August 8, 2013

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

Dear Mr. Anaya:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MICSA & MIA Constrain Wabanaki Self-Determination

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

Formal Initiatives to Address Inequities Caused by MICSA & MIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Additional Constraints on the Houlton Band of Maliseet Indians

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

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

The Aroostook Band of Micmac Settlement Agreement (ABMSA)

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

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

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

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

Distinctions in the Respective Settlement Acts Resulting in Legal Inconsistencies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Results of State NPDES Jurisdiction and Other Water Quality Laws

State jurisdiction over water quality has resulted in the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

John Dieffenbacher-Krall
Executive Director

Jamie Bissonette Lewey
Chair