written by Jamie Bissonette Lewey, chair of the [Maine Indian Tribal-State Commission](#) (MITSC) and Commissioner Dr. Gail Dana-Sacco and researched by MITSC Executive Director John Dieffenbacher-Krall. MITSC was created by the Settlement Act and mandated, among other things, with continually reviewing the effectiveness of the Maine Implementing Act.

“This report sheds light on the costly, ineffective and adversarial attempts to resolve this conflict, including contravention of the statutorily mandated process to amend the MIA,” Lewey said in a prepared statement. “We encourage the parties to the Settlement Agreements to 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.”

The report documents the conflict surfacing as early as 1984. It remained unresolved and was included in a 1997 report by a Task Force on Tribal-State Relations called [At Loggerheads – the State of Maine and the Wabanaki](#) on the relationship between the Wabanaki nations and the state.

That report found racism to be at the core of the troubled tribal-state relationship. “Racism is experienced by the Wabanaki, but generally is not recognized by the majority society,” the 1997 report noted. MITSC’s current report says the issue of racism has not only persisted; it is “central” to the tribal-state conflict.

“Throughout 2013 and 2014, the MITSC received reports of unacceptable and disrespectful language in public hearings and work sessions on the saltwater fisheries conflict,” the report says. “Over the course of the legislative hearings, five MITSC commissioners, the executive director, and the chair reported several incidents in which prejudice was expressed in a public forum.” After a particularly charged public work session on February 19, 2014, the MITSC discussed the need to address racism, unacceptable language, the disrespect of Wabanaki leaders, and the impact these factors have on tribal-state relations, and contacted some legislators with its concerns.

The problem is based in part on ignorance of the status of sovereign tribal nations. “A significant lack of knowledge about the governmental status of federally recognized tribes as sovereign nations and confusion about the State of Maine’s responsibilities in implementing the negotiated agreement reflected in the Settlement Acts persists,” the report says.

According to the report, more work needs to be done. “While the issue of racism and its impact on tribal-state relations is central to resolving long-standing conflicts, it is too complex to address in this report and requires a separate and complete inquiry. A deeper understanding of the Settlement Acts, the issues that the tribes confront, and the importance of treating each other with respect and dignity will increase the prospects for resolving long standing issues between the tribes and the state.”

In one of many efforts to resolve the saltwater fishing conflict, Legislative Document (LD) 2145, An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, was introduced in the Maine legislature during the 118th session (1996-1998).

The original bill included a licensing agreement between the tribe and the state governing the taking of marine resources, the commission noted. The initial version of the bill acknowledged enacting legislation related to saltwater fishing would constitute an amendment to the MIA – but the provision requiring Passamaquoddy approval of any laws proposed in the contested area of jurisdiction over the saltwater fishery later was stripped from the bill through the creation of a “blow-up” or severability clause offered by the Office of the Attorney General (OAG). The “blow-up” clause allowed the Maine legislature to unilaterally decide contested jurisdictional issues involving saltwater fishing. LD 2145 also changed the definition of “sustenance” without the required approval of the tribe, the commission found.

According to the report, the conflict centers on opposing interpretations of the MICSA and the MIA. The Passamaquoddy Tribe says it never abandoned its aboriginal rights to fish within its



traditional territory beyond reservation boundaries without interference from the state. These rights have never been abrogated since they are not mentioned in the extinguishment provisions in the MICSA, the tribe says. The State of Maine says it has the authority to regulate the Passamaquoddy saltwater fishery and prosecute Passamaquoddy fishers who fish according to Passamaquoddy law rather than state law. The report points out that the articles of construction in the MICSA say, “In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this (Settlement) Act should emerge, the provisions of this Act shall govern.” The state has ignored that requirement.

The MITSC report makes 17 recommendations for improving tribal-state relations and resolving the saltwater fishing conflict, including a return to the table by all government, conflict resolution, and development of beneficial solutions for all of Maine.

Attorney General Janet Mills did not respond to a request for comment.

The commission briefed tribal and state leaders on the report before releasing it on July 17 and reported their comments in a prepared statement.

After the MITSC briefed his senior staff, Governor Paul R. LePage said, “I congratulate the members of the MITSC for their hard work in producing the report, and I look forward to the continuation of healthy dialogue between the state and tribal governments.”

House Judiciary Chair Charles Priest said the report shows the urgent need for the tribes and state to continue to work out conflicts together. “Both parties know that the ocean’s resources are not infinite; both sides must recognize the Passamaquoddy’s historical dependence on the ocean. Both sides recognize the State and the Passamaquoddy interest in ensuring that those ocean resources continue in abundance into the future.”

Madonna Soctomah, the Passamaquoddy tribal representative to the state legislature, said, “Saltwater fishing is not a commodity, it is a treasured resource tied into being Passamaquoddy. Legislation that disconnects the Passamaquoddy from the saltwater is like legislation that would transform me, or my people, into non-Indians. ... I will always be a Passamaquoddy woman. We will always fish in the saltwater.”

Supporting the MITSC call for continued dialogue, Priest said, “The key to a fruitful relation between the State and the Passamaquoddy is respect. The Passamaquoddy and the State will exist for the indefinite future. This respect must also exist into the future.”

## **Cleaves on Maine Commission Report: Committed to Discussion on Sharing**

ICTMN [Gale Courey Toensing](#)  
7/18/14

Following a new report that says Maine lawmakers violated the Maine Indian Claims Settlement Act with the passing of a law this spring that limited the Passamaquoddy Tribe's jurisdiction over elvers fishing without the tribe's consent, Passamaquoddy Tribe at Sipayik Chief Reuben (Clayton) Cleaves says the tribe remains committed to finding a common answer.

RELATED: [‘Racism Is Central’ to Tribal Conflict with Maine, Says Report](#)

“The Passamaquoddy People view saltwater fishing as an inherent right. This right was not given to us by the State of Maine or any other state. We have always said that right was never discussed during the Settlement Act negotiations therefore it is retained,” Cleaves said. “The MITSC report proves what we have always known. Yet, we recognize other peoples now live within our traditional territories. We remain committed to discussing how to share these resources in a manner that does not harm the fish. As Passamaquoddy, we follow the fish—their health is the foundation of our well-being, and everyone else's, for that matter.”

The carefully researched 41-page report, co-written by Jamie Bissonette Lewey, chair of the [Maine Indian Tribal-State Commission](#) (MITSC) and Commissioner Dr. Gail Dana-Sacco and researched by MITSC Executive Director John Dieffenbacher-Krall, called “[Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine](#)” found that the legislature violated the [MICA](#) by circumventing its amendment process when it legislated on saltwater fishery issues without the consent of the Passamaquoddy Tribe in 1998, 2013, and 2014.

## Socobasin on Maine Commission Report: Not a Commercial Venture – Our Culture

ICTMN [Gale Courey Toensing](#)  
7/19/14

Following a new report that says Maine lawmakers violated the Maine Indian Claims Settlement Act with the passing of a law this spring that limited the Passamaquoddy Tribe’s jurisdiction over elvers fishing without the tribe’s consent, Passamaquoddy Tribe at Motahkmikuk Chief Joseph Socobasin wants to make sure the Maine lawmakers know the fishing isn’t a commercial venture – it’s a culture.

RELATED: [‘Racism Is Central’ to Tribal Conflict with Maine, Says Report](#)

Socobasin wanted to remind the [Maine Indian Tribal-State Commission](#) “Saltwater fishing has sustained the Passamaquoddy throughout all of our history. Fishing in the ocean is not a commercial venture: it is our culture. Our relationship with the ocean is core to our concepts of sustenance as a people living on this bay that bears our name. For us, sustenance has always included components of barter and exchange. At the same time, we are very worried about the damage to our intertidal zones and to the saltwater fishery. This is why we have set a high standard of conservation and encouraged the state to do likewise. This report sheds light on some hard truths, some very disturbing truths, about the relationship between the Passamaquoddy and the State of Maine. It is my hope that the contents of the report will bring us all back to the table with a newfound respect and commitment to finally resolve this conflict.”

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## Francis on Maine Commission Report: Tribe's Complaints Are Justified

ICTMN [Gale Courey Toensing](#)  
7/20/14

Following a new report that says Maine lawmakers violated the Maine Indian Claims Settlement Act with the passing of a law this spring that limited the Passamaquoddy Tribe's jurisdiction over elvers fishing without the tribe's consent, Penobscot Nation Chief Kirk Francis said in a statement the tribe's complaints have been proven justified.

RELATED: [‘Racism Is Central’ to Tribal Conflict with Maine, Says Report](#)

Francis said, “It is clear from this report that the complaints of the Wabanaki in Maine have been justified. This report documents total disregard of the statutory rights of the tribes that require our consent to any change in the negotiated settlement. By using legal instruments that are not in the spirit of the law to influence legislation on aboriginal rights and place these rights under state law, the legislature is trying to make the tribes perpetual wards of the State. What’s more deplorable is that the state takes this approach on the most important core right of the tribes which is their right to a subsistence and sustenance lifestyle and our right to self-govern it. It is crucial that all of the parties return to the table to resolve this conflict.”

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**Report finds state unilaterally restricts tribe's fishing rights**  
**The Quoddy Tides by Edward French 7/25/14**

The Maine Legislature has unilaterally acted to restrict the saltwater fishing rights of Passamaquoddy tribal members by circumventing the required amendment process under the Maine Indian Claims Settlement Act, according to a recently issued report from the Maine Indian Tribal-State Commission (MITSC). The MITSC report found that the legislature did not receive the consent of the tribe when it approved fishery legislation on three separate occasions -- in 1998, when the first tribal saltwater fishing bill was enacted, and in 2013 and 2014, when tribal elver fishing bills were passed.

In the report, MITSC calls all parties back to the table to resolve the conflict and reminds the legislature that it must follow the required amendment process. The commission also recommends the use of memoranda of understanding between the tribes and the state to resolve long-standing conflicts.

"The central MITSC role is to continually review the effectiveness of the Maine Implementing Act (MIA). This led us to examine the long-standing and pervasive conflict between Passamaquoddy and the State of Maine over the tribe's management of their fishery. This report sheds light on the costly, ineffective and adversarial attempts to resolve this conflict, including contravention of the statutorily mandated process to amend the MIA," says Jamie Bissonette Lewey, chair of MITSC. She notes, "These are not just ordinary laws" that the legislature is enacting to restrict the right of tribal members to fish. Instead, the laws are amending a negotiated settlement agreement approved by the state, federal and tribal governments.

Rep. Madonna Soctomah of the Passamaquoddy Tribe, who attended many of the MITSC briefings, believes that the saltwater fishing rights of the tribes should not be addressed through legislation but instead belong "back on the negotiating table with the federal, state and tribal governments." She says the matter is an unresolved issue in the negotiated 1980 settlement agreement and should not have been introduced in the legislature back in 1997. Emphasizing her belief in the rights of tribal members to fish, she states that the fishery "is how the Passamaquoddy survived as a people," providing "a supplemental diet from the sea."

Bissonette Lewey says that if the legislative path is taken for resolving the conflict, then the provision of the settlement act that requires tribal approval of any changes needs to be followed. However, she points out that memoranda of understanding might be a better tool for reaching a resolution that can be mutually agreed upon.

"Unfortunately, the state's legislative process is a unilateral process," Bissonette Lewey says. In the 1998 tribal saltwater fishing bill, the language requiring Passamaquoddy approval of any changes was replaced by a clause offered by the Maine Attorney General's Office that allowed the legislature to decide contested issues in the fishery.

The MITSC report examines the saltwater fishing conflict since the passage of the Maine Indian Claims Settlement Act in 1980. In one of many efforts to resolve the conflict, LD 2145, An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, was introduced in the legislature in 1998 by then Rep. Fred Moore. The original bill featured the development of a licensing compact between the Passamaquoddy Tribe and the state governing the taking of marine resources. Though the initial version of the bill acknowledged



that legislating in the area of saltwater fishing would constitute an amendment to the MIA, the provision requiring Passamaquoddy approval of any laws proposed in the contested issue area of jurisdiction over the saltwater fishery was later stripped from the bill through the creation of a "blow-up" or severability clause offered by the AG's office. The use of a "blow-up" clause allowed the legislature to unilaterally decide contested jurisdictional issues involving saltwater fishing. Concerning the impact of the state AG's office on the process, Bissonette Lewey notes that while well-reasoned opinions have been presented from the tribes, there have been few corresponding opinions issued from the AG's office. The report recommends that the AG's office should provide formal, well-reasoned, written responses to legislative and administrative requests.

The MITSC report also makes numerous other recommendations for improving tribal-state relations and resolving the saltwater fishing conflict. The report recommends that the articles of construction in the Maine Indian Claims Settlement Act must be applied by all parties -- federal, state and tribal -- and that the statutory process to amend MIA must be conscientiously followed by all parties. Where the tribal-state jurisdictional relationship remains contested, the state and the tribes should execute memoranda of understanding, and the Maine Attorney General's Office, the tribes and the MITSC should routinely review proposed legislation that could be considered a potential amendment to the settlement agreement.

"We encourage the parties to the settlement agreements to 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," says Dr. Gail Dana-Sacco, MITSC commissioner and co-author of the report.

MITSC briefed key state and tribal leaders about the report, which urges all of the governments to return to the table and engage in conflict resolution. Chief Clayton Cleaves of the Passamaquoddy Tribe at Sipayik stated, "The Passamaquoddy people view saltwater fishing as an inherent right. This right was not given to us by the State of Maine or any other state. We have always said that right was never discussed during the settlement act negotiations; therefore it is retained. The MITSC report proves what we have always known."

Chief Joseph Socobasin of the Passamaquoddy Tribe at Motahkmikuk commented, "Saltwater fishing has sustained the Passamaquoddy throughout all of our history. Fishing in the ocean is not a commercial venture: it is our culture. Our relationship with the ocean is core to our concepts of sustenance as a people living on this bay that bears our name." He added, "It is my hope that the contents of the report will bring us all back to the table with a newfound respect and commitment to finally resolve this conflict."

Chief Kirk Francis of the Penobscot Nation responded to the report saying, "It is clear from this report that the complaints of the Wabanaki in Maine have been justified. This report documents total disregard of the statutory rights of the tribes that require our consent to any change in the negotiated settlement. By using legal instruments that are not in the spirit of the law to influence legislation on aboriginal rights and place these rights under state law, the legislature is trying to make the tribes perpetual wards of the state."

After the MITSC briefed his senior staff, Governor Paul LePage commented, "I congratulate the members of the MITSC for their hard work in producing the report, and I look forward to the continuation of healthy dialogue between the state and tribal governments."

"This assessment shows the urgent need for the Indian tribes in Maine and Maine's state government to continue to work out conflicts together," stated House Judiciary Chair Charles Priest. "The key to a fruitful relation between the state and the Passamaquoddy is respect."

The report finishes with the following summation, "The MITSC concludes that open dialogue, negotiations, and formal agreements are mechanisms that are both pragmatic and constructive. 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."

# Debate heats up over rights of state to limit tribal fishing of pricey eels

Douglas Rooks / Special to the Sun Journal  
Sunday, July 27, 2014

When Newell Lewey drove up to the State House on the morning of Feb. 12, he was in an optimistic frame of mind.

The Passamaquoddy Tribe had been negotiating with the state about a joint licensing system for the upcoming elver run in March, which would be operated under a quota system required by the Atlantic State Marine Fisheries Commission, a federal regulatory agency.

Lewey, a member of the Passamaquoddy Tribal Council and its fisheries advisory panel, was hoping the Legislature's Marine Resources Committee would move ahead with a bill containing terms for joint management, an arrangement that would provide quotas for several Indian tribes, as well as individual quotas for all other license holders.

The tribes would issue their own licenses and be subject to the overall limit, but would be able to allocate the catch as they saw fit, without an individual limit.

"That was very important to us," Lewey said. "We don't fish as individuals. We fish as a community."

When the work session opened, however, Patrick Keliher, commissioner of the Department of Marine Resources, told the committee the state Attorney General's office had decided the proposed arrangement with the tribe would violate the equal protection clause of the federal Constitution.

And, just like that, the framework for agreement disappeared. Once again, a promising effort to manage a fishery cooperatively ended in disagreement and confusion.

"By 11 a.m., I was befuddled and bewildered," Lewey said. "It was like somebody hit me on the head with a 2-by-4."

The committee, and the full Legislature, ultimately voted for provisions in LD 1625 that imposed the same individual quotas on the tribes as for other license holders, despite the tribe's fervent objections.

The Passamaquoddy Tribe objected to later characterizations in news reports that it had "accepted," or would "abide by," the individual restrictions. Given the imminent beginning of the elver season, Lewey said they had no choice.

Chief Joseph Socobasin said, "Given the dire economic problems facing tribal members and the investment of two years in developing the elver fishery, the tribe made the difficult decision to amend their own law to assure safety for their fishers."

In the last few years the elver run had suddenly become one of the state's most valuable fisheries. The Pacific tsunami in March 2011 that wrecked several Japanese nuclear power plants had also destroyed the Asian nation's supply of elvers, also known as glass eels, that are similar to the American eel in its juvenile stage.

The ensuing run-up of elver prices, to over \$2,000 a pound at some points, set up a gold rush atmosphere along Maine's coastal rivers and streams. The Maine catch became sought after far and wide, in large part because Maine is the only Atlantic state that permits commercial elver fishing, except for a small quota in North Carolina.

The explosion of fishing pressure also strained the resources at DMR, said Keliher. "Until three years ago, hardly anyone was particularly interested in elver fishing, including the tribes."

And as DMR began enforcing individual catch limits, it stirred up bad memories for the Passamaquoddy, who had faced off with state enforcement officials before. Along the streams, tensions were running high during the 2013 season, which lasted only a few weeks in March and April.

In the biggest enforcement effort, state Marine Patrol officers arrested 63 tribal members with tribal licenses for illegal elver fishing, though the District Attorney ultimately decided not to prosecute any of the cases, and dropped the charges after attorneys for the tribe argued the law was unenforceable.

Tensions over saltwater fishing rights have persisted between the state and the Passamaquoddy for many years, and the conflict is now the subject of a report from the Maine Indian Tribal-State Commission issued earlier this month. MITSC was created under the Indian Land Claims Settlement Act of 1980, federal legislation that resolved claims by the tribes to nearly two-thirds of the land area of Maine.

It provided substantial funding for land purchases by the tribes, and also "uniquely" placed the tribes under the jurisdiction of state, rather than federal law. That is why, for instance, tribes in Connecticut, New York and many other states were able to open casinos under the Indian Gaming Regulatory Act passed by Congress in 1988, while Maine's tribes have not, since the state has not given its consent.

In the area of fisheries, there have been differences over how to apply the settlement act, and the Maine Implementing Act, since shortly after the legislation was enacted nearly 35 years ago.

The MITSC report asserts that the recent elver legislation, and other bills passed during the King administration, violated terms of the implementing act, since changes require the consent of both sides. The law, it says, should prevent terms from being imposed on the tribes. And the report calls on the state to reopen negotiations as soon as possible.

"As I read the report, it says that the state should repeal these laws immediately," said Lewey.

That is not the position taken by the Attorney General's office, however. In a March 12, 2013 opinion, it says that, "reading of the statutes and the legislative history of the (settlement act) leads to the conclusion that tribal members are subject to Maine's regulatory authority over marine resources to the same extent as other Maine citizens and that MITSC has no particular authority or role regarding saltwater fishing issues."

And the opinion concludes, "Although the Legislature has voluntarily granted certain privileges to tribes in saltwater fisheries licensing, these provisions are not required by the settlement act and the Legislature is free to change them."

The tribe submitted its own legal opinion, from Michael Rossetti of the firm of Akin Gump, that describes how in Washington state, under federal court order, tribes and the state have successfully implemented cooperative management to "promote positive tribal-state relations without litigation."

Pat Keliher said DMR is still reviewing the MITSC report with the Attorney General's office, and that the legal questions it raises could result in additional guidance being offered.

From the Passamaquoddy perspective, the 2013-14 conflict echoed one that began in 1994 and came to a head in the following years.

The tribe decided to respond to the first arrests of tribal members with their own show of force. In 1996, Gov. Cliv Dore ordered the Passamaquoddy police chief to "intervene in any actions by any and all person or entity interfering with our people pursuing their aboriginal rights to harvest from our territorial seas with the strongest possible response."

DMR's director of law enforcement, Joseph Fessenden, countered, according to the report, that "Marine Patrol (will) fully enforce all law of Maine and that any obstruction of justice of a marine patrol officer in the course of his duties by any individual, including tribal police officers, will be referred for criminal prosecution."

After a cooling off period, the state and the tribe vowed to negotiate. In 1997, Gov. Angus King visited Passamaquoddy and Penobscot tribal leaders on their reservations, and the Legislature considered a bill, LD 1625, filed by Rep. Albion Goodwin, intended to prompt DMR to negotiate over what the tribe says are fishing rights granted by treaty, and not superseded by the settlement act.

But in 1998, as in 2014, the tribes say that the state imposed its terms on them rather than agree to a compromise.

Back then, too, 13 Passamaquoddy tribal members had been arrested for alleged fishing violations. The tribe unsuccessfully attempted to get the charges dismissed; a District Court judge ruled in the Beal case that the state charges could apply. None of these prosecutions were successful, either, though in Cumberland County defendants did agree to pay court costs.



Scott Ogden, a spokesman for King, now a U.S. senator, said "Senator King has not reviewed the full report, but as governor he worked on the administration of the settlement act and the need to balance the interests of the tribes and state government entities.

He hopes that with the release of the MITSC report both parties will continue to work together to reach a fair and equitable resolution.

There is little question that the continuing differences dismay and discourage the tribal representatives. The report contains a section on "Impact of Racism on Tribal-State Relations" and quotes the findings of a 1997 task force: "Racism is experienced by the Wabanaki, but generally is not recognized by the majority society."

Racism is part of the context of tribal-state relations. And, in a passage that reflects divisions over this year's elver season legislation, it says, "Understanding the nature of this relationship and these responsibilities is fundamentally important in order to address negative prejudicial attitudes and the prevailing public opinion that the tribes are seeking 'special treatment' rather than seeking the respect due them as sovereign nations. In this case, racism occurs when national and state governing bodies and citizens do not consider these distinct rights as legitimate because they do not exist for other racial groups."

Joan Nass, a Republican state representative from 2004-12, recently was appointed to MITSC and participated in the meetings that prepared the report for release. She said she was concerned to hear, from tribal members, that "they feel the state is against them."

The difference in perception and conclusions run throughout not only the law, but in the way the cultures perceive each other. In addition to the issue identified by Newell Lewey, the relative importance of individual and community rights the report says that "the negotiations have involved two separate cultures trying to talk with each other; the importance the Passamaquoddy give to the spoken word over the written word, and the lack of evidence that the Passamaquoddy signed away their fishing rights."

Even where the terminology is similar, the interpretations aren't. Take "sustenance" fishing, reserved to the tribes under federal law. Does this mean only the fishery's nutritional value for personal use, or does it also include the economic value represented by the resource?

The tribes claim that the state has unfairly limited the "sustenance" concept to exclude their members from commercial licenses. Where originally it was left to the tribes to determine what sustenance meant for them, a 1998 statute refers to sustenance as "activities of taking, possessing, transporting and distributing," the report finds. It then adds, "This left out two components of sustenance: barter and exchange, thus impacting the tribe's ability to participate in the commercial fishery."

Then there are the different emphases on whether there is even an open question concerning saltwater rights, which extend beyond tribal reservation boundaries into tidal areas.

The Attorney General's opinion says any separate tribal fishing rights exist only in fresh water, not saltwater. But the report cites a 1997 statement by Richard Cohen, the state attorney general at the time the settlement act was passed, and later MITSC chairman: "It is my recollection that salt water rights and issues were not discussed during the settlement negotiations. They are legitimate issues for discussion now."

Similar differences figured in the recent debate over the Attorney General's finding that the proposed elver license system would violate "equal protection of the law" for other citizens. The tribes say that under this reasoning, any separate arrangement could be seen as running afoul of the concept, yet the tribes are already recognized as having separate status under federal law.

Lewey points out that license rules are already different in other respects. The Passamaquoddy have for years issued lifetime fishing and hunting licenses, something that the state adopted only in the past few years. "Was that equal?" he asks. "How can you say what differences are prohibited?"

Pat Keliher says the tribes object to some agreements on fishing rights, but accept others — such as separate legislation this year that expanded licenses for the Penobscot Tribe.

Keliher said the "equal protection" problem in the elver license dispute involved enforcement. If the tribes didn't have individual quotas, but only an overall one, there would be no effective means of imposing a penalty if the quota was exceeded.

"The tribe isn't a license-holder," he said. "They can't be fined. So who would you penalize?"

It might seem the debate is proceeding in an endless circle. Keliher says he doesn't know if joint resource management can be accomplished in Maine, but he says DMR is committed to continuing the dialogue.

"After the bill (LD 2145) was passed, I continued to talk with the tribal governors," he said. "We will remain at the table. We're not giving up."

He also rejects the notion that the state is "against" the tribes. "That's not the way we see it, not at all," he said.

The MITSC report makes a number of specific recommendations that it believes could re-start a troubled relationship. One is to use MITSC to review pending legislation to ensure it conforms with the implementing act; it says it is now rarely consulted.

Another is to hold a "tribal-federal-state summit on marine resource co- management."

Will that be enough to open a new path for the state and tribes? "We hope the report will be distributed widely, and fully discussed," Lewey said. "It sheds a light I don't think can be turned down."



OFFICE OF  
THE GOVERNOR

NO. 21 FY 11/12  
DATE August 26, 2011

**AN ORDER RECOGNIZING THE SPECIAL RELATIONSHIP  
BETWEEN THE STATE OF MAINE AND THE SOVEREIGN NATIVE  
AMERICAN TRIBES LOCATED WITHIN THE STATE OF MAINE**

**WHEREAS**, the State of Maine is a sovereign state in its own right;

**WHEREAS**, the Passamaquoddy Tribe, the Penobscot Nation, the Aroostook Band of Micmacs, and the Houlton Band of Maliseets are sovereign nations in their own right;

**WHEREAS**, the unique relationship between the State of Maine and the individual Tribes is a relationship between equals;

**WHEREAS**, the individual members of the Tribes are citizens of State of Maine; and

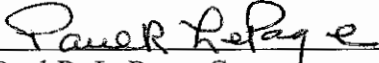
**WHEREAS**, the State and Tribes should work together as one to solve issues facing all Maine citizens;

**NOW, THEREFORE**, I, Paul R. LePage, Governor of the State of Maine, hereby order as follows:

1. Every Department and Agency of State Government shall develop and implement a policy that:
  - a. Recognizes the relationship among sovereigns that exists between the State of Maine and Maine's Native American Tribes;
  - b. Promotes effective two-way communication between the State and the Tribes;
  - c. Enables the Tribes to provide meaningful and timely input into the development of legislation, rules, and policies proposed by the State agency on matters that significantly or uniquely affect those Tribes;
  - d. Establishes a method for notifying employees of the State agency of the provisions of this Executive Order and the policy that the State agency adopts pursuant to this section; and
  - e. Encourages similar communication efforts by the tribes.

2. Every Department and Agency of State Government shall designate a "Tribal Liaison" to facilitate effective communication between the State and the Tribes.
3. The duties of the "Tribal Liaison" shall include:
  - a. Establishment of a communications plan to facilitate information sharing between the State agency and Tribal government;
  - b. Creating and adopting standard operating procedures to engage Tribal Governments at the earliest possible juncture of the development of any legislation, rules, and policies proposed by the State agency on matters that significantly or uniquely affect those Tribes;
  - c. Advising the Chief Executive of the State agency of issues of concern to the Tribes and the impact on the Tribes of proposed legislation, rules, and policies; and
  - d. Other such duties as the Department or Agency may require.
4. In delivering necessary services, every Department and Agency should strive to partner with the Tribes to utilize existing resources to efficiently provide services. Further, Departments and Agencies shall take into consideration the traditions and customs of the Tribes to prevent unnecessary interference.
5. Nothing in this Order creates any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the State of Maine, its agencies, or any person. This order simply recognizes the unique and distinct Tribal Governments in Maine and a process for communicating on an equal level. This order supersedes Executive Order 06 FY 10/11.

The effective date of this Executive Order is August 26, 2011.

  
Paul R. LePage, Governor

# **An Order to Promote Effective Communication Between the State of Maine and the Native American Tribes Located Within the State of Maine**

February 24, 2010

06 FY 10/11

WHEREAS, the State of Maine has a unique legal relationship with Native American Tribes located within the state, including the Passamaquoddy Tribe, the Penobscot Nation, the Aroostook Band of Micmacs, and the Houlton Band of Maliseets, as affirmed and set forth in state and federal law; and

WHEREAS, the State of Maine is committed to ensuring an effective social, economic and legal relationship between the Native American Tribes and the State; and

WHEREAS, it is vital to the well-being and prosperity of the State of Maine that the State maintain and continue to foster long-lasting and committed relationships with the Native American Tribes in Maine; and

WHEREAS, there are numerous unexplored opportunities and possibilities for the State and Tribes to pursue mutual programs and policies in a collaborative partnership to enhance and preserve natural resources for the betterment of communities and citizens in Maine;

NOW, THEREFORE, I, John E. Baldacci, Governor of the State of Maine, do hereby order and direct that every state agency shall develop and implement a policy that:

1. Promotes effective two-way communication between the state agency and Maine's Native American Tribes;
2. Promotes positive government-to-government relations between the State of Maine and Maine's Native American Tribes;
3. Enables Maine's Native American Tribes to provide meaningful and timely input into the development of legislation, rules and policies proposed by an agency on matters that significantly or uniquely affect those Tribes;
4. Establishes a method for notifying employees of the state agency of the provisions of this Executive Order and the policy that the state agency adopts pursuant to this section; and
5. Encourages similar communication efforts by the tribes.

I further direct that every state agency shall designate a tribal liaison, who reports directly to the office of the head of the state agency, to:



A. Assist the head of the state agency with developing and ensuring the implementation of the communication policy set forth above; and

B. Serve as a contact person who shall maintain ongoing communication between the state agency and Maine's Native American Tribes.

Nothing in this order creates any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the State of Maine, its agencies, or any person.

Effective Date

The effective date of this Executive Order is February 24, 2010.

John E. Baldacci, Governor



## Maine Indian Tribal-State Commission

December 20, 2013

Governor Paul R. LePage  
1 State House Station  
Augusta, ME 04333

Jamie Bissonette Lewey  
Denise Altvater  
John Banks  
Harold Clossey  
Matt Dana  
Gail Dana-Sacco  
H. Roy Partridge  
Robert Polchies  
Linda Raymond  
Brian Reynolds

Dear Governor LePage:

We write with deep concern about the Elver Project as described in media reports published last month. The Elver Project is a joint investigation of potential income fraud involving the Department of Health and Human Services (DHHS) in collaboration with Maine Revenue Services (MRS) and the Department of Marine Resources (DMR). Although the media has contacted the Maine Indian Tribal-State Commission (MITSC) seeking comment on this issue, we have decided that the appropriate response is conveying our concerns to you directly before entering the public arena. It is in this spirit of conflict resolution and the development of strong tribal-state relations that we write to you with considerable urgency. While the MITSC understands the importance of investigating welfare fraud, we think there are deeper issues that will come to the forefront if the Elver Project is implemented the way that it has been framed by the media.

Last spring, 432 individuals received licenses to harvest elvers from the DMR, while the Passamaquoddy Tribal Government issued 575 licenses to its citizens in 2013. The MITSC questions why the State of Maine has chosen to focus on this particular fishery when many other commercial fisheries exist including lobster, clams, urchins, and worms for which harvesters may have failed to disclose income earned from the sale of their catch. With the number of Passamaquoddy fishers exceeding the number of other elver harvesters by approximately 133%, the Elver Project will undoubtedly impact Passamaquoddy fishers more than those fishing with state licenses. This potential disproportionate scrutiny becomes more questionable when considering the data that the Passamaquoddy catch was significantly less than 10% of the total elver harvest statewide. Such facts will raise more questions about focused attention on Tribal fishers.

If the Passamaquoddy license holders become the focus of this investigation just by virtue of their level of participation in the fishery and the depth of poverty they endure, the Maine Indian Tribal-State Commission fears that relations between the Wabanaki and the State will be adversely affected. Additionally, the MITSC is very aware that the vast majority of Wabanaki participants in the elver fishery are very poor people. Any income derived from sustenance fishing efforts needs to be weighed against the grueling poverty the Tribe has endured as a direct result of the Settlement Acts—persistent poverty that the elver fishery did little to abate.

John Dieffenbacher-Krall  
Executive Director  
P.O. Box 241  
Stillwater, ME 04489  
(207) 817-3799  
mitsced@roadrunner.com

Furthermore, we must recognize that the fundamental disagreements over the inclusion of salt-water fishing rights under the natural resource provisions of the 1980 Settlement, and the disproportionate number of Passamaquoddy citizens singled out for civil and criminal fishing penalties stemming from the last elver fishing season are the backdrop for the Project. Given the complexity of these existing conversations between the Passamaquoddy Tribe and the State, we encourage you to weigh carefully the imposition of additional sanctions on Tribal citizens.

Governor, the MITSC has been very impressed by the level of attention your administration has given to Wabanaki-State issues. One of your greatest achievements is Executive Order 21 FY 11/12 which explicitly obligates every department and agency of State Government "to engage Tribal Governments at the earliest possible juncture of the development of any legislation, rules, and policies proposed by the State agency on matters that significantly or uniquely affects those Tribes." Our reports from Passamaquoddy MITSC Commissioners lead the MITSC to conclude that no consultation has taken place concerning the Elver Project between the Passamaquoddy Tribal Government and the State of Maine.

Lastly, it is crucial to raise the State of Maine's leadership in the area of Indigenous rights when the Maine Legislature to the best of our knowledge became the first governmental body in North America to express its support for the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The Maine Legislature adopted the resolution in support of UNDRIP on April 15, 2008. Article 19 of UNDRIP reads:

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.

The UNDRIP Resolution in combination with EO 21 FY 11/12 should lay the foundation for healthy tribal-state relations. We encourage you and the Tribes to utilize these strong tools to work out a solution that will not further exacerbate the poverty experienced by Wabanaki people.

You have expressed your concern about this deeply entrenched poverty experienced by the Passamaquoddy People and all of the Wabanaki Tribes within the State of Maine. We urge you to use your authority to order DHHS, MRS, and DMR to transform the Elver Project from an investigative and potentially punitive effort to an educational one ensuring all people accepting State benefits understand their responsibilities, and have the tools to come into compliance with any income reporting subject to benefit determinations.

Sincerely,

A handwritten signature in black ink that reads "John Dieffenbacher-Krall". The signature is written in a cursive, flowing style.

John Dieffenbacher-Krall  
Executive Director





STATE OF MAINE  
OFFICE OF THE GOVERNOR  
1 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0001

Paul R. LePage  
GOVERNOR

November 17, 2014

John Dieffenbacher-Krall, Executive Director  
Maine Indian Tribal-State Commission  
P.O. Box 241  
Stillwater, Maine 04489

Dear John,

I write today in response to the concerns raised in your December 20, 2013 letter regarding a joint investigation, referred to as the "Elver Project," conducted by the Department of Health and Human Services (DHHS) in collaboration with Maine Revenue Services (MRS) and the Department of Marine Resources (DMR). At the outset, let me be clear that the focus of this investigation bears no relationship to the presence or absence of tribal participation in this fishery. Any attempts by the media to indicate otherwise are purely speculative and completely inaccurate.

As you know, the elver fishery has been subject to uniquely strong scrutiny at the Atlantic States Marine Fisheries Commission (ASMFC), the interstate management body who oversees this fishery, and there have been petitions to list American eels under the Endangered Species Act. Since 2010, DMR has documented significant discrepancies between harvester and dealer reported landings, with harvester landings being significantly underreported. This discrepancy presented a monitoring and enforcement challenge that DMR was obligated to address or risk losing the fishery altogether. At \$40 million in landed value, this would have been a tremendous economic loss for the state and one I simply would not allow to occur. The fact of this investigation bears no additional burden or disproportionate scrutiny for tribal participants in the elver fishery than on state license holders.

Commissioner Keliher was obligated by law to report the discrepancies in landings as it may have indicated fraudulent reporting of income occurring against the state. Regardless of who is earning this income, their historic participation in the fishery, or their overall financial position, there is simply no excuse for failing to pay the appropriate taxes on this income as required by state law.

Because there continues to be an ongoing investigation in this matter it is inappropriate for me to comment further.

Sincerely,

Governor Paul R. LePage



PRINTED ON RECYCLED PAPER

PHONE: (207) 287-3531 (Voice)

TTY USERS CALL 711  
[www.maine.gov](http://www.maine.gov)

FAX: (207) 287-1034

SENATE

CHRISTOPHER K. JOHNSON, District 20, Chair  
EDWARD J. MAZUREK, District 22  
RICHARD G. WOODBURY, District 11

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DIANE STEWARD, Committee Clerk



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CHUCK KRUGER, Thomaston  
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MICHAEL G. DEVIN, Newcastle  
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WAYNE R. PARRY, Arundel  
PETER DOAK, Columbia Falls  
ELLEN A. WINCHENBACH, Waldoboro

February 3, 2014

State of Maine  
ONE HUNDRED AND TWENTY-SIXTH LEGISLATURE  
COMMITTEE ON MARINE RESOURCES

John Dieffenbacher-Krall, Executive Director  
Jamie Bissonette Lewey, Chair  
Cushman Anthony, Former Chair  
Paul Bisulca, Former Chair  
Maine Indian Tribal State Commission  
P.O. Box 241  
Stillwater, ME 04489f

Re: **LD 1625 / your letter dated 23 January 2014**

Dear Director Diffenbacher, Chair Lewey, Former Chairs Anthony and Bisulca:

Thank you for your letter dated January 23, 2014 expressing your interest and concerns with the above-referenced legislation that is now before the Joint Standing Committee on Marine Resources.

We would like first to address comments relative to the Marine Resources Committee not sending copies of bills out as they are advertised. It is the responsibility of all parties who follow legislative actions to keep abreast of any bill being proposed which might impact their concerns. Anyone is welcome to add their email address to the Committee's list of Interested Parties (IP's) to ensure that they receive notices of the Marine Resources Committee's work and may do so by contacting the Committee's clerk, Diane Steward. In the case of the MITSC, we would think that might be the role for the Executive Director. It should be noted that MITSC, through the Executive Director, is on the list of IP's and does receive such notices.

Regarding the nature of ongoing discussions and consultation between the Executive branch, and Tribal leaders and representatives, in relation to adherence to executive orders, this matter is one which must be resolved with the Executive Branch of Maine Government. It does not fall under the purview of the Marine Resources Committee. If it rises to the level, tribal and state relations would be a matter for oversight by the legislature's Judiciary Committee.

As you know, there has been a great deal of interest in LD 1625 expressed by several parties and we are keenly aware of how critical it is to have some resolution prior to the opening of the elver fishing season. It is also important that everyone involved realizes that whatever action taken by the Maine Legislature is also subject to actions taken by the Atlantic States Marine Fisheries Commission (ASMFC), which will meet the week of February 3<sup>rd</sup>, 2014. Representative Kumiega is a Commissioner of that body and will attend their proceedings in the upcoming meetings.



MITSC  
February 3, 2014  
Page 2.

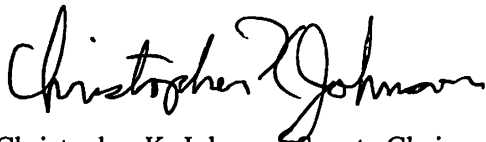
As you rightly point out, deliberations must take into consideration current statutes at both the State and Federal levels; additionally, all parties from the Legislative Branch, the Executive Branch, as well as the Tribes, must review all proposals carefully before crafting, changing or expanding, current Maine statute. We are confident that the parties involved will fully exercise these precautions so as to avoid any decisions which might be subject to unnecessary redress.

We are aware from your letter, from testimony heard at the public hearing and from our conversations of your concerns as regards LD 1625 as written. We are also aware that there have been many hours spent in talks and recognize there remains further discussion before the final piece of legislation is voted. As your recent email indicates, the bill is moving towards a public policy implementation that much better balances the needs of all parties involved. To that end, we stand ready to do whatever we can to further those earnest and respectful discussions.

We note that any Memorandums of Understanding (MOA's) would, as you know, not be between the Legislative Branch and the Tribes, but between the State's Executive Branch and the Tribes. It may, however, call for enabling legislation which would allow the Executive Branch to move forward with some of the proposed provisions. We stand ready to amend LD 1625 in a manner that will allow for such.

Thank you again for taking the time to express your interest and concerns. We look forward to future discussions as we work towards finalizing language in LD 1625 that is, at the very least, somewhat acceptable to all parties.

Sincerely,



Christopher K. Johnson, Senate Chair  
Committee on Marine Resources



Walter A. Kumiega III, House Chair  
Committee on Marine Resources

CKJ:WAK/ds

Cc: Members, Marine Resources Committee  
Chief Reuben Cleaves  
Chief Brenda Commander  
Chief Kirk Francis  
Chief Edward Peter Paul  
Chief Joseph Socobasin

Governor Paul LePage  
Attorney General Janet Mills  
Senator Linda Valentino  
Representative Charles Priest  
Commissioner Patrick Keliher  
Jerry Reid, Assistant Attorney General

**LICENSE AGREEMENT  
BETWEEN  
THE MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY  
BUREAU OF PARKS AND PUBLIC LANDS  
AND  
THE PENOBSCOT INDIAN NATION**

LICENSE AGREEMENT ("Agreement" or "License") made, effective this 19 day of May, 2014 by and between the State of Maine, Department of Agriculture, Conservation and Forestry, acting by and through the Bureau of Parks and Lands, (hereinafter "BPL") Off-road Recreational Vehicle Office, with a mailing address of 22 State House Station, Augusta, Maine 04333-0022, and the Penobscot Indian Nation, 12 Wabanaki Way, Indian Island, Maine 04468 (hereinafter "Tribe"), pursuant to 12 M.R.S. § 1816.

**WITNESSETH:**

WHEREAS, the State of Maine acquired land pursuant to a Quitclaim deed from the Bangor & Aroostook Railroad dated April 30, 2004, and recorded in the Piscataquis County Registry of Deeds, May 5, 2004 in Book 1554, Page 124; and

WHEREAS, a portion of said land acquired includes the Katahdin Iron Works Rail Trail ("Rail Trail or "License Area") that runs through the Town of Brownville and Williamsburg Township (Appendix A); and

WHEREAS, the Tribe has Trust land in Williamsburg Township; and

WHEREAS, the Tribe initially accessed that Trust land through roads located to the west, that have been closed by the current landowner; and

WHEREAS, currently the only other access to the Tribal Trust land is over the Katahdin Iron Works Multi-Use Rail Trail; and

WHEREAS, the Rail Trail can support vehicle traffic and ATV traffic on the Rail Trail is very light; and

WHEREAS, the Tribe is currently constructing an access road on their Trust land in Williamsburg Township that will be completed in 2-3 years; and

WHEREAS, the BPL wants to allow temporary vehicle use of the Rail Trail by the Tribal members, their families, guests and employees during the period of their road construction.

NOW THEREFORE, in consideration of the mutual promises contained in this Agreement, the BPL and the Tribe do hereby mutually covenant and agree as follows:

The BPL hereby gives permission, revocable and terminable as provided below, to the Tribe through this revocable License to use the License Area for the purposes and upon the conditions set forth hereinafter, to-wit: to enter upon said License Area with passenger vehicles to access Tribal property.

The Tribe covenants and agrees that it will comply with all terms, restrictions and conditions set forth herein.

1. **Term:** It is the parties' intent to have this Agreement be a one year renewable License, provided, however, that this License is revocable at any time after ninety (90) days due notice of the BPL's intention to cancel or revoke or when the use for which this License was given has been abandoned or materially modified, or whenever the terms and conditions imposed have been broken.
2. **Ownership:** The Tribe shall not obtain any proprietary interest in the subject multi-use recreational trail.
3. **Fee:** An annual fee of \$500.00 shall be paid by the Tribe to be split evenly between the Brownville Snowmobile Club, PO Box 296, Brownville, ME 04414 and the KI Riders ATV Club, PO Box 384, Brownville Jct., ME 04415. This payment shall be made on July 1<sup>st</sup> of each year this Agreement is in effect. A copy of the checks shall be forwarded to BPL for record keeping purposes.
4. **Expenses:** The BPL will incur no costs associated with maintenance due to vehicular use of the Rail Trail.
5. **Prohibited Travel:** Passenger vehicle travel is prohibited when the Rail Trail has enough snow cover to support snowmobiling or when it is posted closed due to saturated soils. Travel over 15 miles per hour is prohibited. Passenger vehicles shall yield to all other Rail Trail users.
6. **Prohibited Activities:** Plowing of snow is prohibited on the Rail Trail.
7. **Gate:** A gate will be maintained at the entrance to the Rail Trail. This gate will have double ended pins to accommodate a State lock and a Tribal lock. The gate shall remain locked in the closed position. Anyone passing through the gate shall lock the gate behind them.
8. **Identification:** All vehicles must carry a letter from the BPL authorizing travel on the Rail Trail and have lights and hazard flashers turned on while driving on the Rail Trail.
9. **Indemnification:** The Tribe, their families, friends, employees, agents or representatives enter and use the License Area at their own risk. The Tribe shall hold the BPL harmless from any and all claims, costs and expenses (including reasonable attorneys' fees) arising from the Tribe's use of the License Area.
10. **Insurance:** At a minimum, the Tribe shall provide and keep in force comprehensive general public liability insurance in a form satisfactory to the BPL against claims for personal injury, death, or property damage occurring on State property or for any vehicle or equipment used in connection with Rail Trail. At no time shall the coverage be less than \$400,000 with respect to personal injury or death to any one person, nor less than \$400,000 with respect to any one occurrence, nor less than \$400,000 for property damage. The Tribe shall provide the BPL with a copy of a certificate of insurance for all insurance policies that cover the License Area and activities in and on the License Area. All vehicles that use the Rail Trail must carry liability insurance in amounts required by Maine law. The Tribe shall be responsible for insuring its personal property against loss or damage from fire or other causes and shall maintain workers compensation and other insurance as may be required by law.
11. **Notices:** Any notice provided for or concerning this Agreement shall be in writing and be deemed sufficiently given when sent by certified or registered mail if sent to the respective address of each party as set forth at the beginning of this agreement.
12. **Surrender of License Area.** Upon termination of this License for any reason, the Tribe shall

peaceably surrender the License Area occupied by the Tribe in as good condition as such property was at the time of the Tribe's entry on to the License Area.

13. **No Recording.** This License Agreement may not be recorded in any public registry. The recordation of this License in any public registry shall automatically revoke the License without the need for further affirmative action by any party.

14. **Assignability.** This License Agreement may not be assigned.

15. **Interpretation.** This Agreement shall be interpreted under the laws of the State of Maine.

16. **Entire Agreement.** This document constitutes the entire Agreement between the parties concerning this License. No party shall be bound by any representation or communication, spoken or written, not contained herein.


17. **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original, all of which together shall constitute one and the same Agreement.

The terms, conditions and considerations of this Agreement may be altered, amended and changed from time to time by the mutual agreement of the Tribe and the BPL. All alterations, amendments and changes must be made in writing.

IN WITNESS WHEREOF, the parties hereto have had their duly authorized representatives sign and seal this License as of the day first written above.

**LICENSOR:**

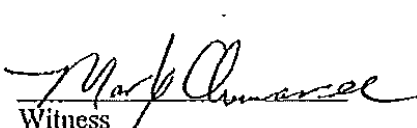
**THE STATE OF MAINE**  
Department of Agriculture, Conservation and Forestry  
Bureau of Parks and Lands

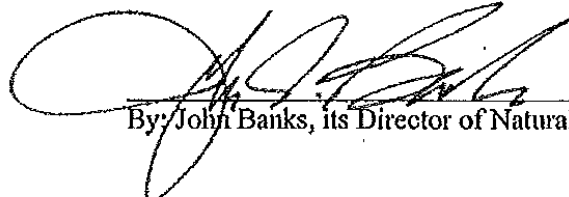
  
Witness

  
By: Willard Harris, its Director

**LICENSEE:**

**PENOBSCOT INDIAN NATION**

  
Witness

  
By: John Banks, its Director of Natural Resources

K:\ORV\Rails and Trails\Katahdin Iron Works\Tribal Information\License Agreement Draft



# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)  
5/15/2014

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

<b>PRODUCER</b> Cross Insurance 74 Gilman Road P.O. Box 1388 Bangor ME 04401		<b>CONTACT NAME:</b> Kelley Neptune, AU, AAI <b>PHONE (A/C No. Ext):</b> (207) 947-7345 <b>FAX (A/C No):</b> <b>E-MAIL ADDRESS:</b> kneptune@crossagency.com	
<b>INSURED</b> Penobscot Indian Nation 12 Wabanaki Way Indian Island ME 04468		<b>INSURER(S) AFFORDING COVERAGE</b>	<b>NAIC #</b>
		INSURER A: Travelers Ins. Co.	-
		INSURER B: Maine Employers Mutual Ins Co	11149
		INSURER C:	
		INSURER D:	
		INSURER E:	
		INSURER F:	

COVERAGES CERTIFICATE NUMBER: CL1310394420 REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	<b>GENERAL LIABILITY</b> <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR  GEN'L AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC			ZLP-14S93615-12-PD	10/1/2013	10/1/2014	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 100,000 MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 3,000,000 PRODUCTS - COMP/OP AGG \$ 3,000,000
	<b>AUTOMOBILE LIABILITY</b> <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS			H-810-9158P524-TCT-12	10/1/2013	10/1/2014	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ Uninsured motorist combined \$ 1,000,000
	<input checked="" type="checkbox"/> UMBRELLA LIAB <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED <input checked="" type="checkbox"/> RETENTION \$ 10,000			ZUP-14S93627-12-PD	10/1/2013	10/1/2014	EACH OCCURRENCE \$ 1,000,000 AGGREGATE \$ 1,000,000
	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below Y/N <input type="checkbox"/> N/A			1810019167	10/1/2013	10/1/2014	<input checked="" type="checkbox"/> WC STATU-TORY LIMITS <input type="checkbox"/> OTH-ER E.L. EACH ACCIDENT \$ 500,000 E.L. DISEASE - EA EMPLOYEE \$ 500,000 E.L. DISEASE - POLICY LIMIT \$ 500,000
A	<b>Abuse or Molestation Liability</b>			ZLP-14S93615-12-PD	10/1/2013	10/1/2014	Each Offense \$250,000 Aggregate \$250,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)  
Refer to policy for exclusionary endorsements and special provisions.

## CERTIFICATE HOLDER

## CANCELLATION

Department of Agriculture Conservation and Forestry Bureau of Parks and Lands Off-Road Recreational Vehicle 22 State House Station Augusta, ME 04333	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE  K Neptune, AU, AAI/KA <i>Kelly Neptune</i>

ACORD 25 (2010/05)

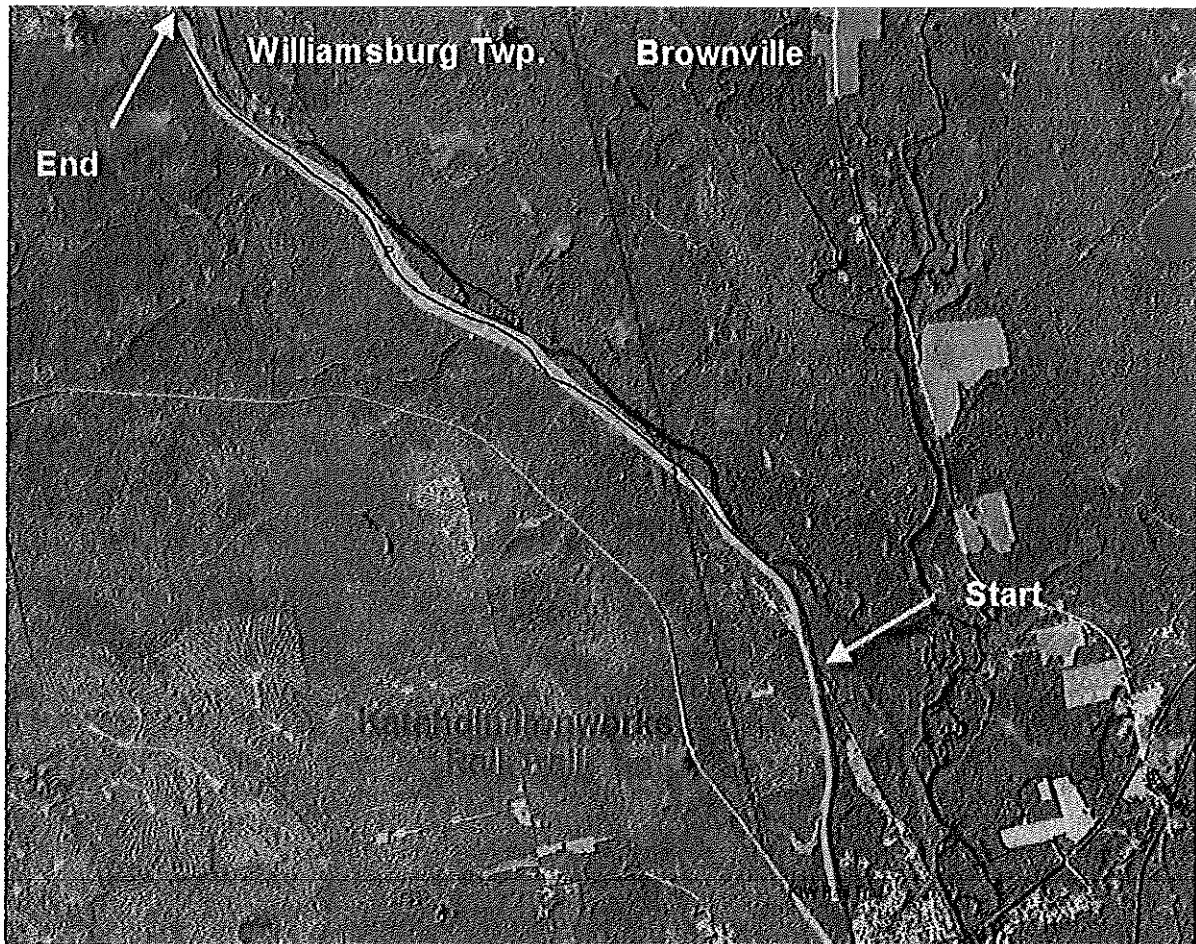
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INS025 (2010/05/01)

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APPENDIX A



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**Maine Indian Tribal-State Commission**

P.O. Box 241, Stillwater, ME 04489

(207) 817-3799 • mitsced@roadrunner.com

**[www.mitsc.org](http://www.mitsc.org)**