

January 23, 2014

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

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

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

Dear Senator Johnson and Representative Kumiega:

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

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

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

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

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

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

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

Further Discussion of Sustenance Fishing Rights

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

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

The United Nations Declaration on the Rights of Indigenous Peoples

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

Maine Indian Claims Settlement Act and Maine Implementing Act create structural inequalities that limit the self-determination of Maine tribes; structural inequalities contribute to Maine tribal members experiencing extreme poverty, high unemployment, short life expectancy, poor health, limited educational

opportunities and diminished economic development. (*Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, p. 36, UN document A/HRC/21/47Add.1)

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

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

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

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

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

Extinguishment of Aboriginal Claims to Maine's Marine Resources

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

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

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

State v Beal

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

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

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

MITSC Authority Over Salt Water Fisheries

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

Continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State and shall make such reports and recommendations to the Legislature, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation as it determines appropriate. [30 MRSA §6212, §§3]

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

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

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

Conservation Issues

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

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

Statistical Conclusions Reached by the MITSC

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

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

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

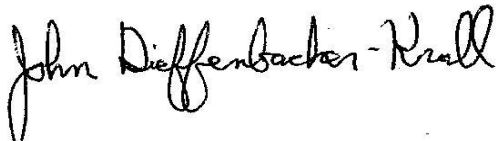
If the Maine Legislature decides to adopt the proposal that Commissioner Keliher is expected to present to the Marine Resources Committee at the January 29 work session, Maine State Government will reinforce the unequitable distribution of the elver harvest. Should Commissioner Keliher's proposed 35%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

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

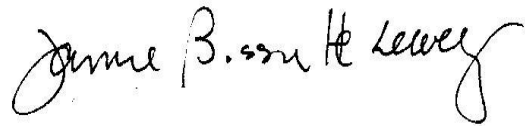
Maine can remain in compliance with the ASMFC conservation goals for elvers without resorting to discriminatory policies only applicable to the Tribes. We urge the Marine Resources Committee to redirect their energy toward a collaborative approach. Better tribal-state relations and a sustainable elver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

Thank you for considering our perspective.

Sincerely,



John Dieffenbacher-Krall
Executive Director



Jamie Bissonette Lewey
Chair



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



Paul Bisulca
Former Chair, MITSC 2005 - 2010

Cc: Senator Edward J. Mazurek
Senator Richard G. Woodbury
Representative Chuck Kruger
Representative Ralph Chapman
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