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

Maine Indian Tribal-State Commission

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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



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

Maine Indian Tribal State Commission Special Report 2014/1

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The full report and addenda can be found at:

http://www.mitsc.org/documents/148_2014-7-11AssessmentoftheIntergovernmentalSaltwaterFisheriesConflictBetweenPassamaquoddyandtheStateofMaine.pdf

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The Maine Indian Tribal-State Commission

Jamie Bissonette Lewey, Chair

Healing Justice Program in New England, American Friends Service Committee

Denise Altvater: Passamaquoddy Appointee

American Friends Service Committee Maine Wabanaki Program

John Banks: Penobscot Appointee

Department of Natural Resources, Penobscot Nation

Harold Clossey: State Appointee

Maine Development Foundation

Mathew Dana II: Passamaquoddy Appointee

Public Safety Coordinator, Passamaquoddy Tribe

Gail Dana-Sacco PhD. MPH: State Appointee

Assistant Research Professor, University of Maine

Hon. Richard Gould: State Appointee

Former State Legislator

Hon. Joan Nass: State Appointee

Former State Legislator

H. Roy Partridge M.S.W., M.A., M. Div., PhD.: State Appointee

Office of the President, Bowdoin College and Visiting Assistant Professor of Sociology

Robert “Bert” Polchies: Penobscot Appointee

Tribal Elder, Cultural Interpreter and Spiritual Leader

Linda Raymond: Maliseet Appointee

Maliseet Tribal Council

Brian Reynolds: Maliseet Appointee

Tribal Administrator, Houlton Band of Maliseet Indians

Hon. Henry Bear: Ex-Officio

Maliseet Tribal Representative to the Maine State Legislature

Hon. Wayne Mitchell: Ex-Officio

Penobscot Tribal Representative to the Maine State Legislature

Hon. Madonna Soctomah: Ex-Officio

Passamaquoddy Tribal Representative to the Maine State Legislature

Norman Bernard: Observer

Aroostook Band of Micmacs, Tribal Council

Peggy Caparotta: Observer

Aroostook Band of Micmacs, Tribal Council

John Dieffenbacher-Krall: Staff

Executive Director

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MITSC commissioners reviewed and provided direction on several preliminary drafts. As part of our preparation process, the MITSC met with the offices of the Governor, 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.

The MITSC extends its appreciation to the staff of the Maine State Law and Legislative Reference Library, the Maine State Archives and the Office of Policy and Legal Analysis for assistance with locating primary material.

The MITSC thanks the Honorable Donald Soctomah, Tribal Historic Preservation Officer of the Passamaquoddy Tribe, for use of the photograph of *Pulpit Rock* in the Passamaquoddy Bay for the cover of this report.

The MITSC Commissioners formally reviewed this report on April 30, 2014 and approved the final version for release on June 17, 2014.

Executive Summary

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

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

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

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

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

Introduction

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

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

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

1. MICA (25 U.S.C. § 1735 (a)) provides that “In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern.” The provisions of the federal MICA thus override the MIA provisions when there is a conflict between the two.
2. 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 tribes and the state within their respective jurisdiction or the allocation of responsibility or jurisdiction over governmental matters between the tribes and the state.

This report reviews:

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

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

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

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

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

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

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

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

Section I: Emergence of the Conflict and Attempts to Resolve Saltwater Fishery Issues

Passamaquoddy Bring Emerging Saltwater Conflicts to the MITSC

A review of the MITSC minutes reflects that the Passamaquoddy Tribe began raising the saltwater fishing issue as early as 1984 (Addendum 2). The MITSC's participation in the resolution of saltwater fishery and marine resource issues relative to the MICSA and the MIA commenced in earnest in 1994 when, at the request of the Passamaquoddy Tribe, the MITSC hosted and staffed a meeting attended by Cliv Dore, Passamaquoddy governor at Pleasant Point; Fred Hurley, MITSC commissioner, State of Maine; and William Brennan, commissioner of the DMR. A set of notes taken by then MITSC Executive Director Diana Scully during this meeting reflect the following issue areas:² (Addendum 3)

1. Passamaquoddy saltwater licensing provisions;
2. Increased DMR law enforcement presence in Downeast Maine resulted in the first arrest of a Passamaquoddy fisher for fishing without a license;
3. Dealers were not buying Passamaquoddy harvested clams because Passamaquoddy harvesters were not licensed by the state;
4. Regulatory restrictions on the sea urchin fishery that were passed by the Maine State Legislature without consultation with the Tribe.

Although the parties disputed the extent of the Tribe's reach in regard to the saltwater fishery, the notes reflect that the Tribe and the DMR were in agreement that saltwater issues were not addressed in the MICSA or the MIA. Yet, they came to opposing conclusions about how to apply that fact to the determination of Passamaquoddy saltwater fishing rights.

The notes summarize next steps: Governor Dore would put Maine Assistant Attorney General (AAG) Tom Harnett in touch with tribal attorneys at the Native American Rights Fund (NARF) in Colorado to discuss sustenance in aboriginal matters vs. commercial fishing with respect to licensing and the DMR would ask AAG Harnett to clarify the state's interpretation of the Settlement Acts and potential statutory changes in commercial fishing.

Increasing Tension 1994-1996

Between 1994 and 1996, tension surrounding this issue increased until, on October 25, 1996, Passamaquoddy Governor Dore issued an order to the Pleasant Point Passamaquoddy Police Chief, Joseph Barnes, directing him to "intervene in any actions by any and all person(s) or entity interfering with our people pursuing their Aboriginal Rights to harvest from our Territorial Seas with the strongest possible response."³ (Addendum 4) This order resulted in a December 3, 1996 letter from the DMR's Director of Law Enforcement, Joseph E. Fessenden, advising Governor Dore that the "Marine Patrol would fully enforce all laws of Maine and that any obstruction of justice of a Marine Patrol officer in the course of his duties by any

² MITSC Notes taken by Diana Scully 11/21/94 (Addendum 3)

³ Cliv Dore, Tribal Governor, Interoffice Memorandum to Joseph Barnes, Chief of Police, October 25, 1996.

individual, including Tribal Police officers, will be referred for criminal prosecution and for any appropriate civil action.”⁴ Fessenden went on to suggest a meeting on December 12, 1996 to discuss the October 25th “memo and underlying saltwater fishing issues.”⁵ (Addendum 5) The MITSC was unable to locate evidence of the suggested December meeting or any subsequent meetings between the Tribe and the DMR.

The 1997 “Task Force on Tribal-State Relations”

The January 15, 1997 final report of the Task Force on Tribal-State Relations, *At Loggerheads—the State of Maine and the Wabanaki*, identified seven areas of conflict including three that reflect the concerns in this inquiry: differing views on treaties and aboriginal rights, marine issues and sustenance fishing.⁶ *At Loggerheads* also indicated that the MITSC minutes reflected that “Passamaquoddy concerns about marine issues” were discussed in seven meetings during five separate years.⁷

LD 273 “Resolve, Directing the Commissioner of Marine Resources to Negotiate with the Passamaquoddy Tribe Regarding Fishing Rights”

Pembroke Representative to the Maine State Legislature, Albion Goodwin, became concerned that the DMR was not negotiating with the Passamaquoddy Tribe. On January 21, 1997, he introduced LD 273 *A Resolve, Directing the Commissioner of Marine Resources to Negotiate with the Passamaquoddy Tribe Regarding Fishing Rights*. (Addendum 6) LD 273, introduced as emergency legislation, directed the Commissioner of Marine Resources to request meetings with Passamaquoddy leadership to discuss the Tribe’s claims to fish in coastal waters and to work out an agreement.

The bill had its public hearing on January 30, 1997. Eleven people testified at the hearing. Ten testified in favor of the bill with Penn Estabrook, Deputy Commissioner of Marine Resources, testifying against the bill saying, “Because there is a good faith effort in negotiations underway, it is our sense that the proposal serves no purpose and may cloud the very process we are involved in.”⁸

On February 6, 1997, John Kelly, legislative analyst from the Office of Policy and Legal Analysis (OPLA) for the Joint Standing Committee on Marine Resources, summarized the testimony on LD 273. (Addendum 7) He recorded the following among the comments of the proponents: coastal fishing rights were not discussed in the MICSA; Governor King had led the Tribe to believe there would be a meaningful agreement; the Tribe’s traditional ability to harvest from the sea is questioned; the inherent right of the Passamaquoddy to harvest from the sea; lack of good faith on the part of state policymakers; the need for legislative oversight, the Tribe’s

⁴ Letter from Joseph E. Fessenden to Pleasant Point Passamaquoddy Governor, Cliv Dore, December 3, 1976

⁵ *ibid*

⁶ The Joint Task Force on Tribal-State Relations, “At Loggerheads—the State of Maine and the Wabanaki,” p 11-12.

⁷ *Ibid*, p 16

⁸ Testimony of E. Penn Estabrook Deputy Commissioner of Marine Resources, January 30, 1997

need to issue its own licenses that are as stringent or more stringent than the state's; the Passamaquoddy are a unique people; 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. Mr. Kelley recorded the following two points made by DMR in opposition to the bill: the DMR had negotiated in good faith and the DMR had dealt with the issues.

The Joint Standing Committee on Marine Resources amended LD 273 on February 12th to direct the Commissioner of Marine Resources to file a report on the status of their negotiations with the Passamaquoddy Tribe with the committee by May 1, 1997. On February 13th, LD 273 was voted out of committee as "Ought to Pass as Amended." Twelve Committee members voted in favor of the bill with Senator MacKinnon recorded as absent. LD 273, as amended, passed the House and the Senate and became effective on March 28, 1997.

Meeting the Requirements of LD 273 118th Legislature: The Department of Marine Resources Report

On April 24, 1997, Robin Alden, DMR Commissioner, summarized the outcomes of the discussions between the Passamaquoddy Tribe and the DMR in a letter (Addendum 8) to Passamaquoddy governors Cliv Dore of Pleasant Point and Richard Stevens of Indian Township. The letter outlined a DMR draft proposal, subject to legislative approval, to resolve the saltwater fishery conflict. DMR's proposed legislation was offered as a starting point for negotiations.

The DMR stipulated that all commercial fishermen, including members of the Passamaquoddy Tribe, had to be subject to the same conservation laws "concerning time, method and manner of harvesting the resource."⁹ The proposal included provisions for a joint State of Maine and Tribal Council License: the Tribe could issue a license in addition to, but not as a replacement for, a State of Maine license. The Passamaquoddy licenses would be regulated as an internal tribal matter and could only be available to Passamaquoddy citizens, but a Passamaquoddy citizen could also get a license directly from the state. Even though the DMR acknowledged the Passamaquoddy authority to issue commercial fishing licenses along with the state, the DMR expected that only they would have license revocation authority. The DMR agreed to work with the Tribe to eliminate barriers for tribal fishers to meet commercial qualifications and to collaborate on a species by species review of the personal use provisions for marine resources already preserved in law.¹⁰

On May 2nd, Robin Alden, Commissioner for Marine Resources, filed a three-paragraph report with the Joint Standing Committee on Marine Resources. The report referenced the requirement to report on the status of negotiations with the Passamaquoddy Tribe in LD 273, and attached a copy of her April 24th letter to the Passamaquoddy governors (Addendum 9), and the DMR's proposed legislation.

⁹ Letter from Robin Alden to the Passamaquoddy governors, April 24, 1997

¹⁰ Ibid

Government-to-Government Negotiations

By June 1, 1997, thirteen Passamaquoddy who were participating in various saltwater fisheries under the Passamaquoddy Tribe's management were charged with a number of violations of state law. Negotiations between the Tribe and the State stalled again. At this point, the Tribe circulated proposed legislation to resolve the conflict and protect the Tribe's sustenance activities and their jurisdiction over commercial fishing enterprises. (Addendum 10)

Governor King moved to advance a resolution of the saltwater fishery conflict by meeting directly with both Passamaquoddy governors on October 2, 1997 in Bangor and then travelling to Pleasant Point on October 14, 1997 to meet with Passamaquoddy Governor Rick Doyle and the Pleasant Point Passamaquoddy Tribal Council, thus establishing direct government-to-government negotiations. In an October 21, 1997 letter to both Passamaquoddy chiefs, Governor King offered to name a team of senior officials to negotiate with the Tribe, and to pay for a mutually acceptable facilitator to advance the negotiations. (Addendum 11)

Gov. King went on to say that any arrangement must be, "Consistent with the fundamental framework of the MILCSA (sic)."¹¹ King agreed to have his staff review the Tribe's proposal and, in turn, he requested that they review the DMR proposal offered by Robin Alden in her April 24th letter. He suggested that these two proposals be the focus of their first meeting. Additionally, Gov. King made it very clear that he would not intervene in the prosecution of Passamaquoddy fishers and that the legislation would not address any violation of existing Maine state law.¹²

We could find no record of any negotiations resulting from Gov. King's intervention.

¹¹ October 21, 1997 Letter from Governor Angus King to both Passamaquoddy Governors: Rick Doyle (Pleasant Point) and Governor Richard Stevens (Indian Township)

¹² Ibid, p2

Section II: Defending Passamaquoddy Saltwater Rights in Court: State v. Beal

State v. Beal

The Passamaquoddy Tribe hired an attorney to defend the Passamaquoddy fishers charged in June of 1997 and the 13 cases were joined into one: *State v. Beal*. The defendants filed a motion to dismiss the case based on lack of subject matter jurisdiction¹³ over Passamaquoddy Tribe fishers. They raised the federal protection of the Passamaquoddy Tribe's inherent authority, citing the US Senate Committee Reports from 1980 prior to the passage of the MICA that characterized the jurisdictional provisions of the Settlement as:

An innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self governing. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1979) as quoted in S. Rep. *supra*, at 29 (emphasis added in the Passamaquoddy brief).

The Passamaquoddy brief (Addendum 12) further asserted that saltwater fishing was never addressed during the Settlement negotiations.

By initiating these criminal cases, it is apparent that the State claims that Congress gave it the power to enforce state law against Passamaquoddy tribal members engaged in salt water fishing. The Defendants maintain that they have aboriginal or implied treaty fishing rights in the salt water, property rights which were not extinguished in the Settlement Act, and therefore remain federally protected . . . Although no express mention of salt water fishing appears in the Settlement Act, Defendants maintain that Congress clearly intended that matters vitally affecting the survival of tribal culture were to be an area of continuing tribal jurisdiction.¹⁴

This quote was footnoted explaining that jurisdiction on this issue was a political issue not addressed in the Settlement Act and, as such, required the application of the amendment provisions in 25 U.S.C. § 1725 (e)(1). This brief, dated December 13, 1997, included an attached copy of the Tribe's proposed legislation from October 1, 1997.

Judge John Romei, writing for the Fourth District Court of State of Maine, rejected the Passamaquoddy motion to dismiss the cases, finding that the State had jurisdiction over any violation of marine resources laws. (Addendum 13) His decision rested on two points of law: 30 M.R.S.A. § 6204 (Laws of the State to Apply to Indian Lands) and 30 M.R.S.A. § 6206.1 (Powers and Duties of the Indian Tribes Within their Respective Indian Territories (General Powers)). Links for all of the case law referenced in this section will be found in Appendix II.

¹³ Subject-matter jurisdiction is the requirement that the court have power to hear the specific kind of claim that is brought to that court.

¹⁴ Memorandum in Support of Defendant's Motion to Dismiss *State of Maine v. Beal*

30 M.R.S.A. § 6204 in Deciding *State v. Beal*

Even though Judge Romei acknowledged that both the MIA and MICSA are “silent on the expressed issue of salt-water fishing rights,”¹⁵ he accepted the state’s argument that the MIA in 30 M.R.S.A. § 6204 subjects “all Indians and natural resources owned by them to the laws of Maine and to the civil and criminal jurisdiction of the courts except as provided in the Act.”¹⁶ Judge Romei concluded that legal precedent resulting from two earlier cases, *Passamaquoddy Tribe v. State of Maine* and *Penobscot Nation v. Stilphen*, bound him. In both of these cases, 30 M.R.S.A. § 6204 was cited to uphold the state’s jurisdiction over the subject matter of each lawsuit. Therefore, Judge Romei relied on 30 M.R.S.A. § 6204 to terminate “any inherent salt-water fishing rights concerning non-reservation lands,”¹⁷ and thus held Passamaquoddy fishers to state law.

Public and Legislative Discourse on 30 M.R.S.A. § 6204 in 1997

Exactly one year earlier, on January 15, 1997, the Task Force on Tribal-State Relations (Task Force) issued its report *At Loggerheads*. Among its “Findings and Analysis” the Task Force looked at “Assimilation and Sovereignty.” In this section, it specifically looked at 30 M.R.S.A. § 6204 and heard testimony. Edward Bassett from the Passamaquoddy Tribe at Pleasant Point explained, “Section 6204 refers to the laws of the State applying to the Tribes. This is not self-determination . . . This is an erosion of sovereignty and should be amended.”¹⁸ Tom Harnett, AAG for the State of Maine, also found problems with the section, “People never want to talk about section 6204, but there must be an honest look at this, especially since this is a section the State relies on over and over again. This must be discussed, if one party does not agree with it.”¹⁹ At one point the Task Force even considered a proposal recommending the repeal of 30 M.R.S.A. § 6204.²⁰

Additionally, MITSC minutes dated June 5, 1997 read (Addendum 14):

Chair [Richard] Cohen²¹ indicated that the major issue in 1980 was the land claims; very little else was addressed (other than section 6204); the Settlement was not intended to mean that salt water rights were not negotiable in the future; there was never any discussion about assimilating the culture; and MITSC was set up to deal with all of these issues. He noted that the state negotiators had all they could do to extinguish the land claims. He said MITSC could look at and recommend things that should not be subject to section 6204 and a big step forward would be to have actions by the state affecting the tribes come before MITSC.

¹⁵ *State v. Beal*, p 2

¹⁶ *Ibid*, p 3.

¹⁷ *State v. Beal* p 5-6.

¹⁸ *At Loggerheads*, January 15, 1997, p 18

¹⁹ *Ibid*, p 18

²⁰ *ibid*, p 18 “One recommendation proposed for consideration by the Task Force was the repeal of Section 6204.”

²¹ Richard Cohen was Attorney General for the State of Maine at the time of the Maine Indian Claims Settlement Negotiations, and through the crafting of the MIA and MICSA.

When the Task Force considered recommending the repeal of 30 M.R.S.A. § 6204, Evan Richert, the director of the Maine State Planning Office and a state representative on the 1997 Task Force on Tribal State Relations had this to say,

Sovereignty stirs passion and fear on both sides. Before the State moves on this, it has to think through all of the implications. Sovereignty cuts across many ways and raises implications for others. For example, what are the implications for land and water outside the reservation and what are the implications for the Federal Government with respect to Maine? I am willing to think through these issues though. If it is assumed that there should be sovereignty, we need to know what this means. I'm not arguing whether sovereignty is good or bad.²²

Ultimately, the Task Force did not recommend the repeal of 30 M.R.S.A. § 6204. In 1997, the Passamaquoddy Tribe introduced LD 956 "An Act to Repeal the Law Providing the State Laws Apply to Indian Lands." While LD 956 did not pass, LD 1269 (enacted in the First Special Session 1997) "Resolve, to Foster the Self-Governing Powers of Maine's Indian Tribes in a Manner Consistent with Protection of Rights and Resources of the General Public" did include a provision requiring the MITSC to "consider the concerns that gave rise to the legislation proposed by the Passamaquoddy Tribe to amend the Act to Implement the Maine Indian Claims Settlement and determine how those concerns may be addressed."²³

30 M.R.S.A. § 6206.1: Internal Tribal Matters and *State v. Beal*

The Passamaquoddy defendants also argued that licensing Tribe members to engage in commercial saltwater fishing was an internal tribal matter. Again, Judge Romei ruled against the Tribe, utilizing the framework for determining an internal tribal matter that was laid out in *Akins v. Penobscot Nation* (November 17, 1997) in which the U. S. Court of Appeals, First Circuit found that the MIA, not federal Indian common law, must guide the determination of what was an internal tribal matter.

To further bolster his conclusion, Judge Romei referred to *Fellencer v. Penobscot Nation*. *Fellencer* was an employment case where the Maine Superior Court ruled that employment matters did not fall under the internal tribal matters provisions of the MIA. On January 19, 1999, *Fellencer* was reversed on appeal to the U.S. Court of Appeals, First Circuit, and the case was remanded for the entry of judgment in favor of the Penobscot Indian Nation.

30 M.R.S.A. § 6206.1: Recognition of Licensing as an Internal Tribal Matter in Negotiating a Solution to the Passamaquoddy Saltwater Fishery Conflict

The MITSC inquiry into the Passamaquoddy Saltwater Fishery Conflict documents how, from 1994 to 1997, both Governor King and the DMR recognized that the issuance of saltwater licenses was an internal tribal matter throughout their negotiations with the Passamaquoddy Tribe while maintaining the state's right to regulate as well. This concept was included in the 1997 proposed legislation offered by Robin Alden in her April 24, 1997 letter. While the MIA

²² Ibid, p 18

²³ Resolve, c. 45 First Special Session—1997

is silent on the saltwater fishery, the regulation of sustenance fishing and hunting on reservation land had always been an internal tribal matter (30 M.R.S.A. § 6207(1)).

The 1980 State of Maine Legislative Record on the Maine Indian Land Claims and *State v. Beal*

In a footnote referencing the years of negotiations that resulted in a settlement to the Maine Indian Land Claims, Judge Romei quoted AG Richard Cohen's testimony before Maine's Joint Select Committee on the Land Claims (the Select Committee). The footnote refers to one of Cohen's answers to a set of questions posed by the Select Committee (Addendum 15) dated April 2, 1980, when he was Maine Attorney General. The Select Committee had asked Cohen to offer his opinion on a set of questions that had come up during the course of the development of the MIA. When asked "What is the effect of the settlement on State and Federal authority over coastal or marine resources?" Cohen had answered that the Pleasant Point Passamaquoddy Tribe could regulate shellfish gathering on mud flats that were adjacent to Passamaquoddy land, likening the Tribe's power to that of a municipality. Richard Cohen also opined, "The tribes will have no other rights in coastal or marine resources than any other person or entity . . . they have no more rights in the coastal lands or marine resources than any other person."²⁴ Judge Romei cited this answer as evidence the state had subject matter jurisdiction over the Tribe's rights in saltwater fisheries in the same way that the state would have jurisdiction over any municipality.

In answering the Select Committee's query, Richard Cohen focused specifically on the management of clam-flats in coastal lands adjacent to Pleasant Point and thus did not address the larger issue of the Passamaquoddy's reserved right to manage their saltwater fishery. We can find no evidence in the legislative record that the saltwater fishery issue was discussed at any other time during the Settlement Act negotiations.

Cohen's answers to the Select Committee's questions referred to above were included in the 1980 *"REPORT OF THE JOINT SELECT COMMITTEE ON INDIAN LAND CLAIMS RELATING TO LD 2037 'AN ACT to Provide for Implementation of the Settlement Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory.'"* The Select Committee was comprised of ten state representatives and three state senators.²⁵ This ad hoc committee was tasked with gathering information about the Maine Indian Claims Settlement, hearing and recording public testimony, and communicating its final report and recommendations to the state and federal governments; it was chaired by Senator Samuel W. Collins and Representative Bonnie Post.

In their report, the Select Committee offered their understandings about how the MIA would be implemented. This report, along with the committee's queries and Cohen's responses, were sent to the U.S. Senate, where they became part of the legislative record documenting the development of the MICA. The report was also submitted to the Maine State Legislature and

²⁴ Memorandum dated April 2, 1980 from Attorney General Richard S. Cohen to [the Maine] Joint Select Committee on Indian Land Claims.

²⁵ Even though both Passamaquoddy and Penobscot Tribal Representatives were seated in the House, neither was appointed to the Select Committee.

the Maine Law and Legislative Reference Library. The Select Committee's report was among hundreds of documents reflecting both state and tribal positions that comprise the congressional record of the MICSA.

Fundamental conflicts regarding tribal fisheries are reflected in policy development and subsequent interpretations of the law. In a 1997 letter to the EPA (Addendum 16), Edward Cohen, Deputy Solicitor for the U.S. Department of the Interior, characterizes aboriginal fishing rights as reserved rights, rather than a grant of rights by the State of Maine, and articulates the federal position, when he states:

According to the legislative history of MICSA, fishing rights are an example of natural resources considered "**expressly retained sovereign activities.**" H.R. Rep. No. 96-1353 at p 15(1980), reprinted in 1980 U.S.C.C.A.N. 7186 p 3791²⁶ (emphasis in the original)

Additionally, MITSC records dated March 5, 1997 (Addendum 17) indicate that when asked whether the Settlement negotiations encompassed saltwater rights, Richard Cohen, now the chair of the MITSC, issued the following clarification:

It is my recollection that salt water rights and issues were not discussed during the settlement negotiations. These are legitimate issues for discussion now.²⁷

²⁶ September 2, 1997 letter To: John DeVillars, Region 1 Administrator, Environmental Protection Agency, From: Edward Cohen, Deputy Solicitor, United States Department of the Interior, p 5. (Addendum 16)

²⁷ Fax from Diana Scully to Mike Best March 5, 1997 (Addendum 17)

Section III: Looking for a Legislative Solution

LD 2145, 118th Legislature: *An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe*

In early January 1998, while the Passamaquoddy Tribe was waiting for Judge Romei to rule on their motion to dismiss the criminal cases brought against tribal fishers in *State of Maine v. Beal*, Passamaquoddy Tribe Representative Fred Moore submitted the draft legislation produced by the Passamaquoddy Tribe after negotiations with the DMR and referenced in Governor King's October 21, 1997 letter to the Passamaquoddy chiefs as, *An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe*. The bill was co-sponsored by Representatives Goodwin of Pembroke, Jones of Bar Harbor and Perkins of Penobscot. (See Addendum 10) Representative Moore explained the purpose of the legislation: "The bill is calling for state recognition of tribal authority to issue its own licenses to its members . . . it is intended to be a compromise."²⁸ (Addendum 18) When he introduced the bill, he had strong support from the Passamaquoddy Tribe's leadership, as evidenced in the record of the public hearing on LD 2145 (Addendum 19) and the notes taken by OPLA analyst, John Kelly. (Addendum 20)

This proposed legislation, LD 2145, acknowledged the Passamaquoddy Tribe's jurisdiction over saltwater fishing and required the development of a Tribal-State compact. The provisions included the following terms:

1. The Passamaquoddy were authorized to take marine resources under the terms of a licensing compact to be negotiated between the state and the Passamaquoddy Tribe;
2. Until the compact was achieved, no state license would be required but Passamaquoddy fishers would adhere both to State of Maine conservation measures and an alternative regulation to be determined by the MITSC;²⁹
3. Tribally issued licenses would be recognized for the taking, transport and sale of marine resources;
4. Any Tribe member with a Passamaquoddy tribal identification card could take marine resources for sustenance;
5. Any Tribe member authorized by Passamaquoddy government could take marine resources for ceremonial use;
6. Enforcement of the compact provisions on Passamaquoddy fishers fell, exclusively, to the Tribe;
7. Any resource gathered in violation of Passamaquoddy tribal code would be forfeited to the Tribe;

²⁸ Baldwin, Letitia, "Tribe seeks to issue own fishing licenses," The Bangor Daily News, January 9, 1998.

²⁹ The reference to the MITSC regulatory authority is unclear but seems to indicate that if compact negotiations stalled, the MITSC would develop interim operating regulations until negotiations were completed. This stop-gap measure would assure that Passamaquoddy fishers would be able to fish if compact negotiations extended into the lobster, elver and urchin seasons beginning in late March of 1998.

8. The law would be retroactive to June 1, 1997 (the date of the Passamaquoddy arrests).

Bill Approved for Introduction with Added Tribal Approval Provisions

An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe LD 2145 (Addendum 21) was approved by the Reviser of Statutes for introduction pursuant to Joint Rule 203 (Cloture for Legislators at the Second Regular Session) and referred to the Committee on Marine Resources on January 20, 1998. The Reviser of Statutes determined that it was necessary to add a new section 3 that required Passamaquoddy Joint Tribal Council approval before the law could take effect and read:

This Act does not take effect unless the Secretary of State receives written certification by the Joint Tribal Council of the Passamaquoddy Tribe that the tribe has agreed to the provisions of this Act, copies of which must be submitted by the Secretary of State to the Secretary of the Senate and the Clerk of the House.

The approval requirement in section 3 mirrored the process mandated by federal law (the MICA) for all amendments to the MIA (25 U.S.C. § 1725 (e)(1)), which reads:

- (1) The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation: *Provided*, That such amendment is made with the agreement of the affected tribe or nation, and that such amendment relates to (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provisions for concurrent jurisdiction between the State and the tribe or nation; or (C) the allocation of jurisdiction between tribal courts and State courts.

This new section was an early acknowledgement that LD 2145 constituted an amendment to the MIA.

LD 2145 Public Hearing

On February 10, 1998, at the public hearing for LD 2145, 17 people testified on the bill. Only three testified in opposition. Laura Taylor read Penn Warren's (Acting Commissioner on Marine Resources) testimony on behalf of the DMR. Colonel Joe Fessenden (DMR) is also listed as testifying against LD 2145, although we find no record of his commentary. The OPLA records also include a letter from Norman Lemieux (a private citizen) of Cutler, ME. DMR opposed the legislation, alleging that the MIA extinguished saltwater fishing rights; that this issue had not been fully reviewed by the MITSC; and, finally, that they were concerned that the Tribe might not adhere to conservation regulations. Norman Lemieux objected to allowing tribal fishers to participate in the lobster and urchin industries. Four people testified in the "neither for nor against" category including Donna Loring, Penobscot Indian Nation Tribe Representative, and Greg Sample, the attorney of record for the Passamaquoddy defendants in *State v. Beal*.

At the public hearing, Passamaquoddy testimony was extensive. We include the following quotes as evidence of the importance the Tribe assigned to LD 2145. John Kelly, the legislative analyst from the OPLA assigned to the Joint Standing Committee on Marine Resources, noted (Addendum 20):

You limit my access to food and limit my freedom. [This is]³⁰ a survival issue for us. [I] want food on the table of every Passamaquoddy, there are only 3,000 of us now. (*Governor John Stevens of Indian Township Passamaquoddy*)

[The Settlement Act is] a subtle and legal form of genocide. I was part of the negotiation committee of the Settlement Act. We presumed to take saltwater rights for granted. It didn't come up . . . This bill is an attempt to resolve a political conflict. (*Wayne Newell, Indian Township Passamaquoddy member of the Maine Indian Claims Settlement negotiation team*)

[This] bill is important to the entire tribe. [There is] much more to the bill than taking fish—[the] message [is]: recognize difference and respect that difference. We are an endangered species—I am] fearful who [will] speak the language. [The amended] 16-b³¹ (sic) in [the] claims act: Any future federal legislation for the benefit of Indians will not apply in Maine. [The] harvest of seafood is critical to [the] existence of [the] tribe. Just like an eagle hunts to kill, [it is] a duty. (*Pleasant Point Passamaquoddy Lieutenant Governor, William Altvater*)

The Work Sessions: Delimiting Tribal Authority and Redefining Sustenance

In its summary provided to the Joint Standing Committee on Marine Resources (Addendum 22), the OPLA questioned whether conservation regulations would apply to sustenance fishing and fishing for ceremonial purposes, and drew attention to amended language in the proposed bill that limited “sustenance” to the activities of taking, possessing, transporting and selling, and distributing. It is important to note that “taking, possessing, transporting and selling, and distributing” were now in both sustenance and commercial fishing definitions. Defining sustenance and commercial fishing through a common set of activities would cause confusion in 2014, when the DMR submitted a bill that criminalized all of these activities if the tribe fisher did not hold a tribal license that was authorized by the DMR, thereby, inadvertently, criminalizing sustenance saltwater fishing.

Sustenance is not defined by activity in either the MICSA or the MIA. Even though the word is used in the MIA (30 M.R.S.A. 6207), there is no language limiting sustenance to a set of activities. The Report of the Joint Select Committee on Indian Land Claims distinguishes sustenance as hunting or fishing for personal consumption or use:

³⁰ Brackets are author inserted.

³¹ Most likely a reference to 25 U.S.C. § 1735 (b) Application of Federal law for the benefit of Indians, Indian nations or tribes or bands of Indians”

The provisions relating to Indian sustenance hunting and fishing apply only to hunting or fishing for personal or family consumption. They do not apply to hunting or fishing to maintain a livelihood or other commercial purpose.³² (Addendum 23)

The limitation of sustenance to certain activities is important because sustenance is specifically protected in the MIA, 30 M.R.S.A. § 6207 (1)(4)(6) where it is stipulated that sustenance fishing is subject only to tribal ordinance. The MIA does delineate a process to address any adverse effect on a species as a result of tribal sustenance hunting or fishing ordinances. The burden of proof in this process rested entirely with the state. The process is outlined in 30 M.R.S.A. § 6207(6), and closes with the following paragraph,

In any administrative proceeding [alleging tribal sustenance fishing regulations are inadequate or require state administrative action] under this section the burden of proof shall be on the commissioner.³³ The decision of the commissioner may be appealed in the manner provided by the laws of the State for judicial review of administrative action and shall be sustained only if supported by substantial evidence.

To date, the state has never exercised this provision. Specifying tribal sustenance activities in state statute was, and is, a significant amendment to the MIA.

The Joint Standing Committee on the Judiciary Determines That LD 2145 Amends the MIA

On February 25, 1998, the Chairs of the Joint Standing Committee on the Judiciary issued a memo entitled “Amendments to the Act to Implement the Maine Indian Land Claims Settlement” (Addendum 24). This memo addressed LD 2145 stating, “We have determined that if the effective date of legislation is contingent on ratification by the Passamaquoddy Tribe, the Penobscot Nation or both, that legislation is, in effect, an amendment to the Implementing Act and should therefore amend Title 30.”

Work Session of the Marine Resources Subcommittee on LD 2145: The Creation of 12 M.R.S.A. § 6302-A³⁴ (Amendment A)

At the March 3, 1998 work session, the Marine Resources subcommittee on LD 2145 released extensive revisions to the proposed law: (Addendum 25)

1. The compacting requirement was removed and, in its place, specific and significant limitations were placed on Passamaquoddy fishers’ participation in the lobster, crab and urchin fisheries;
2. The definition of sustenance heretofore recognized as an internal tribal matter and left to the Passamaquoddy Tribe to determine, was now limited by the state to the

³² Report of the Joint Select Committee on Indian Land Claims, 4/2/80, signed by Senator Samuel Collins and Representative Bonnie Post

³³ In this case, the statute refers to the Commissioner of Inland Fisheries and Wildlife.

³⁴ LD 2145 amended 12 M.R.S.A. § 6302 by adding a Subsection “A” titled “Taking of marine organisms by Passamaquoddy tribal members. LD 2145 was often referred to simply as “Amendment A” in the notes and records of public debate.

activities of taking, possessing, transporting and distributing. This left out two components of sustenance: barter and exchange, thus impacting the Tribe's ability to participate in the commercial fishery;

3. State conservation regulations were to apply to Passamaquoddy sustenance fishing;
4. Sustenance, heretofore defined in Passamaquoddy Tribal statute, as provided for by the MIA, (30 M.R.S.A. § 6207(1)) **would now be defined instead in Maine state law 12 M.R.S.A. § 6302-A** that governs the taking of marine resources;
5. Enforcement of the laws governing the taking of marine resources was assigned entirely to the state, thus eclipsing tribal authority to enforce its own regulations;
6. Sec. 3, the MICSA language requiring approval of the Passamaquoddy Joint Tribal Council for the enactment of changes to the MIA, was removed from this draft;
7. A new section directing MITSC to study any ongoing questions was added;
8. The section requiring the Passamaquoddy Tribe approval of LD 2145 prior to enactment³⁵ was removed with this revision.

OPLA Memo on Amendment A: LD 2145 is an Amendment to the MIA.

On March 9, 1998, John Kelly, Legislative Analyst for the Joint Standing Committee on Marine Resources, sent a memo to the members of their LD 2145 Subcommittee (Addendum 26) in which he writes, "Jon Clark (OPLA's attorney) reviewed the subcommittee's proposed amendment, as well as the federal and state land claims act laws, and concluded that the amendment would require ratification of both the state and the tribe."

Addition of the "Blow-up" Clause to LD 2145

By March 10, John Kelly's notes reflect that the OAG had recommended a "Blow-up Clause." (Addendum 27) In legal terms this is a severability clause that means one defect in a contract or law "blows up" or destroys the whole or a part of any contract or law.³⁶ The blow-up clause replaced the MIA language requiring the Passamaquoddy Tribe's approval of any amendments to the Settlement Act in Sec. 3 and read:

This Act is not an amendment to the Maine Revised Statutes, Title 30 chapter 601, An Act to Implement the Maine Indian Claims Settlement, and is not subject to ratification by the Passamaquoddy Tribe pursuant to United States Code, Title 25, Section 1725 (e)(1). If a court of competent jurisdiction finds that this Act or any portion of Title 30, chapter 601³⁷ so as to constitute an amendment to Title 30, chapter 601, this Act or that portion of this Act, if separable, that constitutes an amendment to Title 30, chapter 601 is void.

In other words, if LD 2145 were found by a "competent court of law" to be an amendment to the MIA the portion of the law affected or the whole law would be void. In this case, the "blow-

³⁵ Since this law only affected the Passamaquoddy Tribe, only the Passamaquoddy Tribe's approval was needed.

³⁶ Michael Dorf, Robert S. Stevens Professor of Law, Cornell University, *The Puzzling Insistence on a Non-Severability Clause*, June 27, 2011

³⁷ Maine Implementing Act (MIA), M.R.S.A. Title 30, Chapter 601.

up” clause allowed the legislature to work around the statutorily mandated requirement for Passamaquoddy Joint Tribal Council approval for changes to the MIA, and to proceed with LD 2145 against the recommendations of OPLA and the Joint Standing Committee on the Judiciary. It also meant that the Passamaquoddy Tribe would have no authority to reject subsequent amendments to the law other than to bring legal suit.

OPLA Reviews the “Blow-up” Clause

On March 12, 1998, a memo (Addendum 28) authored by John Kelly was sent to Greg Sample, Attorney for the Passamaquoddy Tribe, and Paul Stern, AAG for the State of Maine. Despite the March 9th advice that LD 2145 was an amendment to the MIA, OPLA now indicated that the addition of the “blow-up” clause had the following effect, “Any claim that the Act requires ratification or that it is an amendment to the Claims Settlement Act would be finally settled in a court.”

With the inclusion of the “blow-up” clause, the Passamaquoddy Tribe’s capacity to approve or reject amendments to the MIA, as mandated in the MICSA, was nullified. Their only recourse would be to prove in a “court of competent jurisdiction” that LD 2145 improperly amended the MIA. In other words, the “blow-up” clause allowed the State of Maine to unilaterally define the tribal-state relationship with regard to the Passamaquoddy saltwater fishery. The tribe could only overturn these provisions through further litigation.

The Legislative Record on LD 2145

On March 23, 1998, as Amendment A to LD 2145 was debated in the House, Representative David Etnier, chair of the Joint Standing Committee on Marine Resources, offered the minority report of the committee, explaining that LD 2145 was an amendment to the MIA and should be treated as such (Addendum 29). He states:

There is also one of my favorite parts of the Committee Amendment as what is known to the Attorney General’s Office as the blow-up clause. It is an attempt to get around the fact that this is an amendment to the settlement act. The Attorney General’s Office of the state told us it was an amendment to the settlement act. Our OPLA staff told us it was an amendment to the settlement act and yet the Majority Report, the Committee Amendment refuses to acknowledge that . . . it is one of the most peculiar means of addressing or not addressing the sustenance issue I have ever seen.

Later, Rep. Richard Thompson, chair of the Joint Standing Committee on the Judiciary, echoed Rep. Etnier’s statements:

The problem I have with this bill is not only that it has not gone through what I consider the proper process, but that it is clearly an attempt to whatever you want to call it, amend the act, clarify the act or whatever. It is related to the act. I feel very strongly that if changes are going to be made on [an] issue pertaining to the act, then they should be made in the way prescribed by the act. That if it is going to be something passed by this Legislature then it should be designated as a change to the act and should be subject to ratification by the tribes . . . ***The tribe does not have to ratify this bill. Therefore, there is a strong argument that they are not subject to***

this bill and that if they have inherited sovereignty rights, they can go on pursuing them. (Emphasis added.)³⁸

On March 24, 1998, the debate moved to the Senate. A similar discussion ensued regarding the blow-up clause. Senator Benoit explained his concerns:

Pretty self serving, it seems, to say well, the reason this is general law is because the Compact is a cumbersome process. It's a cumbersome process for a very good reason. You do not change the laws relating to the Tribe and the Nation lightly, such as intended here, by this end run play in the general law [. . .] I'm disappointed that there's no written formal Opinion of the Attorney General that I've had the opportunity to read, that indicates that this is a valid way to go about this business. (Addendum 30)

Over these objections, the law was passed in the House on March 23rd and in the Senate on March 25th. On April 3, 1998, LD 2145 was signed into law.

Thus the stage was set to further codify amendments to MIA in 12 M.R.S.A. § 6302-A, rather than through the process required by both state and federal law in which both the tribes and the state would formally approve any changes to MIA.

After LD 2145 was passed, Jon Clark, legal counsel for the OPLA would write,

The amended version that came out of committee was hotly debated; some believed strongly that it was not legally possible to enact this law without amending the Maine Land Claims Settlement Act. The law directly confronts this issue in Sec. 3. It appears that this law, if it is not struck down, may well mark a new direction in tribal/state relations.³⁹ (Addendum 31)

Office of the Attorney General's Responsibilities to Inform Legislative Matters

The OAG consistently plays an important role both in defining the tribal-state relationship and in the development of law and policy that affect the negotiated agreement that is reflected in the Settlement Acts. The OAG has the responsibility to protect the interests of the state and its collective citizenry. In order to accomplish this task, the OAG provides their advice on matters of law. This is a statutory responsibility of the OAG found in M.R.S.A. Title 5, chapter 9 § 195:

The Attorney General shall give his written opinion on questions of Law submitted to him by the Governor, by the head of any state department or any of the state agencies

³⁸ This quote references "tribes" when discussing the amendment provisions of the MIA and refers to "tribe" in referring to how Passamaquoddy ratification is not required in Amendment A.

³⁹ Memo from Jon Clark to Susan Johnson NCSL (National Congress of State Legislators), June 5, 1998 in the remarks section on the fax cover sheet.

or by either branch of the Legislature or any member of the Legislature on legislative matters.

When the OAG provides a written opinion in writing, all parties benefit from a deeper discussion of the crucial legal issues at play and a more informed conversation about the issues can take place. In the review of available public material, the MITSC could not find a written opinion from the OAG regarding the saltwater fisheries conflict. The notes and memos of John Kelly, the legislative analyst assigned to the Joint Standing Committee on Marine Resources, indicate that significant questions were posed by the Joint Standing Committee on Marine Resources regarding the impact of the LD 2145 on the MIA, and that AAG Paul Stern participated in the LD 2145 workgroup.

A written explanation of the OAG's concerns about LD 2145 and the basis for recommending the blow-up clause might illuminate the reasons for moving away from negotiated agreements and towards litigation to resolve conflicts. Since the Settlement Acts both reflected negotiated agreements among the tribes, state and federal government, and resulted from the settlement of a lawsuit, it is crucial that policy decisions that affect this settlement are developed in a fully transparent and careful way.

Given that opinions on the MICSA and/or the MIA affect five sovereign governments and involve federal statutory adherence and given that tribe citizens are also state citizens, it would be important that M.R.S.A. Title 5 Chapter 9 include provisions that both advance public understanding and increase transparency.

Section IV: State Legislation to Further Limit the Passamaquoddy Saltwater Fishery—LD 451, LD 1625, and LD 1723 in the 126th

Amending 12 M.R.S.A. § 6302-A

We include here a brief narrative of subsequent amendments to 12 M.R.S.A. § 6302-A which constitute further erosion of the required amendment process outlined in the MICSA 25 U.S.C. § 1725 (e)(1) regarding Passamaquoddy authority to approve or reject any changes in the Tribe's jurisdictional relationship to the state.

In 2013 and again in 2014, the Maine State Legislature amended 12 M.R.S.A. § 6302-A (LD 2145), thus unilaterally amending the MIA in direct contravention to the provisions of MICSA. We can find no evidence in the legislative record that the OAG offered the legislative history of LD 2145 and the controversy surrounding that law as the legislature considered new amendments.

This illustrates the importance of institutional memory. When the legislature considers legislation that will affect the federally recognized tribes, it is vitally important that the committee that is reviewing the legislation have a thorough grasp of the statute's legislative history. The state entities most suited to prepare the legislative bodies are the OAG, the OPLA and the MITSC. In this case, the legislative history of LD 2145 would have been important information for the Joint Standing Committee on Marine Resources to review as they shaped the law.

MITSC Concerns

The MITSC has a unique responsibility to review the effectiveness of the negotiated agreements between the tribes and the state as reflected in the Settlement Acts and to make recommendations to the tribes and to the state. In order to carry out this charge, the MITSC must have the resources and the opportunity to review legislation that impacts these Acts in any way. In 1998, the legislative record explains why MITSC did not act on LD 2145. In the words of Rep. Etnier:

In the act was a very important additional piece of information [that] was the creation of the Maine Union Tribal State Commission [sic]. This was meant to be the means for addressing all future disputes between the state and the tribe. It has equal representation . . . That is where this bill should have gone. It did not go there. Let me make that very clear. It did not go there. We received nothing from MITSC regarding this bill and its enormous magnitude. Why? It was not brought before them. I think that is important to also understand. The legitimate means for addressing these legitimate grievances, concerns of the Passamaquoddy Tribe were not brought before the Joint Indian Tribal State Commission as they should have been.⁴⁰

In 2013 and 2014, although the subsequent amendments to 12 M.R.S.A. § 6302-A: LD 451, LD 1625 and LD 1723 were not referred to the MITSC for review, the MITSC became aware of the

⁴⁰ Maine Legislative Record—HOUSE March 23, 1998 Rep. Etnier speaking (see Addendum 29)

legislation and did raise the issue that that these pieces of legislation significantly affect the jurisdictional underpinnings of the MIA.

LD 451: Limiting Passamaquoddy Participation in the Elver Fishing Industry

LD 451: *An Act Relating to Certain Marine Resources Licenses* initially focused on limiting the participation of Passamaquoddy fishers in the state's lucrative elver fishing industry. It was later amended to expand both the state's own fishery by 25 licenses and allow for the participation of fishers from the Penobscot Indian Nation, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. LD 451 limited Passamaquoddy participation, heretofore unlimited, to 200 commercial elver licenses. The Passamaquoddy Tribe objected to this restriction, arguing that their management plan, which limited the Tribe's overall catch rather than the number of individual fishers, was a more efficient conservation method than the state's plan which limited the number of individuals entering the fishery and the quantity of gear permitted to each fisher without limiting the catch.

In 2013 the MITSC, acting on its statutory responsibility, raised its concern that LD 451 further constricted the saltwater fishing rights of the Passamaquoddy Tribe and constituted an amendment to the MIA, which would, therefore, require Tribal Council approval. At the request of Patrick Keliher, Commissioner of Marine Resources, Attorney General Janet Mills responded with a letter *re: Regulation of Salt Water fishery Under the Maine Indian Claims Settlement Act*. (Addendum 32) The 1998 concerns of the OAG, OPLA and the Joint Standing Committee on the Judiciary that amending the negotiated settlement acts would require tribal approval, and the late addition of Amendment A, Section 3 (the blow-up clause) were never referenced in this letter. Instead, AG Mills writes, "[LD 2145] was enacted like any other statute and may be amended or repealed or kept on the books like any other legislation in accordance with the will of the Legislature."

The 2013 Elver Fishing Season

In 2013, the legislature enacted amendments to 12 M.R.S.A. § 6302-A as codified in LD 451 that essentially bypassed the legislatively mandated tribal approval process and substantially undermined the Passamaquoddy Tribe's jurisdiction over their saltwater fishery. The Tribe acted on their reserved rights to the saltwater fishery and fished under Passamaquoddy conservation guidelines that were more stringent than those of the state in that they limited the catch and the type of gear used in order to have minimal impact on the American eel. These limitations reflected their culture and ties to land, waters and species. Sixty-eight Passamaquoddy were cited for fishing without a license in 2013. All of these cases were dismissed or filed without further action.

LD 1625 and LD 1723: Further Erosion of the MIA Amendment Provisions

In January and February of 2014, as the 126th legislative session came to a close, the DMR and the Passamaquoddy Tribe came to consensus on management mechanisms that would allow co-management of the fragile elver fishery. These mechanisms were codified in Passamaquoddy Tribal law. The Tribe had put in place an aggressive conservation plan that would have a negligible impact on non-Native elver fishing. The structure of this agreement was presented to the Atlantic States Marine Fisheries Committee (ASMFC) on February 6,

2014 in order to secure federal approval for the State of Maine to fish elvers in 2014. The ASMFC approved the state's plan because it included the successful negotiation of an agreement with the Passamaquoddy Tribe. The Tribe submitted a proposed Memorandum of Agreement to co-manage the elver fishery to the DMR that included the consensus management mechanisms that had been negotiated.

Passage of LD 1625

On February 12, 2014, in the week following these presentations to ASMFC, at a legislative work session on LD 1625, Commissioner Patrick Keliher announced that the AG had "equal protection" problems with the negotiated agreement. The DMR immediately withdrew support for the provisions it had negotiated with the Tribe. When asked to explain the "equal protection" issues raised by the OAG, a representative of the OAG explained that "all groups must be treated the same."⁴¹ Even though the OAG was asked by DMR to give an opinion on the Tribe's proposed Memorandum of Agreement,⁴² we find no evidence that a written OAG opinion was ever produced. Instead, AAGs were present at each public work session to answer questions and AAG Jerry Reid met with Passamaquoddy Tribal leaders and their attorney to discuss the OAG's equal protection concerns at the request of the MITSC chair.

The written legal opinion of the Passamaquoddy Tribe that was provided to the legislative work session is included in this report. (Addenda 33, 34) A written explanation of the OAG's concerns might have dispelled confusion and yielded a more constructive conversation about the equal protection issue identified by the OAG. Fully understanding any concerns that the tribes, OAG, the administration or the legislature have relative to laws, regulation or policy that may affect the Settlement Acts is a fundamental first step to resolving conflict.

Over objections by the Passamaquoddy Tribe, the state passed two pieces of legislation: LD 1625, which requires the Tribe to manage its fishery according to state regulations, and LD 1723, which outlined new compliance requirements, enforcement provisions and penalties in various commercial fisheries.

LD 1723 was enacted on March 13th, and LD 1625 on March 18th, four days in advance of the scheduled start of the elver season. This put the Passamaquoddy tribal law, which reflected the earlier, negotiated agreement, in direct opposition to the state's new law, thus creating a crisis for the Tribe's fishery. The Passamaquoddy Joint Tribal Council met over four days of public meetings within the Tribe to avert a crisis. In the end, the Tribe amended Tribal law to assign individual quotas and added the following language to all Passamaquoddy licenses (Addendum 35):

This license is issued pursuant to the inherent rights of the Passamaquoddy Tribe as secured under various treaties and federal law, and as implemented through the Tribe's Fisheries Management Plan Governing Salt Water Hunting, Fishing and Gathering.

⁴¹ Public Work Session, February 19, 2014

⁴² Patrick Keliher public testimony, February 12, 2014

Section V: Impact of Racism on Tribal-State Relations

The 1997 Report of the Task Force on Tribal-State Relations listed racism among its “Findings and Analysis.”⁴³ “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.”⁴⁴ Later in the same report, the Task Force “urge[d] the MITSC not to skirt the issue of racism in its deliberations.”⁴⁵

In 2000, the MITSC minutes (Addendum 36) reflected a discussion of racism by commissioners calling for a “real examination of racism, noting that it is easy to talk about racism when it is far away, but it is hard to talk about it here” and that it may not be possible to separate racism from sovereignty.⁴⁶

Throughout 2013 and 2014, the MITSC received reports of unacceptable and disrespectful language in public hearings and work sessions on the saltwater fisheries conflict. 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. (Addendum 37) The MITSC contacted legislative leadership in the House and Senate in an effort to address these concerns.

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. A statutory framework governs the relationship and outlines responsibilities among the parties to this agreement. 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.

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.

⁴³ At Loggerheads, p iv, p35-36

⁴⁴ Ibid, p 35

⁴⁵ Ibid, p 36

⁴⁶ MITSC Minutes, 6/12/2000

Section VI: Identifying Solutions

By examining these issues we have sought to deepen understanding of a particular conflict arising from the differing interpretations of the MIA and MICSA held by the tribes and the state. Years of negotiations to resolve the saltwater fisheries conflict played out against a backdrop where the state continued to assert criminal or civil jurisdiction over the Passamaquoddy Tribe and individual Tribe members. In order for the Tribe to protect its inherent rights, they are often forced to argue their interests in state court where a body of case law has now been established that significantly narrows the interpretation of both the MICSA and MIA as it is reflected in the legislative and congressional record and in the documented understandings of negotiators on the state side as well as the tribal side.

The state court decisions have failed to uphold both the articles of construction in the MICSA and in Federal Indian Common Law; thus, the federally recognized tribes in Maine must rely on federal courts to uphold these provisions. The adversarial process of resolving conflicts in court that involve the negotiated settlement reflected in the MIA and MICSA mitigates productive tribal-state relations. The implementation of the MIA has been determined by court decisions rather than through good faith negotiation among the parties as was intended.

We undertook this examination to shed light on the saltwater fisheries conflict and to advance constructive dialogue and mutually beneficial solutions. Our findings are offered both as a summary of what we have learned and as a catalyst for the development of constructive solutions. In our recommendations, we offer a way to proactively and pragmatically address issues that were not resolved in the 1980 negotiations that settled the Passamaquoddy and Penobscot land claims and resulted in the MIA and the MICSA. This is why the MITSC was created: to bring focused effort to recommendations that have the potential to resolve the issues that result in conflict between the tribes and the state. It is our goal not only to provide a pathway to conflict resolution, but also to ground this process in mutual understanding and genuine partnership.

Before the public release of this report, the MITSC made efforts to meet with all of the parties to the saltwater fishery conflict. In these meetings, we were reminded of numerous attempts to reach mutually beneficial agreements and build productive working relationships between the tribes and the state.

We conclude 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.

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 (MICSA) 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 MICSA (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 MICSA thus override the MIA provisions when there is a conflict between the two.
5. MICSA (25 U.S.C. § 1725 (e)(1)) provides that tribal approval is required for any amendments to the MIA that relate to “the enforcement or application of civil, criminal or regulatory laws of the 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 MICSA, and the federal Act requires the approval of affected tribes to amend the MIA. Thus, the MIA is subordinate to the MICSA.
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)

Taking of Marine Resources by Passamaquoddy and Penobscot Tribal Members

**Report to the Joint Standing Committee on
Marine Resources, 119th Maine Legislature,
by the Maine Indian Tribal-State Commission
Pursuant to Public Law 1997, Chapter 708**

The New Law

During the 118th Legislature, Passamaquoddy Tribal Representative Fred Moore introduced LD 2145, "An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe." On April 3, 1998, Governor Angus King signed the legislation into Maine law as PL 1997, Chapter 708. The new law specifies a process for regulation by the Passamaquoddy Tribe of the taking of marine organisms by tribal members. It also states the following:

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

Over the years, the Maine Indian Tribal-State Commission (MITSC) has had some discussion about, but very little involvement with, issues involving marine resources. This is because a major focus of the Maine Indian Claims Settlement Act of 1980 is on the regulation of inland fish and wildlife within Indian Territory. As a result of the new law, MITSC is becoming more active in the area of marine resources.

The Commission

MITSC offers a forum where the State and the Tribes can discuss issues about which they have differing views. With an annual operating budget of \$45,000 (50% state revenues and 50% tribal revenues), MITSC operates on a part-time basis. Created by the Maine Indian Claims Settlement Act, MITSC is an inter-governmental entity with five statutorily specified responsibilities:

- To continually review the effectiveness of the Act and the social, economic, and legal relationship between the Passamaquoddy Tribe and the Penobscot Nation and the State. 30 MRSA §6212(3)

- To make recommendations about the acquisition of certain lands to be included in Passamaquoddy and Penobscot Indian Territory. 30 MRSA §6205(5)
- To promulgate fishing rules on certain inland waters. 30 MRSA §6207(3)
- To study and make recommendations about fish and wildlife management policies on non-Indian lands, to protect fish and wildlife stocks subject to regulation by either Tribe or MITSC. 30 MRSA §6207(8)
- To review petitions by the Tribes for designation as an "extended reservation." 30 MRSA §6209(5)

The People

Four of MITSC's members are appointed by the State, two by the Passamaquoddy Tribe, and two by the Penobscot Nation. The ninth, who is the chairperson, is selected by the eight appointees. Attachment A is the list of MITSC members.

With the death of MITSC Chair Richard Cohen on April 13, 1998, MITSC worked hard to find strong new leadership. After contacting and interviewing several excellent candidates, MITSC unanimously voted on May 27, 1998 to offer the position of MITSC Chair to Cushman D. Anthony, Esq. The principal in the Portland firm of Cushman D. Anthony Dispute Resolution Services of Maine, Mr. Anthony specializes in divorce and family law mediation. A State Representative in the Maine Legislature from 1986-1992, he was a member of the Judiciary Committee, the Committee with jurisdiction over the Settlement Act.

New Committee

To carry out its new charge specified in Chapter 708, MITSC established a Marine Resources Ad Hoc Committee to make recommendations to the full Commission on marine resource issues. Attachment B is the list of Ad Hoc Committee members.

The Ad Hoc Committee met for the first time on November 23, 1998, and learned that, the week before, the Joint Tribal Council of the Passamaquoddy Tribe had enacted an ordinance, setting forth procedures for the tribal issuance of marine harvesting licenses, as provided Chapter 708. At the meeting, Ad Hoc Committee members agreed to ask the Tribes what they consider to be "the outstanding questions and issues in relation to marine resources" on which MITSC should focus and concerning which the Ad Hoc Committee should formulate recommendations for MITSC's consideration.

Issues and Questions

The Ad Hoc Committee has written to ask the Passamaquoddy and Penobscot Tribal Councils to formulate a list of issues and questions. The Committee will discuss these issues and questions, undertake any research required, and bring forward the issues and questions as agenda topics for meetings of MITSC. MITSC will share any findings and recommendations with the Joint Standing Committee on Marine Resources and the Tribal Councils.

Attachment A

Maine Indian Tribal-State Commission

Chair

Cushman Anthony, Esq.
120 Exchange Street, Suite 208
Portland, Maine 04101

State Appointees

Alan Brigham, Director
Policy and Planning
Department of Economic and
Community Development
59 State House Station
Augusta, Maine 04333-0059

Mike Hastings, Director
Maine Aquaculture Center
141 North Main Street
Brewer, Maine 04112

Frederick Hurley, Jr.
Deputy Commissioner
Department of Inland Fisheries
and Wildlife
41 State House Station
Augusta, Maine 04333-0041

Evan Richert, Director
State Planning Office
38 State House Station
Augusta, Maine 04333-0038

Passamaquoddy Appointees

Eric Altvater, Tribal Member
Pleasant Point
PO Box L
Eastport, Maine 04631-0913

Robert Newell, Tribal Member
Indian Township
PO Box 848
Princeton, Maine 04668

Penobscot Appointees

John Banks, Director
Department of Natural Resources
Penobscot Nation
6 River Road
Indian Island, Maine 04468

Mark Chavaree, Esq.
Tribal Counsel
Penobscot Nation
6 River Road
Indian Island, Maine 04468

Executive Director
Diana Scully
MITSC
PO Box 87
Hallowell, ME 04347

Attachment B

Subcommittee Members

Chair:

Michael Hastings, MITSC Member, State of Maine
(Executive Director, Maine Aquaculture Center)

Members:

Eric Altvater, MITSC member, Passamaquoddy Tribe at Pleasant Point

John Banks, MITSC member, Penobscot Nation

Wane Loring, Penobscot Nation,

Ed Nicholas, Passamaquoddy Tribe at Pleasant Point;

Marge Peacock, a teacher at the Beatrice Rafterty School, Pleasant Point

Allen Talbot, Sergeant, Maine Marine Patrol

Addendum 2

Commission Meeting
June 7, 1984
Pittsfield

Participants

7 present, 2 absent, 3 other participants.

MITSC Budget

Governor Love and Governor Stevens agreed to ask their Tribal Councils for one-half of the budget, with other half to be requested from the State. Action: To establish a budget of \$45,000 annually from July 1, 1984 to June 30, 1985. (Passed unanimously.)

MITSC Executive Director

Search for Executive Director and priorities for that person once on board.

Trust Land

Action: To request from the Legislature an extension of time to acquire trust land until December 31, 1988. (Passed unanimously.)

Tribal Courts

Expansion of tribal court jurisdiction.

Marine Issues

Marine resources jurisdiction. Cliv Dore to present position paper to MITSC.

11 / 21 / 94

Fred Hurley

Cliv Dore

Bill Brennan

Diana Scully

CD: Goes back to aboriginal rights on salt water

These never addressed in settlement

We've never addressed this, because hasn't been an issue. We'd been able to fish + gather. Our aboriginal boundaries stretch down to Kennebec River.

We'd like the same licensing provisions awarded us now for fresh water hunting + fishing + same type of enforcement

BB: We haven't changed our rules, but have ↑ enforcement presence. They're focusing more effort, in general, on Downeast waters.

I agree that you should have same licensing provisions as inland, but can't now do this under current authority.

FH The legislature could establish provision concerning licenses without regard to sustenance without amending settlement

BB: We understand that tribal lands end at
Maine L.A. ... CD: 1070 Dick 0110 with H.A.

(2)

FH. Under most conservative law, you can take sustenance betw. low + high tide marks.

BB. I'd like to see this resolved

CD. When we're taking for sustenance, we're talking about aboriginal boundary. ^{Cobscook Bay, Passamaquoddy Bay}
for commercial purposes, we'd want to use it along Washington County.

BB. Have your people been harassed?

CD. One guy has been arrested.

BB. Usually we refer back to your law enforcement people.

CD. We think we don't need licenses, because not addressed in MICA

BB. ~~the~~ [the opposite]

CD. I've consulted w/ ~~both~~ Tom Tureen + the NARF in Colorado.

BB. Who should our AAG talk with

CD. Me + then I'll make sure he's talking with our atty.

BB: So after interpretation resolved, we should develop MOU

Aquaculture -

BB: Do you receive notices ⁱⁿ leasing process?

CD: No

BB: We're required to notify all municipalities ^{in advance}.

We can do this for Pass. Tribe, too.

We will do this for anything affecting Washington Co.

You also have right to intervene.

CD: Any lease granted within our aboriginal territory are subject to our jurisdiction

BB: What is your role in these waters

CD: At least we should be notified.

BB: How do you deal w/ Bur. of Submerged Lands?

CD: We don't

BB: So immediate thing we can do is notice & info.

⑤

BB I'll do a memo to my staff regarding notice concerning ^{notice of all} ~~leasing~~ ^{acquisition} activity

CD Another issue is that the State cut off one of our gathering places by the road to Eastport. Caused substantial decline in fishing. Changed fishing migration pattern

BB. ^{for letter:} MICSA is silent on sustenance in marine. Tribe maintains because it's silent, it needs no license
∴ DMR needs guidance about how to apply State law to sust + com fishing.
AB should contact CD.

What about marine mammals? (Our involvement is just tangential)

CD: We're dealing at Fed level on this + are making good progress

We need more protection of the resource than is happening now.

BB ^{to CD}: Please contact me if you don't hear.

interoffice

MEMORANDUM

to: Joseph Barnes, Chief of Police
from: Cliv Dore, Tribal Governor
subject: Interference with Tribal Fishermen
date: October 25, 1996

The Lt. Governor, Council and myself are strongly committed to the preservation and protection of the traditional customs, practices, and cultural values handed down to all our people by our Passamaquoddy ancestors. The traditional fishing practices of our people are currently under attack by officials of the Federal Government and State of Maine, specifically the Department of Marine Resources and National Marine Fishery Services.

The Lt. Governor and myself join with the Tribal Council in condemning this action by the State. The Tribal Council has resolved to prohibit the interference by any person or entity, with emphasis on officials of the Federal Government and State of Maine, of our people in pursuit of the harvesting of fish, urchins, clams, and any other bounty of our Traditional Territorial Seas.

The Tribal Police are hereby directed to intervene in any actions by any and all person(s) or entity interfering with our people pursuing their Aboriginal Rights to harvest from our Territorial Seas with the strongest possible response. The Tribal Police are explicitly directed to advise the person interfering with our Tribal Fisherman to leave the Reservation, if they refuse the person is to be arrested and charged with Criminal Trespass and any other applicable charges. Please advise your officers that this directive is not subject to interpretation and there is no waiving in these matters. This directive shall be carried out as stated in this memorandum.

The Lt. Governor & myself shall expect to be kept abreast of any and all actions regarding this matter. Additionally, the Lt. Governor, Council and myself shall be diligently keeping our interest and focus on this matter.



Angus S. King, Jr.
Governor

Robin Alden
Commissioner

DEPARTMENT OF MARINE RESOURCES

Telephone (207) 624-6550
FAX (207) 624-6024

December 3, 1996

Cliv Dore
Tribal Governor
Passamaquoddy Tribe
Pleasant Point Reservation
P.O. Box 343
Perry, Maine 04667

Dear Tribal Governor Dore:

The National Marine Fisheries Service has provided me with a copy of the attached memorandum dated October 25, 1996 from you to the Chief of the Passamaquoddy Tribal Police instructing the Tribal Police to "intervene in any actions by any and all person(s) or entity interfering with our people pursuing their Aboriginal Rights to harvest from our Territorial Seas with the strongest possible response." You instruct the Police to instruct the person "interfering with our Tribal Fisherman" to leave the Reservation and if they refuse, direct the Tribal Police to arrest and charge the person with Criminal Trespass and any other applicable charges. Finally you tell the Chief that the directive is not subject to interpretation and "there is no waiving in these matters."

Your letter causes the deepest concern on the part of our Department, as it is clearly an instruction to your officers to obstruct state and federal law enforcement officers as they enforce the valid laws of the State of Maine and federal government concerning marine resources. It is clear under the Maine Indian Land Claims Settlement Act that neither the Passamaquoddy Tribe nor its members have any aboriginal salt water fishing rights nor do the boundaries of the Reservation include any Territorial Seas. These issues are treated in greater depth in my letter to your counsel, Greg Sample, attached.

Your letter also causes serious concern for the reason that I have been engaged in an ongoing dialogue with you and other Tribal representatives about how we might resolve your concerns about Maine's salt water licensing laws as applied to the Tribe. We are committed to working cooperatively with the Tribe on these issues and still hope for a positive solution.

In the interim, please be advised that the officers of the Maine Marine Patrol will be fully enforcing all laws of Maine. Any obstruction of justice of a Marine Patrol officer

Cliv Dore

Page 2

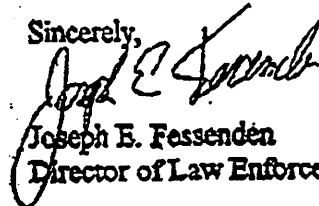
December 3, 1996

in the course of his duties by any individual, including the Tribal Police officers, will be referred for criminal prosecution and for any appropriate civil action.

I suggest that we meet to discuss your memorandum and the underlying salt water fishing issues on December 12, 1996 at 10:00 AM at the Warden Service Regional Headquarters, 650 State Street, BMHI Complex, Bangor. I will invite a representative of the Department of Public Safety and a representative of the Maine Inland Fisheries and Wildlife.

I remain convinced that we can come to an amicable understanding.

Sincerely,


Joseph E. Fessenden
Director of Law Enforcement

Attachments:

cc: Joseph Barnes, Chief of Passamaquoddy Tribal Police
Attorney General Andrew Ketterer
Ross Lane, Special Agent, National Marine Fisheries Service
Col. Alfred Skolfield, DPS
Parker Tripp, Chief Warden, IF&W



118th MAINE LEGISLATURE

FIRST REGULAR SESSION-1997

Legislative Document

No. 273

H.P. 209

House of Representatives, January 21, 1997

**Resolve, Directing the Commissioner of Marine Resources to Negotiate
with the Passamaquoddy Tribe Regarding Fishing Rights.**

Reference to the Committee on Marine Resources suggested and ordered printed.

A handwritten signature in cursive script that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative GOODWIN of Pembroke.
Cosponsored by Representatives: BAGLEY of Machias, ETNIER of Harpswell, LAYTON of
Cherryfield, MOORE of the Passamaquoddy Tribe, PINKHAM of Brunswick.

2 **Sec. 1. Commissioner to request negotiation. Resolved:** That the
Commissioner of Marine Resources shall request the Passamaquoddy
4 Tribe to meet with the commissioner to discuss the tribe's claims
of aboriginal rights to fish in coastal waters in a manner not
6 otherwise permitted under state law. The purpose of the meeting
is to attempt to reach an agreement regarding the tribe's rights.

8

SUMMARY

10

12 This resolve requires the Commissioner of Marine Resources
to meet with the Passamaquoddy Tribe to attempt to work out an
14 agreement regarding the tribe's aboriginal fishing rights in
coastal waters.

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: 2/6/97
To: Marine Resources Committee
From: John Kelley, Legislative Analyst

LD 273, Resolve, Directing the Commissioner of Marine Resources to Negotiate with the Passamaquoddy Tribe Regarding Fishing Rights

SUMMARY

The resolve requires the Commissioner of Marine Resources to meet with the Passamaquoddy Tribe to attempt to work out an agreement regarding the tribe's aboriginal fishing rights in the state's coastal waters.

TESTIMONY

Proponents

- * Coastal fishing rights are not discussed in the Maine Indian Claims Settlement Act of 1980
- * King administration had led the tribe to believe there would be a meaningful agreement for the Marine Resources Committee to review
- * The tribe's traditional ability to harvest from the sea has been called into question
- * The tribe possessed inherent rights to harvest from the sea
- * State policy makers have not listened or talked in good faith
- * Bill is necessary to provide legislative oversight of the on-going negotiations

Opponents

- * DMR has negotiated in good faith and considers the negotiations on-going
- * DMR has not let questions fall by the wayside, but has dealt with the issues

- * Tribe needs to be able to issue its own licenses, with limitations that are as stringent or more stringent than the state's

- * Tribe wants recognition that the Passamaquoddy people are unique

- * The negotiations involve two separate cultures talking to each other

- * The spoken word is more meaningful to the Passamaquoddy people than the written word

- * The Passamaquoddy tribe never signed away its fishing rights

POTENTIAL ISSUES OR TECHNICAL PROBLEMS:

Need further direction from the committee

FISCAL IMPACT: None



Angus S. King, Jr.
Governor

Robin Alden
Commissioner

DEPARTMENT OF MARINE RESOURCES

Telephone (207) 624-6550
FAX (207) 624-6024

April 24, 1997

Tribal Governor John Stevens Tribal	Governor Richard Doyle
Passamaquoddy Tribe	Passamaquoddy Tribe
P.O. Box 301	P.O. Box 343
Princeton, ME. 04668	Perry, ME. 04667

Dear Governor Stevens and Governor Doyle:

Enclosed is our draft proposal for your consideration. The draft is designed to serve what we understand to be our joint goal of conservation of marine resources and avoiding friction between Indian and non-Indian communities. The proposal is designed to resolve the license issue controlling access to the fisheries and to establish a process to assure that the personal use exemptions in the marine resource laws are established at the appropriate level to allow personal use by all Maine citizens, including tribal members, without the need for any licenses. As we explained, this is a draft only, and would be subject to legislative approval. We hope that you will find that this proposal meets your interest in having the option of issuing the license document, while meeting the goals of the State to assure conservation of the marine resources and to assure license revocation for harvesters who violate the laws of Maine.

As you know, the State's position on jurisdiction over salt water fisheries has been set forth in previous correspondence from Joe Fessenden, Chief of the Marine Patrol, to tribal representatives. Another copy of that letter is enclosed for your records and consideration as you review this proposal. It is critical to understand that we believe an essential element of any resolution is that all commercial fishermen, including members of the Passamaquoddy tribe, are subject to the same conservation laws concerning time, method, and manner of harvesting the resource. However, as we discussed at our meeting, we believe that a species by species review of the personal use provisions of current law may reveal possible upgrades to the law that would better address the personal use needs of tribal members, and possibly other non-Indian Maine citizens as well, and we look forward to working on that project with you as part of this solution. The beauty of the personal use exemption is that no license is needed.

The joint State of Maine Passamaquoddy license approach should establish a strong foundation for cooperative state and tribal work in the critical area of marine resource conservation. The process has been framed so as to assure that the qualifications in existing law are met and to assure that the record needs of the State in order to track fishing pressure are met.

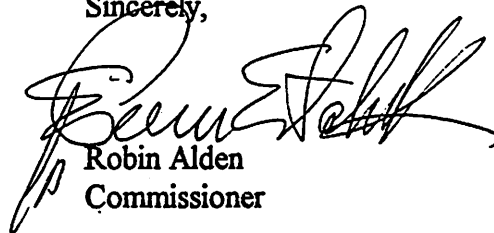
We will have to explore with the Tribe, the Committee and other commercial harvesters how any barriers presented to tribal members by those commercial qualifications can be eliminated while assuring the conservation goal of the laws. Furthermore, it should be clear to the Tribe that the Legislature may require the Department to revoke marine resource licenses not only for violation of marine resource laws, but also for failure to comply with other state laws. The State of Maine currently requires revocation of commercial licenses for non-payment of court-ordered child support, and the Legislature is considering proposal calling for revocation of hunting and fishing licenses for nonpayment of other court ordered payments or fines. These issues could be worked out as we implement the joint license approach, but given this background, we trust that you will understand our concern about the revocation authority.

Finally, we want to clarify our position with respect to the legal foundation for the Joint State of Maine Passamaquoddy Tribal license. We believe that the Passamaquoddy Tribal Council currently may issue a tribal license to tribal members in addition to (not as a replacement for) the State of Maine fishing license required of all Maine citizens for defined fishing activities. We view this to be an internal tribal matter, under the sole jurisdiction of the Tribal Council under 30 M.R.S.A. §6206. However, this Tribal Council authority does not extend to any conservation or fishing regulation of marine resources by tribal members or non-tribal members. Furthermore, the Tribal Council authority does not prevent a member of the Tribe from gaining access to Maine's fishery resource by applying directly to and receiving a State of Maine fishing license directly from state authorities if they choose to do so.

We understand that after you have had an opportunity to review this proposal, you will contact us with the Tribe's position.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Robin Alden", with a stylized flourish at the end.

Robin Alden
Commissioner

E. Penn Estabrook
Deputy Commissioner

Section 1. ³ 12 M.R.S.A. section 6304-A is enacted to read:

6304-A. Passamaquoddy Tribal Member Licenses.

1. Purpose. The Legislature seeks to encourage the members of the Passamaquoddy Tribe to participate in the benefits of the marine resources of the State through commercial and personal use harvesting, subject to the existing conservation and management framework established by state law.
2. Delegation of Authority to Issue State License. Notwithstanding any other provision of law, the commissioner may delegate the authority to issue State of Maine marine resource licenses referenced in Chapters 601 to 627 to the Joint Tribal Council of the Passamaquoddy Tribe with respect to all members of the Passamaquoddy Tribe as determined by the Joint Tribal Council pursuant to 30 MRSA §6206(1). The Tribe may issue a joint State of Maine and Tribal Council license. Alternatively, tribal members may obtain a State of Maine license directly from the State of Maine. If the Tribal Council fails to conform to the requirements of this law, the commissioner may withdraw the delegation of authority to issue a State of Maine license or joint State of Maine and Tribal Council license, after providing the Tribe with notice of the grounds for withdrawal and a reasonable opportunity to cure the failure.
3. Fees Waived. The Commissioner may authorize the Joint Tribal Council to waive all license fees, but shall require the Joint Tribal Council to maintain records of all tribal members to whom licenses have been granted pursuant to this section. The Commissioner may not waive any gear identification requirements or related fees.
4. Entry and License Qualifications Retained. The Commissioner may not authorize the waiver of any non-fee qualifications to obtain a license under Chapters 601 to 627, including, but not limited to, apprenticeship, certification or observance of a moratorium on licenses for a particular species. The Commissioner shall retain responsibility within the Department for determination of whether such non-fee qualifications have been satisfied, based upon documentation from applicants collected by the Joint Tribal Council. The Joint Tribal Council shall maintain those records in a form and for a term set by the Commissioner.
5. Observance of all other marine resource laws. Members of the Passamaquoddy Tribe who receive a State of Maine marine resource license or Joint State of Maine and Passamaquoddy Tribal marine resource license from the Joint Tribal Council of the Passamaquoddy Tribe remain subject to all laws and regulations of the State of Maine governing marine resources, including, but not limited to, laws in Chapters 601 to 627 concerning display of license to

authorized law enforcement personnel, forfeiture and embargo of marine resources, and all conservation laws concerning the time, method and manner of taking marine resources.

6. Inter-Local Agreement. The Department of Marine Resources may enter into an Inter-Local Agreement with the Joint Council of the Passamaquoddy Tribe to allow for enforcement of state and tribal laws pertaining to marine resources and licensing by law enforcement personnel of the Passamaquoddy Tribe and the Department of Marine in accordance with the provisions of 30 MRSA §6210..
7. Enforcement. All enforcement actions pertaining to this section or licenses issued pursuant to this section shall be brought in the courts of Maine or in the Passamaquoddy Tribal Court in accordance with the provisions of 30 MRSA §6209-A..

Section 2. 12 M.R.S.A. section 6074, first paragraph, is amended to read as follows:

____ 1. The commissioner may, with the advice and consent of the advisory council, issue a special license for research, aquaculture, education, or Native American ceremonial purposes which exempts the holder from one or more marine resources' laws as to the time, place, length, condition, amount and manner of taking or possessing any marine organism. Special licenses issued by the commissioner to employees of the department when they are acting in their capacity as employees under the direction of the commissioner or the commissioner's designated representative do not require the advice and consent of the advisory council.

Section 3. The Commissioner of the Department of Marine Resources shall report to the Joint Standing Committee on Marine Resources no later than January 1, 1998 on the personal use provisions in Maine marine resource laws and provide a recommendation on whether those laws should be amended in order to improve accommodation of the needs of the Passamaquoddy Tribal members or any other Maine citizens who rely on marine resource species for personal use. Such recommendations shall be made in the framework of existing law in order to conserve marine resources and assure enforceable laws.



Angus S. King, Jr.
Governor

Robin Alden
Commissioner

DEPARTMENT OF MARINE RESOURCES

Telephone (207) 624-6550
FAX (207) 624-6024

To: Senator Jill Goldthwait, Chair
Joint Standing Committee on Marine Resources

Representative David Etnier
Joint Standing Committee on Marine Resources

From: Commissioner Robin Alden 

Date: May 2, 1997

Dear Senator Goldthwait and Representative Etnier:

Under recent legislation (LD 273, Resolves of 1997), the Department of Marine Resources was requested to report to the Joint Standing Committee on Marine Resources with regard to the status of discussions with the Passamoquoddy Tribe concerning the taking of marine organisms, including any proposed amendments to the laws administered by the Department of Marine Resources. This serves as the requested report to the Committee.

Attached please find a copy of our recent correspondence to the Passamoquoddy Tribal representatives containing the Department of Marine Resources' proposal to constructively address the issues of concern raised by the Tribe with respect to salt water fishing. As indicated by our letter to the tribe, the proposal is designed to serve our mutual goals of conservation and constructive relations, while assuring that the tribe's concerns about tribal member access to the commercial fisheries and tribal member personal use are appropriately addressed. Also enclosed in the packet is draft legislation that would implement our concept proposal. We must emphasize that we have not yet received a reply from tribal representatives as of this date, but do look forward to considering a response.

Please note that we do not consider this report to be an end to this process and indeed consider our discussions to be a "work in progress". We will be happy to respond to any questions the committee might have.

AN ACT Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 M.R.S.A. §§ 6302-A through 6302-D are enacted to read:

§ 6302-A. Commercial Licensing Compact Concerning the Taking of Marine Resources by Passamaquoddy Tribal Members.

1. Authorized. Notwithstanding any other licensing provision, the taking of marine resources by resident members of the Passamaquoddy Tribe for commercial use shall be governed by a license to be issued by the Tribe under the terms of a licensing Compact to be negotiated between the State and the Passamaquoddy Tribe, approved by the legislative bodies of each party, and certified to the Secretary of State in accordance with the procedures in Title 3, section 601. If no Compact has been agreed upon by October 1, 1998, either party may submit a proposed compact for approval by the Legislature.

2. Pending approval. Until the licensing Compact has been approved and takes effect, no license issued under this Title shall be required of any member of the Passamaquoddy Tribe who holds a valid license issued by the Tribe for the taking of marine resources under a tribal regulatory program substantially the same as that governing other Maine residents engaged in the same fishery. A tribal regulatory program complies with the foregoing standard if, for each species regulated, Passamaquoddy tribal members are required to observe:

- A.** the same conservation-based restrictions as the holders of the comparable State license, or
- B.** an alternative regulation determined by the Maine Indian Tribal-State Commission to be of cultural significance to the Passamaquoddy tribal community or licensee, and yet sufficiently restrictive when limited to tribal licensees as to have no significant impact on the marine resource.

Notwithstanding any state law or regulation, until a licensing Compact has been approved under subsection 1 and takes effect, any member of the Passamaquoddy Tribe holding a valid tribal license may take, possess and transport any marine resources for use, distribution or sale as though that member were the holder of a valid State license issued under this Title for the resource or activity involved.

Any regulation approved by the Tribal-State Commission under this subsection shall be certified by the Commission's Chairman to the Secretary of State as having been so approved. A copy of the regulation and certification must be submitted by the Secretary of State to the Commissioner of Marine Resources.

§ 6302-B. Tribal Sustenance. Notwithstanding any state law or regulation, any member of the Passamaquoddy Tribe properly identified by a tribal identity card may take, possess and transport any marine resources for use, distribution or sale exclusively within the Passamaquoddy communities at or near the Pleasant Point or Indian Township Reservations. As used in this section, sustenance use includes all consumption or use by tribal members and members of their households, or within the member's immediate family, other than the commercial sale to any person who is not eligible for sustenance use under this section.

§ 6302-C. Ceremonial Tribal Use. Notwithstanding any state law or regulation, any member of the Passamaquoddy Tribe may take, possess and transport any marine resources identified in a special tribal permit issued to the tribal member by the Passamaquoddy Joint Tribal Council or the Governor and Council at either Passamaquoddy Reservation, when those marine resources are exclusively for use in a gathering that is identified in the permit, and designed and intended to support or advance the public interests of the Passamaquoddy tribal community.

§ 6302-D. Enforcement. Passamaquoddy tribal licenses and laws regulating the taking, possession, transportation and use of marine resources shall be enforced by law enforcement officers appointed by the Tribe. Officers of the Maine Marine Patrol and the National Marine Fisheries Service are authorized to assist, to assure compliance and aid the enforcement of tribal marine resources licenses and laws, through cross-deputization or cooperation with tribal law enforcement officers. The following penalties may be imposed for any violation of tribal law regulating the taking of marine resources:

1. License suspension. Any tribal license for the taking of marine resources shall be subject to suspension for any period up to one year upon a judicial finding that the license holder has violated the terms of the license or the Passamaquoddy tribal regulatory program.

2. Civil penalties. The holder of any tribal license for the taking of marine resources shall be subject to a civil money penalty of up to \$2,000 for any violation of the terms of the license or the Passamaquoddy tribal regulatory program, in addition to any other remedy. In determining the appropriateness of a civil penalty, the nature of the violation, any history of

prior violations, and any adverse consequences to others, their property or the natural resources that may have resulted from the violation shall be considered. In the event that a violation has caused monetary loss or damage to another person, the Court may order restitution, in addition to or instead of other penalties.

3. Forfeiture. Any marine resource taken or possessed in violation of this section or the Passamaquoddy tribal regulatory program shall be subject to seizure by any law enforcement officer with authority to enforce the Passamaquoddy tribal regulatory program, and to forfeiture.

The Passamaquoddy Tribe shall have the right to exercise exclusive jurisdiction separate and distinct from the State over any violation of the Passamaquoddy tribal law regulating marine resources in an action commenced by the Passamaquoddy Tribe.. The decision to exercise or terminate the exercise of the jurisdiction authorized by this section shall be made by the tribal governing body. Should the tribe choose not to exercise, or to terminate its exercise of jurisdiction under this section, the State of Maine shall have exclusive jurisdiction over those matters until such time as the tribal governing body elects to begin or resume the exercise of exclusive tribal jurisdiction.

Sec 2. Retroactivity. This Act applies retroactively to June 1, 1997.

SUMMARY

In furtherance of 1997 Resolves, c. 11, this bill exempts Passamaquoddy tribal members from regulation by the State when taking marine resources exclusively for tribal sustenance, or for tribal ceremonial use under a special tribal permit.

The bill also authorizes the negotiation of a licensing compact between the State and the Passamaquoddy Tribe governing the taking of marine resources by Passamaquoddy tribal members, or the submission of Compact proposals to the 119th Legislature. Until a compact is approved, the bill approves the use of tribal licenses under an enforceable Passamaquoddy regulatory program substantially the same as the laws and regulations administered by the Department of Marine Resources.

The Act is made retroactive to June 1, 1997.



ANGUS S. KING, JR.
GOVERNOR

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

October 21, 1997

Tribal Governor John Stevens
Peter Dana Point Reservation
Passamaquoddy Tribe
P.O. Box 301
Princeton, ME. 04668

Tribal Governor Richard Doyle
Pleasant Point Reservation
Passamaquoddy Tribe
P.O. Box 343
Perry, ME. 04667

Dear Governor Stevens and Governor Doyle:

This letter follows up on our meeting in Bangor on Thursday October 2, 1997 and my subsequent phone call of October 14, 1997 with Governor Doyle and other Pleasant Point Tribal Council representatives.

I had proposed to use the Maine Indian Tribal State Commission ("MITSC") as the forum to discuss the salt water fishing issues raised by the Tribe and our conflicting interpretation of the Maine Indian Land Claims Settlement Act ("MILCSA") governing this issue. It is my understanding that the Passamaquoddy Tribe would prefer to negotiate directly with members of my Administration on this matter, and has declined to use the MITSC as a negotiation forum. In order to accommodate the Tribe's preference, I am prepared to name a small team of senior officials, to identify and pay for a mutually acceptable facilitator to guide our discussions, and to review your most recent proposal on this matter. (For purposes of clarity, I have enclosed a copy of the Tribe's new draft proposal, dated October 1, 1997, that we are now reviewing, delivered to my office subsequent to our meeting by the Tribe's attorney, Greg Sample). We will respond formally to this new proposal at our first meeting.

As I have explained, conservation is the guiding principle for me in pursuing policies for the State's stewardship responsibility in managing natural resources. Any solution must avoid a division of the current unified conservation management and regulatory authority into a dual regulatory regime split between the State of Maine and the Tribe. I also am cognizant of the need to avoid creating further friction between Indian and non-Indian citizens. My goal in these discussions will be to find a solution which can meet your needs while avoiding the creation of a different system of marine resource laws for tribal and non-tribal citizens outside of Indian territories. As I said at our meeting, it is also important to me that whatever arrangement we arrive at be consistent with the fundamental framework of the MILCSA.



PHONE: (207) 287-3531 (Voice)

PRINTED ON RECYCLED PAPER
(207) 287-6548 (TTY)

FAX: (207) 287-1034

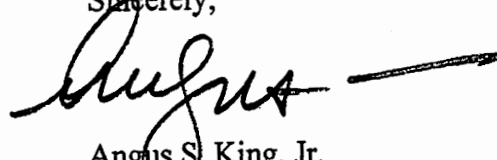
As we discussed in both our meeting and our phone conversation, I do not feel that it is appropriate (nor do I have any jurisdiction) to intervene in any way in the ongoing criminal prosecutions concerning past fishing practices of tribal members in the salt water arena. I strongly urge that the Tribal Council encourage all tribal members to comply with State of Maine marine resource licensing and conservation laws during our discussions. Any solutions that we might develop through our mediated discussions would be purely prospective in application. Therefore, it is essential that tribal members understand that they will be subject to civil and criminal prosecution if they persist in violating the law.

So that the State's position on the legal matter surrounding this case is clear, as well as the State's intent to enforce the marine resource laws, I am enclosing a copy of the prior correspondence on this matter, including key correspondence between State agencies and the Tribe from November 1996 to date.

On a closing note, I am re-enclosing the April 24, 1997 letter from Commissioner Robin Alden outlining the State's draft proposal for your further consideration. Just as you have asked that we again review your original proposal, so I will ask you to carefully reflect upon the advantages of this pragmatic approach offered by Commissioner Alden. It certainly assures access to the salt water fishing resource for the Tribe, while preserving the conservation and harmonious relations goal that we share. I will look forward to your response to this proposal at the first meeting as we respond to your proposal.

I am very hopeful that conflict can be avoided and that we can continue our constructive dialogue on the issue of marine resource conservation as well as other issues of mutual concern. I will have a member of my staff contact your offices in the coming weeks to begin arrangements for the discussions.

Sincerely,



Angus S. King, Jr.
Governor

cc: Attorney General Ketterer
Commissioner Robin Alden

STATE OF MAINE

Washington, ss.

DISTRICT COURT

District Four

Div. Of Northern Washington

STATE OF MAINE

v.

ALLIE BEAL, Defendant

ROGER BRACKETT, Defendant

DONNEL DANA, SR., Defendant

CARROLL FRANCIS, Defendant

CARL JILLSON, Defendant

CECIL LARKIN, Defendant

KARLI MURPHY, Defendant

KENNETH NEWELL, JR., Defendant

FRANCIS SAPIEL, JR., Defendant

JOSEPH SAPIEL, Defendant

CLIFTON SMITH, Defendant

WILLIAM SMITH, Defendant

RONALD TROTT, Defendant

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Docket Nos. 96-957, 97-78, 97-36

Docket No. 97-639

Docket No. 96-1133

Docket No. 97-832

Docket Nos. 97-837, 97-838

Docket No. 97-514

Docket No. 97-394

Docket No. 97-638

Docket Nos. 97-136, 97-137, 97-138

Docket No. 97-640

Docket Nos. 97-835, 97-836, 97-515

Docket No. 97-833

Docket No. 97-630

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The State has filed criminal charges against several members of the Passamaquoddy Tribe for taking various marine resources from the flats and tidal waters near their reservation at Pleasant Point. This memorandum is offered in support of a

Motion to Dismiss those cases on the grounds that the State has no jurisdiction over those activities by tribal members. Supporting evidence is submitted in rough chronological order in two volumes, including an Index. A topical Summary of the evidence is presented at the end of this Memorandum as an aid to accessing the documentary record.

STATEMENT OF THE CASE

The Passamaquoddy Tribe (“Tribe”) is the aboriginal occupant of vast areas of what are now eastern Maine and southwestern New Brunswick. Over literally thousands of years, the territory of the Passamaquoddy ancestors centered on the Passamaquoddy River (later known as the Schoodic, and now the St.Croix) and the vast Passamaquoddy Bay at its mouth. Leader Affidavit, ¶ 5. Champlain observed Indians at St. Croix Island, between Pleasant Point and Calais, living “on a shellfish called the clam” throughout the winter. Leader Affid., ¶ 6. The first Jesuits to do missionary work in the Passamaquoddy Bay region between 1611 and 1613 wrote about Passamaquoddy ancestors, known as the “Etchemins.” Father Baird reported (Leader Affid., ¶ 6):

I myself can witness to the friendship of the Etchemins..., for I have lived among them From the month of May to the middle of September, they are free from all anxiety about their food; for the cod are upon the coast, and all kinds of fish and shellfish... now our savages in the middle of September withdraw from the sea, beyond the reach of the tide, to the little rivers, where the eels spawn, of which they lay in a supply; they are good and fat. In October and November, the second hunt for elks and beavers; and then in December (wonderful providence of God), comes a fish called by them Ponomo, which spawns under the ice. Also, then the turtles bare little ones, etc. These then, but in a still greater number, are the revenues and incomes of our Savages; such, their table and living, all prepared and assigned, everything to its proper place and quarter. Never had Solomon his mansion better regulated and provided with food, then are these homes and their landlords.

After the Seventeenth Century, the main Passamaquoddy village was established at St. Andrews (*Kun-as-kwam-kook*), then moved to Indian Island in Passamaquoddy Bay, then to Birch Point, located three miles below Pleasant Point, and finally to Pleasant Point, the site occupied since that time by the Passamaquoddies and now the Pleasant Point Reservation.. Leader Affid., ¶ 7; Hist. 8. The Passamaquoddy used what is now St. Stephen (*K'tchi Medabiaught*, "Great Landing Place") as their first landing place when returning from seal and porpoise hunting. Leader Affid., ¶ 7. The name *Passamaquoddy* derives from "*Peskutam-akadi*," which means "pollock-plenty-place." *Id.* The name, itself, confirms the orientation of the Passamaquoddy to the sea. *Id.*

French historian, Nicholas Denys, who wrote in the late Seveenth Century, observed the Passamaquoddy hunting seal throughout the year, and what Denys referred to as Sturgeon (porpoise) from canoe, at night, utilizing a finely crafted harpoon. Leader Affid., ¶ 8. Denys described their fishing for squid and other species:

[T]o capture it, a fire is made on land on the edge of the water. At night on a rising tide it comes ashore; the tide falling, it remains high and dry on the beach, which is sometimes found all covered with it. It is about a foot in length, quite round and larger in the middle than at the ends. The end of the tail is pointed and on it there is a border of two inches breadth, all round, like a buckler. It is good to eat roasted, boiled, and fried....

There is also the Haddock, which the fisherman call the fish of St. Peter, because of two black marks which occur upon the two sides of the head. This is said to be the place where Savior took hold of it. It is formed like a small cod, is good to eat, and is even dried just like the cod.

The flounder, occurs near the land on bottoms of sand when the tide is low. To take it there is used a shaft with an iron pointed at the end, having a little tooth which keeps it from coming out when the fish is struck. It is much better eating than those of the rivers, being firmer and better of taste.

Id. Denys described Passamaquoddy collecting shellfish and using lobster claws for pipes to smoke tobacco. *Id.* He observed that “all their hunting and fishing were done only as they had need for,” and that the Passamaquoddy women smoked fish to preserve it. *Id.*

During the 1720's, the English and their provincial governments sought to solidify their relations with the Natives in New England and Nova Scotia, resulting in a treaty of peace and friendship (rather than of conquest, or of cession), known as the Treaty of 1725.¹ The Passamaquoddy Tribe was represented among the tribal signatories to the 1725 Treaty, which, in exchange for tribal promises of peaceful relations, provided the English Crown's assurance “that the Indians shall not be molested in their persons, Hunting, Fishing and Planting Grounds, nor in any other their Lawfull Occasions by His Majestys Subjects.” Hist. 3.

During the Revolutionary War, Colonal John Allan, Superintendent of the Eastern Indians and Colonal of Infantry, enlisted the Passamaquoddy to resist the British from posts on the Canadian front. Leader Affid., ¶ 9. Colonal Allan found them to be excellent mariners, who knew the coast and bay area very well. *Id.* Allan promised the Passamaquoddies “that they should be for ever viewed as brothers & children, under the

¹The Treaty of 1725 is often referred to as “Dummer's Treaty” or “Mascarene's Treaty.” See Andrea Bear Nicholas, *Mascarene's Treaty of 1725*, Hist. 3, at 7-8. There were several versions of this treaty, executed at different times. *Id.* The treaty was originally negotiated in Boston in 1725 in the presence of the General Court or Assembly of the province of Massachusetts. Treaty No. 239, reprinted in *Native Rights in Canada*, 2d ed. (Cumming and Mickenberg, eds. 1972). Moreover, *Dummer's Treaty* and *Mascarene's Treaty* appear to be different versions of a similar treaty: the difference being caused by secret demands made on Mascarene by the government of Nova Scotia which were not made by the government of Massachusetts on Dummer. See Hist. 3, at 8. *Dummer's Treaty*, reserving “all the rights of fishing, hunting, and fowling, as in times past,” was affirmed by representatives of the Province of Massachusetts at Falmouth in October, 1749. Hist. 5, at 258-59.

Protection and Fatherly care of the United States & enjoy every right & privilege, according to difference of setuation [sic] in proportion with others.” He further promised that they would be free to fish. *Id.*

According to Judith Leader, PhD., an expert on the ethnohistory of the Passamaquoddy, wampum was a central part of Passamaquoddy culture. Leader Affid., ¶ 9. Allan observed the Passamaquoddies’ traditional uses of wampum, belts carefully embroidered with seashells. *Id.* The use of material from the sea to make wampum illustrates one aspect of the complex connection between the traditional life of the Passamaquoddy and the sea. *Id.*

With the signing to the Treaty of Paris in 1783, the new Canadian boundary restricted the subsistence fishing grounds of the Passamaquoddy as the British took over Passamaquoddy summer camp sites at St. Andrews and elsewhere within Canada. Leader Affid., ¶ 10. The British allowed the Passamaquoddy passage over the border, and tribal members continued to use St. Andrews to stay overnight when they hunted porpoise. *Id.*

Notwithstanding efforts of the fledgling U.S. Indian Affairs office to establish a treaty between the Passamaquoddy Tribe and the United States, no such treaty was ever entered, but a Treaty was arranged between the Tribe and the Commonwealth of Massachusetts in 1794. The 1794 Treaty “assign[ed] and set off” to the Passamaquoddy Tribe the lands for the Indian Township and Pleasant Point Reservations and certain other lands. Hist., 2. In addition, the Treaty recognized that the Tribe held

... the privilege of fishing on both branches of the river Schoodic without hinderance or molestation and the privilege of passing the said river over the different carrying places thereon,

and

... a privilege of setting down at the carrying place at west Quoddy between the Bay of West Quoddy and the Bay of Fundy, to contain fifty acres.

The 1794 Treaty's recitation of the lands and rights assured to the Passamaquoddy concludes:

The said islands, tracts of land and privileges to be confirmed by the Commonwealth of Massachusetts to the said Indians and their heirs forever.²

The "consideration" given by the Tribe for the Commonwealth's "setting off" and promising to protect lands and rights that the Tribe had held and exercised forever, was

... the said Indians relinquishing all their right, title, interest, claim or demand, on any land or lands lying and being within the said Commonwealth of Massachusetts; and also engaging to be peaceable and quiet inhabitants of the said Commonwealth, without molesting any other of the settlers of the Commonwealth aforesaid in any way or means whatever. . .

Until about 20 years ago, Maine and Massachusetts considered the Passamaquoddy Tribe to have no inherent sovereignty, and no rights under federal Indian law.³ Instead, Massachusetts, and later Maine, appointed "Indian Agents" to oversee

² The Articles of Separation from Massachusetts, by which Maine became a state, provide that "the new State shall . . . perform all the duties, and obligations of this Commonwealth, towards the Indians . . . whether the same arise from treaties, or otherwise; . . ." 1819 Laws of Massachusetts, ch. 161, sec. 1, part Fifth. Thus, Maine continued the official recognition of the rights of the Passamaquoddies acknowledged in the 1794 Treaty, and assumed the Commonwealth's guaranty of those rights.

³ However, the 1794 Treaty's undisclosed conflict with a 1790 federal law prohibiting property transactions with Indians by any but the federal government, resulted eventually in the historic Land Claims of the Passamaquoddy

(continued...)

relations with the Passamaquoddy at Pleasant Point and Indian Township. Leader Affid.,

¶ 11. The Indian Agents reported as late as 1873 that at Pleasant Point, the Passamaquoddy continued to hunt seal, porpoise, and shark both for food and the oil, which they sold for cash. *Id.* In 1882, Indian Agent Porter observed that the Passamaquoddy depended upon “the scanty sustenance obtained by fishing and hunting” and that in 1881, some Passamaquoddy had built three large weirs to catch herring. *Id.* After the Maine Supreme Judicial Court decided *State of Maine v. Newell* in 1892 (84 Me. 465), Passamaquoddy tribal members continued to hunt game out of season notwithstanding the jurisdiction the State asserted over such traditional activities. *Id.*⁴

In 1896, Anthropologist Albert Samuel Gatschet documented Passamaquoddy names for a variety of fish. Leader Affid., ¶ 14. According to Cultural Anthropologist Judith Leader, the predominance of fish and other sea creature names in the Passamaquoddy language and folklore shows the central importance of the sea and its resources to the cultural identity of the Passamaquoddy Tribe. *Id.*

³(...continued)

and other Maine tribes in the 1970's. A synopsis of the historical treatment of the Passamaquoddy Tribe by the state and federal governments is presented in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649, 651-653, 667-669 (D.Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975). Hist., 11. See also S.Rep. No. 96-957, 96th Cong., 2d Sess. at 12-13 (1980), and H.R.Rep. No. 96-1353, 96th Cong., 2d Sess. at 11-13 (1980) reprinted in 1980 U.S. Code Cong. & Admin. News at 3786, 3787-3789.

⁴ In Porter's 1886 Report (Hist., 12), the basis for tribal reliance on earlier treaty rights to hunt and fish is set forth and endorsed. The lawyer for the Defendant Passamaquoddy in *Newell*, George M. Hansen, became an Associate Justice of the Law Court and, thereafter, together with Indian Agents, continued to advocate for Passamaquoddy freedom from hunting and fishing restrictions under state law. Leader Affid., ¶ 12.

In 1972, the Tribe asked the United States to obtain trespass damages and the restoration of aboriginal lands taken without the Congressional consent required by the Indian Nonintercourse Act, 25 U.S.C. § 177, originally enacted in 1790. When the federal government failed to respond, the Tribe filed *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* to establish that the Nonintercourse Act applied to the Tribe. The U.S. District Court ruled that the Tribe was within the plain meaning of the phrase “any Indian Nation or tribe of Indians” used in the Nonintercourse Act, and that the United States had a trust obligation to protect the Tribe’s property interests. *Passamaquoddy v. Morton*, 388 F.Supp. 649, 655-663 (D.Me.), *aff’d*, 528 F.2d 370 (1st Cir. 1975).

The result was the filing of *United States v. Maine* in the U.S. District Court, a case which the Justice Department was later to describe as “potentially the most complex litigation ever brought in the federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties.”⁵ The Congressional Committees considering the eventual legislative resolution of these claims explained the Justice Department’s conclusion:

This conclusion was based on the size of the claim, the number of persons living within the disputed area, and the nature of the legal issues involved, since the Tribes claim covers up to 12.5 million acres of land (60 percent of the State of Maine) and nearly two hundred years had intervened between the time the first agreement was reached and the present day. More than 350,000 people live on the now disputed land.

⁵ S.Rep. No. 96-957, 96th Congress, 2d Sess., at 13, quoting a 1977 Justice Department memorandum.

* * *

Estimates of the time it would take to litigate such a case range from five to more than fifteen years. In the meantime, according to testimony offered to this Committee, titles to land in the entire claim area would be clouded, the sale of municipal bonds would become difficult if not impossible, and property would be difficult to alienate.

H.R.Rep. 96-1353, *supra*, at 14; 1980 U.S.C.C.A.N. 3786, 3789-90. See also S.Rep. 96-957, *supra*, at 13-14.

This Court's jurisdiction over these cases turns upon Congress's intentions in adopting the key provisions addressing property rights and governmental jurisdiction in the resulting Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735. The Settlement Act addressed the most urgent problem just cited -- the uncertainty of land titles traced back to the 1794 cession of Passamaquoddy lands -- by restoring property rights to the *status quo* as it was popularly understood to exist prior to the Maine Indian Land Claims. At the same time the Settlement allocated civil and criminal jurisdiction among all parties, the federal government, the State, and the Tribe. The Committee Reports characterized the jurisdictional provisions of the Settlement as:

an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1979).

S.Rep., *supra*, at 29 (emphasis added).

By initiating these criminal cases, it is apparent that the State claims that Congress gave it the power to enforce state law against Passamaquoddy tribal members engaged in salt water fishing. The Defendants maintain that they have aboriginal or implied treaty

fishing rights in the salt water, property rights which were not extinguished in the Settlement Act, and therefore remain federally protected. Indeed, federal protection of those rights must be incorporated in the Settlement Act itself. Although no express mention of salt water fishing appears in the Settlement Act, Defendants maintain that Congress clearly intended that matters vitally affecting the survival of tribal culture were to be an area of continuing tribal jurisdiction.⁶

The key statutory provisions are as follows:

Addressing property rights in 25 U.S.C. § 1723, Congress cleared any title cloud that might have arisen from “any transfer of land or natural resources located anywhere within the State of Maine, from, by, or on behalf of any Indian, Indian nation, or tribe or

⁶ Even if the Court were to decide that it has jurisdiction to try these cases, it should abstain from exercising jurisdiction because these cases present a political question appropriately left to co-equal branches of government. In the Settlement Act, Congress pre-approved amendments to the Implementing Act relating to “the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe . . . and the State within their respective jurisdictions,” by agreement between the State and the Tribe. 25 U.S.C. § 1725(e)(1). Regulatory jurisdiction over Passamaquoddy fishing is within the scope of this provision. Both the State and the Tribe have committed to reaching a negotiated resolution of this issue, the means expressly authorized by the Settlement Act. They have engaged in an extensive series of meetings aimed at reaching such a resolution, including the exchange of draft legislation. See Pol. __; Sample Affid. The introduction of legislation dealing with this issue has been approved for the 1998 legislative Session. Pol., 9.

The political question doctrine is designed to prevent judicial interference in the business of other branches of government. See *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990); *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Wright v. Department of Defense and Veterans Services*, 623 A.2d 1283, 1284-85 (Me. 1993); *Oxford Paper Co. v. Johnson*, 156 A.2d 235, 240 (Me. 1959). Here, resolution of the ultimate issue – jurisdiction to regulate Passamaquoddy tribal members’ salt water fishing – is under active negotiation by the legislative and executive branches of state government, and the Passamaquoddy Tribe. Compare *Baker*, 369 U.S. at 226. A decision of the jurisdictional issue by this court would inevitably cause the ongoing negotiations to come to an abrupt halt, regardless of what decision the court reaches, as one side would suddenly have a strong incentive to walk away from the bargaining table. The court should allow these two sovereigns to continue their ongoing negotiations without judicial interference.

band of Indians, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State,” but meticulously limited its negation of tribal property rights to rights previously transferred. At the same time that it confirmed titles to transferred lands, Congress expressly recognized the tribal property rights inherent in the Passamaquoddy’s status as a recognized tribe. The modern Passamaquoddy Tribe is recognized as “the Passamaquoddy Indian Tribe, as constituted in aboriginal times,” and the Settlement Act confirms the lands and rights reserved to the Tribe in the 1794 Treaty. 25 U.S.C. § 1721(a)(4) and § 1722(f) (incorporating 30 M.R.S.A. § 6203(5)). *See* S.Rep. 96-957, at 18 (“[T]he Passamaquoddy Tribe ... will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them.”)

As to jurisdiction, Congress provided for State jurisdiction only in general terms:

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

25 U.S.C. § 1725(b)(1). The Maine Implementing Act states:

Except as otherwise provided in this Act, all Indians, Indian nations, 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.

30 M.R.S.A. § 6204 (emphasis added). The Implementing Act does not address jurisdiction over salt water fishing directly, and it is “otherwise provided” in that Act that the tribes retain substantial jurisdiction over their own members and lands, independent of State laws.

[I]nternal 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.

30 M.R.S.A. § 6206(1) (emphasis added). And among other, separately specified areas of tribal jurisdiction, the Implementing Act provides that the Passamaquoddy Tribe “shall have exclusive authority” within its future Indian territory to govern hunting, trapping and other taking of wildlife, including fishing on most ponds within Indian territory, § 6207, and to enforce those tribal laws against tribal members and nonmembers alike. §§ 6209, 6210(1).

Thus Congressional approval of the Implementing Act embraces *tribal* property rights and jurisdiction, as well as *private* property rights and *state* jurisdiction. In substance, these important provisions were ones of preservation of the perceived *status quo ante*. Review of both property and jurisdictional provisions of the Settlement Act indicate that Congress intended to maintain tribal regulation of salt water fishing.

The central issue in construing the Settlement Act is whether Congress intended tribal regulation of *tribal members* fishing in salt water, even though their activities would continue to take place largely in the same public domain used by non-Indians. This

presents issues of federal law, which necessarily implicate established federal rules of construction applied to treaties and statutes involving Indian rights. Defendants maintain that even as Congress allowed limited State jurisdiction over the Tribe, it addressed regulation of the Tribe's salt water fishing by protecting the Passamaquoddy property and culture from interference and regulation by the State.

ISSUES

- I. **DID CONGRESS EXTINGUISH PASSAMAQUODDY RIGHTS TO FISH IN MARINE WATERS?**
- II. **IS PASSAMAQUODDY SALT WATER FISHING SUBJECT TO STATE REGULATION?**

ARGUMENT

- I. **The Passamaquoddy Tribe has Federally Protected Salt Water Fishing Rights, Which were Not Extinguished by the 1980 Settlement Act.**

This brief will first set forth the general principles of federal law that guide the determination of the Passamaquoddy salt water fishing rights at issue, and then discuss the application of that law to the pending cases.

The United States Constitution vests Congress with plenary power over Indian tribes. *See* U.S. Const. art. I, § 8, cl. 3; *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985). Congress's laws and treaties pertaining to Indian tribes constitute the "supreme law of the land." U.S. Const. art. VI. As a result, a special legal relationship exists between the United States and domestic Indian tribes, in which the United States acts as a trustee to the tribes without divesting the tribes of their inherent sovereignty. *Worcester*

v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832). *See also* F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) (hereinafter, “Cohen”) 220-25 (origin of the relationship and limits it places on federal power). The trust “relationship not only preserved tribal government, but insulated it from state interference.” Cohen, at 234-35.

The principle that “tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States” is well-established. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). Therefore, “[a]bsent governing Acts of Congress, a state may not act in a manner that infringes on the right of reservation Indians to make their own laws and be ruled by them.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33 (1983) (quoting *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 171-72 (1973)); *Williams v. Lee*, 358 U.S. 217, 223 (1959).

These basic principles remain central to any adjudication of the rights of Maine’s Indian tribes and their members, even though Congress has enacted federal legislation which has afforded the State some measure of jurisdiction over the Maine tribes. In Maine, as in the rest of the country, tribal rights are a matter of federal law. *Akins v. Penobscot Nation*, No. 97-1644, Slip op. at 7 (1st Cir. Nov. 17, 1997).

Federal litigation prior to the Settlement Act established that state law had little application to the Passamaquoddy Tribe. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* established that the United States had a trust obligation to protect the Tribe’s property interests. 388 F.Supp. at 655-663. In *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979), the Tribe was held to still possess the inherent

sovereign powers attributed to other federally recognized tribes under federal common law, because those powers had never been ceded by the Tribe or limited by Congress, and their termination was in no way implicit in the Tribe's relation to the federal government. From these cases, it followed that state criminal law had no application to serious crimes alleged to have been committed on the Passamaquoddy Reservation by a tribal member, and the Law Court so held. *State v. Dana*, 404 A.2d 551, 560-561 (Me. 1979).

Passamaquoddy reservations are "Indian Country," and governed by federal law. *Id.*

Thus, federal Indian law forms more than just the "backdrop" against which the Maine Indian Claims Settlement Act of 1980 (the "Settlement Act")⁷ was written.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973). The federal Settlement Act is the foundation upon which the Maine Implementing Act (the "Implementing Act")⁸ rests. Without Congressional approval, the state statute is meaningless. Construction of the Implementing Act is a question of Congressional intent.

Since, in adopting the Settlement Act, Congress acted within "the unique trust relationship between the United States and the Indians,"⁹ special rules of construction apply:

Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent

⁷ 25 U.S.C. §§1721 *et seq.*

⁸ 30 M.R.S.A. §§ 6201, *et seq.*

⁹ *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians.

Cohen, at 221. Courts must:

construe a treaty with the Indians as that unlettered people understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right without regard to technical rules.

United States v. Winans, 198 U.S. 371, 380-81 (1905) (internal quotation marks omitted).

The rules governing interpretation of treaties apply with full force to interpretation of modern statutes affecting Indians. *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995); *Passamaquoddy v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975) (“[S]tatutes or treaties relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians understood them, and never to the Indians’ prejudice.”).¹⁰

¹⁰ These rules of construction have been carried forward from the beginning of this nation’s relationship with the Indians to the present day. See *Worcester*, 31 U.S. (6 Pet.) at 551-54, 582; *Winters*, 207 U.S. at 576; *Alaska Pacific Fisheries*, 248 U.S. 78, 89 (1918) (“[S]tatutes passed for the benefit of dependant Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.”); *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 676 (1979) (“[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899))). *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (ambiguity must be resolved in favor of tribal rights and “the federal policy of encouraging tribal independence”).

A. The Passamaquoddy Tribe has Aboriginal Rights or Rights Implicit in the Establishment of the Pleasant Point Reservation to Engage in Salt Water Fishing.

Property rights (as defined in Anglo-American legal concepts) held by American Indian tribes by virtue of their aboriginal occupancy of North America have been recognized ever since the first white settlers arrived in the New World. “Modern legal doctrines that protect aboriginal title derive directly from the policies of the European powers toward the American Indians.” Cohen, at 486. The United States adopted these principles in *Johnson v. M’Intosh*¹¹ to decide between competing claims of title by individuals who had purchased land directly from the Indians and others who held patents granted by the United States, after the tribe had later ceded the land to the government. *Johnson* held that “discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments,” but only subject to aboriginal Indian rights of occupancy. 21 U.S. (8 Wheat) at 573-74.¹²

To protect aboriginal rights, the Court held that they could only be terminated by the federal government, so that the Indians could not convey their aboriginal rights to anyone other than the United States without federal approval. *Id.* at 603. *See also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy,

¹¹ 21 U.S. (8 Wheat) 543 (1823).

¹² As the Court later explained, this rule “regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832).

until that right shall be extinguished by a voluntary cession to our government”).

“Indian aboriginal claims to hunt, fish, and gather are founded on immemorial custom and practice.” Cohen, at 442; *Memominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184, 205 (W.D.Wis. 1996) (quoting Cohen), dismissed, 943 F.Supp. 999 (1996); *United States v. Michigan*, 471 F.Supp. 192, 256-57 (W.D.Mich. 1979).¹³ “Unless extinguished by Congress, hunting and fishing rights based on aboriginal possession continue to be exercisable just as other non-reservation rights are.” Cohen, at 443.

The Passamaquoddy Tribe has always been a fishing tribe. The name “Passamaquoddy” refers to the “pollock People.” Tribal 2, David Francis, Sr., at 16 ; William Altvater, Jr., at 97. *See also* Tribal 9, Wayne A. Newell Affid., ¶ 10; Leader Affid., ¶ 6. The tribal name is evidence of the history of the people who bear the name. *Mattz v. Arnett*, 412 U.S. 481, 485-86 (1973). Passamaquoddies have practiced and relied upon salt water fishing as a means of survival, individually and collectively, from ancient times to the present. Arch. 1; Leader Affid., ¶¶ 5, 6, 8, 10, 11; Tribal 8, Moore, Sr. Affid., ¶ 3. The traditional culture and religious values of the Passamaquoddies are deeply entwined with fishing. Tribal 2, John Holmes at 82 (“tradition of survival”); Tribal 9, Newell Affid., ¶¶ 3-6, 11; Tribal 11, Altvater, Jr. Affid., ¶ 5; Tribal 10, Moore, III Affid., ¶ 5. Passamaquoddy reverence for the haddock as the emblem of the Creator has been noted for 300 years (Leader Affid. ¶ 8), and continues today. Tribal 2, Francis, Sr. at 15;

¹³ Later op. 505 F.Supp. 467 (W.D.Mich. 1980), remanded 623 F.2d 448 (6th Cir. 1980), on remand 89 F.R.D. 307 (1980), later app. 653 F.2d 277 (1981), cert. denied 102 S. Ct. 971 (1981), on remand 520 F.Supp. 207 (1981).

Tribal 9, Newell Affid., ¶ 6. The cultural values triggered by the haddock (Tribal 9, Newell Affid., ¶¶ 3-6) and fishing in general (Tribal 11, Altvater, Jr. Affid., ¶ 5; Tribal 10, Moore, III Affid., ¶ 5) extend across the breadth of Passamaquoddy traditional culture.

The doctrine of aboriginal rights survives to the present day. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345-47 (1941); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69 (1974); *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 376 n.6 (1st Cir. 1975); *Menominee*, 922 F.Supp. at 205 (1996). Aboriginal title need not be recognized by treaty to be protected. *See Oneida Indian Nation*, 414 U.S. at 669; *Santa Fe Pacific R. Co.*, 314 U.S. at 347; *Passamaquoddy v. Morton*, 528 F.2d at 377.

There is no evidence that the Tribe has ever expressly ceded the salt water fishing rights arising from their historic fishing practices. As such, those practices have federal law protection as aboriginal rights.

In addition, tribal property rights have been implied from treaty language, or from the circumstances surrounding the making of a treaty. The circumstances in this case indicate that salt water fishing rights were necessarily preserved by implication, incidental and appurtenant to official recognition of Pleasant Point as a permanent Passamaquoddy community. Where treaties or laws establishing reservations are silent as to the rights associated with the reservation land, two opposing inferences might be drawn: that the Indians ceded all rights they did not expressly reserve, or that the Indians reserved all rights not expressly ceded. *See Winters v. United States*, 207 U.S. 564, 576 (1908). In

Winters, the Court applied “a rule of interpretation of agreements and treaties with the Indians[] [by which] ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between [the] two inferences.” *Id.* at 576-77.

In determining whether reservations include implied rights, courts must look to the circumstances of the tribe at the time the reservation was created:

As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution ... to have in mind the circumstances in which the reservation was created – the power of Congress in the premises, the location and character of the [land], the situation and needs of the Indians and the object to be attained.

Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87 (1918).

The significance to the Passamaquoddy of their traditional hunting and fishing practices was apparent well before the Pleasant Point reservation was established. Leader Affid, ¶¶ 6, 8. In a 1725 Treaty between England and its colonial governments with the many tribes resident in Nova Scotia and New England, including the Passamaquoddy, one of the few provisions secured by the tribes in their favor obtained the colonial powers’ assurance “that the Indians shall not be molested in their persons, Hunting, Fishing and Planting Grounds, nor in any other their Lawfull Occasions by His Majestys Subjects.” 1725 Treaty, Hist., 3. As later affirmed by the Province of Massachusetts in 1749, the treaty reserved to the tribes “all the rights of fishing, hunting, and fowling, as in times past.” Hist. 4, at 146; Hist. 5, at 259.

The historical and archaeological evidence demonstrates that the Passamaquoddy fishing grounds included all of Passamaquoddy Bay, but also extended very broadly around the Bay of Fundy, including travel to Nova Scotia, St. John, N.B., Grand Manan Island, Bar Harbor and Boston. See, e.g., Tribal 2, Maynard Stanley at 86; Moore, III, at 48, 53; Tribal 7, Francis Tomah Affid., ¶ 5. For literally thousands of years, “the most important subsistence resource for these people was food from the sea.” Leader Affid., ¶ 5. Those resources included shellfish, sea birds, fish (including swordfish), and marine mammals, including seal, porpoise and whales. *Id.* Over the past millenium, Passamaquoddies are known to have harvested the annual runs of fish up the rivers. *Id.*

A 1794 Treaty between the Passamaquoddy Tribe and the Commonwealth of Massachusetts gave mutual recognition to the Pleasant Point site as a permanent Passamaquoddy reservation. Pleasant Point is situated between the rich fishing grounds of Passamaquoddy Bay to the north and east, and of Cobscook Bay to the south and west. At the time the Pleasant Point reservation was first created, the Tribe reserved only ten acres of land. Hist., 2.¹⁴ That small, exposed, rocky point was essentially valueless as an economic base, or even as a place to shelter a community. Pleasant Point’s value to the Passamaquoddy Tribe lay in its access to the sea and fishing, and under prevailing law, the rights reserved to the Tribe must be construed in that context.

¹⁴ Another 90 acres was added by action of the Massachusetts General Court at the beginning of the 19th century. Both Congress and the State recognized the expanded reservation. 25 U.S.C. § 1722(f), incorporating 30 M.R.S.A. § 6203(5).

In *Alaska Pacific Fisheries*, the Supreme Court construed an Act of Congress in which “the body of lands known as the Annette Islands” (then a part of the public domain) were “set apart as a reservation for the use of the Metlakahtla Indians, . . . and such other Alaskan natives as may join them, to be held and used by them in common.” Without benefit of other language of conveyance or reservation, the Court inferred that:

The purpose of the Metlakahtlans, in going to the islands, was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

248 U.S. at 88. In the face of arguments that the phrase, the “body of lands known as the Annette Islands,” was not at all ambiguous, the Court considered it essential to understanding the intention of Congress that:

The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.

248 U.S. at 89. In the end, the Court concluded, “Congress intended to conform its action to [the natives’] situation and needs,” *Id.*, and the statute was read as reserving the adjacent fishing grounds as well as the islands themselves. 248 U.S. at 90.¹⁵

¹⁵ In an analogous case involving implied water rights, the Ninth Circuit pointed out that “[t]he specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for (continued...) ”

The Ninth Circuit addressed the circumstances of the Quillayute Tribe of Washington State, who had maintained a village at the mouth of the Quillayute River from time immemorial. *Moore v. United States*, 157 F.2d 760, 762 (9th Cir. 1946). An 1855 treaty established a reservation “sufficient for their wants” which included lands on both banks of the river and “several acres of the river’s bed at [the river’s] mouth and the adjoining ocean beach lands.” *Id.* State officials claimed the right to regulate the fisheries in the adjacent tidal waters and in the river upstream of the Tribe’s riverbed lands. Following *Alaska Pacific*, the Court examined the Quillayute way of life:

When first visited by white men, a mound of shells showed that part of their diet was made up of clams dug at the receding tides of the ocean beach of the sandspit and adjacent waters. They were then catching and smoking salmon, of which there was some commerce with other Indian people. A part of their food was the meat of the sea-going mammals, whales, the sea lions and the pelagic seals moving in the Pacific to and from the Pribilofs. Unlike the Eskimos, with their closed-in decked kayaks, they hunted these mammals in the rough waters of the Pacific in open canoes. Obviously they had been an aboriginal sea-faring people of great daring and skill in seeking their meat food and skins for their clothing.

157 F.2d at 762. To be “sufficient for their wants,” the Court concluded that the reservation had been intended to include the Pacific tidal lands where the Tribe engaged in commercial sealing and whaling, and the bed and waters of the river, “not only by the express reservation of its mouth, but also for the mile upstream from its mouth enclosed

¹⁵(...continued)

the benefit of the government.” *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981)(footnotes omitted).

by the reservation lands, and that this area is not one to which apply the fish and game laws of the State of Washington.” 157 F.2d at 763-64.

The same reasoning underlies *Winters v. United States*, 207 U.S. 564 (1908), construing the statute forming the Fort Belknap Indian reservation, which consisted of lands bounded by a stream, but which “were arid and, without irrigation, were practically valueless.” 207 U.S. at 576. Neither the waters nor irrigation rights were expressly reserved to the Tribe, and yet the Court found their reservation to be implicit, and necessary to give sense to the terms of the Act and the agreement of the Tribe to them. *Accord*, *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939).

The Court later described *Winters* as concluding that the government “intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been valueless.” *Arizona v. California*, 373 U.S. 546, 600 (1963) (holding that water sufficient to meet future irrigation needs was “essential to the life of the Indian people,” and therefore implicitly reserved in creation of Indian reservation.) *Accord*, *Colville Consolidated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981)(assessing purpose of reservation, court considers tribal “need to maintain themselves under changed circumstances;” right to river water for replacement fishing grounds implied); *Menominee Tribe v. U.S.*, 391 U.S. 404, 406 (1968)(reservation “for a home, to be held as Indian lands are held” includes hunting and fishing rights); *U.S. v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976)(tribal right to sustain themselves “from any food source which might

be available” inferred). *Cf., Seufert Brothers Co. v. U.S.*, 249 U.S. 194, 198-99 (1918) (treaty reservation of fishing rights at customary sites includes such sites shared with other Indians, and outside of tribe’s aboriginal lands ceded in treaty).¹⁶

In addition to assuring immediate access to the vast Cobscook and Passamaquoddy Bays, the 1794 treaty provides solid evidence that the Passamaquoddies were engaged in regular use of the Bay of Fundy fishing grounds (and no doubt the islands, beaches and flats). The treaty reserves to the Tribe “a privilege of setting down at the carrying place at west Quoddy between the Bay of West Quoddy and the Bay of Fundy, consisting of fifty acres,”¹⁷ rights and privileges that were confirmed “to the said Indians and their heirs forever” by the terms of the treaty. Hist., 2.

Taken together with evidence of the importance of salt water fishing in the history, culture, and ongoing way of life of the Passamaquoddy, the treaties entered into with the Province and Commonwealth of Massachusetts lead to the inescapable conclusion that, in obtaining treaty protection for Pleasant Point as a reservation, a primary need of the tribe was the continuation of their salt water fishing practices. *See Washington State Commercial Fishing Passenger Vessel Assoc.*, 443 U.S. at 676 (where Indians relied on fishing as a source of food and commerce, it was “inconceivable that *either party*

¹⁶ See also *Tulee v. State of Washington*, 315 U.S. 681, 684 (1942) (“In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear.”)

¹⁷ The practical significance of this carrying place is addressed by Tribal 8, Moore, Sr. Affid. ¶ 13; Tribal 11, Altwater, Jr. Affid., ¶ 2.

deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish” (emphasis added)).

In general, “the treaty [is] not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted.” *United States v. Winans*, 198 U.S. 371, 381 (1905). See also *Washington v. Washington State Fishing Vessel Assoc.*, 443 U.S. 658, 679-82 (1979) (*Winans* doctrine applied to fishing rights). As in any property transfer, a grant of tribal lands consists only of those interests and rights specifically conveyed. *United States v. Michigan*, 471 F.Supp. at 213. That court summarized application of the doctrine:

[T]he *Winans* doctrine is “alive and well” and applies not only to reserved rights to land, but to reserved rights to fish, reserved rights to water and reserved or retained rights of sovereignty, i.e., the right to tribal self-government.... And those notions are buttressed by the canons of treaty interpretation requiring a narrow construction of the grant made by the Indians.

Id. at 254. See also *Arizona v. California*, 373 U.S. 546, 598-601 (1963); *Suefert Bros. Co. v. United States*, 249 U.S. 194, 198-99 (1919); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *United States v. Winans*, 198 U.S. 371, 380-81 (1905). Here, it would be unreasonable to construe the 1794 cession of “land or lands lying and being within the said Commonwealth” to include salt water fishing rights.

Prior cases hold that only Congress has the power to extinguish tribal rights derived from aboriginal occupancy, whether express or implied. *Oneida Indian Nation v.*

County of Oneida, 414 U.S.661, 667 (1974); *Passamaquoddy v. Morton*, 528 F.2d at 376 n.6.. Any such extinguishment must be clearly stated. *Oneida, supra*; *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941). There is no evidence that Congress has ever addressed Passamaquoddy salt water fishing rights, or harbored any intention to limit the Tribe's historic marine activities.

To the contrary, the Settlement Act confirmed the tribal reservation at Pleasant Point. The Congressional Committee Reports state that “the Passamaquoddy Tribe . . . will retain as reservations those lands *and natural resources* which were reserved to them in their [treaty] with Massachusetts and not subsequently transferred by them.”¹⁸ As the Minnesota Supreme Court found in the case of a Chippewa hunting partridge, out of Minnesota's hunting season, for a family dinner,

. . . it is conceded that the treaty whereby the Leech Lake Reservation was established contains no express reservation by the Indians of the right to hunt and fish upon their reservation. But such a saving clause would have been superfluous, as “the treaty was not a grant of rights to the Indians, but a grant of rights from the — a reservation of those not granted.”

State v. Jackson, 218 Minn. 429, 16 N.W.2d 752 (Minn. 1944) (quoting *Winans*). The Settlement Act ratification of the Passamaquoddy Reservations affirms federal protection of the associated fishing rights necessary to maintaining the Passamaquoddy community and way of life that had, by then, been recognized in that location for more than 200 years.

¹⁸ S.Rep., *supra*, at 18; H.R.Rep., *supra*, at 18, (emphasis added).

B. Although Resolution of the Maine Indian Claims Required Congress to Expressly Extinguish Passamaquoddy Aboriginal Rights, the Settlement Act Did Not Extinguish Salt Water Fishing Rights.

In the opening words of the Maine Indian Claims Settlement Act, Congress found as fact that

The Passamaquoddy Tribe, the Penobscot Nation and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1790 (1 Stat. 137), or subsequent reenactments or versions thereof.

25 U.S.C. § 1721(a)(1). In 25 U.S.C. § 1723, Congress ended the tribes' claims by ratifying prior property transfers, and extinguishing aboriginal title and claims to the transferred properties.¹⁹ The essence of the Settlement Act was preservation of the *status quo ante*, not taking away rights that had been long enjoyed, on either side.

Section 1723 is crucial to a determination of the surviving aboriginal rights of the Passamaquoddy Tribe, since only rights that are either ceded by the Tribe or extinguished by the clear and express action of Congress are lost. *Oneida Indian Nation v. County of*

¹⁹ The pertinent language of § 1723 is as follows:

(a)(1) Any transfer of land or natural resources . . . from, by, or on behalf of the Passamaquoddy Tribe, . . . including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States

(2) To the extent that any transfer of land or natural resources described in subsection (a)(1) . . . may involve lands or natural resources to which the Passamaquoddy Tribe . . . or any of their members . . . had aboriginal title, such subsection (a)(1) shall be regarded as an extinguishment of said aboriginal title as of the date of such transfer.

(3) By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all [Indian] claims . . . arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, . . . shall be deemed extinguished as of the date of the transfer.

Oneida, 414 U.S. 661, 667 (1974); *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941). By its plain terms, a transfer of property is the *indispensable* foundation of any Congressional termination of tribal rights. “Transfer” is defined for purposes of the Settlement Act to mean:

any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources.

25 U.S.C. § 1722(n). There is no record evidence of any conveyance of salt water fishing rights “from, by or on behalf of the Passamaquoddy Tribe,” or of any “transaction the purpose of which” was to effect such a conveyance, nor indeed of any “circumstance that resulted in a change in title to, possession of, dominion over, or control of” tribal fishing rights. To the contrary, the limited discussion that *was* before the Congress bearing on these rights indicates an understanding that the Tribe would “retain . . . those lands and natural resources which were reserved to them in their [treaty] with Massachusetts and not subsequently transferred by them.”²⁰

The Defendants cannot prove a non-event, but under the circumstances, the burden lies with the State to prove the factual basis for any claimed extinguishment of tribal

²⁰ S.Rep., *supra*, at 18; H.R.Rep., *supra*, at 18. The Maine Implementing Act defines the Passamaquoddy Indian Reservation as “those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19 [sic], 1794, excepting any parcel within such lands transferred . . . subsequent to such agreement and prior to the effective date of this Act.” 30 M.R.S.A. § 6203(5), incorporated by reference in the federal Settlement Act, 25 U.S.C. § 1722(f).

fishing rights under the Settlement Act. *Cf.* 25 U.S.C. § 194 (evidence of Indian possession of property raises presumption of Indian title, shifting burden to non-Indian claimant).

Neither the federal Settlement Act, nor the Maine Implementing Act it ratified, makes any mention of salt water fishing.²¹ In the absence of proof that tribal fishing rights were “transferred” to a third party prior to adoption of the Settlement Act in 1980, the Act’s silence must be construed as preserving those rights, simply because they are not expressly ceded or extinguished. *See Winans*, 198 U.S. at 381.

II. Congress Did Not Authorize State Regulation of Passamaquoddy Salt Water Fishing Rights.

It follows from *Passamaquoddy v. Morton* and the later pre-Settlement Act cases cited above that the State’s claim of jurisdiction over the Passamaquoddy fishing practices can be derived *only* from subsequent *federal* law, specifically the Settlement Act. While the immediate purpose of the Settlement Act was to settle the claims of the Passamaquoddy Tribe and the Penobscot Nation to vast amounts of land in Maine,²² the Act also makes clear that a parallel purpose was to recognize the aboriginal status of the

²¹ Compare the treaty with the Ottawa, executed in 1807, in which the United States expressly purchased the rights of the Ottawa in the waters of the Great Lakes up to the international boundary with Canada. *See Hist.*, 13. This illustrates that the United States would make clear its intention to acquire off-shore rights of the Indians when cession of such rights was sought.

²² See 25 U.S.C. § 1721(a)(1) (“Passamaquoddy Tribe ... [is] asserting claims for the possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law....” The Senate and House Committee Reports describe the bill as providing for “the extinguishment of the land claims of the Passamaquoddy Tribe, . . . in the State of Maine, including damage claims associated with those land claims. . . .”); S.Rep., *supra*, at 18; H.R.Rep., *supra*, at 18.

Passamaquoddy Tribe²³ and their historic reservation communities, and to provide for their continuation. In accordance with that goal, the Act preserves to the Tribe a large degree of self-governance, especially relating to their lands, their members, and their traditional way of life.

The State's assertion of jurisdiction in these cases presumably derives from a claim of right to treat Passamaquoddies as non-Indians wherever Congress has not *specifically precluded* state jurisdiction. Pol. 1. If so, the State's reasoning is unfounded. Congress clearly intended to leave matters central to their traditional tribal culture, including specifically hunting and fishing, to *tribal* self-government as the means of preserving that native culture. This is apparent from an examination of the structure, terms and history of the Settlement Act.

A. Regulation of Tribal Salt Water Fishing is an Internal Tribal Matter

Section 6204 of the Implementing Act, upon which the State presumably relies entirely for its claim of jurisdiction, is limited by its opening clause, “[e]xcept as otherwise provided in this Act.” Foremost among the stated exceptions is the protection of “internal tribal matters,” which “shall not be subject to regulation by the State.” 30 M.R.S.A. § 6206(1). This provision was of central concern to the Tribe at the time of the Settlement. Since Congress responded by plainly stated its intention that the integrity of the Passamaquoddy way of life would be protected through control of “internal matters”

²³ See 25 U.S.C. § 1721(a)(4).

by the tribal government, the State's claim of regulatory jurisdiction over tribal members engaging in salt water fishing must fail.

In considering the Settlement Act, Congress specifically addressed tribal concerns that even with the "internal tribal matters" provision, the Settlement Act would not protect the tribes' inherent right of self-government or the integrity of their culture. The Reports of the House and Senate Committees drafting the Settlement Act assured the tribes that these fears were "unfounded."

Special Issues

Testimony before the Committee and written materials submitted for the record reveal the following concerns about the settlement embodied in S.2829 [H.R. 7919] and the Maine Implementing Act, all of which the Committee believes to be unfounded.

* * *

2. *That the settlement amounts to a "destruction" of the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation.*--Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States. The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory, **in keeping with these decisions** the settlement provides that **henceforth the tribes will be free from state**

interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, **by recognizing their power to control their internal affairs** and by withdrawing the power which Maine previously claimed to interfere in such matters, **the settlement strengthens the sovereignty of the Maine Tribes.**

* * *

9. *The Settlement will lead to acculturation of the Maine Indians.*--**Nothing in the settlement provides for acculturation,** nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, **the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments** which are separate and apart from the towns and cities of the State of Maine and **which control all such internal matters.**

S. Rep., *supra* at 14, 17; H.R. Rep., *supra* at 14-15, 17, 1980 U.S.C.C.A.N. at 3790, 3793 (italics in original; emphasis added in bold).²⁴

These assurances that the Settlement Act would protect the Passamaquoddy Tribe's cultural integrity and inherent right to be self-governing without interference from the State confirm the incorporation in the Maine Settlement Act of general principles of tribal sovereignty embedded in federal Indian law. The Congressional Committees characterize the quoted assurances as "in keeping with" the principle of *Bottomly v. Passamaquoddy Tribe* "that the Maine tribes still possess inherent sovereignty to the

²⁴ These reports are the best evidence of Congress's intent in adopting the Settlement Act. See *Garcia v. United States*, 469 U.S. 70, 75-76 (1984) (authoritative source for determining legislative intent is Committee Reports on the bill). Accord *Webber v. Heaney*, 793 F.Supp. 1438, 1448 (D.Minn. 1992) (same), *aff'd*, 995 F.2d 872 (8th Cir. 1992); *Printz v. U.S.*, 854 F.Supp. 1503, 1511-12 (D. Mont. 1994) (same). See generally 2A Norman J. Singer, *Sutherland on Statutory Construction* §48.06 (5th. ed. 1992).

same extent as other tribes in the United States.” S. Rep., *supra* at 14; H.R. Rep., *supra* at 14-15.²⁵ The Senate Committee Report also characterized the Settlement Act as:

an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the *inherent authority* of a tribe *to be self-governing*. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

S. Rep., *supra*, at 29 (emphasis added), adopted by the House Committee, H.R.Rep. 96-1353, *supra*, at 20, U.S.C.C.A.N. at 3794.

The then recent *Santa Clara Pueblo* decision summarized the nature of Indian tribes’ inherent authority to be self-governing:

Indian Tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government. *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832). Although no longer “possessed of the full attributes of sovereignty,” they remain a “separate people, with the power of regulating their internal and social relations.” *United States v. Kagama*, 118 U.S. 375, 381-382 (1886). See *United States v. Wheeler*, 435 U.S. 313 (1978).

²⁵ In *Bottomly*, 599 F.2d 1061 (1st Cir. 1979), the First Circuit held that until waived by Congress, the Passamaquoddy Tribe retained its inherent sovereign immunity from suit. Reaffirming *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the *Bottomly* Court rejected Maine’s argument that, given their historical ties to the state (unlike the “warlike” Western tribes), the tribes in Maine were mere “remnants” of Indian tribes, undeserving of any recognition of inherent sovereignty, including common law sovereign immunity. *Id.* at 1064.

The Court explained that the state’s analysis “fundamentally misconceive[d] basic principles of federal Indian law”— that “[t]he powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never [been] extinguished*.” *Id.* at 1065 (quotations and citations omitted, emphasis in original). Accord, *State v. Dana*, 404 A.2d 551, 561 (Me. 1979) (rejecting Maine’s contention that *Morton* was wrongly decided and that lack of federal contact with Maine tribes meant that U.S. assumed no trust relationship to them).

Id. at 55 (some citations omitted).²⁶ The *Wheeler* decision cited by the Court (and decided earlier the same term) described inherent tribal sovereignty in similar terms:

Before the coming of the Europeans, the tribes were self-governing sovereign political communities. See *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

435 U.S. 322-23. The Court has long recognized “the right of reservation Indians to make their own laws and be ruled by them.” *Williams v. Lee*, 358 U.S. 217, 223 (1959). *Accord*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

The Committees’ response to concerns about acculturation was that preserving “the cultural integrity of the Indian people of Maine” is an “internal matter,” over which *tribal* governments will have “control.” It was specifically through tribal governance that “the Settlement offers protections” against acculturation “being imposed by outside entities.” S. Rep., *supra*, at 17; H.R.Rep., *supra*, at 17.

By criminal prosecutions of these Defendants, the State seeks to impose external legal constraints upon a longstanding way of life of the Passamaquoddy Tribe. The facts of this case establish that salt water fishing has, since time immemorial, been integral to the way of life, the culture and traditions of the Passamaquoddy Tribe. The State seeks to

²⁶ In *Santa Clara Pueblo*, the Supreme Court held that the Indian Civil Rights Act, 25 U.S.C. §§1301, *et. seq.*, created no private right of action in federal court, with the exception of petitions for *habeas corpus*. See 436 U.S. at 59-66. To allow such actions in a non-Indian forum, the Court said, would “unsettle a tribal government’s ability to maintain authority” and thereby “infringe on the right of the Indians to govern themselves.” *Id.* at 60, 64 (quotations and citations omitted). This, the Court said, “plainly would be at odds with the congressional goal of protecting tribal government.” *Id.* at 64.

impose regulations that make no pretense of accommodating tribal practices.²⁷ Even if they did, they would by definition be external, representing the State's view of the needs of the Passamaquoddy culture. This is precisely what Congress sought to prevent with the "internal tribal matters" provision, and these criminal prosecutions are barred by the protection against "acculturation" afforded by the Settlement Act.

This analysis is entirely consistent with the Law Court's decision in *Penobscot Nation v. Stilphen*, 462 A.2d 478, 490 (Me. 1983).²⁸ In holding that tribal beano games were not "internal tribal matters," the Law Court said:

Beano has played no part in the Penobscot Nation's *historical culture or development*. It is not uniquely Indian in character. It is not a *traditional Indian practice* and has no *particular cultural importance* for the Nation. Its only relationship to the Nation's "internal tribal matters" consists in the fact that the games' proceeds are used to finance admittedly legitimate tribal services and programs. This link is not strong enough to shield the games from the enforcement of [state law] on the Penobscot reservation.

Id. at 489 (emphasis added). As the record indicates, the salt water fishing practices at issue here *are* of "particular cultural importance" to tribal members; they *are* practices

²⁷ The laws and regulations involved in these cases are barren of any consideration of tribal fishing practices, or tribal culture. Such a notion as a "personal use exemption," allowing any resident or tourist to dig a limited amount of clams without a license, for example, bears no relation at all to the communal subsistence practices of the Passamaquoddy community. See e.g., Tribal 7, Tomah Affid., ¶ 12; Tribal 10, Moore, III Affid., ¶¶ 3, 4, 5; Tribal 8, Moore, Sr. Affid., ¶¶ 3, 5, 6; Tribal 9, Newell Affid., ¶¶ 3, 8, 11.

²⁸ The Defendants do not agree with the reasoning of the *Stilphen* decision, in particular the Court's construction of the term "internal tribal matters" as a matter of state law, effectively in isolation from federal law. See *Akins v. Penobscot Nation*, No. 97-1644, slip op. at 7 (1st Cir. Nov. 17, 1997). Defendants believe the *Stilphen* view of internal tribal matters is too narrow, but they have no disagreement with the inclusion of those matters considered internal tribal matters by the Law Court.

that have played a significant role in the Passamaquoddies' "cultural development." See Evidence Summary, Cultural Evidence and sources cited.

The Defendants' fishing practices "are communal rights of the Tribe." See *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974). "The determination of when and how the rights may be exercised is an 'internal affair' of the Tribe." *Id.* State prosecutions effectively impede the right of the Passamaquoddy Tribe to regulate the cultural activities of its members, a right of self-government expressly protected by the "internal tribal matters" provision of the Settlement Act.

The Passamaquoddy customs and practices, although unwritten, have the status of rules and laws for the behavior of tribal members as much as the contemporary written ordinances of tribal government. See Cohen, at 230 (historical Indian government based on customary norms of conduct). Using state criminal laws to penalize these activities undermines the authority of the Tribe to maintain the customs and traditions of tribal culture. See *Williams v. Lee*, 358 U.S. at 221-22; *Fisher v. District Court*, 424 U.S. 382, 388-89 (1976) (per curiam); *Settler v. Lameer*, 507 F.2d at 237. The Settlement Act cannot authorize the imposition of state criminal laws upon the Defendants' fishing in one place, while also protecting the Tribe's inherent right to govern its members with respect to their internal affairs. Such an imposition of state law upon the internal tribal matters of the Passamaquoddy Tribe violates the Settlement Act.

D. If the Settlement Act Subjects Passamaquoddy Salt Water Fishing to State Regulation At All, the Federal Delegation of Authority Implicitly Bars the State from Limiting or Restricting the Tribe's Historic Fishing Practices

The State claims unrestricted authority to regulate Passamaquoddy fishing, a claim that is presumably derived from Congress' ratification of the Implementing Act, specifically 30 M.R.S.A. § 6204. Even if the Settlement Act did not include the "internal tribal matter" provision, to accept this reasoning the Court must conclude that Congress intended to delegate to the State the power to extinguish federally protected tribal fishing rights. No such conclusion can be drawn in light of the utter silence of both the Settlement Act and its legislative history on the subject of salt water fishing.

The basic principle of the jurisdictional provisions of the Settlement, as with property rights, was to effectively restore the *status quo ante*, with certain necessary adjustments.²⁹ Addressing jurisdiction, Congress had to focus its attention on the one area in which there was no jurisdictional *status quo*, the extensive new "Indian territory" that the federal government would acquire in Maine for the tribes.³⁰

In contrast to the Indian territory that would be newly acquired by the tribes under the settlement -- lands where the long-exercised State jurisdiction was already in sharp conflict with the tribal autonomy won under the *Passamaquoddy v. Morton* and *Bottomly*

²⁹ If the day were to come when either the Tribe or the State sought to change the jurisdictional *status quo*, the Settlement Act expressly provided for consensual resolution, through negotiation, and amendment of the Maine Implementing Act. See 25 U.S.C. § 1725(e)(1). See also n. 6, *supra*.

³⁰ See 25 U.S.C. § 1724(c), (d) and (e).

decisions -- there was no apparent conflict to be resolved with respect to salt water fishing. Maine had, in fact, made no effort prior to the Land Claims and the Settlement Act (or, indeed, until recently) to assert regulatory jurisdiction over Passamaquoddies engaging in salt water fishing or gathering. Tribal 8, Moore, Sr. Affid., ¶ 12; Tribal 12, Joseph Neptune Affid., ¶ 5; Tribal 7, Tomah Affid., ¶ 16; Tribal 2, Moore, III at 49-51, Cleaves at 46-47 (Indian Agent encourages). It is implausible to conclude that tribal negotiators would have understood the Settlement as giving up rights that were not contested, either legally in the Land Claims or factually on the shores and waters around Pleasant Point, when neither the state nor the federal legislation resolving those claims included any plain statement giving them notice that their historic salt water fishing rights would be placed in the hands of State regulators.

An intent to abolish or limit Indian hunting and fishing rights “is not to be lightly imputed to the Congress.” *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968) (implied treaty rights). Cf. *Passamaquoddy v. Morton*, 528 F.2d at 380 (“any withdrawal of trust obligations by Congress would have to have been ‘plain and unambiguous’ to be effective.”)

The courts have applied this doctrine rigorously, as may be seen from cases in which a State asserts jurisdiction over tribal hunting and fishing following an express Congressional abrogation of tribal rights. The 1968 *Menominee* case decided by the Supreme Court is strongly analogous. There, the Court concluded that tribal hunting and

fishing rights implied in an 1854 treaty were not extinguished by the 1954 Menominee Termination Act, even though the statute terminated the entire federal trust relationship with that tribe. The Court acknowledged that in the Termination Act “the Federal Government ceded to the State of Wisconsin its power of supervision over the tribe and reservation lands,” 391 U.S. at 412, by providing that state laws “shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within [its] jurisdiction.” *Id.* (quoting 25 U.S.C. § 899 (repealed); *see* 68 Stat. 303, § 10).

Nevertheless, it rejected the State’s position that tribal hunting and fishing was subject to state regulation. The Supreme Court “decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians.” *Id.*

In another case, Minnesota claimed jurisdiction based on a tribal agreement and resulting federal legislation which included broad terms of cession and extinguishment of tribal land titles: the Chippewa Tribe ceded to the United States “for the purposes and upon the terms stated in said (Nelson) Act, all our right, title and interest in and to the lands reserved and set apart,” which provided the foundation for Congressional enactment of a provision in the Nelson Act effecting “a complete extinguishment of the Indian title” of the tribe in the ceded lands. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001, 1003 (D.Minn. 1971) (quoting agreement and statute respectively).

Nevertheless, because the Nelson Act was silent about Chippewa rights to hunt and fish their lands, and its purpose was not to terminate the reservation or federal responsibility

for the tribe, the court found that it did not abrogate aboriginal hunting and fishing rights previously preserved by treaty. *Id.* at 1004-06.

As in these cases, Maine's position in this case must be drawn from the most general language of the pertinent legislation, when more specific provisions concerning property rights and jurisdiction over matters of cultural importance are to the contrary. There is no basis in the terms or history of the state and federal Settlement Acts to indicate that Congress had any intention of abrogating Passamaquoddy salt water fishing rights. To the contrary, the Tribe "will retain as reservations those lands *and natural resources* which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them." S.Rep., *supra*, at 18; H.R. Rep., *supra*, at 18.

At best, Maine claims that Congress has *sub silentio* swept these tribal fishing practices, so central to the Passamaquoddies' history and indeed their future prosperity, under the blanket of general State civil jurisdiction. However, in light of the evidence that Congress meant to prevent acculturation of Maine's Indians, the broad statutory language upon which the State's claim rests cannot be construed as a grant to State of the authority to treat Passamaquoddies as non-Indians, ignoring their heritage and way of life.³¹ This "backhanded" abrogation of tribal rights and status is inconsistent with the

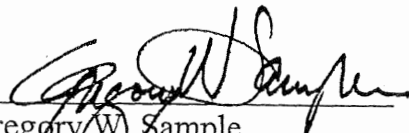
³¹ See also 25 U.S.C. § 456(f), (g) (West Supp. 1997), invalidating any existing or future federal administrative action that "classifies, enhances, or diminishes the privileges and immunities" of any Indian tribe relative to any other tribe.

stated intention to protect the integrity of tribal culture, and would be a violation of Congress's trust obligations to the Tribe, as shown by *Menominee* and similar cases.

CONCLUSION

For the reasons stated above, the Defendants ask that the court grant their motion to dismiss the criminal charges against them for lack of subject matter jurisdiction.

DATED: December 13, 1997


Gregory W. Sample
Kaighn Smith Jr.
Barbara L. Goodwin
Drummond Woodsum & MacMahon
245 Commercial Street
Post Office Box 9781
Portland, ME 04104-5081
Tel: (207) 772-1941

J. Hilary Billings
Billings & Silverstein
47 Main Street
Post Office Box 1445
Bangor, ME 04402-1445
Tel: (207) 941-2356

Attorneys for the Defendants

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STATE OF MAINE
WASHINGTON, SS.

DISTRICT COURT
DISTRICT FOUR
DIV. OF NO. WASHINGTON
DOCKET NOS. 96-957, et. al.

State of Maine,
Plaintiff,

v.

Allie Beal, et. al.,
Defendant.

ORDER

This matter is before the Court on Defendants' Motion to Dismiss based on lack of jurisdiction over the subject matter pursuant to M.R. Civ. P. 12(b)(1). After a thorough review of the evidence and arguments, this Court finds that it has jurisdiction in accordance with the Maine Indian Claims Settlement Act (herein referred to as the Implementation Act), 30 M.R.S.A. § 6201-6214.

The State of Maine issued citations to thirteen members of the Passamaquoddy Tribe (the Tribe) for violating various marine resources laws such as clamming in a closed area, possessing undersized clams, and selling clams and scallops without a license. These violations occurred off the Tribe's reservation. Defendants maintain that the Tribe has retained its aboriginal fishing rights, stemming from its strong cultural and historical ties to salt-water fishing activities, notwithstanding the passage of the Implementation Act. Defendants alternatively contend that salt-water fishing regulation of Tribal members constitutes an "internal tribal matter" which is exempted from State control under the Implementation Act.

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The current dispute arises out of a settlement agreement between the Tribe, the State, and the federal government, which was codified on both the federal and state level. The settlement purports to resolve claims made by the Passamaquoddy Tribe and the Penobscot Nation to almost two-thirds of Maine's land mass. These claims were asserted in the early 1970's and culminated in an agreement in 1980.

The federal act, entitled the Maine Indian Claims Settlement Act (herein referred to as the Settlement Act), 25 U.S.C.A. § 1721-1735, ratified the State's Implementation Act which, in turn, implemented the federal act. Federal Indian law provides that Indian rights can only be terminated by the federal government. Thus, while this Court must look to the Implementation Act for the applicable law, its provisions are only valid to the extent that they have been provided for by the Settlement Act.

I. RETAINED ABORIGINAL FISHING RIGHTS

Both the Implementation Act and the Settlement Act are silent on the express issue of salt-water fishing rights. Because Indian tribes possess inherent sovereignty, agreements delineating Indian rights do not affirmatively grant rights; rather, they either terminate or reserve rights. Defendants argue that because salt-water fishing rights were not expressly terminated by either Act, they were retained by implication. The State refutes this contention, maintaining that the plain language of the Implementation Act terminated whatever salt-water fishing rights the Tribe inherently possessed.

This Court assumes, without deciding, that the Passamaquoddy Tribe

possessed aboriginal fishing rights prior to the Implementation and Settlement Acts. The Settlement Act, however, subjects the Passamaquoddy Tribe to the jurisdiction of the State of Maine to the extent provided in the State's Implementation Act. 25 U.S.C.A. § 1725(b)(1). The Implementation Act states, in relevant part, that all Indians and natural resources owned by them "shall be subject to the laws of Maine and to the civil and criminal jurisdiction of the courts except as otherwise provided in the Act." 30 M.R.S.A. § 6204 (emphasis added). Because the Act does not provide an exemption from the State's marine resources laws, the State argues that the laws Defendants have allegedly violated have been legally invoked.

In evaluating the State's reliance on the above-quoted language of the Implementation Act as providing jurisdiction to the State, this Court is bound by prior judicial interpretation and discussion of the Implementation Act. In Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 787 (1996), the First Circuit stated that the settlement was designed to transform the legal status of the Tribe and to create a unique relationship between state and tribal authority. Likewise, in Penobscot Nation v. Stilphen, 461 A.2d 478, 488 (Me. 1983), the Law Court found that, "the legislative history of both acts makes it clear that they were intended to change the relationship between tribal and state authority from what it had been up until 1980."

In addition, counsel for the Passamaquoddy Tribe and the Penobscot Nation stated at a public hearing before a state legislative committee that, "[i]n the end what we wound up with was a blueprint for a governmental relationship between

Indians and non-Indians alike - unlike that which exists anywhere else in the United States." Id.

At odds with the above pronouncements differentiating the current relationship between the State and the Tribe from traditional notions of Indian law, Defendants nonetheless urge this Court to analyze the Implementation Act in the same manner as other courts have interpreted past Indian treaties. Defendants assert the proposition that the federal government acts as a trustee to the Indians; thus, courts should presume that Congress' intent toward them is benevolent and should construe treaties as protecting Indian rights and in a manner favorable to Indians. F. Cohen, Handbook of Federal Indian Law 221 (1982 ed.). Moreover, Defendants advocate that a treaty with Indians should be interpreted as "unlettered people" understood it, and in a "just manner where power is exerted by the strong over those to whom they owe care and protection." United States v. Winans, 198 U.S. 371, 380-81 (1905).

This Court finds that accepting a plain language interpretation of the Implementation Act does not result in an adherence to "technical rules" without regard to how the Passamaquoddy Tribe understands the Act. See Passamaquoddy v. Morton, 528 F.2d 370, 380 (1st Cir. 1975)(statutes relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians understood them). The record and precedent reveal that the settlement was a result of years of

negotiation between represented and informed parties.¹

...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...[t]he 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.

Passamaquoddy Tribe, 75 F.3d at 794.

While this Court is mindful of, and sensitive to, the integral role that salt-water fishing activities has historically played in the survival and cultural identity of the Passamaquoddy Tribe, the Court finds that the intent of the agreement was to give full meaning to the jurisdictional provision stating that the Tribe shall be subject to the laws of Maine unless otherwise provided. If all of the Tribe's inherent rights had to have been expressly abrogated, then the blanket provision allowing for the Tribe to be governed by the laws of the State would be devoid of meaning. The evidence concerning the change in the legal relationship produced by the agreement demonstrates that the blanket provision was meant to be substantive. This Court finds that the codified agreement terminated any inherent salt-water fishing rights

¹ At the public hearing at which the Tribe's counsel addressed the state legislative committee, referred to above, it was also stated that with regard to marine resources in coastal areas, the Tribe would have only the authority of a municipality, thereby allowing it to enact shellfish conservation ordinances. The Attorney General expressed this same sentiment in a memorandum to the Joint Select Committee on Indian Land Claims which was included in the legislative record. This Court expresses no opinion as to whether or not regulation of the tidal flats within the reservation is an "internal tribal matter," or whether the Tribe would be treated as a municipality in this regard pursuant to the Implementation Act. This Court notes the exchange concerning marine resources only for its evidentiary value which suggests that the Tribe did have notice that its salt-water fishing activities would be affected by the Act.

concerning non-reservation lands that the Tribe possessed prior to the its passage. Accordingly, the Implementation Act applies to salt-water fishing rights, and Maine law will apply unless "otherwise provided in the Act."

II. INTERNAL TRIBAL MATTER

The Act provides that "internal tribal matters" shall not be subject to regulation by the State. 30 M.R.S.A. § 6206. Defendants maintain that salt-water fishing regulation of Tribal members is an internal tribal matter even though the violations occurred off the reservation.²

Once again, case law provides an analytical framework within which this Court is obliged to address the issue. The court in Akins v. Penobscot Nation, 130 F.3d 482, 486 (1st Cir. 1997) developed specific criteria, listed below, for determining what constitutes an internal tribal matter.

- 1) The policy purports to regulate only members of the tribe, and interests of non-tribal members are not at issue;
- 2) the policy deals with the very land that defines the territory of the Tribe;
- 3) the policy concerns control over the natural resources of that land;
- 4) the policy does not implicate or impair any interest of the State of Maine;
- 5) the outcome is consistent with prior legal understanding.

The court commented that the analysis differs from that which would be used in claims against the majority of other Indian tribes in the country because the statute itself, not federal common law, must guide the determination. *Id.* at 484. The court,

² This Order is expressly limited to off-reservation violations and has no application to the conduct of Tribal members on the tidal flats located within the reservation.

in narrowing the application of its opinion, specifically pointed out that what was not at issue in that case was a dispute between Maine and the Tribe over the attempted enforcement of Maine's laws. *Id.* at 488 (holding that a tribal law regulating the issuance of stumpage permits to Tribal members on the reservation was an internal tribal matter). This Court now addresses the very situation which the *Akins* court sought to distinguish from its holding in that case.

These criteria were reaffirmed in *Penobscot Nation v. Feller*, Civ. No. 97-231-B, (D. Me., March 13, 1998), in which the Penobscot Nation sought to preclude application of the Maine Human Rights Act to an employment decision concerning a non-tribal member hired by the Nation. The court found that the employment matter was not "internal" primarily because of its effect on the interests of a non-tribal member.

Turning to the application of the criteria to the facts at hand, Defendants argue that only Tribal members' interests are affected in this situation. However, the laws at issue regulate a limited natural resource that is to be shared by the citizens of Maine and/or others with legal fishing rights. If Tribal members are utilizing these resources, then non-tribal members' interests in sustaining these resources are affected. For example, if the Tribe adopted a regulation concerning commercial fishing which allowed Tribal members to fish when non-tribal members could not, non-tribal fishermen's competitive and financial interests would be affected. Likewise, if Tribal members were allowed to dig clams on the flats of a neighboring municipality in contravention of that municipality's

ordinance,³ then the interests of the other members of that municipality would be compromised.

With regard to the next two criteria, whether reservation lands and/or natural resources from that land are at issue, neither concern is implicated by the alleged violations. Defendants ask this Court to find that the Tribe's extensive historical use of this resource, in waters surrounding the reservation, plays a large part in satisfying these criteria. However, this Court must decline to make this finding in light of the unique partitioning of authority between the State and the Tribe established in the Implementation Act.⁴

This Court finds that the fourth criteria weighs heavily against a finding that salt-water fishing rights are an internal tribal matter due to the State's interest in enforcing a comprehensive regulatory scheme aimed at preserving Maine's fishing resources. This interest can be paralleled to that in Pollencer wherein the court stated that, "the Nation's action here threatens to undermine an extensive state scheme for protecting citizens of Maine against discrimination." Id.

Finally, the fifth criteria presents the Court with competing claims that federal case law supports the position of each side. This Court follows the reference

³ 12 M.R.S.A. § 6671 provides authority to municipalities to enact shellfish conservation ordinances in accordance with statutory standards

⁴ Consistent with the State's position that the Tribe does not have jurisdiction over fishing violations committed off the reservation is the fact that the Passamaquoddy Tribal Court has jurisdiction over criminal misdemeanors and civil small claims only to the extent that the crimes are committed, or the claims arise, on the reservation.

in Akins and Fellencer to White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980), in which the U.S. Supreme Court states: "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." See Akins, 130 F.3d at 490; Fellencer, *supra*. The opposite circumstances exist here where the conduct occurred off the reservation, and the interests of both non-tribal members and the State are implicated.

Looking at what constitutes an internal tribal matter as a whole, Defendants understandably are adamant that the self-governing provisions of the Implementation Act were designed to guard against "acculturation" of the Tribe and to prevent a disruption of the Tribe's cultural integrity. (D. Brief at 32, citing Reports of the House and Senate Committees). Defendants maintain that salt-water fishing rights are an integral part of the Tribe's culture, and that allowing external regulation to impose on their tribal practices is precisely what the internal tribal matters provision was intended to prevent.

This Court recognizes that case law exists which suggests that the historical and cultural importance of a matter should be a large consideration in determining if it is "internal." See Stilphen, 461 A.2d 478, 484 (Me. 1983). However, Defendants' arguments and reliance on the historical and cultural aspects of the Tribe's fishing activities have been weakened by Akins and Fellencer:

[w]hile the historical and cultural importance approach may remain appropriate in some, albeit limited, circumstances . . . the Court is persuaded

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that it is not helpful here where other considerations are relevant and where the subject matter of the suit does not appear on its face to be 'uniquely Indian.'

Pellencer, supra. The Court finds this language to be dispositive of this portion of Defendants' argument. While salt-water fishing is an important part of the Tribe's history, it is not a uniquely Indian activity. Fishing is also of crucial importance to all citizens of Maine, and it is in their capacity as citizens of Maine that the Implementation Act has bound tribal members to abide by Maine's marine resources laws. In this manner, the interests of the Tribe and the rest of the State are combined in an effort to preserve coastal resources for all interested parties.

Based on the foregoing, the Order will be: Motion to Dismiss DENIED.

Dated: March 27, 1998



DISTRICT COURT JUDGE

Commission Meeting
June 5, 1997
Augusta

Participants

MITSC Members Present:

John Banks
Anthony “Mike” Best
Paul Bisulca [nonvoting member]
Mark Chavaree
Richard Cohen, MITSC Chair
Fred Hurley
Evan Richert
Vendean Vafiades

Other Persons Present:

William Eric Altvater, Lt. Governor, Passamaquoddy Tribe at Pleasant Point
Diana Scully, MITSC Executive Director
Dwayne Sockabasin, Passamaquoddy Tribal Council, Indian Township
John Stevens, Governor, Passamaquoddy Tribe at Indian Township
David Westphal, Acadia FilmVideo

Meeting Convened

The June 5, 1997, meeting of the Maine Indian Tribal-State Commission (MITSC), was held in the conference room of the Maine State Planning Office, Augusta. Chair Dick Cohen convened the meeting at approximately 2:00 PM.

Approval of Minutes; Financial Report

It was moved by Evan Richert, seconded by Vendean Vafiades seconded, and agreed unanimously to approve the minutes for the MITSC meeting of March 18, 1997.

Diana Scully reviewed the financial report for the period of July 1, 1996 through May 31, 1997. Chair Cohen expressed concern about the small size of MITSC’s budget and asked whether Governor King’s contingency fund might be a source of additional support. Mr. Richert replied that the contingency fund is not for this purpose. He suggested discussion with Kay Rand about a supplemental budget request and checking with state agencies with an interest in the issues addressed by MITSC. He offered to check out these possibilities. Ms. Scully suggested that perhaps state agencies could support the costs of seminars concerning tribal-state relations. Chair Cohen added that something must be developed. It was agreed that Ms. Scully would work with Mr. Richert and Fred Hurley on developing plan for the

generation of additional state support for MITSC. Mr. Cohen noted that MITSC needs the Executive Director's services at least two days a week and cannot even cover this amount of time at present.

It was moved by John Banks, seconded by Fred Hurley, and unanimously agreed to approve the financial report for July 1, 1996 through May 31, 1997.

Legislation

LD 1269. Representative Bisulca distributed copies of a resolve (chapter 45) enacted by the 118th Legislature. Replacing LD 1269, legislation proposed by the Task Force on Tribal-State Relations, and requiring MITSC to address questions underlying several pieces of legislation proposed by the Passamaquoddy Tribe (LDs 955, 956, 957, 966), the resolve was passed "to foster the self-governing powers of Maine's Indian Tribes in a manner consistent with the protection of rights and resources of the general public."

LD 964. The Judiciary Committee carried over until the Second Regular Session of the 118th Legislature the Passamaquoddy bill to allow lands contiguous to current trust land in Albany Township to be included in Passamaquoddy Indian Territory. This action was taken to allow MITSC time to review the proposal and make a recommendation, as required by the Maine Indian Claims Settlement Act.

LD 1758. The Legislature passed this bill to authorize the transfer of property taxes to the Passamaquoddy Tribe. LD 1758 was the response by the King Administration to concerns raised by the Passamaquoddy Tribe about the payment of property taxes to the State rather than to the Tribe by people living on alienated lots within the Indian Township reservation. Mike Best noted that the legislation provides for retroactive payments to the Tribe only back a year, when the Tribe had stated that these payments should go back to 1980.

Indian School Financing. Representative Bisulca said that in 1992 the State and the Tribes worked out a funding formula for the Indian schools, which will expire on June 30, 1998. MITSC needs to convene interested people to address this. State Department of Education staff and the Superintendent of Indian Schools need to be involved in these discussions.

LD 1855. Representative Bisulca reported that this bill relating to the taxation of tribal bingo activities has been carried over until the Second Regular Session of the 118th Legislature. He said the issue raised is whether tribal gaming is defined as a business activity (which is taxed) or a governmental activity (which is not taxed). The State and the Tribes need to confer to determine whether gaming is a governmental or a business activity. The Tribes have been operating bingo for 10 years without taxation.

Discussion. Noting that the Tribes went through this taxation discussion with stumpage income, John Banks asked what precipitated this recent inquiring about bingo. Representative Bisulca said Mr. Banks is articulating that it looks like there is a concerted effect to get after the Tribes. Now State Tax Assessor Brian Mahaney is talking about income tax, sales tax, etc.

Mr. Richert said MITSC can find out what is behind this. Dwayne Sockabasin said when Passamaquoddy Tribal Members met with King, he said his administration is against gambling, but not against taking money generated from gambling. Noting that the State should stop its own gaming, Representative Bisulca commented that since 1992 state revenues from gaming have increased from \$10 million to \$40 million. He added that people generally do not understand that the Tribes do not have property tax as a means of raising revenue.

Mike Best said the Passamaquoddy Tribe is having a difficult time coming to the MITSC table, when there are 6,000 Native American people compared with 1.2 million people in Maine and the State says they are going to veto everything that can raise money for the Tribes. Representative Bisulca said the State must recognize that the Tribes must do things differently.

Expectations of MITSC

Ms. Scully reviewed numerous handouts about what is expected and required of MITSC and by whom, as well as a proposed work plan and timeline for the work. Vendean Vafiades pointed out that there are two basic questions: What does MITSC have to do? What does MITSC want to do?

Chair Cohen asked what MITSC members think about taking a subcommittee approach. He noted that he wants to start building credibility with the Legislature, so he would attach priority to their resolve. He added that he would like to build credibility with the Attorney General's Office and would like to break through their mentality. Mr. Sockabasin said a big concern is taking the Tribes into consideration, since MITSC needs their credibility, as well. Chair Cohen said he agrees and one way to build credibility with the Tribes is to show them that MITSC can get things enacted.

Emergency at Indian Township

Mr. Best stated that Governor John Stevens said they had to leave the meeting to deal with an emergency back home. Mr. Sockabasin added that the state police are going to Indian Township to close down the bingo operation; the Tribe always has had bingo and now they are going to shut it down; and Governor Stevens is tired of sitting down and talking. Mr. Best commented that it is going to be a hot summer and the Passamaquoddy Tribe "is going after what is ours, no matter what the State says." Mr. Sockabasin asked, "when are we going to wake up and do something about it?"

[Note: Governor Stevens, Mike Best, and Dwayne Sockabasin left the meeting to handle the situation back at Indian Township.]

Chair Cohen indicated that decisions that effect the Tribes should come to MITSC first. Representative Bisulca said that perhaps the Tribe has not paid a \$50,000 permit fee, noting that the Tribes are trying to protect things that are important to them. Eric Altvater said the Passamaquoddy Tribe was told that there was support for beano on the floor of the Legislature because they knew Governor King had promised a veto.

Bringing Issues Before MITSC

Chair Cohen said Governor King should support the idea of actions by state agencies coming before MITSC for discussion. Representative Bisulca noted that the Judiciary Committee was critical of the Passamaquoddy Tribe for not coming to MITSC and the same expectation should apply to State agencies. Mr. Banks added that MITSC's job impossible when it is not involved in and knowledgeable about decisions affecting tribal-state relations.

Chair Cohen asked Mr. Richert whether he would follow up on this discussion with Governor King. Mr. Richert said he would. Mr. Cohen indicated that MITSC might as well be abolished if people do not make it work and MITSC needs to be recognized by the Administration. He said MITSC wants to be informed and have a chance to discuss issues; it does not want veto power over decisions.

Mr. Banks agreed that this is a great idea, offered to make a motion, and noted that if he were Governor he would be happy to have such a third party arbiter. He said this is how MITSC is supposed to work. Representative Bisulca stated that he sees this as a test of the State's willingness to engage in productive tribal-state relations.

Ms. Vafiades said in fairness to the process, if MITSC were to recommend this, it should describe how the process should look and what would actually happen. Chair Cohen said MITSC is not looking for veto power and suasion, noting that with the day's incident at Indian Township the Tribes have even less faith in MITSC, if that is possible. He said the state police should not just go and shut down tribal beano. Ms. Vafiades asked will happen if Al Skolfield (Commissioner of Public Safety) comes before MITSC and says the State is going to close beano because the Tribe has not paid its \$50,000 permit fee, but the Tribe says they do not think the State has jurisdiction? What will MITSC do then?

Mr. Banks commented that he just has been reappointed to MITSC and he does not want to feel frustrated for the next three years. Mr. Richert suggested that there should be a motion with a letter to Governor King from the Chair, which he could hand carry. He said there would be two kinds of

things going on: issues that are less urgent (such as taxation issues) and times when an entity may have defied the law as presently written as an act of civil disobedience. He said there may not be a lot MITSC can do in the second situation, unless the matter has been brought to MITSC. Mr. Richert noted that there always are two sides of every story and asked why the state police would want to close down a legal bingo game. He said he is willing to push for the idea of having the State bring matters before MITSC. He also agreed with earlier comments made by Ms. Vafiades.

Mark Chavaree said the process needs to be changed so that MITSC receives copies of letters about decisions affecting the Tribes. Representative Bisulca agreed that MITSC needs to be kept in the loop. Mr. Richert asked if anyone objected to the letter to the Governor. Fred Hurley suggested that a similar letter should go to the Tribes and John Banks said one letter could go to all Governors and Chiefs.

It was moved by Richard Cohen, seconded by Fred Hurley, and unanimously agreed by the six MITSC members present to send a letter to Governor King to propose that before state agencies take any action affecting the Tribes, they should meet with MITSC, review the intended action, and give MITSC the opportunity to discuss the intended action and possibly suggest alternative actions.

Salt Water Fishing Rights and Settlement Negotiations

Mr. Altvater said the resolve (Chapter 45) enacted by the 118th Legislature refers to the rights of the people of Maine and the Maine Indian Claims Settlement Act has the goal of blending Native Americans into the general population. He commented that Governor King and the State have the opportunity to save the culture of a people. Mentioning that on June 12, 1997, the Calais District Court will hear the case on fishing rights, Mr. Altvater said that the Passamaquoddy People never relinquished these rights.

Chair Cohen indicated that the major issue in 1980 was the land claims; very little else was addressed (other than section 6204); the Settlement was not intended to mean that salt water rights were not negotiable in the future; there was never any discussion about assimilating the culture; and MITSC was set up to deal with all of these issues. He noted that the state negotiators had all they could do to extinguish the land claims. He said MITSC could look at and recommend things that should not be subject to section 6204 and a big step forward would be to have actions by the State affecting the Tribes come before MITSC.

Eric Altvater said there are only so many times a person is willing to participate in a game, when that person always loses. He asked Chair Cohen if he would be willing to articulate his comments in court on June 12. Chair Cohen replied that he will be going in for more surgery and that, in any case,

a judge would not attach much weight to his comments. Chair Cohen reiterated his recollection that 99% of the hours spent in negotiations dealt strictly with what would be satisfactory to extinguish the land claims. He said he would be happy to check with John Paterson to find out what he remembers and would have Ms. Scully report Mr. Paterson's response to Mr. Altvater.

FY 1998 MITSC Work Plan and Budget

Mr. Banks stated his support for the Subcommittee proposal and said it would help save time. Representative Bisulca asked people to look at the proposed time line for FY 1998, noting that some of it continues what already is in place, while other parts, such as the Annual Assembly and the development of an annual plan, need to be programmed out.

Mr. Chavaree asked about the resolve's focus on children. Ms. Scully answered that Senator Susan Longley had introduced this idea as a way for the State and Tribes to remember what is truly important about their work together and to remind people that it is important to resolve difficult tribal-state issues in order to ensure that children have a bright present and future.

Mr. Richert stated that a few things are essential in order for MITSC to meet the resolve's the December 15, 1997 deadline for reporting back to the Legislature and Tribal Councils. MITSC must make a recommendation on LD 964, the bill to put Albany Township land in trust that was carried over to the Second Regular Session of the Legislature. MITSC also needs a subcommittee to scope out the review of civil laws required by the resolve. In addition, a communications committee is needed to scope out the Annual Assembly of Governors and Chiefs.

With respect to fishing regulations, Mr. Banks reported that the Penobscots are ready to report recommendations to MITSC. He said there had been a lot of meetings among state and tribal biologists and they are pretty much in agreement about changes that are needed. Mr. Hurley added that the Passamaquoddy Tribe also is making progress.

It was agreed that the following individuals would serve on the following subcommittees:

Civil Law Review
Mark Chavaree
Evan Richert

Fish and Wildlife
John Banks
Fred Hurley

Communications
Paul Bisulca
Vendean Vafiades

Mr. Richert commented that it would be very helpful if everyone could attempt to give both sides when presenting the issue. Ms. Vafiades stated that if Governor King is receptive to the letter, MITSC should report on how this works. She noted that MITSC is supposed to use conflict resolution. How these things are working could be included in the December 15 report that is required. Ms. Vafiades asked why MITSC should do all of these things, if it can't be effective. Chair Cohen said if MITSC cannot be effective, it should be abolished.

Since there was not a quorum to vote on the proposed FY 1998 budget, there was consensus among the six MITSC members present to begin operating under the proposed budget for the first three months of FY 1998.

AG's Liaison to MITSC

Mr. Chavaree asked what has happened to the Assistant Attorney General assigned as liaison to MITSC. Mr. Richert said he would check in with Thom Harnett to find out.

Penobscot River Basin Dischargers Council

Ms. Scully stated that MITSC had agreed during the March 18, 1997 meeting to correspond with the Penobscot River Basin Dischargers Council (PRBDC) to urge them to include the Penobscot Nation and that she had not yet drafted up a letter to do this. Representative Bisulca said the problem is not so much with ENSR (the consulting firm supporting the PRBDC) and Lincoln Paper; the problem is that there is no way to fight institutionalized bias. The bigger problem is how the Maine Department of Environmental Protection (DEP) responds to Lincoln actions vis a vis the Penobscot Nation. He added that Lincoln is doing outrageous things and there should be an expression of moral outrage about this. He would like to see some moral support by DEP. Mr. Banks added that Lincoln went to seek modifications to their license which would exclude the monitoring of bald eagles and that there would be a meeting about this with DEP.

Chair Cohen asked whether DEP has been approached about being a stakeholder. Mr. Richert said MITSC will write the letter to ENSR that was discussed with DEP and that DEP supports this. The State feels it is proper for the Penobscot Nation to be represented on PRBDC, since this is a watershed organization that includes municipalities and businesses.

FY 1998 Meeting Schedule

It was agreed that during FY 1998 MITSC will hold seven meetings and that these will be on the first Wednesday of September, October, November,

December, February , April, and June. The meetings will be from 1:00 until 4:00.

Adjournment

Mr. Banks expressed the sentiment of all MITSC members for Chair Cohen to have a speedy recovery back to good health. The meeting adjourned at approximately 5:00 P.M.

Addendum
APPENDIX TO THE COMMITTEE REPORT

RICHARD S. COHEN
ATTORNEY GENERAL



STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

April 2, 1980

To: Joint Select Committee on Indian Land Claims
From: Richard S. Cohen, Attorney General
Re: Proposed Indian Land Claims Settlement

In response to questions posed to me by Senator Collins and Representative Post by their letter of March 26, I am pleased to provide the following responses. This memorandum supercedes my memorandum of March 28, 1980 and provides a more detailed response to several of the questions.

1. What are the major consequences of failing to enact this bill?

As I have said in my earlier statements, failure to enact the Maine Implementing Act could have serious consequences for the State and its citizens. In my opinion, if the matter is not settled, the claim will go to trial. The cost of a trial to the State alone, not including private defendants, would probably exceed \$1 million. It would take roughly 5 to 6 years to get a final decision from the United States Supreme Court. During that time titles and mortgages in the claim area would be in turmoil, and municipal bonds would not be marketable. If it goes to trial there is a serious risk of the State and private landowners losing a substantial tract of land and being ordered to pay money damages.

In addition, if the matter goes to trial and if land is awarded to either Indian Tribe, the State will in all probability be unable to enforce any of its laws on those lands.

2. What special provisions exist for Indians attending the University of Maine, such as tuition arrangements, and will they continue after settlement of the claim?

As we understand it, under the current policy of the University of Maine, Indians pay no tuition or fees. This

exemption is not required by law, however, and can be continued or terminated at the option of the trustees.

3. What is the status of Indian Territory after settlement, either organized or unorganized, and what are the tax consequences? Will it result in any tax exemptions? What will be the effect on the Forest District, the Spruce Budworm District, and the Tree Growth Tax Law?

The Indian Territories will be unique legal entities. Although they will not be called municipalities they will, with a few exceptions, be the functional equivalents of municipalities. In effect the Territories will be organized areas of the State and will no longer be considered unorganized territory of the State.

The Unorganized Territory Educational and Service Tax, Title 36 M.R.S.A., Sections 1601-1605, will not apply to the Indian Territory. Since the Indian Territories will be functional equivalent of organized areas, these taxes will not apply to the Territory. The purpose of the referenced tax is to provide sufficient monies to the Unorganized Territory Educational and Service Fund. The Fund is annually established by the Legislature at an amount sufficient to pay for the various municipal services provided to the unorganized territory by State agencies or counties. After the Fund level is established the tax is levied on the unorganized territory at a rate sufficient to generate revenues equal to the legislatively established level. Thus the rate of the tax and tax revenues are directly related to services rendered by the State. Since the effect of L.D. 2037 will be to remove certain areas of the State from the unorganized territory it will automatically reduce State costs to the territory. Thus, removal of the Indian Territory from unorganized territory will result in no loss of revenue to the State.

With respect to other taxes, the Tribes will pay all State, county and district taxes of any kind applicable to any municipality. These taxes will be called a fee but paid in the same amount as the usual tax. Income to the Tribes from the Federal Tribal Trust Fund will be exempt from State income taxes. Any land owned by a tribe in a town can be taxed by the town and taken for non-payment of taxes.

Any land acquired by the Tribes in an area currently designated as within the Spruce Budworm District will remain within that District and will pay a fee equal to the tax. With respect to the Maine Forestry District, the Indian Territory will remain within the District. The definition of the District is a geographical description encompassing organized and unorganized areas. In my judgment the incorporation or creation of Indian Territory in an area currently designated as within the Maine Forestry District does not change the boundaries of the District.

Finally, the Tree Growth Tax Law will apply to the Indian Territory. We anticipate that the practical impact of the application of this law to the Indian Territory will be negligible. Current law requires that all forest parcels over 500 acres in size be taxed under Tree Growth rates. Since we anticipate that the lands to be acquired by the Tribes in the Indian Territory are already classified as Tree Growth lands, the tax status of such parcels will not be altered. Thus, the Tribal payments in lieu of taxes will, as a practical matter, be unchanged from the taxes previously levied on these lands. Similarly state funds to be provided to the Tribes will be computed in the same manner as it would to any other municipality in which the bulk of the lands were designated as Tree Growth Tax Lands.

4. How was the price of land to be purchased under the settlement negotiated, and who was involved?

Negotiations were conducted directly between landowners and the Tribes. Since all parties agreed that any purchase of land would be funded by Congress, we did not believe it appropriate to participate in those negotiations. In addition, I believe that former Governor Longley was of the view that the State should not participate in land acquisition negotiations. I agreed with Governor Longley's position and have acted consistent with it. Only Congress has authority to decide how much money should be appropriated for this purpose. I am confident that Congress will carefully scrutinize the requested appropriation.

5. What will the State's obligation for welfare, education, and other services be after the settlement? Will the Federal Government assume any of these obligations?

The Department of Human Services is required to reimburse any municipality 90% of the general assistance costs that exceed .0003 of that municipality's state valuation. This same system will apply to the Tribes in their respective Territories. We believe the current general welfare statutes provide sufficient safeguards to prevent the tribes from abusing that system. If, however, abuses do occur, the Legislature is free to amend the general welfare laws to correct them. In this regard, however, it should be noted that of the budget of the Maine Department of Indian Affairs for F.Y. 1979-80, an estimated \$450,000 can be classed as general welfare assistance. It is apparent therefore that the State has traditionally spent substantial sums for these programs on the reservations. Under the Implementing Act these direct appropriations will cease and the Tribes will work within the present system as any other municipality does.

For purposes of determining eligibility for State financial assistance, including for example AFDC, any Trust Fund income distributed to individual members of the Tribes will be treated as ordinary income and computed in determining such eligibility.

The State of Maine currently funds nearly the entire cost of education on the existing Reservations. This cost for fiscal year 79-80 was approximately \$770,000. After the settlement, the Federal government will contribute heavily to the cost of education on Penobscot Territory and Passamaquoddy Territory. For fiscal year 80-81 the Federal government is expected to contribute approximately \$1,126,000 to the cost of education on the two territories. We anticipate therefore that the State will have little if any financial obligation for education.

Another State expense for municipalities is in the area of road maintenance. Again, however, we expect that under the proposed Implementing Act, the State will realize a net savings. Under present law all roads on the Passamaquoddy and Penobscot Reservations are designated as state highways, no matter how small, and as a result the State pays all costs of maintenance. Under the Implementing Act, this provision will be repealed and the State will have the option of designated state highways and state-aid roads within Indian Territory as it does in any other municipality. While we do not have cost estimates, it seems reasonable to assume that such a scheme will result in a cost savings to the State.

6. Will jurisdiction and ownership of any "Great Ponds" be affected by the settlement?

Ownership of and access to Great Ponds will be completely unaffected. The waters and subsurface lands will remain under State ownership. The general common law right of access to Great Ponds will apply to any of these ponds.

Fishing jurisdiction on Great Ponds, 50% or more which shoreline is within Indian Territory, will be vested in the Tribal-State Commission with authority in the Commission to adopt regulations on season, bag limits, size limits and methods. This regulatory authority is subject to the residual power of the Commissioner of Inland Fisheries and Wildlife to supercede Tribal-State Commission regulations if he determines that the regulations are harming or there is a reasonable likelihood that they will harm fishing stocks in other water.

7. May Congress alter the amount of money in the settlement, and what is the consequence if it is altered? What is the consequences if Congress appropriates no money after the Legislature has enacted the claims bill?

Congress' power in Indian law is absolute and as a matter of constitutional power Congress can extinguish the claim on any terms that it wishes. Whether an alteration would affect the chances of enactment of the bill is a matter of political judgment and would depend upon the magnitude of the reduction. I would, however, expect that the Tribes would oppose any bill that appropriates less than that to which they agree. Congress could nevertheless provide less money if it wished to do so, though I would not expect Congress to go so far as to extinguish the claim without any compensation.

With respect to the State bill, although it contemplates an appropriation by Congress as a precondition to its taking effect, since Congress' power is absolute, Congress could ratify or otherwise implement the Maine Act without regard to that limitation.

8. What will be the effect of the settlement on "camp lots" leased on lands transferred to the Indians? What policies on future leasing have been agreed to?

We do not know the policy of all the landowners but we understand that some have agreed not to sell lands which are leased for camp lots. We also understand that Dead River and Great Northern will give camp owners the opportunity to purchase their lots and thus except those properties from the Indian Territories. To the extent such lands are sold, the

Tribal Negotiating Committee has represented to us the Tribes' intention to continue the leasing policies previously employed by the timber companies. This representation is not binding, however, and the Tribes could refuse to renew leases after the termination dates just as any other landowner can.

9. What are the estimated expenses of the Tribal-State Commission and who will pay them?

The Governor has suggested that the Commission's initial expenses not exceed \$3,000.00 per year. These costs are proposed to be paid out of the administrative account of the Department of Inland Fisheries and Wildlife. The amount and source of monies can be changed by the Legislature if circumstances require.

10. (A) Will the fish and game provisions of the bill establish two independent licensing authorities in the Territory and Reservation areas?

Yes. The Tribe will have authority to regulate hunting and fishing in small ponds and may require a license. The Tribal-State Commission will have authority in large ponds, rivers and streams and may require a license.

(B) Will Maine residents have to purchase two licenses?

The Tribe and Commission are authorized, but not required, to require licenses on lands or waters under their jurisdiction. These licenses would be separate and distinct from State licenses. However, State licenses are not required to hunt or fish in Indian Territory or waters under Tribal-State Commission control.

(C) Will non-Indians be entirely barred?

Whether non-Indians are barred from the Territory depends on tribal policy. As landowners the Tribes will have the same power to open and close their lands as paper companies do. Since the Tribes may buy land anywhere in the State which will not be included in the Tribal Territory, they will, like any other landowner, be able to use these lands in any legal manner.

(D) How will the licensing and regulatory authority of the Commissioner of Inland Fisheries and Wildlife be affected?

As a general rule, state fish and game laws regarding hunting and fishing will not apply in Indian territory. Taking of game and fish is controlled in the first instance exclusively by the Tribe or Tribal-State Commission. However, the Commissioner can do surveys, can check game registrations and can take remedial

steps, including superceding those regulations, if he finds Tribal or Tribal-State Commission regulations to be harming or that there is a reasonable likelihood that they will harm other fish or wildlife resources.

(E) May the Indians close their lands to hunting and fishing?

Yes.

(F) How does this authority compare to that of private landowners?

Like private landowners, the Tribes can close their lands. Unlike private landowners they can adopt separate hunting and fishing regulations as explained above.

(G) Who and how will Indian hunting and fishing regulations be enforced?

Tribal law enforcement officers will be equivalent to municipal police officers and within the Indian Territory the Tribal police can enforce all laws including Tribal ordinances on hunting and fishing and regulations of the Tribal-State Commission. All other state law enforcement officers, including Fish and Game Wardens, can also enforce Tribal-State Commission regulations and other laws of the State.

Indian violators of Tribal fish and game ordinances will go to Tribal Court. Non-Indian violators will go to State Court. All violators, Indian and non-Indian of Tribal-State Commission regulations go to State Court.

Tribal law enforcement officers will also be subject to the mandatory training requirements applicable to other local police officers.

11. How will the Tribal School Committees be selected, what specific powers will they have and who will pay education expenses?

Tribal school committees are currently provided for by special laws. Those laws will be repealed and the Tribes will be authorized to create their own school committees as any other municipality does. They will be subject to general state education laws, but as a transitional measure, and until those new committees are created, the current school committees will continue in operation.

Educational costs will be a shared Tribal-State expense using the same formulas and methods used in any other municipality. Currently all Indian educational costs are borne by the State, with the appropriation for the current fiscal year amounting to \$770,000. We have been informed that the U.S. Bureau of Indian Affairs anticipates expending more than \$1,100,000 per year on Indian education beginning October 1, 1980. Upon inquiries to the Maine Department of Educational and Cultural Services, we have been advised that this federal payment will more than exceed the anticipated state and local share of education for comparable municipalities.

12. If Indians purchase a business or building with state funds or guarantees and it fails, may the state or other creditor take it to meet the outstanding loans? May lands in the Territories or Reservations be attached by creditors? If not, what remedies are available to enforce payment of debts?

The answer to these questions are not found in the Maine Implementing Act but are contained in the draft of the Federal bill to be proposed to Congress. Lands of the Tribes within the Indian Territories may not be taken or attached to pay creditors, regardless of whether the creditor is the State or other person. However, creditors are entitled to be paid out of Tribal Trust Fund income. Thus a creditor can sue the Tribe for a debt. If the Tribe fails to pay the judgment, the creditor can request the Secretary of Interior to pay the judgment out of the Trust Fund income. If the Secretary refuses to pay, the creditor can sue the Secretary. We would conservatively estimate the annual Trust Fund income at \$1,250,000 for each Tribe which should be ample to pay most debts.

Lands owned by the Tribe outside their Territory are not subject to the same protection and can be foreclosed against, attached or taken for non-payment of taxes or debts. Individual members of the Tribes will not own Tribal land but will occupy parcels assigned to them. Their status is in some respects similar to a person who leases land. The land such individuals occupy cannot be taken or attached by creditors.

13. May Tribal authorities open and close roads through the Territory or Reservation lands, and may they charge for road use?

Private roads owned by the Tribe can be open or closed at will. County or State roads cannot be closed and the Tribe cannot charge fees. County or State roads, whether owned in fee or held under an easement, will not be transferred to the Tribe but will remain under control of the State or County.

14. Are non-Indians residing on Territory or Reservation lands liable for taxes imposed by Tribal authorities? Do they participate in selecting those Tribal authorities or in determining the tax rates?

The real and person property of non-Indians residing on the Territories is subject to taxes imposed by the Tribal Authorities within those territories. Non-Indians residing on the Territories do not have the right to vote in Tribal elections but the Tribes could elect to extend that right to non-members. However, they are entitled to receive any municipal or governmental services provided by the Tribe or Nation or by the State, with minor exceptions, and are entitled to vote in National, State and County elections in the same manner as any tribal member.

15. What is the effect of the settlement on state and Federal authority over coastal or marine waters?

The only coastal land that will be owned by either Tribe is the current Pleasant Point Reservation of the Passamaquoddy Tribe. By virtue of this ownership, the Passamaquoddy Tribe will have authority to enact shellfish conservation ordinances just as other municipalities do in the coastal lands immediately adjacent to Pleasant Point. As in the case of municipalities generally, the enactment of such ordinances will be subject to approval of the Commissioner of Marine Resources. The Tribes will have no other rights in coastal or marine resources other than any other person or entity.

No other coastal lands will be included in the Indian Territory. To the extent the Tribes might buy other coastal land, they have no more rights in the coastal lands or marine resources than any other person.

16. What specific municipal powers and duties are given to the Tribe and Nation under this bill?

The effect of the bill is to make the Indian Territories the functional equivalent of a municipality. The bill confers on the Tribes within their Territories those powers and duties possessed by municipalities under "home rule." Those powers and duties include but are not limited to ordinance powers, taxation powers, home rule powers, the power to sue and be sued and the power to dispense and receive services.

17. What specific "rights incident to ownership of land" in Indian Territory will the Indians gain under this bill?

The quoted provision, which is found in the last sentence of Section 6207(1), means that the Tribes have all the same rights in their property as any other landowner, including the right to prevent hunting, trespassing or snowmobiling, to lease the land, sell stumpage off it, or develop it.

18. What provisions govern the grounds and procedures for civil actions, or custody or domestic relations actions that are within the jurisdiction of the Tribes?

The Tribes are free to establish their own procedures without State regulation but subject to the Federal Indian Civil Rights Act. We assume the Tribes will adopt their own laws regarding minor civil matters and domestic relations as do other Tribes in the county. We understand that the Penobscot Nation now has an operational Tribal Court, employs a lawyer as Tribal judge and that the Court utilizes the Maine Rules of Civil Procedure.

19. What will be the financial obligations of the state after enactment but prior to the effective date of this Act? Will there be an appropriation for transition during FY 1981 or 1982?

The existing State appropriation for Indian programs ends at the end of the current fiscal year. It is unclear whether the State has a legal obligation to fund some or all of the existing Indian programs, until such time as the settlement is implemented and federal funds flow to the Tribes. However, we understand that the Governor is preparing a transitional appropriation for FY 1981 to continue Tribal assistance. Federal funding begins on October 1, 1980, the start of the federal fiscal year.

I hope the answers provided herein are helpful. Please feel free to inquire further of this office.


RICHARD S. COHEN
Attorney General

RSC:mfe



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

SEP 2 1997

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

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

Dear Mr. DeVillars:

The Department of the Interior (Department) has reviewed the correspondence filed with you by the Penobscot Indian Nation (PIN), Lincoln Pulp and Paper Company (Lincoln), and the State of Maine, Department of the Attorney General (State), in the above-referenced Request for Evidentiary Hearing concerning NPDES Permit No. ME0002003. Certain of the positions set forth in those filings cause concern to this Department, in its role as primary agency within the Federal Government charged to act on behalf of Indian Tribes. Consequently, my intent in this letter is to ensure that your agency is fully aware of the positions of this Department, and of the United States, concerning certain issues relevant to the Maine Indian Claims Settlement Act, the Federal Trust responsibility to Maine Indians, and the fishing rights of the Penobscot Indian Nation.¹

I address three major points, as follows:

1. The Nature of the Federal Government's trust responsibility to the PIN;
2. Interpretation of PIN's fishing rights;
3. PIN's right to appeal the NPDES permit

¹ The First Circuit has recognized the Secretary of the Interior as the administrator of the Maine Indian Claims Settlement Act (MICA). Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 794 (1st Circuit, 1996). Moreover, the Department of the Interior is recognized to have reasonable power to discharge effectively its broad responsibilities in the area of Indian affairs, and its actions in interpreting tribal rights are accorded substantial deference. Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996).

1. The Nature of the Federal Government's trust responsibility to the PIN

As you know, the United States has a trust responsibility to protect the lands and resources of federally recognized Indian Tribes. In the exercise of this trust responsibility, the United States is held to the most exacting fiduciary standards. Seminole Nation v. United States, 316 U.S. 286 (1942). This fiduciary responsibility extends to all agencies of the Federal Government, including the Environmental Protection Agency (EPA). Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981).

The Department acknowledges that the Maine Tribes came late to federal recognition and protection. However, as of 1975, when the First Circuit recognized that the protections of the federal Trade and Intercourse Act (1 Stat. 137 (1790), now codified at 25 U.S.C. § 177) did apply to the Maine Tribes (See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379-380 (1st Circuit, 1975)), the United States has recognized and acted in furtherance of its trust responsibility to protect the lands and natural resources of the Maine Indians, beginning with the United States advocacy on the Tribes' behalf in the Maine land claims litigation. This litigation, which alleged that Massachusetts and Maine illegally took lands of the Maine Indians without federal involvement or consent in violation of the Trade and Intercourse Act, was settled through the enactment by Congress in 1980 of the Maine Indian Claims Settlement Act (MICSA), 25 U.S.C. § 1721, et seq., which ratified Maine's Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. § 6201, et seq. (Implementing Act).

Contrary to the assertions made in several of the filings before you, the United States did not through MICSA limit its trust responsibility. While the MICSA did create a unique relationship between the State of Maine and the Maine Tribes, the federal trust obligation to protect the lands and natural resources of the Maine Tribes continues. The Penobscot Nation is a federally recognized Indian Tribe (61 Fed. Reg. 58211, 58213 (1996)) and, as such, is entitled to those rights and benefits which the United States provides to Indians based upon their status as Indians. See 25 U.S.C. § 479a-1(a); H. Rep. No. 96-1353, p. 18, reprinted in 1980 U.S.C.C.A.N. 3786, p. 3794. The Penobscot Reservation is a federal reservation under the jurisdiction of the United States. 25 U.S.C. §§ 2 and 9.

The Department thus finds erroneous the views expressed which suggest that EPA has no special relationship with the Penobscot Indian Nation. In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. §§ 1722, 1721, 1725(i). (Subsequent Congressional action extended this federal recognition to the Aroostook Band of Micmacs. Pub. L. No. 102-171, 105 Stat. 1143 (1991).) Congress has declared that this

recognition requires that the United States protect tribal resources through the trust responsibility. Pub. L. No. 103-454, 108 Stat. 4791 (1994).

The Department further finds no merit in the claim that MICSA extinguished PIN's sovereignty. Federal recognition connotes recognition of a Tribe's inherent sovereignty. Pub. L. No. 103-454, 108 Stat. 4791 (1994). See also Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994). Passage of MICSA did not terminate the Maine Tribes and thus did not extinguish PIN's sovereignty. Instead, as noted in the legislative history, the "settlement strengthens the sovereignty of the Maine Tribes." H. Rep. No. 96-1353 at 15 (1980), reprinted in 1980 U.S.C.C.A.N. 3786, p. 3790. See also Senate Rep. No. 96-957, pp. 14-15 (1980).

It has been asserted that section 1725(h) of the MICSA, a section of the Act which reflects the unique relationship between the Maine Tribes and the State, prevents the application of the trust responsibility and federal case law interpreting its requirements in Maine (25 U.S.C. § 1725(h)). Through this section, Congress provided that the application of federal Indian law (including case law) in Maine can be precluded, but only if such law would affect or preempt the civil, criminal, or regulatory jurisdiction of the State. If Maine's jurisdiction is unaffected, federal law does apply. See H.R. Rep. No. 96-1353 at 19-20 (1980), reprinted in 1980 U.S.C.C.A.N., 3786, pp. 3794-5; Senate Report No. 96-957 at 30 (1980).

In the Department's view, section 1725(h) has no applicability to this situation.² The NPDES program has not been delegated by the United States to the State of Maine; it thus remains a federal program for which EPA is the permitting authority. EPA's consideration of federal law to determine its obligations to the PIN in making the NPDES permit decision, therefore, is required in this case.³

² While the State does have authority under section 401 of the Clean Water Act to certify that a proposed discharge meets its water quality standards, this does not mean that EPA cannot impose a more stringent standard in its permit. 40 C.F.R. § 124.55(c) provides that a state may not condition or deny a certification on the grounds that State law allows a less stringent permit condition.

³ There is also no merit to the claim that, because MICSA is an Act of Congress rather than a treaty, EPA cannot consider federal case law in determining tribal rights and federal obligations. As with a treaty, MICSA is similarly the "supreme law of the Land," and creates rights and liabilities which are virtually identical to those established by treaties. See Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), cert.

Since there exists a trust relationship between the Maine Tribes and the United States, EPA must act as a trustee when taking federal actions which affect tribal resources. When taking such actions, EPA's fiduciary obligation requires it to first protect Indian rights and resources. See Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972), rev'd. in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975) (holding that for the Secretary of Interior to fulfill his fiduciary duty to Tribe while determining amount of water to be diverted from dam for benefit of irrigation district and to detriment of tribal fishery in downstream Pyramid Lake, the "Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake"); Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065 (D. Mont. May 28, 1985) (Rejecting Secretary's argument that national interest in developing coal resources outweighed trust duty and stating that "identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.") Thus, fulfillment of EPA's trust responsibility must entail considerations beyond the minimum requirements in the Clean Water Act (CWA) and in MICSA to fully protect the PIN's rights and resources.

2. Interpretation of PIN's fishing rights

The historic treaties between PIN and Massachusetts (Maine then being part of the Massachusetts territory) provide the basis for rights expressly confirmed to the PIN through the Implementing Act and MICSA. As a result, PIN's fishing right has two components - the aboriginal right retained through treaty and confirmed by MICSA, and a statutory right included within the Implementing Act.

a. PIN's confirmed aboriginal fishing rights

Through a series of treaties which culminated in the 1818 Treaty with Massachusetts, the PIN retained the islands and natural resources, including fishing rights, within the Penobscot River, beginning at Indian Island and extending upriver. Congress, through its ratification in MICSA of the Maine Implementing Act which defined the retained Penobscot Reservation, confirmed this reservation of lands and resources, including fishing rights, to the PIN. See 30 M.R.S.A. § 6203(8); 25 U.S.C. §§ 1722(i); 1725(b)(1). While Section 1723(b) of MICSA did extinguish

denied, 116 S. Ct. 2546 (1996); Felix Cohen, Handbook of Federal Indian Law, p. 127 (1982 ed.).

aboriginal title to lands or natural resources given up by the PIN through transactions illegal under the Trade and Intercourse Act, MICSA did not extinguish aboriginal title to lands or natural resources retained by the PIN. Rather, Congress confirmed those retained aboriginal rights to the PIN. According to the legislative history of MICSA, fishing rights are an example of natural resources considered "**expressly retained sovereign activities.**" H.R. Rep. No. 96-1353 at p. 15 (1980), reprinted in 1980 U.S.C.C.A.N. 3786, p. 3791 (emphasis added).

I attach the brief filed by the United States in Maine's Supreme Judicial Court in Atlantic Salmon Federation v. Maine Board of Environmental Protection, 662 A.2d 206 (Me. 1995), in which the United States position regarding the PIN's fishing right is set out. In short, the brief states that:

The Penobscot Nation's right is a reserved right, meaning it was reserved from the greater aboriginal rights of the Nation to the use and occupancy of its territory which had not been validly extinguished under 25 U.S.C. 177, prior to the enactment of the Maine Implementing Act and the federal Settlement Act ratifying its terms. The fishing right, therefore, is not a grant from the state of Maine in the exercise of its sovereign authority over fish and wildlife within its borders; it is a reservation from the aboriginal rights given up by the Penobscot Nation in the settlement which finally extinguished its aboriginal rights.

Brief for the United States as Amicus Curiae, filed before the Supreme Judicial Court of Maine in Atlantic Salmon Federation, et al., v. Maine Board of Environmental Protection, Law Docket No. Ken-94-779, January 27, 1995, (p. 15).

b. PIN's statutory fishing right under the Maine Implementing Act

In addition to PIN's retained aboriginal fishing rights within its Reservation, the Maine Implementing Act expressly confirmed to PIN a fishing right, providing that

the members of the . . . Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance . . .

30 M.R.S.A. § 6207(4). The State of Maine has only a residual right to prevent the PIN from exercising its fishing right in a manner which has a substantial adverse impact on fish stocks in or on adjacent waters - the legislative history compares this residual power to that which other states retain with respect to federal Indian treaty fishing rights. See H.R. Rep. No. 96-1353 at p. 17 (1980), reprinted in 1980 U.S.C.C.A.N. 3786, p. 3793. Indeed, the State of Maine has acknowledged that, in recognition of "traditional Indian activities" such as fishing, preferential

treatment is to be provided to Maine Indians. See letter from Attorney General Richard Cohen to Senator John Melcher (August 12, 1980), reprinted in U.S. Senate, Select Committee on Indian Affairs, Hearings on S. 2829, Proposed Settlement of Maine Indian Land Claims. See also Letter from Maine Attorney General James Tierney to Atlantic Sea Run Salmon Commission Chair William Vail (Feb. 16, 1988), in which the State recognized that the Penobscot Nation possesses a right to take fish from the Penobscot River for consumption in a manner otherwise prohibited by state law, due to the provisions in the Maine Implementing Act. (Copies attached.)

As provided in the Implementing Act, the PIN fishing right applies within the boundaries of the Penobscot Reservation, as it is defined in the Implementing Act. The Reservation is defined to expressly include the islands in the Penobscot River, beginning at Indian Island and continuing upriver, which were reserved by the PIN in its historic treaties. 30 M.R.S.A. § 6203(8). In those treaties, the PIN ceded lands beginning at the river's edge and extending upland, thereby retaining its rights to the beds and banks of the Penobscot River. See Wilson & Son v. Harrisburg, 107 Me. 207, 210 (1910). Pursuant to the 1818 Treaty, PIN's riparian ownership to the bed and banks of the river is limited only by the commonly recognized right of the public to use the river for navigation. See Pearson v. Rolfe, 76 Me. 380, 386 (1884). In confirming the PIN Reservation, the Implementing Act recognized the retention of PIN's riparian rights to the Penobscot River, including the beds and banks of the river.⁴

As a riparian owner, PIN possesses certain rights under state law which relate to the interpretation of its statutorily-based fishing right. Maine law recognizes that a riparian proprietor, such as the PIN, has a legal right:

to take fish from the water over his own land, to the exclusion of the public. Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec., 333. He does not own the water itself, but he has the right to the natural flow of the stream, and the right to the use and benefit of it, as it passes through his land, for all the domestic and agricultural purposes to which it can be reasonably applied, and no proprietor above or below can unreasonably divert, obstruct or pollute it. Waluppa Reservoir Co. v. Fall River, 147 Mass., 548, 554, 18 N.E. 465, 1 L.R.A., 466; Auburn v. Water Power Co., 90 Maine 576-585, 38 Atl. 561, 38 L.R.A., 188.

⁴ Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory," included within Appendix, Senate Select Committee on Indian Affairs, hearing July 1-2, 1980.

The only limitation upon the absolute rights of riparian proprietors in non-tidal rivers and streams is the public right of passage for fish, and also for passage of boats and logs. ... All these rights which the riparian proprietor has in the running streams are as certain, as absolute, and as inviolable as any other species of property, ...

Opinion of the Justices of the Supreme Judicial Court, 118 Me. 503, 507 (1919) (emphasis added).

The PIN Reservation encompasses the area into which Lincoln discharges its outfall. As such and as a riparian proprietor, PIN possesses certain rights under Maine law, including the right to take fish and the right that others not unreasonably pollute the waters overlying those lands.

3. PIN's right to appeal

The Department finds particularly questionable the attempt to have EPA deny the PIN's right of appeal. We have examined the NPDES regulations which define standing to request a hearing in this matter. In the Department's view, PIN is an "interested person" as provided in 40 C.F.R. §124.74, which is the sole indicated criterion for filing a request for hearing. Moreover, the PIN meets the criteria under the definitions for "Indian Tribe" and of "person" under 40 C.F.R. § 124.2 as well. The definition for "Indian Tribe" specifically states that "[f]or the NPDES program, the term 'Indian Tribe' means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 C.F.R. § 124.2. PIN meets these requirements. There would appear, thus, no grounds on which to contest PIN's status to request an evidentiary hearing in this proceeding.

Thank you for this opportunity to provide the views of the Department. Please contact me if you have any further questions.

Sincerely,



Edward B. Cohen
Deputy Solicitor

Enclosures

cc: The Honorable Francis Mitchell, Chief, PIN
Patty Goldman, Sierra Club Legal Defense Fund
Paul Stern, State of Maine, Office of the Attorney General
Kate Geoffroy, Pierce Atwood

EPA, Office of General Counsel, Washington, D.C.
EPA, Office of Regional Counsel, EPA, Boston
EPA, Indian Desk, Washington, D.C.
Department of Justice, Indian Resources Section
Department of Justice, Office of Tribal Justice
Office of the Regional Solicitor, Boston
Bureau of Indian Affairs, Office of Trust Responsibilities
Bureau of Indian Affairs, Eastern Area Office
Fish and Wildlife Service, Maine Field Office

MAINE INDIAN TRIBAL-STATE COMMISSION

FAX

To: Mike Best 796-5256 FAX
From: Diana Scully *DS*
Re: Statement by Richard Cohen
Date: March 5, 1997

I reached Richard Cohen yesterday at Maine Medical Center to discuss again his recollection and understanding of the discussion of salt water rights and issues between the State and the Passamaquoddy Tribe. Here is his statement:

"It is my recollection that salt water rights and issues were not discussed during the Settlement negotiations. These are legitimate areas for discussion now."

Please give me a call at 622-4815 if you have any questions.

cc: Richard Cohen

Tribe seeks to issue own fishing licenses

MAINE DAILY NEWS JAN 9 1990

By Letitia Baldwin
Of the NEWS Staff

AUGUSTA — Passamaquoddy tribal Rep. Fred Moore will present an emergency bill at a public hearing here Tuesday that would allow the tribe to issue its own commercial fishing licenses and permit tribal members to harvest clams and other marine resources for their personal consumption without a state or tribal license.

If passed by the Legislature,

LD 2145 would entitle the Passamaquoddy Tribe to issue commercial fishing licenses that require tribal members to observe the same size limits for different marine species, the opening and closing of fishing seasons, gear restrictions and other conservation measures set by the state, according to Moore.

"The bill is calling for state recognition of tribal authority to issue its own licenses to its members," Moore said Sunday. "It's intended to be a compromise."

Moore said the bill also would allow the Passamaquoddy to harvest clams, scallops, sea urchins

Hearing on bill scheduled Tuesday

and other marine species without any license for their own "sustenance" and for traditional cultural purposes. He said tribal members

also would be exempted from licenses in order to sell or distribute the seafood on the reservation.

Moore said the tribe would adopt state rules as long as they were consistent with tribal culture. He said the regulations would be enforced jointly by tribal police and state and federal authorities.

Moore said he believes the Passamaquoddy should be exempted from licenses in a number of

Fishing, from B1
circumstances. "We have many single mothers and elders who should not be expected to venture out in a boat. In Passamaquoddy culture, those who cannot fish rely on those who can."

Rep. Albion Goodwin, D-Pembroke, co-sponsored the bill with Reps. Royce Perkins, R-Penobscot, and Kyle Jones, D-Bar Harbor. Goodwin said he believes the Passamaquoddy have an ancestral right to fish in salt water without a state license.

"They've been fishing here for 10,000 years," he said. "The federal government did not take care of the issue of saltwater fishing rights in the 1980 land claims settlement."

State Sen. Jill Goldthwait, chairwoman of the Legislature's Marine Resources Committee, questioned whether it's possible to exempt one group of fishermen from certain state regulations.

"My initial concern is Maine's fishing industry is already being blasted with regulations from every side," she said Sunday. "I am concerned fishermen are going to be upset with the state yielding any regulatory authority when they are under a microscope from the government and all their fishing practices are being restricted. I think the fishing community should be on a level playing field."

In Calais District Court, a dozen or more court cases currently are pending against tribal fishermen charged with various marine resource violations ranging from sea urchin harvesting without a license to digging clams in closed flats.

Just this past week, lawyers

representing the state and Washington County argued in a court brief that the Passamaquoddy's claim of an ancestral right to fish is invalid since some of the defendants and their relatives have applied for state fishing licenses over the years.

The state also has argued that the Passamaquoddy Tribe agreed its members would abide by state laws like any other citizens when they received a cash settlement and some land as part of the 1980 federal land claims settlement.

The public hearing on the fishing bill will begin at 1 p.m. Tuesday in Room 113 of the State Office Building.

TESTIMONY SIGN IN SHEET

COMMITTEE ON MARINE RESOURCES

L.D. # or CONFIRMATION: 2145

DATE: 2-10-98

NAME	TOWN/AFFILIATION	PROPONENT	OPPONENT
1. Rep Fred Moore III	Passamaquoddy tribe	X	
2. Gov Rick Doye	Passamaquoddy	X	
3. Gov Jim King	Passamaquoddy		
4. Wayne Newell	Passamaquoddy	X	
5. Martin Dama	Passamaquoddy	X	
6. Maynard P. Stanley	Passamaquoddy	X	
7. Wm. "Eric" Armour	Pass Thom	X	
8. Richard Dow	Gardner	X	
9. Margie Mitchell	Passamaquoddy	X	
10. Frank White	PASS. Hig. 1		
11. Laura Tan	DMR		X
12. Donna Lacey	Acadsci Rep		
13. Dana Gulch	Penobscot Nation		
14. Greg Temple	Atty - Pass Tribe -		
15. Bill Hedin	EASTPORT		
16.			

AFNA
FHA

TESTIMONY SIGN IN SHEET

COMMITTEE ON MARINE RESOURCES

L.D.# or CONFIRMATION: 2145

DATE: 2-10-98

NAME	TOWN/AFFILIATION	PROPONENT	OPPONENT
1. Rep Moore	Rep Passamaquoddy		
2. Rick Wayne	Tribal Governor	✓	
3. John Stevens	Tribal Governor	✓	
4. Wayne Newell		✓	
5. Martin Wana	Tribal Member	✓	
6. Maynard P Stanley	Tribal Member	✓	
7. William	St Governor	✓	
8. Richard Wows	Gardner	✓	
9. Georgia Mitchell	Tribal Member	✓	
10. Frank White	Passamaquoddy	✓	
11.	Lubec	✓	
12. Laura Payloc	DMR		✓
13. Col. Joe Tessenden	DMR		✓
14. Donna Loring	Tribal Representative		
15. Dana Mitchell	Penobscot Nation		
16. Craig Sample	attorney for Passam.		

with Hopkins East Port

2/10/98

PH. 102145

Fred Moore:

- Bill derived from a concept discussed before tried State offered
- To preserve culture & the integrity of culture

STATE ^{concern} ~~concern~~: Law is arranged where there are less stringent rules along the coast of Maine.

- Other concern: An undue advantage of tribal members over those in commercial fishing

THE BILL: Give assurance

- 1) No undue advantage
- 2) No lower stringency standards

- Maine Tribal Influence - could resolve conflict
- Maine see a distinct culture in their midst
 - An Indian tribe in the state

Ken: Lakes not mentioned - why?

Fred: Retrospective - to 6/1/97 - that's when W+ draft done - Portland Rep. not representative. I do not speak for them - so that's why not included.

Oron: How different from current hunting & fishing laws?

Fred: • We're asking for far less than hunting & fishing -
- Tribes have exclusive authority to hunt & trap on unlanded

- Fishing - ponds & waterways under to access & since it's boundary water.

- Common of PPW - may bring to tribal affairs
 cons. tribal order that would address affil
 game regulate ~~immigrants~~ activities of terrorists
 - Is a process for resolution that - at ultimate
 authority of resolving tribal order, etc.
- Hunting, trapping, fishing authority all at the tribe -
 exclusive authority.

QIM: Develop some of salt water rights in settlement?

PRER: Subject to debate

- Tribal folks say no.

- For this bill, tribe is incorporation with some of
 ownership
 - Tribe have more control authority of the sea
- Much pressure to get down act - because of the
 cloud of title ownership.
- Propulsion of tribe was that it would be dealt with
 as a looter class
- DEFERRED ~~DEFERRED~~ PRER - we have - no pressure in state
 law

Rick Boyle - Tribal Gov. Pleasant Pt

- Have people facing criminal charges for practices that's culture.
- We can regulate + enforce conservative effort of the state.

John Steers - Indian Township Tribal Council

- Your limits my access + to food
- And limits my freedom
- As a result some have
- Want food on table & every less amenable
- Only 3,000 of us now

Wayne Russell: Indian Township Tribal Council member

- Subtle & legal form of cultural genocide
- Losing much of native language
- If part of resistant commitment selfless and -
 - We presumed to take state's rights for granted - it didn't come up.
- Up until 13 people got arrested, we had worked in the state and we compromised
- Not just about regulating personal freedoms:
 - Agreed state effort between 2 nations
 - We're not here asking for something.
- Bill is an attempt to resolve political conflict between 2 entities.

Is legislation the answer?

- Negotiate in good faith - but no results
- Court case - & necessary - judicial branch

Martin Pang Proposed Trade member.

Wayne Stankis: Pleasant Pt.

- Who died and left a state machine of land? -
Creates have not died.
- Conservationists: I've advocated for years to have a
strong conservation measures

William Blum? LA. Gov. Pass Trade - Pleasant Pt.

- Bill is important to the entire tribe
- Much more bill than takes time -
- Message: Recognize difference & respect that
difference
- We are an endangered species - people who
speak the language
- Amendment 10-B - in claim act: Any future federal
legislation for future hundred of Tribes will not apply
in Main.
- Hardest scaled is critical to existence of tribe - just like
concepts have to kill a dog.

- We agree there's a supreme authority governing Ireland - we think it's God - not the state.

Richard Daw - Gardiner

Georgia Mitchell:

- Was employed by DMR
- 2 years ago - in the state - ~~was~~ ~~employed~~ ~~reported~~ a racist.

Frank White - Passam. Commercial Fisheries

- For 37 years
- Jan 1992 - I took a Passam grade trilled license - and I can go where I want to -
- Warden said OK - but later arrested me for a violation.
- Mid Decmber, got a ~~summons~~ summons
- Marine Patrol harassed me -
- I'm still fishing at the Passam. license

Bob Pearce: DMR Advisory Council

- Bill is about:
- 1) Conservation
 - 2) Enforcement
 - 3) Fairness
 - 4) Sovereignty

PELUK • Federal Act - p 1000 in chapter terms
• Did Indians retain rights to subsist on fishing?

- Tribe agree to follow Main Compact Measures
- Muskegon Passageway are distinct areas

ADD • Make a sunset provision - too see how the bill works

Opposed: See Testimony - Laura

• Joe P

Ward: When shall enforce?

- Laws have applied to Passageway - for the years -
- Since 1980-81 - falls had held licenses
- Major issue
 Licensed waters - sea waters
 • More falls participate in the waters
 - Lease license
- License is not compliance - difficult for tribal falls to comply

NPNA

Donna Lewis - President of the Native People's League

- Permitted - we would give up some of our ~~rights~~ tribal rights
- A sovereign nation take on our nation + rights
- Think we could be settled what legislation

MENA:Dana Mitchell - President Native

- Sovereignty
- Federal Authority
- We also have ocean rights - tribes used to come within 3 miles of land - before dams
- Many of the provisions of the federal statute bills in fixed language - not presented to the communities

-
- We did not give up ocean rights - it was never discussed
 - What is not given is retained by us.
-

Greg Sample: Attorney for Passamaquoddy

- 1) Extrajurisdiction of rights: Not correct - tribal position is strong - is detailed provision in federal statute and - as to what rights are extrajurisdictional - tied to property rights + transfers of those rights
 - Rights in form of transfer of rights - no

- 2) Tribal rights - unclear clear unambiguous language, not treated as given.

Fabill 3) Consent negotiations: Tribes have always dealt with strong act



Until compact is worked out, tribal licenses to
the interim results region.

Will Hopkins - Forest

- Forest / Pasture - informal agreement at the in-
dian state
-

Addendum



118th MAINE LEGISLATURE

SECOND REGULAR SESSION-1998

Legislative Document

No. 2145

H.P. 1523

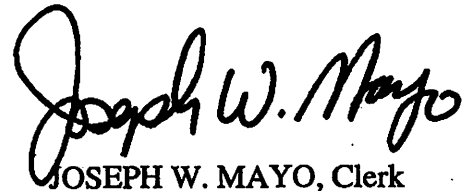
House of Representatives, January 20, 1998

**An Act Concerning the Taking of Marine Resources by Members of the
Passamaquoddy Tribe.**

(EMERGENCY)

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule
203.

Reference to the Committee on Marine Resources suggested and ordered printed.


JOSEPH W. MAYO, Clerk

Presented by Representative MOORE of the Passamaquoddy Tribe.
Cosponsored by Representatives: GOODWIN of Pembroke, JONES of Bar Harbor, PERKINS
of Penobscot.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, it is imperative that this Act take effect before the expiration of the 90-day period because Passamaquoddy tribal members are being prosecuted in the criminal courts of this State for engaging in traditional tribal uses of marine resources; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 MRSA §6302-A is enacted to read:

§6302-A. Taking of marine resources by Passamaquoddy tribal members

1. Commercial use. Notwithstanding any other provision of law regarding licensing, the taking of marine resources by resident members of the Passamaquoddy Tribe for commercial use is governed by a license to be issued by the Passamaquoddy Tribe under the terms of a licensing compact to be negotiated between the State and the Passamaquoddy Tribe, approved by the legislative body of each party and certified to the Secretary of State in accordance with the procedures in Title 3, section 601. If a licensing compact has not been agreed upon by October 1, 1998, either party may submit a proposed compact to the Legislature in any year no later than December 15th for consideration by the Legislature that is in session the following January.

2. Status pending approval of licensing compact. Until a licensing compact has been approved and takes effect, a license issued under this Title is not required of any member of the Passamaquoddy Tribe who acts in accordance with subsection 3 or 4, or who holds a valid license issued by the tribe for the taking of marine resources under a tribal regulatory program substantially the same as that governing other residents of this State engaged in the same fishery. A tribal regulatory program complies with this standard if, for each species regulated, Passamaquoddy tribal members are required to observe:

A. The same conservation-based restrictions as the holders of the comparable state license; or

2 B. An alternative regulation determined by the Maine Indian
3 Tribal-State Commission to be of cultural significance to
4 the Passamaquoddy tribal community or licensee yet
5 sufficiently restrictive when limited to tribal licensees as
6 to have no significant impact on the marine resource.

7 Notwithstanding any other provision of law, until a licensing
8 compact has been approved under subsection 1 and takes effect,
9 any member of the Passamaquoddy Tribe holding a valid tribal
10 license may take, possess and transport any marine resources for
11 use, distribution or sale as though that member were the holder
12 of a valid state license issued under this Title for the resource
13 or activity involved.

14 Any regulation approved by the Maine Indian Tribal-State
15 Commission under this subsection must be certified by the
16 commission's chair to the Secretary of State as having been so
17 approved. A copy of the regulation and certification must be
18 submitted by the Secretary of State to the commissioner.

19 3. Sustenance use. Notwithstanding any other provision of
20 law, any member of the Passamaquoddy Tribe properly identified by
21 a tribal identity card may take, possess, transport and sell or
22 distribute any marine resources for sustenance use. As used in
23 this subsection, the term "sustenance use" includes all
24 noncommercial consumption or use within the Passamaquoddy
25 reservations at Pleasant Point Reservation and Indian Township,
26 and any consumption or use by tribal members or within a member's
27 household or immediate family. The term "sustenance use" does
28 not include the commercial sale to any person who is not eligible
29 for sustenance use under this subsection.

30 4. Ceremonial tribal use. Notwithstanding any other
31 provision of law, any member of the Passamaquoddy Tribe may take,
32 possess and transport any marine resources identified in a
33 special tribal permit issued to the tribal member by the
34 Passamaquoddy Joint Tribal Council or the Governor and Council at
35 either Passamaquoddy reservation when those marine resources are
36 exclusively for use in a gathering that is identified in the
37 permit and designed and intended to support or advance the public
38 interests of the Passamaquoddy tribal community.

39 5. Enforcement. Law enforcement officers appointed by the
40 Passamaquoddy Tribe shall enforce requirements regarding
41 Passamaquoddy tribal licenses and tribal laws regulating the
42 taking, possession, transportation and use of marine resources.
43 Officers of the marine patrol and the National Marine Fisheries
44 Service may assist, to ensure compliance and aid the enforcement
45 of tribal marine resources licenses and laws, through
46 cross-deputization or cooperation with tribal law enforcement
47 officers.

2 officers. The following penalties may be imposed for any
3 violation of tribal laws regulating the taking of marine
4 resources.

5
6 A. Any tribal license for the taking of marine resources is
7 subject to suspension for any period not longer than one
8 year upon a judicial finding that the license holder has
9 violated the terms of the license or the Passamaquoddy
10 tribal regulatory program.

11
12 B. The holder of any tribal license for the taking of
13 marine resources is subject to a civil penalty of no more
14 than \$2,000 for any violation of the terms of the license or
15 the Passamaquoddy tribal regulatory program in addition to
16 any other remedy. In determining the appropriateness of a
17 civil penalty, the nature of the violation, any history of
18 prior violations and any adverse consequences to others,
19 their property or the natural resources that may have
20 resulted from the violation must be considered. In the
21 event that a violation has caused monetary loss or damage to
22 another person, the court may order restitution in addition
23 to or instead of other penalties.

24 C. Any marine resource taken or possessed in violation of
25 this section or the Passamaquoddy tribal regulatory program
26 is subject to seizure by any law enforcement officer with
27 authority to enforce the Passamaquoddy tribal regulatory
28 program and to forfeiture.

29
30 The Passamaquoddy Tribe has the right to exercise exclusive
31 jurisdiction separate and distinct from the State over any
32 violation of the Passamaquoddy tribal laws regulating marine
33 resources in an action commenced by the Passamaquoddy Tribe. The
34 decision to exercise or terminate the exercise of the
35 jurisdiction authorized by this subsection may be made only by
36 the tribal governing body. If the Passamaquoddy Tribe chooses to
37 terminate its exercise of or not to exercise jurisdiction under
38 this subsection, the State has exclusive jurisdiction over those
39 matters until such time as the tribal governing body elects to
40 begin or resume the exercise of exclusive tribal jurisdiction.

41
42 **Sec. 2. Retroactivity.** This Act applies retroactively to June
43 1, 1997.

44
45 **Sec. 3. Effective date.** This Act does not take effect unless
46 the Secretary of State receives written certification by the
47 Joint Tribal Council of the Passamaquoddy Tribe that the tribe
48 has agreed to the provisions of this Act, copies of which must be
49 submitted by the Secretary of State to the Secretary of the
50 Senate and the Clerk of the House.

2 **Emergency clause.** In view of the emergency cited in the
preamble, this Act takes effect when approved, except as
4 otherwise indicated.

6
8 **SUMMARY**

10 This bill continues the work of the Legislature regarding
the issue of the taking of marine resources by members of the
Passamaquoddy Tribe that was begun with Resolve 1997, chapter
12 11. This bill exempts Passamaquoddy tribal members from
regulation by the State when taking marine resources for
14 sustenance use or for ceremonial tribal use under a special
tribal permit.

16 The bill also authorizes the negotiation of a licensing
compact between the State and the Passamaquoddy Tribe governing
18 the taking of marine resources by Passamaquoddy tribal members or
the submission of compact proposals to the Legislature if a
20 compact has not been agreed upon by October 1, 1998. Until a
compact is approved, the bill approves the use of tribal licenses
22 under a Passamaquoddy regulatory program substantially the same
as that governing other residents of this State engaged in the
24 same fishery.

26 This bill is retroactive to June 1, 1997.

Summary of LD 2145:
An Act Concerning the Taking of Marine Resources
by Members of the Passamaquoddy Tribe

The bill addresses three types of salt water fishing activity:

- Commercial
- Sustenance
- Ceremonial

Commercial:

Commercial fishing would be governed by a license issued by the Passamaquoddy Tribe pursuant to a compact negotiated between the State and the Tribe and approved by the legislative bodies of each. If an agreement were not reached by October 1, 1998, either party could submit a proposed compact to the Legislature in any year by December 15th for consideration in the next legislative session.

In the interim: Until approval of a compact, no state license would be required for a member of the Passamaquoddy Tribe who holds a license issued by the tribe and who fishes in accordance with a tribal regulatory program. The program must be "substantially the same as that governing other residents of this State engaged in the same fishery." The program must include:

- "The same conservation-based restrictions as the holders of a comparable state license; or
- An alternative regulation determined by the Maine Indian Tribal-State Commission to be of culture significance to the Passamaquoddy tribal community or licensee yet sufficiently restrictive when limited to tribal licensees as to have no significant impact on marine resources."
 - Maine Indian Tribal-State Commission is a 9 member commission created in state law to review the effectiveness of the Maine Indian Claims Settlement Act and the relationship of the State and the Passamaquoddy Tribe and the Penobscot Nation. Among the commission's responsibilities is the adoption of rules for freshwater fishing in certain waters located wholly or partially in Indian territory.

The license holder could engage in all the activities of a person who holds a State license (take, possess, transport, sell, distribute).

Sustenance:

A member of the Passamaquoddy Tribe could “take, possess, transport and sell or distribute” marine resources for sustenance use - either for consumption within Passamaquoddy reservations or within the home of a tribal member.

- As written, the bill is unclear as to whether conservation restrictions would apply to sustenance fishing.

Ceremonial:

A member of the Passamaquoddy Tribe could “take, possess and transport” marine resources for ceremonial use provided the member obtains a special permit from the Passamaquoddy Joint Tribal Council or the Governor and Council at either Passamaquoddy reservation for that purpose.

- As written, the bill is unclear as to whether conservation restrictions would apply to fishing for ceremonial purposes.

Enforcement:

Enforcement of tribal licenses and tribal marine resources laws would be by tribal law enforcement officers. Maine Marine Patrol officers and National Marine Fisheries Service officers could assist through agreements with the tribe. The Passamaquoddy Tribal Court could exercise exclusive jurisdiction over violations if the tribe so chose.

Retroactivity:

The act would apply retroactively to June 1, 1997.

REPORT
of
JOINT SELECT COMMITTEE
on
INDIAN LAND CLAIMS

The Joint Select Committee on Indian Land Claims would like to present for the record its findings and intentions in voting on L.D. 2037, "AN ACT to Provide For Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory." During the course of its deliberation on this bill, the Committee received a great deal of information from the office of the Attorney General and representatives of the Passamaquoddy Tribe and Penobscot Nation, including their counsel. The information and interpretation developed during the committee deliberations are an integral part of the committee's understanding of the bill and were included in the committee's discussion and decision.

It is the understanding of the Committee that L.D. 2037 is a basic document establishing the principles of the relationship between the State and Indians residing in the State. It is more of an organic document than a specific bill, and thus it seeks to establish the broad and basic provisions of this relationship, rather than the intricate details. Because of this nature of the bill, it was not drafted to refer to specific provisions of state law, but to refer to the basic principles of state law that have remained constant. Thus, it is important that the Committee state that it was considering this bill in the context of present state law, and in some instances, understood that certain specific statutory determinations found elsewhere in State law applied to its intent in the bill. The Committee did not amend the bill to reflect the specific statutory understanding because that would interfere with the bill's purpose of establishing basic principles.

It is the understanding and intent of the Committee that this bill establishes the basic principle of full state jurisdiction over Indian lands within the State, including Indian Territory or Reservations. The bill provides specific exceptions to this principle in recognition of traditional Indian practices and the federal relationship to Indians. The Committee understands that these exceptions are being granted to resolve the long-standing disputes between the State and Indians, and intends that this resolution will provide the basis for harmoniously developing the relationships between Maine's residents. Except for the specific provisions of this bill, Maine's Indians are to be full citizens of the State with all the rights and duties incumbent on that relationship.

It is the understanding and intent of the Committee that the answers to specific questions posed by legislators contained in the memorandum to the Committee from Attorney General Richard S. Cohen, dated April 2, 1980 applies to this bill and accurately interprets its provisions.

It is further the understanding and intent of the Committee that the following specific interpretations apply to the bill:

1. The definitions currently used in Title 12, section 7001 relating to inland fisheries and wildlife apply to the use of those terms in this bill, unless the context clearly indicates otherwise.

2. The authority of the Passamaquoddy Tribe, Penobscot Nation and Tribal State Commission under this bill are limited to regulating the taking and possession of fish and wildlife. That authority does not include any authority over stocking, propagation and selling or disposition, which remain subject to general state law.

3. The provision on transportation of fish and wildlife permits transportation within the State but outside of Indian Territory if the fish or wildlife was legally taken in Indian Territory. This provision does not exempt that transportation from other legitimate state police power regulation, including requirements relating to public health, sanitation, registration, sale or disposition.

4. The provisions relating to Indian sustenance hunting and fishing apply only to hunting or fishing for personal or family consumption. They do not apply to hunting or fishing to maintain a livelihood or other commercial purpose.

5. The jurisdictional provisions relating to fish and wildlife use the term "sides of a river or stream" which means the mainland shore and not the shoreline of an island.

6. This bill continues without restriction the power of the State to determine the assistance it will offer for roads or highways.

7. The exemption from State taxation for the income from the settlement fund is an exemption from state income taxes.

8. The provision for payment by the Tribe or Nation of a fee in lieu of taxes on real property will apply only to the real property in the Territory that is actually located within the jurisdiction of the taxing authority. Thus, payments to a county in lieu of county taxes would be based on the valuation of the portion of Indian Territory that is within that county's boundaries.

9. The tax exemption granted by this bill to Indian property is not a new exemption under the Maine Constitution, Art. IV, Pt. 3, §23. Because of the "municipal status" granted to Indian Territory by this bill, the existing exempt status of "government purpose" municipal property applies.

10. The scope of the tax exemption for "governmental pur-

poses" granted to the Indians under this bill is to be governed by the limitations established by the general statutes, rules and case law governing those exemptions in all other municipalities in the State.

11. The definition of "business capacity" under the taxation provision of this bill means that capacity and resulting acts which any resident of this state could take in a private or corporate form without being a governmental agent or agency.

12. The requirement for municipal approval under section 6205, sub-§5, before property within the municipality may be added to Indian Territory or Reservation applies to property acquired in any manner, including property received in return for property taken by eminent domain or property purchased with the proceeds of a taking under eminent domain.

13. The selection process and requirements for selecting a tribal school committee are internal tribal matters governed solely by tribal law. The standards for operating the school and school committee, including teacher certification, curriculum, hours, records and other operational requirements are governed by State law.

14. The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law. Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are conveyed by the selling party or included by general principles of law. However, the Common Law of the State, including the Colonial Ordinances, shall apply to this ownership. The jurisdictional rights granted by this bill are coextensive and coterminous with land ownership.

Finally, it is the understanding of the Committee that Congress may provide that certain provisions of this bill may not be amended without the consent of the Indian Tribe, Nation or Band that will be affected by the amendment. However, it is also the understanding and intent of the Committee that the state retains exclusive and unlimited discretion and authority to amend or repeal any statute relating to Indians that is not contained in this bill and to enact, amend or repeal general law even though it may have an effect on the powers or duties of the Tribe, Nation or Band as provided by this bill.

This Committee believes that subject to this interpretation, this bill will provide a firm basis for a strong and sound relationship between Maine's Indians and other citizens. It is a major accomplishment of all parties that this difficult, complex and possible divisive controversy can be resolved in such a reasonable and satisfactory manner.

Signed.

Senate:

Samuel W. Collins, Jr.
Senator Samuel Collins, Jr.
Chairman

House:

Bonnie Post
Representative Bonnie Post
Chairman

SENATE

SUSAN W. LONGLEY, DISTRICT 11, CHAIR
LLOYD P. LAFOUNTAIN III, DISTRICT 32
JOHN W. BENOIT, DISTRICT 17

MARGARET J. REINSCH, LEGISLATIVE ANALYST
LISA C. COPENHAVER, LEGISLATIVE ANALYST
THOMAS EYMAN, LEGISLATIVE ANALYST
SUSAN PINETTE, COMMITTEE CLERK



STATE OF MAINE

HOUSE

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RICHARD A. NASS, ACTON
G. PAUL WATERHOUSE, BRIGTON

ONE HUNDRED AND EIGHTEENTH LEGISLATURE

COMMITTEE ON JUDICIARY

February 25, 1998

TO: Sen. Jill M. Goldthwait, Senate Chair
Rep. David Etnier, House Chair
Joint Standing Committee on Marine Resources

FROM: Sen. Susan W. Longley, Senate Chair
Rep. Richard H. Thompson, House Chair

RE: Amendments to the Act to Implement the Maine Indian Land Claims Settlement

As you are aware, the Judiciary Committee has under consideration a number of tribal bills similar to LD 2145 with regard to the effective date provisions. We have determined that if the effective date of legislation is contingent on ratification by the Passamaquoddy Tribe, the Penobscot Indian Nation or both, that legislation is, in effect, an amendment to the Implementing Act and should therefore amend Title 30. We think there are major problems with provisions that require tribal approval when amending any other provisions of the Maine Revised Statutes.

We would be pleased to discuss our concerns with you in this regard.

Thank you.

G:\OPLALHS\COMMTTEEJUD\CORRESP\EFFECT\DT.DOC

Add in III & IV from
my draft

Revised version of LD 2145: Title 12; no tribal ratification

based on 2/26/98 meeting of the
Marine Resources Committee subcommittee

DRAFT
03/02/98

AN ACT Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe

Emergency Preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies, and

Whereas, it is imperative that this Act take effect before the expiration of the 90-day period because Passamaquoddy tribal members are being prosecuted in the criminal courts of this State for engaging in traditional tribal uses of marine resources; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 M.R.S.A. § 6302-A is enacted to read:

§ 6302-A. Taking of marine organisms by Passamaquoddy tribal members.

1. Tribal exemption; commercial harvesting licenses. A resident member of the Passamaquoddy Tribe is not required to hold a license issued under sections XXXX [harvesting licenses] to conduct activities authorized under those licenses if:

A. those activities are conducted in accordance with state laws and rules applicable to the activities authorized by those state licenses; and

B. that person holds a valid license issued by the tribe.

Exempt as provided in section
12-4-A + 6749-5-5

2. Tribal exemption; sustenance or ceremonial tribal use. Notwithstanding any other provision of law, a resident member of the Passamaquoddy Tribe may at any time take, possess, transport and distribute: *in any form, territorial sea.*

A. for sustenance use, any marine organism other than lobster, if

1. the marine organism was taken in compliance with state laws and rules regarding the method of harvesting, the number of organisms harvested, and the weight, size or length of the marine organism; and

2. the tribal member holds a valid license issued by the tribe;

B. lobsters for sustenance use, if

1. the lobsters were taken in compliance with state laws and rules regarding the method of harvesting, and the weight, size or length of the lobsters; and

2. the tribal member holds a valid license issued by the tribe, and the license holder's traps are tagged for identification and tracking in the same manner as the traps of state licensees under section 6431-B and implementing regulations, provided that no sustenance lobster license is may be issued more than 25 trap tags; and

C. any marine organism for noncommercial use in a tribal ceremony, if

1. the marine organism was taken in compliance with state laws and rules regarding the method of harvesting, the number of organisms harvested, and the weight, size or length of the marine organism, and

2. the member holds a valid special tribal permit issued to the tribal member by the Passamaquoddy Joint Tribal Council or the Governor and Council at either Passamaquoddy Reservation.

For purposes of this section, "sustenance use" means all noncommercial consumption or noncommercial use by any person within the Passamaquoddy reservations at Pleasant Point or Indian Township, or at any location by a tribal member, by a tribal member's immediate family, or within a tribal member's household. The term "sustenance use" does not include the sale of marine organisms.

3. **Notification.** The exemptions in this section are conditional upon the filing of a copy of the tribal license or permit with the commissioner by the tribal licensing agency or official in accordance with section 6027 of this Title.

Sec. 2. 12 M.R.S.A. §6421, sub-§4-A is enacted to read:

4-A. **Passamaquoddy tribal members.** A resident member of the Passamaquoddy Tribe is not required to hold a license issued under this section to fish for, take, possess, ship, or transport lobsters or crabs within the State, or to sell lobsters or crabs taken by the tribal member if:

A. those activities are conducted in accordance with state laws and rules applicable to the activities authorized by state licenses issued under this section; and

B. that tribal member holds a valid license issued by the tribe, a copy of which has been filed with the commissioner in accordance with section 6027 by the tribal licensing agency or official, and the license holder's traps are tagged for identification and tracking in the same manner as the traps of state licensees under section 6431-B and implementing regulations;

provided that the tribe issues no more than a total of ²⁴ ~~XX~~ [add number] commercial licenses for the taking of lobsters or crabs in calendar years 1998, including all licenses equivalent to Class I, Class II or Class III licenses and student licenses, but not including apprentice licenses, and that the tribe's issuance of commercial licenses for the taking of lobsters or crabs after 1998 is subject to the eligibility requirements of subsection 5 of this section.

Sec. 3. 12 M.R.S.A. § 6749-O, sub-§§1 and 2, as amended by PL 1995, c. 595, §3, are further amended to read:

1. **Handfishing and dragging licenses.** Except as provided in subsections 3, and 4, and 5, the commissioner may not issue a handfishing sea urchin license or a sea urchin dragging license for calendar year 1994, 1995, 1996, 1997 or 1998 to any person unless that person possessed that license in the previous calendar year.

2. **Hand-raking and trapping license.** Except as provided in subsections 3 and 4, the commissioner may not issue a sea urchin hand-raking and trapping license for calendar year 1996 to any person unless that person possessed either a handfishing sea

urchin license or a sea urchin dragging license in calendar year 1995. The Except as provided in subsection 5, the commissioner may not issue a sea urchin hand-raking and trapping license for calendar year 1997 or 1998 to any person unless that person possessed a sea urchin hand-raking and trapping license in the previous calendar year. A person who is issued a sea urchin hand-raking and trapping license may not be issued a handfishing sea urchin license or a sea urchin dragging license in the same year.

Sec. 4. 12 M.R.S.A. §6749-O, sub-§5 is enacted to read:

a) cw 414 #
5. **Passamaquoddy tribal members.** A resident member of the Passamaquoddy Tribe is not required to hold a license issued under section 6748 [diving], section 6748-A [dragging], section 6748-B [tender] or section 6748-D [hand-raking and trapping] to take, possess, ship, transport or sell sea urchins if:

A. those activities are conducted in accordance with state laws and rules applicable to the activities authorized by state licenses issued under sections 6748 [diving], 6748-A [dragging], 6748-B [tender] and 6748-D [hand-raking and trapping], including demonstrated competency and safety training in accordance with sections 6531 [diving] and 6533 [tender]; and

B. that tribal member holds a valid license issued by the tribe, a copy of which has been filed with the commissioner in accordance with section 6027 by the tribal licensing agency or official;

provided that the tribe issues no more than a total of ⁵⁰XX [add number] licenses for the taking of sea urchins in any calendar year.

Emergency Clause. In view of the emergency cited in the preamble, this Act takes effect when approved.

SUMMARY

In furtherance of 1997 Resolves, c. 11, section 1 of this amendment exempts Passamaquoddy tribal members from licensing by the State when taking marine resources commercially in compliance with the state laws and regulations that govern those activities when conducted by non-Passamaquoddies. The amendment also exempts tribal fishing for sustenance, or tribal ceremonial use under a special tribal permit. Exemption of tribal fishing for sustenance and ceremonial purposes is dependent upon compliance with state laws and rules regarding the method of harvesting, the number of organisms harvested, and the weight, size or length of the marine organism, and

sustenance lobster fishing is further limited by a trap limit. To be effective for purposes of this Act, copies of tribal licenses and permits must be filed with the Commissioner.

Sections 2, 3 and 4 of the amendment permit the tribe to issue a limited number of initial licenses in the restricted lobster and sea urchin fisheries.

/138432

DRAFT



Maine State Legislature
OFFICE OF POLICY AND LEGAL ANALYSIS

State House Station 13, Augusta, Maine 04333
Telephone (207) 287-1670
Telecopier (207) 287-1275

March 9, 1998

MEMO TO: Members, LD 2145 Subcommittee
FROM: John Kelley, Legislative Analyst
RE: 3:30 meeting today to review amendment

I'm hoping you will have time available today at 3:30 to meet and discuss the bill regarding the harvesting of marine resources by members of the Passamaquoddy Tribe. The legal analyst for the Marine Resources Committee, Jon Clark, reviewed the subcommittee's proposed amendment, as well as the federal and state land claims act laws, and concluded that the amendment would require ratification of both the state and tribe. It would be helpful for the subcommittee to discuss the question of ratification before the full committee again discusses the bill. Hopefully the full committee will have time in its Tuesday schedule to again visit LD 2145.

Thanks.

cc: Sen. Jill Goldthwait, Chair
Rep. David Etnier, Chair

1 pm 3/24 - MRAC - non-attest

LD 2145 WLS. 3/10/28

• Paul Stern - "a blow-up clause; or

2) Sunset provision

blow-up - ADD: If trade tries to ratify it - law
becomes void -

Jill: Ence Records

CIDANCE
WARNERS : Imprudent Total records had option to
move into federal lions provision for years
removed

of union licenses: 24

FAX MEMO

Maine State Legislature
Office of Policy and Legal Analysis
Phone: 207-287-1670 Fax: 207- 287-1275

TO: Greg Sample Fax #: 772-3627 # of pgs w/ cover = 5

FROM: John Kelley

RE: LD 2145 amendment

DATE: March 12, 1998

Greg:

Attached is the amendment to LD 2145 which reflects the Marine Resources Committee's worksession on the bill held Tuesday afternoon. The committee will be reviewing this amendment today (Thursday) during its afternoon worksession. The worksession will start at 1 p.m. LD 2145 is second on the committee's agenda and I anticipate the committee getting to the bill early in the worksession.

The suspension provisions are straight-forward: DMR may (or in the case of mandatory suspensions, shall) suspend licenses issued by the tribe pursuant to the Act. I discussed the suspension mechanics with the attorney in our office assigned to the committee. It is his opinion that although the tribe issues licenses, the tribe, in a legal sense, is acting as a licensing agent of the state because it is through the state that the tribal license is given authority. That being the case, the state may suspend the license.

In addition, our attorney did not think that section 3 of the bill needed any additional language. It is his opinion that any claim that the Act requires ratification or that it is an amendment to the Claims Settlement Act would be finally settled in a court. In addition, any provision requiring the Act to become void if the Passamaquoddy Tribe ratifies the Act raises serious questions regarding improper delegation of legislative authority.

I've also faxed a copy to John Doyle's office.

(S.P. 797) (L.D. 2155)
(C. "A" S-532)

An Act to Implement the Recommendations of the Commission to Study Insurance Fraud

(H.P. 1545) (L.D. 2174)
(C. "A" H-914)

An Act to Create the Maine Economic Opportunity Advisory Committee

(H.P. 1571) (L.D. 2203)
(C. "A" H-924)

An Act to Implement the Recommendations of the Commission to Study the Restructuring of the State's Fiscal Policies to Promote the Development of High-technology Industry in Maine

(H.P. 1585) (L.D. 2216)
(C. "A" H-911)

An Act to Authorize the Director of the Bureau of Parks and Lands to Grant a License for Groundwater Extraction at Range Ponds State Park

(H.P. 1586) (L.D. 2217)
(C. "A" H-903)

An Act to Revise and Update the Charter of the Maine Employers' Mutual Insurance Company in Furtherance of its Mission

(H.P. 1593) (L.D. 2222)
(C. "A" H-905)

An Act to Amend the Law Concerning Tax Base Sharing

(H.P. 1613) (L.D. 2239)
(C. "A" H-902)

An Act to Amend the Charter of Great Northern Paper, Inc.

(S.P. 854) (L.D. 2267)

Reported by the Committee on **Engrossed Bills** as truly and strictly engrossed, **PASSED TO BE ENACTED**, signed by the Speaker and sent to the Senate.

Resolves

Resolve, to Establish the Task Force to Increase Primary and Secondary Forest Product Manufacturing

(H.P. 1478) (L.D. 2077)
(C. "A" H-917)

Resolve, to Allow the Estate of Barbara Maxfield to Sue the State

(S.P. 800) (L.D. 2157)
(S. "A" S-529 to C. "A" S-494)

Resolve, to Repeal a Prior Resolve Authorizing the Exchange of a Parcel of Land Owned by the State with One Owned by Luke Bolduc

(H.P. 1581) (L.D. 2211)
(C. "A" H-909)

Reported by the Committee on **Engrossed Bills** as truly and strictly engrossed, **FINALLY PASSED**, signed by the Speaker and sent to the Senate.

An Act to Clarify the Application of Law in Workers' Compensation Cases

(H.P. 955) (L.D. 1318)
(C. "A" H-907)

Was reported by the Committee on **Engrossed Bills** as truly and strictly engrossed.

On motion of Representative HATCH of Skowhegan, was **SET ASIDE**.

The **SPEAKER**: The Chair recognizes the Representative from Skowhegan, Representative Hatch.

Representative HATCH: Madam Speaker, Men and Women of the House. I am pleased to rise in support of LD 1318. This bill was reported unanimously Ought to Pass out of the Labor Committee. It is intended to reverse the decision of the Maine Supreme Court in the cases of *Ray vs. Tallon Construction* and *Pelletier vs. Maine Medical Center*. In those cases, the court interpreted Maine's Workers' compensation law in such a way as to ignore the provisions of the 1992 Workers' Compensation Act, which prohibited retroactive application of that law in any way which would reduce the benefits of employees who had sustained injuries prior to January 1, 1993. In 1992, the Legislature made very clear to the public and to themselves and to those who have previously been injured that the changes passed in 1992 to be effective January 1, 1993, would not have any adverse implications on the benefits of those injured prior to that day. The reason the decision in *Pelletier* and *Ray* was contrary to the Legislature's direction in that regard, this bill is designed to clarify and reinforce the Workers' Compensation Act so as to make clear that it is not to be applied retroactively in such a way as to reduce benefits. *Pelletier* and *Ray* were cases in which the employees had sustained injury before and after January 1, 1993. The court determined that the benefit law in effect at the time of the last injury would control those two injuries had combined to produce disability. Through this bill, the Legislature will make clear that the benefits available to an employee under a pre-1993 injury continued to be available to the employee. Only if those benefits are not available do the benefits available under the 1993 law take affect. This bill is an attempt to make this very clear to the court and I believe it will achieve that affect. The Legislature made a solemn pledge in 1992 and this bill unanimously reported from the committee fulfills that pledge. Thank you.

Subsequently, the Bill was **PASSED TO BE ENACTED**, signed by the Speaker and sent to the Senate.

An Act to Expand the Maine Seed Capital Tax Credit Program

(S.P. 814) (L.D. 2196)
(C. "A" S-528)

Was reported by the Committee on **Engrossed Bills** as truly and strictly engrossed.

On motion of Representative SAXL of Portland, was **SET ASIDE**.

On further motion of the same Representative, **TABLED** pending **PASSAGE TO BE ENACTED** and later today assigned.

UNFINISHED BUSINESS

The following matters, in the consideration of which the House was engaged at the time of adjournment Friday, March 20, 1998, have preference in the Orders of the Day and continue with such preference until disposed of as provided by House Rule 502.

HOUSE DIVIDED REPORT - Majority (8) **Ought to Pass as Amended by Committee Amendment "A"** (H-983) - Minority (4) **Ought Not to Pass** - Committee on **MARINE RESOURCES** on Bill "An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe" (**EMERGENCY**)

(H.P. 1523) (L.D. 2145)

TABLED - March 20, 1998 (Till Later Today) by Representative **ETNIER** of Harpswell.

PENDING - Motion of same Representative to **ACCEPT** the Minority **OUGHT NOT TO PASS** Report.

The SPEAKER: The Chair recognizes the Representative from the Passamaquoddy Nation, Representative Moore.

Representative MOORE: Madam Speaker, Men and Women of the House. This bill, LD 2145, as has been expressed previously in several committee meetings and subcommittee meetings on the same bill and numerous other meetings with the Maine Indian Tribal State Commission and the task force on tribal state relations, is probably the most important bill that the Passamaquoddy people could have before this Legislature in a long time. I cannot stress enough the importance of this bill to the preservation of Passamaquoddy culture and traditional practices. It would go a long way in demonstrating that we do have a unique culture. We have a way of life. We have our own language. The bill would go a very long way in demonstrating that there is room for Passamaquoddy culture in Maine. I would ask the members to defeat the pending motion. Thank you.

The SPEAKER: The Chair recognizes the Representative from Presque Isle, Representative Donnelly.

Representative DONNELLY: Madam Speaker, Men and Women of the House. Sorry about my enthusiasm that gave you some feedback, but perhaps it gave you attention so I don't have to start off with a joke, which is the traditional way. Defeating this bill is no laughing matter. What we are talking about here today is 100 centuries of tradition. We are talking about compromise between the Passamaquoddy people and the government of the State of Maine. I say compromise in that the legal challenges could go on that there were previously 100 centuries of fishing unregulated in this state. One hundred centuries of heritage and people who preceded even the oldest ancestors of any of us in the chamber of fishing and using the natural resources for sustenance. The Passamaquoddy name, as you see on your fax sheet that I will read from, not just the 100 centuries of heritage, but the Passamaquoddy name refers particularly to the life on the sea. It means people who take pollock. Having been a person of Polish decent, I think I am happy about this. It is important for us to focus on what is really going on here.

The compromise that I mentioned earlier is in that the Passamaquoddy people have agreed to abide by all other laws that the Department of Marine Resources will put forth. In our chamber for us to say that we will obey with the state laws is not a big deal. We pass them and we abide by them. Although I have seen some people drive by me and they don't, but it is important for us to recognize it when the Passamaquoddy people participated in this process that they also conceded things in order to maintain 100 centuries of precedent. There are things in this bill that allow for them to remain the Passamaquoddies, true to their name. There are things in this bill that allow the State of Maine to continue to regulate the resources that are so important to our state. To defeat this bill today would be a shame. To defeat this bill today, I believe, would be a huge mistake. I hope you will follow the lead and the request of Representative Moore and defeat this bill and go on and to promote the harmony that can and should occur on our oceans between people who take pollock and the Department of Marine Resources.

Madam Speaker, when the vote is taken, I request the yeas and nays.

Representative DONNELLY of Presque Isle **REQUESTED** a roll call on the motion to **ACCEPT** the Minority Ought Not to Pass Report.

More than one-fifth of the members present expressed a desire for a roll call which was ordered.

The SPEAKER: The Chair recognizes the Representative from Westbrook, Representative Lemke.

Representative LEMKE: Madam Speaker, Men and Women of the House. A couple of weeks ago we recognized the uniqueness of the fishing community on Monhegan Island. It is

true that there was a way of life there that goes back literally hundreds of years. We saw fit to recognize that uniqueness and to protect them. What we have before us to me is quite similar except we are talking about, as the good Representative Donnelly has mentioned, 10,000 years or 10 millennia. We are just about on the verge of the second millennia since the birth of Christ. Frankly, for eight millennia before that, the Passamaquoddy were conducting fishing in this area. I think we should recognize that history and that tradition and be respectful of that culture in the vote we take today. Thank you.

The SPEAKER: The Chair recognizes the Representative from Pembroke, Representative Goodwin.

Representative GOODWIN: Madam Speaker, Men and Women of the House. LD 2145 now looks nothing like the original bill. I support the Majority Report as Amended. The amended version "A" (H-983) finally, each time the full committee met with the amendments we even had to form a subcommittee within the committee to pull it together. The meetings included the Executive Office staff of legal people, the Attorney General's staff of legal people, the Department of Marine Resources, the Tribal Governor, the Tribal Lieutenant Governor, the Tribal Council and other members. We had several caucuses within the subcommittee to resolve amendments. Compromise was the order of the day. Compromise was accomplished. The amendment does not give authority to the tribe to issue driver's licenses, to license doctors, pharmacists or other state controlled people within our community. It does allow the tribe with a small number of fishermen to issue licenses to fish in salt water. This is to ensure that their Passamaquoddy heritage continues. The department has agreed with the amended bill. The majority of the committee agrees with the amended bill. I ask this House to defeat the Minority Report and accept the Majority Report. I thank the Speaker.

The SPEAKER: The Chair recognizes the Representative from Bremen, Representative Pieh.

Representative PIEH: Madam Speaker, Men and Women of the House. I, too, was on the subcommittee working through this bill. It really is nothing like it was before. In fact, now it is so like the department bill that was offered last April that I am surprised there is any opposition at all to it. I am going to talk about a few of the technical details. There is an issue of whether this bill was part of the Maine Indian Claims Settlement Act of 1980. In that bill there is addressing Inland Fisheries and Wildlife and land issues. Marine Resources are not addressed. The Passamaquoddies felt that in that bill they did not give up their marine rights. The tribes, in fact, felt that. The state felt that they had given it up. That is currently in the courts. That is not something our committee was willing to deal with or even think about dealing with because we didn't feel that was our place. We did feel that if we could reach a compromise, it would allow the Passamaquoddy to fish and that would be a good idea.

What we came up with was very simple. The Passamaquoddy will basically issue the Maine State License under Maine State Law. It will say Passamaquoddy fishing license. They will have sustenance rights and ceremonial use. All of these things were at one point suggested by the Department of Marine Resources from the Executive. What I found in this work towards compromise was one side that moved a lot. The Passamaquoddy Tribe moved a lot. They moved forward. They said, let's try this. Let's try that. The Executive moved backward and I still don't know why. I felt like I was feeling, once again, with the Monhegan/Friendship kind of an issue. I really couldn't understand why the Executive moved backwards. At one point, it became a question. The Attorney General's Office said any law that affects any tribe is, in fact, a settlement act issue. We have many laws that affect tribes that

are on the books that aren't in the settlement acts. Two examples are the Passamaquoddy issue their own fishing licenses and hunting licenses and we said there would be no fee for that. Another is around all the Beano that we have approved. The AG did say it was debatable whether it is a part so we put in the amendment a blowup clause that they said would be effective that if it was ever taken to court and ever found to be part of the settlement act, it would not be valid anymore.

I encourage you to support the Majority Ought to Pass Report and remember that we continually, in this body with my support, do not permit increasing of gambling on the reservation. I think that we need to be supporting their cultural way of life. They are not breaking any Maine State Laws by this with their commercial fishing licenses. I encourage you to join me on a Majority Ought to Pass Report. Thank you.

The SPEAKER: The Chair recognizes the Representative from Machias, Representative Bagley.

Representative BAGLEY: Madam Speaker, Ladies and Gentlemen of the House. I rise to ask you to support the Ought Not to Pass report. I have heard from so many of my fishermen and what they are saying is we do not mind if the Passamaquoddy are able to have licenses, but they should come into the fishery the same way that the lobster fishermen and the urchin fishermen have to come in. Everybody should be playing by the same rules. Thank you.

The SPEAKER: The Chair recognizes the Representative from Harpswell, Representative Etnier.

Representative ETNIER: Madam Speaker, Ladies and Gentlemen of the House. One thing I want to straighten away before we get too far down this path and I forget, the department does not support this Committee Amendment. They were involved in probably all of the discussions, but they certainly do not support this amendment, as was implied earlier. There has been much eloquent discussion for the Passamaquoddy culture. There is a handout on it. It is very important that you understand the Passamaquoddy culture as a Maine citizen yourself. Let me tell you something, what is true about the Passamaquoddy culture today, as you heard, was certainly true in 1980 when tribal leadership and Passamaquoddy tribal membership ratified the Maine Indian Claims Settlement and no where in that settlement is any mention made of unique treatment for the tribe regarding marine resources. Nothing has changed regarding their culture. An agreement was made in 1980 based on that culture in which they did not receive any unique treatment. In fact, specifically, there is language regarding inland fish and wildlife issues that occur on tribal lands, but there is no mention of coastal or open ocean marine harvesting. The tribes in the nation have the status of a municipality and a municipality only. What has been made very clear by the Attorney General's Office of this state is because they are not mentioned anywhere in this act, they fall under Section 6204, the laws of the state to apply to Indian lands. What that says is, briefly, "Except as otherwise provided in this act, all Indians in the nations and tribes and bands of Indians in the state and any other lands or other natural resources owned by them." It goes on with a lot of gobbley gook. The bottom line is it says, "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 land or other natural resources therein."

The position of the Attorney General's Office in the state, if that is an interest to you, as this was discussed, it was covered. There is extensive written documentation on it. I have it on my desk. I have read it. Because it was not brought up in the act and specifically excluded. That does not mean that we cannot amend the act, which is what this bill is attempting to do. I just want to make that real clear that it was not mentioned in the act.

In the act was a very important additional piece of information was the creation of Maine Union Tribal State Commission. This was meant to be the means for addressing all future disputes between the state and the tribe. It has equal representation. Two members from the Penobscot Nation and Two members from the Passamaquoddy Tribe, four members appointed by the Governor. We have four/four and the chair to be voted on jointly. That is where this bill should have gone. It did not go there. Let me make that very clear. It did not go there. We received nothing from MITSC regarding this bill and its enormous magnitude. Why? It was not brought before them. I think that is important to also understand. The legitimate means for addressing these legitimate grievances, concerns of the Passamaquoddy Tribe were not brought before the Joint Indian Tribal State Commission as they should have been.

Passamaquoddy Tribal members have been eligible for all Maine fishing licenses to the same extent of all other Maine people. Let me make that clear. You have heard rumors that they have been excluded from Maine licenses. This is not true at all except in instances where there have been moratoriums placed and other folks were excluded as well. They have not been excluded from getting Maine licenses, in any case. Tribal members, in fact, have off and on purchased a number of these commercial fishing licenses. This bill, I view as an end run around two years worth of negotiations between the state and the Department of Marine Resources and the tribe. This bill is an end run around legitimate means of resolving these issues, which is the only place for this issue to be taken up. I also view this bill as an attempt to influence the outcome in an ongoing court case. Let me make reference to that. The *State of Maine vs. Ally Beal*, 13 members in total includes violation of closed area digging and undersized shellfish violations and various commercial license violations. This is in the courts now. This bill, especially in its original form, LD 2145, had in particular a Whereas clause saying this was an emergency because members are being prosecuted in the criminal courts of this state for engaging in traditional travel uses and marine resources. I view this bill as an attempt to influence a very substantive court case before our courts now.

I would like to, as briefly as humanly possible, go through the amendment. There is a lot of warm and fuzzy talk here, but this is where the rubber hits the road. It is going to take me a minute. I apologize for that, but I greatly appreciate you listening. The definition of sustenance found here and in the IF & W section of the bill bears no resemblance to each other. In the Inland Fish and Wildlife Department and in the act itself the Passamaquoddy Tribe has been given sustenance use for individual sustenance only. Let me read to you what sustenance means under this Committee Amendment. Sustenance use means all non-commercial consumption or non-commercial use by any person within the Passamaquoddy reservation at Pleasant Point or Indian Township or any location within the state by tribal members, immediate family or within a tribal members household. That does not include sale, however. Also, sustenance use or ceremonial use would be exempt from any season that is set for the fishery. Say urchins, at the moment, are limited to a 120 day season in this state. They would be exempted from that 120 day season. Harvesting elvers is a 90 day season for the rest of us in the state. They would be exempted from that as well.

I question how that could ever be enforced by one of our warden service, this definition of sustenance given there is no limit on the amount of quantity or who it is distributed to. It is basically unenforceable. There is another very important issue of the handing out of 24 lobster licenses. Tribal members have been eligible right along and could still get student or non-

commercial licenses for family sustenance lobstering if they wished. This bill would hand out 24 lobster licenses, which at the moment if you want to get a lobster license in the State of Maine, you have to go through a two year apprenticeship program. We are talking later today about freezing lobster licenses totally given the concerns from one end of the state to the other about the effort that is being placed on this fishery now and the over-fishing and gear conflict concerns. We are going to be handing out 24 licenses in what is essentially a closed fishery based on purely anecdotal information and nothing more.

Also, we would be handing out 24 urchin licenses. This is a fishery that is in a critical depleted resource state. It is exactly contrary to what the desires of all the urchin fishermen in the state are, which is to reduce efforts drastically. In fact, they came to us earlier this year with a bill that we will have before you later to request that before we allow anyone new into the urchin fishery, five people must leave. That is pretty harsh medicine for people in this state, but they are willing to do that because they recognize that this is a severely depleted resource and they are going to have to bite the bullet on that. In order for these 24 licenses to be issued in the rest of the state, 100 people would have to exit the fishery, but not so for this Committee Amendment. We just hand out 24 based on purely anecdotal information regarding past efforts which has been disputed by members of the non-tribal members. Again, tribal members have been eligible for this license right along. There is also mention of the reporting to MITSC later on in the bill, which is a pure definition of putting the cart before the horse. You pass something now and a year from now you ask for a report on it to come back to you.

There is also one of my favorite parts of the Committee Amendment as what is known to the Attorney General's Office as the blow-up clause. It is an attempt to get around the fact that this is an amendment to the settlement act. The Attorney General's Office of the state told us it was an amendment to the settlement act. Our OPLA staff told us it was an amendment to the settlement act and yet the Majority Report, this Committee Amendment refuses to acknowledge that. Hence, they put in what is called a blow-up clause, which is going to send us directly to court because of course we are going to contest the fact that this is not an amendment to the act. We are going to end up in court. The next thing you know, this whole thing is going to self-destruct anyhow, but it is one of the most peculiar means of addressing or not addressing the sustenance issue I have ever seen.

I appreciate your patience. I am on my last page. I am fighting this all by myself with limited breath so it is taking longer than humanly possible. I find myself in an awkward place with this bill. My lay person non-legislative self is extremely attune to the wrongs committed to Native Americans and generally would wish to redress at every opportunity, but I, like you, took a solemn oath to uphold the laws of this state and are required to look at a far larger picture when considering our rationale for voting in a particular way. Amending the Indian Claims Settlement is a huge issue. It must only be done with the advice of MITSC. Appearing to reward years of flagrant disregard of Maine fisheries laws and potentially influence an ongoing court case is not really wise public policy. Granting dozens of licenses within fisheries that are reeling from limited entry and in the case of urchins, extremely depleted resources is going to justifiably infuriate non-tribal Maine fishermen who would receive no equal treatment. Likewise granting limitless, completely unenforceable sustenance and ceremonial licenses for all marine resources with no limit on season would make this Legislature the laughing stock of the Maine coast. I urge you to respect the 1980 settlement act. I urge you to respect the Maine Indian Tribal

State Commission. I urge you to respect Maine's Marine Resources and our laws. I urge you to respect both tribal and non-tribal fishermen. I urge that you support the pending motion. Thank you.

The SPEAKER: The Chair recognizes the Representative from Brunswick, Representative Pinkham.

Representative PINKHAM: Madam Speaker, Men and Women of the House. My speech will be a lot less long than the previous speaker. When I get up to speak it is usually because I feel that there is something that really needs to be done. I am not one to get up and waste your time. We worked on this bill for I don't know how many hours, but quite a few, and as Representative Goodwin said, we started out with something like that and now we are down to that. I think this is an issue of fairness. It is a matter of doing the right thing. I think by doing this we restore dignity to the Passamaquoddy Tribe. Thank you very much.

The SPEAKER: The Chair recognizes the Representative from Naples, Representative Thompson.

Representative THOMPSON: Madam Speaker, Men and Women of the House. First I will tell you I rise to support the pending motion on the floor. It is with some difficulty, but what we have to look at here, I believe, is the process in which the bill came forward. The Indian Land Claims Settlement Act set up what is commonly referred to as MITSC, the Maine Indian Tribal State Commission. MITSC, one of their jobs or one of their duties is to review any proposed changes to the act. For many years MITSC was not very successful. There is some evidence that MITSC has reached a point where it is starting to be somewhat effective. I will give you an example. In the Judiciary Committee, we were referred a number of bills pertaining to changes to the settlement act and none of those bills have been voted on or referred to MITSC. We took the step of sending the bills to MITSC and carrying the bills over for the consideration here in the second session. MITSC got together and, in fact, made a couple of unanimous recommendations for changes. One of those changes will be coming forth in a bill from the Judiciary Committee, which happens to be a divided report, but it was a recommendation from MITSC and to me that is the proper process to be used.

The problem that I have with this bill is not only that it has not gone through what I consider the proper process, but that it is clearly an attempt to whatever you want to call it, amend the act, clarify the act or whatever. It is directly related to the act. I feel very strongly that if changes are going to be made on issues pertaining to the act, then they should be made in the way prescribed in the act. That is if it is going to be something passed by this Legislature, then it should be designated as a change to the act and should be subject to ratification by the tribes. This bill ignores this step and my opinion is that this does not eliminate any of the controversy that is out there. It says that the State of Maine will set as policy the issuance of a certain number of licenses. It does not take away from the tribe any of their claims to sovereignty over marine fisheries. The tribe does not have to ratify this bill. Therefore, there is a strong argument that they are not subject to this bill and that if they have inherited sovereignty rights, they can go on pursuing them.

In effect, it is a compromise, which is not a compromise. It is members of this House trying to make a compromise with the tribes, but the tribe is not having to compromise by giving anything away. If this was an amendment to the act and the tribe had to ratify it, then both sides would be bound by it. It will not do away with the pending court case, in my opinion. It will not prevent further court cases and I am supporting the present motion.

The SPEAKER: The Chair recognizes the Representative from Penobscot, Representative Perkins.

Representative PERKINS: Madam Speaker, Colleagues of the House. We just heard from the good Representative that the Passamaquoddy are not giving anything away. I submit that they have been giving something away ever since Pale Face came in the area here. For 10,000 or 15,000 years they have been subsisting and living off the sea. I would like to put a few things into perspective real quickly. The Native Claims Settlement Act and the State of Alaska, the natives out there got the rights to fish on the Copper River with their fish traps. No one else could do it. They got all sorts of rights to the commercial fisheries there compared to what they have here, which is zero. In the State of Washington they were awarded one-half of the allotment of commercial fisheries. One-half of the total allotment of any quota that was set for salmon. The natives got half of it. What we are asking for here or what this would do? Not very much. It asks them to allow to be given their own licenses for one thing, sense of pride, some feeling of autonomy in this sovereign state. We are not giving up sovereignty, of course. They are asking for 24 lobster licenses and 24 urchin licenses. Put that in perspective. There are, I think, 7,000 or 8,000 along the coast. They are asking for 24. They are asking to be able to fish for sustenance reasons and certainly reasons any time of the year, that is a change, but they have to abide by every other state laws for size limit and all that. It just means that they can do it year round like they have been for 10,000 years.

Just a few weeks ago, we had a debate in the committee down there in the Marine Resources Committee. We heard testimony on the bill that was brought in front of us from the people of Monhegan Island. This bill talked in terms of we need to do this for the Monhegan people to preserve their culture and their community? I just wish those same people would think about that in terms of these people. Monheganers, except for about three of the fourteen, they are newcomers there from all over and that is fine. The fishing community was preserved by the act that we passed in here. Now the Passamaquoddies true traditionalists and natives are asking for a little help here. The last thing I want to say is six years ago when the casino bill came, I wasn't in the Legislature, but I was sitting up there as a citizen. I remember the debate on that. I want to just remind people that said you don't want to give them a casino, but I would do anything else to help them. Anything else to help them in economic development. Personally, I would have voted against casino. Was it this session or the last one on high-stakes bingo? I voted against that. I said to myself and others that I would do anything, but I don't think heading in the way of gambling is the way to go. This is the way to go. Help them with natural resource-based subsistence and industry. This is the way to go. I hope you will vote against the pending motion. Thank you.

The SPEAKER: The Chair recognizes the Representative from Brooklin, Representative Volenik.

Representative VOLENIK: Madam Speaker, Men and Women of the House. First, briefly to address the issue of the 1980 Indian Land Claims Settlement Act, anything dealing with tribal state law is a gray area because tribal state and, indeed, tribal US government law is continually evolving. Precisely because our people have supplanted tribal people in many areas including land and resource use. At the time of the 1980 Indian Land Claims Settlement Act the Passamaquoddy understood that salt water fishing would be dealt with at a later date. Under the Settlement Act, Maine has the right to further amend the Settlement Act. I would like to read you one sentence from that act. It says, "The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot

Nation." Maine also has the right to amend state law regarding fishing, including laws affecting the Passamaquoddy. There are two separate legal systems that have been operating in regards to fishing, Maine laws and Passamaquoddy laws. Maine fishermen have been operating under Maine's Marine Resources Laws and the Passamaquoddy have fished under traditional tribal laws.

Recently the Department of Marine Resources have begun to prosecute Passamaquoddy fishermen for fishing without Maine licenses and violating other Maine laws. The Passamaquoddy attempted to negotiate with the tribal state commission, known as MITSC, and with the Department of Marine Resources to have the state recognize their right to sustenance and ceremonial fishing and to recognize their rights to their own commercial fishing license. Negotiations were slow and fruitless. The tribe then came to the Legislature. The Marine Resources Committee formed a sub-committee which worked long and hard and crafted a compromise out of LD 2145. In it, the tribe agreed to abide by Maine's Marine Resource laws in return for the dignity of issuing tribal licenses. In the restricted lobster and urchin fisheries, the tribe agreed to 24 licenses per fishery even though that meant a reduction in the number of tribal urchin harvesters in order to reach agreement. This bill does not increase fishing efforts, it only codifies into law fishing that has gone on for thousands of years outside the laws of the State of Maine. The Passamaquoddy will continue to fish whether or not we pass this law. If we fail to pass it, then conflict will continue. If we pass this law, we will truly have made peace on the waters between our two people and that conflict will cease. If that conflict continues and if we insist on winning by our terms and imposing our laws, we all will lose. Should that happen, what will then become of the Passamaquoddy whose tribal name means, "The people who fish for Pollock." Will we force them to call themselves "The people who work at service jobs" or "The people of the unemployed" or simply "The people who no longer fish?"

I want to be sure that no matter what direction we take our culture, that the Passamaquoddy have the right to take the culture of their own people in the direction that they determine. Please do not destroy their identity. Thank you.

The SPEAKER: The Chair recognizes the Representative from Madawaska, Representative Ahearn.

Representative AHEARNE: Madam Speaker, Ladies and Gentlemen of the House. This bill is not about returning or taking lands or gaming. It is simply the opinion of this Native American that this bill is about preserving a culture, a 10,000 year culture and ensuring the survival of a traditional, and very proud people. I ask you not to accept the Minority Report.

The SPEAKER: The Chair recognizes the Representative from Bremen, Representative Pieh.

Representative PIEH: Madam Speaker, Men and Women of the House. I feel I must respond to a couple of things that were raised. One was around the fact that there are outstanding charges. I would submit to you that if I was today riding down to Portland and drove 70 miles per hour and got a ticket and next week the law was changed to 75, I would still be accountable for having broken the law. I don't think that this affects pending charges. I don't know how it could. The fact that it is not mentioned in the Settlement Act is the whole reason it is up for dispute. The Passamaquoddy tribal members were told that they would deal with Marine Resource issues later. Let's get this done now and in a last late night we were given documentation with a committee report to some committee somewhere that said that they would be giving up their rights to marine resources. The Passamaquoddy tribes did not know that and did not agree to that. That will not be affected. In fact, we will be surprised

when that does get worked out and their sovereignty issue and marine resources is sorted out in the courts. We may find they get a whole lot more than we are doing right now or suggesting doing.

Another point was raised around sustenance and ceremonial use and the fact that it couldn't be sold. The examples of urchins and elvers were used. I ask you when was the last time you had urchin or elver for supper? The other point is that the tribal commission has not dealt with this yet. It seems to me that we have had our feet in molasses on this. I also had mentioned to you that the only reason I supported the Monhegan bill is because it is going before a task force. It did not go through the lobster industry, whether it was a good idea to set a precedent by putting up barbed wire on the ocean. We are doing nothing like that with this. They are going to administer the Maine State license. They are going to be completely having to serve our Maine State laws. It is not like a big huge deal. The other thing is I have not had one fishermen including the many fishermen that were at the work session when we originally worked through this that has come up to me and said this is a bad idea. I encourage you to support the Majority Ought to Pass Report that I hope comes next. Thank you very much.

The SPEAKER: The Chair recognizes the Representative from Winslow, Representative Vigue.

Representative VIGUE: Madam Speaker, Ladies and Gentlemen of the House. Back in the 116th, I was very, very supportive of the casino issue. The reason being this would have provided an economic out for our people, the Passamaquoddy, and for the tribes of the State of Maine. We made all kinds of promises and people voted against them for numerous reasons, which I still do not understand. At that time, promises were made that we would do numerous things to help generate jobs in this area for both the major tribes. Nothing, nothing, nothing has been done. Ladies and gentlemen, this is an economic issue to give us a fair share all over the state of what the good that we do in the southern part of the state. This is to help our people that have not been helped at all in the last four sessions that I have been here. We made all kinds of promises and here we are talking about a minor thing. Allowing these people to do what they have done for so many years and we are holding back and saying we can't do it. A casino is not going to happen. Jobs are not going to happen. Let's allow them at least to feed themselves and to work in the way that they understand and do well at. Ladies and gentlemen, I oppose the pending motion on LD 2145 and I ask you to support our brothers and the two different tribes. Thank you.

The SPEAKER: The Chair recognizes the Representative from Calais, Representative Driscoll.

Representative DRISCOLL: Madam Speaker, Men and Women of the House. In the 116th Legislature as the Representative from Winslow stated to you, they did defeat the casino bill. Of course, that hurt Calais, not only the surrounding area there, but both reservations. I live right between the both of them. I know them well. I know their unemployment is over 40 percent or close to 50 percent. I know their poverty level is very low or very high. This bill is simply trying to give them a chance to get a couple of jobs that they can work on. Two jobs in the Calais area are on the reservation and not like in Portland, two jobs will be nothing. Down there, it means a lot. I hope you take that into consideration when you talk about this on the floor and also when you vote. This is going to help those tribes tremendously and it is also going to help the area. Thank you.

The SPEAKER: The Chair recognizes the Representative from Eliot, Representative Wheeler.

Representative WHEELER: Madam Speaker, Men and Women of the House. Just a couple of quick points, look back in

the history and ask yourself who taught us how to fish. I think you all know the answer. Here we are trying to tell them how to fish. I don't think so. The other thing, we have heard a lot of opinions in here on this debate today, but there is one word that sticks out to me. That is culture. Culture defines the Passamaquoddy. I urge you to defeat the pending motion and go on to pass the Majority Report.

The SPEAKER: The Chair recognizes the Representative from Fryeburg, Representative True.

Representative TRUE: Madam Speaker, Ladies and Gentlemen of the House. I have supported everything that I can remember since I have been in this Legislature to help the Native Americans. I will continue to support them. The last time I spoke in consideration of any bill for these people, I asked how many of you have gone to the library to read the act which has been spoken of many times this morning. If you haven't, you should. All I hear and have heard is all that we gave these people by this act. We gave them money. We took away all the things that we are trying to take away today. I am very pleased that my learned friend from Eliot spoke about history. Every person in these hallowed halls should remember their history and how many other people have had their heritage and all the things that were important to them taken away. I would have to stand here until the good Madam Speaker told me to sit down in order to enumerate. This is important. I feel that the Native Americans even gave a little bit here. It is about time that we show them that we can help them economically. We can help them keep their heritage. I urge all of you to defeat the pending motion as it is in front of us. Thank you.

The SPEAKER: The Chair recognizes the Representative from Harpswell, Representative Etnier.

Representative ETNIER: Madam Speaker, Men and Women of the House. We have heard a lot about jobs up there and how without this bill it would adversely impact jobs on the nation and the tribe perhaps. Nothing could be further from the truth. There is nothing to prevent any member of the Passamaquoddy tribe from holding any Maine marine resources license and going fishing. Yesterday, today or tomorrow those licenses are available to everybody as they have been since this act was passed in 1980. There is no impediment to their culture relative to this. You do have to purchase a Maine State license or maybe give it to them. I am not sure how that works. That doesn't mean they can't go make a living on the water. They have always been able to make a living on the water. There is no impediment to that. Any effort to imply that is extremely misleading. I just wanted to clarify that. This is not an attempt to diversely impact them economically. They can hit the water tomorrow fishing with a license and everyone knows that. Thank you.

The SPEAKER: The Chair recognizes the Representative from Cherryfield, Representative Layton.

Representative LAYTON: Madam Speaker, Men and Women of the House. To just address Representative Etnier's concern, it is true that the Passamaquoddy can get a license. The opposition just wants them to go through the apprenticeship program, which is a two-year apprenticeship program which with legislation coming up later on, be extended. The difficulty I have with that is if I were to go to every high school and college in this state and say that all of you students who want to have a fishing license, you can get one and you can fish 15 traps and you need not go through the apprenticeship program. Student licenses you don't have to go through an apprenticeship program. If you stopped and thought of how many students that would be times 150 traps, what the Passamaquoddy are going to do doesn't even impact.

The other item I would like to bring up is that in the committee, we had a representative from the Attorney General's Office address the committee and basically said to us that we can do anything that we wanted to do in the law as long as we made it specific. In order to meet that charge, we formed a subcommittee to make it as specific as they possibly could and they did. I must tell you that the concern here, in my opinion, is the reopening of the Indian Land Claims Settlement Act. That is a concern, I think, that is brought forth by the Executive. So what? The tribe has asked for these 24 licenses, as you have heard, it is not going to be a major impact on the industry. The Attorney General's Office said that we could do whatever we wanted to in committee to put it into law, just be specific. We have done that. Thank you.

The SPEAKER: The Chair recognizes the Representative from the Penobscot Nation, Representative Loring.

Representative LORING: Madam Speaker, Ladies and Gentlemen of the House. I would be remiss if I didn't stand up as Representative of the Penobscot Nation and say that we are in favor of this bill. The cooperation that it took, the work that it took on Representative Moore's part was a lot and it gave up a lot for this. The Penobscots really were watching this very closely because we are interested to see if cooperation between the tribes and the state can really work. I would urge you to vote against this Ought Not to Pass motion. Thank you.

The SPEAKER: A roll call has been ordered. The pending question before the House is acceptance of the Minority Ought Not to Pass Report. All those in favor will vote yes, those opposed will vote no.

ROLL CALL NO. 479

YEA - Bagley, Belanger IG, Bragdon, Bruno, Bunker, Cameron, Carleton, Chartrand, Clukey, Colwell, Cowger, Davidson, Etner, Fisk, Fuller, Green, Honey, Jabar, Kontos, Madore, Mitchell JE, Nass, Nickerson, O'Neal, Pendleton, Plowman, Powers, Rowe, Saxl JW, Stevens, Thompson, Tripp, Waterhouse, Watson, Wheeler EM.

NAY - Ahearn, Baker, Belanger DJ, Berry DP, Berry RL, Bigl, Bodwell, Bolduc, Bouffard, Brennan, Brooks, Bryant, Buck, Bull, Bumps, Campbell, Chick, Chizmar, Cianchette, Clark, Cross, Desmond, Dexter, Donnelly, Driscoll, Dunlap, Farnsworth, Fisher, Foster, Frechette, Gagne, Gagnon, Gamache, Gerry, Gieringer, Goodwin, Gooley, Hatch, Jones KW, Jones SL, Jones SA, Joy, Joyce, Joyner, Kane, Kasprzak, Kerr, Kneeland, Labrecque, Lane, LaVerdiere, Layton, Lemaire, Lemke, Lemont, Lindahl, Lovett, MacDougall, Mack, Mailhot, Marvin, Mayo, McAlevey, McKee, Meres, Morgan, Murphy, Muse, O'Brien, O'Neil, Ott, Paul, Perkins, Perry, Pieh, Pinkham RG, Pinkham WD, Povich, Quint, Richard, Rines, Samson, Sanborn, Savage, Saxl MV, Shannon, Shiah, Sirois, Skoglund, Snowe-Mello, Spear, Stanley, Stedman, Taylor, Tessier, Tobin, Townsend, Treadwell, True, Underwood, Usher, Vedral, Vigue, Volenik, Wheeler GJ, Winglass, Winn, Winsor, Wright, Madam Speaker.

ABSENT - Barth, Dutremble, McElroy, Peavey, Poulin, Tuttle. Yes, 35; No, 110; Absent, 6; Excused, 0.

35 having voted in the affirmative and 110 voted in the negative, with 6 being absent, the Minority Ought Not to Pass Report was NOT ACCEPTED.

Subsequently, the Majority Ought to Pass as Amended Report was ACCEPTED.

The Bill was READ ONCE. Committee Amendment "A" (H-983) was READ by the Clerk and ADOPTED. The Bill was assigned for SECOND READING later in today's session.

The Chair laid before the House the following item which was TABLED earlier in today's session:

Bill "An Act to Implement the Recommendations Relating to the Review of the Department of Professional and Financial Regulation's Office of the Commissioner, Office of Consumer Credit Regulation and Office of Licensing and Registration under the State Government Evaluation Act"

(H.P. 1565) (L.D. 2198)

(C. "A" H-952)

Which was TABLED by Representative VIGUE of Winslow pending his motion to ADOPT House Amendment "A" (H-982) to Committee Amendment "A" (H-952).

The SPEAKER: The Chair recognizes the Representative from Winslow, Representative Vigue.

Representative VIGUE: Madam Speaker, Ladies and Gentlemen of the House. This was a study done by the Business and Economic Development Committee dealing with the Government Evaluation Act. What it did is recommend numerous changes that should be made in the different departments. The one that was holding up the pending legislation was the plumbers being transferred to the plumbing board. We have resolved this and it will remain where it was. The bill is exactly the way it was shown. Thank you very much.

Subsequently, House Amendment "A" (H-982) to Committee Amendment "A" (H-952) was ADOPTED.

Committee Amendment "A" (H-952) as Amended by House Amendment "A" (H-982) thereto was ADOPTED.

The Bill was PASSED TO BE ENGROSSED as Amended by Committee Amendment "A" (H-952) as Amended by House Amendment "A" (H-982) thereto and sent up for concurrence.

The House recessed until 4:00 p.m.

(After Recess)

The House was called to order by the Speaker.

HOUSE DIVIDED REPORT - Majority (7) Ought to Pass as Amended by Committee Amendment "A" (H-956) - Minority (5) Ought to Pass as Amended by Committee Amendment "B" (H-957) - Committee on UTILITIES AND ENERGY on Resolve, Regarding Legislative Review of Chapter 820: Requirements for Non-Core Utility Activities and Transactions Between Affiliates, a Major Substantive Rule of the Public Utilities Commission (EMERGENCY)

(H.P. 1611) (L.D. 2237)

TABLED - March 20, 1998 (Till Later Today) by Representative JONES of Bar Harbor.

PENDING - Motion of same Representative to ACCEPT the Minority OUGHT TO PASS AS AMENDED BY COMMITTEE AMENDMENT "B" (H-957) Report.

Representative THOMPSON of Naples assumed the Chair. The House was called to order by the Speaker Pro Tem.

Representative JONES of Bar Harbor WITHDREW his motion to ACCEPT the Minority Ought to Pass as Amended Report.

this Team. I think we respectfully decline. Point one, point two, I'd just like to say that we've seen you run on the court and regardless of what party you are out there, we consider you shoo ins for office, if you ever decide to run and land yourselves a seat right here. We encourage participation and would love to have you as our colleagues here, too.

THE PRESIDENT: The Chair recognizes the Senator from Kennebec, Senator Daggett, who requests unanimous consent to address the Senate on the record. The Senator may proceed.

Senator **DAGGETT:** Thank you very much Mr. President and Members of the Senate. I would like to add my congratulations to the Team for the very exciting season. It's somewhat ironic that yesterday, in the mail, I got home and had a little clipping from a mother that I thought was somewhat apropos and I'm going to try and read it. Just a little bit of it to begin with. This is from a magazine that appeared in 1887, and it was an article entitled, "Girls," and I'm just going to read a couple paragraphs. It says here, "Girls are to dwell in quiet homes amongst a few friends, to exercise a noiseless influence, to be submissive and retiring. A girl is to be guarded from over-fatigue, subject to restrictions, seldom trusted away from home, simply because if she is not thus guarded, she will probably develop some disease. Any strain upon a girl's intellect is to be dreaded. And any attempt to bring women into competition with men can scarcely escape failure." Well, I will admit to you that when I was in competition with men in the Legislative Basketball Team that I did not escape failure. But it's possible that perhaps I might have an opportunity to gain some rebounding techniques from this team so that when we play next year I won't be so wounded. There have been remarks about the example, for particularly, girls growing up in Maine, to see the successes of these athletes. But I would suggest to you that the successes are far greater than just athletics. To see women as role models is extremely important, and the sportsmanship, and the wonderful attitude of this Team is just something that our state has to be proud of and I thank you all for that.

THE PRESIDENT: The Chair recognizes the Senator from Penobscot, Senator Cathcart, who requests unanimous consent to address the Senate on the record. The Senator may proceed.

Senator **CATHCART:** Thank you Mr. President. I just want to add my proud congratulations to the Team for the University of Maine. What an exemplary bunch of young women and an exemplary Coach, as well for us all to admire and respect, and praise. It's just so exciting and I feel the same way every time I've watched them play, either in person or on TV. I come away and I have bitten my fingernails. I cannot watch this team play without getting so nervous and so excited for them that I just unconsciously commit that act. I'm even starting to do it today. It's just wonderful to be in their presence and it's a proud University, a great University. Thank you so much, Team, for coming to visit the Senate.

THE PRESIDENT: The Chair recognizes the Senator from Franklin, Senator Benoit, who requests unanimous consent to address the Senate on the record. The Senator may proceed.

Senator **BENOIT:** Thank you Mr. President and may it please the Senate. I sat here, as the festivities have been in progress, thinking about my wife, Judy, and the basketball player that she was in High School, in Limington Academy down in York County. In the days when women could only play half court, she was a Forward and we know what half court means, that you stayed in your half and the guards stayed in their half. I always thought that was kind of a form of discrimination, frankly. The boys had full court and the girls could play half court. I think I'm right, in my thinking of that being some form of discrimination because, look at the success today of Women's Basketball, full court. We have evidence today, here in the Chamber, of that success. And so I'm so pleased to see that advancements have been made since Judy played. I guess I could sit down and rest my case, which I will do. Full court is there. You've done it. You've proven it. Thank you.

The Joint Order, **PASSED**, in concurrence.

Off Record Remarks

Senator **PINGREE** of Knox was granted unanimous consent to address the Senate off the Record.

Off Record Remarks

Senator **AMERO** of Cumberland was granted unanimous consent to address the Senate off the Record.

Off Record Remarks

On motion by Senator **PINGREE** of Knox, **RECESSED** until the sound of the bell.

After Recess

Senate called to order by the President.

ORDERS OF THE DAY

The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

HOUSE REPORTS - from the Committee on **MARINE RESOURCES** on Bill "An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe" (EMERGENCY) H.P. 1523 L.D. 2145

Majority - **Ought to Pass as Amended by Committee Amendment "A" (H-983)** (8 members)

Minority - **Ought Not to Pass** (4 members)

Tabled - March 24, 1998, by Senator **GOLDTHWAIT** of Hancock.

Pending - motion by same Senator to **ACCEPT** the Minority **OUGHT NOT TO PASS** Report in **NON-CONCURRENCE**

(In House, March 23, 1998, the Majority **OUGHT TO PASS AS AMENDED** Report READ and **ACCEPTED** and the Bill **PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A"** (H-983).)

(In Senate, March 24, 1998, Reports **READ**.)

THE PRESIDENT: The Chair recognizes the Senator from Hancock, Senator Goldthwait.

Senator **GOLDTHWAIT:** Thank you Mr. President and ladies and gentlemen of the Senate. I feel that I have about spent my fish energy for the evening but I'll try it again, here. This bill represents a tremendous effort on the part of the Passamaquoddy Tribe and the Marine Resources Committee to reach some agreement regarding the taking of marine resources by that Tribe and the regulation of that taking. I think, in many regards, we were able to go a very long way toward a compromise that was comfortable for many people. I do want to say that I fully believe that the effort was entirely a good faith effort on the part of the Passamaquoddy Tribe. They made every effort to be accommodating to the concerns addressed by the Committee and still maintained their traditional relationship with the sea.

So it is not a happy task that I need to speak against this bill. But it is part of the responsibility and the commitment that I feel, and that I have made, to my culture. It is a culture that is a culture by adoption so maybe it's to some extent not entirely a legitimate one. However, it is one that I have chosen to assume and that I feel very strongly. For that reason I will address my three concerns with this bill, but spend the most time on one particular one having to do with the commercial sale of resources taken by the Tribe.

I have concerns about what this might do to the legal status. I confess that, as a non-attorney, with these complex issues, I don't pretend to fully understand the Indian Settlement Act or the implications of some of the bills that have been before this Legislature in regard to that Act. However, it is on advice given to the Committee that I believe there are significant legal questions raised by this bill regarding whether or not it is an opening of the Settlement Act and just what that means. That is one concern.

The second issue regards the enforceability of this, in terms of the different types of licensing, the different uses to which a seafood product can be put, and how one might distinguish between those two if one happened to be a Marine Patrol Warden at sea.

It is the third concern that causes me to oppose this bill and to support the Minority Ought Not to Pass report. That has to do with the commercial sale of lobster and urchins, and the issuing of 24 commercial licenses in each of these Fisheries. These are both restricted access Fisheries now, so that regardless of the role that fishing played in the life of a Maine family, if you did not have a Lobster License in 1997, you cannot get one. Period. We certainly have a list consisting right now of about 100 people who are trying to get a license and are being told, in this Fishery, now, you must go through the Apprentice Program. That is your only means of access to the Fishery. If you do not have a '97 license, you don't get one even if you're an ally from Beal's Island who fished for 16 years and happened to be living in New Hampshire for the qualifying year. You don't get a license. And now we are going to offer 24 new licenses, in this Fishery, to people who have either not currently been fishing, or if they have, have certainly been fishing in violation of existing Marine Resource laws.

The second Fishery, which is the Sea Urchin Fishery, has likewise had a moratorium on it for five years. We are going to be looking at Legislation, probably before the next sun sets, regarding that Fishery, in which there would be a slight lifting of that moratorium, to say that for every five licenses that go out of that Fishery, one new license may be issued. But that is still a pretty limited access. And again, they would be a commercial fisherman, and would be a commercial fisherman, particularly in the Down East area, who are being told that they cannot get into that Fishery. And yet, they will see 24 new boats going out to fish, commercially, for that species. With all due deference to the Passamaquoddy culture, I do not believe that it included the sale of Sea Urchins to the Japanese. My sense is that the commercial fishermen on the coast of Maine have come a tremendously long way toward working with the regulations that have been coming at them in every direction. Many of the Fisheries that used to be available to fishermen on this coast are now closed. There are all kinds of license restrictions. There are all kinds of use it or lose it restrictions. It will be a difficult thing for those fishing families to stand by knowing that they have no access to these Fisheries and see us issuing 48 commercial licenses to people who will be in competition for the commercial sale of those resources.

It is because of the commitment that I made three years ago, to the commercial fishermen of Maine coast-wide, that I am not able to support a bill that contains in it a provision for handing off 48 commercial licenses in restricted Fisheries. I would hope that you will support the Minority Ought Not to Pass report. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from York, Senator MacKinnon.

Senator **MACKINNON:** Thank you Mr. President and women and men of the Senate. I rise today to ask you to please defeat this motion and go on to Accept the Majority report. I realize this is a tough issue for all of us here. It's an issue of which our Committee had to have a sub-Committee to try to craft a piece of Legislation. What we have tried to do on this report is to put in Statute, so it does not go back to violate the Settlement Act, to take into consideration a group of people who have not had licenses in the state of Maine. Therefore they would not be able to qualify for licenses in the state of Maine. It allows these people to go with their life and their culture and allows them to be a proud Nation. I think what we are doing at this particular time is legislating spot legislation of things which really we do not understand, as far as denial. We realize that these people have been able to take things from the sea. Right now there's a tremendous conflict going on where we have people being sited for violations of lobster and sea urchin licenses in the state of Maine because they would like to issue their own. The compromise that came out of this bill, I think you'll look at, is that the Tribe, the Nation itself, will have the right to issue licenses subject to all the Conservation Rules of the State of Maine and the Marine Resources. Now that allows a deal to be made. This same proposal was given a year ago by Commissioner Alden. We are now accepting that but we also put a clause in, which as a lay person, I do not know if it's legal or not. But I certainly would like to make sure that this goes through and has a chance. If it's going to be vetoed then we'll get it back and we'll find out.

This is what we call a blow up clause. If either side tries to go back and ratify this Agreement, it will become null and void, thereby not going back into the Settlement Act. So I would hope that you would please give this consideration, defeat this and go on and support the Majority report. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Franklin, Senator Benoit.

Senator **BENOIT:** Thank you Mr. President. May I pose a question through the Chair, please?

THE PRESIDENT: The Senator may pose his question.

Senator **BENOIT:** Thank you Mr. President. There's a sentence in section 3 that states if the Court of competent jurisdiction determines that this bill amounts to an Amendment of the Compact, that it's void. It's possible then for a Member of the Tribe to expend large sums of money for fishing equipment or gear, or whatever, to come within the preview of the bill. I'd like to know if there's any thought been given, or any money provided for damages to a person, who in good faith in the Tribe, acts under the bill and subsequently is determined to be void, whether there's any money to pay that person?

THE PRESIDENT: The Senator from Franklin, Senator Benoit, poses a question through the Chair to anyone who may wish to answer. The Chair recognizes the Senator from Lincoln, Senator Kilkelly.

Senator **KILKELLY:** Thank you Mr. President and men and women of the Senate. A few weeks ago we dealt with another Marine Resources issue that focused on community, culture, and heritage. We looked at the situation that was presented to us as how a community can survive in this day and age, how a community becomes a community, and how a community can continue. We looked at the heritage of Monhegan and the issues of lobstering around Monhegan and the fact that for 100 years, the people around Monhegan had worked to create a sustainable fishery. They had, as part of their culture, developed different ways of doing things and integrated that into their way of being, and had strengthened their community by that process.

What I believe we're looking at today are those same issues of community, culture, and heritage. Those issues are, in fact, many more than 100 years old. We're looking at a culture and heritage that's thousands of years old. It's a culture and heritage that's built on the sea, from the sea, and around the sea, and strengthens the community and strengthens the people. I feel very strongly that anything that strengthens community and strengthens people, in fact, strengthens Maine, and that's a positive thing for us to be doing. We're talking about a compromise that's been reached in which both sides have given up something and both sides have made some agreements in order to provide opportunities for people to reach back into their heritage and express themselves by using the resources of the sea.

There have been some concerns raised about the fact that these, in some cases, are limited entry Fisheries, and we need to be concerned about the resource. That's a very legitimate concern. I think one of the really positive aspects of this bill is that the fact that we have gone through this process means that the Legislature can, in fact, address this issue in the future. If we see that the resource has been depleted to the point that we need to move in and make changes, this is coming from this arena and then can be amended or addressed in this arena. I think that's really important and that's a very significant safety provision in terms of the resource. But I think as we again move forward into looking at the issues of rural Maine and the issues of how we maintain our state and its diversity. I think it's important for us to be respectful of our native people and to provide them with this very reasonable opportunity for sustenance and also for opportunities for limited Commercial Fishery. I think that's it's important that we defeat the pending motion and go on to Accept the Majority Ought to Pass report. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Franklin, Senator Benoit.

Senator **BENOIT:** Thank you Mr. President. May I pose a question through the Chair, for anyone who might be able to answer?

THE PRESIDENT: The Senator may pose his question.

Senator **BENOIT:** Thank you. Given the language in section 3, aptly referred to as a blow up section, that if a Court of competent jurisdiction should find that this is an Amendment of the Compact, that it would be void. Is it not possible then, at this time that we're in the process of enacting a void law?

THE PRESIDENT: The Senator from Franklin, Senator Benoit, poses a question through the Chair to anyone who may wish to answer. The Chair recognizes the Senator from Kennebec, Senator Treat.

Senator **TREAT:** Thank you Mr. President and men and women of the Senate. In response to the question, it is not terribly uncommon to have provisions in laws that say that if any section of this is found to be void that the rest of the law is maintained, and to think ahead, when there are questions about Constitutionality. I guess I would view this in a similar vein, that this is looking ahead to potential challenges or concerns that may relate to, sort of, another form of Constitution, which is the Maine Indian Land Claim Settlement Act. So I think that provision is somewhat consistent with severability clauses that we have in other provisions of our laws.

THE PRESIDENT: The Chair recognizes the Senator from Washington, Senator Cassidy.

Senator **CASSIDY:** Thank you Mr. President and men and women of the Senate. I rise this evening to shed a little light on this particular bill. As you know, I am fortunate enough to have two of the Reservations, where the Tribe of Passamaquoddy live, within my district. I have visited them many times and know many of the folks there. I also know of the heritage that was mentioned by the good Senator from Lincoln, Senator Kilkelly, and the culture of our native people. It's ironic when we think about the hundreds and hundreds of years that they occupied that land, and we say here, for some reason, that because somebody didn't hold a license two years ago that they couldn't qualify to fish, which has been part of their heritage over the years. I think it's been said that obviously folks have been fishing there on the salt water for years and years, and years. What we tried to do here, and I think it was mentioned by the good Senator from York, Senator MacKinnon, the Department wanted to try to

resolve this situation that we've been running into. If you've been reading the papers, there's been a conflict about how to do this. This, to me, sounded like a compromise that we're going to limit to 24 licenses to each of the Fisheries. It would be controlled by the Tribe. They would have the right to deny or to grant the licenses. The concern that we heard earlier this evening was the discussion of if the Fishery declined, if you'd notice, they're subject to Maine laws. If we decide that we need to go to a 300 trap limit then I assume, because they're under the same Maine law, that they would go to 300 traps as well. I still hate to mention this again but I'm going to. You remember just a couple of years ago when we put this 1,200 trap limit on because of decline in the Fishery, anyone that I talked to realizes that we've probably got many, many more traps in the water now because we put the 1,200 trap limit on. We had people with 300 or 400 decide to jump on an increase their volume. I don't think all the decisions we make here, sometimes, prove to be right. I know that we have enough knowledge and experience that we can go back and amend things, and we do. We try to make things as right as possible in all our Fisheries and Industries, and do the best we can for the people of Maine. I think that we owe it to the Tribe to do the best we can for them. The folks that want to have part of the bill to sustain their families and the other part of the bill is to create some income down in our County, which happens to have, in the entire County, over 12% unemployment rate. We have sections in our County that have 14% unemployment rate. I think this is an opportunity to let these folks do something they have done for years and years, and years. I'm really proud to be able to stand up and ask you to defeat this motion so we can go on and accept the bill as presented. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Franklin, Senator Benoit.

Senator **BENOIT:** Thank you Mr. President and may it please the Senate. Senator Treat from Kennebec has made a statement that we're all familiar with as to Legislation and how it can be determined later on to be invalid or canceled, or whatever. But that begs the question. Here, there's a sentence in the bill that indicates it's possible that if a Court of competent jurisdiction got this matter and determined that it was an end run play around the Compact, that it was really an Amendment of the Compact, that very decision would render this law void. That's novel type Legislation, to me. I think it's unfortunate that we have this end run of the Compact situation taking place and this kind of tongue and cheek section 3 in there saying that this might be, some time down the road, declared void because it should have been something taken through the Compact. I'm disappointed when I read a handout in support of this L.D. that says, the reason they didn't go to the Compact was because that's a cumbersome process. In other words, it takes time to go to the Compact and bring a matter into it, and have it properly passed through the Compact, as was intended when the Compact was made between the Indian Tribe and Nation and the State. Pretty self-serving, it seems, to say well, the reason this is general law is because the Compact is a cumbersome process. It's a cumbersome process for a very good reason. You do not change the laws relating to the Tribe and the Nation lightly, such as is intended here, by this end run play in the general law. I'm disappointed that there's no written formal Opinion of the Attorney General that I've had an opportunity to read, that indicates that this is a valid way to go about this business. He is our lawyer and I don't know why, in such an important matter as this, where he was our Attorney throughout the entire process, which resulted in the Compact, why, here, we would cut and run from getting an opinion from his office that would be helpful. I certainly would vote for this type of Legislation if I felt that it was valid. But it doesn't strike me as something, if you're going to make an end run of the Compact to get this into the general, and you don't want to go through the procedure established in the Compact because it's cumbersome. It seems to me that's a very unfortunate way to do business. To me, it's a bad precedent and for that reason, I can't support the bill. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Penobscot, Senator Cathcart.

Senator **CATHCART:** Thank you Mr. President and men and women of the Senate. I rise briefly just to say a few words on behalf of the Passamaquoddy people and ask you to vote against the motion so that we can go on to pass the Majority report on this bill. First, the issue of conservation and allowing these licenses for the Passamaquoddy Tribe. These are people who have been fishing there for thousands of years. We are not creating some

new special rights for the Tribe but simply allowing a smaller number of them to continue what they have always been doing.

Secondly, let me just remind us all that the Passamaquoddy people have proven themselves for thousands of years to be far better stewards of the earth and the sea than the rest of us have been. I believe we can trust them to remain so. Thank you Mr. President.

THE PRESIDENT: The Chair recognizes the Senator from Androscoggin, Senator Jenkins.

Senator **JENKINS:** Thank you Mr. President. I'd like to pose a question through the Chair.

THE PRESIDENT: The Senator may pose his question.

Senator **JENKINS:** Thank you. Out of curiosity, does anyone have a sense of, in granting these 48 licenses, 24 for sea urchins and 24 for lobstering, for the Passamaquoddy people proportionately to the population of those who fish, how does that match up with the non-Indian population that fish in the same area of those who hold licenses to the non-Indian population that hold licenses to fish? Do you know what the percentage between the two are?

THE PRESIDENT: The Senator from Androscoggin, Senator Jenkins, poses a question through the Chair to anyone who may wish to answer. The Chair recognizes the Senator from Hancock, Senator Goldthwait.

Senator **GOLDTHWAIT:** Thank you Mr. President and men and women of the Senate. I will try to address the question of the good Senator, simply to say, as a percentage I cannot tell you however I'm beginning to sense that there is some understanding that there is some breakdown in allotment of licenses. Passamaquoddy Tribal Members are perfectly able to get State Fishing Licenses on the same basis as anyone else in Maine. So the relevance of the percentage of people who fish down there at a population versus this number of licensed, the Passamaquoddy's currently can obtain an unlimited number of licenses within the existing constraints on the Fishery. There is

no existing cap on licenses nor will there be if this bill passes. It starts out a basic 24 and then says that additional fishermen may enter that Fishery by going through the Apprenticeship Program or whatever the existing rules for entry into that Fishery are.

THE PRESIDENT: The Chair recognizes the Senator from Knox, Senator Pingree.

Senator **PINGREE:** Thank you Mr. President and men and women of the Senate. Just to give my own answer to the last question. I will admit that most of the facts I know about this issue I have learned in the last day or two. But it's my understanding that previously the Passamaquoddy Tribe granted themselves 117 harvesting licenses, and what changes in this bill is that they will reduce that number to only 48, 24 lobster licenses and 24 urchin licenses. So, given my previous understanding of this, they have already had significant impact on the Fisheries. They have already been participants in the local Fisheries and they will be, in fact, reducing the numbers and no longer granting themselves licenses. I just want to comment further about a notion that came to me as we were talking about it and other Members of the caucus had mentioned, is that, I think, there are some similarities in the decisions that we made regarding the Island of Monhegan earlier in this session. I think that we are examining what a group of individuals has been doing with their own area resources for a very long time and, in fact, codifying that into law. But we're asking this Tribe to make some sacrifices, to make some changes, to no longer fish with practices that they've used previously, to now comply with State laws. And we're saying, if everyone agrees to this, we will make it law and we will respect something that's been going on in that culture for a very long time, just as we did, in a way, on the Island of Monhegan. For that reason I will be opposing this motion and supporting the bill.

THE PRESIDENT: The pending question before the Senate is the motion of the Senator from Hancock, Senator Goldthwait, to Accept the Minority Ought Not to Pass Committee Report. The Chair recognizes the Senator from Hancock, Senator Goldthwait.

Senator **GOLDTHWAIT:** Thank you Mr. President and ladies and gentlemen of the Senate. I would just like to address a few of the points raised in other pieces of testimony. One being that this is a reduction in effort on the part of the Passamaquoddy Tribal Members for the commercial Fisheries. I would submit that the only information we have on that effort is anecdotal and therefore varies quite widely from a high estimate of 117 people fishing to a low estimate based on people that I've spoken to Down East, who say there are not more than 6 boats that have been fishing in those two Fisheries combined. So, because those fishermen, whoever have been fishing, have been fishing without State licenses. We don't know what the effort has been but indications that I have suggests that it is quite a bit lower than the 48 licenses that you see on this bill.

The other thing, I have been trying to avoid talking about sea urchin reproduction but you have forced me to it. So instead of, ladies and gentlemen, maybe I should say, boys and girls, it's getting very close to the good Senator from Oxford's bedtime, so this will make a nice bedtime story. Let me tell you a little bit about Mom and Dad Sea Urchins and how they make Baby Sea Urchins, and why this Fishery is a critical point in its history on the coast of Maine. Urchins have a rather interesting ability to be able to reproduce when they are a yard apart, which may sometimes be to the envy in the human population. But it is through a matter of releasing the necessary ingredients into the water, and if they are not within about a meter of each other that effort is not successful. I believe that any diver who has been working that Fishery in the last 10 years on the coast of Maine will tell you that the level of depletion of this animal is astonishing. It is not simply a matter of whether there are any animals around, it is a matter of whether they have been thinned to the point that they are no longer within that critical meter of each other and therefore unable to reproduce. A variety of factors, which I will not bore you with tonight, go into how thinly or thickly settled urchin populations are. But as I say, if you speak to almost anyone who is participating in that commercial dive Fishery they will tell you that the bottom looks pretty terrible. We've got lots of video tape, and I'd be glad to share that with you during a break in the action in the next 10 days, regarding the condition of this resource on the bottom. So it is not that I think that the Passamaquoddy are not good stewards of any resource and, in fact, would probably be inclined to agree with the statement made earlier that we may have quite a bit to learn from them. It is a matter of increased effort at all. The reason that we have restricted access, particularly to the Urchin Fishery, I will admit there is some argument about the state of the lobster resource, but

particularly to the Urchin Fishery, there is little if any disagreement about the state of that resource. And to allow a sudden influx of what will be significant effort on a threatened resource, that is now our second highest value in the state of Maine, our second greatest cash crop from the ocean, is a step that should not be taken lightly. It should not be taken based on a sense of who might have been historically wronged or not, or anything else. It should be taken based on whether this resource can sustain that level of commercial effort. I believe that it cannot. The Department of Marine Resources believes that it cannot. And that is why we have restricted access to that commercial Fishery. I would also like to point out that on the third page of this Committee Amendment, in the 13th line, it exempts the sea urchin Fishery from season limitations, so that the rest of the fishermen on the coast observe a season, which varies depending on where on the coast you live. The Passamaquoddy fishermen will not be required to observe the limitations of that season. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Washington, Senator Cassidy.

Senator **CASSIDY:** Thank you Mr. President. I would like permission to pose a question through the Chair.

THE PRESIDENT: The Senator may pose his question.

Senator **CASSIDY:** Thank you Mr. President. I was wondering if anyone could tell me exactly how many urchin licenses we have in the state of Maine including divers?

THE PRESIDENT: The Senator from Washington, Senator Cassidy, poses a question through the Chair to anyone who may wish to answer. The Chair recognizes the Senator from Hancock, Senator Goldthwait.

Senator **GOLDTHWAIT:** Thank you Mr. President. I am hoping that someone else on the Committee might be able to back me up. I'm wanting to say something in the neighborhood of 1,000, but I'm feeling very uncertain about that figure.

THE PRESIDENT: The Chair recognizes the Senator from Washington, Senator Cassidy.

Senator **CASSIDY:** Thank you Mr. President and men and women of the Senate. I think if that's so, and I assumed that it was when I asked the question but I didn't dare to take a guess, if your math is correct I think we're looking at less than .02% of an increase in the Fisheries. As we also heard earlier this evening that we are going to allow 1 for every 5 licenses that expire, or people who give up the Fishery, will let one in. I don't think that 24 licenses is going to have such an impact on this Fishery that we're going to see a significant difference over the next 50 years.

THE PRESIDENT: The pending question before the Senate is the motion of the Senator from Hancock, Senator Goldthwait, to Accept the Minority Ought Not to Pass Committee Report.

The Chair ordered a Division.

THE PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Rand.

Senator **RAND:** Thank you Mr. President, I request a Roll Call.

THE PRESIDENT: The Senator from Cumberland, Senator Rand, requested a Roll Call. In order for the Chair to order a Roll Call, it must have the expressed desire of one-fifth of the members present. All those in favor of a Roll Call please rise in your place and remain standing until counted. Obviously more than one-fifth of the members present are in favor of a Roll Call. A Roll Call is in order.

On motion by Senator **RAND** of Cumberland, supported by a Division of at least one-fifth of the members present and voting, a Roll Call was ordered.

The Doorkeepers secured the Chamber.

The Secretary called the Roll with the following result:

ROLL CALL

YEAS: Senators: ABROMSON, AMERO, BENOIT, GOLDTHWAIT, HARRIMAN, MICHAUD, MILLS, MITCHELL, PENDLETON, SMALL

NAYS: Senators: BENNETT, BUTLAND, CAREY, CASSIDY, CATHCART, CLEVELAND, DAGGETT, FERGUSON, HALL, JENKINS, KIEFFER, KILKELLY, LAFOUNTAIN, LIBBY, LONGLEY, MACKINNON, MURRAY, NUTTING, O'GARA, PARADIS, PINGREE, RAND, RUHLIN, TREAT, THE PRESIDENT - MARK W. LAWRENCE

10 Senators having voted in the affirmative and 25 Senators having voted in the negative, the motion by Senator **GOLDTHWAIT** of Hancock to **ACCEPT** the Minority **OUGHT NOT TO PASS** Report in **NON-CONCURRENCE**, **FAILED**.

The Majority **OUGHT TO PASS AS AMENDED BY COMMITTEE AMENDMENT "A"** (H-983) Report **ACCEPTED**, in concurrence.

READ ONCE.

Committee Amendment "A" (H-983) **READ.**

On motion by Senator **RUHLIN** of Penobscot, **TABLED** until Later in Today's Session, pending **ADOPTION OF COMMITTEE AMENDMENT "A"** (H-983), in concurrence.

The Chair laid before the Senate the following Tabled and Specially Assigned matter:

SENATE REPORTS - from the Committee on **BUSINESS AND ECONOMIC DEVELOPMENT** on Bill "An Act to Prohibit Discrimination against Osteopathic Physicians and Provide Patient Choice" S.P. 772 L.D. 2099

Majority - **Ought Not to Pass** (12 members)

Minority - **Ought to Pass** (1 member)

Tabled - March 23, 1998, by Senator **RAND** of Cumberland.

Pending - **ACCEPTANCE OF EITHER REPORT**

(In Senate, March 23, 1998, Reports **READ**.)

On motion by Senator **RAND** of Cumberland, **TABLED** 1 Legislative Day, pending **ACCEPTANCE OF EITHER REPORT**.

The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

HOUSE REPORTS - from the Committee on **UTILITIES AND ENERGY** on Bill "An Act to Require All Regulated Public Utilities to Report to the Public Utilities Commission the Sale, Lease or Other Transfer of Assets Paid for by Ratepayers" H.P. 1477 L.D. 2076

Majority - **Ought to Pass as Amended by Committee Amendment "A"** (H-906) (7 members)

Minority - **Ought Not to Pass** (6 members)

Tabled - March 24, 1998, by Senator **CAREY** of Kennebec.

Pending - motion by same Senator to **ACCEPT** the Majority **OUGHT TO PASS AS AMENDED** Report, in concurrence

(In House, March 23, 1998, the Majority **OUGHT TO PASS AS AMENDED** Report **READ** and **ACCEPTED** and the Bill **PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A"** (H-906).)

(In Senate, March 24, 1998, Reports **READ**.)

Comes from the House, **PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A" (H-1001) AS AMENDED BY HOUSE AMENDMENT "A" (H-1075)** thereto, in **NON-CONCURRENCE**.

The Senate **RECEDED** and **CONCURRED**.

Out of order and under suspension of the Rules, the Senate considered the following:

SECOND READERS

The Committee on Bills in the Second Reading reported the following:

House As Amended

Bill "An Act to Implement the Recommendations of the Governor's Commission on School Facilities"
H.P. 1622 L.D. 2252
(C "A" H-1088)

READ A SECOND TIME and **PASSED TO BE ENGROSSED AS AMENDED**, in concurrence.

Senate As Amended

Bill "An Act to Correct Errors and Inconsistencies in the Laws of Maine" (EMERGENCY)
S.P. 803 L.D. 2173
(C "A" S-622)

READ A SECOND TIME and **PASSED TO BE ENGROSSED AS AMENDED**.

Sent down for concurrence.

Out of order and under suspension of the Rules, the Senate considered the following:

ENACTORS

The Committee on Engrossed Bills reported as truly and strictly engrossed the following:

Emergency Measure

An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe
H.P. 1523 L.D. 2145
(S "A" S-599 to C "A" H-983)

On motion by Senator **GOLDTHWAIT** of Hancock, supported by a Division of at least one-fifth of the members present and voting, a Roll Call was ordered.

THE PRESIDENT PRO TEM: The pending question before the Senate is Passage to be Enacted.

The Doorkeepers secured the Chamber.

The Secretary called the Roll with the following result

ROLL CALL

YEAS: Senators: BENNETT, BUTLAND, CASSIDY, CATHCART, CLEVELAND, DAGGETT, FERGUSON, HALL, KIEFFER, LAFOUNTAIN, LIBBY, LONGLEY, MACKINNON, MURRAY, NUTTING, O'GARA, PARADIS, RAND, RUHLIN, TREAT, THE PRESIDENT PRO TEM - CHELLIE PINGREE

NAYS: Senators: ABROMSON, AMERO, BENOIT, CAREY, GOLDTHWAIT, HARRIMAN, MICHAUD, MILLS, MITCHELL, PENDLETON, SMALL

ABSENT: Senators: JENKINS, KILKELLY, LAWRENCE

This being an Emergency Measure and having received the affirmative vote of 21 Members of the Senate, with 11 Senators having voted in the negative, with 3 Senators being absent, and 21 being less than two-thirds of the entire elected Membership of the Senate, **FAILED ENACTMENT**.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Kennebec, Senator Carey.

Senator **CAREY:** Thank you Madam President. Having voted on the prevailing side, I would ask for Reconsideration and ask that it be Tabled until Later.

Senator **CAREY** of Kennebec moved the Senate **RECONSIDER** whereby the Bill **FAILED ENACTMENT**.

On further motion by same Senator, **TABLED** until Later in Today's Session, pending motion by same Senator to **RECONSIDER** whereby the Bill **FAILED ENACTMENT**.

On motion by President Pro Tem **PINGREE** of Knox, **RECESSED** until the sound of the bell.

After Recess

Senate called to order by the President Pro Tem.

Under suspension of the Rules, all matters thus acted upon, with exception of those matters being held, were ordered sent down forthwith for concurrence.

ORDERS OF THE DAY

ROLL CALL

YEAS: Senators: CAREY, CASSIDY, CATHCART, CLEVELAND, DAGGETT, JENKINS, KILKELLY, LAFOUNTAIN, LAWRENCE, LONGLEY, MACKINNON, MICHAUD, MURRAY, NUTTING, O'GARA, PARADIS, PENDLETON, RAND, RUHLIN, TREAT, THE PRESIDENT PRO TEM - CHELLIE PINGREE

NAYS: Senators: ABROMSON, AMERO, BENNETT, BENOIT, BUTLAND, FERGUSON, GOLDTHWAIT, HALL, HARRIMAN, KIEFFER, LIBBY, MILLS, MITCHELL, SMALL

21 Senators having voted in the affirmative and 14 Senators having voted in the negative, the motion by Senator TREAT of Kennebec to **ACCEPT** the Majority **OUGHT NOT TO PASS** Report, **PREVAILED**.

Sent down for concurrence.

Under suspension of the Rules, all matters thus acted upon, with exception of those matters being held, were ordered sent down forthwith for concurrence.

Senator **AMERO** of Cumberland was granted unanimous consent to address the Senate off the Record.

Off Record Remarks

Senator **RAND** of Cumberland was granted unanimous consent to address the Senate off the Record.

Off Record Remarks

On motion by Senator **RAND** of Cumberland, **RECESSED** until the sound of the bell.

After Recess

Senate called to order by the President.

ORDERS OF THE DAY

The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

Emergency

An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe
H.P. 1523 L.D. 2145
(S "A" S-599 to C "A" H-983)

Tabled - March 27, 1998, by Senator **CAREY** of Kennebec.

Pending - motion by same Senator to **RECONSIDER** motion by same Senator to **RECONSIDER** whereby the Bill **FAILED ENACTMENT**

FAILED ENACTMENT

(In House, March 26, 1998, **PASSED TO BE ENACTED**.)

(In Senate, March 27, 1998, **FAILED ENACTMENT** in **NON-CONCURRENCE**.) **FAILED ENACTMENT** in **NON-CONCURRENCE**.)

THE PRESIDENT: The Chair recognizes the Senator from Knox, Senator Pingree.

Senator **PINGREE:** Thank you Mr. President. I request the yeas and the nays.

On motion by Senator **PINGREE** of Knox, supported by a Division of at least one-fifth of the members present and voting, a Roll Call was ordered.

The same Senator further requested and received leave of the Senate to withdraw her motion for a Roll Call.

On motion by Senator **CAREY** of Kennebec, the Senate **RECONSIDERED** whereby the Bill **FAILED ENACTMENT** in **NON-CONCURRENCE**.

The same Senator further requested and received leave of the Senate to withdraw her motion for a Roll Call.

On motion by Senator **CAREY** of Kennebec, the Senate **RECONSIDERED** whereby the Bill **FAILED ENACTMENT** in **NON-CONCURRENCE**.

On motion by Senator **PINGREE** of Knox, supported by a Division of at least one-fifth of the members present and voting, a Roll Call was ordered.

THE PRESIDENT: The pending question before the Senate is Passage to be Enacted.

The Doorkeepers secured the Chamber.

The Secretary called the Roll with the following result

ROLL CALL

YEAS: Senators: BENNETT, BUTLAND, CAREY, CASSIDY, CATHCART, CLEVELAND, DAGGETT, FERGUSON, HALL, JENKINS, KIEFFER, KILKELLY, LAFOUNTAIN, LIBBY, LONGLEY, MACKINNON, MITCHELL, MURRAY, NUTTING, O'GARA, PARADIS, PINGREE, RAND, RUHLIN, TREAT, THE PRESIDENT - MARK W. LAWRENCE

NAYS: Senators: ABROMSON, AMERO, BENOIT, GOLDTHWAIT, HARRIMAN, MICHAUD, MILLS, PENDLETON, SMALL

This being an Emergency Measure and having received the affirmative vote of 26 Members of the Senate, with 9 Senators having voted in the negative, and 26 being more than two-thirds of the entire elected Membership of the Senate, was **PASSED TO BE ENACTED** and having been signed by the President, was presented by the Secretary to the Governor for his approval.

The Chair laid before the Senate the following Tabled and Later (3/10/98) Assigned matter:

SENATE REPORTS - from the Committee on APPROPRIATIONS AND FINANCIAL AFFAIRS on Bill "An Act to Change the State's Fiscal Year from July 1st to October 1st" S.P.627 L.D. 1829

Majority - Ought Not to Pass (9 members)

Minority - Ought to Pass as Amended by Committee Amendment "A" (S-492) (3 members)

Tabled - March 10, 1998, by Senator MICHAUD of Penobscot.

Pending - motion by same Senator to **ACCEPT** the Majority **OUGHT NOT TO PASS** Report

(In Senate, March 10, 1998, Reports **READ**.)

THE PRESIDENT: The Chair recognizes the Senator from Androscoggin, Senator Cleveland.

Senator **CLEVELAND:** Thank you Mr. President. I rise to ask you not to support the Ought Not to Pass report because I think that there are a number of good reasons that we ought to consider changing the fiscal year of the State. I'd like to start by reminding those of you who may not be familiar with the history of how we got into the position of having often having to pass a budget by two-thirds. This was never the intention of the drafters of the Constitution but rather it came about by two separate unrelated instances that inadvertently put us in that situation.

The first was when the Citizens Veto and Initiative process was adopted into the Constitution and it said that all bills would not become effective until 90 days after the adjournment of the session unless they were passed by two-thirds. When that was adopted the fiscal year was in January, I believe, so that was no particular problem because the sessions always adjourned far before the new fiscal year began. That posed no particular problem. Sometime later the fiscal year was changed to July 1st, the sessions began to be extended and therefore, we found ourselves in the situation of not adjourning so that there were not 90 days before the new fiscal year began, so that two-thirds majority was required so that it could become effective immediately because we could not proceed with the fiscal year without having adopted a budget.

I think that's important because I think it's necessary to understand that it was not the intention of the drafters or the Constitution that it was a requirement and a necessity to pass a budget by two-thirds. In fact, it's my understanding that something over 40 states don't require a two-thirds vote to pass their budgets and routinely don't. So it's not a common practice shared within the United States. I also think that it's important to recognize that we have developed a new procedure, or found a new procedure that will, I think, most likely be the one adopted by whichever majority is in control and that is that a majority can be allowed to be used as long as we adjourn the session 90 days before the fiscal year begins. Now that that is a known and tried process, and the genie is out of the bottle, I suspect that it will become the common practice for the procedure for adopting any budget. But to do so

puts enormous constraints on the process of the deliberation. Within less than three months, often times with brand new Legislators and with term limits more and more brand new Legislators and makes it very difficult, I think, in a deliberative way to really be inclusive and to look at all of the aspects of a responsible budget in that short a time frame.

I think it's also important because sometimes folks suggest that it's really a two-thirds majority requirement that really gets the best budget and I'd like to suggest to you that's exactly the opposite. Because anytime that you require a super majority, what you are really saying is that Minority becomes the control. And by the minority, let me be clear here. I'm not talking about one party or another. I'm talking about those Members who tend to be furthest away from the mainstream of general thought in any political Body. Those might be particularly to the right or left of any particular issue. And therefore, what tends to happen is to be able to find enough votes to be able to pass a responsible budget, often times measures are taken and we have seen many of them already with gimmicks and other kinds of questionable activities that really aren't good fiscal practice but they were done primarily so that you could find enough votes to do that.

I think this really provides us with a historic opportunity and that is that it will encourage those people who represent the more centrist thought and opinions of the citizens of this state to be able to come together to form a budget that is in the best interest of most of the citizens of this state regardless of party affiliation. There also still provides a check, which was the check that was intended to be in the Constitution, and that is that the Governor can always veto the budget, or threaten to veto the budget so that it forces the parties to act more responsibly, or at least to find ways to work together to build that coalition. I think that that provides enormous opportunity for us to change the way in which we put together budgets and in the way that we act more fiscally responsible and, I think as well, it really will provide an opportunity to put together those Majorities that are bipartisan and a responsible way to put together a budget. So, I hope that you would consider seriously the benefits of changing our fiscal year. October 1 would make us consistent with the federal fiscal year and would give us plenty of time from our adjournment for the budget to take place. I hope that you will defeat this motion so we can go on to accept the Minority recommendation.

**OFFICE OF POLICY &
LEGAL ANALYSIS
FAX**

Date 06/05/98

Number of pages including cover sheet 8

TO: Susan Johnson
NCSL

Phone

Fax Phone 303-863-8003

FROM: Jon Clark, Esq.
Office of Policy and Legal
Analysis
13 State House Station
Augusta, ME 04333

Phone (207) 287-1670

Fax Phone (207) 287-1275

CC:

REMARKS: ☐ Urgent ☒ For your review ☐ Reply ASAP ☐ Please Comment

At the request of Rep. Ahearn, I am enclosing for your use a copy of the law passed last session by the Maine Legislature regarding taking of marine resources by members of the Passamaquoddy Tribe. Also enclosed is the only written testimony on the bill which I was able to find in the file. I do not staff the committee that dealt with the bill but as the legal counsel for the committee I was involved with the legal issues it raised. The original bill proposed

something rather different from what finally emerged in the law (there was some ambiguity in the language of the original bill). The amended version that came out of committee was hotly debated; some believed strongly that it was not legally possible to enact this law without amending the Maine Land Claims Settlement Act. The law directly confronts this issue in Sec. 3. It appears that this law, if it is not struck down, may well mark a new direction in tribal / state relations. Please feel free to call me or John Kelley (staff of the Marine Resources Committee) if you have any questions.

JANET T. MILLS
ATTORNEY GENERAL




TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
84 HARLOW ST. 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

415 CONGRESS ST., STE. 301
PORTLAND, MAINE 04101
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

March 12, 2013

Patrick Keliher, Commissioner
Department of Marine Resources
#21 State House Station
Augusta, Maine 04333-0021

Re: Regulation of Saltwater Fishery under the Maine Indian Claims Settlement Acts

Dear Commissioner Keliher:

You have asked this Office for an Opinion regarding the State's regulatory jurisdiction over marine resources, in particular, whether the State has the authority to regulate Passamaquoddy tribal members who take saltwater fish, clams, scallops or elvers, and whether the Maine Indian Tribal-State Commission (MITSC) has a statutory role in resolving questions over saltwater fishing matters involving the Maine tribes. You have also asked about the effect of the 1776 Treaty of Watertown.

A reading of the statutes and the legislative history of the Indian Claims Settlement Acts 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. In addition, the 1776 Treaty of Watertown is irrelevant to the saltwater fishery issues.

State Regulation of the Saltwater Fishery

Those who negotiated and drafted the Indian Claims Settlement Acts dealt directly with natural resources issues, which were a critical component of the negotiations, as fully documented in the legislative history. The issue of whether the tribes were subject to licensing and regulation regarding marine resources has also been addressed by the courts, and the Maine Legislature has exercised its authority in this area to enact statutes affording tribal members privileges not available to other Maine citizens.

Statutes. The United States Supreme Court has determined that Congress has plenary power to divest tribes of attributes of sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). 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. Title 30 M.R.S. § 6204 establishes that Maine tribes and their members, lands and *natural resources* are subject to Maine's civil and criminal jurisdiction "to the same extent as any other person or lands or land or other natural resources," "[e]xcept as otherwise provided in" the Maine Implementing Act. "Natural resources" includes fishing rights. 25 U.S.C. § 1722(b); 30 M.R.S. § 6203(3). The Maine Implementing Act was specifically "approved, ratified, and confirmed" by Congress in 25 U.S.C. § 1725(b)(1) (the Maine tribes, members, lands and natural resources "shall be subject to the jurisdiction of the State of Maine" as set forth in the Maine Act). Therefore, Congress confirmed Maine's regulatory jurisdiction over marine resources and extinguished any claims to those resources by the Maine tribes that are based upon ancient or aboriginal title or use.

There is nothing in the Maine Implementing Act that would limit state jurisdiction over marine resources or that would grant tribal members rights to those resources distinct from those enjoyed by other Maine citizens. For example, saltwater fishing is not considered an "internal tribal matter" under 30 M.R.S. § 6206(1), a provision which preserved tribal authority over tribal governance. See *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S. 923 (1983). Regulation of natural resources is *not* an internal tribal matter. *Maine v. Johnson*, 498 F.3d 37, 42-47 (1st Cir. 2007) (tribal resources are subject to Maine's regulatory jurisdiction).

Sustenance fishing rights were reserved to the tribes, but only on inland waters, 30 M.R.S. § 6207(4) & (9), within the reservations themselves. The right to "sustenance fishing" excludes commercial fishing, see Report of the Maine Legislature's Joint Committee on Indian Land Claims (109th Legislature, 2d Sess.) (1980) at 2, and does not allow unlicensed fishing in waters outside the reservations.

Legislative history. In an April 2, 1980, memorandum to the Legislature's Joint Select Committee on Indian Land Claims which is attached to the Committee's Report, Attorney General Richard Cohen addressed a direct question concerning "the effect of the settlement on State and Federal authority over coastal and marine waters." Attorney General Cohen explained that to the extent the Passamaquoddy Tribe owned coastal land at Pleasant Point Reservation it could enact shellfish conservation ordinances just as a municipality could, subject to the approval of the Commissioner of Marine Resources. Otherwise, "[t]he Tribes will have no other rights in coastal or marine resources other than any person or entity." *Cohen Memo*, at 9. The tribes were aware of this contemporaneous interpretation of the Settlement Acts and expressed no disagreement with it.

Marine resources activity under the Settlement Acts. After the 1980 Settlement Acts, Passamaquoddy tribal members sought and received licenses from the Maine Department of Marine Resources ("DMR") and were prosecuted for violating DMR laws and regulations in the same manner as other Maine citizens.

Prior Litigation. In 1996, 13 members of the Passamaquoddy Tribe brought a test case regarding Maine's jurisdiction over marine resources. The tribal members engaged in various

unlicensed and illegal activities, including clamming, taking urchins, scalloping, selling clams, taking clams from closed areas, taking undersized clams, and placing elver nets in violation of state regulations.

After reviewing extensive briefs by both sides, District Court Judge Romei concluded that the Passamaquoddy Tribe retained no aboriginal saltwater fishing rights after the Settlement Acts were enacted and that the Tribe's right to govern its own "internal tribal matters" did not encompass marine fishing rights. *State v. Beal* (1998). Similarly, in 2007 the federal appeals court ruled in *Maine v. Johnson*, 498 F.3d at 42-46, that Maine's environmental regulatory jurisdiction applies uniformly throughout the State and that it covers Maine's tribes and tribal lands and waters.

State legislation following the Settlement Acts. The 1998 court decision prompted a legislative effort by the Passamaquoddy Tribe to obtain saltwater fishing privileges that would be unique to its members, in the form of a bill sponsored by then Passamaquoddy Tribal Representative Fred Moore. 1997 LD 2145. After several necessary redrafts, the bill was enacted. P.L. 1997, c. 708. The new law provided that the Tribe could issue special licenses and permits to its own members to take marine resources for commercial purposes, for sustenance and for tribal ceremonies, in accordance with certain specified terms. Otherwise, tribal members continued to be treated the same as other Maine citizens. This law was enacted like any other statute and may be amended or repealed or kept on the books like any other legislation in accordance with the will of the Legislature.

MITSC's Role Regarding the Saltwater Fishery

The Maine Indian Tribal-State Commission (MITSC) has no regulatory role regarding saltwater fisheries and nothing in law requires consultation with MITSC prior to the Legislature taking any action. MITSC was created by and is part of the State Implementing Act. 30 M.R.S. § 6212. MITSC does have authority to promulgate fishing regulations for certain *inland* ponds, streams or rivers where a requisite amount of the shoreline is within Indian Territories, but it has no authority over marine resources or shellfish *Id.* at § 6207(3) & (9). The law requires the Commissioner of Inland Fisheries and Wildlife to consult with MITSC when the Commissioner believes that MITSC's own regulations may be harming *inland* fisheries but there is no such requirement regarding marine resources because MITSC has no jurisdiction over marine resources. *Id.* at § 6207(6). MITSC may *consult* with the Commissioner of Inland Fisheries and Wildlife "and the Legislature with respect to implementation of fish and wildlife management policies on non-Indian lands in order to protect fish and wildlife stocks on lands and water subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or [MITSC]." *Id.* at § 6207(8). But this permissive "consultation" has nothing to do with marine resources or coastal waters. *Id.* at § 6207(9). Moreover, while this provision authorizes MITSC to make recommendations to the Legislature, it in no way limits the constitutional authority of the Legislature to act without such a recommendation.

Treaty of Watertown


The Treaty of Watertown, signed by the Governors of the State of Massachusetts Bay and the Delegates of the St. John's and Mi'kmaq Tribes of Indians in 1776, was a profession "of Alliance and Friendship," and included an agreement for the provision of soldiers by those Tribes. This Treaty, which was superseded by the Settlement Acts of 1980, does not address saltwater fishing matters and has no relevance to these issues.

Conclusion

Nothing in the Maine Settlement Acts or in other state or federal law limits the jurisdiction of the Maine Legislature to address the marine resource issues presented in the pending legislation. The committee of jurisdiction should follow all normal procedures in reviewing legislation regarding marine resources. Although the Legislature has voluntarily granted certain privileges to tribes in saltwater fisheries licensing, these provisions are not required by the Settlement Acts and the Legislature is free to change them.

Please let me know if this office can be of further assistance.

Respectfully,


JANET T. MILLS
Attorney General

Cc: Governor Paul R. LePage
Senate President Justin L. Alford
House Speaker Mark W. Eves
Senator Christopher K. Johnson
Representative Walter A. Kurniega III
Representative Henry J. Bear
Representative Wayne T. Mitchell
Representative Madonna M. Soctomah
MITSC

MICHAEL G. ROSSETTI
+1 202.887.4311/fax: +1 202.887.4288
mrossetti@akingump.com

February 11, 2014

Janet Mills
Attorney General
6 State House Station
Augusta, ME 04333-0006

Re: Proposed Memorandum of Agreement between the Joint Tribal Council of the
Passamaquoddy Tribe and the State of Maine

Dear Attorney General Mills:

This letter addresses the proposed Memorandum of Agreement (“MOA”), which the Joint Tribal Council of the Passamaquoddy Tribe transmitted to the State of Maine (“State”) on January 24, 2014. The Joint Tribal Council of the Passamaquoddy Tribe (“Tribe”) is the entity with jurisdiction over resources held in common among the various Passamaquoddy communities. The proposed MOA is the product of good faith negotiations between the Tribe and the State regarding management of the American eel fishery, and would achieve a major policy objective of both the Tribe and the State. As you know, this fishery has been the center of great controversy over the past two years, which has resulted in strained relations between the Tribe and the State and prevented the implementation of a cohesive resources management plan in Maine.

Intergovernmental agreements, similar to that proposed by the Tribe, are often utilized by federally recognized tribes and states to address issues of common concern and can be the cornerstone of positive and appropriate tribal-state relations. Indeed, the State itself has acknowledged the potential of such agreements in the past and has entered into Memorandums of Understanding with the Penobscot Nation over issues related to resource management. As you are aware, the State Legislature, through its Joint Committee on Marine Resources, is currently debating LD 1625, an act to clarify the regulatory process for the issuance of licenses for the harvest of the American eel. The Tribe proposes that LD 1625 be amended to authorize the Executive to negotiate and enter into the MOA. LD 1625 is an ideal legislative vehicle through which the State may institute management mechanisms to protect the American eel and clarify the mechanics of this critical tribal-state fishery, which have largely been agreed upon by the Tribe and State and already enacted as tribal law.

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However, it has come to our attention that your office believes that the proposed MOA may violate the Equal Protection Clause of the United States Constitution by creating a “separate class” of tribal citizens under State law. Although federal common law is unsettled as to the permissible extent of disparate treatment between tribes and individuals by states under the federal constitution, it is highly probable that the MOA would survive rational basis review, which only requires that the classification at issue be rationally related to a legitimate governmental interest. Given the many governmental interests that the MOA would advance, and how the MOA addresses them, it would stand shoulder to shoulder with similar agreements upon which some states and Indian tribes rely today.¹ Thus, we urge you to keep that in mind as you review the MOA and the principles embodied within it.

This letter provides a brief background on the status of the Tribe’s reserved treaty rights; examines why the MOA is the proper vehicle to resolve the fisheries management issues between the Tribe and State in the narrowest manner possible; and addresses the concerns raised by your office regarding the Equal Protection Clause of the Constitution.

I. The Passamaquoddy Tribe Possesses Reserved Treaty Fishing Rights That Have Not Been Extinguished and Give Rise to a Legal Right to Regulate Tribal Participation in the American Eel Fishery.

The Passamaquoddy Tribe and the Commonwealth of Massachusetts (“Commonwealth”) entered into treaties in 1776 and 1794, whereby the Tribe ceded a significant portion of land located in present-day Maine to the Commonwealth, in exchange for small land holdings, and guaranteed fishing rights in the Scoodic River (now known as the “St. Croix River”) system and other accustomed fishing locations “without hindrance or molestation.”² Recognizing that the treaties violated the Trade and Intercourse Act,³ Congress passed the Maine Indian Claims Settlement Act of 1980 (“Settlement Act”)⁴ to settle the Tribe’s claim that was brought in *United*

¹ Should the State have concerns that a heightened standard apply, specific concerns and a citation would be helpful going forward.

² Resolution of the General Court of the Commonwealth of Massachusetts to ratify a treaty between the Passamaquoddy Tribe of Indians and the Commonwealth of Massachusetts dated Sept. 29, 1794, MA-Passamaquoddy, Feb. 10, 1795.

³ Act of July 22, 1790, 1 Stat. 138.

⁴ 25 U.S.C. § 1721 et seq.

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States v. Maine;⁵ to clarify the status of land and natural resources in the State; and to ratify the Maine Implementing Act.⁶

The treaties between the Tribe and the Commonwealth are the foundation for rights expressly confirmed to the Tribe through the Maine Implementing Act and the Settlement Act. As a result, the Tribe's fishing rights include the aboriginal rights retained through treaty and confirmed in the Settlement Act, and the statutorily defined rights included within the Maine Implementing Act.⁷ The Maine Implementing Act and the Settlement Act only briefly address sustenance fishing within certain types of inland waterways and water bodies on Indian lands. Although the Settlement Act extinguished aboriginal title to lands and natural resources relinquished by the Tribe through the treaties, it did not extinguish aboriginal title to lands or natural resources retained by the treaty. Rather, Congress confirmed those retained aboriginal rights, which have been continuously exercised since their initial reservation in the eighteenth century, and purposefully omitted them from the wide swath of regulatory jurisdiction ceded to the State under the Settlement Act.⁸ The legislative history of the Settlement Act makes clear that these saltwater fishing rights are an example of natural resources considered "expressly retained sovereign activities."⁹ Thus, the Tribe's saltwater fishing rights were not granted from the State in exercise of its sovereign authority, but were reserved from the aboriginal rights that were relinquished in the late 1700's and finally extinguished in the Settlement Act.¹⁰

II. The Proposed Memorandum of Agreement is the Proper Vehicle to Ratify an Accord between the Tribe and State Regarding the American Eel Fishery.

It is unnecessary to rehash the unfortunate events surrounding the 2013 American eel fishery. However, it is important to take appropriate action to ensure the safety of tribal and non-tribal participants in the fishery and cohesive resource management. As mentioned above, tribal-state agreements, such as the proposed MOA, are commonplace in areas such as Alaska, the Northwest, and the Great Lakes regions of the United States, where competing pressures on

⁵ Civil No. 1966-ND (D. Me., filed July 1, 1972)

⁶ 30 M.R.S.A. §§ 6201 et seq.

⁷ See 30 M.R.S.A. § 6207(1); 25 U.S.C. § 1725(b)(1).

⁸ See 25 U.S.C. § 1723.

⁹ H.R. Rep. No. 96-1353 at 15 (1980).

¹⁰ The Tribe recognizes the State's reliance on *State v. Beal* and 30 M.R.S.A. § 6204 for the proposition that the State implicitly abrogated the Tribe's aboriginal treaty fishing rights. The issues that gave rise to *Beal* were subsequently resolved through an agreement between the Tribe and State that obviated the need to challenge the severely flawed order denying the tribal members' motion to dismiss in that case.

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precious resources demand a cooperative management approach. These agreements have not only passed constitutional muster but can embody responsible tribal-state concerted action.

The most prevalent example of where federally recognized tribes and states cooperatively manage fisheries is in the State of Washington. Although Washington's salmon fishery has been managed in a cooperative fashion since the 1970's, it only came to be operated in this way by virtue of a federal court order. *United States v. Washington*¹¹ and this cooperative management structure arose after the State of Washington attempted to limit the treaty fishing rights of federally recognized tribes. The decision from the federal district court, which has become known as the "Boldt Decision," affirmed the existence of the tribe's treaty rights and held that the tribes explicitly reserved the right to fish when they ceded millions of acres in Washington through a series of treaties. The State of Washington and certain federally recognized tribes in the state have been operating under court-mandated cooperative management plans since the Boldt Decision was issued in 1974. States, such as Washington, and tribes routinely enter into government-to-government agreements to fulfill the mandate of the Boldt Decision, or otherwise to promote robust resources management and promote positive tribal-state relations without litigation.¹²

The Tribe proposes that LD 1625 be amended to authorize the Executive to negotiate and enter into an MOA to manage cooperatively the American eel fishery in 2014 and beyond. Further, we recommend that LD 1625 identify the specific provisions upon which this agreement should be based, including a total allowable catch of 1,650 pounds, use of dip nets only by tribal license holders, and use of the swipe card system. The Atlantic States Marine Fisheries Commission ("ASMFC") requested that the State drastically reduce its total landings in the 2014 season. While the State has moved along with plans to reduce landings by 35%, the Tribe has agreed to do its part by reducing its Total Allowable Catch ("TAC") from 3,600 to 1,650 lbs. To further reduce pressure on the American eel and to facilitate good faith negotiations with the State, the Tribe also restricted tribally issued licenses to dip net only, and agreed to participate in the State's swipe card system. Authorizing the MOA through LD 1625 is in the spirit of bilateral

¹¹ 384 F. Supp. 312 (W.D. Wash. 1974),

¹² See Memorandum of Agreement Between the State of Idaho and the Nez Perce Tribe Concerning Coordination of Wolf Conservation and Related Activities in Idaho (April 2005); Memorandum of Agreement Between the Sitka Tribe of Alaska and the State of Alaska Department of Fish and Game (Dec. 17, 2002); Agreement Between the Confederated Tribes of the Colville Indian Reservation and the Washington State Department of Fish and Wildlife (April 4, 1998); Memorandum of Understanding Between the Washington Department of Fish and Wildlife and the Cowlitz Indian Tribe; Memorandum of Agreement Between the Washington Department of Fish and Wildlife and the Nez Perce Tribe (June 20, 2002);

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agreement and creates binding obligations on each party that will have the force and effect of law. In the unlikely event that the MOA is not followed, the Tribe and the State would be accountable for their commitments.

III. The Proposed MOA is Constitutional and is Consistent with State Law and Policy.

A. The Proposed MOA Would Not Violate the State or Federal Constitution.

The United States Constitution recognizes, in Article I, Section 8, that Indian tribes occupy a separate political status in the United States. This separate political classification is the legal justification for federal courts to mandate the execution of cooperative agreements between tribes and states, and for other tribes and states to voluntarily enter into cooperative agreements to settle longstanding disputes.

The United States Supreme Court's decision in *Morton v. Mancari* underscored and confirmed the federal government's disparate treatment of individuals and tribes on the centuries-long basis that such categories are political, not racial in nature.¹³ In *Mancari*, the Court held that an "Indian preference" for hiring within the Bureau of Indian Affairs was not impliedly repealed by the Equal Employment Opportunities Act of 1972.¹⁴ Specifically, the Court noted that the hiring preference was not directed toward a racial group, but instead applied only to members of federally recognized tribes, namely in their capacity as political entities, not racial groups.¹⁵ The Supreme Court has expounded on what it meant for federal law to treat tribes and their members differently under federal law:

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory [. . .] they are a separate people possessing the power of regulating their internal and social relations."¹⁶

Accordingly, preferences for Indian tribes or individuals in federal law that are "reasonably designed to further the cause of Indian self-government" are generally scrutinized under the so-called rational basis test.¹⁷ However, where an Indian tribal or individual

¹³ 417 U.S. 535 (1974).

¹⁴ *Id.* at 547.

¹⁵ *Id.* at 554 n. 24.

¹⁶ *Id.*

¹⁷ See, e.g., *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1075 (D. Ariz. 2001) vacated on other grounds, 305 F.3d 1015 (9th Cir. 2002).

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classification is not reasonably designed to further the cause of Indian self-government, that classification is subject to strict scrutiny.¹⁸ As the Ninth Circuit opined in *Williams v. Babbitt*, it is doubtful that “Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts.”¹⁹ Accordingly, where an Indian tribal or individual preference were used to grant a monopoly to an Indian tribe in some industry, for example, that preference would likely not be reasonable under *Mancari*’s rationale.

The First Circuit recently discussed the issue of whether *state* law might violate federal constitutional equal protection guarantees where an Indian tribal preference granted the Mashpee Wampanoag a gaming monopoly in Massachusetts.^{20,21} In that case, the First Circuit opined in dicta that the sort of Indian classifications that federal law might permissibly include do not directly overlap with what state law might permissibly include.²² Notwithstanding this distinction, however, no matter whether the federal government or a state government purports to grant a complete monopoly on gaming to Indian tribes, such a preference will not always be scrutinized under *Mancari* as a preference that is “reasonably designed to further the cause of Indian self-government.”²³

The Indian classifications in *Williams v. Babbitt*, *KG Urban*, and others were preferences that were not “reasonably designed” to further the cause of Indian self-government. And while the First Circuit questioned whether a state, acting alone, could permissibly create Indian classifications, it necessarily did so in the context of an Indian preference intended to grant a gaming monopoly to one tribe in one state.^{24,25} The facts of those court cases, however, do not

¹⁸ See *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

¹⁹ *Id.*

²⁰ *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012).

²¹ In *KG Urban*, the First Circuit did not decide the case on the merits. Rather, it evaluated each side’s arguments on a variety of issues, including equal protection, to decide whether certain preliminary relief was warranted. Ultimately, the court, citing “difficulties with each party’s arguments,” affirmed the lower court’s denial of preliminary, equitable relief sought by the non-Indian plaintiff. The merits of *KG Urban* are now before the First Circuit. A decision should not be expected for many months.

²² *Id.* at 19.

²³ See *Williams v. Babbitt*, 115 F.3d at 665.

²⁴ See *KG Urban*, 693 F.3d at 1.

²⁵ Although not explicitly raised by the state in its most recent meetings with the tribe and others, we note that the Maine Supreme Court has examined Indian classifications under the Equal Protection clause of the Maine Constitution and found that rational basis scrutiny applies to Indian classifications for the same reasons cited in *Mancari*. See *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994).

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accurately reflect the facts at play in our negotiations. Our negotiations have never sought to grant a tribal monopoly over any aspect of the commercial glass eel industry in Maine. On the contrary, we seek a bilateral attempt at managing the collective fishing resources that are so vital to both the state and tribal economies. Relatedly, it is doubtful that the proposed agreement between the state and tribe would even constitute an Indian “preference” in the sense contemplated by *Mancari*, *Williams v. Babbitt*, or *KG Urban*. Rather, nothing would put the tribe or its citizens ahead of the state or its citizens and, conversely, nothing would put non-Indians ahead of tribal individuals either. Equal protection arguments from either group of individuals would similarly fail.

The only differential treatment between the two sovereign entities would lie in how they manage their respective licensing regimes. The State’s main concern appears to relate to the so-called penalty provisions in the current form of the agreement whereby individual non-Indians would directly bear the costs associated with overage fees and premiums but no individual tribal member would bear the same. This is but one difference in licensing-regime management that would inevitably arise between any other pair of sovereigns seeking to jointly manage a natural resource.

The fact that a difference in licensing methodology is one of the only points of contention remaining between the State and Tribe show how an agreement is close at hand. There is no sense in allowing one negotiating point to prevent the establishment of sound policy that meets multiple policy objectives of the Tribe and State.

B. The Proposed MOA is Consistent with State Law and Policy.

As discussed above, we firmly believe that this proposal would not establish separate racial or political classes of tribal and state fishers. The State has long recognized the separate political and legal status that the Tribe occupies in the State, and has enacted laws out of respect for this distinction.

Pursuant to the Act of Separation of 1820, through which the State of Maine separated from the Commonwealth of Massachusetts, the State agreed to fulfill all treaty obligations owed to tribes within its borders.²⁶ Thus, the State recognized those referenced and now reserved treaty rights, and agreed to uphold them despite the fact that State citizens wishing to fish were subject to different laws. Although the disparate political treatment of the Tribe is established

²⁶ ME. Const. art. X, § 5, in (1821) Me. Laws. 45-50. This provision remains part of the Maine Constitution even though it is no longer printed.

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under the State Constitution, this treatment has been assumed and legislated upon at numerous points by the State legislature.

The most prominent example of the State's separate political dealings with the Tribe is through the act to "Implement the Maine Indian Claims Settlement" ("Maine Implementing Act").²⁷ The Maine Implementing Act recognized that not just Passamaquoddy but also the Penobscot Nation and the Houlton Band of Maliseet Indians occupy a separate political status in the State. This separate political status allows these federally recognized tribes to exercise unique jurisdiction over hundreds of thousands of acres of land across the State;²⁸ to enact sustenance hunting and fishing laws to be used solely by tribal citizens;²⁹ and to exempt the Tribe and the Penobscot Nation from property taxes on certain tribal lands,³⁰ among the exercise of other rights not held by individual citizens within a municipality. The Maine Implementing Act is also not the only State statute recognizing the distinct status of tribes.³¹ Simply put, the Constitution and the laws of the State established and continue to recognize the separate political status of the Tribe. It is of further consequence that the State has entered into intergovernmental agreements with the Penobscot Nation for natural resource management. Although those agreements touch upon different aspects of resource management, the State clearly views these types of agreements as a vehicle to handle cooperative tribal-state relations. The proposed MOA is intended to be consistent with State constitutional law and policy, and respect the separate political status the Tribe occupies in the State, which has been respected and built upon by State law.

IV. Conclusion

In closing, the proposed MOA is a mechanism carefully crafted to ensure the consistent application of resource management law in Maine and to promote the spirit of cooperation as a means to enact and implement sound tribal-state policy. This agreement is reflective of tribal-state agreements that have been implemented and been in operation around the country for decades. Furthermore, the MOA is the product of good faith negotiations between the State and

²⁷ 30 M.R.S.A. § 6201 *et al.* (1979).

²⁸ See 30 M.R.S.A. § 6206.

²⁹ See 30 M.R.S.A. § 6207.

³⁰ See 30 M.R.S.A. § 6208.

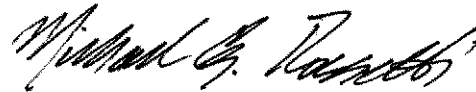
³¹ See *e.g.* 16 M.R.S.A. § 9-106 (1995), adopting, as Maine law, the Indian Child Welfare Act, 25 U.S.C. § 1904 *et al.*, and its disparate treatment of federally recognized Indian tribes for the purpose of child adoption.

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Tribe, and would ratify the binding commitments of those governments to the terms of the agreement, as they have been established to meet specific policy goals.

Please do not hesitate to contact myself or Corey Hinton (202-577-5505) with any questions you have may regarding this letter.

Sincerely,



Michael G. Rossetti

cc: Senator Christopher K. Johnson
Representative Walter A. Kumiega III
Senator Edward J. Mazurek
Senator Richard G. Woodbury
Representative Chuck Kruger
Representative Ralph Chapman
Representative Michael Devin
Representative Elizabeth E. Dickerson
Representative Jeremy G. Saxton
Representative Windol C. Weaver
Representative Wayne R. Parry
Representative Peter Doak
Representative Ellen A. Wichenbach
Representatative Charles Priest
Senator Linda Valentino



Passamaquoddy Tribe
Joint Tribal Council

Motahkmikuk (207) 796-2301
Sipayik (207) 853-2600
February 18, 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: The Proposed Memorandum of Agreement Between the Passamaquoddy Tribe and the State of Maine

Dear Senator Johnson and Representative Kumiega:

On behalf of the Joint Tribal Council of the Passamaquoddy Tribe ("Tribe"), we respectfully submit this letter regarding LD 1625, An Act to Clarify the Law Concerning Maine's Elver Licenses, and the proposed Memorandum of Agreement ("MOA") between the Tribe and the State of Maine ("State"). The proposed MOA was carefully crafted to reflect bilateral agreements that have been entered into between tribal and state governments across the United States for many years. The MOA and similar agreements existing around the country are built upon the principle of comity.

In follow up to the letter transmitted to Attorney General Mills on February 11, 2014 ("February 11th Letter"), we thought it would be helpful to provide you with examples of tribal-state cooperative agreements, many of which were cited in the February 11th letter. The existence of so many examples demonstrates how commonly accepted such agreements are by sovereigns who would have been unlikely to enter into them if they posed real equal protection issues. Indeed, in agreements adopted by sister states, as in the proposed MOA, Indian tribes implemented laws distinct from those applied to state citizens but that were aimed at accomplishing the same end. Further, those states did not add an eleventh hour requirement that an agreement proposed by and for one Indian tribe must be adopted by all Indian tribes inhabiting the same state. Instead, as we are confident you would seriously consider doing during your joint committee work session on February 19, 2014, the states and tribes in question, decided to tackle a problem together and then found an appropriate mechanism for doing so. The proposed MOA is such a mechanism. In the interest of ensuring that you have the full benefit of all pertinent materials for your work session, we have also enclosed with this letter is the proposed MOA, which was transmitted to the State on January 24, 2014. That draft is enclosed with this letter as Attachment A. The draft proposal was for discussion purposes and while it includes the most salient points of agreement between the Tribe and State, it was only intended to be a starting point for its negotiation, and the joint committee may have its own perspective regarding potential improvements to the proposed MOA.

This letter is intended to address some of the issues that continue to be raised by the Attorney General's office and to demonstrate that the proposed MOA is a constitutional vehicle

for ratifying the agreement between the Tribe and State concerning the 2014 American eel fishing season.

I. Tribal-State Cooperative Agreements Serve as an Example for How the Tribe and State can Accomplish Mutual Conservation Goals.

The February 11th Letter cited numerous tribal-state intergovernmental agreements, memorandums of agreement, and memorandums of understanding that were entered into for the promotion of cooperative resource management. These and other examples of similar agreements are enclosed with this letter. Examples of these agreements have been enclosed as Attachment B to this letter. A review of these documents will demonstrate several trends among the agreements: cooperative agreements are viewed as a tool to proclaim policies of cooperation and good relations between governments; recognize that coordinated management plans are critical for resource conservation; and delineate how the respective tribal governments will exercise their unique and distinct authorities to work in concert for the betterment of a resource. Many of these agreements also explicitly state, as the proposed MOA does, that they are not intended to create, expand or diminish any party's legal rights or jurisdictions. States around the country view cooperative agreements as effective tools to create policy. In New York State, the Department of Environmental Conservation ("DEC") enters into cooperative agreements as a matter of written policy concerning hunting and fishing. These agreements are intended to protect the right of tribal nations to engage in these activities in a manner that is consistent with DEC's "interest in protection and management of the State's natural resources." See NYS Dept. of Environmental Conservation Policy on Contact, Cooperation, and Consultation with Indian Nations, March 27, 2009 at 5. The DEC policy is enclosed as Attachment C. Thus, these agreements are focused narrowly on cooperative resource management, as they must be, and not on the distinct rights that the respective parties may have to a particular resource.

Perhaps more salient for the purpose of the Attorney General's current constitutional concern is the fact that some of these documents, such as the "Agreement Between the Confederated Tribes of the Colville and the Washington Department of Fish and Wildlife on Jointly Managed Salmon and Steelhead Populations" ("Colville Agreement"), recognize that the governments may have differing regimes for regulating their respective agreements. To that end, the Colville Agreement stipulates that the parties must notify each other of modifications to the "harvest regime" under the agreement and ensure that such modifications are negotiated in good faith and remain consistent with management guidelines. See Colville Agreement at 2. The Colville Agreement is enclosed as Attachment D. Distinct differences in resource management regimes will always exist among sovereign governments, are permissible as a matter of comity, and facilitate rather than prevent sound conservation where established and overarching management goals are met.

Here, the American eel management plans promoted by the Tribe and the State rely upon the exact same type of "output" controls. An "output" control generally refers to plans that revolve around limits on the pounds of the resource that may be permissibly removed from its habitat. This is in contrast to an "input" control, which focuses on the pieces of gear and number of fishers that may participate in a fishery. Input controls have proven to be less effective than output controls if there is no limit on catch. This will be the second season in which the Tribe has focused on output, while the State is only now shifting from a purely input approach. The

Atlantic States Marine Fisheries Commission (“ASMFC”) unanimously approved a statewide shift from an input approach to the output/quota approach to protecting the American eel. At the end of the day, the most important thing for the Tribe and State is to adhere to the mutually agreed upon Passamaquoddy Total Allowable Catch (“TAC”) of 1,650 pounds. This agreed upon TAC will facilitate efforts to meet statewide TAC goals, which must be met to keep the fishery open. Furthermore, the parties have generally agreed upon how the Tribe will allocate licenses to tribal members in lieu of hard limits on license numbers. To address constitutional concerns raised by the Attorney General related to restitution and remaining differences between the plans, the Tribe resolved on February 11, 2014 to institute an open fishery among tribal members for a portion of the season before shifting to an individual fishing quota (“IFQ”). The State’s proposed plan will utilize an IFQ the entire season. After meeting with the Tribe on February 5, 2014 in Washington, D.C., the Department of Marine Resources (“DMR”) arrived at the February 12th work session with legislative language that adopted this approach to the Passamaquoddy fishery. Thus, the State and Tribe were on the precipice of agreement. *See* Department of Marine Resources proposed amendment to LD 1625 at § 6302-B (2)-(3) (Feb. 12, 2014). However, DMR abandoned this approach and the agreement with the Tribe during the work session at the behest of the Attorney General. The sole difference between the tribal and State approach to the fishery is the Tribe’s reliance on an open quota system for the first portion of its 2014 fishery. This is but one difference in licensing regime management that would inevitably arise between any other pair of sovereigns seeking to jointly manage a natural resource; if Maine and New Hampshire entered into an interstate compact to manage certain hunting resources, there undoubtedly would be differences between those two states’ licensing regimes as well. Here, the tribe elects to split a tribal allocation among all of its members while the state desires individual quotas for its citizens.

The myriad of tribal-state cooperative agreements demonstrate that this type of comparative approach is fundamentally sound from a legal and conservation perspective.

II. The Proposed MOA is intended to Promote Cooperative Joint Management of the American Eel Fishery.

On January 24, 2014, the Tribe transmitted a draft MOA to the State for discussion purposes. The MOA embodies the mechanics of the agreement between the Tribe and State, as they were agreed upon until February 12, 2014. The commitments accepted by the Tribe and demonstrated in the January 24th draft include a Passamaquoddy TAC of 1,650 pounds, the restriction of tribal license holders to dip net only, and participation in the State’s swipe card system. These were reached after good faith negotiations between the Tribe and State. The Tribe’s adoption of a dip net only rule exceeds State law regarding gear and ensures that the Passamaquoddy TAC can be more evenly distributed among tribal members. Although the proposal contains other language promoting the establishment of an American eel technical committee for conservation purposes, the express intent of the agreement is to promote better resource management during the 2014 American eel season. The proposed MOA is intended to sunset after one year to allow the parties to look back at the first year of joint management and make improvements.

Since the MOA was proposed on January 24th, the January 29th work session and conversations with the State revealed the need for the Tribe to ensure accountability of tribal

fishers to the established TAC and enforcement of the agreement. The Tribe responded by enacting a resolution to levy restitution on any tribal license holder who exceeds their IFQ and payment of that restitution into an American Eel Management Fund that may only be used for conservation and law enforcement purposes. This mechanism was adopted to mirror that which has been proposed by the State, and was intended to address the equal protection concerns that had been voiced by the State to the Tribe and the Committee on Marine Resources. The Passamaquoddy Tribal Court, which is recognized under State law, is well equipped to ensure compliance with these tribal laws and should be allowed to do so as a matter of comity. Thus, enforcement of the MOA, for the benefit of the American eel, is sufficiently provided for to ensure the integrity of the joint undertaking under the MOA.

The Tribe has previously recommended amending LD 1625 to authorize the State to enter into this agreement with the Tribe. It is important to note that the Tribe met with Jon King, the Deputy Director of the Office of Policy and Legal Analysis, before the February 12th work session, and Mr. King expressed his support for the proposed legislative and cooperative approach. This approach can be implemented through the use of concise language, similar to that proposed by the Tribe on February 11th, which will ensure that the MOA meets the State and Tribe's most important management goals and keep the American eel fishery open in 2014 and beyond.

III. The Proposed MOA should not be Discarded Because Of Equal Protection Concerns Rooted in a Lack of Resources.

The exact nature of the Attorney General's apprehension with the proposed cooperative management structure is difficult to ascertain beyond a general concern with potential constitutional issues but it appears that this concern is related to enforcement. DMR routinely enforces violations of marine resource laws but the State raised new concerns on February 12th regarding its ability to enforce these laws, if an agreement recognizes a Tribal plan that is only slightly different from the State's. This worry seemingly stems from a concern that District Attorneys and the State justice system do not have the resources to properly confront whatever unfounded constitutional arguments might be raised by an individual challenging a State enforcement action. The fear is that a defendant could force the State to defend its agreement with the Tribe. The State's concern regarding the enforceability of State laws because of the MOA is rooted in a lack of resources for the State justice system. This is not a legitimate ground to preclude the enactment of sound tribal-state policy.


The State has yet to say that the proposed agreement actually is unconstitutional but has instead indicated that potential but hypothetical constitutional arguments pose a threat to enforcement of other laws. While the Tribe sympathizes with a lack of resources, this is a constant reality in tribal governance and should not be a basis to refuse to enter into an agreement with the Tribe. We have gone out of our way to reach an agreement that was satisfactory to your committee and DMR. Our good faith approach to these negotiations has not been to procure an agreement by any means necessary but to reach an enforceable, cooperative agreement that is rooted in comity between sovereign governments who share commonality of purpose.


The constitutional arguments raised by the State cannot be entirely discounted but must be juxtaposed with other policies that might have raised similar questions but became law nonetheless. The February 11th Letter points to the Maine Implementing Act, 30 M.R.S.A. § 6201 *et al.*, as the primary example of where State law recognizes the distinct rights exercised by tribal governments but also to the State's recognition of tribal preferences in the child adoption arena.¹ See 18 M.R.S.A. § 9-107. A more salient and recent example of where enforcement or constitutional concerns did not lead the State to prevent enactment of a resource management law is L.D. 306, which was enacted on May 31, 2013. L.D. 306, An Act To Exempt Members of the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs from Special Training Requirements for Archery and Trapping, amended Title 12 of the Maine Revised Statutes to exempt tribal citizens from safety certification requirements that applied to all other State citizens seeking a license for archery hunting. This section is enclosed as Attachment E. This law clearly passed without receiving the type of scrutiny levied upon the policies at issue today. It seems illogical to suggest that the explicit exemption of tribal members from a law intended to promote public safety and wildlife management was constitutional but somehow the MOA, which embraces State management principles through a slightly different mechanism, is not. This MOA does not create a separate class of citizens but respects the State's institutional and political classification of tribal citizens, and serves to enhance tribal state relations through a bilateral and constitutional agreement.

In closing, we respectfully request that the Marine Resources Committee consider the strong political, legal, and policy justifications for the MOA and authorize its enactment in recognition of the excellent policy goals that it will accomplish.

Please do not hesitate to contact us with any concerns or questions related to this issue.

Sincerely,


Joseph Socobasin
Sakom, Passamaquoddy-Indian Township


R. Clayton Cleaves
Sakom, Passamaquoddy-Pleasant Point

Enclosures

¹ It is important to note that the Maine Supreme Court has examined Indian classifications under the Equal Protection clause of the Maine Constitution, as applied in the context of child adoptions, and found that such classifications were permissible. See *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994).

Cc: Senator Edward J. Mazurek
Senator Richard G. Woodbury
Representative Ralph Chapman
Representative Michael Gilbert Devin
Representative Elizabeth E. Dickerson
Representative Jeremy G. Saxton
Representative Windol C. Weaver
Representative Wayne R. Parry
Representative Peter Doak
Representative Ellen A. Winchenbach
Representative Wayne Mitchell
Chief Brenda Commander
Chief Kirk Francis
Chief Edward Peter Paul
Governor Paul LePage
Commissioner Patrick Keliher
John Dieffenbacher-Krall
Jamie Bissonette-Lewey
Jon Clark
Representative Madonna Soctomah
Representative Henry Bear
Vice Chief Clayton Sockabasin

April 4, 2014: For Immediate Release: From the Passamaquoddy Tribe
Contact: Newell Lewey 207 944 2331 or newell.lewey@gmail.com

Several newspapers have misquoted Passamaquoddy Chief, Joseph Socobasin. Chief Socobasin has been quoted as saying; [the] Passamaquoddy Tribe will abide by state fishing rules for the 2014 elver season that starts this weekend. This misrepresents the difficult decision made by the Passamaquoddy Joint Tribal Council.

After the State's Attorney General alleged there were legal problems to a jointly agreed upon co-management plan, the State unilaterally pulled out of negotiations and ultimately passed a law [LD1625] that allowed the Tribe only two routes of safety for its Tribal members. Either the Tribe would have to amend their own law to reflect an individual catch quota or decide not to fish.

"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" said Chief Socobasin.

"It was important to do this," said Chief Clayton Cleaves, "Because, when I met with Governor LePage on March 12th, he threatened to bring in the National Guard at any hint of a disturbance on the river. We want our people to be safe. This is of paramount importance."

"We have asserted our sovereignty in making this decision. Each Tribal Fisher will bear a Tribally issued license and a statement from the Tribal Government that reads, 'This license is issued pursuant to the inherent rights of the Passamaquoddy Tribe as secured under various treaties and federal law, and as implemented through the Tribe's Fisheries Management Plan Governing Salt Water Hunting, Fishing and Gathering.' " said Newell Lewey.

Eel fishing is a vital part of Passamaquoddy Culture with Passamaquoddy eel camps noted on the earliest maps of the region. "We have preserved access to this fishery for our people," said Vice-Chief Clayton Sockabasin who is also Chair of the Fishery Committee, "but none of us are comfortable with what has happened." Vera Francis, Fishery Committee member, added, "We come to the table and negotiate with full transparency and intent to live up to our commitments. Each time, the State finds a way to force an unpalatable outcome. You would think that living up to their word would be a matter of honor. It is for us."

In conclusion, Chief Socobasin said, "We have done everything in our power to assure access and safety for our people who will fish on the rivers of our territory. We have done our job. We have the inherent power to regulate how our fishers engage with the state. We made a difficult but necessary decision, and we will go to the rivers where we have since the very beginning. We will never stop. It is who we are"

Commission Meeting
June 12, 2000
Indian Island

Participants

MITSC Members

Cushman Anthony, Esq., Chair
John Banks, Penobscot Nation
Alan Brigham, State of Maine
Mark Chavaree, Esq., Penobscot Nation
Rick Doyle, Governor, Passamaquoddy Tribe at Sipayik
Mike Hastings, State of Maine
Fred Hurley, State of Maine
Evan Richert, State of Maine

Others

Rhonda Frey, Penobscot Tribal Member
Robert Ho, Executive Director, Maine Rural Development Council
Evie Hoffman, Friends Committee on Maine Public Policy
Donna Loring, Penobscot Tribal Representative
Eric Nicolar, Penobscot Nation
Jeff Rosenblatt, Albany Township
Diana Scully, Executive Director, MITSC
Elizabeth Sockbeson, Penobscot Nation
Diane Steward, Senate President's Office, 119th Maine Legislature
Jerry Storm, Friends Committee on Maine Public Policy
Krista Thompson, Penobscot Nation

Meeting Convened

Chair Cushman Anthony convened the June 12, 2000 meeting of the Maine Indian Tribal-State Commission (MITSC) at 9:40 AM and asked participants to introduce themselves. The meeting was held in the conference room at the Penobscot Community Building. Chair Anthony directed participants' attention to a copy of S.P. 1086, the Joint Resolution Declaring 2000 the Year of the Native American Woman. Mark Lawrence, President of the Maine Senate, sent this to MITSC.

Reflections on April 28 Meeting

Chair Anthony asked if anyone had any reflections about and/or reactions to the last meeting (April 28, 2000.) When no one responded, he asked Diana Scully to share her thoughts. Ms. Scully responded that this was the most difficult meeting she has experienced during her 11 years with MITSC. She felt sad about the resignation of Eric Altvater during the meeting, the abrupt departure of Donald Soctomah and John Banks from the meeting, and the anger and frustration expressed by both tribal and state MITSC members. Then, when she was preparing the minutes of the meeting, she felt a bit of hope because she saw some good ideas emerging from the conflict.

Chair Anthony pointed out that there was a lot of honest sharing during the meeting. He said participants in the discussion realized that there are many areas they will not be able to resolve in this forum. Noting that big issues come out in a variety of contexts, he said sometimes the bigger issues get shunted to MITSC as though it can magically resolve these.

What Needs to Happen?

Faithful Implementation of Settlement Act

Chair Anthony stated that MITSC must step back and look at its goals, what it is trying to achieve, and where it is going. Evan Richert said he would express his goal as faithfully implementing the terms of the Maine Indian Claims Settlement Act and where it appears that things are unworkable to report this to the legislative bodies of the three governments that form MITSC.

Mistaken Notions about MITSC

Mike Hastings expressed an interest in reinventing MITSC, but said MITSC is constrained by the Implementing Act. He noted that there are a number of entities in State Government that have a mistaken notion of what MITSC is supposed to do. For example, the Legislature wrongly considers MITSC to be a subcommittee or lightning rod to take heat off the legislators, but this is not what MITSC's charter says to do. He said MITSC can give advice back to Legislature about the relationship between the State and the Tribes.

Legislative Mechanism

Mr. Hastings said he is discouraged that the Legislature has no Select Committee on Indian Affairs and pointed out that they deal with the tribal-state relationship on a bill by bill basis. He said no one in the Legislature has the responsibility to look at the forest...the whole picture. He stated that the existence of MITSC seems to perpetuate this lack of focus, and MITSC is supposed to make everything right. He suggested that MITSC consider making a recommendation to the Legislature to create some kind of mechanism to consider Indian Affairs.

Chair Anthony asked if this would be a special committee. Mr. Hastings answered that he would not presume to tell the Legislature what form this should take. He added that there is no institutional memory at the Legislature and there should be a focus on Indian affairs, just like there is a focus on corrections, community development, human services, and other areas.

Forum for Discussion

Alan Brigham said MITSC should serve as a forum for discussion of matters of interest and as a body to support, advocate, and pursue activities such as education. Mr. Hurley said education is a good example of MITSC success, along with work in the area of fisheries. Chair Anthony summarized that where there are shared goals MITSC should work on these.

Position in Executive Branch

Diane Steward asked if there could be a position funded to deal with Indian affairs at the State, such as the Canadian Affairs liaison. Chair Anthony noted that there was Department of Indian Affairs 20 years ago. Elizabeth Sockbeson responded that this would be moving backwards.

Legislative Mechanism (continued)

Jerry Storm indicated that things are not working as well as they might in the Legislature and noted that part-time legislators do not have the time to learn about Indian affairs. He agreed that there ought to be some kind of legislative committee or subcommittee dealing with this. He suggested that the Judiciary Committee might be better than a separate Committee on Indian Affairs, because of the continuing need for interpretation of Maine Indian Claims Settlement Act. He said MITSC would be delinquent in not recommending a Subcommittee on Indian Affairs.

Diane Steward pointed out that sometimes bills relating to Indian affairs go somewhere else besides the Judiciary Committee, and asked Penobscot Tribal Representative Donna Loring what she thinks. Representative Loring replied that this will be a leadership decision. She said it would be better to have a separate Committee on Indian Affairs.

Mr. Brigham asked whether the Judiciary Committee is appropriate for this? Representative Loring answered that this committee has people who are knowledgeable. Mr. Brigham asked whether the State and Local Government Committee would make sense in the future, if there is not a separate committee. Representative Loring responded she would not see this, because of the need to focus on legal issues involved in the Settlement Act.

Chair Anthony asked what obstacle participants are trying to overcome with this recommendation for the Legislature? Representative Loring answered “ignorance.” Mr. Hastings answered “avoidance.”

Problem with Focus on Implementation of Settlement Act

Mark Chavaree commented that he sees a problem with having MITSC focus on the faithful implementation of the Settlement Act and advising the Legislature on ways to improve the relationship between the Tribes and the State, because the Tribes and the State have fundamentally different views about the Act. He said the clarity needed is not going to come from MITSC; it will come from the courts. He noted that things have moved beyond MITSC.

Chair Anthony asked what the issues are that have moved beyond MITSC. Mr. Chavaree identified the following:

Are the Tribes just municipalities or are they sovereign Indian Tribes?

Delegation of permitting under NPDES (National Pollution Discharge Elimination System).

Paper companies say the Tribes must provide information under Freedom of Information Act.

Mr. Chavaree indicated that the Freedom of Information Act request is in court and NPDES is headed that way, and neither party has shown a willingness to sit down and discuss these issues. When Chair Anthony pointed out that no one brought NPDES to MITSC, Mr. Chavaree responded that MITSC has no ability to resolve this. Chair Anthony said he thought MITSC could help facilitate discussions, but he does not see the parties waiting for this to happen.

Jeff Rosenblatt asked what the lawsuits are about. Mr. Richert answered that one issue is about discharges into the rivers. He said this is before the US Environmental Protection Agency, and everyone assumes that this will go to court. Mr. Chavaree replied that the other issue relates to the freedom of information law; Great Northern Paper is seeking information from the Tribes.

Documenting Core Differences

Mr. Hurley asked whether it would be of value for MITSC to document the core differences, since these are at the roots of the relationship between the State and the Tribes. He mentioned that until these things are understood, it will be difficult to move in a different direction other than letting the courts decide. He suggested that MITSC could document the basis for these differences. He said MITSC knows what the differences are, but it might be helpful for the Legislature and other key stakeholders to have this information.

Mr. Richert suggested that there could be a side-by-side analysis. He agreed with Mr. Chavaree's comments and said lawyers will take extreme positions in their briefs and this is the problem with the litigious route. With respect to Mr. Chavaree's question about whether the Tribes are municipalities or sovereign tribes, Mr. Richert thinks there is an in between position, which the Settlement Act is all about, but this will not come out in court. He suggested that maybe MITSC could be the voice of moderation. Chair Anthony suggested that MITSC could identify some compromise positions. Mr. Richert said:

MITSC could offer a third interpretation of the Settlement Act. It would be nice for MITSC to be the champion of the third interpretation.

The side-by-side analysis might help the State and the Tribes to understand things better.

It is inevitable that things will go to court and the courts will come right where the Settlement Act. The two First Circuit cases in the past few years are "right on the money."

Things are hard because the State and the Tribes are in entrenched positions. It would be great if the State and the Tribes could overcome this, but he does not have a lot of hope.

Chair Anthony remarked that there is mutual respect among MITSC members and people know each other, which helps them get by the ideological differences. He suggested that maybe this offers a better chance than lawyers with briefs, but wondered whether people will be willing to do the side-by side-analysis, if they fear it will compromise their positions in court.

Mr. Chavaree responded that there are many areas of disagreement, which go along with MITSC trying to facilitate meetings. He said tribal-state relations have to do with differing views of the

Settlement Act. Mr. Richert said his goal is to report on the areas of disagreement, not to advocate in relation to them. He said perhaps MITSC should meet with the Tribal Councils.

Check In on Process

Chair Anthony asked whether today's process was working for everyone, mentioning that he did not want to use a process that was uncomfortable for people involved in the discussion. No one indicated that the process was uncomfortable.

Forum for Issues

With regard to having MITSC serve as a forum for working out, or at least discussing, matters of joint interest, Ronda Frey commented that MITSC should do this only "as appropriate." Mr. Hastings responded that in the past anyone any MITSC member could raise an issue, and then MITSC would decide whether to address it. He asked who should make the decision about what is appropriate. Chair Anthony asked if Ms. Frey was saying there should be agreement by the State and Tribes before an issue comes to MITSC. Mr. Hurley commented that in practice, if the Tribes are not interested in having MITSC pursue something, it has not done so.

Chair Anthony asked Mr. Richert whether he thinks MITSC has done too much advocacy. Mr. Richert answered that MITSC seems to go down dead-ends and down long and winding treacherous roads and does not realize this until the end. In At Loggerheads, there was agreement to have an Assembly of Governors and Chiefs, so MITSC would have clear idea of what to work on. He added if MITSC had people in Legislature asking it to work on things, maybe MITSC would have more credibility there.

Ms. Sockbeson asked what issues MITSC has decided to work on. Mr. Richert cited land use. Ms. Sockbeson said the State could tell MITSC what it is concerned about through the state MITSC people and Tribal Governments could tell MITSC what they are concerned about through the tribal MITSC people. She noted that Tribal Government has to approve any legislation.

Analysis of Core Differences (continued)

Chair Anthony summarized that if MITSC followed Mr. Hurley's suggestion, it would need to spend some time on serving as a forum for discussing and/or working out matters of jurisdiction and working on this where the State and the Tribes have shared goals. Mr. Richert said MITSC's state members are willing to work on this, and asked whether MITSC's tribal members are willing. Mr. Chavaree said a side-by-side analysis would not undermine the Tribes' position.

Concern about Minor Pursuits

Mr. Hastings commented that some of the things MITSC does are good in their own right, such as Wabanaki Day and education issues. He noted that in comparison with other things, these are more minor pursuits, and he expressed concern that they sap MITSC's energies. He is concerned that MITSC will not really focus on the fundamental things.

Cabinet Level Committee

Mr. Hastings said he would like to see the Legislature set up a committee of experts with institutional memory. At the same time, he noted that Maine State Government is more than the Legislature. He said he thinks there is more Governor King and his successors can do, such as creating a cabinet level Committee on Indian Affairs with structure and periodic meetings.

Racism and Education

Mr. Hastings said there also should be a real examination of racism, noting that it is easy to talk about racism when it is far away, but it is hard to talk about it here. He said he is not sure it is possible to separate this from sovereignty.

Representative Loring reported that she attended a conference on race and ethnicity last week where a term used was "educational apartheid." She added that if you look at this State and see how it has failed to educate students about Maine Indians, it amounts to educational apartheid. She said during the Assembly of Governors and Chiefs everyone felt education is really important to work on.

Controversial Issue of Natural Resources

Mr. Richert said MITSC has done some things statutorily and administratively in the realm of social issues that do not impinge directly on the questions of jurisdiction. He added that where MITSC is at loggerheads is in area of jurisdiction over natural resources. Chair Anthony pointed out that human services and child welfare issues are not as far away from being resolved. Ms. Scully added that the State and the Tribes, assisted by the Muskie Institute, are just completing a round of training for state workers on the Indian Child Welfare Act.

Chair Anthony indicated that problems between the State and the Tribes sometimes relate to racism. Representative Loring said the fact that natural resources is a controversial issue is based on history, given that the Europeans went for the Tribes' resources. Chair Anthony commented that the Settlement Act dealt with resources. Mr. Hurley noted that tribal-state relations in the area of fisheries have worked out. Mr. Richert indicated that it really comes down to the interpretation of section 6204, the doctrine of retained sovereignty, and definition of internal tribal matters.

Attorney General's Office

Ms. Steward said she has heard that the Attorney General's Office is a problem in tribal-state matters, yet when it comes to racism, that office takes a strong position. Mr. Storm pointed out that a representative from Attorney General's Office was not at today's meeting. He asked whether he sent a note. Ms. Scully answered "no."

Chair Anthony indicated that the Attorney General's Office is largely nonparticipatory in MITSC. Mr. Richert asked what MITSC would expect of them and said the Attorney General

works primarily for the Legislature. He suggested if MITSC wants the Attorney General more involved, it should ask the Legislature to direct them to be. He asked how MITSC would want them to be more involved. Mr. Hurley replied that they could be helpful in structuring legislation. He noted that they only interpret what is on paper and they are not policy makers.

Mr. Chavaree commented that they are attorneys for the State of Maine and are not an objective forum. He added that often people do not ask what the tribal attorneys think.

Mr. Storm said he does not think Attorney General's Office is largely uninvolved; they are very much involved, but they designate the degree of involvement. He asked whether the Attorney General has a responsibility to MITSC to put his position in writing. Mr. Richert responded that he has done it many times in briefs to the court.

Representative Loring commented that the Attorney General does not set policy, but he influences it and his opinion is golden to the State. Mr. Richert said MITSC cannot order Attorney General to be involved, but the Legislature can because the Attorney General is a constitutional office.

Summary and Next Steps

Summary So Far

Chair Anthony asked where things go from here. He reviewed that MITSC has had some success in serving as a forum for discussion and in working on things where the Tribes and the State have shared goals; that the State and the Tribes will continue to skirmish in relation to racism; and that the State and the Tribes get hung up on the implementation of the Settlement Act, areas where the Act is not working, and tribal-state issues before the Legislature. He listed 5 implementation items mentioned during the discussion:

Set up a government department or other executive branch entity on Indian affairs.

Establish a Subcommittee on Indian Affairs of the Legislature's Judiciary Committee.

Facilitate meetings of the real powers.

Document areas of difference and the basis for those differences.

Define compromise position possibilities. (a third interpretation)

What's Next?

Chair Anthony said maybe MITSC should facilitate a meeting of stakeholders. He asked if MITSC is at a point where it wants to take on a side-by-side analysis. Mr. Richert answered "yes." Mr. Chavaree said he sees a 2-step process: first, identify the issues and, then, see if the State and the Tribes can work on these. Chair Anthony said MITSC needs Passamaquoddy approval of the side-by-side analysis. Ms. Scully explained that Governor Rick Doyle of Sipayik, appointed to replace Eric Altvater as a MITSC member, planned to come late to this meeting

today because of a schedule conflict. She said Wayne Newell also had planned to attend, but he had an important curriculum meeting at the Indian Township School that conflicted with the MITSC meeting.

Mr. Richert said 3 things that need to happen:

MITSC should prepare the side-by-side analysis of the key areas of disagreement, which will take a while to do carefully.

MITSC should pursue some sort of recommendation to develop a more knowledgeable group of legislators (e.g., State legislators and Tribal Council members having an annual meeting.)

There should be moratorium on having MITSC deal with issues on which there are jurisdictional disagreements until the side-by-side analysis has been completed, but MITSC should move ahead on education, human services, and other issues that are not jurisdictional issues. For example, Representative Loring may come forward with legislation about requiring education about the tribes, and MITSC can talk about this.

Representative Loring asked whether the side-by-side analysis will include both the state and federal acts. Mr. Richert responded that the State and the Tribes would draw on both acts and other information such as treaties. He said MITSC might find that there is some room for coming together or might find that there is no room, or the side-by-side analysis might lead to everyone agreeing to disagree. Mr. Hastings said the side-by-side analysis would go back to the respective stakeholders and they would have to decide what to do with it, and this would move MITSC away from just dealing with the areas of disagreement as they arise in specific issues.

Representative Loring asked whether after the side-by-side MITSC would facilitate something at a higher level. Chair Anthony replied he would hope so. Mr. Richert noted that it might not be possible to see a way through the areas of disagreement. Representative Loring suggested that MITSC should do this anyway, whether or not people see a way forward.

Mr. Richert suggested that there should be a small group of 3-4 people to lay out the format for the side-by-side analysis. Chair Anthony said he could see involving the Attorney General's office in this. Mr. Hurley noted that MITSC members have been frustrated for a while, and there must be a way to get at the underlying issues.

Chair Anthony said he does not want the tribal people to think that the state people have come in with an idea already figured out. Mr. Hastings commented that he is anxious to see what the topics will be. He asked whether they will be Indian law principles or points of confrontation here in Maine. Mr. Richert reiterated that it must include the meaning of retained authority, internal tribal matters and section 6204. Mr. Chavaree, said it is not possible to avoid talking about issues, but the analysis is the same for any of them.

The Plan

Chair Anthony pointed to a 4-point plan on flip chart paper:

Do a side-by-side analysis of interpretations of the Settlement Act.

Pursue a legislative Committee or Subcommittee on Indian Affairs.

Have a moratorium within MITSC on areas whether there are jurisdictional disputes.

Continue working in areas where there are no jurisdictional disputes.

Next Steps on Analysis

Mr. Richert suggested that Mr. Chavaree, Chair Anthony and someone from the Attorney General's Office develop the format for the side-by-side analysis. Mr. Hastings suggested that the format should be friendly to non-lawyers. Chair Anthony said he does not see how MITSC can have a moratorium on issues involving jurisdictional disagreements. He suggested that someone from the Passamaquoddy Tribe like Greg Sample and someone from the Attorney General's Office join Mr. Chavaree and him in developing the format for the side-by-side. He asked whether Mr. Richert also would be involved. Mr. Richert said he would rather get someone from the Attorney General's Office.

Chair Anthony asked about whether MITSC should report just to the Legislature. Others responded that MITSC's charge in the Settlement Act is to report to the Legislative branch, not to the executive branch. Ms. Scully suggested tying the report into the civil law review report due to the Legislature and Tribal Councils in December 2000, pursuant to Resolves 1997, Chapter 45.

Mr. Hastings suggested that the Chair talk with the Micmacs and Maliseets to let them know that they will not be excluded from this work. He said there could be complex negotiations on the topics, and it is necessary to bring in decision-makers to negotiate the underlying principles at issue.

Next Steps on Legislative Committee or Subcommittee

Chair Anthony asked about how to pursue the legislative committee to deal with tribal matters. Ms. Scully said this recommendation can be folded into recommendations submitted pursuant to the civil law review report in December 2000. Ms. Steward mentioned that committees are meeting this summer. Chair Anthony suggested that MITSC could meet at least with the Judiciary Committee.

Ms. Sockbeson asked how the Tribes benefit from a committee? Representative Loring replied that people would learn about tribal issues and the legislative staff would be the institutional memory. Chair Anthony asked whether the Tribes would benefit, and Representative Loring answered "yes." Mr. Brigham added that a committee would bring Indian affairs to a higher level of visibility. Representative Loring said it would send a message that this is an important issue. Ms. Steward noted that the language that creates a committee can be helpful.

Chair Anthony asked whether the tribal representative study will be handled through the Legislature's rules. Representative Loring and Ms. Steward said the Committee that completed the study has issued a report, but there has been no action yet.

Chair Anthony asked whether Ms. Scully needs a committee to help draft language recommending that the Legislature create a committee or subcommittee on Indian affairs. She responded that she can prepare a draft and circulate it to MITSC. Ms. Steward and Representative Loring said they can float a draft recommendation by legislative leaders.

Meeting Minutes
Maine Indian Tribal-State Commission Meeting
Wednesday, Feb 26, 2014
Motahkmikuk Tribal Council Chambers

(minutes approved at the 3/17/14 meeting)

Commissioners in attendance: Jamie Bissonette Lewey (Chair), Denise Altvater (Passamaquoddy – Sipayik), Matt Dana (Passamaquoddy-Motahkmikuk), Gail Dana-Sacco (State), Roy Partridge (State), Robert Polchies (Penobscot)

Others in attendance: April Tomah, Fred Apt, Tina Downing, Norman Bernard, Vera Francis

Regrets: John Banks, Harold Clossey, Linda Raymond, Brian Reynolds

Staff: Executive Director John Dieffenbacher-Krall

Minutes recorded by John Dieffenbacher-Krall.

The meeting took place without a quorum.

I. Review of agenda

Jamie Bissonette Lewey added a discussion of MITSC bylaws under old business.

II. MITSC bylaws

Jamie Bissonette Lewey said there is an interest in considering possible bylaws changes to allow MITSC to hold meetings with a quorum during this period of multiple Commissioner vacancies. Jamie noted that the first State Commissioner vacancy occurred in August 2012 with the resignation of Cushman Anthony followed by Paul Thibeault's resignation in December 2012 and John Boland's resignation in May 2013. She observed that there are two State Commissioners here today. Jamie invited Gail Dana-Sacco to speak.

Gail Dana-Sacco expressed concern that given MITSC's high profile and the potential for greater scrutiny of the Commission's actions that all proper procedures concerning decision making are observed. She proposed a bylaw change that following any vacancy left unfilled for more than 60 days that the MITSC quorum goes down by one.

Jamie Bissonette Lewey asked for thoughts on Gail's recommendation. Commissioners generally liked her suggestion. She asked John Dieffenbacher-Krall to schedule a conference call to consider bylaws changes. Jamie also asked John to reach out to the Maliseets to see if they would join the call.

III. LD 1625, An Act To Clarify the Law Concerning Maine's Elver Fishing License, and related issues

John Dieffenbacher-Krall gave an update on the bill language review session held by the Marine Resources Committee on 2/25 concerning LDs 1723 and 1625. Jamie Bissonette Lewey reported on the Marine Resources Committee work session held on LDs 1625 and 1723 February 19. Jamie reported on unacceptable language spoken at the work session and disrespect shown to Wabanaki leaders. She said that the MITSC has been asked to put together something talking about proper protocol for legislators to use when Tribal leaders are present at legislative proceedings. She added that should we develop this protocol document she would ask Tribal Commissioners to take it back to their governments. Denise Altvater echoed this idea.

Vera Francis said that what happened in the Marine Resources Committee are actions of hatred directed against a People. We were targeted for hatred. They targeted the Passamaquoddy.

Jamie announced that the MITSC will be pursuing a meeting with legislative leadership staff. She cited two reasons for meeting with legislative leadership staff 1) legislative process should never target a People 2) State does not have jurisdiction to act in the area of unceded aboriginal saltwater fishing rights. Jamie told Commissioners that the MITSC can make clear to legislative leaders that hate speech and targeting a People is totally unacceptable. She said it is incumbent upon leadership that hate speech not be directed against any people.

IV. Work on MITSC policy positions

A. Gaming

Jamie Bissonette Lewey proposed that the gaming question presented a good opportunity to do a case study for the MITSC test of MICSA 1735(b), 1725(h). She suggested we look at the Indian Gaming Regulatory Act (IGRA) through this lens. She asked people to review the 1735(b), 1725(h) test. In addition, she also asked Commissioners to review the *Penobscot Nation v. Stilphen* and the *Passamaquoddy Tribe v. State of Maine* cases.

B. Natural Resources Statement

Jamie Bissonette Lewey stated what is crucial with our potential natural resources statement is understanding what does the term “natural resources” mean within the framework of the Settlement Agreement. The State interprets the term to mean anything to do with nature when they want to claim jurisdiction. She asserted that the MITSC needs to do research on what natural resources were under discussion during Settlement Act negotiations.

V. Houlton Band of Maliseet Indians decision to withdraw from MITSC

Jamie Bissonette Lewey told the Commission that the position we have been taking is we are going to respect the Maliseet decision concerning its withdrawal from the MITSC.

Commissioners agreed that the Maliseets should take the lead on drafting and enacting legislation to effectuate their withdrawal from the Commission.

VI. March 11 meeting w/ Gov. LePage

Commissioners were asked their views on potential topics to discuss with Governor LePage. They suggested waiting until the upcoming conference call to discuss potential meeting topics.

VII. MITSC financial report for FY 2014 ytd

John Dieffenbacher-Krall reviewed the financial report with the Commission. He referred Commissioners to a document that he had emailed in advance of the meeting. The financial report shows year-to-date that the Commission has received \$89,260 and spent \$61,915.

VIII. Confirming time, location for next meeting

Commissioners tentatively set 1:00 on Wednesday March 5 or anytime that afternoon for a conference call depending on the availability of Commissioners not present at the meeting. Potential agenda items would include 1) bylaws changes 2) LePage 3/11 meeting agenda items.

Meeting adjourned.

Appendix II

Maine Indian Claims Settlement Act (MICSA) 25 U.S.C. §1721-1735

http://www.mitsc.org/documents/33_FedSettActALL.pdf

The federal law passed to implement the Maine Indian Claims Settlement. It ratified the Maine Implementing Act and specified that when conflicts arise between the state act and the federal act, the federal act would prevail. Section 25 U.S.C. § 1725(e) gave federal consent to the State of Maine to amend the MIA with respect to the Passamaquoddy Tribe or Penobscot Nation provided the affected tribe or nation agrees with the change.

Maine Implementing Act (MIA) M.R.S.A Title 30, Chapter 601

http://www.mitsc.org/documents/38_2010-10-6MIAtitle30ch601.pdf

The state law enacted in April 1980 that explicates the jurisdictional relationship between the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, Penobscot Indian Nation, and State of Maine under the Maine Indian Claims Settlement. The MIA took effect upon passage of the MICSA.

Public Law, c. 708 LD 2145 *An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe*

http://www.mitsc.org/documents/140_1997_PL_c708.pdf

Legislation sponsored by Passamaquoddy Tribal Representative Fred Moore to resolve the conflict between the Passamaquoddy Tribe and State of Maine concerning saltwater fishing. The original bill was dramatically altered during the legislative process and ultimately contravened the required provisions to amend the MIA that are outlined in the MICSA.

Public Law, c. 84 Second Regular Session – 1995 LD 1667 *Resolve, To Improve Tribal and State Relations*

http://www.mitsc.org/documents/144_1995RES_c084creationTaskForceonTribal-StateRelations.pdf

This legislation directed MITSC to create the Task Force on Tribal-State Relations. The Task Force was charged with exploring ways to improve the relationship between the state and MITSC and the state and federally recognized Indian Tribes; determining the appropriate role for the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians in the MITSC; evaluating the general effectiveness of the MITSC; engaging in other activities to improve tribal-state relations; and developing recommendations.

At Loggerheads—the State of Maine and the Wabanaki Final report of the Task Force on Tribal-State Relations

http://www.mitsc.org/documents/77_1997-1-15AtLoggerheads-TheStateofMaineandtheWabanaki.pdf

At Loggerheads - the State of Maine and the Wabanaki is the final report of the Task Force on Tribal-State Relations. The Task Force on Tribal-State Relations, created by the 117th Maine Legislature, worked from June 1996 through early January 1997 to explore ways of improving the tribal-state relationship and the effectiveness of the MITSC.

Public Law, c. 45 First Special Session – 1997 LD 1269 Resolve, to Foster the Self-governing Powers of Maine’s Indian Tribes in a Manner Consistent with Protection of Rights and Resources of the General Public

http://www.mitsc.org/documents/145_1997_RES_c045LD1269.pdf

The legislation generated by the Task Force on Tribal-State Relations created in 1996. It directed MITSC to 1) review the civil laws of the State of Maine to determine the manner and extent to which those laws, as enforced, constrict or impinge upon the best interests of children with respect to: traditional culture and way of life as practiced in tribal communities; the ability of tribes to regulate their members, lands, schools and other cultural institutions and communities; and the respect and dignity appropriately given to all individual citizens in the state and members of the tribes; 2) conduct the study over a period of 4 years notably considering in part the concerns that gave rise to the bill proposed by the Passamaquoddy Tribe to rescind section 6204 of the MIA; 3) report its findings 12/15/97, 12/15/98, and 12/15/00; and 4) convene an Annual Assembly of Governors and Chiefs;

State of Maine v. Beal, 4th Dist. Ct. No. 96-957 et seq.

http://www.mitsc.org/documents/139_1998-3-27StatevBeal.pdf

The decision of Maine District Court Judge John Romei to reject a motion to dismiss filed by the Passamaquoddy Tribe on behalf of 13 Passamaquoddy fishers who were charged with a number of violations of state law related to saltwater fishing.

Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999)

http://www.mitsc.org/documents/142_1999-1-19PenobscotNationvFellencer1stCircuitdecision.pdf

Fellencer was an employment case where the Maine Superior Court ruled that employment matters did not fall under the internal tribal matters provisions of the MIA. On January 19, 1999, *Fellencer* was reversed on appeal to the U.S. Court of

Appeals, First Circuit, and the case was remanded for the entry of judgment (reversed) in favor of the Penobscot Indian Nation.

***Penobscot Nation v. Feller*, 999 F. Supp. 120 (D. Me. 1998)**

http://www.mitsc.org/documents/143_1998-3-13PenobscotNationvFellerUSDistrictCourtdecision.pdf

Judge Morton Brody's decision to uphold the Maine Superior Court ruling that the Maine Human Rights Commission had jurisdiction over an employment dispute the Penobscot Nation had with a former employee. The First Circuit Court of Appeals overturned this ruling on January 19, 1999.

5 M.R.S.A. Chapter 9 Attorney General

<http://www.mainelegislature.org/legis/statutes/5/title5ch9sec0.html>

The portion of Maine law that deals specifically with the duties and responsibilities of the Office of the Maine Attorney General.